

Court strikes down adult social network restrictions

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by Heather Cassell

Owners of social networking and sex-positive Web sites rejoiced last week when a 6th U.S. Circuit Court of Appeals panel issued a unanimous decision striking down a federal statute commonly known as "Section 2257" because it imposes an unconstitutional restriction on free speech.

In a 3-0 decision on October 23, a three-judge panel – Cornelia Kennedy, Karen Nelson Moore, and David McKeague – concurred that under the Overbreadth Doctrine the statute amending Section 2257 of the Federal Recordkeeping and Label Act was unconstitutional.

Kennedy, appointed by President Jimmy Carter, found that the statute's reach was "extremely broad," that the "breadth of the recordkeeping provisions" in this statute couldn't be narrowed, and "[Section] 2257's universal age-verification requirement runs afoul of the First Amendment." Moore, appointed by President Bill Clinton, agreed with Kennedy's reasoning for the decision, adding emphasis on the statute's violation of anonymity under the First Amendment.

McKeague, appointed by President Bush, partially dissented on the decision disagreeing with the application of the doctrine and believed that portions of the section could be judicially salvaged.

"We are absolutely thrilled," said Diane Duke, executive director of the Free Speech Coalition. "It's a solid decision, and it's significant."

The court's decision gives free speech and sex-positive advocates hope, but Duke cautioned that Congress and the Department of Justice have several options to challenge the court's decision. First, the government could ask all of the judges on the court to review the decision or to ask the U.S. Supreme Court to review the case. Second, because the 6th Circuit only reviews cases arising from the federal courts in Michigan, Ohio, Kentucky, and Tennessee, other states could consider the decision. Finally, Congress could rewrite the statute per the court's recommendations, removing what the judges found objectionable.

As the *Bay Area Reporter* reported in September, civil liberties organizations stated that the language in the statute lacked clarity about how personal information could be used by the federal government and maintained the regulations violated individuals' rights to privacy and free speech and caused concerns about security. Individuals and businesses that didn't comply with the statute would be subject to investigation without probable cause or warrants, with potential financial penalties and imprisonment up to five years.

The Federal Recordkeeping and Labeling Act's Section 2257 was enacted by Congress in 1988 in response to the Attorney General's Commission on Pornography's recommendation to enact an age-related recordkeeping provision. This was in response to the *United States vs. Kantor*, the 1987 criminal case against porn star Traci Lords's film producers. Lords began her film career in hardcore pornographic movies when she was 15 years old. Since then, Section 2257 has been amended twice, with the Child Protection Restoration and Penalties Enhancement Act of 1990

and the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003.

"This welcome court decision affirms that the government should not be prying into and punishing relationships between consenting adults under the guise of fighting child pornography," said Matt Foreman, executive director of the National Gay and Lesbian Task Force, in an October 24 press release. "Section 2257 and the regulations proposed are part of our government's hypocritical and punitive views about sex, sexuality, and reproductive rights."

NGLTF, along with other civil rights and free speech organizations, mobilized various communities to protest the proposed amendment to Section 2257, which was a product of the Adam Walsh Child Protection and Safety Act of 2006. The act is designed to prevent sexual and other violent crimes against children, and regulate sexually explicit digital images online. More than 85,000 visitors viewed NGLTF's online center, according to the release, and the U.S. Department of Justice received thousands of objections.

The court's ruling was the result of a legal challenge by Connection Distributing Company, which is owned by Rondee Kamins, owner of General Video of America and Trans World News. Last month, the *B.A.R.* reported an announced merger between GVA-TWN and San Francisco-based Good Vibrations sex toy company. Kamins was the lead plaintiff in the case, *Connection Distributing Co., et al. v. Keisler*, which had been in litigation since 1995, Kamins said. She filed the case on behalf of the company's adult "swingers" magazine, *Connections*, and two unnamed plaintiffs who wanted to publish personal photos in an advertisement in the magazine.

Kamins told the *B.A.R.* she closed the Connection company and the magazine in February.

"This decision really could have a large impact on the entire adult industry," said Kamins.

Kamins added, "I definitely feel like we need to stand up for our First Amendment rights and ... if people don't start standing up we are going to lose rights."

In an unusual move, Judge Kennedy applied the Overbreadth Doctrine, which is used sparingly, to strike down unconstitutional statutes related to unprotected and protected speech as "strong medicine." Kennedy stated the recordkeeping statute failed the doctrine's principles, citing constitutional infirmity of the statute, the type of speech in question, the reach of the effect the statute would have impacting and limiting free speech, and the burden it would produce.

Kennedy cited similar earlier U.S. Supreme Court decisions in her decision and wrote that imposing the statute's regulations on "noncommercial sexually explicit speech" violates a great deal of First Amendment rights protected under free speech, including an individual's anonymity. By requiring secondary producers of images that weren't meant for sale or distribution to be open to government inspection and to potentially suffer penalties that include financial to imprisonment up to five years, it is a statute that "'unquestionably attaches' criminal penalties to protected speech" and could "chill speech."

Furthermore, Kennedy recognized that enforcers could potentially "seek out and silence particularly disliked people or speech."

Therefore, the court reversed and remanded the district court's "grant of summary judgment" in the case.

McKeague partially concurred, agreeing that the statute went beyond the boundaries of the First Amendment's protections of free speech with its aims to reduce child pornography. But he didn't believe Section 2257 "purely" regulated free speech, describing it as something closer to "conduct plus speech." He also believed that the court could salvage the current statute.

"It's like New Year's Eve," said Jonathan Crutchley, co-owner of Boston-based Online Buddies Inc., owner of Manhunt.net. Crutchley was one of the few social networking Web site owners to publicly speak out against Section 2257.

The court is expected to release a more detailed analysis of its decision sometime this week. The Department of Justice should announce its response to the decision within a few weeks. To view the decision, visit <http://www.ca6.usCourts.gov/opinions.pdf/07a0430p-06.pdf>.