

productions a year, which are widespread on the Internet. Almost all the performances involving adults are legal under U.S. obscenity laws and protected by the Constitution's First Amendment guarantee of free speech, but the popularity of pornography troubles many. WFPL's Kristin Espeland reports on a Kentucky man leading an effort to turn back the growth of pornography in his community.

UNIDENTIFIED MALE: There is a bully among us. The bully has many forms.

KRISTIN ESPELAND: You're listening to the opening scene of a video of an anti-pornography group called Reclaim Our Culture Kentuckiana, or ROCK. Kentuckiana is the border region between Kentucky and Indiana.

VIDEO: The bully wants us to believe it is just clean fun. It doesn't hurt anyone else.

KRISTIN ESPELAND: In the video, images of children on swing sets and families eating dinner flash between shots of prostitutes looking for customers and a pole dancer strutting in high heels. It's a juxtaposition ROCK director Bryan Wickens hopes will keep you from visiting that porn site. While he sips coffee in a busy morning bakery in southern Indiana, Wickens says he's seen how an addiction to porn can wreck lives.

BRYAN WICKENS: I've had personal friends whose marriages have been destroyed by pornography, who lost everything, slowly they're drifting more and more away from their spouse. Finding themselves looking at online porn for hours at a time, no longer around the kids. And then it creates this fantasy world where the wife could never meet those expectations.

KRISTIN ESPELAND: That's why Wickens says his organization, ROCK, is focusing on coaching porn addicts to kick the habit, helping sex workers leave the industry, and encouraging communities to staunch the spread of sex businesses. But he's new to this cause. A couple of years ago he was still a young partner for a large Louisville law firm litigating corporate cases. But he says another deeper concern just kept nagging at him.

BRYAN WICKENS: As the years went on it just grew, and it grew, to the point where I really couldn't ignore it anymore and, so on one hand I'm really having a successfully law career. I'm moving up the ladder. I'm becoming a partner. All the things you're supposed to do, and on the other side, it was this complete tugging of, no, there was something more.

KRISTIN ESPELAND: Wickens says pornography, sex businesses, and what he calls a general decline in American values and morality had been bothering him since college. He just didn't know what to do about it. But he knew he'd found kindred spirits when he heard about ROCK, back then just a collection of concerned citizens.

BRYAN WICKENS: People came together and saw the proliferation of sex businesses across our region. And what a lot people don't know is that this region of the country has been stated that it's in the top five worst places when it comes to the number and cluster of sex businesses.

KRISTIN ESPELAND: Wickens says that's according to a former FBI agent's assessment. So he took a first step and joined the fledging group's board. But when the organization decided to formalize, to hire a president, he felt compelled to apply even though it meant leaving his law practice. But now he doesn't look back. Wickens says there are days when he wonders whether he's making a difference. But there are those other days when he's certain of his purpose. Like the moment after a talk he gave when a mother approached him. She thanked him for the work he's doing and said her 12-year-old daughter had been sexually abused by her father and an uncle. Wickens says she had tears in her eyes when she told him pornography was to blame.

BRYAN WICKENS: And she brought that little girl over and she said "I want you to meet Mr. Wickens. He's going to work to protect little girls like you." And, I guess that's what I want to get across. This isn't about, you know, pushing an agenda on somebody else but there are real people being harmed. There are real lives being destroyed.

KRISTIN ESPELAND: Today ROCK offers help for women who want to leave the sex industry with religious counseling and connections to social services. They convene men's groups to talk about the harm pornography can cause a family and they approach town zoning boards to ask for stricter zoning laws that limit concentrations of sex businesses. Wickens acknowledges that heading ROCK has meant he and his family have had to make some sacrifices. Money may sometimes be tight. And Wickens recalls how some family members and colleagues thought he was crazy to walk away from a lucrative law practice to take a job at an unknown non-profit.

BRYAN WICKENS: If anybody's ever been on this kind of a journey where they were feeling really called and led to do something else with their life, I think they would truly understand and know that you don't really have a choice. You know, I heard then: Why would you do this to your family? And my response is well, I'm doing this for my family.

KRISTIN ESPELAND: Wickens says that when he was a lawyer one of his little girls struggled to pronounce his profession. She told her teachers her dad was a "liar." Now, he says, she tells teachers her dad helps protect families.

For Justice Talking, I'm Kristin Espeland in Louisville, Kentucky.

MARGOT ADLER: Anti-porn activists like Bryan Wickens hope to discourage people from accessing pornography and bring about more restrictive laws. But members of the adult film industry say there is no good reason to fight pornography.

UNIDENTIFIED FEMALE: I personally believe that greater sexual access to things is overall a general good, because I think more harm comes from sexual ignorance and isolation than comes from exposure to the material.

MARGOT ADLER: That's Nina Hartley. She's a registered nurse and an adult film star. Her role in "Educating Nina" in 1984 was her first hit. Since then she's participated in hundreds of

adult films. Hartley says her 20 years in the industry have given her some perspective on how critical attitudes toward porn are changing and how they are not.

NINA HARTLEY: In the beginning, of course, the religious prohibitionist, uh, were all on the moral crusades: This is an affront to God, it is adultery, etc., etc. And the anti-porn feminists crowd, or the so-called left anti- position was that it's the tool of the patriarchy and the existence of it is a de facto demeaning to women. So now 20-plus years into it — I have 25 years into the argument — a lot of the religious more or less are now using feminist language to speak against pornography as well to speak against reproductive choice and options.

MARGOT ADLER: Well, how do you answer the other criticisms that pornography is harmful, that people can become very addicted to it, that it can destroy marriages?

NINA HARTLEY: Oh God, first, I don't believe that porn in and of itself is harmful. I do believe, speaking as a trained health professional, that the overuse of any material or activity or substance can indeed be harmful to a person or a relationship. And my personal experience as a person who has been happily married and unhappily married, is no outside force can break up a happy marriage. All marriages break up internally and the blame or the fault can be thrown out onto an outside thing. He worked too much. He used too much porn. She spent too much. He was too much of a mama's boy, etc., etc.

I've discovered there are like three main groups of people when it comes to this issue. There are people who really like adult material. They consume it. They watch it. They make it. It's important to them. Then there are people who really, really hate it. It's equally important to them but they get no pleasure from it. And then there are the much bigger group of people who — there is the much bigger group of people for whom it's not an issue at all. They don't think about it. They don't consume it. They don't use it. They don't look at it. It's not a problem. I came into adult entertainment as an adult of 23 years old before I started as a dancer, and I had already had my feminist training. So I was sure to look at every instance that I was involved in from a feminist perspective.

MARGOT ADLER: And so how do you answer the question that feminists, that some feminists put, that say that porn is misogynist, you know, the famous "Hustler" magazine with the woman in the meat grinder, what it portrays women in a demeaning manner? How do you, how do you answer that argument?

NINA HARTLEY: [SIGHS] First I take a deep breath. So the top of my head does not explode. First, the word misogyny has really been deluded, you know. Just like the word "fascist" is something you throw at someone whose politics you really don't like a whole lot, instead of being aimed at people wearing brown shirts and doing the "Sieg heil" salute. The word "misogynist," the people who use it assume that everyone agrees upon on its meaning and that they agree that it's a bad thing. And for me in this particular debate, the flinging around of the epithet misogynist is a different way of saying what you do really, really, really upsets me a whole lot and I don't like it. You know, I say porn is no place for misogyny because there's too much women in it.

MARGOT ADLER: Is there porn out there that you wouldn't watch?

NINA HARTLEY: Absolutely. Absolutely. There's most of it I wouldn't watch. Most of it is execrable — because why? Because our culture is so complicit about sexuality we do not grant it the grace and honor I think it deserves. We don't, we don't let it be a subject of art, we let it be a subject of commerce because we have, we are very of two minds about it. And so I do believe that the culture gets the adult material it deserves, and so we are a conflicted society that creates a massive amount of material that most of it is very poor quality.

MARGOT ADLER: You've said that porn is not just a commercial enterprise for you, it's also political.

NINA HARTLEY: It's political, it's social. It's my, you know, latent Berkeley do-goodism. I came of age in the '70s in Berkeley, California where I was reading — before I was actually sexually active — I was reading a lot of the theory about sexuality, and what did it mean, and women's rights. And I was told early on, you know, to take responsibility for your own pleasure, learn your body. This is when they had the conscious raising groups and women would get together look at their own cervixes and look at their own vulvas which they had never done before. And so this was very exciting for a young teenager to realize I could have this power over my body. I had control. Really I do? Fantastic!

MARGOT ADLER: And your own contribution, what do you think that's been?

NINA HARTLEY: My contribution has been to help take some of the scariness away from sex and to certainly help empower people at home, men and women both, to feel more confident about sex and sexuality so they can get more pleasure out of it.

MARGOT ADLER: Nina Hartley has been an adult film actress for over 20 years. Thank you for coming on Justice Talking.

NINA HARTLEY: Thank you so much for having me.

MARGOT ADLER: The culture wars concerning porn have played out in feminist theory, evangelical sermons, and in grassroots organizing. They've also moved in and out of the courts. One effort to regulate pornography on the Internet keeps on reappearing in different forms, but is yet to pass muster with the courts.

UNIDENTIFIED FEMALE: Nothing has changed. The government still has failed to show that this is not an unjustifiably broad suppression of free speech for adults.

MARGOT ADLER: And some conservative voices are now wondering if government regulation is the answer.

UNIDENTIFIED MALE: How does it play out to discussions of sexuality that are put out by conservative authors, but that discuss sexuality and religious conservatives from a, you know, religious perspective, but discusses these issues in detail?

MARGOT ADLER: Today on Justice Talking, pornography and the First Amendment. Stay with us.

MARGOT ADLER: This is Justice Talking, the public radio show about law and American life. I'm Margot Adler. Today we're talking about pornography and the law. One of the most significant laws aimed at adult pornography involves a ten year effort to regulate internet porn sites. In 1998, Congress authored the Child Online Protection Act, or COPA, to guard against children gaining access to pornography online. But civil liberties groups raised immediate free speech objections to the law and those groups may be gaining some newfound support. Some conservatives who once advocated for the legislation say it might not be necessary. COPA would require websites containing indecent material that is harmful to minors to verify the age of their users. Anyone violating the law could face up to \$50,000 fines and jail time. The Supreme Court has weighed in on the law twice. Most recently, in 2004, it sent COPA back to the lower court questioning whether it was the least restrictive solution to the problem. A federal judge in Philadelphia answered "no" to that question earlier this year and ruled that COPA was unconstitutional. The government has appealed.

Joining me to discuss this legislation is Nadine Strossen, the president of the American Civil Liberties Union. And Jay Sekulow, chief counsel for the American Center for Law and Justice, a law firm and educational organization that specializes in constitutional law. Nadine, what has troubled you and the courts in some of these decisions about COPA?

NADINE STROSSEN: The point of the law is as you said, Margot, to shield children from accessing certain sexually explicit material online. But given the nature of the Internet you cannot stop children from getting access to that material without also stopping adults from getting access to it. In many, many other contexts — including in the first Internet censorship case the Supreme Court considered — the court has consistently said that even if we assume that there is a very important interest in shielding children, minors, from access to sexual material it is too high a price to pay to stop adults from also getting access to that material. Basically the Supreme Court then remanded it, sent it back to the lower court to see whether all of those technological findings that were the basis for the prior holdings were still applicable. And the lower court judge said yes, nothing has changed. The government still has failed to show that this is not an unjustifiably broad suppression of free speech for adults. And besides it's not even effective because the best way for parents to protect their kids is to do it on their own, in their own homes at the receiving end.

MARGOT ADLER: Jay, your organization describes itself as dedicated to the ideal of religious freedom and freedom of speech.

JAY SEKULOW: Right.

MARGOT ADLER: Many argue that COPA would violate the First Amendment, that The New York Times, for example, could be punished for publishing a story on a sex scandal. That art galleries wouldn't be able to post certain types of art online. Or that health sites couldn't discuss sexually transmitted diseases. All out of fear that content could be deemed harmful to minors. You were last on our show defending an Alaskan student who was holding up a sign saying "Bong Hits 4 Jesus." As a defender of free speech, don't the implications of COPA worry you?

JAY SEKULOW: Well, I think if they were taken out of context. You could take any statute of Congress and bring examples of which ways it could be applied in an unconstitutional manner. Now the difficulty here with this case, and Nadine touched on this, is this is a criminal statute. So it changes what's at play. The idea of Congress, I think, was correct. And that was how do we protect minors from the Internet pornography and obscenity that is out there in huge numbers? Now, I am the first to admit that I think anytime you start restricting access to anything, you've got to be very careful, because if you are to say this is not a First Amendment case is absurd. Of course it is. But I think Congress was within its authority in trying to put forward a law that was going to protect minors simply by really doing anything that any convenience store owner would do. And that is if you walk up to the counter at a convenience store and you ask to buy a sexually explicit magazine, sometimes, they will ask for your age ID. They want to do a verification that you're over 17 years of age. That's typical. Unfortunately here, and the difficulty is, that you've got a statute that is now almost 10 years old and an Internet that is changed significantly over the last 10 years. And I think the hurdle here for the government is very significant because, and very difficult, because the technology is out-pacing the legislation. And that is the problem, by the way, generally, when you're dealing with the whole issue of online regulation.

NADINE STROSSEN: I think one of the interesting facts here is that this law was passed in 1998. It has never gone into effect. So kids have been exposed to whatever online sexual material is not being prosecuted as either obscenity or child pornography — i.e. made using actual kids. Or they have been shielded from that material not because of government prosecution under these kinds of laws, but rather because of ISPs that their parents use that are specially geared toward minors. Because of monitoring by their parents, because of internet filtering, or blocking technology that's used either in their homes or in their schools or in the public libraries. I would say, have we seen any catastrophe in terms of adverse impact of kids being exposed to the dangers of the Internet? I think with the passage of time, some of the initial panic that greeted the Internet, which has been the panic that greets any new communications medium: Oh, this is going to be so dangerous to our kids. I think that's really abated. And some of the initial proponents of the law have acknowledged that there are alternative methods of parents making the determinations about what their kids will or will not see that have been tried and true in other media. And will work as well on the Internet.

MARGOT ADLER: So, Jay, do you think that COPA is obsolete?

JAY SEKULOW: Well, I think that it suffers from what I've called a technological defect at this point. And that is the burden and the hurdle that the government faces in getting the court to say that COPA is constitutional is very difficult in part because what Nadine said, which is that the

technology has increased on the child protection side as well. I mean, there's been a lot of developments by a lot of ISPs including some of the larger ones like AOL and others that are trying to at least protect minors. I think saying that the parents could do this all the time is very difficult because the reality is, kids are online a lot. I do get concerned though – I'm not saying that the Congressional response is the way to handle it, by the way. But to say that there has not been a problem with online pornography, even if doesn't reach the level of obscenity, but online pornography targeting at children, I think that misses the mark. There have been reports. There's been, of course, cases involving this and media reports on this where there have been issues and concern about that.

MARGOT ADLER: Nadine, how big is the threat of exposure to online pornography? I read one figure that says only one percent of all websites contain sexually explicit material. On the other hand, a recent study published in the Journal of Pediatrics showed that 42 percent of children age 10 to 17 had been exposed to online pornography in the past year. So it would seem that although pornography is only a fraction of what's going on on the Internet, children are still seeing it, right?

NADINE STROSSEN: Margot, I hate to quibble over terminology, but to quote the Supreme Court Justice Potter Stewart: "I cannot define it but I know it when I see it." When you look at how broadly the definition of what the term used in COPA is actually harmful to minors, it is so broad that it extends to material the ACLU puts online regarding lesbian and gay sexuality, for example, or reproductive freedom. That's why we are the lead plaintiff in the case as well as the lawyer. And the Supreme Court has acknowledged that mainstream publications that touch on sexuality in even the most serious artistic literary, artistic and scientific contexts can still come afoul of this law. So given how broad the law is, I would say I hope 100 percent of kids are seeing something that comes within this law, either the ACLU website or the website of lesbian and gay bookstores. Or the website of the Electronic Freedom Foundation, to cite a number of our plaintiffs. And I think it's interesting that courts have never demanded any proof that there is any harm to children from seeing sexually explicit material.

MARGOT ADLER: Jay, your view about this. And also what is your own position about adult's right to view porn online?

JAY SEKULOW: Well, I think, look, if it's doesn't reach the level of criminality, adults are adults. And they can make those kind of choices and make those kind of decisions as long as it's not reaching the level of obscenity. I do think that we have to be careful here, and I'm one, and Nadine knows this, I've always been concerned whenever you've got regulation of any source, what impact would that have on portions of the Bible? How does it play out to discussions of sexuality that are put out by conservative authors, but that discuss sexuality and religious conservatives from a, you know, religious perspective, but discusses these issues in detail?

MARGOT ADLER: Nadine, I've looked at pornography and I've got to tell you most of it's boring, repetitive, gross and, you know, we're usually not talking about Allen Ginsberg's "Howl" or James Joyce or "Lady Chatterley's Lover." You've devoted a lot of your life to this. You've written books on the subject. I want to know why I should really care that most of this material exists and that it is protected.

NADINE STROSSEN: I would say that I have devoted my life to defending speech that is persistently attacked and sexually oriented expression is in that category. If you look at my one book on this point, Margot, you'll see illustrations of what has been attacked in through government censorship under the rubric of pornography and it does include material from the Bible. Jay knows this is not a hypothetical. It does include classic works of art and literature. It does include works that are very important to medicine, to science, to anthropology. I hope I can show you, and I believe I can show you, examples where works that you think are positive have in fact been suppressed under the aegis of pornography.

MARGOT ADLER: Jay, my son saw his first pornography online, in the third grade. He was at a friend's house. This happens a lot, you know. He has an older brother. As far as I can tell there were no severe consequences. He's now 17. I monitor my son's internet access pretty closely. I don't see him running to pornography now as a result of the experience. So I tend to think, you know, what's the big deal? Why should I want to restrict free speech for something that doesn't really seem that earthshaking?

JAY SEKULOW: I tend to take a different view than Nadine not from a free speech standpoint, but from what is the potential harm to the minor? That's what I'm, that's how I look at it. That's what I'm concerned about. And in a situation where you now have technology that will enable the parent to be the protector of the information the child gets, I'd feel a lot better about the way the Internet's going than what we did 10 years ago when this legislation went forward.

MARGOT ADLER: Jay Sekulow is chief counsel for the American Center for Law and Justice. Nadine Strossen is the president of the American Civil Liberties Union. Thank you both so much for coming on Justice Talking.

NADINE STROSSEN: Thank you Margot.

JAY SEKULOW: Thanks for having us.

MARGOT ADLER: Technology that blocks the websites children can access may resolve disputes about how to regulate adult pornography on the Internet. But the Supreme Court recently suggested it would take a harder line on the question of child pornography or even virtual child pornography. Joan Biskupic covers the Supreme Court for USA Today. Welcome to Justice Talking.

JOAN BISKUPIC: Thank you Margot.

MARGOT ADLER: The Supreme Court recently heard oral arguments in the case of Michael Williams, a Florida man caught in a federal sting operation. Williams was soliciting and offering child pornography in an internet chat room. He pleaded guilty to owning child pornography, but that's not the end of the story. His case made it up to the Supreme Court because he also faced

charges for bragging about sexual pictures of his daughter which didn't exist. In fact he didn't have a daughter at all. What did Williams do and what is the question before the Court?

JOAN BISKUPIC: The question before the Court revolves around a law that makes it a crime punishable by a minimum five years to advertise, promote, or solicit materials purported to depict children engaging in sex acts. And the "purported" is important here, because what Mr. Williams is maintaining is that you don't even need to have real pornography to be charged and convicted under this law. So the key here is whether this law intended to criminalize the advertising of it, of these materials, sweep so broadly as to violate the First Amendment.

MARGOT ADLER: So this is, this is what's been called pandering, right? It's a pandering law.

JOAN BISKUPIC: Right. Right.

MARGOT ADLER: And the material doesn't have to even exist and it doesn't have to be for sale?

JOAN BISKUPIC: No. In fact, the lower court that struck down the law used an example of a grandparent who might put out a notice that says good pic of children in bed, as if it were it, could've been pornography, but for a hapless grandparent it wouldn't have been. So the lower court said, because it doesn't criminalize someone for advertising actual materials — rather, purported child pornography — it sweeps way too broadly. Now, several other groups have come into this case, free speech-oriented groups, who say this law could actually cover promotions of movies like "Lolita" and "American Beauty." Because it would be promoting materials that talk about underage children engaged in sexual activity when that's not really what's even in the films, just like that's not what's really in a grandparent's attachment of a picture.

MARGOT ADLER: And I gather that booksellers also have been worried that it could go after not only movies, but books like "Lolita."

JOAN BISKUPIC: Right, because what it does, it criminalizes any kind of communication about the advertizing of purported child pornography. Now, what the government says is that this law is important to dry up the market because it's not just that the government is going after the real thing. It wants to go after anything that will fuel the market, which is a key part of the argument from the government's point of view and one, frankly, that got the attention of the justices. Solicitor General Paul Clement stressed to the justices that the distribution of child pornography has expanded greatly because of the Internet. And that even though you might have fraudulent offers to buy or sell child porn that don't have the actual material in hand, those offers nonetheless feed the market.

MARGOT ADLER: Uh hmm. So when Paul Clement, the Solicitor General, made that argument representing the Bush Administration in court, how did the Supreme Court justices react? I mean, I've heard that in general they seemed reluctant to invalidate the pandering provision.

JOAN BISKUPIC: That's true. Several of the justices who normally are fearful of these sorts of criminal laws sweeping too broadly, took a fairly practical approach here in trying to pin down both sides: The Solicitor General of the United States, and the lawyer for Michael Williams. Saying what would really happen out there because at one point, Richard Diaz, the lawyer for Michael Williams, talked about the enormous reach of the statute and how this could punish thought crime so to speak. And what Paul Clement, the Solicitor General, did to counter that was to say, no, there has to be the intention on the part of either the buyer or the seller, that the materials are real. That they actually exist. And more importantly, he stressed, that this is going to be used to dry up what, uh, they assert is a very proliferating market.

MARGOT ADLER: Joan Biskupic covers the Supreme Court for USA Today. Thank you so much for coming back on our show.

JOAN BISKUPIC: Thank you Margot.

MARGOT ADLER: Outside the courtroom, the pornography industry is feeling the heat from a section of a federal law known as 2257. Porn producers say these regulations from the Department of Justice are frustrating and frightening.

UNIDENTIFIED MALE: It seems totally unreasonable to me that I've had to spend so much time doing something that I can't even ever know if I've done correctly unless the FBI shows up at my door.

MARGOT ADLER: Also, prosecutions of adult video producers have been rare in the U.S. for a couple of decades. Coming up on Justice Talking, are the nation's obscenity laws obsolete or under-enforced? Stay with us.

MARGOT ADLER: This is Justice Talking where we make the connection between law and American life. I'm Margot Adler. Today we're talking about pornography and the law. While some worry that the graphic sexual images in pornography will distort relationships between men and women, others say there's much more to fear from sexual repression and censorship. But often the producers in the sex industry make another argument. They say they are mostly small enterprises trying to run an honest business while being unfairly targeted by opponents and policy makers who are uncomfortable with sex. That's been a chief complaint since the Federal Bureau of Investigation announced late this year that it had conducted a wave of inspections of adult video producers. The sweep came after changes to a section of federal law called 2257 which mandates record-keeping within the porn industry. Violating the law can land you in jail and producers say the new requirements are as clear as mud. Reporter Keith Brand paid a visit to one adult video producer in Pennsylvania who is trying to stay in compliance. [NOISE OF TYPEWRITER]

KEITH BRAND: In a rundown loft apartment cluttered with books, artwork, and computers in various states of repair, Al Bairn checks his website to see if there are any new orders for his video. Al is not his real name. He likes to keep his personal and business life separate. He's also wary about inviting government scrutiny of his business. You see, Al sells adult videos.

AL BAIRN: I decided to make a video and see if anyone was interested and I did, and they were. My videos are unusual in that they are strictly solo videos. And there's no one in them but me.

KEITH BRAND: Al's solo act provides him with less than \$15,000 a year, a small but not insignificant portion of his income. This has allowed him to pursue his chosen career as an artist working in different media and his videos reflect that sensibility. In this film, cinéma vérité documentary-style merges with the trance-inducing soundtrack.

AL BAIRN: Because I was working completely alone and outside of any ordinary film making structures, and I'd never done any film making of my own before. I basically just made it up as I went along. When I make art, I tend to be conceptually oriented and that's just the way that I've thought about the videos as well.

KEITH BRAND: The United States criminal code has long required producers of adult videos to keep records of performers, but in 2005, the Department of Justice expanded the scope of those regulations. Now all videos and internet sites must contain the identity of the record keeper and the address where the records are kept and the specifics of that requirement are not at all clear.

AL BAIRN: They're just incredibly complex and the Department of Justice has not been at all forthcoming with information about what it truly means to be in compliance. And according to the regulations, if the FBI came here to inspect my records, I have to have everything cross-referenced in a particular way. I have to have it set up so that I have a list of any aliases I have ever used, a list of all of the depictions, and all of those things have to be cross-referenced to each other. And if I make a mistake in that cross-referencing and don't cross-reference it correctly, according to the regulations, I can go to prison for that.

KEITH BRAND: Still, many people think that's a small price to pay in order to protect underage children from exploitation by adult video producers. But industry advocates claim there have only been two reported cases of underage performers, both of whom faked their identification. Al rejects those critics who exaggerate the extent to which minors are involved in the adult industry.

AL BAIRN: The regulations are like swatting a fly with a skyscraper. The people who these regulations are aimed at, we are not going to do it because we are not dumb. We're not, you know, [LAUGHS] I don't want to go to jail. Basically these regulations are being used very cynically by people who I think are frustrated that because of First Amendment protections, obscenity prosecutions are very difficult. And you know these are mostly people who are very, very anti-sex.

KEITH BRAND: Some larger producers have the resources to manage the record keeping, but according to a report from Georgetown Economic Services on the impact of the regulations, the

vast majority of adult businesses are small like Al's. Jeffrey J. Douglas is a lawyer and advocate for the adult video industry.

JEFFREY J. DOUGLAS: There are probably only a handful of companies that are in the hundred million dollar gross range. And when the adult industry domestically is a 12- to 14-billion-dollar-a-year business, it tells you unlike any other entered portion of the entertainment industry where there are a handful of giants that dominate everything, this is an industry of very small business.

KEITH BRAND: Al Bairn says he understands the motives behind the regulations, but questions the sincerity of the regulators.

AL BAIRN: And if I felt that the regulations were actually doing something worthwhile, I would have much less trouble with it. But again, feeling personally that they're basically about harassing people and trying to stifle speech that people in the government don't like, it seems totally unreasonable to me that I've had to spend so much time doing something. That I can't even ever know if I've done correctly unless the FBI shows up at my door.

KEITH BRAND: And so Al continues to keep reading up on the latest legal developments to make sure he can stay in compliance with regulations he doesn't fully understand. And while he checks his website for any further orders he also keeps an anxious eye on his front door. For Justice Talking, I'm Keith Brand.

MARGOT ADLER: Industry advocates have been fighting hard against the new record-keeping requirements, and earlier this year a federal appeals court in Ohio struck them down. Here to discuss why this fight is so important to adult video producers is Diane Duke, the executive director of the Free Speech Coalition, which lobbies for the adult entertainment industry. Welcome to Justice Talking.

DIANE DUKE: Thank you.

MARGOT ADLER: Section 2257 was enacted in 1988 to combat child pornography. It mandates producers of sexually explicit material to keep and verify records of the names and ages of the performers. On the face of it that seems reasonable, but your group thinks the regulations go too far. Why?

DIANE DUKE: It's comparable to hitting a fly with, instead of a flyswatter, with a sledgehammer. We believe it goes too far because the way that they have the adult entertainment industry collect these records and hold these records is very cumbersome. For example, an owner of a producer has to not only take the identification of the performer and we're all very happy with it and have been checking identification of performers for years and years and years. But take the identification — it has to be in a separate file from any other papers included with that performer. We have to cross-reference it with every performance she has ever done. And every name that she has ever done has to be on a specific type of a form.

Those documents have to be kept at the place of business and the custodian of records has to be at that place of business for at least 20 hours a week between nine and five in case the FBI decides they want to come by and inspect those records.

MARGOT ADLER: So you're saying it's a bureaucratic minefield in a sense?

DIANE DUKE: It's a bureaucratic minefield, but there are additional dangers actually for folks. Well, a lot of our businesses, you think adult entertainment industry, the myth is that, you know, they're all Larry Flynt million, billionaires. But they're not. Really typically, it's a mom and pop organization most of the time. A lot of this is just a second job for folks.

MARGOT ADLER: And you also argue that the 2257 requirements are unconstitutional, and one court has agreed with your position. What's unconstitutional about them?

DIANE DUKE: It's overbroad and over-reaching. You know, in a good example, in Hollywood, if you have, if they have any questionable, any kind of content that looks like it could be more adult, all they have to do is write a letter saying that they check I-9s—

MARGOT ADLER: Tax forms.

DIANE DUKE: —business check, yes, yes, yes. They have I-9s and they check identification that way. It's assuming guilt for the adult entertainment industry and, you know, I think it's important that listeners understand that the adult entertainment industry is entertainment for adults by adults using adult performers. We have absolutely no interest in having underage performers in our productions.

MARGOT ADLER: I want to turn for a moment more broadly to obscenity and the prosecution of obscenity. Former Attorneys General John Ashcroft and Alberto Gonzalez took strong anti-porn positions. Yet despite that, there haven't been many federal obscenity prosecutions for adult pornography. What's your take on that?

DIANE DUKE: It's a very difficult case to prove. You have to have community standards. So the community has to agree that it is, that these materials are obscene and they're having a hard time finding that.

MARGOT ADLER: Coming up we'll be talking to the head of the anti-porn group Morality and Media. The group says more than a third of the children between 10 and 17 run across pornography online accidentally. They complain about statistics that show nearly 16 percent of visitors to adult websites were younger than 18 years of age. That does seem troubling to me.

DIANE DUKE: Adult entertainment is adult for adults. And so we see children coming across adult materials whether it be alcohol, whether it be tobacco, whether it be, you know. As a parent of two sons it was up to me to be a responsible parent and to talk to my kids about what's okay and what's not okay. But, you know, when you look at opening a refrigerator and seeing a beer in there and that's adult material. It's just as easy, you know, for a kid to walk in and grab a

beer out of a refrigerator. But as a parent, I talk to my kids and they understood that underage drinking was not appropriate in our house.

MARGOT ADLER: Do you think that the law is going in the right direction and are there any cases out there that you think will have, in the future, a dramatic effect on laws affecting pornography and obscenity?

DIANE DUKE: Our society has a tendency to want to regulate things that it possibly doesn't understand, and I would say that adult entertainment is seriously misunderstood. I think that we've seen some laws, we're looking at seven states — There are bans on sex toys, on novelties. And I have to question what is it, what possible interest would the government have as to whether or not I have a vibrator, you know? That seems to me far-reaching. I cannot go into the state of Alabama and buy, and legally buy a vibrator. That seems far-reaching to me. These are choices that we have. That's a wonderful thing about this country. We have the freedom to choose. And when the government starts to pull those pieces away it's very, very dangerous.

MARGOT ADLER: Diane Duke is the executive director of the Free Speech Coalition which advocates and lobbies for the adult entertainment industry. Thank you so much for talking with me.

DIANE DUKE: Thank you Margot.

MARGOT ADLER: While advocates for the industry talk about choice and the threat of over-reaching government, Robert Peters says the government really needs to do more. Peters is president of Morality and Media, a group that pushes for enforcement of obscenity laws and fights indecency in the media. Welcome.

ROBERT PETERS: Thanks for having me.

MARGOT ADLER: We just spoke with Diane Duke from the Free Speech Coalition. She argues that Section 2257 which essentially requires porn producers to keep records of the names and ages of the performers is unconstitutional. What's your reaction?

ROBERT PETERS: Certainly properly worded I think a Section 2257 will clearly stand up under the Constitution. Now, one federal circuit court recently concluded that some of the language made it unconstitutional. My anticipation is that the case will be appealed to the Supreme Court, because other courts have appealed the law as such except for the provisions that apply to middlemen. It seems to me, clearly the people who actually produce the pornography, who have the human being in front of them, in front of the camera, they are in the best position to determine whether somebody is of age. Take it one step beyond that and apply to the law to every distributor of the pornography. A bare minimum admittedly, it could make it difficult. Let's say, a middleman wouldn't know who did produce this, or would have a hard time determining who produced it, questioned, should that person simply not distribute the material or distribute it without the information? My guess is that there's probably a compromise that the

courts will uphold in terms of middlemen, but whether the current regulations will stand the test, I don't know.

MARGOT ADLER: If 2257 was wiped away, what would that do? Would that be a really bad thing? Would it really change things?

ROBERT PETERS: Well, I tell you my honest opinion is that for the most part the established pornographers most of whom, or certainly many of whom, are in the Los Angeles area, would take reasonable steps not to have kids in their porn. Because they know that they would lose everything including their freedom. Now that doesn't mean that minors don't make it through their, their testing. I mean practically speaking, I suspect unless they assigned a private detective to follow up on every applicant they'd have a pretty tough time concluding to a virtual certainty that no one under 18 has ever performed in one of their films. But my guess is that minors in terms of more established pornography businesses, that's not a major problem. When you get away from the more established businesses my guess is that a lot of these so-called 18-year-old girls are under 18. And in some cases the producers could care less and they know it.

MARGOT ADLER: John Ashcroft and Alberto Gonzalez, both former heads of the Justice Department, were vocal in their anti-porn stances but that hasn't led to a lot of prosecutions during the Bush administration. Why do you think that is?

ROBERT PETERS: Well, I think two reasons. Number one, this is an opinion, clearly 9/11, September 11th, changed everything in terms of, uh, what the Bush administration intended to do in general.

MARGOT ADLER: So priorities changed.

ROBERT PETERS: Oh clearly. I mean once 9/11 came along, John Ashcroft's focus had to change.

MARGOT ADLER: Why do you believe there should be more prosecutions? What is it about pornography that so concerns you?

ROBERT PETERS: Well, I tell you, to me, pornography hurts people. And you know, our job is really public policy and the law. So unless I'm asked about it, I normally don't talk about my own experience with pornography, but I know from personal experience what a hold it can get on me, a person. I'll tell you, we make the statement that the number one damage that pornography causes is to marriages. Some of the pornography the guy's looking at involves teenagers and maybe younger. And in my opinion...

MARGOT ADLER: Because in...

ROBERT PETERS: No, well I tell you, just the last one. This is a very controversial question.

MARGOT ADLER: Go on.

ROBERT PETERS: But to me it's not controversial at all. I think the evidence is overwhelming that pornography contributes to sexual crimes against adults and children. I mean in terms of rape and sexual exploitation of children.

MARGOT ADLER: And given all the pornography in, in the United States, do you feel sometimes like you're fighting a losing battle?

ROBERT PETERS: At one level I say two things, I mean, in my, you know, being a person of faith, that with God all things are possible. But the other part that keeps me going is my honest belief for many reasons that most Americans, if given a choice, would rather live in a safe and decent society. Than one that is shaped by Larry Flynt, Hugh Hefner, and a hundred other top, leading pornographers in L.A., and Florida, and New York City. I just think that's true. I think if they were given a choice, do we, do you want a society where pornography is everywhere? Where kids, you know, it's totally accessible to children, at least beyond a certain age. Just the world in which you want to live. I think if most Americans were given a choice they'd say no.

MARGOT ADLER: That was Robert Peters of Morality and Media. Tell us what you think about pornography and the law at JusticeTalking.org. Thanks for listening. Join us next week on Justice Talking. I'm Margot Adler.
