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Outside Counsel

Fate of Children's On-Line Protections Considered

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Twenty years ago, authorities believed that they had child pornography essentially under control. U.S. Custom agents and other law enforcement officials disbanded child pornography rings that used traditional overland mail and neighborhood photo labs to distribute their sexually explicit images of helpless infants.

With time, it became difficult for pedophiles[1]† to find each other, interact, and exchange pornographic materials. Public officials declared victory, believing child pornographers could be stopped using traditional law enforcement techniques.[2]† Then came the Internet and, with it, the power for millions around the world to anonymously share files online.

Unfortunately, this ideal means of accessing and sharing information, is the choice medium used by pedophiles to lurk with virtual anonymity and indulge their appetite for preteen victims. No longer must a pedophile risk capture by waiting near a school or local hangout, when he could instead enter a home, ignite a conversation, and develop a harmful relationship in a chat room on the Internet.

To further complicate the problem, advances in photographic imaging technology and inexpensive desktops have simplified the process of creating pornography. In most cases, pedophiles use their own computers to make child pornography, instantly sending it to like-minded friends anywhere in the world, while dodging authorities in ways never before possible.

Given the speed at which pedophiles can upload images from anywhere in the world and then vanish, the Internet's global presence offers unique challenges for law enforcement agencies that find themselves constrained by varying international laws and conflicting jurisdictions. In the recent crackdown involving Landslide Productions'

commercial child pornography web site, for example, the company was headquartered in Fort Worth, Texas, yet most of its 250,000 subscribers lived overseas.[3]†

Today, child pornography remains a grave social concern that continues to flourish while preying on society's most vulnerable members. In their efforts to combat this enduring global epidemic, legislatures have tried to enact laws to protect children online by providing a basis to prosecute those individuals involved in the creation, distribution, and possession of sexually explicit materials made by or through the exploitation of children. Regrettably, child pornography has still managed to evade every legislative attempt to stamp it out.

The most recent federal law, the Child Pornography Prevention Act of 1996 (CPPA), was enacted by Congress as part of its continued effort to rid society of the exploitation of children for sexual gratification. This fall, the U.S. Supreme Court will hear arguments to determine if Congress was overly broad in defining child pornography to include not only images of actual children, but images that "appear to be" children as well.[4]† In a decision reversing a district court's ruling, the U.S. Court of Appeals for the 9th Circuit held that Congress failed to articulate a "compelling state interest" to justify criminalizing virtual child pornography.[5]†

This holding, and its foreseeably harmful implications, form the basis of the Government's appeal to the U.S. Supreme Court in *Ashcroft v. Free Speech Coalition*. To heighten awareness about the important concerns raised by this appeal, this article will review the legislative history of American child pornography legislation and discuss the statutory amendments that address the ongoing "kiddy porn" dilemma.

The 1977 and 1984 Acts

The earliest federal legislation specifically prohibiting the sexual exploitation of children was the Protection of Children Against Sexual Exploitation Act of 1977 (PCASEA).[6]† This law prohibited using a minor to engage in sexually explicit conduct for producing any visual depiction knowing that it was or would be transported in interstate or foreign commerce.[7]† Additionally, this statute also proscribed the interstate transportation of children or juveniles for the purpose of prostitution.[8]†

Congress enacted the PCASEA after finding that child pornography and prostitution were highly organized, highly profitable, and used to exploit countless numbers of children in its production.[9]† Unfortunately, while the PCASEA criminalized the commercial production and distribution of visual depictions of children under the age of sixteen engaging in sexually explicit conduct, this commercial production prohibition resulted in only one conviction.[10]†

Two years after the Supreme Court held that child pornography was not entitled to First Amendment protection in *New York v. Ferber*,[11]† Congress enacted the Child Protection Act of 1984.[12]† This statute eliminated the requirement that the production or distribution of the material made be for profit after Congress realized that a great deal of pornographic trafficking involving children was not for profit.[13]† The Child Protection Act also broadened the scope of the PCASEA by

changing the phrase "visual or print medium" in the former law to the phrase "visual depiction."[14]†

Moreover, Congress substituted the word "lascivious" for the word "lewd" in the definition of "sexual conduct" to make it clear that the depiction of children engaged in sexual activity was unlawful even if it did not meet the adult obscenity standard.

Among its features, the Child Protection Act also raised the age limit for protecting children involved in sexually explicit material from sixteen to eighteen and eliminated a previous requirement that the prohibited material be considered obscene under *Miller v. California*[15]† before its production, dissemination, or receipt became criminal.

More Recent Acts

In 1986, Congress enacted the Child Sexual Abuse and Pornography Act, which banned the production and use of advertisements for child pornography.[16]† Under this statute, violators were also subject to liability for personal injury to children resulting from the production of child pornography.[17]†

In 1988, Congress continued its effort to stop child pornography by enacting the Child Protection and Obscenity Enforcement Act.[18]† This law made it unlawful to use a computer to transport, distribute, or receive child pornography. It also added a new section to the criminal law that prohibited the purchase, sale, or other means of obtaining temporary custody or control of children for the purpose of producing child pornography. Lastly, the statute required record keeping and imposed disclosure requirements on the producers of certain sexually explicit matter.

In 1990, the Supreme Court decided *Osborne v. Ohio*, upholding an Ohio law that prohibited possession and viewing of child pornography.[19]† Shortly thereafter, Congress enacted the Child Protection Restoration and Penalties Enhancement Act of 1990.[20]† This statute criminalized the possession of three or more pieces of child pornography. In 1994, federal child pornography law was amended yet again to penalize the production or importation of sexually explicit depictions of a minor and mandated restitution for victims of child pornography.[21]†

Despite its extensive efforts all throughout, Congress was unable to eliminate child pornography because child pornographers always found ways to circumvent the law.[22]† Before 1996, federal law only proscribed depictions of "actual" minors engaging in sexually explicit conduct. Consequently, prosecutors had to show that the children depicted in pornography were indeed real children.[23]† This requirement made the existing law relatively easy to get around because child pornographers could make visual depictions that appear to show actual children having sex without using children at all.[24]†

Moreover, even when actual children are used, computers could "alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for prosecutors to identify individuals, or to prove that the offending material was produced using [actual] children."[25]†

The 1996 Act

By enacting the CPPA, however, Congress guided the statutory scheme of anti-child pornography laws in a new direction. Specifically, the CPPA adapted to new technology by banning, among other things, visual depictions that "appear to be of a minor engaging in sexually explicit conduct."[26]† The "appears to be" language refers to child pornography that is entirely virtual, i.e., portraying no actual living child.

To elaborate, virtual child pornography does not depict a real or "identifiable minor." Through a technique known as "morphing," a picture of an actual person is transformed into a virtual image of a child engaging in sexually explicit activity.[27]† Although the computer-generated image looks real, the picture is purely "virtual" because the children depicted in the image do not actually exist.[28]†

The underlying premise of the CPPA concerns the harmful impact that pornographic images have on the children who may view them. The law is also based on the notion that child pornography, real as well as virtual, increases the activities of child molesters and pedophiles.

In *Ashcroft v. Free Speech Coalition*, the likely focus will be on whether the definitions of images that "appear to be" minors and images that "convey the impression" of child pornography are unconstitutionally vague. Like every feisty debate, this one has two sides.

On the one hand, supporters of the CPPA argue that the Act is constitutional because it was specifically designed to counteract the destructive effect that child pornography has on innocent children and was not intended to outlaw ideas themselves. Instead, the legislative record shows that only those images which are "virtually indistinguishable" from previously proscribed child pornography are to be targeted. Finally, supporters maintain that the CPPA is not overbroad because it burdens no more speech than necessary to protect children from the harms of child pornography.

On the other hand, opponents of the CPPA argue that the prohibition against images that "appear to be" and "convey the impression" of child pornography is unconstitutional because the CPPA's provisions are far too subjective and vague for use in a criminal statute restricting speech. Their main concern is that these two provisions criminalize a wide variety of images, including those of young-looking adults as well as minors in paintings, drawings, and sculpture, as well as images created and used for serious literary, artistic, political, or scientific purposes.

Given the global reach of the Internet, this debate is not limited to American soil. Earlier this year, the Supreme Court of Canada upheld a ban on child pornography, but held that child pornography that is created by, and kept exclusively for, an individual's own personal use is legally protected as a form of expression.†

A similar decision in *Ashcroft v. Free Speech Coalition*, however, would fail to grasp the notion that questions concerning an individual's freedom of expression - when weighed against society's indubitable duty to protect its children - must be regarded fundamentally as a question of policy. Unfortunately, the Canadian Supreme Court failed to

recognize that child pornography, by its very nature and in whatever form, too often inflicts irreparable harm to countless children around the world. And, although an obvious distinction exists between actual child pornography (using real children) and virtual child pornography (using computer generated images), it seems clear that the difference fails to transform any form of child pornography into anything close to meaningful speech worthy of First Amendment protection.

In sum, few would dispute that freedom of expression is a cherished right, but it is one that should be balanced against the potential for grave harm to our most precious citizens: kids.

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FootNotes:

[1] The American Psychiatric Association defines a Pedophile as an individual who has recurrent, intense sexually arousing fantasies, urges, or behaviors toward a prepubescent child over a period of at least 6 months and acts on these fantasies. Diagnostic and Statistical Manual of Mental Disorders, 571-72 (4th ed. 2000).

[2] See Rod Nordland and Jeffrey Bartholet, "The Web's Dark Secret," Newsweek, Mar. 19, 2001, at 44.

[3] Christopher Marquis, "U.S. Says It Broke Pornography Ring Featuring Youths, A Global Operation," The New York Times, Aug. 9, 2001, at A1.

[4] Ashcroft v. Free Speech Coalition, 121 S.Ct. 876, 148 L.Ed.2d 788 (Jan. 22, 2001) (00-795).

[5] Free Speech Coalition v. Reno, 198 F.3d 1083, 1095 (9th Cir. 1999), reh'g denied, 220 F.3d 1113 (2000).

[6] Pub. L. No. 95-225, 92 Stat. 7 (codified at 18 U.S.C. §§2251-2253).

[7] Id.; United States v. Smith, 795 F.2d 841, 846-47 (9th Cir. 1986) (interpreting visual depiction to include underdeveloped film); United States v. Porter, 709 F.Supp. 770, 774 (E.D. Mich. 1989) (finding visual depiction includes reproductions of pictures or photographs), aff'd, 895 F.2d 1415 (6th Cir. 1990), cert. denied, 498 U.S. 1013 (1990).

[8] 18 U.S.C. §§2421-2424; See Pub. L. No. 95-225, §3, 92 Stat. 7 (1977).

[9] See New York v. Ferber, 458 U.S. 747, 749 n.1 (1982) (citing S. Rep. No. 95-438, at 5).

[10] See Attorney General's Comm'n On Pornography, Final Report 604 (1986) ("AG Report").

[11] New York v. Ferber, 458 U.S. 747, 756 (1982) (holding that States are entitled to "greater leeway in the regulation of pornographic depictions of children").

[12] See Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§2251-2253).

[13] Pub. L. No. 98-292, §§4, 5.

[14] See Pub. L. No. 98-292, §§3, 4, 98 Stat. 204 (1984).

[15] Miller v. California, 413 U.S. 15, 31-32 (1973) (holding obscenity could be prohibited only if the material in question met the requirements of a three-part test). [16]

††† Pub. L. No. 99-628, §2, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. §2251).

[17] See Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783 (1986) (codified as amended at 18 U.S.C. §2255).

[18] See Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended at 18 U.S.C. §§2251A-2252).

[19] Osborne v. Ohio, 495 U.S. 103, 113 (1990).

[20] See Pub. L. No. 101-647, §301, 104 Stat. 4789 (1990) (codified as amended at 18 U.S.C. §2252 (a)(4)).

[21] See Pub. L. No. 103-322, §§16001, 40113, 108 Stat. 2036 (1994) (codified as amended at 18 U.S.C. §2259).

[22] S. REP. NO. 104-358, at 26. (statement of Senator Chuck Grassley).

[23] Id., at 16.

[24] 141 CONG. REC. S 13540-06, S13542 (daily ed. Sept. 13, 1995) (remarks of Senator Orrin Hatch, R-Utah).

[25] Id.

[26] 18 U.S.C. §§2256(8)(B).

[27] See S. REP. NO. 104-358, at 15-16.

[28] The CPPA also prohibits "computer- altered" child pornography. Computer-altered child pornography has the image of an actual or "identifiable minor." 18 U.S.C. §2256(9). This type of child pornography is created by scanning the photograph of a child into a computer and then, using familiar cut and paste features, attaching the child's face onto the body of another individual engaged in sexually explicit activity. Although the image has been altered, the CPPA bans computer-altered child pornography because the child remains "recognizable" through the child's "face, likeness, or other distinguishing characteristic." 18 U.S.C. §2256(9)(A)(ii). The constitutionality of this prohibition, however, is not at issue in Ashcroft v. Free Speech Coalition.

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