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Child Pornography: Constitutional Principles and Federal Statutes

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Child Pornography: Constitutional Principles and Federal Statutes

Summary

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press." Although the First Amendment, in general, protects pornography, the Supreme Court has held that it does not protect two types of pornography: obscenity and child pornography. Consequently, the government may, and has, banned them.

Child pornography is material that visually depicts sexual conduct by children, and is unprotected by the First Amendment even when it is not legally obscene. Federal statutes, in addition to making it a crime to transport or receive child pornography in interstate or foreign commerce, prohibit, among other things, the use of a minor in producing pornography, and provide for criminal and civil forfeiture of real and personal property used in making child pornography, and of the profits of child pornography. In addition, child pornography crimes are included among the predicate offenses that may give rise to a violation of the Federal Racketeer Influenced and Corrupt Organizations Act.

The Child Pornography Prevention Act of 1996, P.L. 104-208, 110 Stat. 3009-26, added a definition of "child pornography" that include visual depictions of what appears to be a minor engaging in explicit sexual conduct, even if no actual minor was used in producing the depiction. In *Ashcroft v. Free Speech Coalition* (2002), the Supreme Court held this provision unconstitutional to the extent that it prohibited pictures that were not produced with actual minors. In response to *Ashcroft*, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, or the PROTECT Act, Public Law 108-21, which would again ban some non-obscene child pornography that was produced without an actual minor.

The Children's Internet Protection Act (CIPA), P.L. 106-554 (2000), amended three federal statutes to provide that a school or library may not use funds it receives under these statutes to purchase computers used to access the Internet, or to pay the direct costs of accessing the Internet, and may not receive universal service discounts, unless the school or library enforces a policy to block or filter minors' Internet access to visual depictions that are obscene, child pornography, or harmful to minors; and enforces a policy to block or filter adults' Internet access to visual depictions that are obscene or child pornography. Filters may be disabled, however, "for bona fide research or other lawful purpose." On June 23, 2003, the Supreme Court held CIPA constitutional.

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Child Pornography: Constitutional Principles and Federal Statutes

Constitutional Principles

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] In general, the First Amendment protects pornography, with this term being used to mean any erotic material. The Supreme Court, however, has held that the First Amendment does not protect two types of pornography: obscenity and child pornography. Consequently, they may be banned on the basis of their content, and federal law prohibits the mailing of child pornography as well as its transport or receipt in interstate or foreign commerce by any means, including by computer.

A. Obscenity[2]

Most pornography is not legally obscene; to be obscene, pornography must, at a minimum, "depict or describe patently offensive 'hard core' sexual conduct." *Miller v. California*, 413 U.S. 15, 27 (1973). The Supreme Court has created a three-part test, known as the *Miller* test, to determine whether a work is obscene. The *Miller* test asks:

> (a) whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[3]

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[1] Despite its literal words, the First Amendment applies not just to Congress, but equally to all branches of the federal government and the state governments. Gitlow v. New York, 268 U.S. 652 (1925).

[2] For additional information, see, *Obscenity and Indecency: Constitutional Principles and Federal Statutes* (CRS Report 95-804 A).

[3] 413 U.S. at 24 (citation omitted). In *Pope v. Illinois*, 481 U.S. 497, 500 (1987), the Supreme Court clarified that "the first and second prongs of the Miller test – appeal to prurient interest and patent offensiveness – are issues of fact for the jury to determine applying contemporary community standards." However, as for the third prong, "[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."

The Supreme Court has allowed one exception to the rule that obscenity, as defined by *Miller*, is not protected under the First Amendment. In *Stanley v. Georgia*, 394 U.S. 557, 568 (1969), the Court held that "mere private possession of obscene material" is protected. The Court wrote:

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch.

Id. at 565.[4]

B. Child Pornography

Child pornography is material that "*visually* depicts sexual conduct by children below a specified age."[5] *New York v. Ferber*, 458 U.S. 747, 764 (1982) (emphasis in original). It is unprotected by the First Amendment even when it is not legally obscene; i.e., child pornography need not meet the *Miller* test to be banned.[6] However, the Court held in *Ferber* that, as with obscenity,

> the conduct to be prohibited must be defined by the applicable state law,[7] as written or authoritatively construed. . . . The category of "sexual conduct" proscribed must also be suitably limited and described.

Id. at 764.

In *Massachusetts v. Oakes*, 491 U.S. 576, 579 (1989), the Supreme Court considered a Massachusetts statute that made it a crime knowingly to permit a child under 18 "to pose or to be exhibited in a state of nudity . . . for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture." The defendant in the case had been convicted for taking topless photographs of his 14-year-old stepdaughter, but the Massachusetts Supreme

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[4] Subsequently, however, the Supreme Court rejected the claim that under *Stanley* there is a constitutional right to provide obscene material for private use (United States v. Reidel, 402 U.S. 351 (1971)), or to acquire it for private use (United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973)). The right to possess obscene material does not imply the right to provide or acquire it, because the right to possess it "reflects no more than . . . the law's 'solicitude to protect the privacies of the life within [the home].'" *Id*. at 127.

[5] Federal law now prohibits some child pornography that was produced without the use of actual minors, but the Supreme Court has declared that such child pornography is protected by the First Amendment. See the discussions of "Section 2252A" and "Section 2256," below.

[6] In *Ferber*, the Court noted that a trier of fact "need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material need not be considered as a whole." 458 U.S. at 764.

[7] Or federal law. For the federal statutory definition of "child pornography," see "Section 2256," below.

Judicial Court reversed on the ground that the statute was overbroad because it would make "a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool." *Id*. at 581. While the case was pending before the Supreme Court, the statute was amended to allow convictions only where nude pictures are taken "with lascivious intent." This amendment made moot the question of whether the statute under which the defendant was convicted was overbroad. However, it left open the question whether the statute under which the defendant was convicted could constitutionally be applied to him; i.e., whether his conduct was protected by the First Amendment. The Supreme Court remanded the case for this to be decided.

In *Osborne v. Ohio*, 495 U.S. 103 (1990), the Supreme Court held that the *Stanley v. Georgia* right to possess obscene material in one's home does not extend to child pornography. The difference is that:

> In *Stanley*, Georgia primarily sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers. We responded that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

Id. at 109 (citations omitted).

In *Osborne*, by contrast,

> the State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted [its statute prohibiting possession of child pornography] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children. . . . It is . . . surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand. . . . Other interests also support the Ohio law. First, as *Ferber* recognized, the materials produced by child pornography permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. The State's ban on possession and viewing encourages possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

Id. at 109-111 (citations omitted).

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Supreme Court held that child pornography that is produced without using an actual minor is protected by the First Amendment. We discuss this case in the section below titled "Section 2256."

Federal Child Pornography Statutes

Federal child pornography statutes are codified at 18 U.S.C. §§ 2251-2260. These sections, including selected court cases that have ruled on their

constitutionality or interpreted them, are summarized in numerical order. After that, the Children's Internet Protection Act and the Federal Racketeer Influenced and Corrupt Organizations Act (RICO) are considered, to the extent that they incorporate child pornography crimes.

A. 18 U.S.C. §§ 2251-2260

Section 2251. Sexual exploitation of children. Subsection (a) of this section, as amended by P.L. 105-314, § 201 (1998), makes it a crime to use a minor in child pornography if the pornography has one of three specified connections to commerce. The phrase "use a minor in child pornography" in the preceding sentence is a synopsis of the following statutory language:

> employs, uses, persuades, induces, entices, or coerces any minor to engage in, or . . . transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . .

Subsection (b), as amended by P.L. 105-314, § 201 (1998), makes it a crime for any "parent, legal guardian, or person having custody or control of a minor" knowingly to permit such minor to engage in child pornography that has one of three specified connections to commerce.

Subsection (c) makes it a crime for any person knowingly to publish notices or advertisements for child pornography or for "participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct," if "such person knows or has reason to know that such notice or advertisement *will be* transported in interstate or foreign commerce by any means including by computer or mailed," or if "such notice or advertisement *is* transported [apparently even without the defendant's knowing or having reason to know] in interstate or foreign commerce by any means including by computer or mailed."[8]

Subsection (d) sets forth the criminal penalties for violations of subsections (a), (b), or (c); it was amended by P.L. 104-208, § 121, and by P.L. 105-314, § 201, to increase the penalties.

Section 2251A. Selling or Buying of Children. This section imposes a *minimum* 20-year sentence on "[a]ny parent, legal guardian, or other person having custody or control of a minor who sells or otherwise transfers custody or control of such minor, or offers to sell or otherwise transfer custody or control of such minor" (1) with knowledge that, as a consequence of the sale or transfer, the minor will be portrayed in child pornography, or (2) with intent to promote the participation of the minor in child pornography. It imposes the same sentence on the person who purchases or otherwise obtains custody or control of the child for one of these

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[8] Italics added. The provision seems redundant (with knowledge never required) because, for a person to know that an advertisement will be transported logically requires that it be transported. Perhaps what it means is that the person expect it to be transported, whether or not it actually is.

purposes. "Custody or control" is defined to include "temporary supervision or responsibility for a minor whether legally or illegally obtained." 18 U.S.C. § 2256(7).

In order for a person to be guilty under § 2251A, there must be a nexus with interstate or foreign commerce, namely that, in the course of the offense, either the minor or the defendant have traveled in interstate or foreign commerce, the offer for transfer of custody or control have been "communicated or transported in interstate or foreign commerce by any means including by computer or mail," or the offense have been committed in a territory or possession of the United States.

Section 2252. Certain activities relating to material involving the sexual exploitation of minors. This section, unlike § 2252A, applies only to child pornography that depicts actual children. It makes it a crime (1) knowingly to *transport or ship* child pornography by any means, including by computer, in interstate commerce or foreign commerce, or to mail it (even intrastate), (2) knowingly to *receive or distribute* child pornography that has been transported or shipped in interstate or foreign commerce by any means including by computer, or mailed, and (3) knowingly to *reproduce* child pornography for distribution in interstate or foreign commerce by any means including by computer, or through the mails.

Section 2252 also makes it a crime, in two situations, knowingly to *possess* "1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction . . . of a minor engaging in sexually explicit conduct." It shall be an affirmative defense, however, that the defendant "possessed less than three matters containing [such] visual depiction" and "promptly and in good faith, and without retaining or allowing any person other than a law enforcement agency, to access any [such] visual depiction . . . (A) took reasonable steps to destroy each such visual depiction; or (B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction." 18 U.S.C. § 2252(c).[9]

The two situations in which the crime of knowing possession and the affirmative defense apply are: (1) "in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title," and (2) if the material "has been mailed, or has been shipped or transported in interstate or foreign commerce, or . . . was produced using materials which have been mailed or so shipped or transported, by any means including by computer." 18 U.S.C. § 2252(a)(4).

In the most natural grammatical reading of § 2252, the word "knowingly" applies to transporting, shipping, receiving, or distributing child pornography, but does not require that the person doing these things know that the material is child pornography. Nevertheless, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the Supreme Court held that the statute must be read to require that the

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[9] P.L. 105-314, § 203(a), changed "3 or more" to "1 or more" and added the affirmative defense.

defendant knew that the material depicted sexually explicit conduct and that at least one of the performers was a minor. The Court read the statute this way "because of anomalies that would result from [the most natural grammatical reading of the statute], and because of the respective presumptions that some form of scienter [knowledge] is to be implied in a criminal statute even if not expressed, and that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." *Id*. at 68-69.

As for anomalies that would result from limiting the application of "knowingly" to the acts of transporting, shipping, receiving, and distributing, the Court observed that doing so would make the statute apply to a retail druggist who returns an uninspected roll of developed film to a customer, and would make it apply to a new resident of an apartment who receives the mail for the prior resident and stores it unopened. As for constitutional questions to be avoided, in *Smith v. California*, 361 U.S. 147, 153 (1959), the Supreme Court held that the First Amendment prohibits prosecution of a book distributor for possession of an obscene book unless the distributor has "knowledge of the contents of the book."

In *United States v. Knox*, the defendant was convicted of violating § 2252 for possessing videotapes that focused on the genitalia and pubic area of minor females, even though those body parts were covered by opaque clothing.[10] The Court of Appeals for the Third Circuit affirmed, and the Supreme Court agreed to hear the case, but the Solicitor General filed a brief for the United States agreeing with the defendant that the statute did not apply to depictions of clothed children. In November 1993, the Supreme Court sent the case back to the Third Circuit for reconsideration in light of the Solicitor General's opinion. The Third Circuit, nevertheless, in June 1994, reaffirmed Knox's conviction. Knox again asked the Supreme Court to hear the case, and this time the Solicitor General agreed with the Third Circuit that the statute applied to depictions of clothed children. The Supreme Court, however, declined to review the case, and Knox's conviction stands.

Between the Supreme Court's two actions, Congress apparently amended the statute to apply explicitly to depictions of clothed children. P.L. 103-322, § 160003(a) (1994), states:

> The Congress declares that in enacting sections 2252 and 2256 of title 18, United States Code, it was and is the intent of Congress that —
>
> (1) the scope of "exhibition of the genitals or pubic area" in section 2256(2)(E),[11] in the definition of "sexually explicit conduct", is not limited to nude exhibitions or exhibitions in which the outlines of those areas were discernible through clothing; and

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[10] 977 F.2d 815 (3d Cir. 1992), *vacated and remanded*, 510 U.S. 375 (1993); 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). For additional information on the Knox case, see, *The* Knox "*Clothed Children" Child Pornography Case and the Congressional Response*, CRS Report 94-753 A (Jan. 30, 1995).

[11] As amended by § 502(b) of the PROTECT Act, P.L. 108-21, the phrase "exhibition of the genitals or pubic area" now appears in 18 U.S.C. § 2256(2)(A)(v).

> (2) the requirements in section 2252(a) (1)(A), (2)(A), (3)(B)(i), and (4)(B)(i) that the production of a visual depiction involve the use of a minor engaging in "sexually explicit conduct" of the kind described in section 2256(2)(E) are satisfied if a person photographs a minor in such way as to exhibit the child in a lascivious manner.[12]

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[12] 18 U.S.C. § 2252 note. Congress's expression of the intent of an earlier Congress has no legal effect, as statutory interpretation is the province of the judiciary. Congress may, of course, amend a statute prospectively, but it does not often do so by "declaring" the intent of Congress with respect to a statute; rather, it changes the language of a statute. One might argue, therefore, that, in this instance, Congress was merely advising the courts as to how to interpret the earlier statute and was not amending it. However, for two reasons, the better view seems to be that it was amending the statute. First, in *Stockdale v. Insurance Companies*, 20 Wall. (87 U.S.) 323, 331, 332 (1874), the Supreme Court addressed a statute that provided that an earlier statute "shall be construed to . . . ." Noting that there would be no resistance to the statute "[b]ut for the unfortunate and unnecessary use of the word 'construe,'" the Court wrote:

> > [A] legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law . . . . [W]here it can exercise a power by passing a new statute . . . the form of words which it uses to put this power in operation cannot be material, if the purpose is clear, and that purpose is within the power. . . . Are we captiously to construe the use of the word "construe" as an invasion of the judicial function where the effect of the statute and the purpose of the statute are clearly within the legislative function?

Second, the subsection in question in the 1994 legislation (subsection (a) of section 160003) is headed "Declaration," whereas the following subsection (subsection (b) of section 160003), as well as the previous section (section 160002), are headed "Sense of the Congress." A court therefore would likely hold that Congress would have used the phrase "Sense of the Congress" in subsection (a) of section 160003 as well if it had not meant to amend the statute.

Because the two provisions that were headed "Sense of the Congress" concern child pornography, we quote them in their entirety here:

> Sec. 160002. It is the sense of the Congress that each State that has not yet done so should enact legislation prohibiting the production, distribution, receipt, or simple possession of materials depicting a person under 18 years of age engaging in sexually explicit conduct (as defined in section 2256 of title 18, United States Code) and providing for a maximum imprisonment of at least 1 year and for the forfeiture of assets used in the commission or support of, or gained from, such offenses.
>
> Sec. 160003(b). It is the sense of the Congress that in filing its brief in United States v. Knox, No. 92-1183, and thereby depriving the United States Supreme Court of the adverseness necessary for full and fair presentation of the issues arising in the case, the Department of Justice did not accurately reflect the intent of Congress in arguing that "the videotapes in [the Knox case] constitute 'lascivious exhibition[s] of the genitals or pubic area' only if those body parts are visible in the tapes and the minors posed or acted lasciviously."

Section 2252A. This section was created by the Child Pornography Prevention Act of 1996 (CPPA), P.L. 104-208, 110 Stat. 3009-26, and amended by the PROTECT Act, P.L. 108-21 (2003). The CPPA added a definition of "child pornography" to 18 U.S.C. § 2256, which was also amended by the PROTECT Act. As so amended, it prohibits any "digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct," even if no actual minor was used to produce the image. This definition, before and after its amendment by the PROTECT Act, is discussed below under "Section 2256."

With respect to child pornography as so defined, § 2252A, as amended by the PROTECT Act, imposes essentially the same prohibitions as § 2252, which were described above. Specifically, § 2252A(a) makes it a crime knowingly to (1) mail, transport, or ship child pornography in interstate or foreign commerce, by any means, including by computer; (2) receive or distribute child pornography that has been moved in violation of (1); (3)(A) reproduce any child pornography for distribution in violation of (1); (3)(B) advertise, promote, present, distribute, or solicit any material in a manner that reflects the belief, or that is intended to cause another to believe, that the material is child pornography that is obscene or that depicts an actual minor; (4) sell or possess with the intent to sell child pornography in specified circumstances; (5) possess, in specified circumstances,[13] "any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography"[14]; or (6) distribute, offer, send, or provide to a minor any visual depiction that is or appears to be of a minor engaging in sexually explicit conduct, "for purposes of inducing or persuading a minor to participate in any activity that is illegal."

Section 2252A(d) allows the same affirmative defense as § 2252(c) to charges of knowing possession (i.e., to charges of violating § 2252A(a)(5)). In addition, the PROTECT Act amended § 2252A(c) to allow an affirmative defense to a charge of violating § 2252A(a)(1), (2), (3)(A), (4), or (5), that the material was produced using actual persons, each of whom was an adult; or the material was produced without using an actual minor. The affirmative defense is not available to a charge of violating § 2252A(a)(3)(B), or to prosecutions that involve child pornography under § 2256(8)(C), which is the portion of the definition of "child pornography" that covers images that were modified to make it appear that an identifiable minor is engaging in sexually explicit conduct.[15] This portion was not struck down by *Ashcroft* and was not amended by the PROTECT Act.

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[13] These circumstances are the same as those applicable to knowing possession of child pornography under 18 U.S.C. § 2252(a)(4), and are spelled out above in the third paragraph under "Section 2252."

[14] P.L. 105-314, § 203(b), changed "3 or more images" to "an image." Section 2252(a)(4), by contrast, outlaws knowing possession of "1 or more books," etc.; see note 9, *supra*.

[15] The conference report explains that the affirmative defense "does not apply to the pandering provisions [§ 2252A(a)(3)(B)] or the morphing [§ 2256(8)(C)] provisions." H.Rept. No. 108-66, 108th Cong., 1st Sess. (2003) at 61.

Section 2252A(f), as added by § 510 of the PROTECT Act, authorizes civil actions by persons aggrieved by a violation of 18 U.S.C. § 2252A(a) or (b), or § 1466A.

Section 2252B. Misleading Domain Names on the Internet. Although this section, which was created by § 521 of the PROTECT Act, was placed in the child pornography statute, it concerns obscenity and "harmful to minors" material, and not child pornography, except to the extent that obscenity or "harmful to minors" material may also be child pornography. It makes it a crime knowingly to use a misleading domain name on the Internet with the intent to deceive a person into viewing material that is obscene, or with the intent to deceive a minor into viewing material that is "harmful to minors." It defines "harmful to minors" so as to parallel the *Miller* test for obscenity, as applied to minors.

Section 2253. Criminal forfeiture. This section provides for criminal forfeiture in child pornography cases. Specifically, it provides that a person convicted of violating 18 U.S.C. §§ 2251, 2251A, 2252, 2252A, or 2260, shall forfeit to the United States (1) the child pornography involved in the violation, (2) property, real or personal, constituting or traceable to gross profits or other proceeds obtained from the offense, and (3) property, real or personal, used or intended to be used to commit or to promote the commission of the offense.[16]

The right of the United States to the property vests upon violation of a child pornography statute, not upon conviction. Therefore, property that was transferred between the violation and the conviction belongs to the United States, and shall also be forfeited. However, the statute contains an exception precluding forfeiture if the person to whom the property was transferred establishes that at the time of purchase he "as reasonably without cause to believe that the property was subject to forfeiture." Thus, if a person is convicted and the money he paid his lawyer to defend him can be traced to gross profits from the sale of obscene material, the lawyer may be required to forfeit the money unless he can convince the court that he had no reasonable cause to believe that the money was subject to forfeiture.[17] In *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), the Supreme Court held that forfeiture of lawyers' fees under the federal drug forfeiture statute does not violate the Due Process Clause of the Fifth Amendment or criminal defendants' Sixth Amendment right to counsel of choice.

Section 2253(c) provides that, prior to conviction, upon application of the United States, a court may enter a restraining order or injunction "to preserve the availability of property . . . for forfeiture." Section 2253(d) authorizes a court to issue a warrant for the seizure of property upon the government's showing of "probable cause to believe that the property to be seized would, in the event of

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[16] P.L. 105-314, § 602, added the reference in § 2253 to §§ 2252A and 2260.

[17] The lawyer could argue that the money came from a source independent of his client's alleged criminal activity; it seems less certain whether he could argue that, at the time his client paid him, he (the lawyer) was reasonably without cause to believe that the money was subject to forfeiture because he reasonably believed that his client would be found not guilty.

conviction, be subject to forfeiture and that an order under subsection (c) of this section may not be sufficient to assure the availability of the property for forfeiture." In *American Library Association v. Thornburgh*, a federal district court declared these provisions unconstitutional insofar as they allow "seizure or restraint . . . without a prior adversarial hearing."[18] The court based this holding on the Supreme Court's decision in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), which is discussed in the section on RICO, below.

The court also declared two aspects of the post-conviction criminal forfeiture provisions unconstitutional. However, on appeal, the United States Court of Appeals for the District of Columbia vacated the entire decision, without addressing its merits. Its reason, with respect to § 2253, was that, because the government had not threatened the plaintiffs with enforcement, the plaintiffs' claims were not ripe for judicial resolution.[19]

Section 2254. Civil Forfeiture. This section provides for *civil* forfeiture in connection with violations of 18 U.S.C. §§ 2251, 2251A, 2252, 2252A, and 2260.[20] The property that is subject to civil forfeiture under § 2254 is, as with criminal forfeiture under § 2253, (1) the child pornography involved in the violation, (2) property, real or personal, constituting or traceable to gross profits or other proceeds obtained from the offense, and (3) property, real or personal, used or intended to be used to commit or to promote the commission of the offense. However, unlike criminal forfeiture, civil forfeiture is not permitted as to property other than child pornography itself if the owner of the property proves that the offense was committed without his knowledge or consent.

To proceed with a civil forfeiture, the government need not, as with a criminal forfeiture, convict a child pornographer of a violation of an offense under § 2251 or one of the other included sections of the law. The government need only prove, by the burden of proof applicable in civil cases, that at least one of the three sections had been violated. The burden of proof applicable in civil cases is generally proof by a "preponderance of the evidence," but an argument may be made that proof by "clear and convincing evidence" may be required in cases that implicate First Amendment rights.[21] This would still be a lesser burden than the standard required for criminal forfeitures, which is proof beyond a reasonable doubt.

As it did with respect to the criminal forfeiture provision, the district court in *American Library Association v. Thornburgh*, *supra*, declared portions of the civil

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[18] 713 F. Supp. 469, 485 (D.D.C. 1989), *vacated sub nom*. American Library Association v. Barr, 956 F.2d 1178 (D.C. Cir. 1992).

[19] The district court also struck down the recordkeeping requirements of 18 U.S.C. § 2257; this aspect of the decision is discussed below.

[20] P.L. 105-314, § 603, added the reference in § 2254 to §§ 2252A and 2260.

[21] *See*, Harte-Hanks, Inc. v. Connaughton, 491 U.S. 657, 661 n.2 (1989); California v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90, 93 (1981); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971).

forfeiture provision unconstitutional, but, as noted, the court of appeals vacated the entire decision.

Section 2255. Civil remedy for personal injuries. This section provides that a minor who suffers personal injury as the result of a violation of various laws, including §§ 2251, 2251A, 2252, 2252A, and 2260, may bring a civil action for actual damages (which shall be deemed to be at least $50,000) plus the cost of the suit, including a reasonable attorney's fee.[22]

Section 2256. Definitions for chapter. This section defines terms used in 18 U.S.C. §§ 2251-2260. As amended by § 502 of the PROTECT Act, P.L. 108-21 (2003), it defines "sexually explicit conduct" (conduct in which one may not depict minors engaging) as "actual or simulated" –

> (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> (ii) bestiality;
> (iii) masturbation;
> (iv) sadistic or masochistic abuse; or
> (v) lascivious exhibition of the genitals or pubic area of any person.

The PROTECT Act provided a separate definition of "sexually explicit conduct" for purposes of its use in part of the definition of "child pornography"; we discuss this under "PROTECT Act," below.

Paragraph (v) (formerly paragraph (E)) was supplemented by § 2252 note, set forth in the discussion of the *Knox* case, above, which indicates that "lascivious exhibition" is not limited to nudity.

The Child Pornography Protection Act of 1996 (CPPA), P.L. 104-208, 110 Stat. 3009-26, added a definition of "child pornography" to § 2256. The term, which is used in 18 U.S.C. § 2252A, includes visual depictions that do not portray an actual child. The definition was struck down in part by the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and then amended by the PROTECT Act, P.L. 108-21 (2003). In order to explain *Ashcroft*, we will first discuss the CPPA definition of "child pornography," before it was amended by the PROTECT Act. This definition provided:

> "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where –
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

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[22] P.L. 105-314, § 605, added the reference in § 2255 to §§ 2251A, 2252A, and 2260.

> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

The CPPA provided an affirmative defense (not applicable to charges of violating the knowing possession provision, § 2252A(a)(5)) that the alleged child pornography was produced using only adults, and that "the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252A(c).[23] For a defendant charged only with knowing possession of child pornography, there is, as noted above under "Section 2252A," and unchanged by the PROTECT Act, an affirmative defense that the defendant (1) possessed fewer than three images of child pornography, and (2) promptly and in good faith destroyed or reported the images to a law enforcement agency. 18 U.S.C. § 2252A(d).

Ashcroft v. Free Speech Coalition. In *Ashcroft*, the Supreme Court struck down paragraphs (B) and (D) of the definition of "child pornography" quoted above. Paragraphs (A), which covers images of actual children engaged in sexually explicit conduct, and paragraph (C), which covers images of actual children "morphed" to make it appear as if the children are engaged in sexually explicit conduct, were not in issue. Paragraphs (B) and (D), by contrast, cover pornography that was produced without the use of actual children.

In *Ashcroft*, the Supreme Court observed that statutes that prohibit child pornography that use real children are constitutional because they target "[t]he production of the work, not its content." 535 U.S. at 249; see also *id*. at 242. The CPPA, by contrast, targeted the content, not the means of production. "Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*." *Id*. at 250; see also *id*. at 249.

The government's rationales for the CPPA included that "[p]edophiles might use the materials to encourage children to participate in sexual activity" and might "whet their own sexual appetites" with it, "thereby increasing . . . the sexual abuse and exploitation of actual children." *Id*. at 241. The Court found these rationales inadequate because "[t]he evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. . . . The government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. . . . The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at

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[23] This affirmative defense, as amended by the PROTECT Act, is summarized in the penultimate paragraph of the discussion of "Section 2252A," above. The amended version, by permitting defendants to prove that no person used in producing the material was a minor (instead of only that each person used was an adult), makes the affirmative defense available to defendants charged with producing computer-generated child pornography.

some indefinite future time.' . . . Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct." *Id*. at 253-254.

The government also argued that the existence of "virtual" child pornography "can make it harder to prosecute pornographers who do use real minors," because, "[a]s imaging technology improves . . . , it becomes more difficult to prove that a particular picture was produced using actual children." *Id*. at 242. "This analysis," the Court found, "turns the First Amendment upside down. The Government may not suppress lawful speech as a means to suppress unlawful speech. . . . '[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . .'" *Id*. at 255.

The Court also noted that, because child pornography, unlike obscenity, may include material with serious literary, artistic, political, or scientific value, it includes "[a]ny depiction of sexually explicit activity, no matter how it is presented . . . . The CPPA [therefore] applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse. . . . [T]eenage sexual activity and the sexual abuse of children . . . have inspired countless literary works." *Id*. at 247. The Court then noted that the CPPA would make it a crime to film Shakespeare's *Romeo and Juliet* in a manner that made it appear that the teenage lovers were engaging in sexually explicit conduct.

The majority opinion in *Ashcroft* was written by Justice Kennedy and joined by Justices Stevens, Souter, Ginsberg, and Breyer, with Justice Thomas concurring. Justice O'Connor concurred insofar as the decision struck down the prohibition of child pornography created with adults that look like children, but dissented insofar as it struck down the ban on virtual child pornography. Justices Rehnquist wrote a dissenting opinion joined by Justice Scalia, arguing that the CPPA should be construed to apply only to "computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct," and upheld as such. *Id*. at 268.

PROTECT Act. The PROTECT Act, P.L. 108-21 (2003), amended the definition of "child pornography" to provide:

> "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where –
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

The PROTECT Act defines "sexually explicit conduct," for purposes of (B), as:

> (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast or pubic area of any person is exhibited;
> (ii) graphic or lascivious simulated; (I) bestiality; (II) masturbation; or (III) sadistic or masochistic abuse; or
> (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person.[24]

The most significant change in the definition of "child pornography," from the CPPA to the PROTECT Act, as the term applies to material produced without the use of an actual minor, is that, instead of including any visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct," it now includes only "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct." The PROTECT Act defines "indistinguishable" to mean "virtually indistinguishable," and not to apply to "drawings, cartoons, sculptures, or paintings."[25]

Nevertheless, the inclusion of "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct" is apparently unconstitutional under *Ashcroft*, unless the PROTECT Act's expanded affirmative defense (see note 23, *supra*) can save it. But whether it can seems questionable, because a defendant who "is not the producer of the work . . . may have no way of establishing the identity, or even the existence, of the actors. . . . The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof."[26] These aspects of the CPPA, which the Court in *Ashcroft* called "serious constitutional difficulties," were not changed by the PROTECT Act.[27] The Court in *Ashcroft* did "not decide, however, whether the Government could impose this burden on a speaker."[28]

Section 504 of the PROTECT Act created 18 U.S.C. § 1466A,[29] which makes it a crime knowingly to produce, distribute, receive, or possess, with or without intent to distribute, "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting," that depicts a minor engaging in sexually explicit conduct and is obscene or lacks serious literary, artistic, political, or scientific value. This provision applies whether an actual minor is used or not, but covers only depictions of minors engaged in specified sexual activities, and not in lascivious exhibition of the genitals

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[24] The definition of "sexually explicit conduct" for purposes of (A) in the definition of "child pornography," and for other provisions of 18 U.S.C. §§ 2251-2260, is quoted at the beginning of the discussion of "Section 2256," above.

[25] 18 U.S.C. § 2256(11), as added by § 502(c) of the PROTECT Act.

[26] *Ashcroft*, 535 U.S. at 255-256.

[27] *Id.* at 255.

[28] *Id.* at 256. For further discussion of this issue, see CRS Report RL31744, pp. 12-13.

[29] This provision thus is not part of § 2256, and is included in the discussion of § 2256 solely for convenience.

or pubic area. Section 1466A allows the same affirmative defense to charges of knowing possession (without intent to distribute) that appears in 18 U.S.C. §§ 2252(c) and 2252A(d). It does not, however, allow the same affirmative defense that appears in § 2252A(c), that the material was produced using actual persons, each of whom was an adult; or the material was produced without using an actual minor. To the extent that § 1466A applies to non-obscene material produced without the use of an actual minor, it would be unconstitutional under *Ashcroft*.

Section 2257. Recordkeeping requirements. This section, which was declared unconstitutional in 1989 and amended in 1990 in order to restore it, provides:

> Whoever produces any book, magazine, periodical, film, videotape, or other matter which —
>
> (1) contains any visual depiction made after November 1, 1990 [prior to the 1990 amendment this date was February 6, 1978] of actual sexually explicit conduct; and
>
> (2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;
>
> shall create and maintain individually identifiable records pertaining to every performer portrayed in such visual depiction.[30]

Section 2257 also provides, as it did before the 1990 amendment, that these records must include the performer's name and date of birth, and must be made available to the Attorney General for inspection at all reasonable times. They may not be used directly or indirectly as evidence against any person with respect to any violation of law. However, before the amendment, in a prosecution under sections 2251(a) or 2252, failure of the defendant to comply with the recordkeeping requirements would raise a rebuttable presumption that the performer was a minor.

Producers are required (as they were before the 1990 amendment) to "cause to be affixed to every copy of any matter" containing visual depictions of actual sexually explicit conduct "a statement describing where the records required by this section . . . may be located."

The word "produces," as defined by § 2257, both before and after the 1990 amendment, "includes the duplication, reproduction, or reissuing" of material. However, the amendment narrowed the definition, as discussed below.

In *American Library Association v. Thornburgh*, *supra*, a federal district court struck down the original recordkeeping requirements because they "excessively burden First Amendment material and infringe too deeply onto First Amendment

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[30] Revised Department of Justice regulations under § 2257 took effect June 23, 2005. 70 Fed. Reg. 29607 (May 24, 2005), 28 C.F.R. Part 75.

rights." 713 F. Supp. at 473. The requirements are not "incidental burdens," the court wrote. It explained:

> The result of the requirement that each producer along the stream of commerce must *personally* contact the model or performer and *personally* ascertain the model's or performer's age, current name, maiden name, professional name, and other information will undoubtedly be the effective prohibition of the distribution of much First Amendment protected material. . . . To take one example, a film distributor would be faced with the often-insurmountable task of having to track down personally any performer in a "lascivious" scene, *even if* the original producer of the film provided the distributor with his own documentation of the age of every performer.
>
> Moreover, the Act applies to all depictions made since early 1978 and applies even to images made overseas, where a large percentage of "lascivious" images are created. To require a publisher or producer to travel to Europe or Asia to track down every "lascivious" model or performer shown in a book, magazine, or film originally created a decade earlier is overly burdensome.

Id. at 477 (emphasis in original). The court also held the criminal presumptions unconstitutional on the ground that they

> take away from the criminal defendant the right to be presumed innocent until proven guilty beyond a reasonable doubt. They are unconstitutional because the presumed fact [that the performer was a minor] does not appear more likely than not to flow from the proven fact [that the defendant failed to keep records].

Id. at 482.

In 1990, P.L. 101-647, § 311, amended § 2257 in order to make it constitutional. It made the law applicable only to works produced after November 1, 1990. It eliminated the criminal presumption as to a performer's age that would arise from failure to comply with the recordkeeping requirements. Instead of the presumption, it prescribes criminal penalties for failing to comply with the recordkeeping requirements or with the requirement that a statement as to the location of records be affixed to every copy of visual depictions of actual sexually explicit conduct.

It also amended the statute's definitions of "actual sexually explicit conduct" and "produces." As noted above, the word "produces," as defined both before and after the 1990 amendment, "includes the duplication, reproduction, or reissuing" of material.[31] The 1990 amendment, however, provides that "produces" "does not include mere distribution or any other activity which does not involve hiring, contracting for [,] managing, or otherwise arranging for the participation of the performers depicted." Persons who engage only in the activities that are excluded from the definition of "produces" would not have to comply with the recordkeeping requirements. Thus, only persons who arrange for the participation of the performers

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[31] The type of material covered was originally "any book, magazine, periodical, film, video tape, or other similar matter." P.L. 108-21, § 511(a)(2) (2003) added "computer generated image, digital image, or picture."

depicted would have to contact them personally to ascertain their ages and the other information required.

In February, 1992, the D.C. Circuit found that the 1990 amendments "mooted the question whether the recordkeeping provisions of the Child Protection Act are constitutional," and consequently vacated the district court's holding that they were unconstitutional. *American Library Association v. Barr*, 956 F.2d 1178, 1186 (D.C. Cir. 1992).

In April, 1992, the Department of Justice issued a final rule implementing the statute.[32] In May, 1992, in *American Library Association v. Barr*, a federal district court declared the new recordkeeping requirements unconstitutional and enjoined the government from enforcing the act "with respect to producers and distributors of any material who have satisfied themselves after due diligence that such material does not contain depictions of people under 18 years of age."[33] However, in 1994, United States Court of Appeals for the District of Columbia reversed, finding the statute constitutional.

The D.C. Circuit held that the recordkeeping requirements were content-neutral incidental restrictions on speech and met the intermediate level of scrutiny applicable to such restrictions.[34] Although the statute discriminates on the basis of content in that it applies only to visual depictions of sexually explicit conduct, the court emphasized "the key role of the Government's purpose in determining whether a particular statute is content based or content neutral." *Id.* at 84. In this case, "Congress enacted the act not to regulate the content of sexually explicit materials, but to protect children by deterring the production and distribution of child pornography." *Id*. at 86. The court of appeals drew an analogy to *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), in which the Supreme Court upheld a zoning ordinance that "treats theaters that specialize in adult films differently from other kinds of theaters." *Id*. at 85. Although the ordinance discriminated on the basis of content, "the Court concluded that it was 'aimed not at the *content* of the films shown at "adult motion picture theaters," but rather at the *secondary effects* of such theaters on the surrounding community.'" *Id*. (emphasis in original).

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[32] 57 Fed. Reg. 15017 (1992), 28 C.F.R. Part 75.

[33] 794 F.Supp. 412, 420 (D.D.C. 1992), *rev'd sub nom*. American Library Association v. Reno, 33 F.3d 78 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1158 (1995).

[34] The recordkeeping requirements apply to speech that is protected by the First Amendment, not just to child pornography. A statute that regulates protected speech on the basis of its content must pass "strict scrutiny" to be constitutional, which means that it must "promote a 'compelling interest' and employ 'the least restrictive means to further the articulated interest.' In contrast, 'regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . .' Thus, 'content-neutral regulations that have an incidental effect on First Amendment rights will be upheld if they further an important or substantial governmental interest.'" 33 F.3d at 84 (citations omitted). Content-neutral regulations must be "narrowly tailored," but need not be the least restrictive means to further the governmental interest involved. Ward v. Rock Against Racism, 491 U.S. 781, 798-799 (1989).

Another federal appeals court denied a preliminary injunction against enforcement of § 2257, finding that the plaintiff had not demonstrated a substantial likelihood of success on its First Amendment claim. *Connection Distributing Co. v. Reno*, 154 F.3d 281 (6th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999).

Section 2258. Failure to report child abuse. This section, added in 1990 by P.L. 101-647, § 226(g)(1), provides that a person who, while engaged in a specified professional capacity or activity on federal land or in a federally operated or contracted facility, learns of facts that give him or her reason to suspect child abuse, and fails to make a timely report of it, shall be guilty of a Class B misdemeanor. The specified professionals are those described in 42 U.S.C. § 13031(b), and include, among others, medical personnel, social workers, teachers, law enforcement personnel, foster parents, and commercial film and photo processors.

Section 2259. Mandatory restitution. This section requires courts to order a defendant convicted of a federal child pornography crime to pay to the victim the full amount of the victim's losses.

Section 2260. Production of sexually explicit depictions of a minor for importation into the United States.[35] This section, added in 1994 by P.L. 103-322, § 160001, makes it a crime for a person, outside the United States, to employ, use, persuade, induce, entice, or coerce any minor to engage in, or transport a minor with the intent that the minor engage in, any sexually explicit conduct, for the purpose of producing a visual depiction of such conduct for importation into the United States or into waters within twelve miles of the coast of the United States. It also makes it a crime for a person, outside the United States, knowingly to receive, transport, ship, distribute, sell, or possess with the intent to transport, ship, sell, or distribute any visual depiction of a minor engaging in sexually explicit conduct (if the product involved the use of a minor engaging in sexually explicit conduct), intending that the visual depiction be imported into the United States or into waters within twelve miles of the coast of the United States.

B. Children's Internet Protection Act[36]

The Children's Internet Protection Act (CIPA), P.L. 106-554 (2000), 114 Stat. 2763A-335, amended three federal statutes to provide that a school or library may not use funds it receives under these statutes to purchase computers used to access the Internet, or to pay the direct costs of accessing the Internet, and may not receive universal service discounts (other than for telecommunications services), unless the school or library enforces a policy "that includes the operation of a technology protection measure" that blocks or filters minors' Internet access to visual depictions

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[35] When it was enacted, this section was numbered "2258," despite there already being a section with that number, but was renumbered "2260" by P.L. 104-294, § 601(i)(1).

[36] P.L. 106-554 incorporated H.R. 5666, 106th Congress, Title 17 of which is CIPA.

that are obscene, child pornography, or harmful to minors; and that blocks or filters adults' Internet access to visual depictions that are obscene or child pornography.[37]

The sections of CIPA (1711 and 1712) that require schools and libraries to block or filter if they use federal funds for computers or for Internet access, provide that the blocking or filtering technology may be disabled "to enable access for bona fide research or other lawful purpose." The section of CIPA (1721) that requires schools and libraries to block or filter if they receive universal service discounts, provides that the blocking or filtering technology may be disabled "during use by an adult, to enable access for bona fide research or other lawful purpose."

Sections 1711, 1712, and 1721 all contain identical definitions of "child pornography,"which they define to have the meaning given such term in 18 U.S.C. § 2256, which is discussed above.

In *United States v. American Library Association*, a three-judge federal district court unanimously declared CIPA unconstitutional and enjoined its enforcement insofar as it applies to libraries.[38] The government to appealed directly to the Supreme Court, which, on June 23, 2003, reversed the district court, finding CIPA constitutional.[39] The plurality opinion acknowledged "the tendency of filtering software to 'overblock' – that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block."[40] It found, however, that, "[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled."[41] The plurality also found that CIPA does not deny a benefit to libraries that do not agree to use filters; rather, the statute "simply insist[s] that public funds be spent for the purposes for which they were authorized."[42]

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[37] Section 1711 amends Title III of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6801 *et seq*. Section 1712 amends section 224 of the Museum and Library Services Act, 20 U.S.C. § 9134, which is part of the Library Services and Technology Act (LSTA), which is Title II of the Museum and Library Services Act. Section 1721 amends section 254(h) of the Communications Act of 1934, 47 U.S.C. § 254(h), which establishes the "universal service discount," or "E-rate," for schools and libraries.

[38] 201 F. Supp.2d 401 (E.D. Pa. 2002). The district court struck down § 1712(a)(2), which concerns LSTA funds, and § 1721(b) which concerns E-rate discounts for libraries. The provisions affecting schools were not challenged.

[39] 539 U.S. 194 (2003).

[40] *Id.* at 208. The three-judge court had found that "At least tens of thousands of pages of the indexable Web are overblocked by each of the filtering programs evaluated by experts in this case, even when considered against the filtering companies' own category definitions. Many erroneously blocked pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as 'pornography' or 'sex.'" 201 F. Supp.2d, at 449.

[41] *Id*. at 209.

[42] *Id*. at 211. A fuller analysis of the decision appears in CRS Report 95-804, *Obscenity and*
(continued...)

C. RICO

In 1988, the Federal Racketeer Influenced and Corrupt Organizations Act (RICO), was amended by P.L. 100-690, § 7514, to add the child pornography crimes specified in 18 U.S.C. §§ 2251, 2251A, 2252 to the definition of "racketeering activity" in 18 U.S.C. § 1961(1)(B). In 1994, RICO was amended by P.L. 103-322, § 160001, to add the crimes specified in 18 U.S.C. § 2260 to the definition. RICO makes it a crime for any person employed by or associated with any "enterprise" engaged in or affecting interstate or foreign commerce to participate in the affairs of the enterprise "through a pattern of racketeering activity." 18 U.S.C. § 1962(c). A "pattern of racketeering activity" means at least two acts of racketeering activity within ten years (excluding any period of imprisonment). 18 U.S.C. § 1961(5). Thus, if a person engages in two such activities, which may include the child pornography offenses specified, he is subject to prosecution under RICO in addition to, or instead of, prosecution for the particular activities.

RICO also provides for criminal forfeiture (18 U.S.C. § 1963). In *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), the Supreme Court held that *pretrial* seizure, under the Indiana RICO statute, of books or other expressive materials, was unconstitutional. Although probable cause to believe that a person has committed a crime is sufficient to arrest him, "probable cause to believe that there are valid grounds for seizure is insufficient to interrupt the sale of presumptively protected books and films." *Id*. at 66. This presumption of First Amendment protection "is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding." *Id*. at 67. The Federal RICO statute, in any event, does not provide for pretrial seizure.[43]

In *Fort Wayne Books*, the Court did, however, uphold the constitutionality of including obscenity violations among the predicate offenses under a RICO statute. The Court rejected the argument "that the potential punishments available under the RICO law are so severe that the statute lacks a 'necessary sensitivity to first amendment rights.'" *Id*. at 57. Further, the Court held that such obscenity violations need not be "affirmed convictions on successive dates . . . in the same jurisdiction as that where the RICO charge is brought." *Id*. at 61.

The fact that the violations need not be affirmed convictions means that the obscenity violations may be proved as part of the RICO prosecution; no "warning shot" in the form of a prior conviction for obscenity is required. "As long as the standard of proof is the proper one with respect to all the elements of the RICO allegation – including proof, beyond a reasonable doubt, of the requisite number of constitutionally proscribable predicate acts – all of the relevant constitutional requirements have been met." *Id*.

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[42] (...continued)
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[43] See, Fort Wayne Books, Inc. v. Indiana, 489 U.S. at 67 n.13.

There appears to be no reason why the principles the Court stated in *Fort Wayne Books* with respect to obscenity violations under RICO would not apply equally to child pornography violations.

In *Alexander v. United States*, 509 U.S. 544 (1993), the Supreme Court addressed a question it had left open in *Fort Wayne Books*: whether there are First Amendment limitations to RICO forfeitures of assets that consist of expressive materials that are otherwise protected by the First Amendment. The defendant in the case had been found guilty of selling four magazines and three videotapes that were obscene, and, on that basis, had been convicted under RICO. He was sentenced to six years in prison, fined $100,000, and ordered to pay the cost of prosecution, incarceration, and supervised release. He was also ordered to forfeit all his wholesale and retail businesses, including more than a dozen stores and theaters dealing in sexually explicit material, all the assets of these businesses (i.e., expressive materials, whether or not obscene), and almost $9 million. The government chose to destroy, rather than sell, the expressive material.

The Supreme Court rejected the argument that the forfeiture of expressive materials constitutes prior restraint, as the forfeiture order "does not *forbid* petitioner from engaging in any expressive activities in the future, nor does it require him to obtain prior approval for any expressive activities." *Id*. at 550-551 (emphasis in original). Consequently, the Court analyzed the forfeiture "under normal First Amendment standards," and could see no reason why, "if incarceration for six years and a fine of $100,000 are permissible forms of punishment under the RICO statute, the challenged forfeiture of certain assets directly related to petitioner's racketeering activity is not. . . . [T]he First Amendment does not prohibit either stringent criminal sanctions for obscenity offenses or forfeiture of expressive materials as punishment for criminal conduct." *Id*. at 554.

The Court did, however, remand the case to the court of appeals to decide whether the forfeiture constituted an "excessive fine" under the Eighth Amendment. The same day, in *Austin v. United States*, 509 U.S. 602 (1993), the Court held that the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property imposed by criminal statutes.

Recently Enacted Federal Legislation

The Sex Crimes Against Children Prevention Act of 1995, P.L. 104-71, became law on December 23, 1995. It requires the United States Sentencing Commission to amend the sentencing guidelines to increase the penalties for offenses under 18 U.S.C. §§ 2251 and 2252 (which are discussed in this report), to increase the penalties under particular subdivisions of those sections if a computer was used to commit the crime, and to increase the penalty under 18 U.S.C. § 2423 (which prohibits transporting a minor in interstate or foreign commerce for the purpose of prostitution, and which is not discussed in this report). It would also require the Sentencing Commission, within 180 days after enactment of the bill, to submit a report to Congress concerning offenses involving child pornography and other sex offenses against children.

Section 508 of the Communications Decency Act of 1996 (CDA), which is Title V of the Telecommunications Act of 1996, P.L. 104-104, amended 18 U.S.C. § 2422, which imposes up to five years' imprisonment on anyone who "knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce . . . to engage in prostitution or in any sexual activity for which any person can be charged with a criminal offense" (and which is not discussed in this report). The 1996 amendment added a subsection imposing up to ten years' imprisonment on anyone who, "using any facility or means of interstate or foreign commerce . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution or any sexual act for which any person may be criminally prosecuted . . . ."

The Child Pornography Prevention Act of 1996 (CPPA), P.L. 104-208, 110 Stat. 3009-26, added 18 U.S.C. § 2252A and added a definition of "child pornography" to 18 U.S.C. § 2256. These provisions banned child pornography even when no actual minor was used to produce it. In *Ashcroft v. Free Speech Coalition* (2002), the Supreme Court declared this provision unconstitutional to the extent that it prohibited pictures that were not produced with actual minors.

The Protection of Children From Sexual Predators Act of 1998, P.L. 105-314, included some sections relating to child pornography. These amended 18 U.S.C. §§ 2252, 2252A, 2253, 2254, and 2255; these amendments are noted in this report in the summaries of these sections. In addition, P.L. 105-314, § 604, added § 227 to the Victims of Child Abuse Act of 1990, 42 U.S.C. §§ 13001 *et seq*. Section 227 provides, in part: "Whoever, while engaged in providing an electronic communication service [as defined at 18 U.S.C. § 2510] or a remote computing service [as defined at 18 U.S.C. § 2711] to the public, through a facility or means of interstate or foreign commerce, obtains knowledge of facts or circumstances from which a violation of section 2251, 2251A, 2252, 2252A, or 2260 of title 18, United States Code, involving child pornography (as defined in section 2256 of that title), is apparent, shall, as soon as reasonably possible, make a report of such facts or circumstances to a law enforcement agency or agencies designated by the Attorney General."

The Children's Internet Protection Act (CIPA), P.L. 106-554 (2000), amended three federal statutes to provide that a school or library may not use funds it receives under these statutes to purchase computers used to access the Internet, or to pay the direct costs of accessing the Internet, and may not receive universal service discounts, unless the school or library enforces a policy to block or filter minors' Internet access to visual depictions that are obscene, child pornography, or harmful to minors; and enforces a policy to block or filter adults' Internet access to visual depictions that are obscene or child pornography. Filters may be disabled, however, "for bona fide research or other lawful purpose." On June 23, 2003, the Supreme Court held CIPA constitutional.

The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, or the PROTECT Act, Public Law 108-21, amended 18 U.S.C. § 2252A to make prohibit any "digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct," even if no actual minor was used to produce the image.

It also amended the affirmative defense in 18 U.S.C. § 2252A to prosecutions for child pornography crimes, and amended the definitions in 18 U.S.C. § 2256 of "sexually explicit conduct" and "child pornography." The PROTECT Act also created 18 U.S.C. § 1466A, which makes it a crime knowingly to produce, distribute, receive, or possess, with or without intent to distribute, "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting," that depicts a minor engaging in sexually explicit conduct and is obscene or lacks serious literary, artistic, political, or scientific value.

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