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Child Pornography Produced Without an Actual Child: Constitutionality of 107th Congress Legislation

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Summary

In *Ashcroft v. Free Speech Coalition*, the Supreme Court declared unconstitutional the Child Pornography Prevention Act of 1996 (CPPA) to the extent that it prohibited material that was produced without the use of an actual child. The only possible means that the Court explicitly left open for Congress to try to restrict such material was to ban it, but allow an affirmative defense that the material was produced without using actual children. Even this approach the Court did not say would be constitutional, but merely found no need to decide whether it would be.

This approach would shift the burden of proof to the defendant on the question of whether actual children were used in producing the material. If the defendant could not meet the burden of proof, then he could be punished for child pornography that might or might not have been produced with an actual minor. The Court, however, said that "[t]he Government may not suppress lawful speech as a means to suppress unlawful speech." This suggests that an affirmative defense would be unconstitutional if it were not effectively available to all classes of defendant. It might not effectively be available, however, to individuals charged with mere possession of child pornography, or to producers of pornography that pre-dated the CPPA, as these defendants might have "no way of establishing the identity, or even the existence, of the actors."

The three bills that this report examines – H.R. 4623, as passed by the House, S. 2511, and S. 2520 – would all ban child pornography produced without the use of an actual child. Though all three bills would allow an affirmative defense, to the extent that they applied to defendants who had "no way of establishing the identity, or even the existence, of the actors," they raise the same questions that the Court in *Ashcroft* posed as to the constitutionality of such an approach. Though the bills would permit a defendant to prove that no minors were used, rather than, as under the CPPA, that only adult actors were used, this would not appear to eliminate this problem, and some defendants might be convicted for conduct involving lawful speech.

Some provisions of the bills, however, appear constitutional. All three bills, for example, would ban attempts to distribute material in a manner that conveys the impression that it depicts a minor engaging in sexually explicit conduct, whether or not it does. This proscription, unlike the one that the Court struck down in *Ashcroft*, would not ban any material itself, but would ban only attempts to distribute such material. All three bills would also make it a crime to provide minors with child pornography, whether or not it was produced with an actual child. This would appear constitutional because the Court has found there to be a compelling interest in shielding minors from any pornography.

This report will be updated if action occurs on any of the bills it discusses.

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The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press." In general, the First Amendment protects pornography, unless it constitutes obscenity or child pornography. Obscenity is material that appeals to the prurient interest, is patently offensive, and lacks serious literary, artistic, political, or scientific value.[1] Child pornography is material that "*visually* depicts sexual conduct by children below a specified age."[2] It is unprotected by the First Amendment even when it is not legally obscene.[3]

On April 16, 2002, in *Ashcroft v. Free Speech Coalition*, the Supreme Court declared unconstitutional the federal child pornography law to the extent that it prohibited material that was produced without the use of an actual child.[4] The case held, in other words, that pornography created by artists, including "virtual" (computer-generated) pornography, and pornography produced with adult actors but with no actors below 18 years of age, are protected by the First Amendment, even if they appear to portray minors, unless they are obscene. In response to *Ashcroft*, bills were introduced in the 107th Congress that would continue to ban some child pornography that was produced without the use of an actual child. The Senate bills are S. 2520 and S. 2511; the House bill is H.R. 4623, which was identical to S. 2511, but which was amended by the House Judiciary Committee and reported on June 24, 2002 (H.R. Rep. No. 107-526), and passed by the House without further amendment on June 25, 2002.

This report will examine (1) the current federal child pornography statute, part of which was declared unconstitutional in *Ashcroft v. Free Speech Coalition*, (2) *Ashcroft v. Free Speech Coalition*, and (3) the bills introduced in response to *Ashcroft v. Free Speech Coalition*.

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[1]*See* Miller v. California, 413 U.S. 15, 24 (1973). See also, *Obscenity and Indecency: Constitutional Principles and Federal Statutes* (CRS Report 95-804 A).

[2]New York v. Ferber, 458 U.S. 747, 764 (1982) (emphasis in original). See *Child Pornography: Constitutional Principles and Federal Statutes* (CRS Report 95-406 A).

[3]This means that child pornography may be banned even if does not appeal to the prurient interest, is not patently offensive, and does not lack serious value. *See Ferber, supra* note 2, 458 U.S. at 764.

[4]535 U.S.__, 122 S. Ct. 1389, 152 L.Ed.2d 403 (2002).

The Federal Child Pornography Statute

The federal child pornography statute prohibits the transporting, shipping, receipt, distribution, reproduction, selling, or possessing of child pornography.[5] It defines "sexually explicit conduct" (conduct in which one may not depict minors engaging) as "actual or simulated"

> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> (B) bestiality;
> (C) masturbation;
> (D) sadistic or masochistic abuse; or
> (E) lascivious exhibition of the genitals or pubic area of any person.[6]

The Child Pornography Prevention Act of 1996 (CPPA)[7] added to the statute the following definition of "child pornography":

> "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 –
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> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (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.[8]

The CPPA, however provides an affirmative defense (not available to a defendant charged with possession without intent to sell) that each person used in producing the alleged child pornography was an adult, 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

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[5]18 U.S.C. §§ 2252(a), 2252A(a).

[6]18 U.S.C. § 2256(2).

[7]Public Law 104-208, 110 Stat. 3009-26.

[8]18 U.S.C. § 2256(8).

in sexually explicit conduct."[9] For a defendant charged only with possession of child pornography, there is 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.[10]

Ashcroft v. Free Speech Coalition

On April 16, 2002, in *Ashcroft v. Free Speech Coalition*, 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 v. Free Speech Coalition*, the Supreme Court observed that statutes that prohibit child pornography that is produced with actual children are constitutional because they target "[t]he production of the work, not the content."[11] 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.*"[12]

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."[13] 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 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."[14]

The government also argued that the existence of "virtual" child pornography "can make it harder to prosecute pornographers who do use real minors," because,

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[9]18 U.S.C. § 2252A(c). The reason that this affirmative defense is not available to a defendant charged with possession without intent to sell is that the affirmative defense applies only to paragraphs (1), (2), (3), and (4) of section 2252A(a), whereas paragraph (5) covers possession offenses. (Paragraph (4) covers possession with intent to sell.)

[10]18 U.S.C. §§ 2252(d), 2252A(d).

[11]*Ashcroft, supra* note 4, 122 S. Ct. at 1401; see also *id.* at 1397.

[12]*Id.* at 1402; see also *id.* at 1401.

[13]*Id.* at 1397.

[14]*Id.* at 1403.

"[a]s imaging technology improves . . . , it becomes more difficult to prove that a particular picture was produced using actual children."[15] "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. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. '[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 . . . .'"[16]

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."[17] 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 v. Free Speech Coalition* 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.[18]

Did the Court leave Congress with any constitutional means by which it may restrict child pornography that was produced without an actual child? The only possibility that the Court explicitly left open – not by saying that it would be constitutional, but merely by finding no need to decide the question – is to ban material that appears to depict an actual child engaging in sexually explicit conduct, but that was produced without using an actual child, while allowing an affirmative defense that the material was produced without using an actual child. This approach would shift the burden of proof to the defendant on the question of whether an actual child was used in producing the material. If the defendant could not meet the burden

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[15]*Id.* at 1397.

[16]*Id.* at 1404. Justice Thomas, concurring, wrote that "technology may evolve to the point where . . . the Government cannot prove that certain pornographic images are of real children," and that, if that becomes the case, "the Government may well have a compelling interest in barring or otherwise regulating some narrow category of 'lawful speech' in order to enforce effectively laws against pornography made though the abuse of real children." *Id.* at 1406-1407.

[17]*Id.* at 1400.

[18]*Id.* at 1411.

of proof, then he could be punished for child pornography that might or might not have been produced with an actual minor. Here is what the Court said on this matter:

> [T]he Government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused to prove the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute, which allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. See 18 U.S.C. § 2252A(c).
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> The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. 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. Failure to establish the defense can lead to a felony conviction.
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> We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in the production. A defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors. See *ibid.* So while the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing the prohibited work. Furthermore, the affirmative defense provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors. See *ibid.* In these cases, the defendant can demonstrate no children were harmed in producing the images, yet the affirmative defense would not bar the prosecution. For this reason, the affirmative defense cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones.[19]

In the third paragraph of this quotation, the Court notes that the CPPA's affirmative defense is not available to defendants charged with possessing, as opposed to distributing, proscribed works, and is not available to defendants charged with producing material using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors.[20] But, if Congress expanded the affirmative defense to include these two classes of defendants, the CPPA might

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[19] *Id.* at 1404-1405.

[20] *See* note 9, *supra.*

still be unconstitutional. An affirmative defense that applied to defendants charged with possession offenses, or to producers of older works, might violate due process because such persons might, as the Court noted in the second paragraph of the above quotation, "have no way of establishing the identity, or even the existence, of the actors." If such persons had no way of establishing their innocence, then the affirmative defense would effectively not be available to them, and the government would still apparently, in violation of the First Amendment, "suppress lawful speech as a means to suppress unlawful speech."[21]

Justice Thomas, in his concurring opinion, wrote: "The Court does leave open the possibility that a more complete affirmative defense could save a statute's constitutionality, see *ante*, at 1405, implicitly accepting that some regulation of virtual child pornography might be constitutional. I would not prejudge, however, whether a more complete affirmative defense is the only way to narrowly tailor a criminal statute that prohibits the possession and dissemination of virtual child pornography."[22] He does not, however, suggest any other way.

The Court concluded: "In sum, §2256(8)(B) covers materials beyond the categories [of unprotected speech] recognized in *Ferber* [child pornography using an actual child] and *Miller* [obscenity], and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment."[23] It added that the prohibitions of § 2256(8)(D), as well as of 2256(8)(B), "are overbroad and unconstitutional."[24]

Constitutionality of Pending Bills

The 107th Congress bills that would continue to ban some child pornography that was produced without the use of an actual child are, as noted above, H.R. 4623, S. 2511, and S. 2520. H.R. 4623 was identical to S. 2511, but was amended by the House Judiciary Committee and reported on June 24, 2002 (H.R. Rep. No. 107-526), and passed by the House without further amendment on June 25, 2002.

The three bills are, in broad outline, similar. All contain similar features that appear unconstitutional and other similar features that appear constitutional. This report considers these features of the bills in general terms; for a more detailed, section-by-section analysis of the bills, see *Constitutionality of 107th Congress Legislation to Ban Child Pornography Produced Without an Actual Minor*. This is a CRS general-distribution memorandum by the present author, dated July 2, 2002.

Limiting the Types of Child Pornography that Would be Banned.

H.R. 4623, as passed by the House, would amend paragraph (B) of the definition of "child pornography," quoted at page 2 above, so that it no longer would include

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[21] *Id.* at 1404 (previously quoted in the text accompanying note 16, *supra*).

[22] *Id.* at 1407.

[23] *Id.* at 1405.

[24] *Id.* at 1406.

any "visual depiction [that] is, or appears to be, of a minor engaging in sexually explicit conduct," but would include only any "visual depiction [that] is a computer image or computer-generated image that is, or is indistinguishable . . . from, that of a minor engaging in sexually explicit conduct."[25] Thus, H.R. 4623, unlike the CPPA, would ban depictions only if they appear on a computer and only if they are virtually indistinguishable from images of actual minors engaging in sexually explicit conduct.

H.R. 4623 would also provide, for purposes of the new paragraph (B) of the definition of "child pornography," a new definition of "sexually explicit conduct." Whereas, for purposes of paragraphs (A), (C), and (D) of the definition of "child pornography," the phrase "sexually explicit conduct" would continue to mean "actual or simulated" sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person, it would mean, for purposes of the new paragraph (B) of the definition of "child pornography," each of these sexual activities in "actual or lascivious simulated" form. H.R. 4623, thus, would ban depictions of simulated sexual activities only if they were "lascivious," and, for depictions of simulated sexual intercourse to be lascivious, the new definition of "sexually explicit conduct," applicable to the new paragraph (B) of the definition of "child pornography," provides that "the genitals, breast, or pubic area of any person" would have to be exhibited. (The provision does not distinguish male from female breasts.) This limitation on the meaning of "lascivious" would apply only to simulated sexual intercourse, and not to simulations of other types of sexually explicit conduct.

H.R. 4623 would also enact a new 18 U.S.C. § 1466A that would make it a crime knowingly to produce, distribute, receive, or possess "a visual depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct."[26] It appears that the word "indistinguishable" would generally apply to computer-generated pornography, and not to pornography that uses actors over 18 years of age, as such actors would seem rarely if ever to be indistinguishable from pre-pubescent children. Section 1466A, by prohibiting a subset of child pornography, would apparently be redundant, except as to the penalties that could be imposed. Section 5(b) would prescribe the sentence applicable to these sections under the Sentencing Guidelines.

S. 2511 is similar to H.R. 4623, as passed, regarding the above provisions. None of the above limitations, in and of themselves, would appear to make H.R. 4623 or S. 2511 constitutional, to the extent that they would ban non-obscene child pornography that does not portray an actual child engaging in sexually explicit conduct. This is because the Court in *Ashcroft v. Free Speech Coalition* held it unconstitutional to prohibit *any* non-obscene material that does not portray an actual child engaging in sexually explicit conduct. The decision provided no exception for material that is virtually indistinguishable from child pornography, for material that

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[25]Every reference to H.R. 4623 from this point on is to the bill as passed.

[26]H.R. 4623 would define "pre-pubescent child" as (1) "one whose physical development indicates the child is 12 years of age or younger," or (2) one who, "as depicted, does not exhibit significant pubescent physical or sexual maturation."

appears on a computer, for material that is lascivious, or for material that depicts pre-pubescent children.

S. 2520 would include a different limitation as to the child pornography that it would ban. It would define "child pornography" to include visual depictions that are "of a minor, or an individual who appears to be a minor," actually engaging in specified sex acts, and that "lack[ ] serious literary, artistic, political, or scientific value." This new definition would be unconstitutional to the extent that it would prohibit material that was produced without using a minor and that was not obscene. The fact that such material lacked serious literary, artistic, political, or scientific value would mean that it would satisfy the third prong of the three-pronged *Miller* test for obscenity. To be obscene, however, material would also have to appeal to the prurient interest and be patently offensive.

Providing a New Affirmative Defense.

The affirmative defense in the CPPA provided that a defendant may avoid conviction by proving that each person used in producing the alleged child pornography "was an adult," 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." H.R. 4623 would require the defendant to prove "that the alleged offense did not involve the use of a minor . . . ." The defendant would no longer have to prove anything with regard to the matter of advertising, promoting, presenting, describing, or distributing the material. The change from having to prove that the actors were adults, to having to prove that they were not minors, would be significant because the former requirement, as the Supreme Court noted in *Ashcroft*, meant that "the affirmative defense provide[d] no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors."[27] S. 2511 is similar to H.R. 4623, as passed, regarding its affirmative defense.

In *Ashcroft*, the Court found the affirmative defense in the CPPA "incomplete and insufficient" for two reasons: (1) "[a] defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors,"[28] and (2) "the affirmative defense provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors."[29] That would not be the case under H.R. 4623 or S. 2511. But this would not necessarily mean that these bills would be constitutional, as the Court in *Ashcroft* did not say that fixing these two problems would be sufficient. Rather, it said that it "need not decide"

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[27]Previously quoted in the third paragraph of the text accompanying note 19, *supra*.

[28]*Id.* *See* note 9, *supra*.

[29]*Id.* The reason that this was the case under the CPPA is that the affirmative defense required the defendant to prove that each actor was an adult at the time the material was produced.

whether the government could impose on a speaker the burden of proving his innocence. And, it wrote:

> Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. 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. Failure to establish the defense can lead to a felony conviction.[30]

All these facts would remain the case under H.R. 4623 and S. 2511. A defendant other than a producer might not be able to prove that a minor was not used in the production of child pornography, whether it was produced with adult actors or computer-generated, and even a producer might not be able to prove this with regard to material that pre-dated the CPPA. Though the Court left open whether prosecutions in either of these instances would be constitutional, it did say that "[t]he Government may not suppress lawful speech as a means to suppress unlawful speech."[31] The affirmative defense in H.R. 4623 and S. 2511 would arguably not prevent the bills from suppressing lawful speech in some cases.

S. 2520 would amend the affirmative defense in the CPPA similarly to the way that H.R. 4623 and S. 2511 would. S. 2520 would (1) make the affirmative defense apply to all five paragraphs of 18 U.S.C. § 2252A(a), instead of just the first four, thereby making it available to possession offenses,[32] (2) allow the defendant to prove either that the material was produced only with adults or that it was not produced with an actual minor, thereby making the affirmative defense applicable to virtual child pornography,[33] and (3) remove the requirement that the defendant prove that he "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."

The first and second of these changes would eliminate the two reasons that the Court in *Ashcroft* found the affirmative defense in the CPPA "incomplete and insufficient": (1) "[a] defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors," and (2) "the affirmative defense provides no protection to persons who

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[30]Previously quoted in the second paragraph of the text accompanying note 19, *supra.*

[31]Previously quoted in the text accompanying note 16, which indicates that this statement was a response to the government's argument that a ban on virtual child pornography should be permitted because, "[a]s imaging technology improves . . . , it becomes more difficult to prove that a particular picture was produced using actual children."

[32]*See* note 9, *supra.*

[33]If a defendant can prove that the material was not produced with an actual minor, then it would not matter whether the material was produced only with adults or was computer-generated. And, if the defendant can prove that the material was produced only with adults, he would thereby also prove that it was not produced with an actual minor. Therefore, the bill's option to prove that the material was produced only with adults seems superfluous.

produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors."[34] To this extent, S. 2520 is similar to S. 2511 and H.R. 4623 as passed. But the Court's comment about the CPPA's affirmative defense would apparently apply to S. 2520, as it would to the other two bills: "Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors."[35] As noted above, the Court did not decide whether this fact would render the CPPA's affirmative defense unconstitutional, but, if S. 2520's affirmative defense would effectively be unavailable to a class of defendants, then S. 2520 would appear to "suppress lawful speech as a means to suppress unlawful speech"[36] and therefore be unconstitutional.

Prohibiting Conduct Other than Possession.

Both H.R. 4623 and S. 2511 would repeal 18 U.S.C. § 2256(8)(D), which is the part of the definition of "child pornography" that makes it a crime to mail, transport, receive, distribute, reproduce, sell, or possess material that is not necessarily child pornography but that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that" it is. This provision was held unconstitutional in *Ashcroft*. H.R. 4623 and S. 2511, however, would reenact this provision in a different form, as new section 2252B. Subsection (a) of section 2252B would make it a crime to "offer[ ], agree[ ], attempt[ ], or conspire[ ] to provide or sell a visual depiction to another, and who in connection therewith knowingly advertises, promotes, presents, or describes the visual depiction with the intent to cause any person to believe that the material is, or contains, a visual depiction of a minor engaging in sexually explicit conduct." Subsection (b) of the new section would make it a crime to "offer[ ], agree[ ], attempt[ ], or conspire[ ] to receive or purchase from another a visual depiction that [one] believes to be, or to contain, a visual depiction of a minor engaging in sexually explicit conduct." Subsection (c) of the new section would provide: "It is not a required element of any offense under this section that any person actually provide, sell, receive, purchase, possess, or produce any visual depiction."

The substance of subsection (c) seems implicit in subsections (a) and (b), and may have been included solely for the sake of clarity. Both section 2256(8)(D), which H.R. 4623 and S. 2511 would repeal, and the new section 2252B could apply to material that is not child pornography; the most significant difference between the two sections appears to be that section 2256(8)(D), in conjunction with section 2252A, outlaws various acts, including distributing or possessing material that was advertised as child pornography, whether or not it was child pornography, whereas the new section would outlaw merely *attempts* to "provide or sell a visual depiction" by advertising it as child pornography, whether or not it is child pornography, or even exists. This means that the new provision would not outlaw possession of any material.

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[34]Previously quoted in the third paragraph of the text accompanying note 19, *supra*.

[35]Previously quoted in the second paragraph of the text accompanying note 19, *supra*.

[36]Previously quoted in the text accompanying note 16, *supra*.

The committee report accompanying H.R. 4623 draws an analogy to "criminalizing an individual offering to provide or sell illegal drugs, even where the offeror does not actually have drugs in hand."[37] Another analogy might be a situation where the offeror does not even intend to sell illegal drugs, but makes a fraudulent offer. Yet banning such conduct would not seem unconstitutional. The Court in *Ashcroft* found section 2256(8)(A) unconstitutional because "[m]aterials falling within the proscription are tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described. . . . The provision prohibits a sexually explicit film containing no youthful actors, just because it is placed in a box suggesting a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled." New section 2252B, by contrast, would not punish possession, but only providing and selling. It would, therefore, appear to be constitutional even when no child pornography was provided or sold.

S. 2520 has a similar provision; it would make it a crime to "advertise[ ], promote[ ], present[ ], describe[ ], distribute[ ], or solicit[ ] . . . any material in a manner that conveys the impression that the material is, or contains, an obscene visual depiction of a minor engaging in sexually explicit conduct." This language is virtually identical to subparagraph 2256(8)(D); however, like H.R. 4623 and S. 2511, it would differ from subparagraph 2256(8)(D) in that it would not outlaw possession of any material. Therefore, it would also appear to be constitutional.

Banning Obscene Material Depicting a Pre-Pubescent Child.

H.R. 4623 (but neither of the Senate bills) would enact a new 18 U.S.C. § 1466B that would make it a crime knowingly to produce, distribute, receive, or possess "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that – (1) depicts a pre-pubescent child engaging in sexually explicit conduct, and (2) is obscene . . . . It is not a required element of any offense under this section that the pre-pubescent child depicted actually existed." Section 1466B, by prohibiting a subset of obscenity, would apparently be redundant, except as to the penalties that could be imposed. Section 5(b) would prescribe the sentence applicable to these sections under the Sentencing Guidelines.

A possible constitutional problem with section 1466B is its prohibition of possession of obscene material. The Supreme Court has held that, even though obscenity is not protected by the First Amendment, there is a constitutional right to possess obscene material in "the privacy of one's own home,"[38] but that there is no constitutional right to possess child pornography in the privacy of one's own home.[39] Section 1466B would cover material that is both child pornography and obscene, so which rule would apply? The material that it would cover would include both child pornography produced with an actual child, and child pornography produced without an actual child, with the former being unprotected speech and the latter being

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[37]H.R. Rep. No. 107-526, at 23 (2002).

[38]Stanley v. Georgia, 394 U.S. 557, 568 (1969).

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

protected speech. It seems reasonable, therefore, to suppose that possession of the former in one's home would be unprotected and possession of the latter in one's home would be protected. In addition, the Court in *Osborne v. Ohio*, in holding that there is no constitutional right to possess child pornography in the privacy of one's own home, appeared to rely primarily on the governmental interest in deterring "the use of children as subjects of pornographic materials,"[40] and this interest is not present with respect to child pornography produced without an actual child. *Osborne v. Ohio* also mentioned that "evidence suggests that pedophiles use child pornography to seduce other children into sexual activity,"[41] and the governmental interest in deterring this conduct is present with respect to child pornography produced without an actual child, but *Ashcroft* found this interest not to be a legitimate basis to ban such material. Thus, to the extent that H.R. 4623 would ban possession in one's home of child pornography produced without an actual child, it would seem to be unconstitutional.

Denying Child Pornography to Minors.

H.R. 4623 would make it a crime to "provide[ ] or show[ ] to a person below the age of 16 years any visual depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct, any obscene matter, or any child pornography." Material in the first category would not necessarily be obscene, and would not constitute child pornography under *Ferber* if it did not depict an actual child. Nevertheless, this provision would apparently be constitutional because it would not restrict adults' access to speech, and the Supreme Court has "recognized that there is a compelling interest in . . . shielding minors from the influence of literature that is not obscene by adult standards."[42]

S. 2511 contains a similar provision. S. 2520 would prohibit providing a minor (a person under 18, not, as in H.R. 4623 and S. 2511, a person under 16) with any visual depiction that is, or appears to be, of a minor engaging in sexually explicit conduct. It would appear to be constitutional for the same reason that the comparable provisions of H.R. 4623 and S. 2511 would appear to be constitutional.

Conclusion

In *Ashcroft v. Free Speech Coalition*, the Supreme Court declared unconstitutional the Child Pornography Prevention Act of 1996 to the extent that it prohibited material that was produced without the use of an actual child. The only possible means that the Court explicitly left open for Congress to try to restrict such material was to ban it, but allow an affirmative defense that the material was produced without using actual children. Even this approach the Court did not say would be constitutional, but merely found no need to decide whether it would be.

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[40]*Id.* at 109.

[41]*Id.* at 111.

[42]Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989).

This approach would shift the burden of proof to the defendant on the question of whether actual children were used in producing the material. If the defendant could not meet the burden of proof, then he could be punished for child pornography that might or might not have been produced with an actual minor. The Court, however, said that "[t]he Government may not suppress lawful speech as a means to suppress unlawful speech." This suggests that an affirmative defense would be unconstitutional if it were not effectively available to all classes of defendant. It might not effectively be available, however, to individuals charged with mere possession of child pornography, or to producers of pornography that pre-dated the CPPA, as these defendants might have "no way of establishing the identity, or even the existence, of the actors."

The three bills that this report has examined – H.R. 4623, as passed by the House, S. 2511, and S. 2520 – would all ban child pornography produced without the use of an actual child. Though all three bills would allow an affirmative defense, to the extent that they applied to defendants who had "no way of establishing the identity, or even the existence, of the actors," they raise the same questions that the Court in *Ashcroft* posed as to the constitutionality of such an approach. Though the bills would permit a defendant to prove that no minors were used, rather than, as under the CPPA, that only adult actors were used, this would not appear to eliminate this problem, and some defendants might be convicted for conduct involving lawful speech.

Some provisions of the bills, however, appear constitutional. All three bills, for example, would ban attempts to distribute material in a manner that conveys the impression that it depicts a minor engaging in sexually explicit conduct, whether or not it does. This proscription, unlike the one that the Court struck down in *Ashcroft*, would not ban any material itself, but would ban only attempts to distribute such material. All three bills would also make it a crime to provide minors with child pornography, whether or not it was produced with an actual child. This would appear constitutional because the Court has found there to be a compelling interest in shielding minors from any pornography.