

108TH CONGRESS
1ST SESSION

S. 151

To amend title 18, United States Code, with respect to the sexual exploitation of children.

IN THE SENATE OF THE UNITED STATES

JANUARY 13, 2003

Mr. HATCH (for himself, Mr. LEAHY, and Mr. BENNETT) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, with respect to the sexual exploitation of children.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Prosecutorial Remedies
5 and Tools Against the Exploitation of Children Today Act
6 of 2003” or “PROTECT Act”.

7 **SEC. 2. FINDINGS.**

8 Congress finds the following:

9 (1) Obscenity and child pornography are not
10 entitled to protection under the First Amendment

1 under *Miller v. California*, 413 U.S. 15 (1973) (ob-
2 scenity), or *New York v. Ferber*, 458 U.S. 747
3 (1982) (child pornography) and thus may be prohib-
4 ited.

5 (2) The Government has a compelling state in-
6 terest in protecting children from those who sexually
7 exploit them, including both child molesters and
8 child pornographers. “The prevention of sexual ex-
9 ploitation and abuse of children constitutes a gov-
10 ernment objective of surpassing importance,” *New*
11 *York v. Ferber*, 458 U.S. 747, 757 (1982) (empha-
12 sis added), and this interest extends to stamping out
13 the vice of child pornography at all levels in the dis-
14 tribution chain. *Osborne v. Ohio*, 495 U.S. 103, 110
15 (1990).

16 (3) The Government thus has a compelling in-
17 terest in ensuring that the criminal prohibitions
18 against child pornography remain enforceable and
19 effective. “[T]he most expeditious if not the only
20 practical method of law enforcement may be to dry
21 up the market for this material by imposing severe
22 criminal penalties on persons selling, advertising, or
23 otherwise promoting the product.” *Ferber*, 458 U.S.
24 at 760.

1 (4) In 1982, when the Supreme Court decided
2 Ferber, the technology did not exist to: (A) create
3 depictions of virtual children that are indistinguish-
4 able from depictions of real children; (B) create de-
5 pictions of virtual children using compositions of real
6 children to create an unidentifiable child; or (C) dis-
7 guise pictures of real children being abused by mak-
8 ing the image look computer generated.

9 (5) Evidence submitted to the Congress, includ-
10 ing from the National Center for Missing and Ex-
11 ploited Children, demonstrates that technology al-
12 ready exists to disguise depictions of real children to
13 make them unidentifiable and to make depictions of
14 real children appear computer generated. The tech-
15 nology will soon exist, if it does not already, to make
16 depictions of virtual children look real.

17 (6) The vast majority of child pornography
18 prosecutions today involve images contained on com-
19 puter hard drives, computer disks, and/or related
20 media.

21 (7) There is no substantial evidence that any of
22 the child pornography images being trafficked today
23 were made other than by the abuse of real children.
24 Nevertheless, technological advances since Ferber
25 have led many criminal defendants to suggest that

1 the images of child pornography they possess are not
2 those of real children, insisting that the government
3 prove beyond a reasonable doubt that the images are
4 not computer-generated. Such challenges will likely
5 increase after the *Ashcroft v. Free Speech Coalition*
6 decision.

7 (8) Child pornography circulating on the Inter-
8 net has, by definition, been digitally uploaded or
9 scanned into computers and has been transferred
10 over the Internet, often in different file formats,
11 from trafficker to trafficker. An image seized from
12 a collector of child pornography is rarely a first-gen-
13 eration product, and the retransmission of images
14 can alter the image so as to make it difficult for
15 even an expert conclusively to opine that a particular
16 image depicts a real child. If the original image has
17 been scanned from a paper version into a digital for-
18 mat, this task can be even harder since proper fo-
19 rensic delineation may depend on the quality of the
20 image scanned and the tools used to scan it.

21 (9) The impact on the government's ability to
22 prosecute child pornography offenders is already evi-
23 dent. The Ninth Circuit has seen a significant ad-
24 verse effect on prosecutions since the 1999 Ninth
25 Circuit Court of Appeals decision in *Free Speech*

1 Coalition. After that decision, prosecutions generally
2 have been brought in the Ninth Circuit only in the
3 most clear-cut cases in which the government can
4 specifically identify the child in the depiction or oth-
5 erwise identify the origin of the image. This is a
6 fraction of meritorious child pornography cases. The
7 National Center for Missing and Exploited Children
8 testified that, in light of the Supreme Court's affir-
9 mation of the Ninth Circuit decision, prosecutors in
10 various parts of the country have expressed concern
11 about the continued viability of previously indicted
12 cases as well as declined potentially meritorious
13 prosecutions.

14 (10) In the absence of congressional action, this
15 problem will continue to grow increasingly worse.
16 The mere prospect that the technology exists to cre-
17 ate computer or computer-generated depictions that
18 are indistinguishable from depictions of real children
19 will allow defendants who possess images of real
20 children to escape prosecution, for it threatens to
21 create a reasonable doubt in every case of computer
22 images even when a real child was abused. This
23 threatens to render child pornography laws that pro-
24 tect real children unenforceable.

1 (11) To avoid this grave threat to the Govern-
 2 ment’s unquestioned compelling interest in effective
 3 enforcement of the child pornography laws that pro-
 4 tect real children, a statute must be adopted that
 5 prohibits a narrowly-defined subcategory of images.

6 (12) The Supreme Court’s 1982 *Ferber v. New*
 7 *York* decision holding that child pornography was
 8 not protected drove child pornography off the shelves
 9 of adult bookstores. Congressional action is nec-
 10 essary to ensure that open and notorious trafficking
 11 in such materials does not reappear.

12 **SEC. 3. CERTAIN ACTIVITIES RELATING TO MATERIAL CON-**
 13 **STITUTING OR CONTAINING CHILD PORNOG-**
 14 **RAPHY.**

15 Section 2252A of title 18, United States Code, is
 16 amended—

17 (1) in subsection (a)—

18 (A) by striking paragraph (3) and insert-
 19 ing the following:

20 “(3) knowingly—

21 “(A) reproduces any child pornography for
 22 distribution through the mails, or in interstate
 23 or foreign commerce by any means, including
 24 by computer; or

1 “(B) advertises, promotes, presents, dis-
2 tributes, or solicits through the mails, or in
3 interstate or foreign commerce by any means,
4 including by computer, any material or pur-
5 ported material in a manner that conveys the
6 impression that the material or purported mate-
7 rial is, or contains, an obscene visual depiction
8 of a minor engaging in sexually explicit con-
9 duct;”;

10 (B) in paragraph (4), by striking “or” at
11 the end;

12 (C) in paragraph (5), by striking the pe-
13 riod at the end and inserting “; or”; and

14 (D) by adding at the end the following:

15 “(6) knowingly distributes, offers, sends, or
16 provides to a minor any visual depiction, including
17 any photograph, film, video, picture, or computer
18 generated image or picture, whether made or pro-
19 duced by electronic, mechanical, or other means, of
20 sexually explicit conduct where such visual depiction
21 is, or appears to be, of a minor engaging in sexually
22 explicit conduct—

23 “(A) that has been mailed, shipped, or
24 transported in interstate or foreign commerce
25 by any means, including by computer;

1 “(B) that was produced using materials
2 that have been mailed, shipped, or transported
3 in interstate or foreign commerce by any
4 means, including by computer; or

5 “(C) which distribution, offer, sending, or
6 provision is accomplished using the mails or by
7 transmitting or causing to be transmitted any
8 wire communication in interstate or foreign
9 commerce, including by computer,
10 for purposes of inducing or persuading a minor to
11 participate in any activity that is illegal.”;

12 (2) in subsection (b)(1), by striking “(1), (2),
13 (3), or (4)” and inserting “(1), (2), (3), (4), or (6)”;
14 and

15 (3) by striking subsection (c) and inserting the
16 following:

17 “(c) It shall be an affirmative defense to a charge
18 of violating paragraph (1), (2), (3), (4), or (5) of sub-
19 section (a) that—

20 “(1)(A) the alleged child pornography was pro-
21 duced using an actual person or persons engaging in
22 sexually explicit conduct; and

23 “(B) each such person was an adult at the time
24 the material was produced; or

1 “(2) the alleged child pornography was not pro-
2 duced using any actual minor or minors.

3 No affirmative defense shall be available in any prosecu-
4 tion that involves obscene child pornography or child por-
5 nography as described in section 2256(8)(D). A defendant
6 may not assert an affirmative defense to a charge of vio-
7 lating paragraph (1), (2), (3), (4), or (5) of subsection
8 (a) unless, within the time provided for filing pretrial mo-
9 tions or at such time prior to trial as the judge may direct,
10 but in no event later than 10 days before the commence-
11 ment of the trial, the defendant provides the court and
12 the United States with notice of the intent to assert such
13 defense and the substance of any expert or other special-
14 ized testimony or evidence upon which the defendant in-
15 tends to rely. If the defendant fails to comply with this
16 subsection, the court shall, absent a finding of extraor-
17 dinary circumstances that prevented timely compliance,
18 prohibit the defendant from asserting such defense to a
19 charge of violating paragraph (1), (2), (3), (4), or (5) of
20 subsection (a) or presenting any evidence for which the
21 defendant has failed to provide proper and timely notice.”.

22 **SEC. 4. ADMISSIBILITY OF EVIDENCE.**

23 Section 2252A of title 18, United States Code, is
24 amended by adding at the end the following:

1 “(e) **ADMISSIBILITY OF EVIDENCE.**—On motion of
2 the government, in any prosecution under this chapter, ex-
3 cept for good cause shown, the name, address, social secu-
4 rity number, or other nonphysical identifying information,
5 other than the age or approximate age, of any minor who
6 is depicted in any child pornography shall not be admis-
7 sible and may be redacted from any otherwise admissible
8 evidence, and the jury shall be instructed, upon request
9 of the United States, that it can draw no inference from
10 the absence of such evidence in deciding whether the child
11 pornography depicts an actual minor .”.

12 **SEC. 5. DEFINITIONS.**

13 Section 2256 of title 18, United States Code, is
14 amended—

15 (1) in paragraph (1), by inserting before the
16 semicolon the following: “and shall not be construed
17 to require proof of the actual identity of the per-
18 son”;

19 (2) in paragraph (8)—

20 (A) in subparagraph (B), by inserting “is
21 obscene and” before “is”;

22 (B) in subparagraph (C), by striking “or”
23 at the end; and

24 (C) by striking subparagraph (D) and in-
25 serting the following:

1 “(D) such visual depiction—

2 “(i) is, or appears to be, of a minor
3 actually engaging in bestiality, sadistic or
4 masochistic abuse, or sexual intercourse,
5 including genital-genital, oral-genital, anal-
6 genital, or oral-anal, whether between per-
7 sons of the same or opposite sex; and

8 “(ii) lacks serious literary, artistic, po-
9 litical, or scientific value; or

10 “(E) the production of such visual depic-
11 tion involves the use of an identifiable minor
12 engaging in sexually explicit conduct;” and

13 (3) by striking paragraph (9), and inserting the
14 following:

15 “(9) ‘identifiable minor’—

16 “(A)(i) means a person—

17 “(I)(aa) who was a minor at the time
18 the visual depiction was created, adapted,
19 or modified; or

20 “(bb) whose image as a minor was
21 used in creating, adapting, or modifying
22 the visual depiction; and

23 “(II) who is recognizable as an actual
24 person by the person’s face, likeness, or
25 other distinguishing characteristic, such as

1 a unique birthmark or other recognizable
2 feature; and

3 “(ii) shall not be construed to require
4 proof of the actual identity of the identifiable
5 minor; or

6 “(B) means a computer or computer gen-
7 erated image that is virtually indistinguishable
8 from an actual minor; and

9 “(10) ‘virtually indistinguishable’ means that
10 the depiction is such that an ordinary person view-
11 ing the depiction would conclude that the depiction
12 is of an actual minor.”.

13 **SEC. 6. RECORDKEEPING REQUIREMENTS.**

14 Section 2257 of title 18, United States Code, is
15 amended—

16 (1) in subsection (d)(2), by striking “of this
17 section” and inserting “of this chapter or chapter
18 71,”;

19 (2) in subsection (h)(3), by inserting “, com-
20 puter generated image or picture,” after “video
21 tape”; and

22 (3) in subsection (i)—

23 (A) by striking “not more than 2 years”
24 and inserting “not more than 5 years”; and

1 (B) by striking “5 years” and inserting
2 “10 years”.

3 **SEC. 7. SERVICE PROVIDER REPORTING OF CHILD POR-**
4 **NOGRAPHY AND RELATED INFORMATION.**

5 Section 227 of the Victims of Child Abuse Act of
6 1990 (42 U.S.C. 13032) is amended—

7 (1) in subsection (c), by inserting “or pursuant
8 to” after “to comply with”;

9 (2) by amending subsection (f)(1)(D) to read as
10 follows:

11 “(D) where the report discloses a violation
12 of State criminal law, to an appropriate official
13 of a State or subdivision of a State for the pur-
14 pose of enforcing such State law.”;

15 (3) by redesignating paragraph (3) of sub-
16 section (b) as paragraph (4); and

17 (4) by inserting after paragraph (2) of sub-
18 section (b) the following new paragraph:

19 “(3) In addition to forwarding such reports to
20 those agencies designated in subsection (b)(2), the
21 National Center for Missing and Exploited Children
22 is authorized to forward any such report to an ap-
23 propriate official of a state or subdivision of a state
24 for the purpose of enforcing state criminal law.”.

1 **SEC. 8. CONTENTS DISCLOSURE OF STORED COMMUNICA-**
2 **TIONS.**

3 Section 2702 of title 18, United States Code, is
4 amended—

5 (1) in subsection (b)—

6 (A) in paragraph (5), by striking “or” at
7 the end;

8 (B) in paragraph (6)—

9 (i) in subparagraph (A)(ii), by insert-
10 ing “or” at the end;

11 (ii) by striking subparagraph (B); and

12 (iii) by redesignating subparagraph
13 (C) as subparagraph (B);

14 (C) by redesignating paragraph (6) as
15 paragraph (7); and

16 (D) by inserting after paragraph (5) the
17 following:

18 “(6) to the National Center for Missing and
19 Exploited Children, in connection with a report sub-
20 mitted under section 227 of the Victims of Child
21 Abuse Act of 1990 (42 U.S.C. 13032); or”; and

22 (2) in subsection (c)—

23 (A) in paragraph (4), by striking “or” at
24 the end;

25 (B) by redesignating paragraph (5) as
26 paragraph (6); and

1 (C) by inserting after paragraph (4) the
2 following:

3 “(5) to the National Center for Missing and
4 Exploited Children, in connection with a report sub-
5 mitted under section 227 of the Victims of Child
6 Abuse Act of 1990 (42 U.S.C. 13032); or”.

7 **SEC. 9. EXTRATERRITORIAL PRODUCTION OF CHILD POR-**
8 **NOGRAPHY FOR DISTRIBUTION IN THE**
9 **UNITED STATES.**

10 Section 2251 of title 18, United States Code, is
11 amended—

12 (1) by striking “subsection (d)” each place that
13 term appears and inserting “subsection (e)”;

14 (2) by redesignating subsections (c) and (d) as
15 subsections (d) and (e), respectively; and

16 (3) by inserting after subsection (b) the fol-
17 lowing:

18 “(c)(1) Any person who, in a circumstance described
19 in paragraph (2), employs, uses, persuades, induces, en-
20 tices, or coerces any minor to engage in, or who has a
21 minor assist any other person to engage in, any sexually
22 explicit conduct outside of the United States, its territories
23 or possessions, for the purpose of producing any visual de-
24 piction of such conduct, shall be punished as provided
25 under subsection (e).

1 “(2) The circumstance referred to in paragraph (1)
2 is that—

3 “(A) the person intends such visual depiction to
4 be transported to the United States, its territories or
5 possessions, by any means, including by computer or
6 mail; or

7 “(B) the person transports such visual depic-
8 tion to the United States, its territories or posses-
9 sions, by any means, including by computer or
10 mail.”.

11 **SEC. 10. CIVIL REMEDIES.**

12 Section 2252A of title 18, United States Code, as
13 amended by this Act, is amended by adding at the end
14 the following:

15 “(f) CIVIL REMEDIES.—

16 “(1) IN GENERAL.—Any person aggrieved by
17 reason of the conduct prohibited under subsection
18 (a) or (b) may commence a civil action for the relief
19 set forth in paragraph (2).

20 “(2) RELIEF.—In any action commenced in ac-
21 cordance with paragraph (1), the court may award
22 appropriate relief, including—

23 “(A) temporary, preliminary, or permanent
24 injunctive relief;

1 “(B) compensatory and punitive damages;
2 and
3 “(C) the costs of the civil action and rea-
4 sonable fees for attorneys and expert wit-
5 nesses.”.

6 **SEC. 11. ENHANCED PENALTIES FOR RECIDIVISTS.**

7 Sections 2251(d), 2252(b), and 2252A(b) of title 18,
8 United States Code, are amended by inserting “chapter
9 71,” before “chapter 109A,” each place it appears.

10 **SEC. 12. SENTENCING ENHANCEMENTS FOR INTERSTATE**
11 **TRAVEL TO ENGAGE IN SEXUAL ACT WITH A**
12 **JUVENILE.**

13 Pursuant to its authority under section 994(p) of title
14 18, United States Code, and in accordance with this sec-
15 tion, the United States Sentencing Commission shall re-
16 view and, as appropriate, amend the Federal Sentencing
17 Guidelines and policy statements to ensure that guideline
18 penalties are adequate in cases that involve interstate
19 travel with the intent to engage in a sexual act with a
20 juvenile in violation of section 2423 of title 18, United
21 States Code, to deter and punish such conduct.

22 **SEC. 13. MISCELLANEOUS PROVISIONS.**

23 (a) APPOINTMENT OF TRIAL ATTORNEYS.—

24 (1) IN GENERAL.—Not later than 6 months
25 after the date of enactment of this Act, the Attorney

1 General shall appoint 25 additional trial attorneys to
2 the Child Exploitation and Obscenity Section of the
3 Criminal Division of the Department of Justice or to
4 appropriate U.S. Attorney's Offices, and those trial
5 attorneys shall have as their primary focus, the in-
6 vestigation and prosecution of Federal child pornog-
7 raphy laws.

8 (2) AUTHORIZATION OF APPROPRIATIONS.—

9 There are authorized to be appropriated to the De-
10 partment of Justice such sums as may be necessary
11 to carry out this subsection.

12 (b) REPORT TO CONGRESSIONAL COMMITTEES.—

13 (1) IN GENERAL.—Not later than 9 months
14 after the date of enactment of this Act, and every
15 2 years thereafter, the Attorney General shall report
16 to the Chairpersons and Ranking Members of the
17 Committees on the Judiciary of the Senate and the
18 House of Representatives on the Federal enforce-
19 ment actions under chapter 110 of title 18, United
20 States Code.

21 (2) CONTENTS.—The report required under
22 paragraph (1) shall include—

23 (A) an evaluation of the prosecutions
24 brought under chapter 110 of title 18, United
25 States Code;

1 (B) an outcome-based measurement of per-
2 formance; and

3 (C) an analysis of the technology being
4 used by the child pornography industry.

5 (e) SENTENCING GUIDELINES.—Pursuant to its au-
6 thority under section 994(p) of title 18, United States
7 Code, and in accordance with this section, the United
8 States Sentencing Commission shall review and, as appro-
9 priate, amend the Federal Sentencing Guidelines and pol-
10 icy statements to ensure that the guidelines are adequate
11 to deter and punish conduct that involves a violation of
12 paragraph (3)(B) or (6) of section 2252A(a) of title 18,
13 United States Code, as created by this Act. With respect
14 to the guidelines for section 2252A(a)(3)(B), the Commis-
15 sion shall consider the relative culpability of promoting,
16 presenting, describing, or distributing material in violation
17 of that section as compared with solicitation of such mate-
18 rial.

19 **SEC. 14. SEVERABILITY.**

20 If any provision of this Act, an amendment made by
21 this Act, or the application of such provision or amend-
22 ment to any person or circumstance is held to be unconsti-
23 tutional, the remainder of this Act, the amendments made
24 by this Act, and the application of the provisions of such

1 to any person or circumstance shall not be affected there-
2 by.

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