U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 29, 2005

The Honorable J. Dennis Hastert
Speaker
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I am transmitting herewith a legislative proposal entitled the "Child Pornography Prevention and Obscenity Prosecution Act of 2005." Attorney General Alberto R. Gonzales considers the prevention of child pornography and the prosecution of obscenity to be priorities in his leadership of the Department of Justice. The following sections of this letter describe the proposed bill's provisions.

Findings to Support Prosecution and Protect Children

Section 2, the bill's findings section, provides support for two important improvements in the laws protecting children from exploitation through child pornography. First, it contains findings that create a stronger interstate commerce nexus in child pornography cases. Several federal appeals courts have found an insufficient nexus to create federal prosecutorial jurisdiction in the current statute, which establishes jurisdiction only when the pornographic material used to produce the images traveled in interstate commerce. Investigators and prosecutors often have difficulty proving that the images did travel in interstate commerce. In addition, in many cases the defendant personally produced the images and did not transport them in interstate commerce, for example, in the context of Polaroid/videotapes home-produced by the defendant. The findings therefore clearly establish that the intrastate possession of child pornography has an effect on interstate commerce because of its effect in stimulating demand and creating potential supply for the interstate child pornography "market."

Second, the section contains findings supporting the statutory changes, detailed later in the legislative package, that protect victims of child pornography from being further victimized by the criminal justice system. The findings state that children who have been exploited in child pornography are exploited again when a defendant, his attorneys, and expert witnesses are permitted to duplicate the images of child pornography as part of the defense. This problem can be remedied by providing that the government allow the defendant, his attorneys, and expert witnesses access to the material only while such material is under its control or that of the court.

Ensuring Children Are Not Exploited in the Production of Pornography

In order to ensure that minors are not exploited in the production of pornography, 18 U.S.C. § 2257 requires certain producers of sexually explicit materials to keep records of the names, ages, and proof of identification of the individuals depicted in those materials and permits the Attorney General or his designee to inspect those records at all reasonable times. Section 3 of this proposed bill improves the regulatory scheme by adding to the types of depictions covered, imposing a criminal penalty for failing to allow an inspection, and clarifying who is covered by the inspection regime.

The section adds simulated sexual conduct and lascivious exhibition in sexually explicit depictions to those activities that are covered by the record-keeping and inspection provisions of Section 2257. Currently, section 2257 requires only producers of materials containing visual depictions of "*actual* sexually explicit conduct" to maintain records. Simulated conduct (i.e., conduct that gives the impression of sexual activity without showing the ultimate sexual act) involving children is illegal, and producers of such simulated pornography should be required to comply with Section 2257 in order to prevent exploitation of children. Currently, for example, a pornographer can film 16-year-old girls engaged in "soft-core" sex and not be subject to the record-keeping requirements. The material produced is legally child pornography, but because the pornographer is not required to maintain age records, he can claim that the girls are 18 or older or that he was not aware of the girls' ages. Similarly, the lascivious exhibition of the genitals of a minor constitutes child pornography. The current statute does not require records for depictions of lascivious exhibition, however, which appears to be a drafting error. As with the concern about simulated conduct above, a pornographer can produce sexually explicit depictions of a minor in the form of nude photos and claim that the minor is over 18 or that he was not aware of the minor's age.

This section of the bill also improves the enforceability of Section 2257 inspections. Currently the inspection regime is weak because a producer can flatly refuse inspection without consequences. Specifically, while there is a criminal penalty for failure to maintain records under Section 2257, *see* 18 U.S.C. § 2257(f)(1), there is no criminal penalty for refusing to allow an inspection.

This section also clarifies the definition of "produces" in Section 2257. Section 2257 requires that records of the names and ages of performers be kept by "whoever produces any book, magazine, periodical, film, videotape, or other matter" containing a visual depiction of actual sexually explicit conduct that was produced using material that traveled in interstate commerce or is intended for shipment in interstate commerce. "Produces," in turn, "means to produce, manufacture, or publish any book, magazine, periodical, film, video tape, computer-generated image, digital image, or picture, or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but 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."

Last year the Department published a proposed rule and recently it published a final rule that defines "producers" to include those who photograph or publish sexually explicit depictions, even if they are not directly involved in the hiring, contracting for, managing or otherwise arranging for the participation of the depicted performers. The Department believes that Congress did not intend to exclude from the record-keeping requirements those who publish sexually explicit depictions (such as the producers of magazines and films referenced in the statute) but have no direct relationship with the performers. However, a statutory change to clarify Congress' intent would be helpful, as the Department prepares to enforce the regulation.

The bill also contains several technical changes to update the statute to account for changes in technology, such as the use of the Internet to distribute pornography.

Prevention of Distribution of Child Pornography Outside the Government's Direct Control

Section 4 of the bill specifies that depictions of child pornography discovered by law enforcement must be maintained within the government's or a court's control at all times, in order to prevent courts from ordering the prosecution to distribute child pornography to the defense. Courts often require such distribution as part of the discovery process. Despite restrictions on accessibility, the child pornography is still often distributed to persons outside the government's or court's control. The changes in this section would prevent such repeated exploitation of the child victims while not depriving defendants of their right to examine the material.

Authorizing Asset Forfeiture in Child Exploitation and Obscenity Cases

Section 5 of the bill contains amendments to the obscenity forfeiture provisions in 18 U.S.C. § 1467 to make the procedures for obscenity forfeitures the same as they are for most other crimes, and will make it unnecessary for Congress to make parallel conforming amendments each time a procedural change to criminal forfeiture procedures is adopted. The amendments also strike a provision requiring the court to ensure that the forfeiture is not grossly disproportional to the gravity of the underlying offense.

These changes would benefit prosecution by removing courts' current discretion to choose not to forfeit property used or intended to be used in the offense if courts feel the forfeiture somehow would be disproportionate. Obscenity offenders are primarily motivated by the prospect of financial gain. It would benefit law enforcement to increase the deterrent value of the forfeiture provision by making clearer that property used to commit the offense, not just the obscene material produced and the proceeds from its sale, is subject to forfeiture.

This section also adds new offenses to the list of those for which criminal and civil forfeiture are available under §§ 2253 and 2254, respectively. These offenses cover the Misleading Domain Names Act, § 2252B, part of the PROTECT Act, record-keeping of the ages of performers, § 2257, and sexual abuse offenses against children, Chapter 109A. Forfeiture should be an option for these crimes because those who violate § 2252B and § 2257 are normally motivated by financial gain, and child abuse offenses should be subject to forfeiture to increase the deterrent effect of federal law. Moreover, current provisions allow for forfeiture for producing sexually explicit depictions of children, § 2252, but not for producing child pornography, § 2252A, which may simply be a drafting oversight.

Similarly, the section adds violation of § 2252A and § 2252B as predicates for RICO and money laundering charges. As with forfeiture above, § 2252 violations are currently included as predicates, but violations of § 2252A are not, while violation of § 2252B should be added because monetary gain is the motivating factor in the creation of misleading domain names.

Enhancing Administrative Subpoena Power to Cover Obscenity Cases

Section 6 of the bill adds administrative subpoena power for investigation of obscenity offenses in order to expedite requests for information from Internet Service Providers (ISPs). In child exploitation investigations, federal prosecutors can quickly obtain key information allowing them to identify and locate online offenders from ISPs through the use of administrative subpoenas. In contrast, in order to obtain similar information in obscenity investigations, prosecutors must first open a grand jury investigation and then use grand jury subpoenas. ISPs, which are currently not covered by record-retention requirements, generally maintain records of users' activities for short periods of time, sometimes as little as two days. Grand jury subpoenas, however, can take up to a week or more to obtain. Administrative subpoena power, then, would enable prosecutors to secure fleeting electronic evidence in Internet-based obscenity cases.

Prohibiting the Production, Transportation, and Sale of Obscenity

Section 7 of the bill criminalizes the production of obscenity as well as its transportation, distribution, and sale, so long as the producer has the *intent* to transport, distribute, or sell the material in interstate or foreign commerce. This would add to prosecutorial tools to investigate and bring charges against obscenity producers because it attacks the source of the problem. Current law, based on transportation and distribution offenses (including engaging in the business of selling obscene matter and possessing such matter with intent to distribute it), merely controls the spread of obscene material; it does not prohibit its creation. Accordingly, current law does not allow the federal government to attack obscene material at every step in the chain leading to its dissemination into society, but rather allows the government to attack it once it has been (or is about to be) distributed. This proposal would fix this limitation.

Thank you for the opportunity to present our views on this legislative package. A more detailed section-by-section analysis is also attached. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Attachment

IDENTICAL LETTER SENT TO THE HONORABLE RICHARD B. CHENEY, PRESIDENT OF THE SENATE

Legislative Proposal on Child Pornography and Obscenity

Bill Text

A bill to enhance prosecution of child pornography and obscenity by strengthening Section 2257 of the U.S. Code to ensure that children are not exploited in the production of pornography, prohibiting distribution of child pornography used as evidence in prosecutions, authorizing asset forfeiture in child pornography and obscenity cases, expanding administrative subpoena power to cover obscenity cases; and prohibiting the production of obscenity, as well as its transportation, distribution, and sale.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE- This Act may be cited as the "Child Pornography Prevention and Obscenity Prosecution Act of 2005."

(b) TABLE OF CONTENTS- The table of contents for this Act is as follows:

SECTION 2. Findings.

(a) Congress makes the following findings:

(1) The effect of the intrastate production, transportation, distribution, receipt, advertising, and possession of child pornography on interstate market in child pornography

(A) The illegal production, transportation, distribution, receipt, advertising and possession of child pornography, as defined in 18 U.S.C. § 2256(8), as well as the transfer of custody of children for the production of child pornography, is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole.

(B) A substantial interstate market in child pornography exists, including not only a multi-million dollar industry, but also a nationwide network of

individuals openly advertising their desire to exploit children and to traffic in child pornography. Many of these individuals distribute child pornography with the expectation of receiving other child pornography in return.

(C) The interstate market in child pornography is carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce, such as the Internet. The advent of the Internet has greatly increased the ease of transporting, distributing, receiving, and advertising child pornography in interstate commerce. The advent of digital cameras and digital video cameras, as well as videotape cameras, has greatly increased the ease of producing child pornography. The advent of inexpensive computer equipment with the capacity to store large numbers of digital images of child pornography has greatly increased the ease of possessing child pornography. Taken together, these technological advances have had the unfortunate result of greatly increasing the interstate market in child pornography.

(D) Intrastate incidents of production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the transfer of custody of children for the production of child pornography, have a substantial and direct effect upon interstate commerce because

(i) Some persons engaged in the production, transportation, distribution, receipt, advertising, and possession of child pornography conduct such activities entirely within the boundaries of one state. These persons are unlikely to be content with the amount of child pornography they produce, transport, distribute, receive, advertise, or possess. These persons are therefore likely to enter the interstate market in child pornography in search of additional child pornography, thereby stimulating demand in the interstate market in child pornography.

(ii) When the persons described in (D)(i) above enter the interstate market in search of additional child pornography, they are likely to distribute the child pornography they already produce, transport, distribute, receive, advertise, or possess to persons who will distribute additional child pornography to them, thereby stimulating supply in the interstate market in child pornography.

(iii)Much of the child pornography that supplies the interstate market in child pornography is produced entirely within the boundaries of one state, is not traceable, and enters the interstate market surreptitiously. This child pornography supports demand in the interstate market in child pornography and is essential to its existence.

(E) Prohibiting the intrastate production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the intrastate transfer of custody of children for the production of child pornography, will cause some persons engaged in such intrastate activities to cease all such activities, thereby reducing both supply and demand in the interstate market for child pornography.

(F) Federal control of the intrastate incidents of the production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the intrastate transfer of children for the production of child pornography, is essential to the effective control of the interstate market in child pornography.

(2) The importance of protecting children from repeat exploitation in child pornography

(A) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and related media.

(B) Child pornography is not entitled to protection under the First Amendment and thus may be prohibited.

(C) The government has a compelling state interest in protecting children from those who sexually exploit them, and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain.

(D) Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.

(E) Child pornography constitutes prima facie contraband, and as such should not be distributed to, or copied by, child pornography defendants or their attorneys.

(F) It is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims, so long as the government makes reasonable accommodations for the inspection, viewing, and examination of such material for the purposes of mounting a criminal defense.

SECTION 3. Strengthening Section 2257 to Ensure That Children Are Not Exploited in the Production of Pornography

(a) Section 2257 of Title 18 of the United States Code is amended –

(1) In subsection (a)(1), by deleting "actual";
(2) In subsection (b), by deleting "actual";
(3) In subsection (f)(4)(A), by deleting "actual";
(4) By rewriting subsection (h)(1) to read:
"the term "sexually explicit conduct" has the meaning set forth in subparagraphs (A)(i) through (v) of paragraph (2) of section 2256 of this title."; and
(5) In subsection (h)(4), by deleting "actual."

(b) Section 2257(f) of Title 18 of the United States Code is hereby amended,

(1) at the end of subsection (3), by deleting "and";
(2) at the end of subsection (4)(B), by deleting "." and by adding "; and" ; and
(3) by inserting after subsection (4)(B) the following new subsection:

"(5) for any person to whom subsection (a) applies to refuse to permit the Attorney General or his or her delegee to conduct an inspection under subsection (c)."

(c) Section 2257(h)(3) of Title 18 of the United States Code is hereby amended

(1) by deleting, after "the term *produces* means," the words, "to produce, manufacture, or publish any book, magazine, periodical, film, video tape, computer generated image, digital image, or picture, or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but 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";
(2) and by inserting, "actually filming, videotaping, photographing; creating a picture, digital image, or digitally- or computer-manipulated image of an ctual human being; or digitizing an image, of a visual depiction of sexually explicit conduct; or, assembling, manufacturing, publishing, duplicating, reproducing, or reissuing a book, magazine, periodical, film, videotape, digital image, or picture, or other matter intended for commercial distribution, that contains a visual depiction of sexually explicit conduct; or, inserting on a computer site or service a digital image of, or otherwise managing the sexually explicit content, of a computer site or service that contains a visual depiction of, sexually explicit conduct."

(d) Section 2257 of Title 18 of the United States Code is amended –

(1) In subsection (a), by inserting after "videotape," the following: "digital image, digitally- or computer-manipulated image of an actual human being, or picture,"; and
(2) In subsection (f)(4), by inserting after "video" the following: "digital image, digitally- or computer-manipulated image of an actual human being, or picture,".

SECTION 4: Prevention of Distribution of Child Pornography Used as Evidence in Prosecutions

(a) Section 3509 of Title 18 of the United States Code is amended by inserting at the end the following:

"(m) Prohibition on reproduction of child pornography
"(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) must remain in the care, custody, and control of either the Government or the court.

"(2) (A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.
(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial."

SECTION 5. Authorizing Civil and Criminal Asset Forfeiture in Child Exploitation and Obscenity Cases

(a) Conforming Forfeiture Procedures for Obscenity Offenses

Section 1467 of Title 18, United States Code, is amended

(1) in subsection (a)(3), by inserting a period after "of such offense" and striking all that follows;
(2) by striking subsections (b) through (n) and inserting the following:
"(b) The provisions of Section 413 of the Controlled Substance Act (21 U.S.C. § 853) with the exception of subsection (d), shall apply to the criminal forfeiture of property pursuant to subsection (a).
(c) Any property subject to forfeiture pursuant to subjection (a) may be forfeited to the United States in a civil case in accordance with the procedures set forth in Chapter 46 of this title."

(b) Amendments to Child Exploitation Forfeiture Provisions

(1) Criminal Forfeiture—Section 2253(a) of Title 18, United States Code, is amended –
(A) In the matter preceding paragraph (1) by—
(i) Inserting "or who is convicted of an offense under sections 2252B or 2257 of this chapter," after "2260 of this chapter";
(ii) Inserting ", or 2425" after "2423" and deleting "or" before "2423";
(iii) Inserting "or an offense under chapter 109A" after "of chapter 117"; and
(B) In paragraph (1), by inserting ", 2252A, 2252B or 2257" after "2252".
(2) Civil Forfeiture—Section 2254(a) of Title 18, United States Code, is amended—
(A) In paragraph (1), by inserting ", 2252A, 2252B, or 2257" after "2252";

(B) In paragraph (2)—
(i) by deleting the word "or" and inserting the word "of" before "Chapter 117";
(ii) by inserting ", or an offense under Sections 2252B or 2257 of this chapter," after "Chapter 117," and
(iii)by inserting ", or an offense under chapter 109A" before the period; and
(C) In paragraph (3) by
(i) inserting ", or 2425" after "2423" and deleting "or" before "2423.
(ii) inserting ", a violation of section 2252B or 2257 of this chapter, or a violation of chapter 109A" before the period.

(c) Amendments to RICO

Section 1961(1)(B) of Title 18, United States Code, is amended by inserting "2252A, 2252B," after "2252."

SECTION 6: Enhancing Administrative Subpoena Power to Cover Obscenity

(a) Section 3486(A)(1) of title 18, United States Code, is amended,

(1) in subparagraph (A)(i), by striking "children," and inserting "children; or (III) a Federal offense involving the distribution of obscenity,"; and
(2) by inserting after subparagraph (D) the following:

(E) As used in this paragraph, the term "Federal offense involving the distribution of obscenity" means an offense under section 1460, 1461, 1462, 1465, 1466, 1468, or 1470."

SECTION 7: Prohibiting the Production of Obscenity as Well as Transportation, Distribution, and Sale

a) Section 1465 of Title 18 of the United States Code is amended, as follows:
(1) by adding "Production and" before "Transportation" in the heading of the section;
(2) by inserting "produces with the intent to transport, distribute, or transmit in interstate or foreign commerce, or whoever knowingly" after "whoever knowingly" and before "transports or travels in"; and
(3) by inserting a comma after "in or affecting such commerce," and before "for the purpose of sale or distribution..."

b) Section 1466 of Title 18 of the United States Code is amended, as follows:
(1) in paragraph (a), by inserting "producing with intent to distribute or sell, or" before "selling or transferring obscene matter,"
(2) in paragraph (b), by inserting, "produces" before "sells or transfers or offers to sell or transfer obscene matter"

(3) in paragraph (b) by inserting "production," before "selling or transferring or offering to sell or transfer such material."

Section-by-Section Analysis

Section 2: Findings

The findings section of the bill provides support for two important improvements in the laws protecting children from being exploited in child pornography.

Section 2(a)(1) contains findings that create an interstate commerce nexus in child pornography cases in order to counter the holdings of several courts that have found an insufficient nexus. For example, in *United States v. Corp*, 236 F.3d 325 (6th Cir. 2001), *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003), and *United States v. Maxwell*, 386 F.3d 1042 (11th Cir. 2004), circuit courts found that there is no Commerce Clause jurisdiction over the possession of child pornography whose only federal nexus is that it was produced using materials that had traveled in interstate commerce (although other circuits, e.g., the Third, Fifth, and Seventh, have found jurisdiction). Assistant U.S. Attorneys in the Sixth, Ninth, and Eleventh Circuits are therefore avoiding bringing child pornography cases unless they can prove that the images themselves traveled in interstate commerce. Unfortunately, this proof is generally not obtained in routine child pornography cases because of the lack of forensic resources and training in the field.

Ensuring that the jurisdictional nexus for federal prosecution is established is particularly important in cases where the defendant himself produced the images and did not transport the images in interstate commerce, or where the defendant possessed images that federal prosecutors cannot prove traveled in interstate commerce. This occurs, for example, in the context of Polaroid/videotapes home-produced by defendant. In one case from the District of Kansas, the defendant had taken several hundred Polaroid pictures of child pornography. Federal prosecutors could not prove the images had traveled out of

his state -- indeed, the evidence was that the pictures were taken in his basement and bedroom. Only the jurisdictional nexus that possession of intrastate child pornography does have an impact on interstate commerce enabled the federal government to prosecute him for these pictures. If other courts were to follow the *Corp/McCoy/Maxwell* reasoning, the nexus would be eliminated.

The problem also occurs in the electronic context where images are stored either on a computer's hard drive, zip drive, CD/DVD, or disc, and federal prosecutors have no evidence as to when they were downloaded or otherwise obtained. If an offender has a disc with child pornography on it, but nothing on his computer showing that he downloaded those particular images from the Internet, federal jurisdiction can be difficult to establish. For example, in one case from Ohio, the defendant had child pornography images on a CD manufactured outside the defendant's state. The defendant's computers did not have child pornography on them, and federal prosecutors had no evidence showing where he obtained the images on the CD. Since the prosecution was in the Sixth Circuit, prosecutors had a *Corp* problem. Only when the federal government devoted significant investigative resources and (1) found where one of the pictures was taken, in Florida; (2) found a witness who could testify that she had seen the apartment where that picture was taken and that it was in Florida; and (3) showed the defense that it actually could produce the witness in court, did the defendant agree to plead guilty. If the jurisdictional nexus for possession of child pornography had not been eliminated by the Sixth Circuit, that prosecution would have proceeded much more quickly and would not have required such substantial resources.

The findings in Section 1, analogous to those found at 21 U.S.C. 801 concerning the effect on interstate commerce of the intrastate manufacture, distribution, and possession of controlled substances, clearly establish that the intrastate possession of child pornography has an effect on interstate commerce. The findings would therefore render courts less likely to follow *Corp, McCoy, and Maxwell.*

Section 2(a)(2) contains findings that support the statutory changes in Section 4 that protect victims of child pornography from being exploited again in the criminal justice system. As the findings state, children who have been exploited in child pornography are exploited again when a defendant, his attorneys, and expert witnesses are permitted to duplicate the images of child pornography as part of his defense. As explained in more detail below, this problem can be remedied by providing that the government allow access to the defendant, his attorneys, and expert witnesses to the material while such material is under its control or that of the court.

Section 3: Statutory Changes to Ensure Children Are Not Exploited in the Production of Pornography

In order to ensure that minors are not exploited in the production of pornography, 18 U.S.C. § 2257 requires certain producers of sexually explicit materials to keep records of the names, ages, and proof of identification of the individuals depicted in those materials and permits the Attorney General or his designee to inspect those records at all reasonable times. The provisions of Section 3 improve the regulatory scheme by adding to the types of depictions covered, imposing a criminal penalty for failing to allow an inspection, and clarifying who is covered by the inspection regime.

Section 3(a) includes simulated conduct and lascivious exhibition in sexually explicit depictions that are covered by the record-keeping and inspection provisions of Section 2257. Currently, section 2257 requires only producers of materials containing visual depictions of "*actual* sexually explicit conduct" to maintain records. *See* 18 U.S.C. § 2257(a)(1) (emphasis added). This limitation is in stark contrast to the statutory definition of "sexually explicit conduct," which includes "actual *or simulated*" conduct. *See* 18 U.S.C. § 2256(2). The legislative history of 18 U.S.C. § 2257 sheds little light on why Congress made this distinction. It is possible that Congress did not understand the meaning of "simulated" conduct, perhaps incorrectly interpreting it to mean that real people were not involved, and, therefore, no records were necessary. It is also possible that Congress was seeking to ensure that producers of mainstream, Hollywood films depicting this conduct in an "artistic" way would not be subject to prosecution. However, more insidious producers are also exempt. Currently, for example, a pornographer can film 16-year-old girls engaged in "soft-core" sex and not be subject to the record-keeping requirements. The material produced is legally child pornography, but because the pornographer is not required to maintain age records, he can claim that the girls are 18 or older, or, at least, he was not aware of the ages of the girls. In addition, protecting minors from such unlawful sexual exploitation is an important governmental interest that would be furthered by this amendment. An amendment to the statute, therefore, to require all producers of potential child pornography—whether depicting actual or simulated conduct—to keep age records for their performers, is an important and needed change.

In addition to limiting the underlying depictions to those of actual sexually explicit conduct, Section 2257 limits the definition of "sexually explicit conduct" to 18 U.S.C. § 2256(2)(A) through (D), leaving out subsection (E), *i.e.*, the "lascivious exhibition of the genitals or pubic area of any person," later recodified as 18 U.S.C. § 2256(A)(i)-(iv). The reason for excluding this type of depiction is also unclear, particularly because subsection (E) was included in the public law enacted by Congress. *See* Child Protection and Obscenity Enforcement Act of 1988, Pub. L. 100-690. The omission may even be the result of a codification error. In any event, the lascivious exhibition of the genitals of a minor constitutes child pornography. As with the concern about simulated conduct above, a pornographer can produce sexually explicit depictions of a minor in the form of nude photos and claim that the minor is over 18 or that, at the least, he was not aware of the minor's age. Likewise, protecting minors from such unlawful sexual exploitation is an important governmental interest that would be furthered by this amendment.

While it is true that these changes will mean that more mainstream producers—whose materials depict only simulated sex and/or nudity, rather than overt sexual acts—will have to keep records under Section 2257, eliminating them from the record-keeping requirement, as is now the case, raises serious child exploitation potential.

Section 3(b) improves the enforceability of Section 2257 inspections. Currently the inspection regime is weak because a producer can flatly refuse inspection without consequences. Specifically, while there is a criminal penalty for failure to maintain records under Section 2257, *see* 18 U.S.C. § 2257(f)(1), there is no criminal penalty for refusing to allow an inspection. By contrast, other inspection schemes rely on statutory

provisions that create criminal penalties for failure to permit inspection. For example, 18 U.S.C. § 924 makes it a crime to violate any provision of Gun Control Act, including the inspection provision. Because Section 2257 itself does not criminalize failure to allow entry, it would be difficult, if not impossible, to legitimately create criminal liability merely through promulgating a regulation. Thus, if the Department were now to try to execute a search of the records, pornographers could potentially refuse law enforcement entry to their premises with no legal repercussions. Resolution of this issue therefore requires an amendment to Section 2257 to create a criminal penalty for failure to permit inspection.[1]

Section 3(c) clarifies the definition of "produces" in Section 2257. Section 2257 requires that records of the names and ages of performers be kept by "whoever produces any book, magazine, periodical, film, videotape, or other matter" containing a visual depiction of actual sexually explicit conduct that was produced using material that traveled interstate commerce or is intended for shipment in interstate commerce. *See* 18 U.S.C. § 2257(a). "Produces," in turn, "means to produce, manufacture, or publish any book, magazine, periodical, film, video tape, computer-generated image, digital image, or picture, or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but 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." 18 U.S.C. § 2257(h)(3). Arguably, by its plain language,

[1] It is unclear to what extent a criminal penalty for refusal to permit an inspection can exist outside of a licensing scheme, such as gun or liquor licensing, in which the urgency of completing the inspection is an interest justifying a criminal penalty for refusing inspection. The 2257 record-keeping requirement does not involve licensing, arguably diminishing the urgency of the inspection and the justification for a criminal penalty for refusing it. Although, of course, protecting the minors from further exploitation is an urgent interest, nevertheless, some kind of inspection scheme is required to survive constitutional scrutiny. Such an inspection scheme is being prepared in conjunction with this proposal.

this definition suggests that unless one is involved in the hiring, contracting for, managing, or otherwise arranging for the participation of the performers, one cannot be a producer and, therefore, is not subject to the Section 2257 record-keeping requirements. Such an interpretation is consistent with the notion that those involved in hiring, managing, etc. work in closest proximity to the performers and therefore can be reasonably expected to verify their identification and age.

The existing regulations under Section 2257 attempt to eliminate this ambiguity in favor of the Government by separating those who produce into (1) "primary producers" and (2) "secondary producers" and defining them as (1) "any person who actually films, videotapes, or photographs a visual depiction of actual sexually explicit conduct" and (2) "any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, or other matter intended for commercial distribution that contains a visual depiction of actual sexually explicit conduct." Thus, the regulations suggest that a variety of persons involved in production can in fact fall under the statute even if they are not involved in hiring, managing, etc. The regulations exclude only those who are involved in mere distribution or technical processing of the images (e.g., photo processors).

This discrepancy between the statute and the regulation was squarely addressed in *Sundance Assoc., Inc. v. Reno*, 139 F.3d 804 (10th Cir. 1998), where the Tenth Circuit held that the regulation impermissibly "fail[ed] to exclude persons from the class that the statute requires," and that "the practical effect of the regulatory scheme is that the exclusion cannot be applied to anyone." The court characterized as "tortured" the

government's argument that Section 2257(h)(3)'s second clause was actually intended to broaden the scope of "produces" to include activities that involve hiring, managing, etc.

In view of this Tenth Circuit decision, there is a real possibility that the same—or even a larger—portion of the regulations will be struck down. Such a possibility is of particular concern in the realm of Internet pornography, where it is difficult to determine from the face of a website whether the website owner is involved directly with the performers, and where it is easy to distance oneself from the performers by receiving images from unknown sources and thereby having no involvement with hiring, managing, etc. Even for brick-and-mortar businesses, the Tenth Circuit's interpretation opens the door for straw-man arrangements involving multiple tiers of companies, so that the ultimate publisher has no direct involvement with the performer.

In order to prevent such circumvention, the statute should be amended to reflect the exact language of the regulation's definition, including the regulatory language with which the Tenth Circuit took issue.

Section 3(d) makes several technical corrections to the statute. The definition section of 18 U.S.C. § 2257(h)(3) was recently amended so that "the term 'produces' means to produce, manufacture, or publish any book magazine, periodical, film, video tape, *computer-generated image, digital image, or picture*, or other similar matter...." (emphasis added). This amendment modernized the definition of producer to reflect evolving technology. The offense conduct, however, while inherently dependent on the definition of "produces," still pertains to "Whoever produces any book, magazine, periodical, film, videotape, or other matter...." 18 U.S.C. § 2257(a). Thus, the more expansive definition of "produces" is not reflected in the offense conduct language.

Given that the target of the recent amendment includes Internet websites, a statutory amendment could clarify that the offense conduct explicitly encompasses digital images in order to reduce any potential ambiguity that these producers are subject to Section 2257. The labeling requirement in subsection (f)(4) should be similarly amended for consistency. Section 2(d) fixes this discrepancy, using the same language as included in the new definition of "produces" above.

Section 4: Prevention of Distribution of Child Pornography Outside the Government's Direct Control

This section specifies that depictions of child pornography discovered by law enforcement must be maintained within the government's control at all times, in order to prevent courts from ordering the prosecution to distribute child pornography to the defense. Courts often require such distribution as part of the discovery process. For example, prosecutors are often directed to provide the defense a mirror image of the computer hard drive seized from a defendant, which mirror image necessarily contains the child pornography at issue in the case. In such circumstances, prosecutors' only recourse is to seek a protective order specifying the members of the defense team who have access to the child pornography, prohibiting the defense from further copying it, and requiring the defense to return it at the close of the case. Despite these conditions, the child pornography is still often distributed to persons outside the government's or court's control. Child pornography, however, exploits the child every time it is viewed outside the context of what is absolutely necessary for the prosecution. The changes in this section would prevent such repeated exploitation of the child victims while not depriving

defendants of their right to examine the material. The only limitation imposed is that the defense cannot remove the material from the government's or court's control.

Section 5. Authorizing Asset Forfeiture in Child Exploitation and Obscenity Cases

Section 5(a) contains amendments to the obscenity forfeiture provisions in 18 U.S.C. § 1467 to make the procedures for obscenity forfeitures the same as they are for most other crimes, and will make it unnecessary for Congress to make parallel conforming amendments each time a procedural change to criminal forfeiture procedures is adopted. The amendments also strike a provision that requires that the court ensure that the forfeiture is not grossly disproportional to the gravity of the underlying offense.

These changes would benefit prosecution by removing courts' current discretion to choose not to forfeit property used or intended to be used in the offense if courts feel the forfeiture somehow would be disproportionate. Obscenity offenders are primarily motivated by the prospect of financial gain. It would benefit law enforcement to increase the deterrent value of the forfeiture provision by making clearer that property used to commit the offense, not just the obscene material produced and the proceeds from its sale, is subject to forfeiture. Expanding the deterrent impact of forfeiture is particularly important in obscenity cases. As a practical matter, the federal government's obscenity enforcement efforts, in terms of numbers of investigations and prosecutions, will always be restricted by limited resources. Accordingly, the government must rely on maximizing the deterrent effect of the convictions it is able to obtain. Expanding forfeiture in obscenity cases is a critical part of increasing the deterrent effect of obscenity convictions. In fact, forfeiture may be the best means of deterring criminal

conduct in light of the relatively low sentences available—e.g., a five-year statutory maximum.

Section 5(b) adds new offenses to the list of those for which criminal and civil forfeiture are available under §§ 2253 and 2254, respectively. These offenses cover the Misleading Domain Names Act, part of the USA PATRIOT Act (§ 2252B), record-keeping of the ages of performers (§ 2257), and sexual abuse offenses against children (Chapter 109A). Forfeiture should be an option for these crimes because those who violate § 2252B (Truth in Domain Names) and § 2257 (pornography record-keeping) are normally motivated by financial gain, and child abuse offenses should be subject to forfeiture to increase the deterrent effect of federal law. Moreover, current provisions allow for forfeiture for violation of § 2252 (sexually explicit depictions of children), but not for violations of § 2252A (child pornography), which may simply be a drafting oversight in the code.

Section 5(c) adds child pornography (§ 2252A) and violations of the Misleading Domain Names Act (§ 2252B) as predicates for RICO and money laundering charges. As with forfeiture above, § 2252 violations (sexually explicit depictions of children) are currently included as predicates, but violations of § 2252A (child pornography) are not. Sections 2252 and 2252A are similar statutes, covering largely the same scope of criminal conduct involving child pornography. The difference is that § 2252, the older of the two sections, requires the government to prove that the image at issue depicts an actual minor; in contrast, § 2252A incorporates the definition of "child pornography" in § 2256, which includes images that are indistinguishable from those of real minors as well as images that have been modified to make it appear that an identifiable minor is engaged

in sexually explicit conduct. The exclusion of § 2252A appears, therefore, to be a simple oversight that this section would remedy.

Section 2252B should be added as a RICO and money laundering predicate because Misleading Domain Names Act violations are motivated by financial gain. *United States v. Zuccarini*, a case prosecuted in the Southern District of New York, demonstrates why such an addition is appropriate. Zuccarini obtained as much as $1 million per year from registering and using misleading domain names that directed Internet users to websites that advertised for, among other things, pornography. Specifically, Zuccarini pled guilty to registering and using domain names that consisted of close misspellings of legitimate domain names. Furthermore, Zuccarini admitted that many of the domain names he registered were misspellings or variations of websites associated with entertainers, celebrities, and cartoon characters that are popular with young children. For example, Zuccarini registered the domain names www.bobthebiulder.com and www.teltubbies.com, which are, respectively, misspellings of the websites for the children's television programs "Bob the Builder" and "Teletubbies." Investigation by the United States Postal Inspection Service revealed that if a person were inadvertently to access www.bobthebiulder.com or www.teltubbies.com, the person would be presented with numerous images of hard-core pornography, such as explicit photographs of young people engaging in sexual intercourse. Zuccarini registered at least 3,000 such misleading domain names. Following his plea, Zuccarini was sentenced to 30 months imprisonment and three years of supervised release. Because of the nature of this crime, and the fact that it is done for financial gain, it is

appropriate for criminal conduct such as Zuccarini's to be a RICO and money laundering predicate.

Section 6. Enhancing Administrative Subpoena Power to Cover Obscenity Cases

Administrative subpoena power is currently available under 18 U.S.C. § 3486 for investigations of child pornography, sexual abuse of children, kidnapping of children, and transportation of minors across state lines for prostitution. This power enables executive branch agencies to issue compulsory requests for documents without prior approval from a grand jury, court, or other judicial body. This section adds subpoena power for investigation of obscenity offenses in order to expedite requests for information from Internet Service Providers (ISPs). In child exploitation investigations, federal prosecutors can quickly obtain key information allowing them to identify and locate online offenders from ISPs through the use of administrative subpoenas. In contrast, in order to obtain similar information in obscenity investigations, prosecutors must first open a grand jury investigation and then use grand jury subpoenas. ISPs, which are currently not covered by record-retention requirements, generally maintain records of users' activities for short periods of time, sometimes as little as two days. Grand jury subpoenas, however, can take up to a week or more to obtain. Administrative subpoena power, then, would enable prosecutors to secure fleeting electronic evidence in Internet-based obscenity cases.[2] Given that most of the obscenity investigations involve the Internet, and the information prosecutors seek is highly perishable, the inherent delay in obtaining grand jury subpoenas seriously complicates investigations and drains our limited resources. Investigations would be more timely, and therefore more efficient and

[2] Preservation orders served pursuant to 18 U.S.C. § 2703(f) are limited in effectiveness because they cover only one ISP at a time, and ISPs that are located as a result of that preservation order must be subpoenaed, leading to the delay noted in the text above.

productive, if prosecutors could use administrative subpoenas in obscenity investigations as it does in child exploitation investigations.

Section 7. Prohibiting the Production of Obscenity as Well as Transportation, Distribution, and Sale.

Section 7 criminalizes the production of obscenity as well as its transportation, distribution, and sale, so long as the producer has the intent to transport, distribute, or sell the material in interstate or foreign commerce. This would add to prosecutorial tools to investigate and bring charges against obscenity producers because it attacks the source of the problem. Current law, based on transportation and distribution offenses (including engaging in the business of selling obscene matter and possessing such matter with intent to distribute it), merely controls the spread of obscene material; it does not prohibit its creation. Accordingly, current law does not allow the federal government to attack obscene material at every step in the chain leading to its dissemination into society, but rather allows the government to attack it once it has been (or is about to be) distributed. This proposal would fix this limitation.

Although, under *Stanley v. Georgia* the government cannot criminalize mere possession of adult obscenity in the privacy of one's own home, the federal government's position is that there is no implicit corresponding right to produce it for distribution. Further, the prohibition in this provision does not apply to all production, but only that done with the intent to transport the obscene material in interstate or foreign commerce or to distribute it, or that done by those in the business of selling obscene material. Thus, the provision is not inconsistent with *Stanley* because the

prohibition is inextricably intertwined with the concept of distribution or transportation of obscene material, which enjoys no constitutional protection.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 29, 2005

The Honorable Richard B. Cheney
President
United States Senate
Washington, D.C. 20510

Dear Mr. President:

I am transmitting herewith a legislative proposal entitled the "Child Pornography Prevention and Obscenity Prosecution Act of 2005." Attorney General Alberto R. Gonzales considers the prevention of child pornography and the prosecution of obscenity to be priorities in his leadership of the Department of Justice. The following sections of this letter describe the proposed bill's provisions.

Findings to Support Prosecution and Protect Children

Section 2, the bill's findings section, provides support for two important improvements in the laws protecting children from exploitation through child pornography. First, it contains findings that create a stronger interstate commerce nexus in child pornography cases. Several federal appeals courts have found an insufficient nexus to create federal prosecutorial jurisdiction in the current statute, which establishes jurisdiction only when the pornographic material used to produce the images traveled in interstate commerce. Investigators and prosecutors often have difficulty proving that the images did travel in interstate commerce. In addition, in many cases the defendant personally produced the images and did not transport them in interstate commerce, for example, in the context of Polaroid/videotapes home-produced by the defendant. The findings therefore clearly establish that the intrastate possession of child pornography has an effect on interstate commerce because of its effect in stimulating demand and creating potential supply for the interstate child pornography "market."

Second, the section contains findings supporting the statutory changes, detailed later in the legislative package, that protect victims of child pornography from being further victimized by the criminal justice system. The findings state that children who have been exploited in child pornography are exploited again when a defendant, his attorneys, and expert witnesses are permitted to duplicate the images of child pornography as part of the defense. This problem can be remedied by providing that the government allow the defendant, his attorneys, and expert witnesses access to the material only while such material is under its control or that of the court.

Ensuring Children Are Not Exploited in the Production of Pornography

In order to ensure that minors are not exploited in the production of pornography, 18 U.S.C. § 2257 requires certain producers of sexually explicit materials to keep records of the names, ages, and proof of identification of the individuals depicted in those materials and permits the Attorney General or his designee to inspect those records at all reasonable times. Section 3 of this proposed bill improves the regulatory scheme by adding to the types of depictions covered, imposing a criminal penalty for failing to allow an inspection, and clarifying who is covered by the inspection regime.

The section adds simulated sexual conduct and lascivious exhibition in sexually explicit depictions to those activities that are covered by the record-keeping and inspection provisions of Section 2257. Currently, section 2257 requires only producers of materials containing visual depictions of "*actual* sexually explicit conduct" to maintain records. Simulated conduct (i.e., conduct that gives the impression of sexual activity without showing the ultimate sexual act) involving children is illegal, and producers of such simulated pornography should be required to comply with Section 2257 in order to prevent exploitation of children. Currently, for example, a pornographer can film 16-year-old girls engaged in "soft-core" sex and not be subject to the record-keeping requirements. The material produced is legally child pornography, but because the pornographer is not required to maintain age records, he can claim that the girls are 18 or older or that he was not aware of the girls' ages. Similarly, the lascivious exhibition of the genitals of a minor constitutes child pornography. The current statute does not require records for depictions of lascivious exhibition, however, which appears to be a drafting error. As with the concern about simulated conduct above, a pornographer can produce sexually explicit depictions of a minor in the form of nude photos and claim that the minor is over 18 or that he was not aware of the minor's age.

This section of the bill also improves the enforceability of Section 2257 inspections. Currently the inspection regime is weak because a producer can flatly refuse inspection without consequences. Specifically, while there is a criminal penalty for failure to maintain records under Section 2257, *see* 18 U.S.C. § 2257(f)(1), there is no criminal penalty for refusing to allow an inspection.

This section also clarifies the definition of "produces" in Section 2257. Section 2257 requires that records of the names and ages of performers be kept by "whoever produces any book, magazine, periodical, film, videotape, or other matter" containing a visual depiction of actual sexually explicit conduct that was produced using material that traveled in interstate commerce or is intended for shipment in interstate commerce. "Produces," in turn, "means to produce, manufacture, or publish any book, magazine, periodical, film, video tape, computer-generated image, digital image, or picture, or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but 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."

Last year the Department published a proposed rule and recently it published a final rule that defines "producers" to include those who photograph or publish sexually explicit depictions, even if they are not directly involved in the hiring, contracting for, managing or otherwise arranging for the participation of the depicted performers. The Department believes that Congress did not intend to exclude from the record-keeping requirements those who publish sexually explicit depictions (such as the producers of magazines and films referenced in the statute) but have no direct relationship with the performers. However, a statutory change to clarify Congress' intent would be helpful, as the Department prepares to enforce the regulation.

The bill also contains several technical changes to update the statute to account for changes in technology, such as the use of the Internet to distribute pornography.

Prevention of Distribution of Child Pornography Outside the Government's Direct Control

Section 4 of the bill specifies that depictions of child pornography discovered by law enforcement must be maintained within the government's or a court's control at all times, in order to prevent courts from ordering the prosecution to distribute child pornography to the defense. Courts often require such distribution as part of the discovery process. Despite restrictions on accessibility, the child pornography is still often distributed to persons outside the government's or court's control. The changes in this section would prevent such repeated exploitation of the child victims while not depriving defendants of their right to examine the material.

Authorizing Asset Forfeiture in Child Exploitation and Obscenity Cases

Section 5 of the bill contains amendments to the obscenity forfeiture provisions in 18 U.S.C. § 1467 to make the procedures for obscenity forfeitures the same as they are for most other crimes, and will make it unnecessary for Congress to make parallel conforming amendments each time a procedural change to criminal forfeiture procedures is adopted. The amendments also strike a provision requiring the court to ensure that the forfeiture is not grossly disproportional to the gravity of the underlying offense.

These changes would benefit prosecution by removing courts' current discretion to choose not to forfeit property used or intended to be used in the offense if courts feel the forfeiture somehow would be disproportionate. Obscenity offenders are primarily motivated by the prospect of financial gain. It would benefit law enforcement to increase the deterrent value of the forfeiture provision by making clearer that property used to commit the offense, not just the obscene material produced and the proceeds from its sale, is subject to forfeiture.

This section also adds new offenses to the list of those for which criminal and civil forfeiture are available under §§ 2253 and 2254, respectively. These offenses cover the Misleading Domain Names Act, § 2252B, part of the PROTECT Act, record-keeping of the ages of performers, § 2257, and sexual abuse offenses against children, Chapter 109A. Forfeiture should be an option for these crimes because those who violate § 2252B and § 2257 are normally motivated by financial gain, and child abuse offenses should be subject to forfeiture to increase the deterrent effect of federal law. Moreover, current provisions allow for forfeiture for producing sexually explicit depictions of children, § 2252, but not for producing child pornography, § 2252A, which may simply be a drafting oversight.

Similarly, the section adds violation of § 2252A and § 2252B as predicates for RICO and money laundering charges. As with forfeiture above, § 2252 violations are currently included as predicates, but violations of § 2252A are not, while violation of § 2252B should be added because monetary gain is the motivating factor in the creation of misleading domain names.

Enhancing Administrative Subpoena Power to Cover Obscenity Cases

Section 6 of the bill adds administrative subpoena power for investigation of obscenity offenses in order to expedite requests for information from Internet Service Providers (ISPs). In child exploitation investigations, federal prosecutors can quickly obtain key information allowing them to identify and locate online offenders from ISPs through the use of administrative subpoenas. In contrast, in order to obtain similar information in obscenity investigations, prosecutors must first open a grand jury investigation and then use grand jury subpoenas. ISPs, which are currently not covered by record-retention requirements, generally maintain records of users' activities for short periods of time, sometimes as little as two days. Grand jury subpoenas, however, can take up to a week or more to obtain. Administrative subpoena power, then, would enable prosecutors to secure fleeting electronic evidence in Internet-based obscenity cases.

Prohibiting the Production, Transportation, and Sale of Obscenity

Section 7 of the bill criminalizes the production of obscenity as well as its transportation, distribution, and sale, so long as the producer has the *intent* to transport, distribute, or sell the material in interstate or foreign commerce. This would add to prosecutorial tools to investigate and bring charges against obscenity producers because it attacks the source of the problem. Current law, based on transportation and distribution offenses (including engaging in the business of selling obscene matter and possessing such matter with intent to distribute it), merely controls the spread of obscene material; it does not prohibit its creation. Accordingly, current law does not allow the federal government to attack obscene material at every step in the chain leading to its dissemination into society, but rather allows the government to attack it once it has been (or is about to be) distributed. This proposal would fix this limitation.

Thank you for the opportunity to present our views on this legislative package. A more detailed section-by-section analysis is also attached. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella
Assistant Attorney General

Attachment

IDENTICAL LETTER SENT TO THE HONORABLE J. DENNIS HASTERT, SPEAKER OF THE HOUSE OF REPRESENTATIVES

Legislative Proposal on Child Pornography and Obscenity

Bill Text

A bill to enhance prosecution of child pornography and obscenity by strengthening Section 2257 of the U.S. Code to ensure that children are not exploited in the production of pornography, prohibiting distribution of child pornography used as evidence in prosecutions, authorizing asset forfeiture in child pornography and obscenity cases, expanding administrative subpoena power to cover obscenity cases; and prohibiting the production of obscenity, as well as its transportation, distribution, and sale.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE- This Act may be cited as the "Child Pornography Prevention and Obscenity Prosecution Act of 2005."

(b) TABLE OF CONTENTS- The table of contents for this Act is as follows:

SECTION 2. Findings.

(a) Congress makes the following findings:

(1) The effect of the intrastate production, transportation, distribution, receipt, advertising, and possession of child pornography on interstate market in child pornography

(A) The illegal production, transportation, distribution, receipt, advertising and possession of child pornography, as defined in 18 U.S.C. § 2256(8), as well as the transfer of custody of children for the production of child pornography, is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole.

(B) A substantial interstate market in child pornography exists, including not only a multi-million dollar industry, but also a nationwide network of

individuals openly advertising their desire to exploit children and to traffic in child pornography. Many of these individuals distribute child pornography with the expectation of receiving other child pornography in return.

(C) The interstate market in child pornography is carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce, such as the Internet. The advent of the Internet has greatly increased the ease of transporting, distributing, receiving, and advertising child pornography in interstate commerce. The advent of digital cameras and digital video cameras, as well as videotape cameras, has greatly increased the ease of producing child pornography. The advent of inexpensive computer equipment with the capacity to store large numbers of digital images of child pornography has greatly increased the ease of possessing child pornography. Taken together, these technological advances have had the unfortunate result of greatly increasing the interstate market in child pornography.

(D) Intrastate incidents of production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the transfer of custody of children for the production of child pornography, have a substantial and direct effect upon interstate commerce because

(i) Some persons engaged in the production, transportation, distribution, receipt, advertising, and possession of child pornography conduct such activities entirely within the boundaries of one state. These persons are unlikely to be content with the amount of child pornography they produce, transport, distribute, receive, advertise, or possess. These persons are therefore likely to enter the interstate market in child pornography in search of additional child pornography, thereby stimulating demand in the interstate market in child pornography.

(ii) When the persons described in (D)(i) above enter the interstate market in search of additional child pornography, they are likely to distribute the child pornography they already produce, transport, distribute, receive, advertise, or possess to persons who will distribute additional child pornography to them, thereby stimulating supply in the interstate market in child pornography.

(iii) Much of the child pornography that supplies the interstate market in child pornography is produced entirely within the boundaries of one state, is not traceable, and enters the interstate market surreptitiously. This child pornography supports demand in the interstate market in child pornography and is essential to its existence.

(E) Prohibiting the intrastate production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the intrastate transfer of custody of children for the production of child pornography, will cause some persons engaged in such intrastate activities to cease all such activities, thereby reducing both supply and demand in the interstate market for child pornography.

(F) Federal control of the intrastate incidents of the production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the intrastate transfer of children for the production of child pornography, is essential to the effective control of the interstate market in child pornography.

(2) The importance of protecting children from repeat exploitation in child pornography

(A) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and related media.

(B) Child pornography is not entitled to protection under the First Amendment and thus may be prohibited.

(C) The government has a compelling state interest in protecting children from those who sexually exploit them, and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain.

(D) Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.

(E) Child pornography constitutes prima facie contraband, and as such should not be distributed to, or copied by, child pornography defendants or their attorneys.

(F) It is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims, so long as the government makes reasonable accommodations for the inspection, viewing, and examination of such material for the purposes of mounting a criminal defense.

SECTION 3. Strengthening Section 2257 to Ensure That Children Are Not Exploited in the Production of Pornography

(a) Section 2257 of Title 18 of the United States Code is amended –

(1) In subsection (a)(1), by deleting "actual";
(2) In subsection (b), by deleting "actual";
(3) In subsection (f)(4)(A), by deleting "actual";
(4) By rewriting subsection (h)(1) to read:
"the term "sexually explicit conduct" has the meaning set forth in subparagraphs (A)(i) through (v) of paragraph (2) of section 2256 of this title."; and
(5) In subsection (h)(4), by deleting "actual."

(b) Section 2257(f) of Title 18 of the United States Code is hereby amended,

(1) at the end of subsection (3), by deleting "and";
(2) at the end of subsection (4)(B), by deleting "." and by adding "; and" ; and
(3) by inserting after subsection (4)(B) the following new subsection:

"(5) for any person to whom subsection (a) applies to refuse to permit the Attorney General or his or her delegee to conduct an inspection under subsection (c)."

(c) Section 2257(h)(3) of Title 18 of the United States Code is hereby amended

(1) by deleting, after "the term *produces* means," the words, "to produce, manufacture, or publish any book, magazine, periodical, film, video tape, computer generated image, digital image, or picture, or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but 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";
(2) and by inserting, "actually filming, videotaping, photographing; creating a picture, digital image, or digitally- or computer-manipulated image of an ctual human being; or digitizing an image, of a visual depiction of sexually explicit conduct; or, assembling, manufacturing, publishing, duplicating, reproducing, or reissuing a book, magazine, periodical, film, videotape, digital image, or picture, or other matter intended for commercial distribution, that contains a visual depiction of sexually explicit conduct; or, inserting on a computer site or service a digital image of, or otherwise managing the sexually explicit content, of a computer site or service that contains a visual depiction of, sexually explicit conduct."

(d) Section 2257 of Title 18 of the United States Code is amended –

(1) In subsection (a), by inserting after "videotape," the following: "digital image, digitally- or computer-manipulated image of an actual human being, or picture,"; and
(2) In subsection (f)(4), by inserting after "video" the following: "digital image, digitally- or computer-manipulated image of an actual human being, or picture,".

SECTION 4: Prevention of Distribution of Child Pornography Used as Evidence in Prosecutions

(a) Section 3509 of Title 18 of the United States Code is amended by inserting at the end the following:

"(m) Prohibition on reproduction of child pornography
"(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) must remain in the care, custody, and control of either the Government or the court.

"(2) (A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.
(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial."

SECTION 5. Authorizing Civil and Criminal Asset Forfeiture in Child Exploitation and Obscenity Cases

(a) Conforming Forfeiture Procedures for Obscenity Offenses

Section 1467 of Title 18, United States Code, is amended

(1) in subsection (a)(3), by inserting a period after "of such offense" and striking all that follows;
(2) by striking subsections (b) through (n) and inserting the following:
"(b) The provisions of Section 413 of the Controlled Substance Act (21 U.S.C. § 853) with the exception of subsection (d), shall apply to the criminal forfeiture of property pursuant to subsection (a).
(c) Any property subject to forfeiture pursuant to subjection (a) may be forfeited to the United States in a civil case in accordance with the procedures set forth in Chapter 46 of this title."

(b) Amendments to Child Exploitation Forfeiture Provisions

(1) Criminal Forfeiture—Section 2253(a) of Title 18, United States Code, is amended –
(A) In the matter preceding paragraph (1) by—
(i) Inserting "or who is convicted of an offense under sections 2252B or 2257 of this chapter," after "2260 of this chapter";
(ii) Inserting ", or 2425" after "2423" and deleting "or" before "2423";
(iii) Inserting "or an offense under chapter 109A" after "of chapter 117"; and
(B) In paragraph (1), by inserting ", 2252A, 2252B or 2257" after "2252".
(2) Civil Forfeiture—Section 2254(a) of Title 18, United States Code, is amended—
(A) In paragraph (1), by inserting ", 2252A, 2252B, or 2257" after "2252";

(B) In paragraph (2)—
(i) by deleting the word "or" and inserting the word "of" before "Chapter 117";
(ii) by inserting ", or an offense under Sections 2252B or 2257 of this chapter," after "Chapter 117," and
(iii)by inserting ", or an offense under chapter 109A" before the period; and
(C) In paragraph (3) by
(i) inserting ", or 2425" after "2423" and deleting "or" before "2423.
(ii) inserting ", a violation of section 2252B or 2257 of this chapter, or a violation of chapter 109A" before the period.

(c) Amendments to RICO

Section 1961(1)(B) of Title 18, United States Code, is amended by inserting "2252A, 2252B," after "2252."

SECTION 6: Enhancing Administrative Subpoena Power to Cover Obscenity

(a) Section 3486(A)(1) of title 18, United States Code, is amended,

(1) in subparagraph (A)(i), by striking "children," and inserting "children; or (III) a Federal offense involving the distribution of obscenity,"; and
(2) by inserting after subparagraph (D) the following:

(E) As used in this paragraph, the term "Federal offense involving the distribution of obscenity" means an offense under section 1460, 1461, 1462, 1465, 1466, 1468, or 1470."

SECTION 7: Prohibiting the Production of Obscenity as Well as Transportation, Distribution, and Sale

a) Section 1465 of Title 18 of the United States Code is amended, as follows:
(1) by adding "Production and" before "Transportation" in the heading of the section;
(2) by inserting "produces with the intent to transport, distribute, or transmit in interstate or foreign commerce, or whoever knowingly" after "whoever knowingly" and before "transports or travels in"; and
(3) by inserting a comma after "in or affecting such commerce," and before "for the purpose of sale or distribution..."

b) Section 1466 of Title 18 of the United States Code is amended, as follows:
(1) in paragraph (a), by inserting "producing with intent to distribute or sell, or" before "selling or transferring obscene matter,"
(2) in paragraph (b), by inserting, "produces" before "sells or transfers or offers to sell or transfer obscene matter"

(3) in paragraph (b) by inserting "production," before "selling or transferring or offering to sell or transfer such material."

Section-by-Section Analysis

Section 2: Findings

The findings section of the bill provides support for two important improvements in the laws protecting children from being exploited in child pornography.

Section 2(a)(1) contains findings that create an interstate commerce nexus in child pornography cases in order to counter the holdings of several courts that have found an insufficient nexus. For example, in *United States v. Corp*, 236 F.3d 325 (6th Cir. 2001), *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003), and *United States v. Maxwell*, 386 F.3d 1042 (11th Cir. 2004), circuit courts found that there is no Commerce Clause jurisdiction over the possession of child pornography whose only federal nexus is that it was produced using materials that had traveled in interstate commerce (although other circuits, e.g., the Third, Fifth, and Seventh, have found jurisdiction). Assistant U.S. Attorneys in the Sixth, Ninth, and Eleventh Circuits are therefore avoiding bringing child pornography cases unless they can prove that the images themselves traveled in interstate commerce. Unfortunately, this proof is generally not obtained in routine child pornography cases because of the lack of forensic resources and training in the field.

Ensuring that the jurisdictional nexus for federal prosecution is established is particularly important in cases where the defendant himself produced the images and did not transport the images in interstate commerce, or where the defendant possessed images that federal prosecutors cannot prove traveled in interstate commerce. This occurs, for example, in the context of Polaroid/videotapes home-produced by defendant. In one case from the District of Kansas, the defendant had taken several hundred Polaroid pictures of child pornography. Federal prosecutors could not prove the images had traveled out of

his state -- indeed, the evidence was that the pictures were taken in his basement and bedroom. Only the jurisdictional nexus that possession of intrastate child pornography does have an impact on interstate commerce enabled the federal government to prosecute him for these pictures. If other courts were to follow the *Corp/McCoy/Maxwell* reasoning, the nexus would be eliminated.

The problem also occurs in the electronic context where images are stored either on a computer's hard drive, zip drive, CD/DVD, or disc, and federal prosecutors have no evidence as to when they were downloaded or otherwise obtained. If an offender has a disc with child pornography on it, but nothing on his computer showing that he downloaded those particular images from the Internet, federal jurisdiction can be difficult to establish. For example, in one case from Ohio, the defendant had child pornography images on a CD manufactured outside the defendant's state. The defendant's computers did not have child pornography on them, and federal prosecutors had no evidence showing where he obtained the images on the CD. Since the prosecution was in the Sixth Circuit, prosecutors had a *Corp* problem. Only when the federal government devoted significant investigative resources and (1) found where one of the pictures was taken, in Florida; (2) found a witness who could testify that she had seen the apartment where that picture was taken and that it was in Florida; and (3) showed the defense that it actually could produce the witness in court, did the defendant agree to plead guilty. If the jurisdictional nexus for possession of child pornography had not been eliminated by the Sixth Circuit, that prosecution would have proceeded much more quickly and would not have required such substantial resources.

The findings in Section 1, analogous to those found at 21 U.S.C. 801 concerning the effect on interstate commerce of the intrastate manufacture, distribution, and possession of controlled substances, clearly establish that the intrastate possession of child pornography has an effect on interstate commerce. The findings would therefore render courts less likely to follow *Corp, McCoy, and Maxwell.*

Section 2(a)(2) contains findings that support the statutory changes in Section 4 that protect victims of child pornography from being exploited again in the criminal justice system. As the findings state, children who have been exploited in child pornography are exploited again when a defendant, his attorneys, and expert witnesses are permitted to duplicate the images of child pornography as part of his defense. As explained in more detail below, this problem can be remedied by providing that the government allow access to the defendant, his attorneys, and expert witnesses to the material while such material is under its control or that of the court.

Section 3: Statutory Changes to Ensure Children Are Not Exploited in the Production of Pornography

In order to ensure that minors are not exploited in the production of pornography, 18 U.S.C. § 2257 requires certain producers of sexually explicit materials to keep records of the names, ages, and proof of identification of the individuals depicted in those materials and permits the Attorney General or his designee to inspect those records at all reasonable times. The provisions of Section 3 improve the regulatory scheme by adding to the types of depictions covered, imposing a criminal penalty for failing to allow an inspection, and clarifying who is covered by the inspection regime.

Section 3(a) includes simulated conduct and lascivious exhibition in sexually explicit depictions that are covered by the record-keeping and inspection provisions of Section 2257. Currently, section 2257 requires only producers of materials containing visual depictions of "*actual* sexually explicit conduct" to maintain records. *See* 18 U.S.C. § 2257(a)(1) (emphasis added). This limitation is in stark contrast to the statutory definition of "sexually explicit conduct," which includes "actual *or simulated*" conduct. *See* 18 U.S.C. § 2256(2). The legislative history of 18 U.S.C. § 2257 sheds little light on why Congress made this distinction. It is possible that Congress did not understand the meaning of "simulated" conduct, perhaps incorrectly interpreting it to mean that real people were not involved, and, therefore, no records were necessary. It is also possible that Congress was seeking to ensure that producers of mainstream, Hollywood films depicting this conduct in an "artistic" way would not be subject to prosecution. However, more insidious producers are also exempt. Currently, for example, a pornographer can film 16-year-old girls engaged in "soft-core" sex and not be subject to the record-keeping requirements. The material produced is legally child pornography, but because the pornographer is not required to maintain age records, he can claim that the girls are 18 or older, or, at least, he was not aware of the ages of the girls. In addition, protecting minors from such unlawful sexual exploitation is an important governmental interest that would be furthered by this amendment. An amendment to the statute, therefore, to require all producers of potential child pornography—whether depicting actual or simulated conduct—to keep age records for their performers, is an important and needed change.

In addition to limiting the underlying depictions to those of actual sexually explicit conduct, Section 2257 limits the definition of "sexually explicit conduct" to 18 U.S.C. § 2256(2)(A) through (D), leaving out subsection (E), *i.e.*, the "lascivious exhibition of the genitals or pubic area of any person," later recodified as 18 U.S.C. § 2256(A)(i)-(iv). The reason for excluding this type of depiction is also unclear, particularly because subsection (E) was included in the public law enacted by Congress. *See* Child Protection and Obscenity Enforcement Act of 1988, Pub. L. 100-690. The omission may even be the result of a codification error. In any event, the lascivious exhibition of the genitals of a minor constitutes child pornography. As with the concern about simulated conduct above, a pornographer can produce sexually explicit depictions of a minor in the form of nude photos and claim that the minor is over 18 or that, at the least, he was not aware of the minor's age. Likewise, protecting minors from such unlawful sexual exploitation is an important governmental interest that would be furthered by this amendment.

While it is true that these changes will mean that more mainstream producers—whose materials depict only simulated sex and/or nudity, rather than overt sexual acts—will have to keep records under Section 2257, eliminating them from the record-keeping requirement, as is now the case, raises serious child exploitation potential.

Section 3(b) improves the enforceability of Section 2257 inspections. Currently the inspection regime is weak because a producer can flatly refuse inspection without consequences. Specifically, while there is a criminal penalty for failure to maintain records under Section 2257, *see* 18 U.S.C. § 2257(f)(1), there is no criminal penalty for refusing to allow an inspection. By contrast, other inspection schemes rely on statutory

provisions that create criminal penalties for failure to permit inspection. For example, 18 U.S.C. § 924 makes it a crime to violate any provision of Gun Control Act, including the inspection provision. Because Section 2257 itself does not criminalize failure to allow entry, it would be difficult, if not impossible, to legitimately create criminal liability merely through promulgating a regulation. Thus, if the Department were now to try to execute a search of the records, pornographers could potentially refuse law enforcement entry to their premises with no legal repercussions. Resolution of this issue therefore requires an amendment to Section 2257 to create a criminal penalty for failure to permit inspection.[1]

Section 3(c) clarifies the definition of "produces" in Section 2257. Section 2257 requires that records of the names and ages of performers be kept by "whoever produces any book, magazine, periodical, film, videotape, or other matter" containing a visual depiction of actual sexually explicit conduct that was produced using material that traveled interstate commerce or is intended for shipment in interstate commerce. *See* 18 U.S.C. § 2257(a). "Produces," in turn, "means to produce, manufacture, or publish any book, magazine, periodical, film, video tape, computer-generated image, digital image, or picture, or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but 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." 18 U.S.C. § 2257(h)(3). Arguably, by its plain language,

[1] It is unclear to what extent a criminal penalty for refusal to permit an inspection can exist outside of a licensing scheme, such as gun or liquor licensing, in which the urgency of completing the inspection is an interest justifying a criminal penalty for refusing inspection. The 2257 record-keeping requirement does not involve licensing, arguably diminishing the urgency of the inspection and the justification for a criminal penalty for refusing it. Although, of course, protecting the minors from further exploitation is an urgent interest, nevertheless, some kind of inspection scheme is required to survive constitutional scrutiny. Such an inspection scheme is being prepared in conjunction with this proposal.

this definition suggests that unless one is involved in the hiring, contracting for, managing, or otherwise arranging for the participation of the performers, one cannot be a producer and, therefore, is not subject to the Section 2257 record-keeping requirements. Such an interpretation is consistent with the notion that those involved in hiring, managing, etc. work in closest proximity to the performers and therefore can be reasonably expected to verify their identification and age.

The existing regulations under Section 2257 attempt to eliminate this ambiguity in favor of the Government by separating those who produce into (1) "primary producers" and (2) "secondary producers" and defining them as (1) "any person who actually films, videotapes, or photographs a visual depiction of actual sexually explicit conduct" and (2) "any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, or other matter intended for commercial distribution that contains a visual depiction of actual sexually explicit conduct." Thus, the regulations suggest that a variety of persons involved in production can in fact fall under the statute even if they are not involved in hiring, managing, etc. The regulations exclude only those who are involved in mere distribution or technical processing of the images (e.g., photo processors).

This discrepancy between the statute and the regulation was squarely addressed in *Sundance Assoc., Inc. v. Reno*, 139 F.3d 804 (10th Cir. 1998), where the Tenth Circuit held that the regulation impermissibly "fail[ed] to exclude persons from the class that the statute requires," and that "the practical effect of the regulatory scheme is that the exclusion cannot be applied to anyone." The court characterized as "tortured" the

government's argument that Section 2257(h)(3)'s second clause was actually intended to broaden the scope of "produces" to include activities that involve hiring, managing, etc.

In view of this Tenth Circuit decision, there is a real possibility that the same—or even a larger—portion of the regulations will be struck down. Such a possibility is of particular concern in the realm of Internet pornography, where it is difficult to determine from the face of a website whether the website owner is involved directly with the performers, and where it is easy to distance oneself from the performers by receiving images from unknown sources and thereby having no involvement with hiring, managing, etc. Even for brick-and-mortar businesses, the Tenth Circuit's interpretation opens the door for straw-man arrangements involving multiple tiers of companies, so that the ultimate publisher has no direct involvement with the performer.

In order to prevent such circumvention, the statute should be amended to reflect the exact language of the regulation's definition, including the regulatory language with which the Tenth Circuit took issue.

Section 3(d) makes several technical corrections to the statute. The definition section of 18 U.S.C. § 2257(h)(3) was recently amended so that "the term 'produces' means to produce, manufacture, or publish any book magazine, periodical, film, video tape, *computer-generated image, digital image, or picture*, or other similar matter...." (emphasis added). This amendment modernized the definition of producer to reflect evolving technology. The offense conduct, however, while inherently dependent on the definition of "produces," still pertains to "Whoever produces any book, magazine, periodical, film, videotape, or other matter...." 18 U.S.C. § 2257(a). Thus, the more expansive definition of "produces" is not reflected in the offense conduct language.

Given that the target of the recent amendment includes Internet websites, a statutory amendment could clarify that the offense conduct explicitly encompasses digital images in order to reduce any potential ambiguity that these producers are subject to Section 2257. The labeling requirement in subsection (f)(4) should be similarly amended for consistency. Section 2(d) fixes this discrepancy, using the same language as included in the new definition of "produces" above.

Section 4: Prevention of Distribution of Child Pornography Outside the Government's Direct Control

This section specifies that depictions of child pornography discovered by law enforcement must be maintained within the government's control at all times, in order to prevent courts from ordering the prosecution to distribute child pornography to the defense. Courts often require such distribution as part of the discovery process. For example, prosecutors are often directed to provide the defense a mirror image of the computer hard drive seized from a defendant, which mirror image necessarily contains the child pornography at issue in the case. In such circumstances, prosecutors' only recourse is to seek a protective order specifying the members of the defense team who have access to the child pornography, prohibiting the defense from further copying it, and requiring the defense to return it at the close of the case. Despite these conditions, the child pornography is still often distributed to persons outside the government's or court's control. Child pornography, however, exploits the child every time it is viewed outside the context of what is absolutely necessary for the prosecution. The changes in this section would prevent such repeated exploitation of the child victims while not depriving

defendants of their right to examine the material. The only limitation imposed is that the defense cannot remove the material from the government's or court's control.

Section 5. Authorizing Asset Forfeiture in Child Exploitation and Obscenity Cases

Section 5(a) contains amendments to the obscenity forfeiture provisions in 18 U.S.C. § 1467 to make the procedures for obscenity forfeitures the same as they are for most other crimes, and will make it unnecessary for Congress to make parallel conforming amendments each time a procedural change to criminal forfeiture procedures is adopted. The amendments also strike a provision that requires that the court ensure that the forfeiture is not grossly disproportional to the gravity of the underlying offense.

These changes would benefit prosecution by removing courts' current discretion to choose not to forfeit property used or intended to be used in the offense if courts feel the forfeiture somehow would be disproportionate. Obscenity offenders are primarily motivated by the prospect of financial gain. It would benefit law enforcement to increase the deterrent value of the forfeiture provision by making clearer that property used to commit the offense, not just the obscene material produced and the proceeds from its sale, is subject to forfeiture. Expanding the deterrent impact of forfeiture is particularly important in obscenity cases. As a practical matter, the federal government's obscenity enforcement efforts, in terms of numbers of investigations and prosecutions, will always be restricted by limited resources. Accordingly, the government must rely on maximizing the deterrent effect of the convictions it is able to obtain. Expanding forfeiture in obscenity cases is a critical part of increasing the deterrent effect of obscenity convictions. In fact, forfeiture may be the best means of deterring criminal

conduct in light of the relatively low sentences available—e.g., a five-year statutory maximum.

Section 5(b) adds new offenses to the list of those for which criminal and civil forfeiture are available under §§ 2253 and 2254, respectively. These offenses cover the Misleading Domain Names Act, part of the USA PATRIOT Act (§ 2252B), record-keeping of the ages of performers (§ 2257), and sexual abuse offenses against children (Chapter 109A). Forfeiture should be an option for these crimes because those who violate § 2252B (Truth in Domain Names) and § 2257 (pornography record-keeping) are normally motivated by financial gain, and child abuse offenses should be subject to forfeiture to increase the deterrent effect of federal law. Moreover, current provisions allow for forfeiture for violation of § 2252 (sexually explicit depictions of children), but not for violations of § 2252A (child pornography), which may simply be a drafting oversight in the code.

Section 5(c) adds child pornography (§ 2252A) and violations of the Misleading Domain Names Act (§ 2252B) as predicates for RICO and money laundering charges. As with forfeiture above, § 2252 violations (sexually explicit depictions of children) are currently included as predicates, but violations of § 2252A (child pornography) are not. Sections 2252 and 2252A are similar statutes, covering largely the same scope of criminal conduct involving child pornography. The difference is that § 2252, the older of the two sections, requires the government to prove that the image at issue depicts an actual minor; in contrast, § 2252A incorporates the definition of "child pornography" in § 2256, which includes images that are indistinguishable from those of real minors as well as images that have been modified to make it appear that an identifiable minor is engaged

in sexually explicit conduct. The exclusion of § 2252A appears, therefore, to be a simple oversight that this section would remedy.

Section 2252B should be added as a RICO and money laundering predicate because Misleading Domain Names Act violations are motivated by financial gain. *United States v. Zuccarini*, a case prosecuted in the Southern District of New York, demonstrates why such an addition is appropriate. Zuccarini obtained as much as $1 million per year from registering and using misleading domain names that directed Internet users to websites that advertised for, among other things, pornography. Specifically, Zuccarini pled guilty to registering and using domain names that consisted of close misspellings of legitimate domain names. Furthermore, Zuccarini admitted that many of the domain names he registered were misspellings or variations of websites associated with entertainers, celebrities, and cartoon characters that are popular with young children. For example, Zuccarini registered the domain names www.bobthebiulder.com and www.teltubbies.com, which are, respectively, misspellings of the websites for the children's television programs "Bob the Builder" and "Teletubbies." Investigation by the United States Postal Inspection Service revealed that if a person were inadvertently to access www.bobthebiulder.com or www.teltubbies.com, the person would be presented with numerous images of hard-core pornography, such as explicit photographs of young people engaging in sexual intercourse. Zuccarini registered at least 3,000 such misleading domain names. Following his plea, Zuccarini was sentenced to 30 months imprisonment and three years of supervised release. Because of the nature of this crime, and the fact that it is done for financial gain, it is

appropriate for criminal conduct such as Zuccarini's to be a RICO and money laundering predicate.

Section 6. Enhancing Administrative Subpoena Power to Cover Obscenity Cases

Administrative subpoena power is currently available under 18 U.S.C. § 3486 for investigations of child pornography, sexual abuse of children, kidnapping of children, and transportation of minors across state lines for prostitution. This power enables executive branch agencies to issue compulsory requests for documents without prior approval from a grand jury, court, or other judicial body. This section adds subpoena power for investigation of obscenity offenses in order to expedite requests for information from Internet Service Providers (ISPs). In child exploitation investigations, federal prosecutors can quickly obtain key information allowing them to identify and locate online offenders from ISPs through the use of administrative subpoenas. In contrast, in order to obtain similar information in obscenity investigations, prosecutors must first open a grand jury investigation and then use grand jury subpoenas. ISPs, which are currently not covered by record-retention requirements, generally maintain records of users' activities for short periods of time, sometimes as little as two days. Grand jury subpoenas, however, can take up to a week or more to obtain. Administrative subpoena power, then, would enable prosecutors to secure fleeting electronic evidence in Internet-based obscenity cases.[2] Given that most of the obscenity investigations involve the Internet, and the information prosecutors seek is highly perishable, the inherent delay in obtaining grand jury subpoenas seriously complicates investigations and drains our limited resources. Investigations would be more timely, and therefore more efficient and

[2] Preservation orders served pursuant to 18 U.S.C. § 2703(f) are limited in effectiveness because they cover only one ISP at a time, and ISPs that are located as a result of that preservation order must be subpoenaed, leading to the delay noted in the text above.

productive, if prosecutors could use administrative subpoenas in obscenity investigations as it does in child exploitation investigations.

Section 7. Prohibiting the Production of Obscenity as Well as Transportation, Distribution, and Sale.

Section 7 criminalizes the production of obscenity as well as its transportation, distribution, and sale, so long as the producer has the intent to transport, distribute, or sell the material in interstate or foreign commerce. This would add to prosecutorial tools to investigate and bring charges against obscenity producers because it attacks the source of the problem. Current law, based on transportation and distribution offenses (including engaging in the business of selling obscene matter and possessing such matter with intent to distribute it), merely controls the spread of obscene material; it does not prohibit its creation. Accordingly, current law does not allow the federal government to attack obscene material at every step in the chain leading to its dissemination into society, but rather allows the government to attack it once it has been (or is about to be) distributed. This proposal would fix this limitation.

Although, under *Stanley v. Georgia* the government cannot criminalize mere possession of adult obscenity in the privacy of one's own home, the federal government's position is that there is no implicit corresponding right to produce it for distribution. Further, the prohibition in this provision does not apply to all production, but only that done with the intent to transport the obscene material in interstate or foreign commerce or to distribute it, or that done by those in the business of selling obscene material. Thus, the provision is not inconsistent with *Stanley* because the

prohibition is inextricably intertwined with the concept of distribution or transportation of obscene material, which enjoys no constitutional protection.