

107TH CONGRESS
2D SESSION

S. 2520

AN ACT

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

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Prosecutorial Remedies
5 and Tools Against the Exploitation of Children Today Act
6 of 2002” or “PROTECT Act”.

1 **SEC. 2. FINDINGS.**

2 Congress finds the following:

3 (1) Obscenity and child pornography are not
4 entitled to protection under the First Amendment
5 under *Miller v. California*, 413 U.S. 15 (1973) (ob-
6 scenity), or *New York v. Ferber*, 458 U.S. 747
7 (1982) (child pornography) and thus may be prohib-
8 ited.

9 (2) The Government has a compelling state in-
10 terest in protecting children from those who sexually
11 exploit them, including both child molesters and
12 child pornographers. “The prevention of sexual ex-
13 ploitation and abuse of children constitutes a gov-
14 ernment objective of surpassing importance,” *New*
15 *York v. Ferber*, 458 U.S. 747, 757 (1982) (empha-
16 sis added), and this interest extends to stamping out
17 the vice of child pornography at all levels in the dis-
18 tribution chain. *Osborne v. Ohio*, 495 U.S. 103, 110
19 (1990).

20 (3) The Government thus has a compelling in-
21 terest in ensuring that the criminal prohibitions
22 against child pornography remain enforceable and
23 effective. “[T]he most expeditious if not the only
24 practical method of law enforcement may be to dry
25 up the market for this material by imposing severe
26 criminal penalties on persons selling, advertising, or

1 otherwise promoting the product.” Ferber, 458 U.S.
2 at 760.

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

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

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

23 (7) There is no substantial evidence that any of
24 the child pornography images being trafficked today
25 were made other than by the abuse of real children.

1 Nevertheless, technological advances since Ferber
2 have led many criminal defendants to suggest that
3 the images of child pornography they possess are not
4 those of real children, insisting that the government
5 prove beyond a reasonable doubt that the images are
6 not computer-generated. Such challenges will likely
7 increase after the *Ashcroft v. Free Speech Coalition*
8 decision.

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

23 (9) The impact on the government's ability to
24 prosecute child pornography offenders is already evi-
25 dent. The Ninth Circuit has seen a significant ad-

1 verse effect on prosecutions since the 1999 Ninth
2 Circuit Court of Appeals decision in Free Speech
3 Coalition. After that decision, prosecutions generally
4 have been brought in the Ninth Circuit only in the
5 most clear-cut cases in which the government can
6 specifically identify the child in the depiction or oth-
7 erwise identify the origin of the image. This is a
8 fraction of meritorious child pornography cases. The
9 National Center for Missing and Exploited Children
10 testified that, in light of the Supreme Court's affir-
11 mation of the Ninth Circuit decision, prosecutors in
12 various parts of the country have expressed concern
13 about the continued viability of previously indicted
14 cases as well as declined potentially meritorious
15 prosecutions.

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

1 threatens to render child pornography laws that pro-
2 tect real children unenforceable.

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

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

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

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

19 (1) in subsection (a)—

20 (A) by striking paragraph (3) and insert-
21 ing the following:

22 “(3) knowingly—

23 “(A) reproduces any child pornography for
24 distribution through the mails, or in interstate

1 or foreign commerce by any means, including
2 by computer; or

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

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

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

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

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

1 “(A) that has been mailed, shipped, or
2 transported in interstate or foreign commerce
3 by any means, including by computer;

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

8 “(C) which distribution, offer, sending, or
9 provision is accomplished using the mails or by
10 transmitting or causing to be transmitted any
11 wire communication in interstate or foreign
12 commerce, including by computer,

13 for purposes of inducing or persuading a minor to
14 participate in any activity that is illegal.”;

15 (2) in subsection (b)(1), by striking “(1), (2),
16 (3), or (4)” and inserting “(1), (2), (3), (4), or (6)”;
17 and

18 (3) by striking subsection (c) and inserting the
19 following:

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

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

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

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

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

1 **SEC. 4. ADMISSIBILITY OF EVIDENCE.**

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

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

15 **SEC. 5. DEFINITIONS.**

16 Section 2256 of title 18, United States Code, is
17 amended—

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

22 (2) in paragraph (8)—

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

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

1 (C) by striking subparagraph (D) and in-
2 serting the following:

3 “(D) such visual depiction—

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

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

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

15 (3) by striking paragraph (9), and inserting the
16 following:

17 “(9) ‘identifiable minor’—

18 “(A)(i) means a person—

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

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

1 “(II) who is recognizable as an actual
2 person by the person’s face, likeness, or
3 other distinguishing characteristic, such as
4 a unique birthmark or other recognizable
5 feature; and

6 “(ii) shall not be construed to require
7 proof of the actual identity of the identifiable
8 minor; or

9 “(B) means a computer or computer gen-
10 erated image that is virtually indistinguishable
11 from an actual minor; and

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

16 **SEC. 6. RECORDKEEPING REQUIREMENTS.**

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

19 (1) in subsection (d)(2), by striking “of this
20 section” and inserting “of this chapter or chapter
21 71,”;

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

25 (3) in subsection (i)—

- 1 (A) by striking “not more than 2 years”
2 and inserting “not more than 5 years”; and
3 (B) by striking “5 years” and inserting
4 “10 years”.

5 **SEC. 7. SERVICE PROVIDER REPORTING OF CHILD POR-**
6 **NOGRAPHY AND RELATED INFORMATION.**

7 Section 227 of the Victims of Child Abuse Act of
8 1990 (42 U.S.C. 13032) is amended—

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

11 (2) by amending subsection (f)(1)(D) to read as
12 follows:

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

17 (3) by redesignating paragraph (3) of sub-
18 section (b) as paragraph (4); and

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

21 “(3) In addition to forwarding such reports to
22 those agencies designated in subsection (b)(2), the
23 National Center for Missing and Exploited Children
24 is authorized to forward any such report to an ap-

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

3 (B) by redesignating paragraph (5) as
4 paragraph (6); and

5 (C) by inserting after paragraph (4) the
6 following:

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

11 **SEC. 9. EXTRATERRITORIAL PRODUCTION OF CHILD POR-**
12 **NOGRAPHY FOR DISTRIBUTION IN THE**
13 **UNITED STATES.**

14 Section 2251 of title 18, United States Code, is
15 amended—

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

18 (2) by redesignating subsections (c) and (d) as
19 subsections (d) and (e), respectively; and

20 (3) by inserting after subsection (b) the fol-
21 lowing:

22 “(c)(1) Any person who, in a circumstance described
23 in paragraph (2), employs, uses, persuades, induces, en-
24 tices, or coerces any minor to engage in, or who has a
25 minor assist any other person to engage in, any sexually

1 explicit conduct outside of the United States, its territories
2 or possessions, for the purpose of producing any visual de-
3 picture of such conduct, shall be punished as provided
4 under subsection (e).

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

7 “(A) the person intends such visual depiction to
8 be transported to the United States, its territories or
9 possessions, by any means, including by computer or
10 mail; or

11 “(B) the person transports such visual depic-
12 tion to the United States, its territories or posses-
13 sions, by any means, including by computer or
14 mail.”.

15 **SEC. 10. CIVIL REMEDIES.**

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

19 “(f) CIVIL REMEDIES.—

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

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

4 “(A) temporary, preliminary, or permanent
5 injunctive relief;

6 “(B) compensatory and punitive damages;
7 and

8 “(C) the costs of the civil action and rea-
9 sonable fees for attorneys and expert wit-
10 nesses.”.

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

12 Sections 2251(d), 2252(b), and 2252A(b) of title 18,
13 United States Code, are amended by inserting “chapter
14 71,” before “chapter 109A,” each place it appears.

15 **SEC. 12. SENTENCING ENHANCEMENTS FOR INTERSTATE**
16 **TRAVEL TO ENGAGE IN SEXUAL ACT WITH A**
17 **JUVENILE.**

18 Pursuant to its authority under section 994(p) of title
19 18, United States Code, and in accordance with this sec-
20 tion, the United States Sentencing Commission shall re-
21 view and, as appropriate, amend the Federal Sentencing
22 Guidelines and policy statements to ensure that guideline
23 penalties are adequate in cases that involve interstate
24 travel with the intent to engage in a sexual act with a

1 juvenile in violation of section 2423 of title 18, United
2 States Code, to deter and punish such conduct.

3 **SEC. 13. MISCELLANEOUS PROVISIONS.**

4 (a) APPOINTMENT OF TRIAL ATTORNEYS.—

5 (1) IN GENERAL.—Not later than 6 months
6 after the date of enactment of this Act, the Attorney
7 General shall appoint 25 additional trial attorneys to
8 the Child Exploitation and Obscenity Section of the
9 Criminal Division of the Department of Justice or to
10 appropriate U.S. Attorney's Offices, and those trial
11 attorneys shall have as their primary focus, the in-
12 vestigation and prosecution of Federal child pornog-
13 raphy laws.

14 (2) AUTHORIZATION OF APPROPRIATIONS.—

15 There are authorized to be appropriated to the De-
16 partment of Justice such sums as may be necessary
17 to carry out this subsection.

18 (b) REPORT TO CONGRESSIONAL COMMITTEES.—

19 (1) IN GENERAL.—Not later than 9 months
20 after the date of enactment of this Act, and every
21 2 years thereafter, the Attorney General shall report
22 to the Chairpersons and Ranking Members of the
23 Committees on the Judiciary of the Senate and the
24 House of Representatives on the Federal enforce-

1 ment actions under chapter 110 of title 18, United
2 States Code.

3 (2) CONTENTS.—The report required under
4 paragraph (1) shall include—

5 (A) an evaluation of the prosecutions
6 brought under chapter 110 of title 18, United
7 States Code;

8 (B) an outcome-based measurement of per-
9 formance; and

10 (C) an analysis of the technology being
11 used by the child pornography industry.

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

1 **SEC. 14. SEVERABILITY.**

2 If any provision of this Act, an amendment made by
3 this Act, or the application of such provision or amend-
4 ment to any person or circumstance is held to be unconsti-
5 tutional, the remainder of this Act, the amendments made
6 by this Act, and the application of the provisions of such
7 to any person or circumstance shall not be affected there-
8 by.

Passed the Senate November 14, 2002.

Attest:

Secretary.

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