



2004

The Aftermath of Free Speech: A New Definition of Child Pornography

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Recommended Citation

Brian G. Slocum, *The Aftermath of Free Speech: A New Definition of Child Pornography*, 52 U.S. ATTORNEYS' BULLETIN 8 (2004).

Available at: <https://scholarlycommons.pacific.edu/facultyarticles/582>

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Child Protection, Exploitation, and Obscenity

March 2004
Volume 52
Number 2

United States
Department of Justice
Executive Office for
United States Attorneys
Office of Legal Education
Washington, DC
20535

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Director

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The United States Attorneys'
Bulletin is published pursuant to
28 CFR § 0.22(b).

The United States Attorneys'
Bulletin is published bi-monthly
by the Executive Office for United
States Attorneys, Office of Legal
Education, 1620 Pendleton Street,
Columbia, South Carolina 29201.

Periodical postage paid at
Washington, D.C. Postmaster:
Send address changes to Editor,
United States Attorneys' Bulletin,
Office of Legal Education, 1620
Pendleton Street, Columbia, South
Carolina 29201.

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Internet Address
[www.usdoj.gov/usao/
reading_room/foiamanuals.
html](http://www.usdoj.gov/usao/reading_room/foiamanuals.html)

Send article submissions to
Managing Editor, United States
Attorneys' Bulletin,
National Advocacy Center,
Office of Legal Education,
1620 Pendleton Street,
Columbia, SC 29201.

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The Aftermath of Free Speech: A New Definition for Child Pornography

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I. Introduction

In 2002, a United States Supreme Court decision struck a serious blow to federal child pornography prosecutions. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Supreme Court found two of the four then-existing definitions of child pornography to be unconstitutional. The first of these was 18 U.S.C. § 2256(8)(B), which defined "child pornography" to include visual depictions that "appear[] to be" of minors engaging in sexually explicit conduct. This definition, often referred to as the "virtual child pornography" definition, included computer-generated images or images of adults who appeared to be minors. The Court found this provision to be unconstitutionally overbroad. In particular, the Court concluded that the definition extended beyond the traditional reach of obscenity as described in *Miller v. California*, 413 U.S. 15 (1973), that the Court's decision in *New York v. Ferber*, 458 U.S. 747 (1982) could not be extended to support a complete ban on virtual child pornography, and that the government's arguments in favor of the prohibition were insufficient under the First Amendment. *Ashcroft*, at 246-52, 256. The aftermath of this portion of the Court's decision is the focus of this article.

By invalidating these important features of the Child Pornography Prevention Act of 1996, codified at 18 U.S.C. §§ 2251-2260, the Court's decision left the government in an unsatisfactory position that warranted a prompt legislative response. As a result of the *Free Speech* decision, defendants frequently contend that there is "reasonable doubt" as to whether charged images, particularly digital images on a computer, were produced with an actual child, or as a result of some other process. Occasionally, there are experts who are willing to testify to the same effect on the defendants' behalf. Without a

provision that covers highly-realistic computer-generated images, it is difficult to meet the burden of proof when images are of real, but unidentified, children. This problem has the potential to grow increasingly worse as trials devolve into confusing battles between experts arguing over the method of generating images that look like, and probably are, real children. Even in cases involving identified victims of child pornography, it is very difficult for prosecutors to arrange for one of the few law enforcement witnesses who have met the child to be available for any given child pornography trial.

II. The need for a "Free Speech fix"

Congress sought to remedy these concerns with the enactment of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-066, 117 Stat. 650, on April 30, 2003. The PROTECT Act greatly enhances federal child pornography law by, among other things, replacing with a new provision the prior definition of "child pornography" in 18 U.S.C. § 2256(8)(B) that was struck by the *Free Speech* court. Title V, Subsection A of the PROTECT Act directly responded to the *Free Speech* decision by creating a new provision in § 2256(8)(B) that defines child pornography to include computer-based depictions that are indistinguishable from those involving real children. The PROTECT Act also expands the affirmative defense applicable to cases brought under § 2256(8)(B) in response to the Supreme Court's criticism of the prior law.

The PROTECT Act child pornography provisions more narrowly focus federal child pornography law on the government's core interest: preserving its ability to enforce laws proscribing child pornography produced using real children. To further this interest, the PROTECT Act makes fundamental changes with respect to the "virtual" child pornography ban in § 2256(8)(B), and the corresponding affirmative defense in 18 U.S.C. § 2252A(c). Thus, the PROTECT Act includes in the definition of child pornography images that, to an ordinary observer, could pass for the real thing. At the same time, the PROTECT Act provision gives a defendant the ability to escape conviction under the child pornography statutes if he can establish that the image was not produced using a real child.

The changes brought about by the PROTECT Act are intended to address the Supreme Court's concerns that legitimate expression might improperly fall within the scope of the child pornography laws. The provision is therefore narrowly tailored in four ways to advance the government's compelling interest, without casting a broad net over protected speech. First, the proscription of virtual images is limited to digital, computer or computer-generated images. Second, the images must genuinely look like they depict real children. Third, the sexual content must be particularly explicit. Fourth, the defendant can escape conviction through an affirmative defense by establishing that the images were produced without the use of a real child. As set forth in more detail below, the new provision provides an important response to the Supreme Court's concerns in *Ashcroft v. Free Speech Coalition*.

III. The details of the new child pornography provisions

The centerpiece of the PROTECT Act's response to the *Free Speech* decision was to amend § 2256(8)(B) to read as follows:

such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct;

18 U.S.C. § 2256(8)(B) (2003).

Among other changes, the new definition substitutes the phrase "indistinguishable from [] that" of a minor for the "appears to be" phrase struck down by the Court in *Free Speech*. A new provision, § 2256(11), explains the meaning of "indistinguishable" as follows:

the term "indistinguishable," used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to drawings, cartoons, sculptures or paintings depicting minors or adults.

18 U.S.C. § 2256(11) (2003).

The definition thus clarifies that only the most convincing depictions of child pornography, which are indistinguishable from those depicting real children, are proscribed.

Further narrowing the scope of the virtual child pornography definition, § 2256(8)(B) is now explicitly limited to "digital image[s]," "computer

image[s]," and "computer-generated image[s]." This limitation implicitly acknowledges the power of computer imaging technology both to alter actual child pornography and to generate simulated child pornography. Because the use of computers and digital technology to traffic images of child pornography implicates the core of the government's practical concern about enforceability, "drawings, cartoons, sculptures, or paintings," which cannot pass for the real thing, are specifically excluded from the scope of § 2256(8)(B).

Along with narrowing the definition of child pornography, the PROTECT Act limits the scope of sexual conduct depicted that is actionable for virtual child pornography under § 2256(8)(B). (Note that this new definition does *not* affect prosecutions under either § 2256(8)(A) or (C)). Thus, a new provision, § 2256(2)(B), contains a definition of sexually explicit conduct specific to § 2256(8)(B):

(B) For purposes of subsection 8(B) of this section, 'sexually explicit conduct' means—

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse, where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;

18 U.S.C. § 2256(2)(B) (2003).

This provision, in turn, relies upon a new definition in 18 U.S.C. § 2256(10), which defines "graphic":

'graphic', when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genital area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted[.]

Notably, the new provision requires a simulated image to be lascivious to constitute child pornography under § 2256(8)(B). Thus, child pornography that simulates sexually explicit conduct (as opposed to depicting actual sexually explicit conduct) must be lascivious, as well as meet the other requirement of the definition. The

combined effect of these changes is to narrow the definition of sexually explicit conduct in cases involving virtual child pornography under § 2256(8)(B). In such cases, sexually explicit conduct must be graphic or, if simulated, also lascivious.

The PROTECT Act also significantly amends the affirmative defense in 18 U.S.C. § 2252A(c). Previously, the affirmative defense was available in cases involving transportation, distribution, receipt, and reproduction of child pornography if the defendant could prove that the alleged child pornography was produced using an actual adult, and was not pandered in such a manner as to convey the impression that it was child pornography. In *Free Speech*, the Court criticized the affirmative defense on the grounds that it incompletely protected defendants' First Amendment rights. Specifically, the Court observed that the affirmative defense was not available to a defendant who could prove that real children were not involved in the production of the images, but who had pandered the material as child pornography. 535 U.S. at 256. The Court was also concerned that the defense did not extend to possession offenses. *Id.*

The new affirmative defense eliminates both of the problems identified by the Court. First, the affirmative defense now includes possession offenses. Second, while prior law only granted an affirmative defense for productions involving youthful-looking adults, and only allowed the defense if the defendant did not pander the material as child pornography, a defendant can now prevail simply by showing that no children were used in the production of the materials. In other words, a defendant can now prevail by establishing that the images do not depict actual children. The defendant must, however, provide notice to the government of an intention to assert the affirmative defense no later than ten days before trial.

IV. Application of the new provisions and alternative charges

Since the enactment of the PROTECT Act, prosecutors have several options to consider in child pornography cases. The Department of Justice (Department) expects that the "virtual porn" provision of the PROTECT Act will face constitutional challenges. Because it is possible that those challenges will ultimately be heard by the Supreme Court, Assistant United States Attorneys (AUSAs) considering charges under the new child pornography definition in § 2256(8)(B) should be mindful that their cases are just as likely as any other to serve as the vehicle for a

challenge. Prudence dictates that, until the challenges are finally resolved by the Supreme Court, prosecutors should carefully evaluate and scrutinize their use of the new provisions, and include "safe harbor" or back-up charges in their indictments to the extent such charges are available.

Several aspects of the images should be considered before a charging decision is made. The images should be of good quality, appear to show real children, and depict sexually explicit conduct, if possible. In addition, given the Supreme Court's emphasis on the potential literary and artistic merit of materials exploring teenage sexuality, images of prepubescent children should be given preference over those of older children.

In all cases, prosecutors and law enforcement should continue their efforts to identify children depicted in the images. The identification of known victims is essential in determining which victims of child pornography have not yet been identified and protected from further harm. Prosecutions under § 2256(8)(B) will also be in a stronger position against any constitutional challenge if some of the charged images depict known victims. In cases brought under the old child pornography statutes, the identification of known victims is useful even if it is not feasible to introduce evidence regarding the child's identity at trial. The identification of known victims can often lead to plea agreements or to stipulations that charged images depict actual minors engaged in sexually explicit conduct.

Prosecutors considering charging under the pre-existing child pornography provisions, rather than the new § 2256(8)(B), should keep in mind that the identification of known victims is by no means the only way to meet the government's burden of proving that charged images depict real children engaging in sexually explicit conduct. Indeed, there is support for the position that simply entering the images into evidence can meet the government's burden.

The three circuits that have addressed the issue in light of the *Free Speech* decision have concluded that the jury can make its decision by simply viewing the images themselves. *See United States v. Kimler*, 335 F.3d 1132, 1142 (10th Cir. 2003) (holding that juries are capable of distinguishing between "real and virtual images" and that neither expert testimony nor evidence of victim identity is required by the *Free Speech* decision); *United States v. Deaton*, 328 F.3d 454, 455 (8th Cir. 2003) (per curiam) (holding that images alone were sufficient to prove that production of charged images involved use of a

real minor); *United States v. Hall*, 312 F.3d 1250, 1260 (11th Cir. 2002) (holding that despite unconstitutional jury instruction, examination of charged images showed that no reasonable jury could have found that images depicted virtual children as opposed to actual children). Prosecutors in child pornography cases may also want to support their proof that images depict real children by presenting the testimony of a physician that characteristics such as the proportions, body fat distribution, and skin tone of the children depicted are consistent with those of real children. See *United States v. Bender*, 290 F.3d 1279 (11th Cir. 2002).

In cases that proceed under the new 18 U.S.C. § 2256(8)(B), charging some images under one of the obscenity provisions, 18 U.S.C. §§ 1460-70, is also an effective way to ensure that convictions will stand in the event that § 2256(8)(B) is struck down as unconstitutional. The new obscenity statute enacted as part of the PROTECT Act, § 1466A, is one of the possible backup charges. This statute is directed to the obscene visual representation of the sexual abuse of children. See 18 U.S.C. § 1466A (2003). When possession, as opposed to receipt or distribution, of the images is all that can be shown, the new § 1466A(b) is the only available federal obscenity provision because it is the only one that includes possession within its prohibitions. When receipt or distribution can be shown, however, obscenity provisions other than § 1466A can be used. In addition, while § 1466A(a)(1) is likely to be a safe charge, § 1466A(a)(2) should be used with caution as a backup charge due to the likelihood that it will be challenged.

Finally, care should be taken to develop a strong record when accepting pleas to child pornography charges. First, to the extent the record supports it and the defendant agrees, the plea colloquy should unequivocally reflect that the defendant is pleading to child pornography involving real minors. If the government has evidence suggesting that one or more of the charged images depicts an identified minor, the fact that such evidence exists should be part of the colloquy.

V. Conclusion

The situation before the enactment of the PROTECT Act was unacceptable, as many meritorious cases involving child pornography were not being brought, or were creating an unnecessarily heavy drain on law enforcement and prosecutorial resources. The Supreme Court's decision in *Free Speech* made enforcement of the child pornography laws substantially more difficult and threatened to reinvigorate this pernicious traffic and harm more children. While the Department was disappointed with the Court's decision, any legislation must necessarily respect it and endeavor, in good faith, to resolve the constitutional deficiencies in the prior law that were identified by the Court. The Department believes that the PROTECT Act has succeeded in doing so. ❖

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