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Child Pornography: Side-by-Side Comparison of the Senate-passed and House-passed Versions of S. 151, 108th Congress

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Summary

In *Ashcroft v. Free Speech Coalition*, the Supreme Court declared unconstitutional the federal child pornography statute to the extent that it prohibited material that was produced without the use of an actual child.¹ The case held, in other words, that pornography produced without the use of a minor, whether drawn or painted, computer-generated, or produced only with adult actors, is protected by the First Amendment, even if it appears to portray a minor, unless it is obscene.² In response to this decision, the Senate and House passed differing versions of S. 151, 108th Congress.³ This report compares the substantive provisions of these bills.⁴

¹ 535 U.S. 234 (2002).

² “Obscenity,” which is not protected by the First Amendment, is defined by the Supreme Court as material that appeals to the prurient interest, is patently offensive, and lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973). Pornography that uses an actual child is not protected by the First Amendment, even if it meets none of the three criteria for obscenity.

³ The House-passed bill began as H.R. 1161 and was adopted (except for section 10) as an amendment (Title V) to H.R. 1104, which the House passed as S. 151.

⁴ For additional information, see CRS Report 95-406, *Child Pornography: Constitutional Principles and Federal Statutes*; CRS Report RL31744, *Child Pornography Produced Without an Actual Child: Constitutionality of 108th Congress Legislation*; and CRS Report RS21463, *Child Pornography: Comparison of Selected Provisions of the Senate-passed and House-passed Versions of S. 151, 108th Congress, with Brief Comments on their Constitutionality*.

Provision	Senate-passed bill	House-passed bill
Title of bill	“Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003” or “PROTECT Act” (§ 1)	Title V of the “Child Abduction Prevention Act” (§ 1)
Findings (All findings in the Senate-passed bill are in the House-passed bill, but not vice versa.)	Findings 1 through 9 and the first two sentences of Finding 10 in each bill are substantively identical. Findings 11-13 of the Senate-passed bill are identical to Findings 13-15 of the House-passed bill. (§ 501)	Not in Senate-passed bill: Third sentence of Finding 10, Finding 11, and Finding 12. (§ 501)
Pandering, false advertising	Section 3 would prohibit advertising, promoting, presenting, distributing, or soliciting any material in a manner to cause another to believe that it is an obscene visual depiction of a minor, or is child pornography produced with an actual minor.	Section 503 would enact 18 U.S.C. § 2252B, which would prohibit advertising, promoting, presenting, or describing any material in a manner to cause another to believe that it is child pornography produced with an actual child. (“Distributing” and “obscene” in the Senate-passed bill are not included.)
Providing material to minors	Section 3 would prohibit distributing, offering, sending, or providing a minor (a person under 18) with child pornography, whether produced with an actual child or not, to induce the minor to participate in an illegal activity.	Section 505 would prohibit providing or showing a person under 16 material that is obscene or child pornography, whether produced with an actual child or not, regardless of purpose.
Affirmative defense to child pornography charge	Section 3 would allow a defendant to avoid conviction by proving that each person used in producing the alleged child pornography was an adult or none was a minor. Proving that no person was a minor would not be an affirmative defense in prosecutions involving images of an actual child “morphed” to make it appear as if the child is engaging in sexually explicit conduct.	Section 502(d) would allow a defendant to avoid conviction by proving that no person used in producing the alleged child pornography was a minor. Proving that no person was a minor would not be an affirmative defense in prosecutions involving images of an actual child engaging in sexually explicit conduct or an actual child “morphed” to make it appear as if he or she is engaging in sexually explicit conduct.

Provision	Senate-passed bill	House-passed bill
Affirmative defense notice requirement	Section 3 provides that a defendant may not assert the affirmative defense that no person was a minor unless, absent extraordinary circumstances, he provides the court and the U.S., no later than 10 days before trial, with notice of his intent to assert the defense and the substance of his evidence.	No provision.
Admissibility of evidence	On motion of the government, except for good cause, nonphysical identifying information, other than age, of any minor depicted in child pornography shall not be admissible, and jury shall be instructed to draw no inference from the absence of such evidence.	No provision.
Child pornography with an image indistinguishable from that of an actual minor	Section 5 would define “child pornography” to require the use of an “identifiable minor,” and would define “identifiable minor” to include an image “virtually indistinguishable” from that of an actual minor.	Section 502(a) would define “child pornography” to include a computer-generated image that is “indistinguishable” from that of an actual minor. 18 U.S.C. § 1466A, which would be created by section 504, would define “indistinguishable” to mean “virtually indistinguishable.”
Proof of actual identity of minor	Section 5 would provide that proof of the actual identity of a minor shall not be required to establish that he is a minor (under 18).	No provision.
Definition of “sexually explicit conduct”	Section 5 would include “simulated sexual intercourse” in the definition only if “lascivious” and only if “the genitals, breast, or pubic area of any person is exhibited.”	Section 502 would include “simulated sexual intercourse” in the definition only if “lascivious” and only if “the genitals, breast, or pubic area of any person is exhibited.”
Depictions, obscene or otherwise, of minors engaging in sexually explicit conduct	Section 6 would enact 18 U.S.C. § 2252B, which would prohibit producing, distributing, receiving, or possessing with or without intent to distribute, any depiction that appears to be of a minor engaging in sexually explicit conduct, if it is obscene or lacks serious literary, artistic, political, or scientific value.	Section 504 would enact 18 U.S.C. § 1466B, which would prohibit producing, distributing, receiving, or possessing with or without intent to distribute, any depiction that appears to be of a minor engaging in sexually explicit conduct, if it is obscene.

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Affirmative defense under 18 U.S.C. §§ 2252B or 1466B	Defendant possessed fewer than 3 images and promptly destroyed them or afforded law enforcement agency access to them (substantively the same as 18 U.S.C. §§ 2252(c), 2252A(d)).	Defendant possessed fewer than 3 images and promptly destroyed them or afforded law enforcement agency access to them (substantively the same as 18 U.S.C. §§ 2252(c), 2252A(d)).
Sentencing under 18 U.S.C. §§ 2252B or 1466B	The category of offenses described in § 2G2.2 of the Sentencing Guidelines shall apply unless the Sentencing Commission promulgates higher sentencing ranges.	The category of offenses described in § 2G2.2 of the Sentencing Guidelines shall apply unless the Sentencing Commission promulgates higher sentencing ranges.
Depictions of pre-pubescent children, actual or otherwise	No provision.	Section 504 would enact 18 U.S.C. § 1466A, which would prohibit producing, distributing, receiving, or possessing with or without intent to distribute, any depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct.
Sentencing under 18 U.S.C. § 1466A	Not applicable.	The category of offenses described in § 2G2.2 of the Sentencing Guidelines shall apply unless the Sentencing Commission promulgates higher sentencing ranges.
Extraterritorial production of child pornography for distribution in the United States	Section 10 would make it a crime to employ, use, persuade, induce, entice, or coerce any minor to engage in, or assist another person to engage in, any sexually explicit conduct outside of the U.S., its territories or possession, to produce child pornography to be transported to the U.S., its territories or possessions.	Section 506 would make it a crime to employ, use, persuade, induce, entice, or coerce any minor to engage in, or assist another person to engage in, any sexually explicit conduct outside of the U.S., its territories or possession, to produce child pornography to be transported to the U.S., its territories or possessions.
Record-keeping requirements	Section 7 would amend 18 U.S.C. § 2257, which requires producers of sexually explicit material to keep records of performers' names and date of birth. Section 7 would (1) allow records to be used in obscenity prosecutions, (2) apply the section to computer-generated and digital images, and (3) increase the possible prison sentence for violations of the section.	Section 512 would require the Attorney General to submit a report to Congress detailing the number of times since January 1993 that the Department of Justice has inspected the records of any producer of materials regulated pursuant to 18 U.S.C. § 2257 and 28 C.F.R. § 75. The Attorney General shall indicate the number of violations prosecuted as a result of those inspections.

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Service-provider reporting	Section 8 would amend 18 U.S.C. § 13032, which requires electronic communication service providers to report child pornography to the National Center for Missing and Exploited Children. Section 8 would require them to report it to state officials as well.	Section 508(a) would amend 18 U.S.C. § 13032, which requires electronic communication service providers to report child pornography to the National Center for Missing and Exploited Children. Section 508(a) would require them to report it to state officials as well.
Contents disclosure of stored communications	Section 9 would amend 18 U.S.C. § 2702 so that it does not prevent electronic communication service providers to report child pornography to the National Center for Missing and Exploited Children.	Section 508(b) would amend 18 U.S.C. § 2702 so that it does not prevent electronic communication service providers to report child pornography to the National Center for Missing and Exploited Children.
Civil remedies	Section 11 would authorize persons aggrieved by violations of 18 U.S.C. § 2252A to sue for injunctive relief, compensatory and punitive damages, and attorneys' and expert witnesses' fees.	No provision.
Enhanced penalties for recidivists	Section 12 would include obscenity convictions among the past crimes that would cause a violator of child pornography laws to be deemed a recidivist.	Section 507 would include obscenity convictions among the past crimes that would cause a violator of child pornography laws to be deemed a recidivist.
Sentencing enhancements for interstate travel to engage in sexual act with juvenile	Section 13 would require the Sentencing Commission to review, and, as appropriate, amend the Federal Sentencing Guidelines to ensure that penalties are adequate in cases that involve interstate travel with intent to violate 18 U.S.C. § 2423.	No provision.
Appointment of trial attorneys	Section 14(a) would require the Attorney General to appoint 25 additional trial attorneys to the Child Exploitation and Obscenity Section of the Criminal Division of the Department of Justice or to U.S. Attorney's Offices to prosecute child pornography crimes.	No provision.
Report to Congressional Committees	Section 14(b) would require the Attorney General to report to the Judiciary Committees on enforcement of federal child pornography laws.	See entry on page 4, describing section 512, on record-keeping requirements.

Provision	Senate-passed bill	House-passed bill
Sentencing Guidelines	Section 14(c) would require the Sentencing Commission to review, and, as appropriate, amend the Federal Sentencing Guidelines applicable to 18 U.S.C. § 2252A(3)(B) and (6).	No provision.
Interception of communications	Section 15 would allow judges to authorize the interception of wire and oral communications in investigating additional crimes, including child pornography.	Section 511 would allow judges to authorize the interception of wire and oral communications in investigating violations of 18 U.S.C. §§ 1466A and 1466B, which the House-passed bill would enact.
Investigative authority	Section 16 would allow subpoenas issued in an investigation of sexual exploitation or abuse of children to seek additional types of information.	Section 510 would allow subpoenas issued in an investigation of sexual exploitation or abuse of children to seek additional types of information.
Severability	Section 17 provides that, if any provision of S. 151 is held invalid, the remainder shall not be affected.	Section 509 provides that, if any provision of Title V of S. 151 is held invalid, the remainder shall not be affected.

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