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Playing Hide and Seek: How to Protect Virtual Pornographers and Actual Children on the Internet

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I. INTRODUCTION

WITH its ruling in *Ashcroft v. Free Speech Coalition*,[1] the Supreme Court cloaked virtual child pornography with First Amendment protection.[2] In so doing, it rejected all of the government's contentions concerning the harm to actual children that virtual pornography may engender.[3] In particular, the Court rejected the government's position that a ban on virtual pornography is necessary because of the difficulty of establishing that an image depicted an actual, rather than a virtual child.[4] Instead, the Court suggested that creating a market for virtual pornography is not only innocuous to actual children, but could actually protect them.[5]

This Article considers the Supreme Court's suggestion and recommends a mechanism to regulate the virtual pornography market in a manner that balances the rights of virtual pornographers with the prosecution of actual child pornographers. Part II traces the events leading up to the *Free Speech* decision, commencing with the enactment of the Child Pornography Prevention Act of 1996 (CPPA).[6] Part III discusses the *Free Speech* opinion and the post-*Free Speech* cases.[7] Part IV examines the PROTECT

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1. 535 U.S. 234 (2002).

2. *See id.* at 258 (discussing holding in context of plausible First Amendment violations that may arise with broadly written language).

3. *See id.* at 236 ("While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect."). Absent causation, the government maintained that child pornography rests outside the First Amendment's protection because the government did not consider pornographic images to be valuable speech. *See id.* (recounting government's arguments for why Court should uphold law). The Court, however, considered the government's categorization of child pornography as incongruent with previous holdings. *See id.* (highlighting government's misapplication of holding in *New York v. Ferber*, 458 U.S. 747 (1982)).

4. *See id.* at 254 (describing government's argument as "implausible").

5. *See id.* (reasoning that few pornographers would illegally abuse actual children if virtual images would sufficiently feed an interested market).

6. 18 U.S.C. §§ 2251–2260 (1994 & Supp. V 1999). For a discussion of the events leading up to the *Free Speech* ruling commencing with the enactment of the Child Pornography Prevention Act of 1996 (CPPA), see *infra* notes 11–20 and accompanying text.

7. For a discussion of the *Free Speech* case and post-*Free Speech* cases, see *infra* notes 21–80 and accompanying text.

Act[8]—the legislative response to the Supreme Court's decision.[9] Part V concludes that regulation of the virtual pornography industry is the most effective method of protecting children and free speech rights.[10] Building upon existing statutory record-keeping provisions and adapting them to virtual pornography can best accomplish such regulation.

II. THE CHILD PORNOGRAPHY PREVENTION ACT OF 1996

Congress brought the issue of virtual pornography to the forefront with its enactment of the CPPA.[11] Seeking to be proactive, Congress's ban on pornographic images of virtual children was based on congressional findings of a compelling state interest in protecting actual children from all child pornography, whether it depicted real or virtual children.[12] The legislative history of the CPPA was premised on thirteen findings, including that pedophiles use images of child pornography to seduce actual children by reducing their inhibitions and desensitizing them to sexual conduct.[13] Congress found that both real and virtual child pornography

8. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT), 18 U.S.C. § 2252A (2000 & Supp. III 2003). For further discussion, see *infra* notes 81–100 and accompanying text.

9. For a discussion of the PROTECT Act, see *infra* notes 101–08 and accompanying text.

10. For a discussion of suggestions for regulating virtual pornography, see *infra* notes 109–66 and accompanying text.

11. "Before 1996, Congress defined child pornography as the type of depictions at issue in *Ferber*, images made using actual minors." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241 (2002). Congress first passed legislation concerning child pornography with the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C. §§ 2251–2253 (1978)). This Act focused on child pornography that was obscene and commercially produced. *See id.* (discussing purpose of Act). The Supreme Court's 1982 ruling in *New York v. Ferber*, 458 U.S. 747 (1982), banning all pornography using actual children regardless of whether it was obscene, helped lead to the next chapter in the legislative attempts to ban child pornography—the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251–2253 (1984)), and the Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628 § 2, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. §§ 2251 (1986)). *See generally* John P. Feldmeier, *Close Enough for Government Work: An Examination of Congressional Efforts to Reduce the Government's Burden of Proof in Child Pornography Cases*, 30 N. KY. L. REV. 205 (2003) (tracing historically relevant congressional responses to federal common law in light of expanding criminality of child pornography).

In 1986 the Attorney General's Commission on Pornography issued its final report, which examined the problems with the existing child pornography legislation and suggested changes in the law to better protect children. *See generally* UNITED STATES DEP'T. OF JUSTICE, ATT'Y GEN. COMM. ON PORNOGRAPHY, FINAL REP. (1986) [hereinafter FINAL REPORT]. The report led to the enactment of the Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1986) (codified as amended at 18 U.S.C. §§ 2251A–2252 (1988)).

12. *See* CHILD PORNOGRAPHY PREVENTION ACT OF 1995, S. REP. NO. 104-358, at 2 (1996).

13. Child Pornography Prevention Act of 1996, Pub. L. No 104-208, 110 Stat. 3009 (1996).

whets the appetite of molesters by fueling their fantasies and stimulating their desire to molest an actual child.[14] Moreover, Congress determined that child pornography prosecutions would be increasingly difficult as images of virtual children become indistinguishable from actual victims of child pornography.[15] Specifically, Congress found that "new photographic and computer imaging technologies, make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer" from images of actual children.[16]

In recognition of the advances being made in technology and the Internet, the CPPA expanded the definition of child pornography to encompass "any visual depiction" that "is *or appears to be*, a minor engaging in sexually explicit conduct."[17] The CPPA contained an affirmative defense allowing the producers of pornography to establish that the pornography was produced using adults.[18] The ban on virtual pornography created a wealth of commentary[19] and a split between the circuits[20] that was ultimately resolved by the United States Supreme Court.

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14. *See* CHILD PORNOGRAPHY PREVENTION ACT OF 1995, S. REP. NO. 104-358, at 2.

15. *See* 18 U.S.C. §§ 2251–2260 (1994 & Supp. V 1999) (noting CPPA definition of criminal exploitation of children also includes youthful-looking adult actors).

16. CHILD PORNOGRAPHY PREVENTION ACT OF 1995, S. REP. NO. 104-358, at 2 (reporting relative ease with which sexual abuse of children can occur with increasingly powerful technological advances). *See also* Samantha L. Friel, *Porn by Any Other Name? A Constitutional Alternative to Regulating "Victimless" Computer Generated Pornography*, 32 VAL. U. L. REV. 207, 223 (1997) (presenting example of how computer programmer could splice child's image with adult's image to create pornographic picture without real child participation).

17. 18 U.S.C. § 2256(8)(B) (1994 & Supp. V 1999) (emphasis added).

18. 18 U.S.C. § 2252A(c) (1994 & Supp. V 1999) (discussing CPPA's affirmative defense).

19. *See generally* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921 (2001) (discussing child pornography and its effect on First Amendment analysis); Daniel S. Armaugh, *The Fate of the Child Pornography Act of 1996: Virtual Child Pornography: Criminal Conduct or Protected Speech*, 23 CARDOZO L. REV 1993 (2002) (finding causal link between visual depictions of sexual conduct and emotional and physical damage to both depicted and non-depicted children); Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439 (1997) (discussing whether child pornography is protected speech); Friel, *supra* note 16, (proposing rebuttable presumption that image depicting child in sexual activity is child pornography whether child is virtual or actual); Belinda Tiosavljevic, *A Field Day for Child Pornographers and Pedophiles if the Ninth Circuit Gets Its Way: Striking down the Constitutional and Necessary Child Pornography Prevention Act of 1996*, 42 S. TEX. L. REV. 545 (2001) (discussing CPPA and Ninth Circuit's decision in *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999)); Matthew K. Wegner, *Teaching Old Dogs New Tricks: Why Traditional Free Speech Doctrine Supports Anti-Child-Pornography Regulations in Virtual Reality*, 85 MINN. L. REV. 2081 (2001) (arguing that national obscenity standard regulates virtual child pornography).

20. Four Circuits upheld the CPPA. *See* United States v. Fox, 248 F.3d 394, 411 (5th Cir. 2001) (affirming conviction of defendant who knowingly

III. *ASHCROFT V. FREE SPEECH COALITION* AND THE POST-*FREE SPEECH* CASES

A. Ashcroft v. Free Speech Coalition

In 2002, the United States Supreme Court decided *Free Speech* and, in a 6-3 decision, struck down the CPPA's ban on pornography using virtual children, ruling that the CPPA's "appears to be" language was overbroad and unconstitutional under the First Amendment.[21] The majority opinion written by Justice Kennedy stated that the harm to actual children, which is the premise of the ban on child pornography, is missing when a virtual child is depicted.[22] Moreover, in rejecting the government's argument, the Court reasoned that the possibility that virtual pornography might whet the appetite of child molesters was too remote to support an abridgement of constitutionally protected speech.[23]

The majority also rejected the government's position that the CPPA serves to eliminate the market for actual child pornography.[24] In contrast, the Court stressed the reverse—that allowing virtual pornography could in fact protect children by drying up the market of actual child pornography. "If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing actual children if fictional, computerized images would suffice."[25] The Court also rejected the government's claim that, with advances in computer technology, it will be increasingly difficult to distinguish between actual and vir-

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downloaded and transmitted pornographic images of children from computer at place of employment), *vacated by*, Fox v. U.S., 535 U.S. 1014 (2002); United States v. Mento, 231 F.3d 912, 922–23 (4th Cir. 2000) (concluding that "appears to be" language of CPPA remains constitutionally well-defined to substantiate conviction of defendant), *vacated by*, Mento v. United States, 535 U.S. 1014 (2002); United States v. Acheson, 195 F.3d 645, 650–53 (11th Cir. 1999) (discussing defendant's failure to prove CPPA language is sufficiently vague or overbroad); United States v. Hilton, 167 F.3d 61, 69–70 (1st Cir. 1999) (reasoning that CPPA falls outside constitutionally-protected speech and that CPPA's definition of child pornography is "adequately precise."). The Ninth Circuit found the CPPA to be invalid on its face. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1091 (9th Cir. 1999) (holding that CPPA language violates First Amendment because of insufficient compelling government interest).

21. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002) (discussing holding).

22. *See id.* at 250–52 (discussing Court's reasoning).

23. *See id.* at 253–54 ("First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.").

24. *See id.* at 254 (rejecting government's argument as "implausible" due to government's false assumption that virtual images would incentivize criminal activity).

25. *Id.*

tual pornography.[26] It stressed that protected speech cannot be limited as a means of suppressing unlawful speech.[27]

In addition, the majority noted that the CPPA's affirmative defense, which shifts from the government the burden of proving an image depicted only adults, only applied to producers and distributors of pornography and left possessors of pornography unprotected.[28] Moreover, the affirmative defense did not protect individuals who created pornographic images solely by computer; resulting in a complete ban on virtual pornography.[29]

Justice O'Connor, concurring in part and dissenting in part, agreed that the "appears to be" language in the CPPA was overbroad because it could be used to infringe on images of youthful looking adults, but she would have upheld the ban on virtual child pornography that is "virtually indistinguishable from" actual child pornography.[30] Rejecting the crux of the majority's rationale, Justice O'Connor found that virtual pornography whets the appetite of molesters who may then use the virtual images to seduce young children.[31] Moreover, Justice O'Connor stressed the "serious concern" that actual child pornographers may evade prosecution by claiming that an image was computer-generated.[32] She agreed with the majority that the "language was not narrowly tailored," and suggested the "virtually indistinguishable from" language would better keep with the language used in the legislative findings.[33] Similarly, in his concurring opinion, Justice Thomas noted that should technology reach the point that the government is unable to distinguish an image of actual from virtual pornography—and therefore unable to prosecute—regulation of the latter would be permissible, perhaps with an affirmative defense that would meet the majority's concerns.[34]

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26. *See id.* at 254–55 (reasoning that First Amendment forbids criminalization of constitutionally protected speech because of "mere resemblance" to unprotected speech).

27. *See id.* (discussing scope of First Amendment protection).

28. *See id.* at 255 (discussing evidentiary difficulties of affirmative defense).

29. *See id.* at 255–56 (highlighting insufficiencies of affirmative defense where defendants can prove they did not harm children through image production).

30. *See id.* at 264–65 (O'Connor, J., concurring) (stressing danger in distribution of virtual images).

31. *See id.* at 263 (O'Connor, J., concurring) (disagreeing with majority's holding). Justice O'Connor heavily relies on the congressional findings that correlate virtual images to sexual predation of children. *See id.* (O'Connor, J., concurring) (citing congressional findings of CPPA).

32. *See id.* (O'Connor, J., concurring) (equating available defense with "reasonable" means through which criminal could circumvent culpability). Justice O'Connor's argument focuses on the reasonable probability of sexual predators evading accountability for molestation through increasingly sophisticated technology. *See id.* (O'Connor, J., concurring) (assuming that criminal behavior will go unpunished due to eventually successful defense).

33. *Id.* at 264–65 (O'Connor, J., concurring).

34. *See id.* at 259–60 (Thomas, J., concurring) (discussing Justice Thomas's concern for evolution of technology).

Chief Justice Rehnquist, joined by Justice Scalia, agreed with Justice O'Connor that the government had a compelling interest in protecting children from the harm of sexual abuse, and that technological advances will soon make it nearly impossible for the government to protect children from sexual abuse.[35] The Chief Justice found that the CPPA could have been interpreted to reach only what was previously unprotected speech.[36] According to the Chief Justice, the CPPA would only ban hardcore pornography involving actual sexual activity between youthful looking adult actors, not mere suggestions of sexual activity that are advertised or promoted as child pornography.[37] Furthermore, Chief Justice Rehnquist noted that Congress intended for the CPPA only to reach those computer-generated images that are easily mistaken for pictures of actual children engaging in sexual conduct.[38] The CPPA proscribed images that were virtually indistinguishable from pictures of actual children, not depictions of Shakespearian tragedies, as the majority purported.[39]

B. *Post*-Free Speech *Cases*

Since the 2002 *Free Speech* ruling, the government's fears of difficulty in prosecuting purveyors of child pornography have been, in great measure, borne out. First, a number of defendants who were convicted under pre-*Free Speech* jury instructions that defined child pornography as including images that "appear to be" minors have had their convictions over-

35. *See id.* at 267–68 (Rehnquist, C.J., dissenting) (quoting Turner Broadcasting Sys. Inc. v. FCC, 520 U.S. 180, 195 (1997)).

36. *See id.* at 269 (Rehnquist, C.J., dissenting) (citing New York v. Ferber, 458 U.S. 747, 773–74 (1982) finding CPPA could be interpreted to only ban "hard core of child pornography").

37. *See id.* at 269–70 (Rehnquist, C.J., dissenting) (same).

38. *See id.* at 270–71 (Rehnquist, C.J., dissenting) (discussing CPPA's legislative history and congressional intent behind Act).

39. *See id.* at 270 (Rehnquist, C.J., dissenting) (disagreeing with majority opinion). In addition, the Chief Justice noted that actual movie producers never felt the chill of protected speech that the majority claimed would occur from the CPPA as evidenced by the Best Picture Oscars garnered by the films noted by the majority. *See id.* at 272 (Rehnquist, C.J., dissenting) (noting Best Picture nominations for "American Beauty" and "Traffic"). Finally, according to the Chief Justice, the CPPA's prohibition on advertising and promoting did not reach any further than the "sordid business of pandering" that was already unprotected by the First Amendment. *Id.* at 271 (Rehnquist, C.J., dissenting) (citing Ginzberg v. United States, 383 U.S. 463, 467 (1966)). The majority read this provision too broadly, according to the Chief Justice, because it would not reach a person who possesses protected materials. *See id.* (Rehnquist, C.J., dissenting). Agreeing with Justice O'Connor, Chief Justice Rehnquist suggested that the provision could be constitutionally limited by requiring that a possessor know the material contains images of real minors engaged in sexually explicit conduct or virtually indistinguishable computer-generated images. *See id.* at 271 (Rehnquist, C.J., dissenting) (offering alternative interpretation of CPPA).

turned and have received acquittals[40] or new trials.[41] Thus, in *United States v. Ellyson*,[42] the Fourth Circuit held that the government was required to prove that the images found on the defendant's computer were of actual children, and the jury instructions could have led the jury to convict for possession of constitutionally protected materials.[43] In finding that retrial rather than acquittal was appropriate,[44] the Fourth Circuit acknowledged that there "is no suggestion whatsoever that . . . the images are computer generated."[45] Nevertheless, the court found the jury instructions to be erroneous based on the government's expert witness who testified that it is possible to "completely construct an image of a young boy" by computer technology.[46] The court noted that because the images were not included in the appellate record, they were unable to make their own assessment of the authenticity of the images.[47] As will be discussed below, the admission of the pictures into evidence had tactical significance.[48]

Second, as Justice O'Connor predicted, defendants have moved to have indictments dismissed or convictions overturned because of the government's failure to prove that they "knowingly" possessed actual child pornography.[49] For example, in *United States v.*

40. *See, e.g.*, United States v. Sims, 220 F. Supp. 2d 1222, 1228 (D.N.M. 2002) (acquitting defendant on one of four counts relating to receipt of pornographic images because of government's failure to satisfy their burden of production).

41. *See* United States v. Ellyson, 326 F.3d 522, 530 (4th Cir. 2003) (noting new trials granted in some cases due to jury instructions based on "appears to be" language); United States v. Richardson, 304 F.3d 1061, 1063 (11th Cir. 2002) (same); United States v. Hilton, 2003 U.S. Dist. LEXIS 4208, *19–20 (D. Me. March 20, 2003) (same).

42. 326 F.3d 522 (4th Cir. 2003).

43. *See id.* at 522.

44. *See id.* at 535. Defendant argued that he should receive a judgment of acquittal on the grounds of insufficient evidence of shipment of child pornography across state lines. *See id.* (outlining defendant's argument for acquittal).

45. *See id.* at 535 (citing *Richardson*, 304 F.3d at 1064).

46. *Id.* at 531.

47. *See id.* (highlighting court's inability to assess authenticity of pictures). In contrast, in *Richardson*, a new trial was avoided by appellate review of the images that demonstrated they were of actual children. *See Richardson*, 304 F.3d at 1061.

48. *See, e.g.*, United States v. Pabon-Cruz, 255 F. Supp. 2d 200, 206 (S.D.N.Y. 2003) (noting significance of "quantity, nature, and organization of the child pornography" to appellate record). For a further discussion of the *Pabon-Cruz* case, see *infra* notes 71–75 and accompanying text.

49. *See, e.g.*, United States v. Slanina, 359 F.3d 356 (5th Cir. 2004) (demonstrating situation where defendant moved for dismissal or acquittal); United States v. Tanner, 66 Fed. Appx. 449 (4th Cir. 2003) (same); United States v. Hall, 312 F.3d 1250 (11th Cir. 2002) (same); *Richardson*, 304 F.3d at 1061 (same); *Pabon-Cruz*, 255 F. Supp. 2d at 200 (same); United States v. Sims, 220 F. Supp. 2d 1222 (D.N.M. 2002) (same); United States v. Dean, 231 F. Supp. 2d 382 (D. Me. 2002) (same); United States v. Oakes, 224 F. Supp. 2d 296 (D. Me. 2002) (same); Tad Dickens, *Guilty Plea in Child Porn Case May be Altered; Man Asks Roanoke Judge to Let Him Withdraw Plea*, ROANOKE TIMES & WORLD NEWS, July 8, 2002, at C1 (noting impact of *Free Speech* case on child pornography prosecution), *available at* 2002 WL 24045079.

Reilly,[50] the defendant moved to withdraw his guilty plea of receiving child pornography on the grounds that the allocution was insufficient because it did not state that the defendant knew the images he received were of actual minors.[51] The court granted the motion in light of the *Free Speech* ruling.[52] The court melded the Supreme Court's earlier opinion in *United States v. X-citement Video*,[53] which mandated that the government prove that a defendant "knowingly" possess a visual depiction of a minor, with the *Free Speech* protection of virtual pornography.[54] Thus, not only must the government prove that an image *is* of an actual child, it must prove that the defendant *knew* it was not of a virtual child.[55] Defendants have seized on the CPPA and its legislative findings to argue that they had no way of knowing whether an image was virtual or actual, and therefore, the government failed to establish the requisite *mens rea*.[56]

In contrast to the *Reilly* decision, one federal district court refused to allow a defendant to withdraw his guilty plea in a post-*Free Speech* case in which the defendant asserted he could not "know" the image was of an actual child.[57] The court reasoned that the defendant was aware of the government's burden, yet voluntarily pled guilty—in *United States v. Marcus*.[58] Nevertheless, in dicta that proved to be portentous of future cases, the court noted:

> [A]n individual who simply possesses or receives images of children engaged in sexually explicit conduct may not even consider, much less know, whether the images depict actual children or are the product of computer technology; indeed, such nuances as to origin seemingly would be irrelevant to the viewer if the two

50. 2002 U.S. Dist. LEXIS 19564 (2002) (S.D.N.Y. Oct. 15, 2002).

51. *See id.* at *5–7 (stating reasons for defendant's request to withdraw guilty plea).

52. *See id.* at *18.

53. 513 U.S. 64 (1994).

54. *See id.* at 465; *see also* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256 (2002) (establishing burden of proof for child pornography prosecutions).

55. Since the *Free Speech* ruling, some disagreement among the courts has surfaced as to whether defendants must actually *know* an image is of a real child or whether a belief is sufficient. *Compare* United States v. Tynes, 58 M.J. 704, 706–07 (A. Ct. Crim. App. 2003) (requiring that defendant present evidence that minors in depictions were computer-generated as affirmative defense), *with* United States v. Pabon-Cruz, 255 F. Supp. 2d 200, 205 (S.D.N.Y. 2003) (requiring proof that defendant knew images were made of actual, rather than virtual, children to support criminal conviction for possession of child pornography).

56. *See, e.g.*, *Pabon-Cruz*, 255 F. Supp. 2d at 204 (noting defendant's argument that "the evidence was insufficient to prove that he knew that the photographs contained images of actual children and that such knowledge was a required element" to sustain child pornography conviction).

57. United States v. Marcus, 239 F. Supp. 2d 277, 284 (E.D.N.Y. 2003) (noting district court's refusal to permit withdrawal of guilty plea).

58. 239 F. Supp. 2d 277, 281–84 (E.D.N.Y. 2003).

> types of presentation are, or become as technology improves, indistinguishable.[59]

The *Marcus* court's prediction was confirmed. Until recently, all courts have rejected defense assertions that the *Free Speech* ruling mandates that the government either provide the identity of the children portrayed in pornographic images or supply expert testimony that the images are of actual children.[60] Courts have ruled that such expert testimony is not required because, as the Tenth Circuit stated in *United States v. Kimler*,[61] "[j]uries are still capable of distinguishing between real and virtual images."[62]

In May 2004, however, the First Circuit in *United States v. Hilton*[63] mandated that the government introduce evidence, *in addition to the images*, to prove the children depicted were real.[64] The court indicated that such evidence could constitute testimony by a computer graphics expert that the images were not virtual.[65] Significantly, the court specifically rejected one type of expert testimony widely used in other cases in which, applying the Tanner Scale of physical development, the expert testifies that the images portray a child rather than an adult.[66] The *Hilton* court noted that a virtual pornographer would seek to create images that "would be amenable to expert testimony under the Tanner Scale," and therefore an expert would not necessarily be able to tell if the child portrayed was real or virtual.[67] Accordingly, the court vacated the defendant's child pornography

59. *See id.* at 283. In other cases, the failure to directly appeal pre-*Free Speech* convictions has limited some defendants to establishing their actual innocence of the child pornography charges, which, to date, no defendant has been able to do. *See, e.g.*, United States v. Dean, 231 F. Supp. 2d 382, 387 (D. Me. 2002) (noting failure to appeal convictions has hindered ability to establish innocence); United States v. Oakes, 224 F. Supp. 2d 296, 300–01 (D. Me. 2002) (same).

60. *See, e.g.*, Unites States v. Kimler, 335 F.3d 1132, 1142 (10th Cir. 2003) (rejecting expert testimony); United States v. Deaton, 328 F.3d 454, 456 (8th Cir. 2003) (same); United States v. Hall, 312 F.3d 1250, 1262 (11th Cir. 2002) (same).

61. 335 F.3d 1132 (10th Cir. 2003).

62. *Id.* at 1142.

63. 363 F.3d 58 (1st Cir. 2004).

64. *See id.* at 64 (discussing evidence requirement).

65. *See id.* at 65 n.6 (noting that direct evidence of child's identity would also suffice).

66. *See id.* at 60. The Tanner scale looks at breast and genital development as a means of assessing the age of the person depicted. *See id.*

67. *Id.* at 66. The *Hilton* court noted:

> We find more commonsensical a proposition leading to the contrary inference that someone manufacturing images to look like children will try—and with sufficient technology will manage—to produce images that would be amenable to expert analysis under the Tanner Scale. Whatever parameters of body proportion, growth and development serve as signs of age under the Tanner Scale, those parameters will be mimicked by the virtual pornographer—whether by design or as a byproduct of the goal of realism. What a finding of guilt beyond a reasonable doubt demands is evidence that the indicators of youth apparent to the untrained eye belong to an actual child. Accordingly, we find the government's conten-

conviction, notwithstanding that thousands of images were found on the defendant's computer.[68]

Hilton is the first case to require evidence beyond the images to establish that the defendant knowingly possessed child pornography. With it comes an explicit acknowledgment that technology may have reached a point that juries will not be able to distinguish real from virtual without guidance. While other courts have criticized *Hilton*,[69] this may well be the first indication of what Justice Thomas noted in *Free Speech* that, should technology reach the point that the government is unable to distinguish an image of actual from virtual pornography, regulation of the latter would be permissible.[70]

The *Free Speech* ruling has had other significant trial strategy implications. For example, in *United States v. Pabon-Cruz*,[71] the defendant, who had been found guilty of receiving and distributing child pornography, moved for a judgment of acquittal based on insufficient evidence that he knew the images were of actual children.[72] The court denied the motion because the defendant had stipulated that the images were of actual children.[73] In the alternative, the defendant moved for a new trial based on the prejudicial effect of the admission of the pornographic images found on the defendant's computer.[74] The court similarly rejected the request, finding that the photographs were "extremely relevant" to the defendant's claim that he did not know the images were of actual children.[75]

These cases demonstrate that the government's fears of the difficulty in prosecuting purveyors of child pornography are real and growing. Appellate courts have reversed convictions, some without the opportunity of retrial, and set aside guilty pleas. Yet, at this point no jury has acquitted a

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> tion that Dr. Ricci [(the government's expert witness)] presented sufficient evidence to prove that the children represented were real unavailing.

Id.

68. *See id.* at 60. Significantly, the government introduced only seven images. *See id.* at 60. Hilton had a convoluted procedural history commencing with the defendant's arrest in 1997 as his was one of the first cases to contest the constitutionality of the CPPA. *See id.* (emphasizing importance of case).

69. *See, e.g.*, Wisconsin v. Holze, 2004 Wisc. App. LEXIS 383, *18 (Wis. Ct. App. May 4, 2004) (criticizing *Hilton* case).

70. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 259 (2002) (Thomas, J., concurring) ("[I]f technological advances thwart prosecution of 'unlawful speech,' the Government may well have a compelling interest in barring or otherwise regulating some narrow category of 'lawful speech' in order to enforce effectively laws against pornography made through the abuse of real children.").

71. 255 F. Supp. 2d 200 (S.D.N.Y. 2003).

72. *See id.* at 204 (providing example of implication of *Free Speech* ruling).

73. *See id.*; *see also* United States v. Tanner, 66 Fed. Appx. 449, 450 (4th Cir. 2003).

74. *See Pabon-Cruz*, 255 F. Supp. 2d at 213.

75. *See id.*

defendant on the basis that he was ignorant that the pornographic images were of real children.[76]

Trial strategy continues to evolve. If defendants do not stipulate that the images are of actual children, the veracity of their claimed ignorance of the photographs' authenticity will put the images into the jury's hands. Most defendants vigorously object to the introduction of the images into evidence, cognizant of the effect they will have on the jury. Similarly, where the appellate courts have had access to the images, most have upheld pornography convictions, even under pre-*Free Speech* jury instructions.[77] Surely, however, given the *Free Speech* ruling, defendants will weigh much more closely the decision to stipulate as to the authenticity of pornographic images so as to put the Government to its proof. Now, with at least one circuit requiring expert testimony of a picture's veracity, stipulations surely will diminish and battles of experts surely will increase.

What can be done to protect actual children? The *Free Speech* Court rejected outright some of the government's arguments for a ban on virtual pornography, yet left the door open for new legislation.[78] Congress responded with the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, otherwise known as the PROTECT Act.[79] The following section describes those provisions relating to the virtual pornography problem.[80]

IV. THE PROTECT ACT

The congressional findings in support of the PROTECT Act are in direct response to the *Free Speech* ruling. The thrust of the legislative findings is that prosecutors are being hampered in their ability to prosecute child pornographers.[81] The rationale for this inability, however, differs radically from earlier findings. In 1996, congressional findings linked that inability to prosecute to advancements in technology that made "it possible to produce by electronic, mechanical, or other means visual depictions of what appear to be children . . . that are virtually indistinguishable from

76. *See generally* Feldmeier, *supra* note 11 (noting no jury has acquitted based on lack of knowledge defense).

77. *See* United States v. Richardson, 304 F.3d 1061, 1063 (11th Cir. 2002) (providing example).

78. *See generally* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 259 (2002) (Thomas, J., concurring) (discussing possibility of new legislation).

79. 18 U.S.C. § 2252A (2000 & Supp. III 2003).

80. *See id.* (emphasizing that main thrust of Act was to establish a nationwide "AMBER Alert."). The discussion that follows highlights those sections of the PROTECT Act relevant to this Article and is not meant as an exhaustive description of the Act.

81. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 501, 117 Stat. 650 (2003) [hereinafter Congressional Findings].

actual . . . children."[82] In stark contrast, the new congressional findings concede "there is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children."[83] Because of the *Free Speech* ruling, however, Congress found that many defendants have suggested that they did not know the images they possessed were of actual children, rather than virtual children.[84] Moreover, the new congressional findings stated that technology does exist "to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated."[85] It found further that "technology will soon exist, if it does not already, to computer generate realistic images of children."[86]

Based on these findings, the PROTECT Act amended existing child pornography laws contained in 18 U.S.C. § 2256(8)(B) to define child pornography as including images that are "indistinguishable from" that of a "minor engaging in sexually explicit conduct."[87] In a direct nod to Justice O'Connor, Congress defined the term "indistinguishable" to mean a depiction that is "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."[88] To fit within *Free Speech*'s mandate, the definition expressly excludes depictions "that are drawings, cartoons, sculptures, or paintings depicting minors or adults."[89]

The PROTECT Act also amended the CPPA's affirmative defense that the *Free Speech* Court found too narrow. First, Congress extended the af-

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82. Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, 100 Stat. 3009 (codified as amended at 18 U.S.C. § 2251 (1996)).

83. Congressional Findings, *supra* note 81, § 501(7).

84. *See id.*

85. *See id.*, § 501(5).

86. *Id.*

87. *See* 18 U.S.C. § 2256(8)(B) (2000 & Supp. III 2003).

88. *Id.* § 2256(11). *See generally* Congressional Findings, *supra* note 81, § 502(c) (amending definition of "indistinguishable" under § 2256(11)).

89. 18 U.S.C. § 2256(11). *See generally* Congressional Findings, *supra* note 81, § 502(c). The PROTECT Act also expanded the pandering provision struck down by the *Free Speech* ruling to punish anyone who:

> [A]dvertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief . . . that the material or purported material is, or contains—(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.

18 U.S.C. § 2252A(a)(3)(B). This section has been attacked as unconstitutional because of the "purported materials" provisions. *See* Letter on S. 151 from Laura W. Murphy, Director, ACLU, & Marvin J. Johnson, Legislative Counsel, ACLU, to Senator Patrick J. Leahy (Feb. 5, 2003) [hereinafter ACLU Letter], *available at* http://www.aclu.org/Privacy/Privacy.cfm?ID=11806&c=252http://www.aclu.org/Privacy/Privacy.cfm?ID=11806&c=252.

firmative defense beyond producers and distributors to those who possess child pornography.[90] Secondly, the affirmative defense allows defendants to prove that the images were created completely by computer graphics.[91]

Congress also amended the record-keeping requirements of producers of pornography.[92] The original requirements were enacted to protect minors from being used in pornographic films and visual depictions by requiring producers to ascertain the ages of the actors employed, keep records of this information and affix a statement to all copies of pornographic materials as to where the records could be found.[93] It required that "[w]hoever produces any book, magazine, periodical, film, videotape, or other matter which . . . contains one or more visual depictions . . . of actual sexually explicit conduct," shall create and maintain records that validate that minors were not used.[94] The original provisions defined

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90. *See* 18 U.S.C. § 2252A(c) (delineating affirmative defenses). *See generally id.* § 2252A (a)(5)(B) (expanding federal prohibition against child pornography to those who merely possess such materials).

91. *See id.* § 2252A(c). CPPA's affirmative defense was limited to establishing that adults were used. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002) (noting government's interpretation that CPPA shifted burden to accused to prove their speech was lawful). It does not extend, however, to images of morphed children. *See id.* at 256 (noting "the affirmative defense provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors"). *But cf.* 18 U.S.C. § 2252A(c) (providing affirmative defense if child pornography was produced without actual minors).

In addition, the PROTECT Act creates a new crime of obscene child pornography that provides for harsher penalties than ordinary obscenity. *See* 18 U.S.C. § 1466A. Under the new statute, penalties are imposed on any person who "knowingly produces, distributes, receives, or possesses with intent to distribute" either an obscene depiction of a minor engaging in sexually explicit conduct or any image of a minor engaging in "graphic bestiality, sadistic or masochistic abuse," or any form of sexual intercourse. *See id.* § 1466A(a)(1)–(2)(A). Furthermore, any material that "lacks serious literary, artistic, political, or scientific value" shall also be subject to a reprimand. *See id.* § 1466A(a)(2)(B). The statue further provides that "[i]t is not a required element of any offense under this section that the minor depicted actually exist." *Id.* § 1466A(c). Much controversy exists over this new section because it does not require that a depiction is deemed obscene under the prevailing constitutional principles. *See* Feldmeier, *supra* note 11, at 208, 217; ACLU Letter, *supra* note 89. This new obscenity crime follows the suggestion of the National Center for Missing and Exploited Children, which is that the best approach in addressing child pornography is through obscenity laws, because "99–100 percent of all child pornography would be found to be obscene by most judges and juries." 149 CONG. REC. S2573-02, S2580 (daily ed. Feb. 24, 2003) (statement of Sen. Leahy) (quoting National Center for Missing and Exploited Children's answer to written questions submitted after Congressional hearing).

92. *See* 18 U.S.C. § 2257 (1994 & Supp. V 1999).

93. *See id.* (listing requirements); *see also,* 18 U.S.C. § 2257(b) (2000 & Supp. III 2003) (mirroring CPPA's requisite recording of performers' ages); *id.* § 2257(e)(1) (mandating similar obligation, as that under CPPA, to attach notice on all pornographic materials identifying location of all records on performers).

94. *See* 18 U.S.C. § 2257(a) (1994 & Supp. V 1999). Note the definitions of producers as primary or secondary as established in the Code of Federal Regulations. *See* 28 C.F.R. § 75.7(b) (1992) (explaining that, if primary and secondary

"produces" as meaning "to produce, manufacture, or publish any book, magazine, periodical, film, video tape, or other similar matter."[95]

Additionally, Congress had originally authorized the Attorney General to issue regulations to implement the record-keeping provisions.[96] Following public comments on proposed regulations, the Attorney General included an exemption to the record-keeping requirements that is particularly relevant in light of the amendments to Section 2257. In the Code of Federal Regulations Section 75.7, an exemption from the record-keeping requirements is permitted for depictions of simulated sexually explicit conduct.[97] The regulation requires that a statement referring to the exemption be attached to the material.[98]

The PROTECT Act amended Section 2257's definition of "produces" to include "computer generated image[s], digital image[s], or picture[s]."[99] It further provides that information or evidence obtained or required by Section 2257 may be used in any child pornography prosecution.[100] Previously, such evidence was limited to use solely in prosecutions for violations of Section 2257. The significance of these changes is discussed below.

A. *The Questionable Constitutionality of the PROTECT Act*

The PROTECT Act has narrowed the ban on virtual child pornography to those depictions that are "indistinguishable from that of a minor engaging in sexually explicit conduct."[101] Some commentators have noted that the "indistinguishable" language will not survive constitutional attack because it does not remedy the core finding in *Free Speech*—that the actual danger from pornography to children is that they are exploited in its creation.[102] Nevertheless, a ban on virtually indistinguishable pornography would aid the government's position that it will be unable to prosecute actual pornographers as technology advances. Furthermore, that rationale may override all other concerns and allow for a ban on virtual

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producers are separate, primary producer can delegate duty to affix notice on pornographic materials to secondary producer).

95. *See* 18 U.S.C. § 2257(h) (1994 & Supp. V 1999). *But cf.* 18 U.S.C. § 2257(h)(3) (2000 & Supp. III 2003) (adding "computer generated image, digital image, or picture" to list of materials).

96. *See* 18 U.S.C. § 2257(g) (1994 & Supp. V 1999); *see also* 18 U.S.C. § 2257(g) (2000 & Supp. III 2003) (maintaining original provision from CPPA).

97. *See* 28 C.F.R. § 75.7(a)(2). Also exempt are depictions made prior to November 1, 1990, the effective date of the original enactment. *See id.* § 75.7(a)(1).

98. *See id.* § 75.7(a).

99. 18 U.S.C. § 2257(h)(3) (2000 & Supp. III 2003).

100. *See id.* § 2257(d)(2).

101. *Id.* § 2256(8)(B).

102. *See, e.g.*, Feldmeier, *supra* note 11. *See generally* Jasmin J. Farhangian, Comment, *A Problem of "Virtual" Proportions: The Difficulties Inherent in Tailoring Virtual Child Pornography Laws to Meet Constitutional Standards*, 12 J.L. & POL'Y 241 (2003).

pornography that is indistinguishable from actual child pornography. At this point, however, as acknowledged in the new congressional finding, technology has not yet reached the point where it can create a completely virtual child that is indistinguishable from an actual child.[103] Therefore, the "indistinguishable from" language bears the same constitutional infirmity that befell the CPPA's "appears to be" language.

In addition to being overbroad, the new "indistinguishable from" language is unconstitutionally vague. Its definition of "indistinguishable" is linked to an "ordinary" person standard.[104] Who is the "ordinary" person? Does it differ from a "reasonable" person? If it is meant to be synonymous with the latter, other problems arise. The *mens rea* of Section 2252 is "knowingly," yet the assessment of whether an image is child pornography is whether an ordinary person would so think.[105] Thus, defendants who do not know that they possess child pornography, where it is in the form of a virtual image, can be convicted if an ordinary person would believe the image was of an actual child. In effect, defendants are being convicted on a negligence standard rather than the "knowingly" *mens rea* stated in the statute and mandated by the Supreme Court.[106]

The expanded affirmative defense available to those charged with violating the Act may not survive constitutional scrutiny because, although it extends to producers, distributors and possessors, it is difficult to see how anyone other than the producer of virtual pornography would be able to establish that no actual children were used. As the *Free Speech* Court reasoned, if the government professes difficulty in establishing that an image is of an actual child, "it will be at least as difficult for the innocent possessor."[107] Nevertheless, the majority did not rule out the possibility of an appropriately drawn affirmative defense.[108] The PROTECT Act addresses some of these concerns with the change in the affirmative defense coupled with the changes in the record-keeping requirement. With some revi-

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103. Morphing is child pornography. See 18 U.S.C. § 2256(8)(C); Timothy J. Perla, Note, *Attempting to End the Cycle of Virtual Pornography Prohibitions*, 83 B.U. L. REV. 1209, 1212 n.10, 1213 n.21 (2003) (affirming CPPA and PROTECT Act's prohibitions of morphing visuals to appear as though "identifiable minor is engaging in sexually explicit conduct"). *See generally* Congressional Findings, *supra* note 81, § 501(5) ("The technology *will soon exist* . . . to computer generate realistic images of children.") (emphasis added).

104. 18 U.S.C. § 2256 states that "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 engaging in sexually explicit conduct." 18 U.S.C. § 2256(11) (emphasis added).

105. *Compare id.* § 2252, *with id.* § 2256(11).

106. *But see* United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994) (holding that § 2252 requires knowledge of both sexually explicit nature of material and age of performers).

107. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255–56 (2002).

108. *See id.* at 256.

sions, the record-keeping provisions can be the cornerstone of legislation that protects virtual pornographers and actual children.

V. REGULATION OF THE VIRTUAL PORNOGRAPHY MARKET

Since the Supreme Court endorsed virtual pornography as a positive, a commercial market for virtual pornography could develop. With it, so could come some of the protections Congress seeks. Certainly, if the Supreme Court is correct and the existence of a virtual pornography market results in the reduced exploitation of actual children in the creation of pornography—that could be a positive result, depending on a few crucial assumptions. First, one would have to accept the Court's contention that "[f]ew pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."[109] Unfortunately, many experts on child molesters explain that these individuals derive sexual gratification from the pain inflicted on actual children, and the recording of it.[110] These producers of child pornography would not be interested in virtual pornography. Concomitantly, some purveyors of child pornography would also not have their appetites satiated if they knew they were viewing images of virtual pornography. It is possible, therefore, that only a small class of pornographers—those who are in it solely for profit—fit the *Free Speech* rationale. Whether crimes against actual children will be reduced is yet to be seen.

As discussed in Part Three above, the government faces a great hurdle in post-*Free Speech* cases of establishing that defendants *knew* they possessed images of actual children. Government regulation of the virtual pornography industry would require labeling of images so as to verify that the images are virtual. Thus, the labeling provision may ultimately turn out to be the best method for prosecuting actual child pornographers—those who produce, distribute and possess child pornography—who would find it more difficult to claim lack of knowledge. Whether the labeling provisions are effective requires us to examine a number of issues.

Since the Supreme Court declared virtual pornography was protected expression under the First Amendment, the first issue is whether Section 2257 of the PROTECT Act unduly burdens this right. An examination of the legislative and judicial history of the original record-keeping provisions provides clear guidance. The original provisions were enacted for reasons that are strikingly similar (if not virtually identical) to the con-

109. *Id.* at 254.

110. *See* A. Nicholas Groth et al., *The Child Molester: Clinical Observations*, LITIGATION AND ADMINSTRATIVE PRACTICE COURSE HANDBOOK SERIES CRIMINAL LAW AND URBAN PROBLEMS, (Practicing Law Institute), Jan. 27, 1989, at 323 ("Child molestation is the sexual expression of non-sexual needs and unresolved life issues."); COURT TV'S CRIME LIBRARY, *Child Molestation*, ("Molesters engage in sex with children for a variety of reasons and sometimes these reasons have little to do with sexual desires."), *at* http://www.crimelibrary.com/criminal_mind/psychology/pedophiles/2.html?sect=19 (last visited Jan. 18, 2005).

cerns raised by computer-generated images. According to the 1986 Attorney General's Commission on Pornography, which was the catalyst for the amendments to the original 1984 child pornography legislation,[111] regulations were necessary to stem the use of children in pornographic films and pictures.[112] Additionally, the report noted that requiring producers of pornographic materials to ascertain the ages of the actors they employ would eliminate claims of mistake or ignorance.[113]

Producers and distributors of adult pornography immediately challenged the record-keeping provisions as unduly burdensome on their First Amendment rights.[114] Ultimately, the Court of Appeals for the District of Columbia Circuit, in *American Library Association v. Reno*,[115] found that the provisions and related regulations[116] were constitutional. In doing so, the court rejected the plaintiffs' claims that the record-keeping provisions were content-based; instead, the court ruled that "it is clear that Congress enacted the Act [The Child Protection and Obscenity Enforcement Act of 1988] not to regulate the content of sexually explicit materials, but to protect children by deterring the production and distribution of child pornography."[117]

The *Reno* court further reasoned that content-neutral regulations are constitutional if narrowly tailored, serve a significant governmental interest and leave ample alternative channels of communication.[118] Applying that test to the record-keeping provisions, the court noted that they were narrowly tailored to the prevention of child pornography because they fulfilled three goals:

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111. *See* Am. Library Ass'n v. Reno, 33 F.3d 78, 81 (D.C. Cir. 1994).

112. *See* FINAL REPORT, *supra* note 11, at 618–20 ("Despite the umbrella protection provided by the Child Protection Act of 1984, loopholes remain that permit the continued exploitation of children.").

113. *See id.* at 620.

114. *See* Am. Library Ass'n v. Barr, 794 F. Supp. 412 (D.D.C. 1992, *aff'd in part, rev'd in part, sub nom.* Am. Library Ass'n v. Reno, 33 F.3d 78 (D.C. Cir. 1994); Am. Library Ass'n v. Thornburgh, 713 F. Supp. 469 (D.D.C. 1989), *vacated by, sub nom.* Am. Library Ass'n v. Barr, 956 F.2d 1178 (D.C. Cir. 1992).

115. 33 F.3d 78 (D.C. Cir. 1994). The *Reno* court tailored the scope of the record-keeping provisions by disallowing certain provisions and regulations. *See id.* at 90–92. For example, it narrowed the scope of "secondary producers" and invalidated the requirement that producers keep records as long as they remain in business. *See id.* at 91, 93. Later cases further refined the definition of "producer." *See* Sundance Assocs., Inc. v. Reno, 139 F.3d 804 (10th Cir. 1998) (clarifying definition of "producer" under Child Protection and Obscenity Act); *see also* Connection Distrib. Co. v. Reno, 154 F.3d 281, 285–86 (6th Cir. 1998) (same).

116. *See* 28 C.F.R. § 75 (1992); 57 Fed. Reg. 15017 (1992).

117. *Reno*, 33 F.3d at 86. The court noted that the goals of the record-keeping provisions were threefold: first, to prevent the exploitation of children; second, to deprive child pornographers of access to commercial markets; and third, to aid law enforcement in identifying the performers in sexually explicit materials to verify compliance with the law. *See id.* at 89.

118. *See id.* at 88.

> It ensures that primary producers actually confirm that a prospective performer is of age; it deters children from attempting to pass as adults; and most important, it creates the only mechanism by which secondary producers (who by definition have no contact with performers) can be required to verify the ages of the individuals pictured in the materials they will be producing.[119]

Employing the *Reno* court's rationale to virtual pornography, the regulation of virtual pornography should survive a constitutional challenge that it unduly burdens protected speech. The same goals and concerns apply to underage record-keeping provisions and virtual record-keeping provisions. In both instances, the goal is to prevent the exploitation of children. In both situations, the concern is that, without the provisions, law enforcement is hampered in its ability to prosecute child pornographers who claim lack of knowledge of the true nature of the materials produced, distributed or possessed.

The second issue concerning the language of the newly amended Section 2257 presents a more difficult constitutional challenge. The Section now requires that "whoever produces any book, magazine, periodical, film, videotape, or other matter which . . . contains one or more visual depictions . . . of *actual sexually explicit conduct*," shall create and maintain records that validate that minors were not used.[120] The PROTECT Act amendments define "produces" to include "*computer generated image[s].*"[121]

Herein lies the problem that renders the Section constitutionally void for vagueness: How can someone produce a computer-generated image of "actual sexually explicit conduct?" If it is computer-generated, or virtual, it does not contain actual conduct.[122] The statute does not define "actual sexually explicit conduct" except to state that it does not include "simulated conduct."[123] Moreover, judicial interpretation of the latter term is scant.[124] Notably however, during Senate debates on the PROTECT Act, Senator Leahy pointed out a similar ambiguity in the proposed new defini-

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119. *Id.* at 89.

120. 18 U.S.C. § 2257(a)(1) (2000 & Supp. III 2003) (emphasis added).

121. *Id.* § 2257(h)(3) (emphasis added).

122. *See* 149 CONG. REC. S2573-02, S2578 (daily ed. Feb. 24, 2003) (statement of Sen. Leahy) (attacking 2252A and amending it to remove "actual sexually explicit conduct").

123. 18 U.S.C. § 2257(h)(1).

124. *See* United States v. Adams, 343 F.3d 1024, 1036 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 2871 (2004) (holding definition of "sexually explicit conduct" including term "simulated" not void for vagueness). *Cf.* United States v. Carroll, 190 F.3d 290, 298 (5th Cir. 1999) (concluding that superimposing minor's face on body of person exhibiting genitals does not violate § 2251(a), which prohibits defendant from enticing or using minor to engage in actual or simulated sexually explicit conduct), *vacated in part and reinstated in part by*, 227 F.3d 486, 488 (5th Cir. 2000) (per curium). In its opinion, the *Carroll* court noted that "our search did not reveal another court's interpretation of the 'simulated . . . lascivious exhibition' language." *Id.* at 294 n.6 (citation omitted).

tions of child pornography.[125] Originally, the statute prohibited visual depictions, including computer-generated images that were "indistinguishable from that of an actual minor" engaging in *sexually explicit conduct.*[126] Nevertheless, the definition of "sexually explicit conduct" covered "*actual* sexual intercourse."[127] Senator Leahy stated that he believed:

> [T]here is a vagueness concern in the new statute 2252A [enacted as 2256] because, while it is clearly aimed at "virtual" child pornography (where no real children are involved), it still requires "actual" conduct. In the realm of computer generated images, however, the distinction between actual and simulated conduct makes no sense.[128]

In response, the final version of the statute deleted the term "actual" and replaced it with the term "graphic."[129] Thus, the regulation provision as presently constructed will not withstand constitutional scrutiny because of its contradictory, and therefore vague, language.

To rectify this ambiguity, Congress should amend Section 2257 to clarify its requirements with respect to producers of adult pornography and producers of virtual pornography by creating two separate parts as illustrated in Appendix One. The proposed Section 2257(I), as appended, should be limited to production of actual sexually explicit conduct involving real actors. The proposed Section 2257(II), as appended, should be drafted with respect to producers of virtual pornography. Because the creation of virtual pornography does not involve actual individuals, there is no need for the verification requirements in 2257(b). Instead, the proposed Section 2257(II)(b), as appended, should be created whereby producers of virtual pornography will record the methods used to create the virtual images, the specific program and software used, the names and addresses of the programmers who created the images, the location of the computer used in the production and the date of creation, as well as other records necessary to verify that no actual minors were used in the production.

The regulations promulgated to enforce the record-keeping provision added an exemption that also needs to be adjusted in light of the amend-

125. *See* 149 CONG. REC. S2573-02, S2578 (daily ed. Feb. 24, 2003) (statement of Sen. Leahy) (discussing Hatch-Leahy bill provisions that alter definition of "child pornography").

126. *See id.* at S2575 (detailing amendments to 18 U.S.C. § 2256).

127. *Id.* (emphasis added). The definition also covered "lascivious simulated sexual intercourse". *Id.*

128. *Id.* at S2581. Senator Leahy stressed that he fears "clever defendants might seek to argue that this new provision still requires proof [of] 'actual' sexual acts involving real children." *Id.*

129. *See* 18 U.S.C. § 2256(2)(B)(i) (2004) (defining characteristics of "sexually explicit conduct").

ments to Section 2257.[130] Under the Code of Federal Regulations Section 75.7, depictions of simulated sexually explicit conduct are exempt from the record-keeping requirements.[131] This regulation directly conflicts with Congress's intent to extend the record-keeping requirement to creators of virtual pornography.[132] Therefore, the regulation must be changed to eliminate the exemption for simulated sexually explicit conduct created by computer technology.[133]

The new record-keeping provision states that evidence or information obtained from the mandated records can now be used in the prosecution of any child pornography offense, rather than just labeling offenses.[134] This significantly expands the scope of Section 2257, which previously limited the use of information or evidence obtained from the records only to prosecutions for violating the record-keeping provision.[135] The impetus for the original record-keeping legislation—the Attorney General's Commission on Pornography—stated that the information contained in the records should not be used in pornography prosecutions so as to avoid Fifth Amendment self-incrimination concerns.[136] Congress obeyed, thus precluding any judicial or scholarly examination of the issue.[137] The self-

130. For a discussion of the record-keeping requirements on producers of pornography, see *supra* notes 92–95 and accompanying text.

131. *See* 28 C.F.R. § 75.7(a)(2) (2004) (providing exemption for record-keeping requirement of 18 U.S.C. § 2257(a)–(c) (2004)).

132. *See* 149 CONG. REC. S2573-02, S2584 (daily ed. Feb. 24, 2003) (statement of Sen. Hatch) (discussing new provisions of PROTECT Act). Senator Hatch noted that the new record-keeping "expands the scope of materials covered to reflect the computerized manner in which they are increasingly being distributed and sold. Producers of such sexually explicit materials must make and maintain records confirming that no actual minors were involved in the making of the sexually explicit materials." *See id.*

133. Simulated sexually explicit conduct using actual adults would still be subject to the existing exemption. For example, images merely suggesting off camera sexual activity would be exempt. *See* Child Protection Restoration and Penalties Enhancement Act of 1990, 57 Fed. Reg. 15,017, 15,019 (Apr. 24, 1992) (codified at 28 C.F.R. pt. 75).

134. 149 CONG. REC. S2573-02, S2578 (daily ed. Feb. 24, 2003) ("These records, which will be helpful in proving that the material in question is not 'virtual' child pornography, may be used in federal child pornography and obscenity prosecutions under this Act.").

135. *Id.* (noting need for changed record-keeping requirements).

136. *See* FINAL REPORT, *supra* note 11, at 621 (stating that information in records should not be used in prosecution so as to avoid Fifth Amendment problems).

137. To the contrary, initial challenges to Section 2257's constitutionality asserted that it was not narrowly tailored to serve a significant governmental interest because the evidence could *not* be used in a child pornography prosecution. *See* Amer. Library Ass'n v. Barr, 794 F. Supp. 412, 417 (D.D.C. 1992) (stating that Act applies to all depictions of actual sexually explicit conduct regardless of age or apparent age of model), *aff'd in part, rev'd in part, sub nom.* Am. Library Ass'n v. Reno, 33 F.3d 78 (D.C. Cir. 1994) (upholding requirement to hold records for minimum of five years but struck down requirement to hold records indefinitely); Amer. Library Ass'n v. Thornburgh, 713 F. Supp 469, 478 (D.D.C. 1989) (discuss-

incrimination concerns were revived in Senate debates on the PROTECT Act's amendment to Section 2257 enlarging its scope.[138] The resultant expanded scope now demands an examination of such self-incrimination issues.

The Fifth Amendment states that a person cannot be compelled to incriminate him or herself.[139] Yet, the privilege against self-incrimination is not absolute. In two related areas, the courts have demarcated limitations on the privilege. The first concerns records that the government requires of those engaged in a regulated industry. Such "required records" are not privileged even if they may incriminate the record-keeper.[140] This doctrine limits the right against self-incrimination if three criteria are met. First, the documents must be kept for an "essentially regulatory" purpose; second, the records must be of a kind that the regulated party has customarily kept; and third, the records have assumed public aspects, which make them analogous to public records.[141]

In the seminal case *Shapiro v. United States*,[142] the defendant, a wholesaler of produce during World War II, was subject to the record-keeping provisions of the Emergency Price Control Act, which required him to record price, sale and delivery information.[143] The defendant claimed his privilege against self-incrimination after being ordered to produce his records and prosecuted for violating the Act.[144] In rejecting the defendant's constitutional claim, the Supreme Court noted that the congressional intent behind the record-keeping provision was to aid law enforcement, and therefore, Congress could not have intended to make

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ing constitutional problems with Section 2257) *vacated by, sub nom.* Am. Library Ass'n v. Barr, 956 F.2d 1178 (D.C. Cir. 1992); *see also* Amer. Library Ass'n v. Reno, 47 F.3d 1215, 1216 (D.C. Cir. 1995) (Tatel, J., dissenting) (stating there is serious risk that Section 2257 burdens substantially more speech than necessary). Presumably the expanded scope of the amended Section 2257 allays this concern.

138. *See* 148 CONG. REC. S 11,199, 11,204 (daily ed. Nov. 15, 2002) (statement of Sen. Leahy) ("[R]equiring producers to maintain records at the risk of criminal liability for not doing so, which records can be used against them in a child pornography prosecution, violates the constitutional prohibition against mandatory self-incrimination.").

139. *See* U.S. CONST. amend V ("[N]or shall be compelled in any criminal case to be a witness against himself . . . .").

140. *See generally*, Bernard D. Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687 (1951) (discussing required records doctrine and effect on constitutional privilege against self-incrimination); Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6 (1986) (same).

141. *See* Grosso v. United States, 390 U.S. 62, 67–68 (1968) (detailing premises of required records doctrine). *See generally* Jeremy Hugh Temkin, *"Hollow Ritual[s]": The Fifth Amendment and Self-Reporting Schemes*, 34 UCLA L. REV. 467 (1986) (discussing required records doctrine and self-incrimination).

142. 335 U.S. 1 (1948).

143. *See id.* at 4 (noting defendant's occupation and his required federal records).

144. *See id.* at 5 (stating that defendant produced records, but claimed constitutional privilege).

them privileged.[145] The majority reasoned that documents required to be kept for the public benefit were not privileged.[146] Justice Frankfurter dissented on the grounds that the mere requirement that records be kept does not make them public records that are outside the scope of Fifth Amendment protection.[147] He stressed that for records to be exempt from constitutional protection, the public should have "the same right that the Government has to peruse [these records], if not to use, them."[148]

Recently, in *Environmental Defense Fund, Inc. v. Lamphier*,[149] the defendant argued that compelling him to notify the EPA of hazardous waste activities and requiring him to obtain a permit for those activities forced him to make incriminating disclosures in violation of the Fifth Amendment.[150] The Fourth Circuit rejected this contention, and ruled that the regulatory scheme set up by Congress to monitor the hazardous waste industry was not to outlaw the hazardous waste business, but rather to bring people into compliance.[151] Making an analogy to *Shapiro*, the court noted, "records required as part of a valid regulatory scheme (as opposed to a ploy to entrap gamblers, drug dealers, etc.) are not barred on fifth amendment grounds even though they may contain incriminating information."[152]

Closely related to, but distinct from, the required records doctrine are self-reporting requirements. These statutory schemes require individuals to provide information to the government. The extent to which the government can use such information against the provider also implicates the privilege against self-incrimination.

In three cases decided on the same day and known as the "trilogy," the Supreme Court attempted to delineate the scope of the privilege in self-reporting cases.[153] The Court determined that where the activity for

145. *See id.* at 15 (stating that Congress's intent was to aid effective enforcement of record-keeping requirements and did not intend private privilege to attach).

146. *See id.* at 32–33 (concluding that privilege of private papers cannot be maintained for documents "which are the appropriate subjects of governmental regulation" (quoting Davis v. United States, 328 U.S. 582, 589–90 (1946))).

147. *See id.* at 51 (Frankfurter, J., dissenting) ("If records merely because required to be kept by law ipso facto become public records, we are indeed living in glass houses.").

148. *Id.* at 55 (Frankfurter, J., dissenting).

149. 714 F.2d 331 (4th Cir. 1983).

150. *See id.* at 339 (stating Lamphier's constitutional argument).

151. *See id.* ("In passing RCRA [Resource Conservation and Recovery Act], Congress did not outlaw the hazardous waste business; it merely set up a regulatory program for monitoring those activities.").

152. *Id.*

153. *See* Marchetti v. United States, 390 U.S. 39 (1968) (examining whether wagering tax statutes' registration requirements violated defendant's Fifth Amendment privilege against self-incrimination); Grosso v. United States, 390 U.S. 62, 63–64 (1968) (same); Haynes v. United States, 390 U.S. 85 (1968) (analyzing

which records were sought was essentially criminal, the self-incrimination privilege prevailed. In *Marchetti v. United States*,[154] the defendant was a professional gambler, who failed to comply with Internal Revenue Service (IRS) requirements that he supply the IRS with information about his gambling activities.[155] The defendant failed to supply the information or to pay the requisite excise and occupational taxes on his wagering activities.[156] In challenging his convictions for income tax evasion, Mr. Marchetti argued that the self-reporting requirement violated his right against self-incrimination.[157] The Supreme Court agreed by reasoning that, because gambling was illegal in all but one jurisdiction, the defendant would be required to admit criminal behavior by filling out the form.[158] The Court distinguished *Shapiro* by stressing that reporting requirements in "'an essentially non-criminal and regulatory area of interest'" do not violate the right against self-incrimination, whereas the gambling regulation was incriminatory because it was targeting "a selective group inherently suspect of criminal activities."[159]

Thus, the Supreme Court developed parallel lines of cases concerning the keeping of required records and self-reporting provisions. Commentators have noted the distinction between the two and the differing test for determining Fifth Amendment problems.[160] Nevertheless, in the

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whether firearm registration requirements violated defendant's Fifth Amendment privilege against self-incrimination).

154. 390 U.S. 39 (1968). For a discussion of the protections offered by the Fifth Amendment, see *supra* notes 139–41 and accompanying text.

155. *See Marchetti*, 390 U.S. at 40–41.

156. *See id.*

157. *See id.* at 41 (noting defendant's argument that "statutory obligations to register and pay occupational tax violated his Fifth Amendment privilege against self-incrimination").

158. *See id.* at 44–49 (stating that "petitioner's assertion of the privilege as a defense to this prosecution was entirely proper, and accordingly should have sufficed to prevent his conviction"). Similarly, *Grosso* involved a gambler who failed to comply with income tax statutes. *See Grosso*, 390 U.S. at 63–64. *Haynes* concerned the failure to self-report a firearm purchase. *See Haynes*, 390 U.S. at 85.

159. *See Marchetti*, 390 U.S. at 57 (quoting Alberston v. Subversive Activities Control Bd., 382 U.S. 70 (1965)). *Alberston* involved a self-reporting scheme directed at members of the Communist Party, which the Supreme Court struck down because it was targeting a selective group "inherently suspect of criminal activities." Alberston v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965). For a discussion of *Marchetti*, see Envtl. Def. Fund, Inc. v. Lamphier, 714 F.2d 331, 339 (4th Cir. 1983) ("[W]hile reporting requirements in 'an essentially non-criminal and regulatory area of inquiry' are permissible despite the possibility of incidental self-incrimination, an inquiry directed to a 'selective group inherently suspect of criminal activities' is not.").

160. *See* Temkin, *supra* note 141, at 467 n.2 (discussing distinction between required records and self-reporting provisions); *see also* Abraham Abramovsky, *Money Laundering and Narcotics Prosecution*, 54 FORDHAM L. REV. 471, 495–97 (1986) (discussing line of cases where Supreme Court addressed Fifth Amendment privilege in self-reporting context); Irene Merker Rosenberg, Bouknight*: Of Abused Children and the Parental Privilege Against Self-Incrimination*, 76 IOWA L. REV. 535, 540–47 (1991) (same).

initial congressional reports and hearings on the record-keeping provisions, it appears that Congress was relying too heavily on the self-reporting line of cases.[161] In believing that Section 2257 was governed not by the required records line of cases, but instead by the self-reporting cases, the original record-keeping provisions unduly limited the evidentiary use of the information obtained by the records to find violations of Section 2257.

The PROTECT Act's amendment expansion is permissible because the record-keeping provisions here do not deal with an "essentially criminal" activity such as gambling. Under the *Shapiro* line of cases, Section 2257 will survive constitutional scrutiny by satisfying the three established criteria. The first requirement is that the records must be kept for an "essentially regulatory" purpose.[162] Here, because producers of virtual pornography are within their constitutional rights to engage in that activity, the records they must keep are essentially regulatory. If producers comply with the record-keeping and labeling provisions, they are within their rights to produce the pornography—unlike the *Marchetti* petitioner, who risked gambling prosecutions because of the self-reporting requirements.

The second requirement is that the records must be of the kind the regulated party has customarily kept.[163] Because the field of virtual pornography is so new, we cannot say that this criterion is met per se. Nevertheless, we can see that the industry is already accustomed to keeping records of the actors employed in its productions by making an analogy to the record-keeping requirement for the producers of adult pornography.[164] Requiring records that document the means used to create underage virtual pornography should not be problematic.

The third requirement is that the records must have public aspects.[165] Justice Frankfurter's criteria in his *Shapiro* dissent highlights Section 2257s constitutionality with respect to this criterion—because the labeling would be required to be posted on all productions, it is certainly available to the public.

Producers and distributors of virtual pornography should have no objection to such labeling because it would allow them to exercise their First Amendment rights and protect them from unwarranted prosecution. The government would benefit from the labeling because it would be easier to prove that defendants knew they possessed actual child pornography if the images did not include a virtual pornography label. Moreover, it would ease the evidentiary burden of establishing that an image was of an actual

161. *See* H.R. DOC. NO. 100-129, at 55–106 (1987) (providing analysis of proposed Child Protection and Obscenity Enforcement Act of 1987 (citing *Marchetti* and *Albertson*)).

162. *See Grosso*, 390 U.S. at 67–68 (stating first requirement).

163. *See id.* at 68 (stating second requirement).

164. For a discussion of record-keeping requirements for producers of pornography, see *supra* notes 92–95 and accompanying text.

165. *See Grosso*, 390 U.S. at 68 (stating third requirement).

child. Concomitantly, the record-keeping provision would aid the possessors of alleged child pornography in establishing their affirmative defense that the images they possessed were completely virtual. They can buttress this claim by introducing into evidence the label required by 2257 that states that the images are of adults or are completely computer-generated.

VI. CONCLUSION

As the post-*Free Speech* child pornography cases illustrate, the government must prove two elements: first, that a pornographic image is of an actual child, and second, that the defendant had knowledge of the authenticity of the image.[166] Protecting actual children and the rights of virtual pornographers can be accomplished by using the record-keeping provisions, as modified according to the suggestions made above. If the Supreme Court is correct in its assessment that a virtual pornography market is desirable, then images generated by producers of virtual pornography will all contain the record-keeping label. Accordingly, those seeking constitutionally protected images will come to rely on the label.[167] Concomitantly, the lack of a label can be used in a prosecution as evidence that the defendant knew he was dealing with actual child pornography. Thus, the best defense against child pornography may be to embrace virtual pornography.

166. For a discussion of the government's burden of proof in post-*Free Speech* child pornography cases, see *supra* notes 40–80 and accompanying text.

167. If a producer of child pornography falsely affixes a statement that the images are virtual, this analysis fails, but then so does the Supreme Court's premise that virtual pornography will dry up the market for actual child pornography.

APPENDIX

MODEL STATUTE (Additions or amendments in italics)

§ 2257. Record keeping requirements

I

(a) Whoever produces any book, magazine, periodical, film, videotape, or picture or other matter of actual individuals which—

(1) contains one or more visual depictions made after November 1, 1990 of actual sexually explicit conduct; and

(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct—

(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

(d)

(1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

(2) Paragraph (1) of this subsection shall not preclude the use of such information or evidence in a prosecution or other action for a violation of this chapter or chapter 71 [18 USCS §§ 2251 et seq. or 1460 et seq.], or for a violation of any applicable provision of law with respect to the furnishing of false information.

(e)

(1) Any person to whom subsection (a) applies shall cause to be affixed to every copy of any matter described in paragraph (1) of subsection (a) of this section, in such manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located.

(2) If the person to whom subsection (a) of this section applies is an organization the statement required by this subsection shall include the name, title, and business address of the individual employed by such organization responsible for maintaining the records required by this section.

(f) It shall be unlawful—

(1) for any person to whom subsection (a) applies to fail to create or maintain the records as required by subsections (a) and (c) or by any regulation promulgated under this section;

(2) for any person to whom subsection (a) applies knowingly to make any false entry in or knowingly to fail to make an appropriate entry in, any record required by subsection (b) of this section or any regulation promulgated under this section;

(3) for any person to whom subsection (a) applies knowingly to fail to comply with the provisions of subsection (e) or any regulation promulgated pursuant to that subsection; and

(4) for any person knowingly to sell or otherwise transfer, or offer for sale or transfer, any book, magazine, periodical, film, video, or other matter, produce in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce or which is intended for shipment in interstate or foreign commerce, which—

(A) contains one or more visual depictions made after the effective date of this subsection of actual sexually explicit conduct; and

(B) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

which does not have affixed thereto, in a manner prescribed as set forth in subsection (e)(1), a statement describing where the records required by this section may be located, but such person shall have no duty to determine the accuracy of the contents of the statement or the records required to be kept.

(g) The Attorney General shall issue appropriate regulations to carry out this section.

(h) As used in this section-

(1) the term "actual sexually explicit conduct" means actual but not simulated conduct as defined in subparagraphs (A) through (D) of paragraph (2) of section 2256 of this title;
(2) "identification document" has the meaning given that term in section 1028(d) of this title;
(3) the term "produces" means to produce, manufacture, or publish any book, magazine, periodical, film, video tape, picture, or other similar matter involving actual individuals 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; and
(4) the term "performer" includes any person portrayed in a visual depiction engaging in, or assisting another person to engage in, actual sexually explicit conduct.

(i) Whoever violates this section shall be imprisoned for not more than 5 years, and fined in accordance with the provisions of this title, or both. Whoever violates this section after having been convicted of a violation punishable under this section shall be imprisoned for any period of years not more than 10 years but not less than 2 years, and fined in accordance with the provisions of this title, or both.

II

(a) Whoever produces by computer, digital or other similar means wholly virtual images:
(1) contains one or more visual depictions made after November 1, 1990 of sexually explicit conduct; and
(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce; shall create and maintain individually identifiable records pertaining to every image portrayed in such a visual depiction.

(b) "Whoever produces any image covered under this subsection shall affix to the production a statement that the images were completely created by computer and that no image of any actual minor was used in its production. The producer shall keep records of the methods used to create the virtual images, include the specific program and software used, the names and addresses of the programmers who created the images, the location of the computer used in the production, the date of creation and other records necessary to verify that no actual minors were used in the production."

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

(d)

(1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

(2) Paragraph (1) of this subsection shall not preclude the use of such information or evidence in a prosecution or other action for a violation of this chapter or chapter 71 [18 USCS §§ 2251 et seq. or 1460 et seq.], or for a violation of any applicable provision of law with respect to the furnishing of false information.

(e)

(1) Any person to whom subsection (a) applies shall cause to be affixed to every copy of any matter described in paragraph (1) of subsection (a) of this section, in such manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all images depicted in that copy of the matter may be located.

(2) If the person to whom subsection (a) of this section applies is an organization the statement required by this subsection shall include the name, title, and business address of the individual employed by such organization responsible for maintaining the records required by this section.

(f) It shall be unlawful—

(1) for any person to whom subsection II (a) applies to fail to create or maintain the records as required by subsections (a) and (c) or by any regulation promulgated under this section;

(2) for any person to whom subsection II(a) applies knowingly to make any false entry in or knowingly to fail to make an appropriate entry in, any record required by subsection (b) of this section or any regulation promulgated under this section;

(3) for any person to whom subsection II(a) applies knowingly to fail to comply with the provisions of subsection (e) or any regulation promulgated pursuant to that subsection; and

(4) for any person knowingly to sell or otherwise transfer, or offer for sale or transfer, any book, magazine, periodical, film, video, or other matter, produce in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce or which is intended for shipment in interstate or foreign commerce, which—

(A) contains one or more visual depictions made after the effective date of this subsection of actual sexually explicit conduct; and

(B) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

which does not have affixed thereto, in a manner prescribed as set forth in subsection (e)(1), a statement describing where the records required by this section may be located, but such person shall have no duty to determine the accuracy of the contents of the statement or the records required to be kept.

(g) The Attorney General shall issue appropriate regulations to carry out this section.

(h) As used in this section—

(1) the term "sexually explicit conduct" means simulated conduct as defined in subparagraphs (A) through (D) of paragraph (2) of section 2256 of this title;

(2) "identification document" has the meaning given that term in section 1028(d) of this title;

(3) the term "produces" means to produce, manufacture, or publish any computer generated, digital, 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; and

(i) Whoever violates this section shall be imprisoned for not more than 5 years, and fined in accordance with the provisions of this title, or both. Whoever violates this section after having been convicted of a violation punishable under this section shall be imprisoned for any period of years not more than 10 years but not less than 2 years, and fined in accordance with the provisions of this title, or both.