Order Code RS21463
Updated March 31, 2003

Child Pornography: Comparison of Selected Provisions of the Senate-passed and House-passed Versions of S. 151, 108th Congress, with Brief Comments on their Constitutionality

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Summary

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

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

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

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

[4] For comparison of additional provisions, see CRS Report RS21468, *Child Pornography: Side-by-Side Comparison of the Senate-passed and House-passed Versions of S. 151, 108th Congress*. For additional information on the bills' constitutionality, see CRS Report RL31744, *Child Pornography Produced Without an Actual Child: Constitutionality of 108th Congress Legislation.* For additional information on child pornography law, see CRS Report 95-406, *Child Pornography: Constitutional Principles and Federal Statutes.*

Provision	Senate-passed bill	House-passed bill	Comment
Pandering, false advertising	Section 3 would prohibit advertising, promoting, presenting, distributing, or soliciting any material in a manner to cause another to believe that it is an obscene visual depiction of a minor, or is child pornography produced with an actual minor.	Section 503 would enact 18 U.S.C. § 2252B, which would prohibit advertising, promoting, presenting, or describing any material in a manner to cause another to believe that it is child pornography produced with an actual child.	The Senate-passed bill, but not the House-passed bill, includes "distributes" and "obscene." To ban distribution would apparently be unconstitutional as applied to protected speech; the other verbs would merely prohibit false advertising.

Provision	Senate-passed bill	House-passed bill	Comment
Providing material to minors	Section 3 would prohibit distributing, offering, sending, or providing a minor (a person under 18) with child pornography, whether produced with an actual child or not, to induce the minor to participate in an illegal activity.	Section 505 would prohibit providing or showing a person under 16 material that is obscene or child pornography, whether produced with an actual child or not, regardless of purpose.	Inducing a minor to participate in an illegal activity, by any means, may be prohibited, but it is questionable whether banning only a means that restricts protected speech would be constitutional.[5] Providing or showing pornography to minors, even if it is protected speech, may be prohibited.[6]
Affirmative defense	Section 3 would allow a defendant to avoid conviction by proving that each person used in producing the alleged child pornography was an adult or none was a minor.	Section 502(d) would allow a defendant to avoid conviction by proving that no person used in producing the alleged child pornography was a minor.	Requiring proof that each person was an adult, as the law the Court struck down did, meant that there was no affirmative defense if the material was produced without actors. But the bills' affirmative defenses might be unconstitutional because a defendant other than the producer might have no way to know how the material was produced.

[5] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[6] Ginsberg v. New York, 390 U.S. 629 (1968); Sable Communications of California v. Federal Communications Commission, 492 U.S. 115 (1989).

Provision	Senate-passed bill	House-passed bill	Comment
Child pornography with an image indistinguishable from that of an actual minor	Section 5 would define "child pornography" to require the use of an "identifiable minor," and would define "identifiable minor" to include an image "virtually indistinguishable" from that of an actual minor.	Section 502(a) would define "child pornography" to include a computer-generated image that is "indistinguishable" from that of an actual minor. 18 U.S.C. § 1466A, which would be created by section 504, would define "indistinguishable" to mean "virtually indistinguishable."	Under *Ashcroft*, it would be unconstitutional to prohibit any child pornography not produced with an actual minor, even if it is indistinguishable from an actual minor.
Depictions, obscene or otherwise, of minors engaging in sexually explicit conduct	Section 6 would enact 18 U.S.C. § 2252B, which would prohibit producing, distributing, receiving, or possessing with or without intent to distribute, any depiction that appears to be of a minor engaging in sexually explicit conduct, if it is obscene or lacks serious literary, artistic, political, or scientific value.	Section 504 would enact 18 U.S.C. § 1466B, which would prohibit producing, distributing, receiving, or possessing with or without intent to distribute, any depiction that appears to be of a minor engaging in sexually explicit conduct, if it is obscene.	Obscene material is not protected by the First Amendment, even if it is produced with no actual person. Material that lacks serious value is not obscene unless it appeals to the prurient interest and is patently offensive. Even though obscene material is unprotected, possessing it in "the privacy of one's own home," without intent to distribute, is protected.[7]
Depictions of pre-pubescent children, actual or otherwise	No provision	Section 504 would enact 18 U.S.C. § 1466A, which would prohibit producing, distributing, receiving, or possessing with or without intent to distribute, any depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct.	Under *Ashcroft*, it would be unconstitutional to prohibit any child pornography not produced with an actual minor, regardless of the apparent age of the child it depicts.

[7] Stanley v. Georgia, 394 U.S. 557, 568 (1969).