2184

99992

Department of Justice

STATEMENT

OF

LAWRENCE LIPPE
CHIEF, GENERAL LITIGATION SECTION
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTEE ON JUVENILE JUSTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 1305, COMPUTER PORNOGRAPHY

ON

OCTOBER 1, 1985

Mr. Chairman and Members of the Subcommittee:

My name is Lawrence Lippe. I am Chief of the General Litigation and Legal Advice Section in the Criminal Division. I am pleased to testify today in strong support of the concepts and objectives embodied in S. 1305, the Computer Pornography and Child Exploitation Act of 1985.

Child molestation is conduct of the most heinous nature. Child abuse is punishable under many state and local laws, and we have no reason to believe state and local authorities are not aggressively enforcing these laws. Nevertheless, there is a very valid role for the federal government to play.

In 1977, the Department of Justice strongly endorsed legislation which first banned the production and dissemination of child pornography. In 1984, the Department worked closely with Congress to develop legislation to strengthen these statutes. The legislation was enacted in May of 1984, and since that time there has been a quantum leap in federal prosecutions. Indeed, since last May we have indicted nearly twice as many defendants for violations of these statutes than during the prior six and one-half years, and our conviction record has been impressive.

It should be clear that the Department places a very high priority on child pornography prosecutions. The Department

enthusiastically endorses legislation which can increase our effectiveness in this area. As I stated earlier, the Department endorses the concepts reflected in S.1305, and we believe this bill, with minor changes, can be an effective piece of legislation.

This bill would amend 18 U.S.C. 1462 to add obscene, lewd, lascivious, or filthy matter entered, stored, or transmitted by or in a computer to those items whose importation or interstate or foreign transportation by common carrier is presently forbidden by that statute. It would also punish those who knowingly permit their computer services to be used for the transmission of material covered by the statute in interstate or foreign commerce. In addition, the bill defines "computer," "computer program," "computer service," and "computer system."

The bill would also amend 18 U.S.C. 2251 to prohibit entry into or transmission by computer, or making, printing, publication or reproduction by other means, of a notice, statement or advertisement, or of identifying information about minors, for the purpose of facilitating, encouraging, offering, or soliciting sexually explicit conduct with a minor, or the visual depiction of such conduct, if the actor knows or has reason to know the notice or other information will be transported in interstate or foreign commerce or mailed, or if it is in fact so transported or mailed.

The bill would amend 18 U.S.C. 2252 to prohibit entry into or transmission by computer or making, printing, publication or reproduction by other means of a notice, statement, or advertisement to buy, sell, receive, exchange, or disseminate visual depictions of a minor engaging in sexually explicit conduct if the production of the visual depiction involves the use of a minor engaging in such conduct, and if the actor knows or has reason to know the notice, statement, or advertisement will be transported in interstate or foreign commerce or mailed, or if it is in fact so transported or mailed.

Finally, the bill would amend 18 U.S.C. 2255 by adding a definition of "computer."

The intent of this legislation appears to be the prohibition of the use of computers for the interstate or foreign dissemination of obscene material, child pornography and advertisements for the same, and information about minors which can be used for child abuse. I shall first address what I consider to be the legal parameters of federal legislation in this area. I shall then make certain recommendations for the restructuring of these provisions.

As I stated earlier, the Department fully supports S.1305 in concept, and we strongly endorse those provisions of the bill that would ban the interstate or foreign dissemination by computer of obscene material, child pornography, and

advertisements to buy, sell or trade child pornography. Federal statutes pertaining to pornography provide a comprehensive prohibition against the importation, mailing and interstate transmission of obscene material and child pornography (18 U.S.C. §§ 1461, 1462, 1465, and 2252). Section 1461 also prohibits the mailing of advertisements for obscene material. Federal law also prohibits the use of children for the production of child pornography (18 U.S.C. § 2251), so long as the requisite interstate nexus can be established. Another statute prohibits the use of the telephone to make obscene comments (47 U.S.C. § 223). Although some of these statutes purport to regulate the transmission of "obscene, lewd, lascivious, indecent, and filthy" material, federal courts have construed all these words as being synonymous with the legal term "obscene." Hamling v. United States, 418 U.S. 87 (1974); Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962). While it might be argued that some of these statutes cover the use of a computer, explicit legislation on the subject is clearly desirable.

Such legislation would, we believe, pose no constitutional problem. It is abundantly clear that neither obscene material nor child pornography is protected by the First Amendment. New York v. Ferber, 458 U.S. 747 (1982); Miller v. California, 413 U.S. 15 (1973).

The extent to which legislation may go beyond this point, to bar matter which is communicative in nature and neither obscene

material nor child pornography is somewhat more problematic. As a general rule the First Amendment prohibits the Government from interfering with communication of factual information, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), even where the material communicated is of a commercial nature, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). In our view, legislation which seeks to ban the transmission of descriptive information about juveniles and nothing more would raise serious constitutional problems. This legislation, of course, is more limited because it imposes the condition that such information be provided "for purposes of facilitating, encouraging, offering, or soliciting sexually explicit conduct of or with any minor." The question is whether this qualification is sufficient to cure any constitutional infirmity.

It is clear that the First Amendment does not protect speech which is used as an integral part of conduct which is in violation of a valid criminal statute. Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); United States v. Barnett, 667 F.2d 835 (9th Cir. 1982); United States v. Moss, 604 F.2d 569 (8th Cir. 1979). However, the courts have made a distinction between speech which merely advocates in general terms violation

of the law and speech which is intended to incite imminent lawless activity; the former is protected speech, the latter is not. Brandenberg v. Ohio, 395 U.S. 444 (1969); United States v. Damon, 676 F.2d 1060 (5th Cir. 1982). Thus, it seems clear that Congress could ban the interstate or foreign dissemination by computer of information deemed speech which is involved with specific criminal activity.

There are existing precedents for such a federal law. For instance, 18 U.S.C. 875 makes criminal the interstate communication of a telephone threat, and 18 U.S.C. 1084 makes it a criminal offense to use a wire communication facility for the transmission in interstate or foreign commerce of wagering information. Sections 1951 and 1952 of Title 18 make criminal the threat to use physical violence to obstruct interstate commerce, and traveling in interstate commerce in connection with or to facilitate an "unlawful activity," as defined in the statute. It should be emphasized that all of these statutes cover speech which either constitutes or is intimately connected with illegal activity. They do not ban the communication of mere information.

Child abuse is essentially a local crime covered by local statutes, but so also is the underlying criminal conduct which is the subject of these four statutes. It is the interstate commerce aspect that provides the basis for federal jurisdiction

in these statutes, and that same basis would be available here. It is as appropriate for the federal government to assert jurisdiction over acts of child molestation facilitated by interstate computer transmissions or computer transmissions utilizing an interstate common carrier as it is for the federal government to assert jurisdiction over the crimes which underlie the four existing statutes.

However, a reading of the four cited statutes reveals that they all define the underlying criminal activity in such a specific fashion that it is clear the underlying activity is unlawful. The operative language in S. 1305 is not as precise. The statute as drafted could prohibit the exchange of identifying information which is innocuous on its face and where no underlying criminal activity is in being, imminent, or even specifically contemplated or planned. Under these circumstances, we are concerned that the proposed provisions would run afoul of the First Amendment.

It may be suggested that the qualifying language in the proposed amendment to 18 U.S.C. 2251 is just as specific as the present language in that statute, particularly in light of the fact that "sexually explicit conduct" as used in the amendment would be limited by the definition of that term in 18 U.S.C. 2255. However, the new material sought to be covered by the proposed amendment is of a very different nature from what is dealt with in the present statutes. Section 2251 presently deals

only with the production of child pornography, which is conduct involving actual child abuse, to which the First Amendment is inapplicable. Section 2252 prohibits the dissemination of child pornography, which likewise has no First Amendment protection. The amendment would add names, telephone numbers and other information about minors to the statute. This material is mere information which on its face may be content neutral and protected by the First Amendment unless it is an integral part of conduct which is in violation of a criminal statute. It is neither conduct (present 2251) nor material which is unprotected per se (present 2252). A statute, such as the proposed amendment, which would ban the transmission of mere information must be more narrowly drawn (see Richmond Newspapers, First National Bank and Virginia State Board, supra) than one which deals with patently illegal conduct in order to withstand constitutional scrutiny.

We suggest that the language "for purposes of facilitating, encouraging, offering, or soliciting sexually explicit conduct of or with a minor" be amended by deleting the word "encouraging" and by adding the words "which sexually explicit conduct is in violation of any state or federal law." As amended, the provision will read "for the purposes of facilitating, offering, or soliciting sexually explicit conduct of or with a minor which sexually explicit conduct is in violation of any state or federal law." Tying the conduct to violations of specific statutes will,

in our opinion, provide the necessary specificity to enable the statute to survive constitutional challenge.

I would like to turn now to some suggestions for restructuring the provisions of this bill.

If amended by the addition of proposed subsection (d), 18 U.S.C. 1462 would cover a person who imports a computer containing a covered program or uses a common carrier to ship it in interstate or foreign commerce. We understand the principal intent of proposed subsection (d) is to punish those who transmit covered material in interstate commerce from one computer to another via telephone lines. While a computer hooked up to a telephone line may be using a common carrier, this is by no means clear. We believe the desired coverage can be more effectively achieved by adding the words "or computer" after the words "common carrier" in the first paragraph of section 1462. Amending the statute in this fashion will obviate any possible controversy over whether use of a computer in the contemplated manner involves use of a "common carrier."

Under the present scheme of the child pornography statutes, 18 U.S.C. 2251 covers conduct -- actual child abuse -- and 18 U.S.C. 2252 deals with the dissemination of material. The proposed changes in this bill all concern the dissemination of material and, therefore, in our judgment, properly belong only in section 2252. Further, if the language "any notice, statement or

advertisement ... for purposes of facilitating, encouraging, offering, or soliciting ... the visual depiction of such conduct" in the proposed amendment to section 2251 means advertisements to buy or sell child pornography, it is duplicated by the proposed amendment to section 2252. 1/ We suggest that coverage of computer transmission of child pornography and advertisements to buy, sell or trade it could be accomplished first, by amending 18 U.S.C. 2252(a)(1) to read "knowingly transports or ships in interstate or foreign commerce by any means, including by computer, or mails any visual depiction or any notice, statement, or advertisement to buy, sell, receive, exchange, or disseminate any visual depiction, if --;" second, by adding the words "by any means, including by computer," after the words "foreign commerce" where they appear in 18 U.S.C. 2252(a)(2); and third, by adding the words "or any notice, statement, or advertisement to buy, sell, receive, exchange, or disseminate any visual depiction" after the words "visual depiction" in the first two places in which they appear in 18 U.S.C. 2252(a)(2). A provision prohibiting the interstate or foreign dissemination of identifying information about minors, if amended as suggested above, could be added as a separate subsection of section 2252.

1/ If this language instead means a communication encouraging the production of such visual depictions, it is unnecessary because production would require sexually explicit conduct by a minor, and communications encouraging such conduct are covered by other language of the proposed amendment to 18 U.S.C. 2251.

Finally, it has come to our attention that certain large providers of long-distance telephone service, such as AT&T and Sprint, either have or are attaining the capability of providing specialized computer services linked by telephone lines tailored to customer needs. To the extent that these companies provide such services as common carriers with neither control over nor knowlege of the content of these specialized networks, they should be exempt from liability. Since the amendments to all three statutes contain knowledge requirements, we view the bill as adequate to protect these service providers. However, we would suggest that the legislative history state that the legislation does not apply to providers of such services absent knowledge on their part or on the part of responsibile corporate officers of the illegality of the transmissions.

I appreciate the opportunity to appear before you today to discuss S. 1305 and the issues involving the use of computers to transmit obscene material, child pornography and information which is related to child abuse. The Department will be pleased to work with the staff of the Subcommittee to draft appropriate language reflecting the Department's suggestions.

END