

Testimony of
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October 15, 2003

STATEMENT

OF

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BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

INDECENT EXPOSURE: OVERSIGHT OF DOJ'S EFFORTS TO PROTECT
PORNOGRAPHY'S VICTIMS

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Mr. Chairman, Mr. Ranking Member, and esteemed Members of the Committee:

My name is John Malcolm, and I am a Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. Among my other duties, I supervise the Child Exploitation and Obscenity Section (CEOS) and the Computer Crime and Intellectual Property Section (CCIPS). In addition to pornographic material, which is constitutionally-protected, adult obscene material and child pornography, which are not constitutionally-protected and which are illegal, are, unfortunately, pervasive in our society. I thank the Committee for inviting me to testify about the Department of Justice=s enforcement efforts against those who produce and disseminate adult obscenity and child pornography.

I. The Nature and Scope of the Problem

Let me begin by acknowledging the positive benefits of the Internet, which are too numerous and obvious to restate here. While there is no doubt that the Internet provides access to a highly diverse network of educational and cultural content, it is also responsible for the proliferation of adult and child pornography and obscene material. Indeed, offensive material that used to be largely unavailable to average citizens and children is now largely unavoidable. Far from being hidden in brown paper bags behind the counters of disreputable stores, offensive material is now readily available to anyone with an Internet connection within a matter of minutes with a few clicks of a computer mouse, accessed oftentimes by unsuspecting children and by adults who had no intention to seek such material and no desire to view it.

Over the last several years, online pornographers have used various technological and marketing techniques designed to trick both adults and children into viewing their offensive material. One favorite trick of online pornographers is to send pornographic spam email. Another is to utilize misleading domain names or deceptive metatags (which is a piece of text hidden in the Hypertext Markup Language (HTML) used to define a web page) which can mislead search engines into returning a pornographic web page in response to an innocuous query. As a result of these deceptive metatags, searches using terms such as Atoys,@ Awater sports,@ AOlsen Twins,@ ABritney Spears,@ Abeanie babies,@ Abambi,@ and Adoggy@ can lead to pornographic websites. Indeed, it has been estimated that ninety percent of children between the ages of 8 and 16 have been exposed to obscene material on the Internet. Moreover, once an unsuspecting person is on a pornographic website, online pornographers utilize other techniques such as Amousetrapping@ to prevent that individual from exiting these websites and stopping the assault of offensive material.

The proliferation of this material and the desire by pornographers to differentiate themselves in a highly-competitive market have prompted pornographers to produce ever-more offensive material. In addition to child pornography, pornography depicting and glorifying bestiality, scatology, and rape are readily available and aggressively marketed.

The harmful effects of obscene material and the victims of this sordid industry are very real. The images produced promote the idea of sex without consequences, such as unwanted pregnancies

or sexually-transmitted diseases. The victims, usually women, are objectified and demeaned, presented as completely non-discriminating with respect to the number or type of sexual partners they have and as being aroused and gratified by being beaten, tortured or raped. Very few women grow up dreaming of being filmed having sex with an animal or being raped and beaten by multiple partners, and very few who see these powerful images and absorb the antisocial values they portray can remain unaffected by them. The negative, lasting impact that this has on the participants who are in these images, and on the attitudes that are formed by the predominantly-male viewers who see them, is incalculable.

The negative impact and effects of child pornography, while more readily apparent and universally-recognized, are too horrifying to think about. Images of young teenagers, prepubescent youngsters, and literally infants engaging in sex of all types with other children and adults are readily-obtainable and would make you sick to your stomach.

Because the Internet has popularized the trade in child pornography, there has been a surge in demand and a corresponding surge in production of child pornography. A recent study by the National Society for the Prevention of Cruelty to Children (ANSPCC@) indicates that approximately 20,000 images of child pornography are posted on the Internet every week. We see younger and younger children depicted in these images. Indeed, the recent NSPCC study indicates that about half of new images appearing on the Internet depict children between the age of nine and twelve, and the rest are younger.

As with obscenity, the trend with respect to child pornography is towards more violent and extreme sexual acts being committed against children. We see Acustom-order@ child pornography where consumers request specific types and ages of children to be molested and photographed or filmed, along with specific sexual directions to the abuser. We see molesters filming their abuse real-time with webcams and broadcasting that sexual abuse live over the Internet. Because child sexual abuse tends to occur in the home or other private location by a person close to the child, the potential for the sexual abuse to span years is great. We must never forget that each image represents the rape of a child. Each image is a tragedy and a gruesome memorial of trauma, abuse, powerlessness, and humiliation that will be with that child for the rest of his or her life.

The Internet has proven to be a useful tool for pedophiles who are able to use it to communicate with each other, trade images, and encourage each other to continue this deviant and harmful conduct. Pedophiles also use the Internet to contact unsuspecting children in chat rooms, to befriend them and engage in sexually-explicit conversations, and, ultimately, to lure them away from the safety of their homes for illicit and dangerous assignments. In so doing, pedophiles frequently use child pornography and obscene material to lower the inhibitions of their victims and to persuade them that adult-child sexual interaction is perfectly acceptable. Too often, this pernicious ploy works.

The sad reality is that, because the Internet is borderless and seamless and because the production and dissemination of objectionable material is both pervasive and international in scope, it is highly unlikely that the Department is ever going to be able to rid our country of obscene material and child pornography through prosecution alone. Active involvement by parents and teachers in the activities of children, public awareness of the Adark side@ of the Internet as well as the harm caused by obscenity and child pornography, and development and deployment of protective software tools and filters are going to be necessary components of any effective strategy to combat this scourge.

Nonetheless, the Department of Justice is aware that it must do its part. Most Americans do not want their Internet-connected homes to be besieged by an avalanche of obscene material and child pornography and overwhelmingly support law enforcement efforts to protect them and their children. Protecting women, children, and families is something that we can all agree is a vital role for government, and that is what the Department is attempting to accomplish.

II. The Department's Efforts to Combat Adult Obscenity

Attorney General Ashcroft publicly stated that A[t]he Department ... is unequivocally committed to the task of prosecuting obscenity@ and that federal prosecutors should work together with CEOS to facilitate Aongoing, systemic and aggressive obscenity investigations and prosecutions.@ Since that time, CEOS attorneys, working with prosecutors in U.S. Attorney=s Offices around the country, have created an obscenity enforcement strategy and have made tremendous progress, along a number of fronts, in combating the scourge of obscenity. In order to aggressively and effectively combat the online distribution of obscenity, the Department created the High Tech Investigative Unit (AHTIU@). The HTIU, which has been operational since October 2002, is staffed with computer forensic experts who bring their special technological expertise to bear against internet-based child pornography and obscenity offenders, many of whom feel impervious to law enforcement because of the perceived anonymity of the Internet. Working side-by-side with CEOS Trial Attorneys and federal agents, HTIU=s computer forensic specialists meet the challenge presented by the use of emerging Internet technology in the commission of child pornography and adult obscenity crimes and are poised to meet new challenges that will surely develop as technology evolves. The HTIU has successfully initiated and developed several cases and has a number of matters under investigation. The HTIU continues to leverage its resources in identifying and investigating complex online cases which may otherwise escape prosecution due to the technical challenges involved.

By formal arrangement, the HTIU receives tips from the National Center for Missing and Exploited Children (NCMEC), Morality in Media (MIM), and the Federal Trade Commission (FTC) involving child pornography and obscenity offenses. The HTIU is already receiving and reviewing an average of 120 tips per month from NCMEC and MIM and has direct access to the FTC=s complaint database. Many of these complaints have been referred for further investigation. The Department appreciates the efforts of these organizations, and all citizen groups which report violations of federal law, and hopes to maintain these very beneficial relationships in the future.

CEOS devised and conducted a Federal Prosecutors Symposium on Obscenity held at the National Advocacy Center in June 2002. The Attorney General personally addressed the audience and, via live simulcast, also addressed U.S. Attorney=s Offices throughout the country. In October 2002, CEOS presented an Obscenity Training Seminar, during which it distributed a detailed obscenity case digest. A second annual Obscenity Training Seminar began today and will last the rest of the week. It is through such training of federal prosecutors and agents that the Department hopes to develop a national strategy and framework for sustained, long-term enforcement of federal obscenity laws, to complement the anti-obscenity efforts of state and local prosecutors and investigators.

I am pleased to state that the Department's efforts in this regard are starting to bear fruit. To date, during this Administration, there have been nineteen convictions involving federal obscenity statutes. Two defendants, including a former police officer, who allegedly distributed rape videos are on trial right now in federal court in Dallas, Texas. There are three other obscenity cases that have been indicted, including large-scale distributors of allegedly obscene material, and approximately fifty federal obscenity investigations are ongoing in districts throughout the country.

Each investigation is unique and complex, rising or falling based on the facts involved. Although it is not my purpose today to announce any new targets, nor is it my purpose to immunize any purveyors of offensive material from our federal obscenity enforcement efforts, among the factors we review are the content of the material itself, the size of the distribution network, how the material is marketed and to whom it is marketed, where the targets are located, how the material is disseminated, and where the material is disseminated.

Under the Supreme Court's test for obscenity, first announced in *Miller v. California*, 413 U.S. 15 (1973), two of the three prongs call for the application of a contemporary community standards. Varying community standards means that a given item may be obscene in some districts but not in others. For this reason, among others, we work closely with U.S. Attorneys in different districts because they are in the best position to determine the local standards of the communities in which they live and work. I would note, however, that those who disseminate offensive material from more permissive districts into arguably less permissive districts, a matter of particular relevance to those who distribute such material via the Internet, do so at their peril. As the Supreme Court stated recently in *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 583 (2002):

If a publisher chooses to send its material into a particular community, this Court's jurisprudence teaches that it is the publisher's responsibility to abide by that community's standards. The publisher's burden does not change simply because it decides to distribute its material to every community in the Nation.

III. The Department's Efforts to Combat Child Pornography

While the Department is committed to a renewed enforcement agenda with regard to adult obscenity, and despite the obvious divergence of federal resources to combat terrorism, the Department continues to vigorously enforce child sexual exploitation laws. Indeed, according to the Executive Office of United States Attorneys, in fiscal year 2002, 1199 cases were filed involving child pornography and child exploitation statutes (a 22% increase from FY 2001). Internet investigations often uncover large child pornography groups with hundreds and sometimes thousands of targets. The Internet affords pedophiles the ability to exchange large amounts of child pornography with large numbers of people with minimal effort. CEOS, working closely with U.S. Attorney's Offices throughout the country, is currently involved in nine significant national operations. These investigations require coordination among law enforcement agencies, including state and local Internet Crime Against Children (ICAC) Task Forces, and prosecution entities to ensure the best utilization of our limited resources. Several of these investigations have identified and rescued child victims. Although these investigations are ongoing, and some of them are international in scope, several child molesters have already been

apprehended and convicted in this country

In Operation Hamlet, for instance, the Department dismantled an international ring of active child molesters. Many of these criminals were molesting their own children, as young as 14 months old, making their children available to other members of the ring, exchanging images depicting their abuse, and, in some instances, running a *Alive-feed* via webcam during their abuse so the other ring members could watch the abuse in real-time. Thus far, thirteen Americans have been identified as active child molesters and another fourteen have been identified as child pornography traders. Other countries experienced similar success. Of the thirteen American child molesters, all but one (who committed suicide) have been indicted federally (with six convictions obtained thus far). The fourteen Americans identified as child pornography traders have likewise been targeted for federal charges, with several indictments already pending.

NCMEC operates two *Atiplines* designed to receive complaints of child pornography on the Internet, receiving hundreds of tips each week. CEOS works closely with NCMEC to ensure that tips, which are shared with the Federal Bureau of Investigation (FBI), Bureau of Immigration and Customs Enforcement (ICE), U.S. Postal Inspection Service (USPIS), and U.S. Secret Service (USSS), as well as state and local law enforcement, are actively pursued. Additionally, acting in coordination with other law enforcement agencies and NCMEC, CEOS devised and is currently implementing the National Child Victim Identification Program. Its mission is to gather and analyze intelligence in order to find and save children who are being sexually abused. Images of child pornography are tracked in the *Adatabase*, which is able to identify images representing fresh instances of abuse. Those images, along with any intelligence data, are forwarded to law enforcement for priority investigation.

Through passage of the PROTECT Act, Congress, with the assistance of this Committee, recently provided the Department of Justice with some significant new tools to assist law enforcement in combating child pornography and thwarting child exploitation. Among its many useful provisions, the PROTECT Act requires lifetime supervised release for convicted sex offenders, creates a rebuttable presumption against pretrial release for child rapists/abductors, and eliminates the statute of limitations for child sex crimes. In addition, the Act improves existing sex tourism laws to target sex tourists and sex tour operators, limits the bases upon which sentencing judges can downwardly depart in child sex cases, and creates a *Two Strikes, You're Out* law for child sex offenders. The Truth in Domain Names provision, part of the PROTECT Act, criminalizes the use of misleading domain names to attract persons, and particularly children, to pornographic web sites.

The Department is already making effective use of these tools, as evidenced by the recent indictments under the PROTECT Act (1) by the United States Attorney's Office for the Southern District of New York of John Zuccarini, who is alleged to have created and used over 3,000 misleading domain names on the Internet with the intent to deceive minors into viewing pornographic web sites, (2) by the United States Attorney's Office for the Western District of Washington of Michael Lewis Clark, who is alleged to have traveled to Cambodia to engage in sexual activity with underaged boys, and (3) by the United States Attorney's Office for the District of South Carolina of Joseph Bledsoe for possession and distribution of child pornography as that term is defined in the Act.

IV. Some of the Challenges We Face

As I have discussed in some detail already, the Department faces many challenges in enforcing federal child pornography and obscenity laws. Many of these challenges relate to the complexity of investigating Internet crimes. Although the Department has made great progress in developing the technological expertise necessary to successfully investigate Internet cases, such cases can pose significant difficulties even when law enforcement has the necessary technical expertise. For example, it is often difficult to obtain records from Internet Service Providers (ISPs) which can assist law enforcement officials. There are literally thousands of ISPs, and each has a different policy regarding record retention. Some keep detailed records for long periods of time, usually to meet their own security needs, while others do not keep detailed records or retain them only for short periods.

Several of the statutes that we utilize have come under constitutional attack, which could significantly affect our ability to pursue obscenity violations and protect children from sexual exploitation. One such statute is the Child Online Protection Act (COPA) (codified at 47 U.S.C. § 231), which was enacted by Congress in 1998 to protect children on the Internet from obscene content and content that is harmful to minors. COPA was Congress's second attempt at protecting children from harmful content on the Internet. The first attempt, the Communications Decency Act, was struck down as unconstitutional by the Supreme Court. As of today, there is an injunction barring the Department's enforcement of the challenged COPA provisions, and the Department is seeking the Supreme Court's review of the Third Circuit's decision striking down the statute. Another lawsuit challenges the use of the traditional Miller obscenity standard in Internet cases, alleging that applying local community standards to Internet content (which has no boundaries) renders the statute unconstitutionally overbroad. See *Barbara Nitke, et al. v. Ashcroft*, 01 Civ. 11476 (S.D.N.Y. Dec. 14, 2001).

Conclusion

While we are addressing these challenges, we are under no illusion that they will be easy to overcome or that we will not face additional challenges in the future, particularly as new technologies emerge. Nonetheless, despite these and future challenges, the Department of Justice will do everything within its power to curb the proliferation of obscene material in our society and protect children both at home and abroad from the predatory activities of pedophiles. I would like to thank you again for inviting me to testify on behalf of the Criminal Division of the Department of Justice, and I look forward to answering your questions.