NOTE

Child Pornography and Technology: The Troubling Analysis of *United States v. Mohrbacher*

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INTRODUCTION

The cultural impact of the Internet results from its limitless exchange of ideas, images, and information.[1] Unfortunately, experience reveals that the Internet's uninhibited communication also facilitates the darker sides of human nature.[2] One disturbing example of this is the explosion of child pornography on the Internet.[3] The Internet's powerful

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[1] *See* Reno v. ACLU, 521 U.S. 844, 850-53 (1997) (describing Internet and its impact on American society). The Internet's enormous impact on the American social landscape has not escaped notice in the legal community. *See id.* For example, in *Reno*, Justice Stevens recognized that the Internet is a "unique and wholly new medium of worldwide human communication" with content "as diverse as human thought." *Id.* at 850, 852 (quoting Reno v. ACLU, 929 F. Supp. 830, 835, 844 (E.D. Pa. 1996)). In addition, many commentators describe the pervasiveness and social impact of the Internet. *See* YOCHAI BENKLER, RULES OF THE ROAD FOR THE INFORMATION SUPERHIGHWAY 28 (1996) (arguing that Internet's social implications include decentralization and diversification of popular culture); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993, 994 (1994) (arguing that some developments in "cyberspace" give rise to novel legal questions); *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1586, 1586 (1999) (indicating that Internet is "increasingly relevant to ordinary people in ordinary life"); *id* at 1610-11 (describing unique nature of Internet); Paul K. Ohm, Comment, *On Regulating the Internet: Usenet, A Case Study*, 46 UCLA L. REV. 1941, 1943-44 (1999) (describing decentralized nature and lack of control found throughout Internet); Jennifer A. Rupert, Note, *Tangled in the Web: Federal and State Efforts to Protect Children from Internet Pornography*, 11 LOY. CONSUMER L. REV. 130, 130 (1999) (suggesting current federal and state efforts to regulate Internet are likely to be ineffective or unconstitutional because of its rapid technological evolution).

[2] *See* JONATHAN ROSENOER, CYBERLAW: THE LAW OF THE INTERNET 167-92 (1997) (analyzing computer criminal liability arising from fraud, extortion, threats, sexual exploitation, obscene transmissions, and copyright violations); F. LAWRENCE STREET, LAW OF THE INTERNET § 7-4 (1998) (describing crimes committed by computer users, including: planting viruses, posting pornography, committing copyright infringement, and transmitting kidnapping threats); C.G. Wallace, *Utah Agent's a Star at Fighting Porn*, DESERT NEWS, March 8, 1999, at B4, *available in* 1999 WL 13866421 (detailing child pornography cases investigated by U.S. Customs agent Don Daufenbach). Wallace's article details Dan Daufenbach, a Customs agent who works "undercover" on the Internet to identify individuals trafficking child pornography. *See id.* Daufenbach's investigation of Michael Aaron Wilson demonstrates the dark side of human nature available on the Internet. *See id.* Daufenbach discovered Wilson operated an Internet site called the "Boy Torture Channel." *See id.* Before Daufenbach shut down the site, it featured images of underage males being sexually abused and tortured. *See id.*

[3] *See* ROGER J.R. LEVESQUE, SEXUAL ABUSE OF CHILDREN 65 (1999) (stating that child pornography is multi-billion-dollar industry carried out primarily on Internet); Brian M. Werst, Comment, *A Survey of the First Amendment "Indecency" Legal Doctrine and Inapplicability to Internet to Internet Regulation: A Guide for Protecting Children from Internet Indecency After* Reno v. ACLU, 33 GONZ. L. REV. 207, 208 (1998) (indicating that pornographic entertainment on Internet earns approximately $100 million annually and accounts for third largest source of sales in cyberspace); William Booth, *Internet Target: Sexual Predators, FBI Unit Seeks Those Seeking Minors*, WASH. POST, Dec. 7, 1999, at A29 (describing growth of child pornography on Internet). Booth's article describes the FBI's Sexual Assault Felony Enforcement ("SAFE") task force. *See id.* SAFE targets individuals

technology unleashed the child pornography industry from its former shadows and advanced it beyond the reach of existing laws.[4]

For much of the 1970s and early 1980s, child pornography existed as a large, but underground activity, accessible only to a small segment of American society through videos and magazines.[5] The Internet's unique properties greatly increased the availability of child pornography.[6] Today, any individual may view images of children engaged in sexually explicit conduct by simply downloading files from a wide array of Internet web pages.[7] As a result of the Internet's unique properties,

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seeking child pornography and actual children for sexual exploitation over the Internet. *See id.* The FBI developed the SAFE unit in response to evidence that Internet expansion included child pornography. *See id.*

[4] *See* Levine, Note, *Establishing Legal Accountability for Anonymous Communication in Cyberspace*, 96 COLUM. L. REV. 1526, 1557 (1996) (stating that existing legal rules pertaining to child pornography are ineffective due to anonymity of Internet); Elaine Shannon, *Main Street Monsters: A Worldwide Crackdown Reveals That Child Pornographers Might Just Be the People Next Door*, TIME, Sept. 14, 1998, at 59 (reporting international crackdown on Internet child pornography distributors known as "Wonderland" which reached into 47 countries and involved 13 international law enforcement agencies).

[5] *See* ATT'Y GEN. COMM'N ON PORNOGRAPHY, FINAL REPORT, at 595, 599-600 (1986) (stating that 1970 Commission on Obscenity and Pornography made no mention of industry in child pornography and dating first public awareness of child pornography between 1973 and 1976); *see id.* at 604 (stating that "[t]he production of child pornography is so clandestine in character that from 1978 to 1984 only one person . . . [was] convicted under . . . [one federal child pornography law]."); *see also* John C. Scheller, Note, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 989 (1994) (stating that underground networks of child pornography consisting of magazines and videos had inherent limitations because they required physical transportation and delivery).

[6] *See* Hardy, *supra* note 1, at 1016 (describing Internet as "essentially ungoverned by any sort of 'higher authority'"); *Developments in the Law—The Law of Cyberspace*, *supra* note 1, at 1617 (noting Internet's wide availability and participatory nature); Ohm, *supra* note 1, at 1955-56 (describing cyberlibertarian position which argues central authority is undermined by the Internet's decentralized nature); Scheller, *supra* note 5, at 989-90 (indicating computer communication over Internet enables secrecy and resembles covert underground networks); Sean Adam Shiff, Comment, *The Good, The Bad, and The Ugly: Criminal Liability for Obscene and Indecent Speech on the Internet*, 22 WM. MITCHELL L. REV. 731, 735-36 (1996) (attributing proliferation of child pornography on Internet to ease with which users download images and indulge private fantasies at home). Commentators commonly identify three unique properties of the Internet: (1) no geographic or physical boundaries, (2) an anonymous interface, and (3) cheap unlimited access. *See* Ohm, *supra* note 1, at 1955-56; Scheller, *supra* note 5, at 989-90; Shiff, *supra*, at 735-36.

[7] *See* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV J. ON LEGIS. 439, 439-40 (1997) (recognizing that Internet growth supported proliferation of online child pornography); Lesli C. Esposito, Note, *Regulating the Internet: The New Battle Against Child Pornography*, 30 CASE W. RES. J. INT'L. L. 541, 542 (1998) (describing Internet as spurring growth of child pornography industry); Lydia W. Lee, Note, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISCIPLINARY L.J. 639, 642 (1999) (stating that ease of scanning or downloading

existing federal statutes prohibiting child pornography are ineffective.[8]

Section 2252 of the Protection of Children Against Sexual Exploitation Act[9] is one attempt to regulate the widespread transmission of child pornography over the Internet.[10] It prohibits any person from knowingly receiving, shipping, transporting, distributing, or possessing visual depictions of minors engaged in sexually explicit conduct.[11] However, courts applying section 2252's provisions to Internet activity face significant interpretative obstacles.

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illicit images on computer creates loopholes in child pornography laws because pedophiles and child molesters are able to avoid criminal liability); Rupert, *supra* note 1, at 130 (stating that "[c]hild pornography thrives within the anonymous and unrestrained environment of the Internet"); Scheller, *supra* note 5, at 1010-11 (describing Internet as attractive vehicle for transmitting child pornography which expands its availability); *see also* LEVENSQUE, *supra* note 3, at 65 (citing Department of Justice figures that estimate child pornography industry is currently worth between $2 to $3 billion a year).

[8] *See* Esposito, *supra* note 7, at 541 (arguing that child pornography is rampant on Internet because pedophiles transmit and download illicit images anonymously from unregulated sources, thereby evading law enforcement); Levine, *supra* note 4, at 1526 (indicating Internet allows individuals to transfer child pornography through computer networks "with near impunity"); Laura J. McKay, Note, *The Communications Decency Act: Protecting Children from On-line Indecency*, 20 SETON HALL LEGIS. J. 463, 484 (1996) (finding that current regulations are ineffective in regulating child pornography on Internet); Scheller, *supra* note 5, at 989-90, 1010 n.166 (describing ability of individuals to avoid legal accountability by using Internet for child pornography purposes).

[9] *See* 18 U.S.C. § 2252(a)(1)-(2) (1999).

[10] *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7, 7-8 (1978) (codified as amended at 18 U.S.C. §§ 2251-56 (1999)).

[11] *See* 18 U.S.C. § 2252(a). It provides in relevant part:

> (a) Any person who-
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> (1) knowingly transports or ships . . . by any means including by computer or mails, any visual depiction, if-
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> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct . . .
>
> (2) knowingly receives, or distributes, any visual depiction . . . by any means including by computer . . . if-
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct . . .
>
> shall be punished as provided in . . . this section.

Id.

In *United States v. Mohrbacher*,[12] the Ninth Circuit decided whether downloading child pornography from the Internet constituted "receiving," "transporting," or both under section 2252.[13] *Mohrbacher* held that downloading child pornography constituted receiving, but not transporting child pornography.[14] In reaching its decision, the Ninth Circuit had difficulty interpreting section 2252.

This Note argues that the *Mohrbacher* court reached the right result based on congressional intent and the policy behind the Protection of Children Against Sexual Exploitation Act of 1977. However, this Note contends that the Ninth Circuit's analysis of section 2252 in *Mohrbacher* is unworkable. The *Mohrbacher* rationale conflicts with U.S. Supreme Court precedent and relies on a faulty analogy to reach its decision.

Part I of this Note examines the relevant legislative history and two important cases interpreting the Act. Part II discusses the *Mohrbacher* decision. Part III explains that, despite a correct result, the Ninth Circuit's section 2252 analysis in *Mohrbacher* sets unwise precedent. Finally, this Note concludes that the Ninth Circuit must revise its interpretation of section 2252 for the federal government to prohibit child pornography effectively.

I. PROTECTION OF CHILDREN AGAINST SEXUAL EXPLOITATION ACT OF 1977

In 1977, Congress outlawed child pornography by passing the Protection of Children Against Sexual Exploitation Act ("the Act").[15] The legislative history of the Act reveals that Congress intended to regulate the proliferation of child pornography through section 2252 and companion statutes.[16] However, uncertain statutory language and rapid technological developments limited the Act's effectiveness.[17] Case law

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[12] 182 F.3d 1041 (9th Cir. 1999).

[13] *Mohrbacher*, 182 F.3d at 1047 (stating that determining whether downloading was receiving or transporting under § 2252(a)(1) was legal question of first impression).

[14] *See id.* at 1050.

[15] *See* ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 602-03 (noting that Congress's intent to fight sexual exploitation of children); Burke, *supra* note 7, at 449 (indicating that Congress passed 1977 Act in order to stop children from being harmed by child pornography's production); Vincent Lodato, Note, *Computer-Generated Child Pornography—Exposing Prejudice in Our First Amendment Jurisprudence?*, 28 SETON HALL L. REV. 1328, 1332 (1998) (noting that Congress passed Act in 1977 to protect children from harms associated with production of child pornography).

[16] *See* S. REP. NO. 95-438, at 5 (1977) *reprinted in* 1977 U.S.C.C.A.N. 40, 42; Burke, *supra* note 7, at 449; Lodato, *supra* note 15, at 1332.

[17] *See* ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 602-03 (describing ineffectiveness of original federal child pornography statutes).

indicates that courts have faced obstacles in interpreting section 2252's vague language.[18]

A. Legislative History

Congress developed the language of section 2252 after hearings revealed that child pornography was a "highly organized, multimillion dollar" industry.[19] Congress's findings indicated that the child pornography industry operated on a national scale primarily through the mails and instruments of interstate commerce.[20] In addition, Congress found that child abuse was inherent to the production of child pornography.[21] In response, Congress passed the Protection of Children Against Sexual Exploitation Act of 1977.[22]

The Act amended Title 18 of the United States Code[23] by adding three substantive provisions, sections 2251, 2252, 2423, and one definitional statute, section 2253.[24] Sections 2251 and 2423 primarily punished the physical acts of sexual exploitation required for the production of child

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[18] *See* United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (interpreting whether § 2252 contained constitutionally-acceptable mental element); United States v. Hockings, 129 F.3d 1069 (9th Cir. 1997) (determining whether computer-based GIF images fell within § 2252 provisions).

[19] S. REP. NO. 95-438, at 5; *see* Burke, *supra* note 7, at 449; Patricia A. Burke, Note, United States v. X-Citement Video, Inc.*: Stretching the Limits of Statutory Interpretation?*, 56 LA. L. REV. 937, 938-39 (1996); Lodato, *supra* note 15, at 1332; Scheller, *supra* note 5, at 1008 (indicating Protection of Children from Sexual Exploitation Act of 1977 and its 1984 amendment were only laws that regulated child pornography until 1986).

[20] *See* S. REP. NO. 95-438, at 5 (finding that child pornographers used interstate mails extensively to exchange illicit material); Burke, *supra* note 7, at 449 n.62 (noting that § 2252 was intended to reach child pornography distributors and recipients); Christina Egan, *Level of Scienter Required for Child Pornography Distributors: The Supreme Court's Interpretation of "Knowingly" in 18 U.S.C. § 2252*, 86 J. CRIM. L. & CRIMINOLOGY 1341, 1343-50 (1996) (detailing legislative history of Protection of Children Against Sexual Exploitation Act of 1977); Lodato, *supra* note 15, at 1332 (noting that in late 1970s Congress reacted to public concern over "rampant stories of child abuse, child prostitution rings, and the increased production and availability of child pornography.").

[21] *See* S. REP. NO. 95-438, at 5.

[22] *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7, 7-8 (1978) (codified as amended at 18 U.S.C. § 2251-56 (1999)); S. REP. NO. 95-438, at 5; Burke, *supra* note 7, at 449; Egan, *supra* note 20, at 1343-50; Lodato, *supra* note 15, at 1332; Scheller, *supra* note 5, at 1008.

[23] *See* Protection of Children Against Sexual Exploitation Act § 2252(a) (adding new section to 18 U.S.C.). Congress drafted section 2252 and its companion statutes to amend Title 18 of the United States Code because it contains the bulk of the Federal criminal statutes. *See* H.R. REP. NO. 95-696, at 5 (1977) (stating that Judiciary Committee members and Department of Justice felt Title 18 of United States Code was most appropriate location for statutes because Title 18 contains majority of Federal criminal statutes).

[24] *See* Protection of Children Against Sexual Exploitation Act of 1977 §§ 2251-53, 2423.

pornography.[25] This included using or transporting children for the purpose of producing child pornography.[26] Section 2252, on the other hand, focused only on the actual pornographic materials produced.[27] Specifically, section 2252 targeted visual or print media depictions of child pornography.[28] Because section 2252 applies directly to online child pornography images, only that statute is at issue in this Note.

1. Original Version of § 2252

Section 2252 supplemented existing statutory prohibitions on mailing,[29] importing,[30] and transporting[31] obscene materials across state lines.[32] Section 2252 set forth rules applying specifically to distributors and recipients of child pornography.[33] The significant subsections of section 2252 are (a)(1) and (a)(2).[34] As adopted, section 2252(a)(1) punished any person who transported or shipped visual or print medium that depicted or involved the use of a minor engaging in sexually explicit conduct.[35] Section 2252(a)(2) applied to the same illicit

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[25] *See id.* Specifically, section 2251 prohibited any person employing, using, persuading, enticing, or coercing any minor to engage in sexually explicit conduct for the purpose of producing child pornography. *See id.* § 2251. Section 2423 extended the Mann Act by prohibiting any person from transporting or financing the transportation or movement of a minor across state lines for the purpose of either prostitution or producing child pornography. *See id.* § 2423.

[26] *See id.*

[27] *See* Protection of Children Against Sexual Exploitation Act of 1977 § 2252(a)(4)(B) (applying statute's provisions to books, magazines, periodicals, films, and video tapes).

[28] *See id.*

[29] *See* 18 U.S.C. § 1461 (1999).

[30] *See* 18 U.S.C. § 1462 (1999).

[31] *See* 18 U.S.C. § 1465 (1999).

[32] *See* S. REP. NO. 95-438, at 9 (1977) *reprinted in* 1977 U.S.C.C.A.N. 40, 47. The Senate Judiciary Committee found that the existing federal statutes prohibiting movement of obscene materials were adequate weapons for federal authorities to combat child pornography. *See id.* However, the Committee determined adding section 2252 and its companion statutes would greatly enhance federal enforcement of child pornography. *See id.*; *see also* H.R. REP. NO. 95-696, at 1 (1977) (indicating that purpose of Protection of Children Against Sexual Exploitation Act of 1977 was to "address the problems of juvenile prostitution and . . . the making of films or photographs of children engaging in sexual conduct for distribution in interstate commerce.").

[33] *See* S. CONF. REP. NO. 95-601, at 7 (1977) (indicating that Congress intended § 2252 to reach any person transporting or shipping child pornography in order to sell or distribute such material); Burke, *supra* note 19, at 938-39 (stating that Congress proposed § 2252 in order to reach distributors and recipients of child pornography)

[34] *See* S. CONF. REP. NO. 95-601, at 5.

[35] *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7, 7-8 (1978) (codified as amended at 18 U.S.C. § 2251(a)(1) (1999)).

content but targeted any person who received or distributed such material.[36]

The original version of section 2252 was ineffective.[37] In fact, between 1978 and 1983, the Department of Justice reported only seventeen convictions under section 2252.[38] Section 2252 hampered federal efforts to combat child pornography because it only applied to individuals receiving or distributing child pornography for commercial purposes.[39] After Congress passed the statute in 1977, much of the previously available commercial child pornography went underground and was no longer available over-the-counter.[40] Further, Congress found that the bulk of child pornography traffic was noncommercial.[41] Thus, section

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[36] *See* Protection of Children Against Sexual Exploitation Act of 1977 § 2252(a)(2).

[37] *See* ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 602-05 (detailing ineffectiveness of federal efforts to prosecute child pornography after Congress passed § 2252 in 1977); *see also* Burke, *supra* note 7, at 450 (indicating that "the 1977 Act proved to be of limited practical value to federal law enforcement authorities."); Lodato, *supra* note 15, at 1335 (noting 1977 Act was ineffective).

[38] *See Child Pornography and Pedophilia: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs*, 99th Cong. 104 (1985) [hereinafter *Child Pornography Hearings*]. Section 2252's companion statute, section 2251 (which prohibited the production of child pornography), provides the most dramatic example of the ineffectiveness of Congress's 1977 child pornography statutes. *See id.* From 1978 to 1984 the government convicted only *one* person under § 2251. *See id.* The Department of Justice explained the extremely low conviction totals by pointing out that the child pornography statutes required prosecutors to prove a commercial purpose for the production, receipt, or transporting of child pornography. *See id.* Since most child pornographers produced the images in a clandestine manner and traded, not sold, their material, the statutes did not apply in most situations. *See id.* Instead, the government relied upon sections 1461-1465, the federal obscenity statutes, to prosecute child pornographers (with little success). *See id.*

[39] *See* Protection of Children Against Sexual Exploitation Act of 1977 § 2252(a) (requiring that transporting or receiving child pornography be for commercial purposes); *Child Pornography Hearings*, *supra* note 38, at 104 (finding § 2252's commercial purpose element hampered its use); H.R. REP. NO. 98-536, at 2 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492, 493 (stating that "[u]tilization of 18 U.S.C. § 2252 has been inhibited by that statute's limited application to the distribution of child pornography only for commercial purposes"); ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 603-04 (asserting that § 2252 only applies to commercial use and does not prohibit bartering or simply giving away child pornography).

[40] *See* H.R. REP. NO. 98-536, at 16 (indicating that 1977 enactment of Protection of Children Against Sexual Exploitation Act caused child pornography traffickers to go underground) (statement of Charles R. Clauson, Assistant Chief Postal Inspector); ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 604 (stating that after 1978 child pornography trafficking went underground and commercially-produced child pornography was no longer available in pornography outlets).

[41] *See Child Pornography Hearings*, *supra* note 38, at 104 (stating that most U.S. child pornographers are traders, rather than sellers, of child pornography); H.R. REP. NO. 98-536, at 2 (finding that "[m]any of the individuals who distribute materials covered by 18 U.S.C. § 2252 do so by gift or exchange without any commercial motive and thus remain outside

2252 failed to reach the majority of child pornography in the United States. To address these issues, Congress substantially revised the statute in 1984.[42]

2. 1984 Amendment to § 2252

Congress amended section 2252 in 1984 to remove the statute's "commercial purpose" language.[43] Thus, government prosecutors no longer had to prove that child pornographers acted for commercial gain.[44] In addition, Congress eliminated language requiring that any child pornography leading to a prosecution under section 2252 was constitutionally "obscene." A 1982 Supreme Court case holding that child pornography was not constitutionally protected speech rendered the requirement unnecessary.[45] These revisions of section 2252

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the coverage of this provision."); ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 605 (indicating that most child pornography traffic is noncommercial).

[42] *See* Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204, 204-05 (1984) (codified as amended at 18 U.S.C. §§ 2251-2255 (1999)); *Child Pornography Hearings*, *supra* note 38, at 104; Free Speech v. Reno, 198 F.3d 1083, 1087-88 (9th Cir. 1999); United States v. Norris, 159 F.3d 926, 931 n.6 (5th Cir. 1998) (stating that 1984 revision removed many limitations of § 2252); ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 604-06 (noting that 1984 revisions increased reach of § 2252); Burke, *supra* note 7, at 450 (indicating Congress amended § 2252 in 1984 due to original statute's failure); Lodato, *supra* note 15, at 1332 n.20, 1335 (noting Congress amended § 2252 in 1984 because 1977 version proved ineffective).

[43] *See* Child Protection Act of 1984 § 2252(a) (stating that perpetrator merely has to transport or ship pornography in commerce); *Child Pornography Hearings*, *supra* note 38, at 104 (stating that 1984 revisions removed for sale requirement); ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 605; Lodato, *supra* note 15, at 1335-36 (noting that 1984 revisions eliminated commercial purpose requirement).

[44] *See Child Pornography Hearings*, *supra* note 38, at 104; ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 605.

[45] *See* New York v. Ferber, 458 U.S. 747, 774 (1982) (holding that New York statute which prohibited promotion of sexual performances by children under sixteen years-old did not violate First Amendment); *see also* Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. MARSHALL J. COMPUTER & INFO. L. 483, 485-86 (1996) (describing *Ferber* decision as important because it recognized the child abuse inherent to child pornography's production); Burke, *supra* note 7, at 442-46 (noting that *Ferber* established prevention of child abuse and sexual exploitation as objective of surpassing importance); Egan, *supra* note 20, at 1351-52 (finding that *Ferber* removed obscenity requirement for child pornography and led to § 2252's 1984 amendment); Lodato, *supra* note 15, at 1334-36 (describing *Ferber* holding as removing First Amendment protection from child pornography); Scheller, *supra* note 5, at 997 (indicating that *Ferber* held child pornography was per se obscene); Adam J. Wasserman, Note, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996—A Reply to Professor Burke and Other Critics*, 35 HARV. J. ON LEGIS. 245, 251-53 (1998) (relating facts and holding of *Ferber*). The *Ferber* court's

dramatically increased the number of federal prosecutions under the Act.[46]

Despite the increased effectiveness of the federal child pornography statutes, another problem arose after 1984 that reduced section 2252's significance.[47] The problem was not the statute itself, rather, it was the extraordinary growth of personal computers.[48] Section 2252's provisions expressed tangible, "real world" actions such as transport, ship, receive, and distribute. Similarly, the illicit materials regulated by section 2252

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rationale focused on the various harmful impacts child pornography has on the victims portrayed in the images. *See* Ferber, 458 U.S. at 756-64; Adelman, *supra*, at 486; Burke, *supra* note 7, at 442-46; Scheller, *supra* note 5, at 997-98; Wasserman, *supra*, at 252. Specifically, the *Ferber* court found that inherent to child pornography's production was physical, psychological, emotional, and mental harm to the victims. *See* Ferber, 458 U.S. at 758; Burke, *supra* note 7, at 442; Scheller, *supra* note 5, at 997-98; Wasserman, *supra*, at 252. For this, and related reasons, the court recognized that states have a compelling interest in regulating child pornography which surpasses individual First Amendment guarantees. *See* Ferber, 458 U.S. at 756; *see also* Adelman, *supra* note 38, at 486; Burke, *supra* note 7, at 442-43; Scheller, *supra* note 5, at 997-98; Wasserman, *supra*, at 252.

[46] *See* ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 606 (recognizing "dramatic increase in federal prosecutions" under federal child pornography laws after 1984 amendments); *see also* Susan G. Caughlan, Note, *Private Possession of Child Pornography: The Tensions between* Stanley v. Georgia *and* New York v. Ferber, 29 WM. & MARY L. REV. 187, 199 (1987) (discussing dramatic increase in prosecutions under federal child pornography statutes following 1984 amendments); Lodato, *supra* note 15, at 1336 n.38 (indicating that 1984 amendment to § 2252 lead to greater success in child pornography cases for government prosecutors). The impact of the 1984 Amendment to section 2252 were put into perspective by Department of Justice figures which indicated that between 1977, when Congress passed the Protection of Children Against Sexual Exploitation Act, to 1986 there were 255 indictments under the federal child pornography laws. *See* ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 606 n.432. Of the 255 indictments, government prosecutors obtained 183 of them *after* the 1984 amendments. *See id.*

[47] *See* ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5 (reporting to Congress about development of large-scale child pornography industry and greater use of computer networks by pedophiles in America). Congressional attention again focused on the federal child pornography statutes after Attorney General Edwin Meese's Commission on Pornography released an influential report on pornography in July 1986. *See id.*; *see also* H.R. DOC. NO. 100-129, at 1, 55 (1987) (citing recommendations of Attorney General's Final Report as evidence of need to amend federal child pornography statutes); Burke, *supra* note 7, at 451 n.76 (indicating report of Attorney General's Commission on Pornography prompted Congressional efforts to regulate exchange of child pornography through computer networks); Scheller, *supra* note 5, at 1008 (identifying Attorney General's report as influential on Congress's response to child pornography).

[48] *See* ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 629. Recommendation 39 of the 1986 Final Report of the Attorney General's Commission on Pornography advised: "Congress Should Enact Legislation to Prohibit the Exchange of Information Concerning Child Pornography Through Computer Networks." *Id.* at 628. The Commission based its recommendation on findings that "pedophiles and child pornographers have begun to use personal computers for their communications." *Id.* at 629.

were tangible items such as magazines, photos, and films.[49] Yet, by the late 1980s, individuals traded and sold child pornography through computer networks not covered by section 2252.[50] In 1987, President Reagan recommended that Congress amend the 1984 version of section 2252 to account for a perceived national network of child molesters, pedophiles, and child pornographers trafficking child pornography through the emerging technology of personal computers.[51]

3. 1988 Amendment to § 2252

In 1988, Congress amended section 2252 again to address the loopholes and weaknesses created by the growth of personal computer networks.[52] With little debate, Congress increased the scope of section 2252's coverage by adding the language "by any means including by

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[49] *See* S. REP. NO. 95-438, at 11 (1977) *reprinted in* 1977 U.S.C.C.A.N. 40, 48. The technology and capability to trade child pornography over computer networks simply was not contemplated in 1977. *See id.* Instead, Congress focused on tangible items which pornographers moved through interstate commerce, such as videos, films, and magazines. *See id.* An indication of this thinking is reflected by an early version of the statute proposed by Senator Roth. *See id.* His proposed section 2252 included language that covered "any film, photograph, negative, slide, book, magazine, or other print or visual medium" depicting child pornography. *Id.* at 13, 51

[50] *See Computer Pornography and Child Exploitation Prevention Act: Hearings on S. 1305 Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 99th Cong. 21 (1985) (statement of Sen. Jeremiah Denton) (arguing that Congress must "expand the application of § 2252 which prohibits the sexual exploitation of children, to include a prohibition against the transmission, by computer or otherwise, of data to facilitate such exploitation."); H.R. DOC. NO. 100-129, at 1 (statement of Pres. Reagan) (expressing concern over new computer technologies utilized by child pornographers which created loopholes and weaknesses in existing child pornography statutes); *id.* at 55 (expressing concern that § 2252 "is not backed up by legislative history clearly indicating that it is intended to reach interstate commerce involving computers . . . "); ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 628 (recommending Congress enact legislation to prohibit child pornography through computer networks).

[51] *See* H.R. DOC. NO. 100-129, at 1-4. In an executive message to the House of Representatives, President Reagan cited, with concern, the findings of the Attorney General's 1986 report. *See id.* at 1. The President urged that Congress amend section 2252 in order to take into account technologies utilized by the pornography industry. *See id.* According to President Reagan, Congress needed to stop the child molesters, pedophiles, and collectors of child pornography who had developed a complex, computerized, and nationwide network to traffic in child pornography. *See id.*

[52] *See* Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690 § 7511, 102 Stat. 4485 (codified as amended at 18 U.S.C. § 2252(a) (1999)) (amending § 2252 by adding language "by any means including by computer"); *see also* Burke, *supra* note 7, at 451 (recognizing that § 2252's 1988 amendment extended its reach to computers); Scheller, *supra* note 5, at 1009 (describing congressional efforts to amend § 2252 in 1988 as targeting child pornography on computers).

computer."[53] Thus, today, section 2252 prohibits any person from knowingly receiving, transporting, shipping, distributing, or possessing visual depictions of a minor engaging in sexually explicit conduct through interstate commerce by any means, including by a computer.[54]

B. Judicial Interpretation of § 2252

Section 2252's vague language created significant difficulty for courts that interpreted its provisions. The terms "knowingly" and "visual depiction" were particularly troublesome.[55] First, the case law interpreting section 2252's "knowingly" language presented an important challenge to the statute's constitutionality.[56] The Supreme Court resolved the challenge with an interpretation that altered the mental element of the statute.[57] Second, case law interpreting another portion of the statute, section 2252's "visual depiction" element, presented the problem of applying the statute's language to technology it did not encompass, specifically, computer images.[58]

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[53] *See* Child Protection and Obscenity Enforcement Act of 1988 § 2252(a).

[54] *See* 18 U.S.C. § 2252 (1999).

[55] *See* United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (interpreting § 2252 to include "knowingly" requirement to extend to both age of performer and sexually explicit nature of materials); United States v. Hockings, 129 F.3d 1069 (9th Cir. 1997) (interpreting § 2252's "visual depictions" element to include computer GIF images).

[56] *See X-Citement*, 513 U.S. at 64 (rejecting defendant's argument that § 2252 did not contain a mental element); United States v. Thomas, 893 F.2d 1066 1070 (9th Cir. 1990), *cert. denied*, 498 U.S. 826 (1990) (holding § 2252 lacked sufficient mental element); United States v. Matthews, 11 F. Supp. 2d 656, 660 (D. Md. 1998) (rejecting challenge to § 2252's constitutionality for lack of mens rea requirement); United States v. Long, 831 F. Supp. 582, 586 (W.D. Ky. 1993) (rejecting facial constitutional challenge to § 2252 where defendant argued statute lacked mental element); United States v. Maxwell, 45 M.J. 405, 424 (C.A.A.F. 1996) (denying defendant's constitutional challenge that § 2252's "knowingly" element did not encompass computer child pornography).

[57] *See X-Citement*, 513 U.S. at 78 (interpreting § 2252 to include "knowingly" requirement which extended to both performer's age and sexually explicit nature of materials).

[58] *See* United States v. Vig, 167 F.3d 443, 449 (8th Cir. 1999) (rejecting argument that § 2252's "visual depictions" language did not include computer files); United States v. Whiting, 165 F.3d 631, 634 (8th Cir. 1999) (denying defendant's contention that § 2252's "visual depictions" element did not cover child pornography stored on computer disks); Hockings, 129 F.3d at 1071 (interpreting § 2252's "visual depictions" element to encompass computer GIF images); United States v. Lamb, 945 F. Supp. 441, 448 (N.D.N.Y 1996) (rejecting defendant's constitutional challenge to § 2252's "visual depictions" element as overbroad and vague).

1. The "Knowingly" Element

The leading case interpreting section 2252's "knowingly" language is *United States v. X-Citement Video, Inc.*[59] In *X-Citement*, a Los Angeles police investigation targeted Ruben Gottesman, the owner of an adult video store.[60] An undercover officer approached Gottesman about acquiring videos featuring Traci Lords, a pornography star.[61] Gottesman complied by selling the officer forty-nine tapes featuring Lords before her eighteenth birthday.[62] Gottesman also shipped eight tapes to Hawaii.[63] The government charged him with violating section 2252 for transporting and distributing child pornography.[64]

The district court convicted Gottesman of violating both section 2252(a)(1) and section (a)(2) by knowingly shipping and distributing child pornography.[65] Gottesman challenged the constitutionality of section 2252, arguing that the statute lacked a necessary scienter, or intent, requirement.[66] The Ninth Circuit Court of Appeals reversed the district court, holding section 2252 unconstitutional.[67]

The court of appeals found that the First Amendment required the government to prove that the defendant knew an individual in the visual depiction was a minor.[68] According to the Ninth Circuit, a "natural grammatical" reading of the statute suggested "knowingly" only modified the surrounding verbs: "ships," "transports," "receives," and "distributes."[69] Therefore, the court of appeals held section 2252

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[59] 513 U.S. 64 (1994).

[60] *See X-Citement*, 513 U.S. at 66.

[61] *See id.*

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] *See id.*

[66] *See id.* at 67. Under the Supreme Court's First Amendment jurisprudence, criminal responsibility for possession of obscene materials may be imposed only with proof that the defendant knew the illegal nature of the materials. *See* Smith v. California, 361 U.S. 147, 152-53 (1959) (invalidating California statute which imposed strict liability on distributors of obscene materials and holding that obscenity laws must have scienter requirement). Thus, in the context of child pornography, it is unconstitutional for a statute to impose criminal liability on an individual without requiring proof that the defendant knew the performers were under the age of majority because the First Amendment protects nonobscene, sexually explicit materials with performers over 17 years old. *See X-Citement*, 513 U.S. at 72 ("[N]onobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment.").

[67] *See id.* at 67.

[68] *See id.*

[69] *See id.*

unconstitutional because it did not incorporate the threshold of intent required by the First Amendment.[70]

The United States Supreme Court granted certiorari and reversed the Ninth Circuit.[71] The Court upheld the constitutionality of section 2252 and reinstated Gottesman's convictions.[72] The Court rejected the Ninth Circuit's "natural grammatical" reading and concluded that section 2252's "knowingly" element extended to modify both (1) the age of the performers in child pornography and (2) the sexually explicit nature of the materials.[73]

The *X-Citement* court's conclusion relied upon a common sense interpretation of the statute, prior case law, and congressional intent.[74] The Court first recognized that the Ninth Circuit's interpretation was "the most natural grammatical reading" of section 2252.[75] However, the *X-Citement* court seized upon the absurd results that occurred under the Ninth Circuit's construction.[76] According to the Court, the Ninth Circuit created strict criminal liability for any person caught with child pornography.[77] If, as the Ninth Circuit held, "knowingly" only modifies

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[70] *See id.*

[71] *See id.* at 79.

[72] *See id.* at 76-78.

[73] *See id.*; *see also* Free Speech v. Reno, 198 F.3d 1083 (9th Cir. 1999) (indicating that *X-Citement* extended knowledge requirement beyond knowing transportation, shipping, distribution, or receiving to include both sexually explicit nature of material and age of performer); United States v. Lacy, 119 F.3d 742, 747 (9th Cir. 1997) (recognizing *X-Citement*'s extension of § 2252's knowingly element); 'Egan, *supra* note 20, at 1356-60, 1370 (summarizing court's decision in *X-Citement* and finding analysis was correct); Burke, *supra* note 19, at 937-38 (stating that *X-Citement* decided § 2252's mental element should apply to all elements of its crimes); Chad R. Fears, Note, *Shifting the Paradigm in Child Pornography Criminalization:* United States v. Maxwell, 1998 B.Y.U. L. REV. 835, 845 (describing *X-Citement*'s holding that knowingly applies to each element); Wasserman, *supra* note 45, at 255 (describing *X-Citement*'s extension of knowingly to each element of § 2252's provisions). *But see* United States v. Maxwell, 45 M.J. 406, 424 (C.A.A.F. 1996) (recognizing knowledge requirement imposed by *X-Citement* but finding that only "crucial fact which the government had to prove was that the subjects were minors."); *cf.* Jeffrey P. Kaplan & Georgia M. Green, *Grammar and Inferences of Rationality in Interpreting the Child Pornography Statute*, 73 WASH. U. L.Q. 1223, 1228, 1250 (1995) (rejecting *X-Citement* court's grammatical interpretation as doing "violence to the statutory text.").

[74] *See X-Citement*, 513 U.S. at 69-78; Burke, *supra* note 19, at 948-50; Fears, *supra* note 73, at 845. *But see* Kaplan & Green, *supra* note 73, at 1228-33 (refuting each basis of *X-Citement* court's rationale).

[75] *See X-Citement*, 513 U.S. at 68.

[76] *See id.* at 69 (explaining that actors, such as retail druggists developing film containing child pornography, would be criminally liable under § 2252 if statute lacked knowingly mental element).

[77] *See id.* (finding that if "knowingly" only modified "receives" or transports then § 2252's provisions included actors with no idea they were dealing with sexually explicit

"receives" or "transports" without modifying the contents of the illegal material, then section 2252's provisions applies to actors who have no idea they are handling illegal materials.[78] Thus, the Court could not uphold the Ninth Circuit's interpretation. The *X-Citement* court then analyzed precedent addressing criminal statutes lacking a necessary mental element.[79]

Under Supreme Court jurisprudence, criminal intent is a necessary element of any criminal statute.[80] According to the *X-Citement* court, case law interpreting criminal statutes lacking the necessary mental element demonstrates that courts usually imply some form of scienter[81] to salvage the statute's constitutionality.[82] Section 2252 does not have an express scienter requirement.[83] However, the *X-Citement* court implied that

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materials of minors).

[78] *See id.*

[79] *See id.* at 70.

[80] *See* Morissette v. United States, 342 U.S. 246, 250-62 (1952) (recounting common law origins and subsequent American adoption of rule that all criminal acts require showing bad or criminal intent to trigger legal liability). At English common law, the principle developed that an injury can only amount to a crime when inflicted by a person intentionally. *See id.* at 250. The underlying rationale stressed an individual's free will to choose between right and wrong. *See id.* at 250-51. As American states codified and courts interpreted English common law, they also adopted the requirement that criminal intent be proven in order to convict a person of a crime. *See id.* at 251-52. This principle survives today. *See X-Citement*, 513 U.S. at 69. Thus, with a few limited exceptions, mental intent is a necessary element of any common-law offense and most criminal statutes. *See Morrisette*, 342 U.S. at 261-62; *see also X-Citement*, 513 U.S. at 78 (indicating that statute without scienter requirement raises serious constitutional concerns).

[81] Scienter is the required mental state or degree of knowledge required to make a person legally responsible for their actions. *See* BLACK'S LAW DICTIONARY 1347 (7th ed. 1999); *see also Morissette*, 342 U.S. at 258 (describing scienter as criminal intent).

[82] *See X-Citement*, 513 U.S. at 69, 71-72 (articulating presumption that some form of scienter is implied in criminal statutes even if not expressed). The *X-Citement* court cited *Morissette v. United States*, 342 U.S. 246 (1952), *Liparota v. United States*, 471 U.S. 419 (1985), and *Staples v. United States*, 511 U.S. 600 (1994), to support the principle that a scienter requirement is presumed in the absence of an express contrary intent by Congress. *See X-Citement*, 513 U.S. at 70-72; *see also* State v. Rosul, 974 P.2d 916, 921 (Wash. Ct. App. 1999) (articulating *X-Citement* court's concern that statutes without mental element raise serious constitutional doubts);"" Egan, *supra* note 20, at 1342 (arguing majority's approach of deferring to legislative intent and canons of construction was "sensible"); Burke, *supra* note 19, at 953 (characterizing *X-Citement* as consistent with rules of statutory interpretation and prior case law); Fears, *supra* note 73, at 845 (describing *X-Citement* court's rationale). *But see X-Citement*, 513 U.S. at 80-81 (Scalia & Thomas, JJ. dissenting) (stating that "There is no way in which any of these cases, [*Morissette*, *Liparota*, and *Staples*] or all of them in combination, can be read to stand for the sweeping proposition that 'the presumption in favor of a scienter requirement should apply to each of the statutory elements' . . . even when the plain text of the statute says otherwise."); Kaplan & Green, *supra* note 73, at 1228-33 (critiquing *X-Citement* court's reliance on *Morissette*, *Liparota*, and *Staples*).

[83] *See X-Citement*, 513 U.S. at 73.

"knowingly" included knowledge of the age of the performers and the sexually explicit nature of child pornography.

As a final step in the *X-Citement* court's section 2252 interpretation, the Court analyzed the congressional intent behind the statute. The Court found section 2252's legislative history unclear due to the numerous revisions by Congress.[84] However, the *X-Citement* court refused to impute a congressional intent that is inconsistent with the Constitution.[85] In particular, the court interpreted section 2252 to require that people knowingly receive or transport visual depictions that they know depict minors engaging in sexually explicit conduct, thereby avoiding any constitutional problem.[86]

2. The "Visual Depictions" Element

Like the "knowingly" provision of section 2252, the "visual depictions" language, also created interpretative problems for courts. *United States v. Hockings*[87] presented the Ninth Circuit with the question of whether computer-based graphic interchange format ("GIF") images satisfied section 2252's visual depictions element.[88] According to the definition found in section 2256,[89] visual depictions include any photograph, film, video, picture, or data stored on computer disk by electronic means which can be converted into a visual image.[90]

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[84] *See id.* (indicating that § 2252's legislative history evolved over period of years and spoke "somewhat indistinctly to the question whether 'knowingly' modifies subsections (1)(A) and (2)(A)"); *see also Rosul*, 974 P.2d at 921 (indicating *X-Citement* court viewed § 2252's legislative history as "unclear"); Burke, *supra* note 19, at 949 (noting Chief Justice Rehnquist's acknowledgement of § 2252's unclear legislative history).

[85] *See X-Citement*, 513 U.S. at 68-69; *id.* at 73 (stating that "we do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution . . . "); *see also* Burke, *supra* note 19, at 950 (indicating court in *X-Citement* would not impute unconstitutional intent to congressional legislation); Fears, *supra* note 73, at 845 (noting *X-Citement*'s court's statement that it would not impute to congressional intent to pass unconstitutional legislation).

[86] *See X-Citement*, 513 U.S. at 73; *see also* Burke, *supra* note 19, at 938 (arguing that impact of *X-Citement* was to require mental element with regard to performer's age and sexually explicit nature of child pornography); Fears, *supra* note 73, at 845 (describing *X-Citement*'s holding as extending knowingly requirement to age of performers and sexually explicit nature of images).

[87] 129 F.3d 1069 (9th Cir. 1997).

[88] *See Hockings*, 129 F.3d at 1070.

[89] *See* 18 U.S.C. § 2256 (1999) (providing definitions for § 2252's chapter).

[90] *See Hockings*, 129 F.3d at 1071; 18 U.S.C. § 2256(8) (defining child pornography as any visual depiction of a minor engaging in sexually explicit conduct, including any photograph, film, video, picture, or computer or computer-generated image or picture); 18 U.S.C. § 2256(5) (expanding visual depiction definition to include "undeveloped film and

GIF images are a type of computer-based graphic file format.[91] Computers receive and transmit GIF images in a binary format.[92] Software then decodes them into visual images for the user to view.[93] Based on these properties, the *Hockings* court held that GIF images satisfied section 2252's visual depictions element.[94]

In *Hockings*, a district court convicted Mark Stuart Hockings, under section 2252(a)(1), of transporting sixteen visual depictions of child pornography after he downloaded the images to his computer.[95] Hockings appealed his conviction, arguing that the GIF images did not fall within the visual depictions described in section 2252.[96] The court of appeal rejected Hockings' argument.[97]

The Ninth Circuit Court of Appeals affirmed Hockings' conviction by interpreting section 2252 to include GIF images.[98] The Ninth Circuit recognized the absurd result that would follow if Congress intended to prohibit computer transportation of child pornography yet omitted GIF files from section 2252's coverage.[99] To bolster this interpretation, the court also analogized GIF files to "unprocessed, undeveloped film."[100]

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videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image").

[91] *See* United States v. Wilson, 182 F.3d 737, 742-43 (10th Cir. 1999) (recognizing GIF files and interpreting expert testimony which detailed how computers receive and represent GIFs); United States v. Lamb, 945 F. Supp. 441, 451 (N.D.N.Y. 1996) (describing nature of computer images); United States v. Maxwell, 45 M.J. 406, 412 (C.A.A.F. 1996) (recognizing GIF images as type of computer graphic file in child pornography case); BOB COTTON & RICHARD OLIVER, THE CYBERSPACE LEXICON 89 (1994) (defining GIF as graphic file format developed in 1987 by Compuserve for transmission of color images over computer networks); *see also* PAUL GILSTER, THE INTERNET NAVIGATOR 324 (2d ed. 1994) (explaining how to decode graphic files on personal computers).

[92] *See Lamb*, 945 F. Supp. at 451; *Maxwell*, 45 M.J. at 412; GILSTER, *supra* note 91, at 324-26; *cf.* United States v. Hibbler, 159 F.3d 233, 235 n.1 (6th Cir. 1998) (referring erroneously to GIF files as "slang for online pictures").

[93] *See Lamb*, 945 F. Supp. at 451; *Maxwell*, 45 M.J. at 412; GILSTER, *supra* note 91, at 324-26.

[94] *See Hockings*, 129 F.3d at 1072; *cf.* State v. Cohen, 696 So. 2d 435, 439 (Fla. 4th Dist. Ct. App. 1997) (finding scope of Florida statute prohibiting possession of "any representation" of child pornography included computer graphic images).

[95] *See Hockings*, 129 F.3d at 1070.

[96] *See id.*

[97] *See id.* at 1071.

[98] *See id.* at 1072; *see also* United States v. Whiting, 165 F.3d 631, 634 (8th Cir. 1999) (citing *Hockings* in holding that computer images were within § 2252's "visual depictions" element).

[99] *See Hockings*, 129 F.3d at 1071 (stating that it was absurd to find Congress intended to prohibit transportation of visual depictions by computer but did not intend to include GIF files within "visual depictions" definition).

[100] *See id.* The Ninth Circuit interpreted § 2252's visual depictions element to include

In a 1986 case, the Ninth Circuit interpreted undeveloped film to be within section 2252's visual depiction element.[101] According to the *Hockings* court, GIF images are similar to unprocessed, undeveloped film because both formats are a means of storage and transportation for child pornography.[102] Based on this analogy, the *Hockings* court concluded that section 2252's visual depictions element included GIF images.[103] Thus, after *Hockings*, section 2252 clearly applies to receiving or transporting GIF images by computer.[104]

Both *Hockings* and *X-Citement* demonstrate the significant interpretative difficulties created by section 2252.[105] In both cases, the courts relied upon section 2252's legislative history and congressional intent.[106] Despite prior case law interpreting section 2252, there is still uncertainty regarding terms found in the statute.[107] A recent Ninth

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unprocessed, undeveloped film in an earlier case, *United States v. Smith*, 795 F.2d 841, 846 (9th Cir. 1986). In *Smith*, James E. Smith mailed film containing images of three nude teenage girls to a photo company for development. *See Smith*, 795 F.2d at 844. After developing the pictures, the company contacted U.S. postal service authorities who conducted an investigation into the origin of the photos. *See id.* After determining the girls were minors, the government convicted Smith of transporting child pornography in violation of § 2252(a)(1). *See id.* at 845. Smith argued that unprocessed, undeveloped film did not fall within section 2252's visual depiction language. *See id.* at 846. On appeal, the Ninth Circuit held that unprocessed, undeveloped film constituted a visual depiction under section 2252. *See id.* at 847. Following the *Smith* decision, Congress expanded section 2252's visual depiction by amending its definitional statute to include unprocessed, undeveloped film. *See* Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510, 3511 (1986) (codified as amended at 18 U.S.C. § 2256(5)).

[101] *See Smith*, 795 F.2d at 846 (holding that undeveloped, unprocessed film fell within § 2252's visual depictions element); *see also Hockings*, 129 F.3d at 1071 (describing holding of *Smith* as extending visual depictions to include unprocessed, undeveloped film).

[102] *See Hockings*, 129 F.3d at 1071 (finding that both GIF files and undeveloped film acted as storage and transportation for visual depictions of child pornography).

[103] *See id.*

[104] *See id.* (holding that GIF files are visual depictions within § 2252's meaning because visual images transported in binary form both start and end pornographically).

[105] *Compare* United States v. X-Citement Video, Inc., 513 U.S. 64, 68-69 (recognizing that court's interpretation of "knowingly" is not most natural grammatical reading of § 2252 but necessary to eliminate constitutional doubt), *with Hockings*, 129 F.3d at 1071 (interpreting § 2252's language, legislative history, and case law to determine whether statute includes GIF images).

[106] *See X-Citement*, 513 U.S. at 73 (finding that § 2252's legislative history is unclear regarding statute's mental intent requirement); *Hockings*, 129 F.3d at 1071-72 (relying upon § 2252's legislative history and congressional intent to support holding that statute includes GIF images of child pornography).

[107] *See* United States v. Mohrbacher, 182 F.3d 1041, 1047 (9th Cir. 1999) (analyzing whether downloading GIF files fell within § 2252's coverage); United States v. Vig, 167 F.3d 443, 448 (8th Cir. 1999) (interpreting § 2252 to determine whether it covered defendant who possessed child pornography files on his computer hard drive); United States v. Wilson,

Circuit Court of Appeals opinion, *United States v. Mohrbacher*,[108] demonstrates that section 2252 continues to create significant interpretative problems.

II. *UNITED STATES V. MOHRBACHER*

United States v. Mohrbacher presented the Ninth Circuit with an important legal question of first impression.[109] The question concerned whether downloading child pornography constituted both receiving and transporting child pornography under section 2252.[110] The Ninth Circuit held that downloading child pornography is punishable only as "receiving" under the statute based on both statutory interpretation and the nature and process of downloading.[111] In reaching its decision, the *Mohrbacher* court analogized downloading images to ordering materials over the phone.[112] As a result, computer-based traffickers of child pornography are subject to lighter penalties because they are only guilty of one offense under section 2252.[113]

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182 F.3d 737, 740-41 (10th Cir. 1999) (determining whether disks containing computer files of child pornography were covered by § 2252); United States v. Maxwell, 45 M.J. 406, 424-25 (C.A.A.F. 1996) (interpreting and applying weakened version of § 2252's knowledge requirement).

[108] 182 F.3d 1041 (9th Cir. 1999).

[109] *See Mohrbacher*, 182 F.3d at 1047. *But see* United States v. Lacy, 119 F.3d 742, 750 (9th Cir. 1997) (characterizing downloading images of child pornography as "producing" images on defendant's computer). According to the Ninth Circuit in *Mohrbacher*, the issue of whether downloading child pornography fit within § 2252(a)'s provision was never directly addressed by another court. *See Mohrbacher*, 182 F.3d at 1050. Perhaps the best explanation for the lack of legal precedent analyzing downloading under § 2252 is the fact that most defendants charged under the statute plead guilty before trial. *See* KENNETH V. LANNING, NATIONAL CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 28-29 (2nd ed. 1987) (describing how defendants possessing child pornography often try to make plea agreements in order to avoid public nature of criminal trials); Wallace, *supra* note 2, at B4 (detailing high FBI conviction rates in Internet child pornography cases). In fact, in 1995, the FBI created a program called Innocent Images to catch pedophiles operating online. *See id.* From 1994 to March 1999, Innocent Images resulted in 264 arrests and 255 convictions. *See id.* According to FBI agent Peter Gulotta, FBI cases involving Internet-based child pornography have a 99 percent conviction rate. *See id.* Thus, since most defendants prosecuted under § 2252(a) pled guilty, courts, before *Mohrbacher*, never needed to analyze downloading child pornography under section 2252. *See id.*

[110] *See Mohrbacher*, 182 F.3d at 1047.

[111] *See id.* at 1048-50.

[112] *See id.* at 1050 (analogizing downloading image from Internet to ordering materials over phone and receiving materials through mail).

[113] *See id.* at 1051 (holding that defendant downloading child pornography only violates § 2252(a)(2)'s receiving provision).

A. Facts and Procedure

Mohrbacher involved a California resident who downloaded child pornography from an international pornographer operating on the Internet.[114] In March 1992, Danish police seized the business records of a computer bulletin board in Denmark that was selling child pornography over the Internet.[115] The records seized indicated that a Californian, Daniel Zane Mohrbacher, downloaded two computer GIF images from the Danish bulletin board.[116] Subsequently, police executed a search warrant at Mohrbacher's workplace.[117] Police found two GIF images from the Danish bulletin board, one portraying a nude girl, the other showing a girl engaged in a sex act with an adult.[118] Police determined both girls were under twelve.[119]

Mohrbacher confessed to downloading the images and provided police with telephone records confirming the dates of his Internet activity.[120] He also showed them where to find the images on his computer and assisted in their investigation of child pornography.[121] But despite his cooperation he could not reach a plea agreement with the prosecution and a grand jury eventually indicted Mohrbacher.[122]

The government prosecuted Mohrbacher under the three provisions of 18 U.S.C. section 2252 that punish transporting, receiving, and possessing child pornography.[123] The jury convicted Mohrbacher on two counts of transporting, one count of receiving, and one count of

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[114] *See id.* at 1044-45.

[115] *See id.* at 1044.

[116] *See id.*

[117] *See id.*

[118] *See id.*

[119] *See id.*

[120] *See id.*

[121] *See id.*

[122] *See id.* Originally, Mohrbacher accepted a plea agreement and entered a guilty plea to possession of child pornography. *See id.* However, Mohrbacher withdrew his plea. *See id.* After the failed plea agreement, the government offered Mohrbacher another plea agreement. *See id.* at 1044-45. Mohrbacher refused to negotiate. *See id.* at 1045. Apparently, part of Mohrbacher's reason for refusing to enter another agreement stemmed from two personal tragedies before trial. *See id.* at 1044. First, Mohrbacher's wife died from a botched intubation procedure. *See id.* at 1044 n.1. According to the Ninth Circuit, Mohrbacher blamed his wife's death on his own involvement in the child pornography case. *See id.* Mohrbacher told the district court that, as a paramedic, he would have been able to save his wife if he had not been away at a court appearance. *See id.* Then, even more tragically, Mohrbacher's daughter attempted suicide. *See id.* Thus, after rejecting offers from the government to plea, Mohrbacher went to trial. *See id.* at 1045.

[123] *See id.* at 1045; *see also* 18 U.S.C. § 2252 (1999).

possessing child pornography.[124] The court sentenced him to thirty-six months in prison.[125]

On appeal, Mohrbacher argued that downloading was receiving rather than transporting under the plain language of section 2252.[126] According to Mohrbacher, he received child pornography through an Internet download only after the bulletin board operator transported the image to him.[127] The Ninth Circuit agreed[128] and reversed Mohrbacher's two-count conviction for transporting child pornography.[129]

B. Holding and Rationale

The *Mohrbacher* court held that section 2252 only punished downloading as receiving under subsection (a)(1), and not as transporting or shipping under (a)(2).[130] In reaching its decision, the Ninth Circuit relied on two grounds: (1) a statutory interpretation of section 2252 and (2) the definition of the "nature of the process of downloading."[131]

1. Statutory Interpretation

The *Mohrbacher* court's analysis began by interpreting section 2252.[132] The court found the statute's ordinary meaning ambiguous because it failed to define "transport," "ship," or "receive."[133] Because the statute did not indicate the scope of the terms, the court consulted dictionaries for the definition of transport, ship, and receives.[134]

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[124] *See Mohrbacher*, 182 F.3d at 1045.

[125] *See id.* at 1046. The district court sentenced Mohrbacher to nine months for each count under § 2252. *See id.; see also* 18 U.S.C. § 2252(b)(1) (providing that any person who (1) violates or (2) attempts or conspires to violate § 2252(a) may be fined or imprisoned, for not more than 15 years). Mohrbacher served his thirty-six month sentence by the time the Ninth Circuit heard his appeal. *See Mohrbacher*, 182 F.3d at 1046.

[126] *See id.* at 1047.

[127] *See id.* at 1048.

[128] *See id.* at 1050 (concluding that Mohrbacher's interpretation was persuasive).

[129] *See id.* at 1053.

[130] *See id.* at 1050 (stating that customer who downloads image available through automated, preconfigured process or sent by another computer user is guilty of receiving or possessing those materials under § 2252(a)(2) but not of shipping or transporting).

[131] *See id.* (relying on statutory interpretation principles and court's analysis of downloading).

[132] *See id.* at 1048.

[133] *See id.*

[134] *See id.* at 1048 (citing *Muscarello v. United States*, 524 U.S. 125 (1998), to support principle that courts may look to dictionaries for definitions where there is no indication

The court of appeals did not find the dictionary definitions dispositive.[135] The court found that the traditional meanings of transport, ship, and receive all encompassed the act of downloading.[136] The *Mohrbacher* court then turned to a broader consideration of the statute.[137]

The court of appeals considered the purpose of the statute in its entirety and whether the proposed interpretation would frustrate or advance that purpose.[138] This method also proved inconclusive.[139] According to the court, section 2252 was a broad enactment designed to prevent child abuse.[140] The *Mohrbacher* court found that the penalties and sentencing guidelines were identical whether it interpreted downloading as transporting or receiving.[141] Accordingly, the court found that its interpretation of downloading that included only receiving, neither frustrated nor advanced section 2252's purpose.[142] For further guidance, the *Mohrbacher* court took a structural approach, construing the statutory language in relation to the other parts of the statute.[143]

In order to interpret and give significance to section 2252, the *Mohrbacher* court compared the language of subsections (a)(1) and (a)(2) with other parts of the statute.[144] According to the court of appeals, this analysis supported Mohrbacher's position because subsection (a)(1),

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that Congress intended specific legal meaning for term).

[135] *See id.* at 1049 (indicating that dictionary definitions were not dispositive of issue).

[136] *See id.* at 1048-49 (finding that it was possible to use dictionary definitions of "transport" and "ship" to include downloading). The *Mohrbacher* court explained that "transport" and "ship" encompassed downloading because their definitions meant to carry or convey an item. *See id.* The court found that since a person downloading an image "indisputably" received, and arguably transported or shipped, the item, the dictionary definitions were not dispositive. *See id.*

[137] *See id.* at 1049 (stating that to determine meaning of statutory provisions, courts look to its entire purpose and whether proposed interpretation frustrates or advances that purpose).

[138] *See id.*

[139] *See id.*

[140] *See id.* (stating that statutory provisions must be interpreted to coincide with statute's broad and general purpose of facilitating prosecution of individuals involved with child pornography). The court's determination of the statute's purpose came from *United States v. Black*, 116 F.3d 198, 202 (7th Cir. 1997), which described the statute's purpose as a "broad legislative enactment" that was "necessary to prevent child abuse." *Id.*

[141] *See Mohrbacher*, 182 F.3d at 1049 (finding that decision whether downloading is properly charged under § 2252 (a)(1) or § (a)(2), or both, would neither hinder nor facilitate prosecutions because court served statute's purpose either way).

[142] *See id.*

[143] *See id.* at 1050 (citing *United States v. DeLaCorte*, 113 F.3d 154 (9th Cir. 1997)). In *DeLaCorte*, the Ninth Circuit stated that courts may look to a specific part of a statute and compare that to other parts of the statute. *See DeLaCorte*, 113 F.3d at 156.

[144] *See Mohrbacher*, 182 F.3d at 1050.

proscribing transporting child pornography, is separate from subsection (a)(2), prohibiting receiving child pornography.[145] This suggested to the *Mohrbacher* court that Congress intended the provisions to regulate different types of behavior.[146] Thus, the court of appeals concluded that Mohrbacher's downloading could not be both transporting and receiving.[147]

2. Defining the "Nature of the Process of Downloading"

In addition to the statutory interpretation of section 2252, the *Mohrbacher* court relied upon what it termed the "nature of the process of downloading" for its decision.[148] The court of appeals analyzed the nature of downloading in order to define it.[149] Unfortunately, the *Mohrbacher* court gave little indication of the definition or meaning it adopted for the nature of the process of downloading.[150] Instead, the court relied upon analogies presented through expert testimony at trial[151] and by Mohrbacher on appeal.[152]

According to the expert testimony, downloading an image entails computer "A" receiving a binary string of information from computer "B" through a telephone modem, which computer "A" then represents as an image.[153] To clarify this definition,[154] the government's expert witness analogized downloading to placing an order through a mail order

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[145] *Compare* 18 U.S.C. § 2252(a)(1) (prohibiting knowing transportation and shipping of child pornography), *with* 18 U.S.C. § 2252(a)(2) (prohibiting knowing receipt and distribution of child pornography).

[146] *See Mohrbacher*, 182 F.3d at 1050 (stating that separating provisions prohibiting transporting and receiving child pornography into subsections suggests that Congress intended provisions to regulate different types of behavior).

[147] *See id.* at 1050 (holding that customer downloading child pornography is guilty of receiving or possessing those materials under § 2252(a)(2)).

[148] *See id.* (stating that court's analysis of downloading was basis for its § 2252(a)(2) analysis).

[149] *See id.* at 1047-48 (indicating that nature of downloading was key to resolving whether downloading was receiving, transporting, or both under § 2252).

[150] *See id.* at 1050 (indicating only that nature of downloading was basis for court's decision).

[151] *See id.* at 1045-46 (highlighting expert testimony presented to district court by prosecution).

[152] *See id.* at 1047 (analogizing downloading to customer placing phone order requesting delivery of item).

[153] *See id.* at 1045.

[154] *See id.* On cross-examination by Mohrbacher's attorney, the government's expert witness analogized downloading to ordering through a mail order catalog. *See id.*

catalog.[155] The only difference, according to the expert, was that a computer fills the order automatically and the supply is not depleted because a new copy of the image is generated.[156]

Mohrbacher presented a similar analogy on appeal.[157] He claimed that his downloading was comparable to that of a customer who places a phone order requesting delivery of an item.[158] According to Mohrbacher, the only difference was that the entity filling the order, a bulletin board, had a completely automated response while a phone order required action by an individual at the time the order was filled.[159]

The analogies persuaded the Ninth Circuit.[160] The linchpin for the *Mohrbacher* court was that downloading resulted from an "automated, preconfigured process."[161] The court of appeals reasoned that a person downloading an image could only accomplish this task after another person had preconfigured the bulletin board to accept the order.[162] In Mohrbacher's case, downloading was merely the act of receiving an image that was available from an automated, preconfigured process and not transporting the image.[163] Thus, the court of appeals reversed Mohrbacher's two-count conviction for transporting child pornography.[164]

III. ANALYSIS

The *Mohrbacher* court reached the correct result based on the provisions of section 2252 and the nature of downloading.[165] The decision comports with section 2252's legislative history and the statute's dual policies of prohibiting child pornography's proliferation and deterring the child abuse inherent to its production.[166] However, the *Mohrbacher* court's analysis is troubling for two reasons. First, the

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[155] *See id.*

[156] *See id.*

[157] *See id.* at 1047.

[158] *See id.*

[159] *See id.*

[160] *See id.* at 1050 (agreeing with Mohrbacher's statutory interpretation).

[161] *See id.* at 1050.

[162] *See id.* at 1048.

[163] *See id.* at 1050.

[164] *See id.* at 1053.

[165] *See id.* at 1050 (holding that downloading child pornography is receiving under § 2252(a)(2)); *see also* 18 U.S.C. § 2252(a)(2) (1999) (prohibiting receipt of child pornography); BENKLER, *supra* note 1, at 11 (describing method of file exchange over World Wide Web as binary transfer of information between two users).

[166] *See Mohrbacher* 182 F.3d at 1049 (discussing § 2252's legislative history).

Mohrbacher holding conflicts with the Supreme Court's decision in *United States v. X-Citement Video.*[167] Second, future courts will have no concise method for interpreting similar technological developments because the analysis relies on an analogy.[168] Therefore, while the *Mohrbacher* court reached a correct, policy-driven decision, the analysis is troubling.[169]

A. The Correct Result

The *Mohrbacher* court reached the correct result. Courts should not prosecute downloading an image as both transporting and receiving.[170] Characterizing downloading as both receiving and transporting under section 2252 is inconsistent with the statute's language and legislative history.[171]

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[167] *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7, 7-8 (1978) (codified as amended at 18 U.S.C. § 2252);S. REP. NO. 95-438, at 5 (1977) *reprinted in* 1977 U.S.C.C.A.N. 40, 42; *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (holding that § 2252 includes "knowingly" requirement which extends to both performer's age and sexually explicit nature of materials).

[168] *See* Rupert, *supra* note 1, at 138-39 (critiquing Supreme Court's application of phone analogy to First Amendment free speech concerns on Internet); *see also* Hardy, *supra* note 1, at 999 (arguing that cyberspace gives rise to many novel legal questions that are best answered with new rules developed according to technology).. *But see* David J. Loundy, *E-Law 4: Computer Information Systems Law and System Operator Liability*, 21 SEATTLE U. L. REV. 1075, 1185 (1998) (finding that much current law concerning system operators adapts well to computer information systems); Jonathan D. Bick, *Why Should the Internet Be Any Different?*, 19 PACE L. REV. 41, 53 (1998) (contending that analogies are useful tools for interpreting novel technology questions).

[169] *See* BENKLER, *supra* note 1, at 37 (arguing that courts analyzing new technological issues should not rely on metaphors to determine legal rules because such reliance avoids thoughtful resolution of those problems); *see also* Rupert, *supra* note 1, at 138-39 (arguing that Supreme Court's use of analogy in technological setting was faulty).

[170] *See* United States v. Mohrbacher, 182 F.3d 1041, 1049 n.9 (9th Cir. 1999) (stating that it is difficult to support concept that courts should interpret downloading child pornography as both receiving and transporting under § 2252).

[171] *See* 18 U.S.C. § 2252(a)(2). The original version of section 2252 punished two different actors in the exchange of child pornography. *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7, 7-8 (1978) (codified as amended at 18 U.S.C. § 2251(a)(1) (1999)). Subsection (a)(1) punished the recipients of child pornography for receiving the material. *See* Protection of Children Against Sexual Exploitation Act of 1977 § 2252(a)(1). Subsection (a)(2) punished the seller or distributor of child pornography for transporting or shipping the materials. *See id.* § 2252(a)(2) (punishing any person receiving visual or print medium that depicted or involved use of minor engaging in sexually explicit conduct). The 1988 Amendment extended section 2252's scope to include computers. *See id.* However, the amendment did not change the original language of subsections (a)(1) or (a)(2) of the statute. *See* Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690 § 7511, 102 Stat. 4485 (codified as amended at 18 U.S.C. §§ 2252(a)(1)-(2) (1999)) (amending § 2252 by adding "by any means including by computer"). Thus, the district court's holding that Mohrbacher's downloading

Section 2252's language classifies two distinct offenses, receiving and transporting child pornography.[172] These offenses describe two different actors: the person receiving child pornography and the person sending the illicit material.[173] Consistent with this language, an individual ordering a video, magazine, or photo containing child pornography through the mail commits two section 2252 offenses: (1) receiving and (2) possessing child pornography.[174] Downloading child pornography from the Internet should be punished in the same manner.[175]

Computer users downloading child pornography from the Internet receive the information by modem and possess it on their computer.[176] The process of downloading online images is expressly described by section 2252(a)(2).[177] Thus, in order to accurately apply section 2252,

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constituted both receiving and transporting conflicts with section 2252's language and legislative history. *See* 18 U.S.C. § 2252(a)(2); Protection of Children Against Sexual Abuse Act of 1977 § 2252(a)(2); *Mohrbacher*, 182 F.3d at 1046 (convicting defendant on counts of receiving and transporting for downloading child pornography).

[172] *See* 18 U.S.C. § 2252(a)(1)(prohibiting transportation of child pornography); § 2252(a)(2) (prohibiting receiving child pornography).

[173] *See id.* § 2252(a); H.R. REP. NO. 95-696, at 6 (1977)(describing purpose of § 2252(a)(1) as punishing any person transporting child pornography and purpose of § 2252(a)(2) as punishing any person receiving child pornography).

[174] *See* United States v. Knox, 32 F.3d 733, 733 (3d Cir. 1994) (affirming defendant's conviction for receiving and possessing child pornography under § 2252 where he ordered videos from France containing child pornography); United States v. Long, 831 F. Supp. 582, 582 (D. Ky. 1993) (convicting defendant of receiving and possessing child pornography under § 2252 where he ordered two videos containing child pornography from overseas); *see also* United States v. Layne, 43 F. 3d 127, 127 (5th Cir. 1995) (affirming defendant's conviction for possession under § 2252 for his collection of magazines containing child pornography).

[175] *See Mohrbacher*, 182 F.3d at 1050 (analyzing downloading as receiving under § 2252(a)(2)); *id.* at 1049 n.9 (arguing that government's characterization of downloading child pornography as transportation was difficult to support); United States v. Lamb, 945 F. Supp. 441, 450-53 (N.D.N.Y 1996) (analyzing downloading child pornography as receiving under § 2252(a)(2)).

[176] *See Lamb*, 945 F. Supp. at 451 (describing that computer distribution of child pornography over Internet involves converting scanned photos or film into image file formats and transmitting them over modems to other computers); *see also* BENKLER, *supra* note 1, at 11-12 (describing process of transferring binary files between computers as allowing users to send and receive music, text, and color representations to each other).

[177] *See* 18 U.S.C. § 2252(a)(2) (1999); *Lamb*, 945 F. Supp. at 450 (finding that downloading is described by § 2252(a)(2)). *Compare* 18 U.S.C. § 2252 (prohibiting receiving visual depictions of child pornography), *with* BENKLER, *supra* note 1, at 12 (describing process of downloading pornography through File Transfer Protocol ("FTP") as user retrieving graphic file from World Wide Web), *and* COTTON & OLIVER, *supra* note 91, at 66 (indicating that downloading is transferring data from: (1) one computer system to another, (2) one network or bulletin board to personal computer, and (3) one computer to archival storage device).

courts must treat downloading as receiving.[178]

Similarly, to give effect to section 2252's legislative history, courts should punish downloading child pornography as receiving.[179] When Congress passed section 2252, it sought to prohibit child pornography trafficking through the mails by targeting both buyers and sellers of the material.[180] To achieve this goal, Congress drafted section 2252(a)(1) to punish pedophiles for transporting child pornography, and section 2252(a)(2) to prohibit people from receiving child pornography.[181] Subsequent congressional amendments to section 2252, in 1984 and 1988, broadened the statute's scope by removing its "commercial purposes" language and extending its coverage to computer networks.[182] Nothing in the legislative history indicates that Congress intended to punish downloading child pornography any differently than receiving child pornography through the mail.[183]

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[178] *See* United States v. Muick, 167 F.3d 1162, 1164 (7th Cir. 1999) (affirming defendant's conviction under § 2252(a)(2) where he downloaded child pornography from computer in Tijuana); *Mohrbacher*, 182 F.3d at 1050; United States v. Matthews, 11 F. Supp. 2d 656, 658 (D. Md. 1998) (accepting defendant's plea to receiving child pornography under § 2252(a)(2) where reporter downloaded child pornography from Internet); *Lamb*, 945 F. Supp. at 450 (finding that § 2252(a)(2) accurately describes downloading child pornography).

[179] *See Mohrbacher*, 182 F.3d at 1050 (finding that treating downloading child pornography as receiving under § 2252(a)(2) is consistent with statute's legislative history); *Muick*, 167 F.3d at 1164 (accepting downloading as consistent with § 2252(a)(2)); *Lamb*, 945 F. Supp. at 452 (rejecting defendant's argument that § 2252(a)(2)'s legislative history does not properly include downloading child pornography).

[180] *See* S. REP. NO. 95-438, at 5 (1977) *reprinted in* 1977 U.S.C.C.A.N. 40, 42 (indicating that Congress targeted child pornography being traded and sold through mail); *see also* Burke, *supra* note 7, at 449-50 (indicating that Congress enacted § 2252 to combat exchange of child pornography in interstate commerce); Egan, *supra* note 20, at 1343-50 (detailing legislative history of Protection of Children Against Sexual Exploitation Act of 1977); Lodato, *supra* note 15, at 1332 (noting that in late 1970s Congress reacted to public concern over "rampant stories of child abuse, child prostitution rings, and the increased production and availability of child pornography").

[181] *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7, 7-8 (1978) (codified as amended at 18 U.S.C. § 2251-56 (1999)) (punishing buyers and sellers of child pornography); S. CONF. REP. NO. 95-601, at 7 (indicating that Congress intended § 2252 to reach any person transporting or shipping child pornography to sell or distribute such material); Burke, *supra* note 19, at 938-39 (arguing that Congress proposed § 2252 to reach distributors and recipients of child pornography).

[182] *See* Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204, 204-05 (1984) (codified as amended at 18 U.S.C. § 2251-2255 (1999)) (removing § 2252's "commercial purpose" and obscenity requirements from previous version); Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690 § 7511, 102 Stat. 4485 (codified as amended at 18 U.S.C. § 2252(a) (1999)) (amending § 2252 by adding "by any means including by computer").

[183] *See* Child Protection and Obscenity Enforcement Act of 1988 § 2252(a) (amending §

In fact, section 2252's legislative history demonstrates that the opposite is true.[184] Congress's 1988 amendment to section 2252 simply applied the statute's rules to computers.[185] Congress drafted its prohibitions on receiving child pornography to computers based upon the tangible world of interstate mails and commerce.[186] As already demonstrated, a person receiving child pornography through the mail commits receiving and possession offenses only.[187] Therefore, to comport with section 2252's legislative history, courts should punish downloading child pornography as receiving, not as transporting.[188]

On the other hand, downloading child pornography could be considered quite different from ordering a video or magazine.[189] In fact, the government in *Mohrbacher* argued that section 2252's provisions apply differently to the Internet.[190] In the government's view, a bulletin board's automated response to a download request makes the person downloading child pornography the only individual responsible for causing the transportation of the image.[191] As a result, the individual both transports and receives child pornography via the computer.[192] Thus, courts should analyze and punish downloading child pornography differently from other forms of the illicit material, such as

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2252 by adding "by any means, including by computer"); *see also* Free Speech v. Reno, 198 F.3d 1083, 1088 (9th Cir. 1999) (noting that 1988 amendment to § 2252 applied the statute to computers); *Lamb*, 945 F. Supp. at 452 (finding that § 2252's 1988 amendment extended its provisions to computers).

[184] *See* Child Protection and Obscenity Enforcement Act of 1988 § 2252(a).

[185] *See id.*; *see also Free Speech*, 198 F.3d at 1088 (indicating that § 2252's 1988 amendment applied its provisions to computers); *Lamb*, 945 F. Supp. at 452 (recognizing § 2252 applied to computers after 1988 amendment).

[186] *See* Child Protection and Obscenity Enforcement Act of 1988 § 2252(a); *see also* 18 U.S.C. § 2256 (1999) (defining § 2252's provisions as covering photographs, films, videos, and pictures).

[187] *See* United States v. Knox, 32 F.3d 733 (3rd Cir. 1994) (affirming conviction for receiving and possessing child pornography under § 2252); United States v. Long, 831 F. Supp. 582, 582 (W.D. Ky 1993) (convicting defendant for receiving and possessing child pornography under § 2252); *see also* United States v. Layne, 43 F.3d 127, 127 (5th Cir. 1995) (affirming conviction for possession under § 2252).

[188] *See* United States v. Muick, 167 F.3d 1162, 1164 (7th Cir. 1999); United States v. Mohrbacher, 182 F.3d 1041, 1050 (9th Cir. 1999); *Lamb*, 945 F. Supp. at 452.

[189] *See* Robert W. Peters, *There is a Need to Regulate Indecency on the Internet*, 6 CORNELL J.L. & PUB. POL'Y 363, 368 (1997) (distinguishing indecent material available through dial-a-porn phone services from material on Internet).

[190] *See Mohrbacher*, 182 F.3d at 1047 (describing government's argument that downloading is different from receiving child pornography through mails because downloader causes transportation of images).

[191] *See id.*

[192] *See id.*

videos or magazines.[193]

However, as the Ninth Circuit demonstrated, downloading child pornography should not be punished more severely simply because the Internet is different from the real world.[194] There is no substantive difference between using a computer to violate section 2252 and using an order form or going to a video store to violate section 2252.[195] The harm to child victims of pornography is the same, the moral culpability of the

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[193] *See id.*

[194] *See id.* at 1050 (arguing that customer downloading child pornography is simply on receiving end of transaction and should not be punished as transporting or shipping).

[195] *See* LANNING, *supra* note 109, at 19. According to Lanning, all child pornography produced records the victimization of a child. *See id.* The child pornographer first exploits the child victim by producing the illicit images. *See id.*; LEVESQUE, *supra* note 3, at 63 (indicating that child pornography's production is "inextricably connected" to child sexual abuse). The child pornographer's photograph or videotape then acts a permanent record of the child's molestation. *See* Osborne v. Ohio, 495 U.S. 103, 111 (1990) (finding that "materials produced by child pornographers permanently record the victim's abuse"); LANNING, *supra* note 109, at 19. The result is that each child portrayed in child pornography is victimized. *See id.* Pedophiles use child pornography (1) for sexual arousal, (2) as a tool for seducing other children, and (3) to blackmail the child victim in order to cover up the activity. *See id.* at 21; *see also* LEVESQUE, *supra* note 3, at 64 (arguing child pornography's uses include: lowering children's inhibitions, expanding sexual activities of pedophiles, and legitimizing child sex abuse). *See* LANNING, *supra* note 109, at 19. Lanning indicates that computers assist pedophiles to collect child pornography by increasing the ease of communication through bulletin boards and making organization of child pornography collections more efficient. *See id.* Thus, pedophiles using computers to view, possess, or exchange child pornography neither enhance nor reduce child pornography's harmful effects on its victims. *See id.* Similarly, the producers and possessors of child pornography using computers are not more or less guilty for their acts. *See id.* Accordingly, prosecutors must still prove the same criminal elements for a section 2252 violation whether the defendant received child pornography in the mail, bought it in a store, or downloaded it from the Internet. *See id.*; *Compare* JOHN CREWDSON, BY SILENCE BETRAYED: SEXUAL ABUSE OF CHILDREN IN AMERICA 247 (1988) (arguing that tougher punishments punishing clandestine exchanging of child pornography avoids addressing more fundamental problem of child pornography production), *with* Peters, *supra* note 189, at 368. Peters argues that there is a clear distinction between gaining access to a dial-a-porn service over the phone and gaining access to Internet indecency. *See id.* According to Peters, computers are different for two reasons. First, computers allow *any* child with a computer to access indecency while dial-a-porn requires a child to steal a credit card or forge an ID. *See id.* Second, the Internet's indecent material is often free which means phone bills are less likely to alert parents to their kids' behavior. *See id.* Peters' argument fails to analyze the specific issue regarding Internet indecency. *See* LANNING, *supra* note 109, at 19. Specifically, the issue is not easier access to indecent material provided by the Internet. *See* Peters, *supra* note 189, at 368. Rather, the issue is whether the Internet changes the nature of the indecent material. *See* LANNING, *supra* note 109, at 19. Using a computer to access indecent material does not enhance or reduce the material's properties in any way. *See id.* Thus, receiving or possessing indecent material by using a computer should not be prosecuted more severely. *See id.*

offender is the same, and the burden on the prosecutor is the same.[196] Thus, since downloading does not change the nature of receiving, transporting, or possessing child pornography under section 2252, the punishment should not be different.[197] Applied to the facts in *Mohrbacher*, the court properly concluded that Daniel Mohrbacher did not transport child pornography when he downloaded the images through his computer.[198]

B. Policy Supports the Mohrbacher *Decision*

The policy behind the Act also supports the *Mohrbacher* decision.[199] Congress drafted section 2252 to prohibit the dissemination of child pornography based on two important public policy considerations. First, child pornography records the severe sexual abuse of the children depicted in the images.[200] Thus, each image of child pornography represents evidence of an illegal act.[201] Second, pedophiles utilize child pornography to seduce other children into performing sexual acts.[202] Congress addressed both policy considerations by proscribing all child

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[196] *See* 18 U.S.C. § 2252(a)(2) (1999) (punishing receiving child pornography under same elements whether it is downloaded or received in mail); LANNING, *supra* note 109, at 19 (arguing that production of child pornography harms children whether it is in form of photo, video, or computer image); *see also* CREWDSON, *supra* note 195, at 247 (arguing that punishing child pornography's clandestine exchange avoids more serious problem of abuse inherent to child pornography's production).

[197] *See* 18 U.S.C. § 2252(b)(1) (making no distinction in punishments based on manner in which defendants violate statute); *see also* CREWDSON, *supra* note 195, at 247 (arguing that punishing possession of child pornography avoids more serious problem of its production); Werst, *supra* note 3, at 234 (arguing that congressional regulation of indecent content on Internet is admirable goal but abridges free speech).

[198] *See* United States v. Lamb, 945 F. Supp. 441, 450 (N.D.N.Y 1996) (finding that downloading child pornography was receiving under § 2252 while sending images constituted transporting under statute).

[199] *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7, 7-8 (1978) (codified as amended at 18 U.S.C. § 2252(a) (1999)); S. REP. NO. 95-438, at 5 (1977) *reprinted in* 1977 U.S.C.C.A.N. 40, 42.

[200] *See* Protection of Children Against Sexual Exploitation Act of 1977 § 2252(a); S. REP. NO. 95-438, at 5; *see also* Osborne v. Ohio, 495 U.S. 103, 111 (1990) (citing Congress's findings that child pornography permanently records victim's abuse); LANNING, *supra* note 109, at 19 (indicating that child pornography is evidence of victim's abuse).

[201] *See* Protection of Children Against Sexual Exploitation Act of 1977 § 2252(a); S. REP. NO. 95-438, at 5; *Osborne*, 495 U.S. at 111 (indicating that child pornography permanently records victim's abuse); LANNING, *supra* note 109, at 19 (finding that pedophiles use child pornography for (1) for sexual arousal, (2) as a tool for seducing other children, and (3) to blackmail the child victim in order to cover up the activity).

[202] *See* Protection of Children Against Sexual Exploitation Act of 1977 § 2252(a); S. REP. NO. 95-438, at 5.

pornography trafficking through section 2252.[203]

The federal prohibition of child pornography did not apply to computer-based child pornography until Congress amended section 2252 in 1988.[204] The 1988 amendment's legislative history indicates that Congress specifically targeted the proliferation of child pornography over computer networks.[205] The special attention given to section 2252's application to computers, however, did not alter the statute's two central public policy considerations.[206] Stated simply, Congress intended to punish computer users violating section 2252 in the same manner as offenders in the real world.[207] Thus, section 2252's policies support *Mohrbacher* because the decision treats computer and non-computer offenders similarly.[208]

Opponents may argue that by treating downloading only as receiving, the *Mohrbacher* decision is contrary to the section's purpose because a violator will not be punished severely enough.[209] The narrow

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[203] *See* Protection of Children Against Sexual Exploitation Act of 1977 § 2252(a); *see also Osborne*, 495 U.S. at 111 (stating that materials produced by child pornographers permanently record victim's abuse); Free Speech v. Reno, 198 F.3d 1083, 1088 (9th Cir. 1999) (noting that premise behind child pornography statutes was (1) to eliminate impact on child victims and (2) to reduce activities of child molesters and pedophiles abusing children).

[204] *See* Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690 § 7511, 102 Stat. 4485 (codified as amended at 18 U.S.C. § 2252(a) (1999)) (amending § 2252 by adding language "by any means including by computer")""; *see also* ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 602-03 (indicating that in 1986 § 2252's provisions did not apply to computer networks).

[205] *See Computer Pornography and Child Exploitation Prevention Act: Hearings on S. 1305 Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 99th Cong. 21 (1985) (statement of Sen. Jeremiah Denton) (arguing that Congress should expand § 2252's coverage to specifically include computers); H.R. REP. NO. 95-696, at 1 (1977) (statement of Pres. Reagan) (urging Congress to amend federal child pornography statutes in order to cover pedophiles utilizing newly developing computer technologies).

[206] *See* Child Protection and Obscenity Enforcement Act of 1988 § 2252(a); United States v. Mohrbacher, 182 F.3d 1041, 1049 (9th Cir. 1999) (finding that § 2252's purpose is to facilitate prosecution of child pornographers and those involved in it).

[207] *See* Child Protection and Obscenity Enforcement Act of 1988 § 2252(a) (adding "by any means including by computer" to § 2252); *Mohrbacher*, 182 F.3d at 1049 (indicating that court's decision comports with § 2252's broad purpose of facilitating prosecution of individuals involved in child pornography); *see also Computer Pornography and Child Exploitation Prevention Act: Hearings on S. 1305 Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 99th Cong. 21 (1985) (statement of Sen. Jeremiah Denton) (seeking expansion of § 2252's existing provisions to computer networks); H.R. DOC. NO. 100-129, at 1 (statement of Pres. Reagan) (wanting Congress to extend § 2252 to computer networks).

[208] *See Mohrbacher*, 182 F.3d at 1050 (treating downloading child pornography as receiving under § 2252(a)(2)).

[209] *See id.* at 1047 (articulating government's argument that § 2252 requires persons

interpretation of downloading as receiving may not sufficiently deter child pornographers, pedophiles, and child abusers from posting, trading, or producing child pornography because the punishment is inadequate.[210] For example, the Ninth Circuit held that the district court properly convicted Daniel Mohrbacher of receiving and possessing child pornography.[211] For his section 2252 violations, Mohrbacher received a prison sentence of eighteen months.[212] Opponents would contend that an eighteen-month prison sentence for downloading images of two twelve year old girls being sexually abused is incongruent with the severity of Mohrbacher's crime.[213]

In further support of more severe sentences, evidence indicates that child pornography was virtually dead before the growth of personal computers and the Internet.[214] Because of the anonymity and ease of posting and downloading child pornography on the Internet, computer networks revived the child pornography industry.[215] Individuals

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downloading child pornography be held responsible for transporting and receiving); *cf.* Peters, *supra* note 189, at 364 (arguing in favor of stronger punishments being applied to Internet indecency because of its extraordinary availability); Scheller, *supra* note 5, at 1011-12 (advocating larger fines and longer prison sentences than currently available for people transmitting child pornography over computers).

[210] *See Mohrbacher*, 182 F.3d at 1047 (describing government's argument that online child pornography should be punished as both receiving and transporting); Scheller, *supra* note 5, at 1011-12 (proposing new legislation containing severe punishments for transmitting child pornography over computers based on argument that § 2252's current provisions do not adequately deter pedophiles and child pornographers); *see also* Peters, *supra* note 189, at 364 (arguing that potential exposure of minors to indecent materials justifies greater regulation of speech over Internet). *But see* CREWDSON, *supra* note 195, at 247-50 (arguing that tougher punishments for child pornography possession avoids addressing more fundamental problem of American society's acceptance of suggestive advertising featuring adolescent girls to sell clothing, perfume, and shampoo).

[211] *See Mohrbacher*, 182 F.3d at 1046.

[212] *Id.* at 1045-46.

[213] *See* Scheller, *supra* note 5, at 1012 (arguing that § 2252 does not sufficiently deter pedophiles or child pornographers who transmit child pornography over computers).

[214] *See* H.R. DOC. NO. 100-129, at 1 (1977) (indicating that child pornographers utilization of new computer technologies created loopholes and weaknesses in existing child pornography statutes); ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 607 (arguing that § 2252's original version "effectively halted the bulk of the commercial child pornography industry" and subsequent 1984 amendment "enabled federal officials to move against the noncommercial, clandestine mutation of [the child pornography] industry."); *see also* Scheller, *supra* note 5, at 1008-09, 1016 n.163 (describing impact of computers on child pornography industry).

[215] *See* ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra* note 5, at 630 (finding that child pornographers and pedophiles use personal computers to (1) establish contacts, (2) identify children used in child pornography and (3) as source for exchange or sale of child pornography); LEVESQUE, *supra* note 3, at 70 (arguing that modern computers and developing technology present greatest challenges and difficulties to enforcing criminal

produce and distribute child pornography on an international scale.[216] Unlike international videos and magazines which must pass through U.S. Customs officials, it is more difficult to regulate child pornography on the Internet.[217] Thus, because the Internet poses significant obstacles to section 2252's effective enforcement, more severe punishment and

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child pornography laws); Burke, *supra* note 7, at 439-40 (stating that Congress drastically reduced child pornography's commercial availability by criminalizing distribution, but computers revived industry); Esposito, *supra* note 7, at 541 (arguing that child pornography is rampant on Internet because pedophiles transmit and download illicit images anonymously from unregulated sources, thereby evading law enforcement); Lee, *supra* note 7, at 642-43 (recognizing ease of scanning and downloading child pornography); Levine, *supra* note 4, at 1531 (describing "remailers" which allow users to send or post anonymous messages); Rupert, *supra* note 1, at 130 (arguing anonymous Internet environment causes child pornography to thrive); Scheller, *supra* note 5, at 989, 999, 1001, 1010; Shiff, *supra* note 6, at 735-36 (attributing proliferation of child pornography on Internet to computer users indulging in their fantasies in privacy of their homes and ease of downloading images). For a technical description of how computer users post child pornography on the Internet, see Loundy, *supra* note 168, at 1128-29 (describing process of uploading graphic files to Internet site).

[216] *See* CREWDSON, *supra* note 195, at 243 (stating that child pornography reaches America from Denmark, Sweden, and Netherlands); LEVESQUE, *supra* note 3, at 66 (indicating Denmark is largest source of commercialized child pornography and Germany's annual sales exceed $250 million each year); Tim Tate, *The Child Pornography Industry: International Trade in Child Sexual Abuse*, *in* PORNOGRAPHY 203, 205-07 (Catherine Itzin, ed., 1992) (detailing international scope and sources of child pornography); Esposito, *supra* note 7, at 543-44, 546, 552-53 (describing and critiquing international efforts to regulate child pornography on Internet); Rupert, *supra* note 1, at 136-37 (describing international sources for transmission of child and inapplicability of United States law); Shannon, *supra* note 4, at 59 (reporting international crackdown on online distributor of child pornography known as "Wonderland" which reached into 47 countries and involved 13 international law enforcement agencies); *cf.* Loundy, *supra* note 168, at 1186 (arguing for international coordination of laws regulating Internet content). The *Mohrbacher* case provides a ready example of child pornography's international scope. *See Mohrbacher*, 182 F.3d at 1048. Daniel Mohrbacher downloaded images of child pornography in California from a Danish bulletin board system. *See id.* Thus, child pornography's reach has international scope. *See id.*

[217] *See* LEVESQUE, *supra* note 3, at 66. Levesque describes the United States as a major market for computer-linked child pornography originating in Denmark, Norway, Sweden, Switzerland, and the Netherlands. *Id.* According to Levesque, since computers allow for secrecy and covert underground networks, pedophiles obtain child pornography through international organizations. *Id.*; *see also* Esposito, *supra* note 7, at 543-44, 546, 552-53 (arguing that international child pornography exchange results from Internet's anonymous nature); Rupert, *supra* note 1, at 136-37 (contending that international proliferation of online child pornography is due to anonymity of Internet); *cf.* Bick, *supra* note 168, at 43 (arguing that applying laws to some Internet transactions creates significant difficulties). The international dimension of child pornography is particularly troublesome because in some countries the possession and posting of child pornography is not prohibited. *See* LEVESQUE, *supra* note 3, at 66 (noting that child pornography operations are widespread in Asian countries); Esposito, *supra* note 7, at 556-64 (surveying international efforts to regulate child pornography).

deterrence is required.[218] If section 2252 punishes downloading as both transporting and receiving, then courts realize the important public policies underlying the statute.[219]

Despite the desire to punish a defendant such as Mohrbacher, characterizing downloading as receiving and transporting might lead to egregiously inconsistent results.[220] If courts interpret downloading as both receiving and transporting, then an individual downloading child pornography is properly charged with two separate counts under section 2252.[221] However, a bulletin board operator, who is primarily responsible for making child pornography available on the Internet, is not guilty of a crime under section 2252.[222]

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[218] *See* Esposito, *supra* note 7, at 542 (calling for increased international efforts and tougher laws to effectively regulate child pornography); Scheller, *supra* note 5, at 1012 (advocating longer prison terms and larger fines for people transmitting child pornography over computers); Maria Gold, *Fighting Crime With a Mouse and Modem; Increasingly, Computers Hold the Clues to Cracking a Case*, WASH. POST, Mar. 29, 1998, at B1 (describing difficulties of law enforcement in investigating and authenticating evidence in child pornography and other computer-based crime cases). *But see* BENKLER, *supra* note 1, at 17-18 (contending that any law attempting to regulate bulletin boards or newsgroups must be narrowly tailored to particular uses and abuses in that specific interaction); Ohm, *supra* note 1, at 1959-62 (arguing that regulation of Internet technology is destructive and should cease); Rupert, *supra* note 1, at 130 (describing legislative attempts to regulate Internet as likely to be ineffective and unconstitutional); Werst, *supra* note 3, at 238 (concluding that congressional efforts to ban Internet pornography abridge First Amendment free speech rights).

[219] *See Mohrbacher*, 182 F.3d at 1047 (describing government's argument that automated nature of bulletin board's response makes defendants downloading child pornography responsible for transporting and receiving images under section); *see also* Peters, *supra* note 189, at 380 (arguing that Congress needs strict laws and screening technology for Web sites in order to protect children from offensive sexual and excretory speech on Internet); Scheller, *supra* note 5, at 1012 (arguing that § 2252's policy of deterring pedophiles from transmitting child pornography justifies more severe penalties).

[220] *See Mohrbacher*, 182 F.3d at 1049 n.1 (finding that punishing downloading as both receiving and transporting under § 2252 is difficult to support); *cf.* Werst, *supra* note 3, at 240 (arguing that regulating indecent speech on Internet is not proper response because it infringes on individual First Amendment rights).

[221] *See Mohrbacher*, 182 F.3d at 1050 (reversing district court conviction for transporting and affirming conviction for receiving under § 2252 where defendant downloaded child pornography).

[222] *See id.* at 1047. In *Mohrbacher*, the government argued that a person downloading child pornography both received and transported the image. *Id.* According to the government, an individual downloading child pornography causes the images to be transported. *Id.* Based on this analysis, the government argued that an individual downloading child pornography violated sections 2252(a)(1) and (a)(2) by receiving and transporting the images. *Id.* At oral argument, the court of appeals asked the government whether a bulletin board operator violated section 2252 by transporting or shipping child pornography. *Id.* The government answered in the negative. *Id.*; *see also id.* at 1049 n.9 (indicating Ninth Circuit's rejection of government's argument). The *Mohrbacher* court

Allowing the bulletin board operator to escape criminal responsibility is an improper application of section 2252.[223] The application is inappropriate because when a bulletin board operator uploads child pornography to the Internet, the person transports images from their computer to cyberspace.[224] In other words, the bulletin board operator is the initial source for the child pornography on any given Web site.[225] Thus, if courts interpret section 2252's provisions to allow bulletin board operators to go unpunished, then section 2252's policy of abolishing child pornography's proliferation is not implemented.[226] To avoid this inconsistent result, and properly punish Internet-based child pornographers, courts must interpret posting child pornography by a bulletin board operator as transporting and treat downloading as receiving under section 2252.[227]

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found that a bulletin board operator "cannot be properly characterized as receiving images but only as transporting or shipping—unless the operator's conduct does not violate any provision of the statute, as the government rather oddly suggested at oral argument." *Id.* The court of appeals further stated that the bulletin board operator is the individual primarily responsible for moving child pornography to an individual's computers. *Id.*

[223] 18 U.S.C. § 2252(a)(1) (1999) (prohibiting any person from transporting or shipping child pornography through interstate commerce).

[224] *See* United States v. Lamb, 945 F. Supp. 441, 451 (N.D.N.Y 1996) (describing computer distribution of child pornography as entailing (1) a photograph or film being transferred to computer by digital cameras, flatbed scanners, or video capture card, and (2) transmitting these converted computer files via modem to other computers); BENKLER, *supra* note 1, at 11 (describing transfer of GIF from single user to remote source as process of transmitting binary data from one computer to another); *see also* United States v. Maxwell, 45 M.J. 405, 412 (C.A.A.F. 1996) (stating that computer users can transport graphic files containing child pornography by sending images attached to e-mail).

[225] *See* United States v. Black, 116 F.3d 198, 200 (7th Cir. 1997) (stating that defendant originated several images of child pornography when he uploaded them on to America Online's system).

[226] *See Mohrbacher*, 182 F.3d at 1049 n.9 (arguing that allowing bulletin board operator to avoid criminal responsibility is illogical in light of § 2252's separate provisions punishing transporting and receiving child pornography).

[227] *See id.* (finding that action of bulletin board operator is properly characterized as only transporting or shipping); *Lamb*, 945 F. Supp. at 450 (holding that downloading child pornography constituted receiving child pornography while sending images was transporting under § 2252); *see also* United States v. Hibbler, 159 F.3d 233, 235-37 (6th Cir. 1998) (affirming defendant's seven-count conviction under § 2252(a)(1) for transporting child pornography where school principal sent illicit GIF images to other users on America Online); United States v. Matthews, 11 F. Supp. 656, 659 (D. Md. 1998) (analyzing e-mail transmissions of child pornography as transporting under § 2252(a)(1) where reporter sent four e-mail attachments containing child pornography to other users). *But see Black*, 116 F.3d at 200 (affirming defendant's conviction for receiving child pornography under § 2252(a)(2) where defendant uploaded and originated several child pornography files to America Online's system).

The *Mohrbacher* court's interpretation of downloading properly applies section 2252's policies to the Internet.[228] Under *Mohrbacher*, a person downloading child pornography violates section 2252(a)(2) for receiving the material, while a bulletin board operator posting child pornography violates section 2252(a)(1) for transporting the material.[229] Thus, by separately analyzing the actions of downloaders and bulletin board operators, *Mohrbacher* effectuates section 2252's policies.[230]

Although *Mohrbacher*'s result is consistent with the behavior section 2252 regulates, the analysis is unworkable.[231] As the Ninth Circuit noted, *Mohrbacher* presented a legal question of first impression.[232] To answer this novel question, the court of appeals relied on an analogy to reach its decision.[233] Ultimately, analogies are troublesome because they provide little guidance to future courts.[234]

C. The Troubling Analysis

The Ninth Circuit's analysis is problematic for two reasons. First, the court's interpretation of section 2252 is inconsistent with the Supreme Court's decision in *United States v. X-Citement Video*.[235] Second, the court's use of analogies provides little guidance to future courts on how to handle downloading, or similar challenges, to section 2252.[236]

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[228] *See Mohrbacher*, 182 F.3d at 1050 (interpreting downloading child pornography as falling within § 2252(a)(2)).

[229] *Id.* (holding that downloading child pornography is properly viewed as receiving under § 2252(a)(2) and posting child pornography is properly viewed as transporting under § 2252(a)(1)).

[230] *See id.* (distinguishing person downloading child pornography from bulletin board operator uploading child pornography because they are different actions); *see also* 18 U.S.C. § 2252(a)(1) (1999) (punishing transportation of child pornography); *id.* § 2252(a)(2) (prohibiting receiving child pornography).

[231] *See* BENKLER, *supra* note 1, at 37; *see also* Werst, *supra* note 3, at 224 (finding that legal precedent in traditional communications categories is not applicable to Internet).

[232] *See Mohbacher*, 182 F.3d at 1047.

[233] *Id.* at 1050 (analogizing person downloading child pornography to customer ordering materials over phone in reaching court's decision that downloading is receiving under § 2252(a)(2)).

[234] *See* BENKLER, *supra* note 1, at 37 (arguing that using analogies to interpret new technological issues avoids developing coherent analysis to apply for digital information); *see also* Werst, *supra* note 3, at 224 (finding that electronic technology is entirely distinguishable from physical world).

[235] *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994).

[236] *See* BENKLER, *supra* note 1, at 37; *see also* Werst, *supra* note 3, at 224 (arguing that since technology moves with "stunning" speed, law is too slow to catch up and effectively regulate Internet).

1. The *X-Citement* Problem

The *Mohrbacher* decision conflicts with the Supreme Court's interpretation of section 2252 in *United States v. X-Citement Video*.[237] Under *X-Citement*, the government must show that a defendant knowingly received or transported images they knew involved performers under the age of eighteen and that were sexually explicit in nature.[238] However, *Mohrbacher* allows the government to prosecute an individual under section 2252 for receiving child pornography without proving they knew the age of the performers or the sexually explicit nature of the images.[239] Thus, the *Mohrbacher* decision criminalizes a person's unknowing acts and thus conflicts with the Supreme Court's section 2252 interpretation in *X-Citement*.[240]

In *X-Citement*, the Supreme Court expanded its interpretation of section 2252 by extending the knowingly element to include separate subclauses of the statute.[241] The *X-Citement* majority conceded that its interpretation of section 2252 was not the most natural grammatical reading of section 2252's language.[242] Nevertheless, the Court upheld the statute based on two interpretative principles.[243] First, that criminal

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[237] *Compare X-Citement*, 513 U.S. at 69 (requiring government to prove defendant knowingly received or transported images he or she knew contained performers under eighteen and sexually-explicit material), *with Mohrbacher*, 182 F.3d at 1050 (holding § 2252's "receiving" language includes downloading images of child pornography).

[238] *X-Citement*, 513 U.S. at 72.

[239] *Mohrbacher*, 182 F.3d at 1050 (holding downloading is receiving under § 2252(a)(2) without recognizing downloading child pornography can occur unknowingly).

[240] *See X-Citement*, 513 U.S. at 78 (holding that § 2252's "knowingly" requirement applies to both sexually explicit nature of child pornography and age of performers); *Mohrbacher*, 182 F.3d at 1050 (finding that downloading satisfies § 2252's receiving provision).

[241] *X-Citement*, 513 U.S. at 64; Kaplan & Green, *supra* note 73, at 1227-28 (finding that *X-Citment* extended § 2252's knowledge requirement to include age of performers and sexually explicit nature of materials).

[242] *X-Citement*, 513 U.S. at 64; Kaplan & Green, *supra* note 73, at 1227-28; *see also X-Citement*, 513 U.S. at 86-87 (Scalia & Thomas, JJ. dissenting) ("I can neither understand nor approve of the disposition . . . adopted today, which not only rewrites the statute, but (1) rewrites it more radically than its constitutional survival demands, and (2) raises baseless constitutional doubts that will impede congressional enactment of a law providing greater protection for the child-victims of the pornography industry."). In his dissent, Justice Scalia argued that the majority's interpretation of section 2252 was contrary to the plain language of the statute. *Id.* at 86-87 (Scalia & Thomas, J.J. dissenting). Scalia found section 2252 unconstitutional because it imposed criminal liability on people who did not knowingly deal in child pornography. *Id.* at 86 (Scalia & Thomas, JJ. dissenting) (agreeing with Ninth Circuit's "natural grammatical" reading of § 2252); *see also* Burke, *supra* note 19, at 952 (finding *X-Citement* court's interpretation of § 2252 improperly broadened statute's language).

[243] *X-Citement*, 513 U.S. at 69. *But see* Kaplan & Green, *supra* note 73, at 1228-33

statutes are presumed to have some form of scienter requirement, even if it is not expressly stated.[244] Second, that a statute should be construed to avoid constitutional questions.[245]

Under *Mohrbacher*, however, a person is criminally liable for receiving child pornography if it is sent through electronic mail ("e-mail") or downloaded from the Internet.[246] Similarly, an individual is criminally liable for transporting child pornography if they make it available by sending it through e-mail or by posting it on a bulletin board or Web page.[247] However, e-mailing and downloading attachments can often occur unknowingly.[248]

For example, suppose Erik is sent an e-mail message from a friend. Also assume that the e-mail includes an attachment containing images of child pornography. After downloading the message to his laptop, Erik reads the text of the message which mentions nothing of the content of the images. He then saves the attachment to his hard drive without opening it or knowing that it contains the pornographic images.

Under *Mohrbacher*, Erik is criminally liable for violating section 2252 by receiving and possessing child pornography.[249] However, under the *X-Citement* rule, Erik did not commit a crime.[250] Criminal liability under *X-Citement* is unconstitutional without Erik's knowledge that the

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(rejecting each basis of *X-Citement* court's rationale as unprincipled grammatical reading of § 2252).

[244] *X-Citement*, 513 U.S. at 69.

[245] *Id.*

[246] United States v. Mohrbacher, 182 F.3d 1041, 1050 (9th Cir. 1999) (holding that individual downloading child pornography violates § 2252(a)(2) for receiving child pornography).

[247] *Id.* at 1049 n.9 (stating "Those who are responsible for providing the images to a customer, by making them available on a computer bulletin board or by sending them via electronic mail, are properly charged with and convicted of shipping or transporting images under § 2252 (a)(1)."); EDWARD A. CAVAZOS & GAVINO MORIN, CYBERSPACE AND THE LAW 101 (1994) (stating that knowingly uploading or downloading child pornography violates § 2252).

[248] *See* United States v. Maxwell, 45 M.J. 405, 412 (C.A.A.F. 1996) (indicating that there is no way to know what computer-based GIF files contain until they are downloaded and viewed through specific software by user); CAVAZOS & MORIN, *supra* note 247, at 106 (stating that it is possible to violate federal laws for seemingly innocent activity in cyberspace). Cavazos and Morin indicate that the federal statutes governing cyberspace, such as section 2252, sometimes punish people for "engaging in what seems like harmless modeming." *Id.* Further, the authors argue that people with no intent to cause harm, commit federal crimes and are sometimes sentenced to significant prison time. *Id.*

[249] *See Mohrbacher*, 182 F.3d at 1050.

[250] *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (requiring that defendant knows that child pornography contain sexually explicit material and children under eighteen).

performers were under eighteen and that the material was sexually explicit.[251] Thus, *Mohrbacher*'s holding that the unknowing downloading of child pornography constitutes receiving and possessing under section 2252 conflicts with the *X-Citement* court's scienter requirement.[252] Therefore, the *Mohrbacher* analysis is incorrect because it fails to apply Supreme Court precedent forbidding the prosecution of defendants who unknowingly receive and possess child pornography.[253]

2. The Analogy Problem

In addition to conflicting with *X-Citement*, there is a second problem with *Mohrbacher*. Specifically, analogy-based decisions serve as flawed legal precedent.[254] Essentially, analogies are an aid to understand and describe new technology, they do not develop clear and coherent legal principles.[255] Precise definitions and clear legal rules are essential to the growing body of law regulating the Internet.[256]

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[251] *X-Citement*, 513 U.S. at 77 (holding that Constitution requires government prove defendant knew both age of performers and sexually explicit nature of materials for violation of § 2252).

[252] *See Mohrbacher*, 182 F.3d at 1050 (affirming defendant's conviction for receiving and possessing child pornography where he downloaded images from Internet).

[253] *X-Citement*, 513 U.S. at 78.

[254] *See Mohrbacher*, 182 F.3d at 1045. The *Mohrbacher* decision effectively demonstrates this point. *Id.* In interpreting section 2252, the district court in *Mohrbacher* held that downloading is analogous to a person taking an item off the shelf at store. *Id.* Thus, the person both receives and transports the item. *Id.* The Ninth Circuit disagreed with this analogy and replaced it with its own analogy. *Id.* at 1050. According to the Ninth Circuit, downloading is analogous to ordering materials over the phone or receiving materials through the mail. *Id.* Thus, the person only receives the item. *Id.* This battle of analogies did little to provide a concise definition of what downloading is and how it should be interpreted by future courts. *Id.*; *see also* Werst, *supra* note 3, at 224 (arguing that legal decisions linking electronic and physical worlds are ineffective because worlds are entirely distinguishable from each other).

[255] *See* BENKLER, *supra* note 1, at 37. Benkler argues that in analyzing technological problems which give rise to novel legal questions, metaphors to the existing world function *only* as a comprehensive aid. *Id.* According to Benklar, employing metaphors to tackle an emerging technological question avoids a reasoned analysis. *Id.* The reason, he says, is that digital technology is separating everyday functions that once were combined, and combining everyday functions that once were separate. *Id.* Thus, metaphors to the real world simply obscure a thoughtful resolution to any given technological problem. *Id.* at 38.

[256] *Id.* at 37-38 (arguing that categorization of new technological legal problems must avoid metaphors and recognize digital information's unique properties in order to reach solutions that are well reasoned); *Developments in the Law—The Law of Cyberspace, The Long Arm of Cyber-Reach*, *supra* note 1, at 1587 (contending that legal rules are crucial to future development of cyberspace). *But see* Ohm, *supra* note 1, at 1959-62 (arguing regulation of Internet technology is destructive and should cease).

United States v. Hockings illustrates the problem of relying on analogies as precedent.[257] *Hockings* is significant because the Ninth Circuit utilized the same approach it did in *Mohrbacher* to interpret a unique technological issue.[258] In *Hockings*, the Ninth Circuit held that computer GIF files were visual depictions within the meaning of section 2252(a)(1).[259]

The *Hockings* court based its holding on a common sense reading of section 2252's language and an analogy.[260] The court analogized GIF files to "unprocessed, undeveloped film."[261] Like *Mohrbacher*, the result is correct and supports section 2252's policy. However, the *Hockings* court improperly rested its holding on an analogy.[262]

By resting its decision on an analogy, the *Hockings* court avoided interpreting the nature of GIF images.[263] In fact, the court of appeals did not mention what GIF images are or how they operate.[264] Instead, the *Hockings* court simply quoted its prior precedent that undeveloped film constituted visual depictions, analogized it to GIF files, and adopted that rationale.[265]

However, the *Hockings* analysis, like the *Mohrbacher* analysis, fails to answer the challenge raised by an emerging technological issue.[266] The courts' section 2252 interpretation fails to guide district courts in properly deciding future cases dealing with new technologies.[267] Instead,

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[257] United States v. Hockings, 129 F.3d 1069, 1069 (9th Cir. 1997).

[258] *Compare Hockings*, 129 F.3d at 1070-72 (interpreting § 2252's language based upon its plain language, legislative history, case law, and analogy), *with Mohrbacher*, 182 F.3d at 1048-50 (interpreting § 2252's language based upon its plain language, purpose, legislative history, structure, case law, and analogy).

[259] *Hockings*, 129 F.3d at 1072.

[260] *Id.* at 1070-72.

[261] *Id.*

[262] *See Mohrbacher*, 182 F.3d at 1050.

[263] *See* BENKLER, *supra* note 1, at 37 (arguing that relying on metaphors to formulate legal rules for digital information avoids interpreting nature of technology at issue).

[264] *See Hockings*, 129 F.3d at 1071 (stating that GIF images are means of storage and transportation of pornographic images); *cf.* United States v. Hibbler, 159 F.3d 233, 235 n.1 (6th Cir. 1998) (describing GIF images as "slang" for online computer files).

[265] *Hockings*, 129 F.3d at 1071 (quoting United States v. Smith, 795 F.2d 841 (9th Cir. 1986) (applying *Smith* court's rationale to GIF images).

[266] *See* BENKLER, *supra* note 1, at 37 (arguing that using metaphors to answer novel technological question obscures thoughtful legal analysis). *Compare Hockings*, 129 F.3d at 1070-72 (interpreting § 2252's "visual depictions" element in light of computer GIF images), *with Mohrbacher*, 182 F.3d at 1047 (interpreting § 2252's "receiving" and "transporting" language in light of downloaded child pornography).

[267] *See Mohrbacher*, 182 F.3d at 1050 (analogizing downloading child pornography to receiving mail in order to find defendant guilty of receiving child pornography); *see also*

the lower courts are left to hunt for clever comparisons between cyberspace and real space, and hope that their analysis is not overturned.[268] Future challenges to section 2252 based upon technological developments should be answered with clear legal principles and thoughtful analysis rather than fanciful analogies to the real world.[269]

While analogies may raise some concern, proponents of *Mohrbacher* may argue that its holding is the most important consequence of the decision.[270] By affirming Mohrbacher's two-count conviction, the Ninth Circuit achieved section 2252's goal of punishing child pornographers who download images of sexual child abuse.[271] Thus, even if

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Hockings, 129 F.3d at 1071 (analogizing GIF images to undeveloped film in order to find defendant guilty of possessing child pornography); BENKLER, *supra* note 1, at 38 (arguing that since digital technology has transformed society old metaphors are entirely irrelevant to novel legal issues raised by technology).

[268] *See* BENKLER, *supra* note 1, at 37 (stating that "we cannot use metaphors to categorize problems and thereby avoid reasoned analysis"). Benkler argues that legal problems created by digital technology require carefully constructed solutions. *Id.* Employing metaphors, or analogies, to experiences in the real world will not provide a solution. *Id.* Applying this argument to courts analyzing Internet decisions, the use of analogies to solve novel legal questions avoids a reasoned and principled analysis. *Id.* Thus, analogies may help us understand problems created by technology, but they fail to account for the transformation of social and communicative settings created by the Internet and digital technology. *Id.* at 38.

[269] *See e.g.* United States v. Vig, 167 F.3d 443, 448 (8th Cir. 1999); United States v. Whiting, 165 F.3d 631, 633 (8th Cir. 1999). In *Vig*, the Eighth Circuit found a Ninth Circuit analogy from United States v. Fellows, 157 F.3d 1197 (9th Cir. 1988), compelling. *Vig*, 167 F.3d at 448. The compelling Ninth Circuit analogy equated a computer's hard drive to a library. *Id.* (quoting *Fellows*, 157 F.3d at 1201). The *Fellows* court reasoned, and the Eighth Circuit agreed, that "each file within the hard drive is akin to a book or magazine within that library." *Id.* Similarly, in *Whiting*, the Eighth Circuit relied on analogy to reach its decision. *See Whiting*, 165 F.3d at 633. In *Whiting*, the Eighth Circuit analogized computer images of child pornography to images on a video tape. *Id.* Both cases demonstrate the willingness of the courts to fall back on analogies in order to reach some reasonable outcome in a case. *See Vig*, 167 F.3d at 448; *Whiting*, 165 F.3d at 633. This analogy-laden precedent provides little interpretative guidance to future courts and avoids confronting the legislature's unclear statutory language. *See* BENKLER, *supra* note 1, at 38. As a final example of decision-by-analogy, see United States v. Matthews, 11 F. Supp.2d 656, 659 (D. Md. 1998). The *Matthews* court analogized an email transmission to an envelope placed in a mailbox. *Id.* According to this analogy, when a person attaches child pornography to an email message and sends it through cyberspace, the person transports the material under section 2252. *Id.*

[270] *See* Peters, *supra* note 189, at 364-68 (arguing that Internet indecency must be punished more severely than regular indecency); Fears, *supra* note 73, at 838 (arguing that courts interpreting § 2252 should punish defendants involved in child pornography under relaxed mental requirements because of child pornography's insidious nature).

[271] *See Mohrbacher*, 182 F.3d at 1050 (finding that punishing downloading as receiving under § 2252(a)(2) sufficiently realizes Congress's desire to punish and deter child

Mohrbacher's analysis is flawed, the Ninth Circuit defined downloading and courts can properly decide "downloading" cases in the future.[272]

This argument, however, fails to recognize the judicial uncertainty court-created analogies represent.[273] When courts depend upon analogies for their decisions, they move beyond statutory interpretation and into judicial legislation.[274] Courts looking to sources outside of a statute in order to determine its meaning are problematic because their opinions lack authority and credibility.[275] As an example, the *Mohrbacher* opinion now authoritatively defines downloading under section 2252 without resting upon any clear congressional mandate.[276] Thus, courts should avoid making analogy-based decisions which regulate new areas of technology.[277] Instead, Congress should amend section 2252's

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pornographers); *see also* Fears, *supra* note 73, at 838, 873 (arguing that U.S. Military Court of Appeals' analysis in Internet child pornography was not as important as result punishing defendant's "repulsive conduct").

[272] *See Mohrbacher*, 182 F.3d at 1050 (defining downloading as person on receiving end of automated, preconfigured process).

[273] *See* BENKLER, *supra* note 1, at 38. Benkler describes digital information as a wholly unique form of communication. *Id.* As a result of the uniqueness, Benkler argues that courts analyzing legal questions created by emerging technological issues, must avoid relying too heavily on metaphors to the real world. *Id.* According to Benkler, analogies and metaphors to real world experience are often irrelevant to a principled legal analysis. *Id.*

[274] *See* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 23 (1997) (arguing that it is problematic for courts to use sources outside of statutory language because statutory interpretation becomes judicial version of legislative action); 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 55.01, at 273 (5th ed. 1992) (stating that courts utilizing legislative analogies to interpret statutes participate in "judicial lawmaking" which produces consequences beyond what is reasonably intended or communicated by legislature); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 97 (1984). Easterbrook argues that all interpretation involves a reader adding meaning to words. *Id.* In the judicial realm of interpretation, Easterbrook says "the more meaning added by the judge, the less powerful the judge's claim to obedience." *Id.* Thus, where courts depend upon analogies to give statutory provisions new meaning, the authority and legitimacy of their decisions is diminished. *Id.*

[275] *See* MIKVA & LANE, *supra* note 274, at 23; Easterbrook, *supra* note 274, at 97.

[276] *See Mohrbacher*, 182 F.3d at 1050. *Mohrbacher* held that downloading is receiving under § 2252(a)(2). *Id.* The court based its decision, in part, on the similarity of downloading from Internet to ordering items over the phone. *Id.* While this result comports with section 2252's language and policy, it seems problematic to rely on an analogy. *See* SINGER, *supra* note 274, at 273; Easterbrook, *supra* note 274, at 97. Court-created analogies are especially troublesome in the context of Internet technology because the relationship between the digital information world and the real world is particularly attenuated. *See* BENKLER, *supra* note 1, at 38.

[277] *See* BENKLER, *supra* note 1, at 38; *see also* Easterbrook, *supra* note 274, at 97.

language to set the rules for Internet activities.[278]

CONCLUSION

The proliferation of child pornography over the Internet represents a significant, modern law enforcement problem.[279] Unfortunately, federal law prohibiting the exchange of child pornography over the Internet, section 2252, contains outdated language. Section 2252's legislative history is clear. Congress intended to eliminate the child abuse and exploitation inherent in the production of child pornography. However, section 2252's provisions are unclear. *United States v. Mohrbacher* demonstrates that courts struggle to apply section 2252 to Internet activities.

Aside from *Mohrbacher*'s conflict with Supreme Court precedent, the Ninth Circuit's analysis of downloading is troubling because it relies on an analogy. To avoid the analogy problem, Congress should amend section 2252. Section 2252's language must be updated to reflect the activity regulated.[280] Specifically, Congress should supplement the receiving and transporting language of section 2252 with a new subsection applying to Internet activities, such as downloading. By updating section 2252's language, Congress would further its policy of prohibiting child pornography and remove the interpretative barriers facing courts today.

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[278] *See* Loundy, *supra* note 168, at 1185 (arguing that novel legislation is needed to define terms used in developing technology and fill gaps in developing law); *see also* Levine, *supra* note 4, at 1557-58 (advocating liability for system administrators for illegal acts committed by their users). *See generally Developments in the Law—The Law of Cyberspace, Communities Virtual & Real: Social and Political Dynamics of Law in Cyberspace*, 112 HARV. L. REV. 1586, 1588 (1999) (arguing that policymakers formulating legal rules for cyberspace must consider existing, as well as future, impacts on virtual and real communities).

[279] *See* LEVESQUE, *supra* note 3, at 70-72 (indicating that regulating computerized child pornography presents significant challenges for law enforcement); Levine, *supra* note 4, at 1557; McKay, *supra* note 8, at 484 (contending that current regulation of Internet child pornography is ineffective).

[280] *See* Levine, *supra* note 4, at 1557 (arguing that Congress must update § 2252 to reach computer systems administrators who allow users to post child pornography anonymously).

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