

possessing an obscene cartoon drawing depicting minors engaged in sexually explicit conduct under 18 U.S.C. § 1466A(b) would receive a sentence equivalent to a five year mandatory minimum term of imprisonment under § 2G2.2, while a defendant convicted under 18 U.S.C. 2252(a)(4) of possessing a picture of actual minors engaged in sexually explicit conduct would receive a sentence of only two years' imprisonment under § 2G2.4.

According to the legislative history, the intent of the directive in section 504 was to ensure that offenses under 18 U.S.C. 1466A are "subject to the penalties applicable to child pornography, not the lower penalties that apply to obscenity." See H.R. Conf. Rep. No. 66, 108th Cong. 1st Sess. (2003). Obscenity offenses are sentenced under § 2G3.1, which has a base offense level of level 10. Simple possession offenses under 18 U.S.C. 1466A(b) more appropriately may be covered under the simple possession guideline, § 2G2.4. Therefore, the proposed amendment refers offenses under 18 U.S.C. 1466A(a) involving trafficking and possession with intent to traffic to § 2G2.2, as directed by Congress, but refers offenses under 18 U.S.C. 1466A(b) involving simple possession to § 2G2.4.

This proposed amendment also makes a number of changes to Appendix A (Statutory Index) and the statutory provisions in § 2G2.2. Offenses under 18 U.S.C. 2252 and 2252A currently are referenced to both §§ 2G2.2 and 2G2.4 because these statutes contain prohibitions on both trafficking in and simple possession of child pornography. This proposal amends Appendix A and the statutory provisions in § 2G2.2 to refer trafficking offenses in 18 U.S.C. 2252(a)(1)–(3) and 2252A(a)(1), (2), (3), (4), and (6) to § 2G2.2 only, thereby ensuring that the trafficking offenses receive the appropriate base offense level which corresponds to the five year mandatory minimum term of imprisonment. This amendment makes a similar change with respect to offenses under 18 U.S.C. 2251(d)(1)(A) (formerly (c)(1)(A), redesignated by the PROTECT Act). This section prohibits making, printing, or publishing any notice or advertisement seeking to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction if the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct and the visual depiction is of such conduct. Currently, these offenses are referenced to § 2G2.2 instead of § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian

Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) because they are more like trafficking offenses than production offenses. However, the PROTECT Act increases the mandatory minimum term of imprisonment for these offenses from 10 to 15 years. Therefore, these offenses are proposed to be referenced to the production guideline, § 2G2.1. Subpart D of the proposed amendment increases the base offense level in § 2G2.1 to level [30][32][34][35][36] to reflect the increased mandatory minimum term of imprisonment.

In response to comments from CEOS, calls to the Helpline, and issues identified through case law regarding inconsistencies in the application of the use of a computer enhancement at § 2G2.2(b)(5), the amendment proposes to broaden the enhancement in two ways. First, the amendment proposes to expand the enhancement to include "interactive computer devices" (e.g., Internet access devices), as defined in 47 U.S.C. 230(f)(2). Currently, § 2G2.2(b)(5) provides an enhancement if only a computer was used for "the transmission, receipt or distribution" of the pornographic material, in contrast to similar enhancements in other pornography or sexual abuse guidelines that provide an enhancement for the use of a "computer or Internet-access device". (See *United States v. Albright*, 67 Fed. Appx. 751 (3d Cir. 2003)(unpub.) (use of a WebTV device used to access the Internet is not a computer for purposes of the enhancement)). Use of the term "interactive computer device" may be preferable to "Internet access device" in the applicable guidelines because it is statutorily defined. Conforming changes are proposed for §§ 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct), proposed 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Use of Interstate Facilities to Transport Information about a Minor), 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of

Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), and 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact). Second, the amendment proposes to broaden the enhancement to apply to offenses in which the computer (or an interactive computer service) was used for the possession of pornographic material. Currently, the enhancement provides a two-level increase if only a computer was used for "the transmission, receipt, or distribution" of the pornographic material.

Finally, in response to CEOS comments, calls to the Helpline, and issues identified through training, this proposal makes the following minor changes to the commentary to § 2G2.2:

- (1) Provides a definition of "computer".
- (2) Makes clear that the definition of "minor" includes (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represents to a participant (i) had not attained the age of 18 years, and (ii) could be provided to a participant for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.
- (3) Provides a definition of "image" for purposes of applying the enhancement at § 2G2.2(b)(6).
- (4) Makes clear that "distribution" includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include soliciting such material.

#### *B. Simple Possession Offenses Under § 2G2.4*

The PROTECT Act raised the statutory maximum term of imprisonment for simple possession offenses from five to ten years. As a result, this proposed amendment includes an option for increasing the base offense level from level 15 to level [18][20]. An increase in the base offense level also may be justified to maintain proportionality with the child pornography trafficking guideline because of a proposed increase in the base offense level at § 2G2.2 for trafficking and receipt cases (see subpart A of this amendment).

In response to comments from CEOS, the proposed amendment addresses a recent Seventh Circuit decision in *United States v. Sromalski*, 318 F.3d 748 (7th Cir. 2003), regarding the cross reference at § 2G2.4(c)(2). Currently, the