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Prosecute the Cheerleader, Save the World?: Asserting Federal Jurisdiction over Child Pornography Crimes Committed Through "Sexting"

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COMMENTS

PROSECUTE THE CHEERLEADER, SAVE THE WORLD?: ASSERTING FEDERAL JURISDICTION OVER CHILD PORNOGRAPHY CRIMES COMMITTED THROUGH "SEXTING"

I. INTRODUCTION

Perhaps one of the most quoted lines from NBC's popular television show *Heroes* is "Save the cheerleader, save the world," the prophetic message of the time-traveling Hiro Nakumura given to the young idealist Peter Petrelli.[1] However, one can imagine that the scene may have played out very differently if Peter were not a modern-day super hero, but instead a federal prosecutor. Hiro walks into Peter's office and pronounces, "Peter Petrelli, prosecute the cheerleader, save the world!" Peter, startled by Hiro's prophecy, looks up from his desk and asks, "Why Hiro?" Hiro glances down with his characteristic grimace, raises a plastic evidence bag containing a cell phone, and replies, "She has been sexting!"

This comment explores the possible scenarios in which sexting could give rise to prosecution under Protection of Children Against Sexual Exploitation Act of 1977 ("PCASEA") for transporting, distributing, receiving, or possessing child pornography.[2] Part II provides background information on the practice and prevalence of sexting. Part III discusses the definition of child pornography within the meaning of federal law and applies that defini-

1. *Heroes: Save the Cheerleader* (NBC television broadcast Oct. 23, 2006).

2. Protection of Children Against Sexual Exploitation Act ("PCASEA") of 1977, 18 U.S.C. §§ 2251–52, 2256 (Supp. II 2008). The specific statutory provisions within the PCASEA that criminalize transporting, distributing, receiving, or possessing child pornography are codified at 18 U.S.C. § 2252 (Supp. II 2008).

tion to sexting. Part IV presents the concept of the transporting or shipping in interstate or foreign commerce jurisdictional hook and its potential relation to sexting. Part V applies the principles of statutory interpretation to the relevant provisions of the PCASEA to determine the proper application of the statute's current jurisdictional language. Part VI discusses the application of sexting to the particular offenses of transporting, distributing, receiving, or possessing child pornography under the PCASEA, including distinct jurisdictional issues for each offense.[3] Part VII delineates issues that are collateral to the jurisdictional question, but that are necessarily raised by attempting to resolve it. Part VIII concludes that prosecution of child pornography offenses committed through sexting is within the purview of the PCASEA and future judicial interpretations of the PCASEA will result in broad subject matter jurisdiction to do so.

II. BACKGROUND

Sexting has been defined as "[t]he practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones . . . or over the Internet. . . ."[4] Typically, the subject takes a picture of himself or herself with a mobile phone camera (or other digital camera), or has someone else take the picture.[5] The picture is then stored as a digital image and transmitted via mobile phone as a text-message, photo-send function, or electronic mail.[6] Additionally, the subject may use a mobile phone to post the image to a social networking website like Facebook or MySpace.[7] There are three basic scenarios in which teenagers engage in sexting: (1) images are shared between two romantic partners in lieu of, as a prelude to, or as part of sexual activity; (2) the recipient of a text message that was sent in the course of a romantic relationship forwards

3. It is important to note that § 2252 is not the only potential statute under which sexting could be prosecuted. *See, e.g.*, 18 U.S.C. § 1465 (2006) (restricting production and transportation of obscene matters for sale or distribution); 18 U.S.C. §§ 2251, 2252A (2006 & Supp. II 2008) (restricting child exploitation); 47 U.S.C. § 223 (2006) (criminalizing, obscene phone calls). Nonetheless, the issues that arise in determining jurisdiction under § 2252 are likely to be present in these other statutes.

4. Complaint ¶ 7, Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009) (No. 3:09-cv-540).

5. *Id.* ¶ 8.

6. *Id.* ¶ 9.

7. *Id.*

the image to friends, classmates, or other individuals; and (3) images are exchanged between friends platonically or with the hope of cultivating a romantic relationship.[8]

There is no doubt that sexting among teenagers is a growing problem that federal lawmakers will be forced to confront in the near future.[9] Seventy-one percent of teenagers between the ages of twelve and seventeen own a mobile phone.[10] When considered in their respective age categories, the percentage of teenagers owning a mobile phone increases with age: 52% between the ages of twelve and thirteen, 72% at the age of fourteen, and 84% at the age of seventeen.[11] Next, turning to the use of mobile phones: 58% of all teenagers have sent text messages to friends,[12] and 38% do so on a daily basis.[13]

Within the population of teenagers that own mobile phones, four percent have sent sexually suggestive nude or nearly nude images of themselves via text message.[14] Eight percent of seventeen-year-olds that own a mobile phone have sent sexually suggestive nude or nearly nude images of themselves via text message.[15] Fifteen percent of teenagers who own a mobile phone have received sexually suggestive nude or nearly nude images of someone they know via text message.[16] Thirty percent of seventeen-year-olds that own a mobile phone have received sexually suggestive nude, or nearly nude images via text message.[17] Given the strong presence of sexting in the teenage population and its expected growth in the future, it is necessary to consider how federal law is currently geared to address the issue.[18]

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8. AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, TEENS AND SEXTING 6–7 (2009), http://www.pewinternet.org/~/media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf.

9. For the purposes of the statistical evidence presented in Part II, a teenager is a child between the age of twelve and seventeen. *Id.* at 2.

10. AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, TEENS AND SOCIAL MEDIA: AN OVERVIEW 17 (2009), http://www.pewinternet.org/presentations/2009/17-Teens-And-Social-Media-An-Overview.aspx (follow "Download Powerpoint" hyperlink).

11. *Id.*

12. *Id.* at 9.

13. *Id.* at 10.

14. LENHART, *supra* note 8, at 2.

15. *Id.*

16. *Id.*

17. *Id.*

18. *See* Anayat Durrani, *"Sexting" Growing Trend Among Teens*, GETLEGAL, Apr. 29, 2009, http://public.getlegal.com/articles/sexting ("Teens sending risqué photos of them-

III. DEFINING CHILD PORNOGRAPHY

Before considering the jurisdictional question, it is worth discussing an equally important threshold issue under the PCASEA. Namely, one must determine whether the image or images in question are of the variety proscribed by the PCASEA, because not every text message containing nude or partially nude teenagers is child pornography for the purposes of federal law.[19] Section 2256(8) provides, in relevant part, that child pornography is any visual depiction of sexually explicit conduct when the visual depiction is a digital image, computer image, or computer-generated image of a minor engaging in sexually explicit conduct.[20] Sexually explicit conduct includes (1) all forms of sexual intercourse (including oral or anal) where the genitals, breasts, or pubic area of any person is exhibited; (2) bestiality; (3) masturbation; (4) sadistic or masochistic abuse; and (5) the lascivious exhibition of the genitals or pubic area.[21]

There is a tremendous amount of leeway for creative argument in § 2256's definition of sexually explicit conduct, particularly in an image purporting to be a "lascivious exhibition of the genitals or pubic area."[22] For example, an image of a nude minor may not be child pornography because the display of the genital or pubic area is not lascivious.[23] Furthermore, an image depicting a mi-

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selves to friends using cell phones, called 'sexting,' has parents and school officials up in arms over the growing trend.").

19. *See, e.g.*, Doe v. Chamberlin, 299 F.3d 192, 196 (3d Cir. 2002) (holding that nude photographs of minors, taken in a shower on a beach, were not lascivious because photos depicted natural activity of washing off sand, pubic areas of minors were not focal, shower was not a place associated with sexual activity, and minors did not display any sexual coyness).

20. This is a paraphrase of the definition provided in § 2256(8)(B) (Supp. II 2008). For purposes of this statute, a minor is an individual under the age of eighteen. *Id.* § 2256(1). The statute outlines other situations where certain material will be considered child pornography. *Id.* § 2256(8)(A)–(C). However, those provisions are not relevant to the scope of this comment. It is worth noting that § 2256(8)(B) was declared unconstitutional at one point. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002). Congress amended § 2256(8)(B) in response to *Ashcroft*. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, §§ 501–02, 117 Stat. 650, 676–78 (codified as amended at 18 U.S.C. § 2256 (2006)).

21. 18 U.S.C. § 2256(2)(A)–(B) (Supp. II 2008).

22. *Id.* § 2256(2)(B)(iii).

23. *See, e.g.*, *Chamberlin*, 299 F.3d at 196. The criteria used in determining whether an exhibition of a minor's genitalia or pubic area is lascivious include (1) "whether a forbidden area is the focus" of the image, (2) "whether the setting of the depiction is sexually suggestive or generally associated with sexual activity," (3) "whether the pose or attire of the minor is unnatural or inappropriate given her age," (4) "whether the child is naked,"

nor's breasts alone may not qualify, even if the image is sexually suggestive.[24] However, nudity or discernability are not prerequisites for the occurrence of a lascivious exhibition within the meaning of § 2256.[25] Thus, a court may find that images of minors who are wearing thin or opaque clothing over the proscribed areas are still child pornography within the meaning of the PCASEA.[26] Therefore, a party (whether the government or the defendant) will first want to determine whether a colorable argument may be made regarding the image's status as child pornography before expending significant resources on accumulating evidence that addresses the elements of a particular offense.

IV. THE COMMON "JURISDICTIONAL HOOK"

A. *Defining a Jurisdictional Hook*

If a legitimate argument can be made that the image in question is child pornography, the next critical inquiry is whether the facts of the case are sufficient to prove a "jurisdictional hook" under the language of the PCASEA. A jurisdictional hook is "a provision in a federal statute that requires the government to establish specific facts justifying the exercise of federal jurisdiction in connection with any individual application of the statute."[27] The purpose of the jurisdictional hook is to create the necessary nexus between the proscribed conduct and interstate commerce so that federal prosecution complies with the Commerce Clause of the United States Constitution.[28]

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(5) "whether the child shows sexual coyness or willingness to engage in sex," and (6) "whether the photo is intended or designed to elicit a sexual response in the viewer." *Id.* (citing United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986)). However, "[this] list is not exhaustive and no single factor is dispositive." *Id.* (citing United States v. Knox, 32 F.3d 733, 746 n.10 (3d Cir. 1994)).

24. *See, e.g.*, United States v. Hilton, 257 F.3d 50, 58 (1st Cir. 2001).

25. *Knox*, 32 F.3d at 746.

26. *Id.* at 747 (finding a "lascivious exhibition" when minor subjects, wearing only "very tight leotards, panties, or bathing suits," were video-taped "spreading or extending their legs to make their genital and pubic region entirely visible to the viewer").

27. United States v. Rodia, 194 F.3d 465, 471 (3d Cir. 1999); *see also* Tara M. Stuckey, *Jurisdictional Hooks in the Wake of* Raich*: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. 2101, 2105–06 (2006) (explaining the definition and purpose of a jurisdictional hook).

28. United States v. McCoy, 323 F.3d 1114, 1124 (9th Cir. 2003) (citing United States v. Morrison, 529 U.S. 598, 611–12 (2000); *Rodia*, 194 F.3d at 471). As noted above, this comment's primary purpose is to focus on the jurisdictional dimension of this legal issue,

The goal of this comment is to identify when sexting will trigger federal jurisdiction under the PCASEA, allowing prosecution of an individual for transporting, distributing, receiving, or possessing child pornography.[29] While the factual circumstances that give rise to charging a specific offense are different, there is a factual scenario that will confer federal jurisdiction to prosecute any of the above named offenses—if the child pornography in question has been transported or shipped in interstate or foreign commerce.[30] If such a scenario exists, the government will be able to prove the necessary jurisdictional hook for any of the offenses enumerated in § 2252(a).[31] Therefore, regardless of the offense charged, a central issue for sexting child pornography cases is whether sending child pornography via text message is tantamount to sending it in interstate or foreign commerce. Does it matter where the sender and recipient are located? Is the technological nature of mobile phone communications relevant? Answers to these questions, and others like them, may mean the dif-

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not the constitutional aspects. Nonetheless, there is great potential for confusing the issue of jurisdiction with the issue of Congress's constitutional power to regulate intrastate child pornography operations. Therefore, a brief discussion of the constitutional aspect of the issue is warranted. It is critical to keep the constitutional dimension of regulating intrastate trafficking of child pornography analytically distinct from the issue of the jurisdictional hook because satisfying the constitutional requirement does not automatically satisfy the jurisdictional requirement. *See, e.g.*, United States v. Green, 259 F. App'x 171, 173 n.1 (11th Cir. 2007); United States v. Schaefer, 501 F.3d 1197, 1200 n.7 (10th Cir. 2007). In other words, current precedent suggests that it is a constitutionally permissible use of the Commerce Clause for the federal government to prosecute an individual for intrastate child pornography operations. *See Rodia*, 194 F.3d at 476; United States v. Bausch, 140 F.3d 739, 741 (8th Cir. 1998); United States v. Robinson, 137 F.3d 652, 656 (1st Cir. 1998). Thus, a defendant appealing a conviction for intrastate trafficking of child pornography on the grounds that a statute regulating intrastate child pornography operations is an unconstitutional use of Congress's power under the Commerce Clause is likely to fail. *See, e.g.*, *Rodia*, 194 F.3d at 478–79. However, the charge may still be dismissed or reversed because the "interstate commerce" jurisdictional hook that is required by the statutory language of 18 U.S.C. § 2252 is lacking. *See, e.g.*, *Schaefer*, 501 F.3d at 1207. While there is no debate that Congress has the power under the Commerce Clause to regulate purely interstate child pornography enterprises and it manifested its intent to use the full extent of its power in recent amendments to the statute, it is unclear if the language of § 2522, as it existed prior to these amendments, limited its ability to do so. *See id.* at 1201–02; Pub. L. 110-358, 122 Stat. 4001, 4002–03 (2008) (codified as amended at 18 U.S.C. § 2252 (Supp. II. 2008)). It could be argued that the limited jurisdictional language in the prior version of § 2252(a) demonstrated that Congress did not originally intend to regulate child pornography operations to the fullest extent permitted by the Constitution. *See Schaefer*, 501 F.3d at 1201–02.

29. 18 U.S.C. § 2252(a)(1)–(4) (Supp. II 2008).

30. *Id.* However, it is important to note that other jurisdictional hooks have been assigned to particular offenses. These are discussed below. *See* discussion *infra* Part V.

31. *See id.*

ference in the outcome of the action because jurisdiction cannot be conferred on the court by the will or waiver of the parties.[32] If subject matter jurisdiction does not exist, the court is required to dismiss the suit without regard to its procedural posture.[33] The issue of jurisdiction may be raised at any point by the parties or by the court sua sponte.[34] In evaluating whether sending child pornography via text message satisfies the in interstate or foreign commerce jurisdictional hook, two approaches are possible: (1) the per se approach and (2) the interstate movement approach.[35]

B. *The Per Se Approach to the Jurisdictional Hook*

Courts may treat the transmission of a text message as they have treated other electronic transmissions, particularly transmissions over the Internet. Typically, when child pornography has been sent through the Internet, most courts have automatically found the jurisdictional hook to be sufficiently proved.[36] For the purposes of this comment, this will be called the "per se" approach. Courts justify the per se approach by averring that transmitting material through the Internet (a metaphysical net-

32. *See* Delaware v. Van Arsdall, 475 U.S. 673, 692 (1986) ("[F]ederal courts . . . exercise only the authority conferred on them by Art. III and by congressional enactments pursuant thereto."). Even a nonconditional guilty plea does not waive the ability to appeal jurisdictional defects. *See, e.g.*, *Green*, 259 F. App'x at 173 n.1.

33. *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999).

34. United States v. Lopez-Vasquez, 227 F.3d 476, 482 n.11 (5th Cir. 2000) (quoting Barnes v. Levitt, 118 F.3d 404, 410 (5th Cir. 1997)); United States v. Means, 133 F.3d 444, 448 (6th Cir. 1998) (quoting United States v. Duke, 50 F.3d 571, 574 (8th Cir. 1995)).

35. As will be discussed later in this comment, recent amendments to § 2252(a) make clear the interstate movement approach is not the proper interpretation of the statute. *See* discussion *infra* Part VI. Nonetheless, understanding the nature of these two approaches is relevant, as a defendant may be tried under the law as it existed before these amendments took place. *See, e.g.*, United States v. Beltran-Hernandez, No. CR 08-0726 WHA, 2009 WL 928169, at *1 & n.1 (N.D. Cal. Apr. 3, 2009).

36. *See* United States v. MacEwan, 445 F.3d 237, 244 (3d Cir. 2006) (adopting a mode of analysis, under § 2252A, that considers the defendant's use of the Internet in conducting child pornography operations to automatically establish the requisite "interstate commerce" jurisdictional hook); United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997) (finding transmission of photographs via the Internet is "tantamount to" moving them through interstate commerce for purposes of 18 U.S.C. § 2251(a)); ACLU v. Reno, 929 F. Supp. 824, 830–38 (E.D. Pa. 1996) (discussing the global nature and size of the Internet). *But see* United States v. Schaffer, 501 F.3d at 1197–1205 (10th Cir. 2007) (holding that § 2252(a) confers federal jurisdiction only when the government proves the signal or transmission carrying the proscribed material traveled between state boundaries).

work of information by its very nature) inherently places the material in the stream of interstate or foreign commerce.[37] Furthermore, cyberspace has no particular geographic location.[38] The Internet is the international network of computers that allows information in cyberspace to be available anywhere in the world.[39] One court provided an unequivocal expression of the per se approach, concluding "that an electronic transmission of [child pornography], whether across state lines or across the street, via the internet is a means of transmission in interstate commerce."[40]

In the context of sexting, a court applying the per se approach would hold that any text message transmitted by use of a telecommunications device has been sent in interstate or foreign commerce, regardless of the geographic location of the sender and recipient.[41] *United States v. Giordano* provides an excellent example of the reasoning and application of the per se approach to telecommunications devices, albeit applying a different statute.[42] *Giordano* involved the defendant's appeal of (1) one conviction of conspiring to transmit the names of two minor victims through a means or facility of interstate commerce with the intent to entice, encourage, offer, and solicit criminal sexual activity; and (2) fourteen convictions of actually transmitting the names of the two victims with the intent to entice, encourage, offer, and solicit criminal sexual activity.[43] The government accumulated its evidence for the basis of the charges by intercepting 151 calls on Giordano's mobile phone, to and from a female prostitute, in which she agreed (at his behest) to bring minor children to observe or participate in purchased sexual services.[44]

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37. United States v. Murray, 52 M.J. 423, 426 (A.F. Ct. Crim. App. 2000) (citing *Carroll*, 105 F.3d at 742; *Reno*, 929 F. Supp at 830–38).

38. Reno v. ACLU, 521 U.S. 844, 851 (1997).

39. *Id.*

40. United States v. Smith, 47 M.J. 588, 592 (N-M. Ct. Crim. App. 1997).

41. Dupuy v. Dupuy, 511 F.2d 641, 644 (5th Cir. 1975) ("[I]ntrastate use of the telephone may confer federal jurisdiction over a private action alleging violation of § 10 of the Securities Exchange Act of 1934 and S.E.C. Rule 10b-5.").

42. 442 F.3d 30, 39–41 (2d Cir. 2006) (applying the per se approach and finding that an intrastate telephone call could confer federal jurisdiction for prosecution under § 2425 (2006)).

43. *Id.* at 33. The defendant also appealed other convictions that are not relevant to this discussion. *See id.*

44. *Id.*

On appeal, Giordano categorized the phone calls giving rise to the charges as intrastate because both he and the prostitute had been in the same state when the calls took place.[45] Accordingly, he argued that the calls were an insufficient jurisdictional hook under the relevant federal law because they were not made using a means or facility of interstate commerce.[46] In analyzing the issue, the court focused on the technological nature of a telecommunication network.[47] It noted that a telephone network, by nature of its national presence and ability to power interstate communication, is a means or facility of interstate commerce.[48] The court then categorized an intrastate phone call as a particularized use of that means or facility and concluded that the intrastate use of a means or facility of interstate commerce satisfies the jurisdictional language provided in § 2425.[49] Thus, under the per se approach, the "in interstate or foreign commerce" jurisdictional hook is satisfied if the transmission method—in this case, a mobile phone network—has a national or international presence, or an ability to power interstate or international communication.[50] If so, a transmission via that method is, by definition, one made in a means or facility of interstate or foreign commerce regardless of the origin and destination of the transmission.[51]

Thus, an advocate of broader jurisdictional ability to prosecute sexting under the PCASEA should focus on tendering evidence of the technological nature of a mobile phone network, particularly its nationwide scope. Once a showing of the national presence and capability of the phone network is made, the argument then would follow that any transmission through it—intrastate or interstate in nature—is a per se satisfaction of the jurisdictional hook.[52] Given the similarity of language and the substantive pur-

45. *Id.* at 38.

46. *Id.*

47. *See id.* at 39 (citing United States v. Perez, 414 F.3d 302, 304 (2d Cir. 2005)).

48. *Id.* (citing *Perez*, 414 F.3d at 304).

49. *Id.*

50. *Id.* at 39–40.

51. *Id.*

52. *See, e.g.*, United States v. Drury, 396 F.3d 1303, 1311 (11th Cir. 2005) ("Section 1958 establishes federal jurisdiction whenever any 'facility of interstate commerce' is used in the commission of a murder-for-hire offense, regardless of whether the use is interstate in nature (*i.e.* the telephone call was between states) or purely intrastate in nature (*i.e.* the telephone call was made to another telephone within the same state).").

pose between § 2425—the statute used in the *Giordorno* case—and the PCASEA, courts may find this argument persuasive.

C. *The Interstate Movement Approach to the Jurisdictional Hook*

The propriety of applying the per se approach to child pornography offenses committed through sexting is undermined by two factors: (1) application of the per se approach ignores the technological nature of the particular mobile phone communication that is the subject matter of the action, and (2) statutory and judicial authority indicates that the technological nature of mobile phone communications is relevant for the purposes of conferring jurisdiction for prosecution of the relevant offenses under the PCASEA. For the purposes of this comment, the alternative to the per se approach will be termed the "interstate movement" approach. Under this approach, it is not the phone network's national presence or ability to power interstate communication that satisfies the jurisdictional hook. Rather, an electronic transmission is evaluated in the same manner as a physical transmission, with the jurisdictional inquiry being the specific path that the proscribed image traveled en route to its destination.[53]

Conceptually, sending a text message via mobile phone bears a strong semblance to mailing a letter.[54] Like a mailed letter, the text message is relayed from one specific point to another, until arriving at its final destination.[55] When an individual sends a short message service ("SMS") text message, the communication signal is transmitted to a relay tower.[56] The tower then forwards the signal to an SMS center.[57] The center selects a tower or series of towers that can then relay the signal to the intended recipient, and transmits the signal accordingly.[58] The signal passes through the towers and arrives at the intended destination.[59] One website

53. *See, e.g.*, United States v. Schaefer, 501 F.3d 1197, 1205 (10th Cir. 2007).

54. Short message service ("SMS") technology is what allows an individual to send a text message (up to 160 characters). Jennifer Maughan, *How Does Text Messaging Work?*, LIFE 123, http://www.life123.com/technology/home-electronics/text-messaging/how-does-text-messaging-work.shtml (last visited Apr. 1, 2010).

55. *Id.*

56. *Id.*

57. Tiesha Whatley, *How Does Text Messaging Work?*, EHOW, http://www.ehow.com/how-does_4571898_text-messaging-work.html (last visited Apr. 1, 2010).

58. *Id.*

59. *Id.*

provides a simplified explanation of the SMS communication process:

> Cell phones are always sending and receiving information through signals even when the phone isn't in use. The signals are sent and received from a cell phone tower or control channel. In order for the phone calls and messages to come through, the control channel needs to know which phone belongs to which phone number. Depending on the location of the cell phone, it will communicate with different towers as the user moves around the city, state, country and even the world. If the phone is unable to communicate with a tower, then it will not receive a signal and can't be used.
> The control channel maps the path for SMS, or text messages. When a message is sent, it first must go through the nearby tower and then the SMS center. The SMSC receives the message and sends it to the appropriate tower closest to the location of the cell phone and then to the destination.[60]

Thus, a text message signal—like a letter sent in the mail—traverses an identifiable path between sender and recipient. This being true, it is conceivable that the text message signal carrying child pornography from one mobile phone to another would never leave a state's territorial boundaries if the parties, relevant towers, and SMS center were all within the same state.

Why is the travel path of the signal relevant? First, the plain language of "transports or ships . . . in . . . interstate or foreign commerce" suggests the proscribed image must actually travel between state boundaries.[61] Second, precedent suggests that particular jurisdictional language should be interpreted in accord with the interstate movement approach.[62]

Section 2252(a)(1)–(2), (4) each refer to shipping or transporting the proscribed image "in" interstate or foreign commerce.[63] Giving this language its plain meaning, it suggests a jurisdictional requirement that the child pornography must actually move between state boundaries.[64] Assigning that interpretation to the statutory language of § 2252(a)(1) is consistent with how other

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60. *Id.*

61. *See* Bradley Scott Shannon, *The Jurisdictional Limits of Federal Criminal Child Pornography Law*, 21 U. HAW. L. REV. 73, 88 (1999) (noting the language of the statute suggests the jurisdictional requirement is met only if the pornography moves across state boundaries).

62. United States v. Schaefer, 501 F.3d 1197, 1202–04 (10th Cir. 2007).

63. 18 U.S.C. § 2252(a)(1)–(2), (4) (Supp. II 2008).

64. *Id.*; *Schaefer*, 501 F.3d at 1201–02 (citing United States v. Hunt, 456 F.3d 1255, 1264–65 (10th Cir. 2006)).

statutes possessing similar language have been interpreted.[65] At least one court has expressly concluded that "the plain terms of § 2252(a) convey that Congress intended to punish only those who moved images or 'materials' across state lines . . . ."[66]

There is judicial support for such an interpretation. At least one court interpreting § 2252(a) found an absolute jurisdictional requisite in the statute that the child pornography must have moved between state boundaries.[67] In *United States v. Schaefer*, the Tenth Circuit rejected the per se approach, even in transmission of pornography through the Internet, stating, "[§ 2252(a)'s] 'including by computer' [language] specifies a method of interstate movement; the government must still establish that any computer-related movement crossed state lines."[68] The court declined to hold that there is an "Internet exception" to the jurisdictional requisite that the images or material cross state lines, and reaffirmed that the government must prove interstate movement by presenting sufficient evidence to that effect.[69] Oddly enough, even the court in *Giordano*, though applying the per se approach, arguably acknowledged that the travel path of the communication signals are the proper consideration in determining if the jurisdictional requirement is met.[70]

In the context of sexting, a court applying the interstate movement approach to text messaging communication would base its jurisdictional analysis on the specific route that the SMS signal traveled, finding jurisdiction only where the signal carrying

65. *Id.* at 1202 (citing United States v. Cardall, 885 F.2d 656, 674–75 (10th Cir. 1989) (noting that the wire fraud statute, 18 U.S.C. § 1343, has similar language and has been consistently interpreted to require communications to cross state lines)).

66. *Id.*

67. *Id.* However, it is important to note that the *Schaefer* court arrived at this conclusion relaying on the statutory language of § 2252(a) as it existed prior to the Effective Child Pornography Prosecution Act (ECPPA) of 2007, Pub. L. 110-358, 122 Stat. 4001 (2008) (codified as amended at 18 U.S.C. §§ 2251-52 (Supp. II 2008)).

68. *Id.*

69. *Id.* at 1205.

70. United States v. Giordano, 442 F.3d 30, 39 n.8 (2d Cir. 2006) (discussing that the defendant did not raise the issue of whether the particular communication signals traveled in an intrastate fashion).

the child pornography traveled across state borders.[71] *United States v. Drury* is illustrative of how a court using the interstate movement approach would determine if the "transported or shipped in interstate or foreign commerce" jurisdictional hook under § 2252(a)(1)–(4) has been satisfied.[72] In *Drury*, the court addressed the issue of whether the defendant used a facility "in interstate or foreign commerce" with the intent to commit murder when he called an undercover agent (believing him to be a mercenary) for the purpose of having his wife assassinated.[73] Drury called the agent's mobile phone four times from a payphone in Georgia, each time with the purpose of procuring mercenary services.[74] The agent received each of the calls while also being physically present in Georgia.[75] On appeal from his conviction, Drury argued that the statutory language of 18 U.S.C. § 1958 mandated reading the jurisdictional element in accord with the interstate movement approach.[76] The government argued that Drury's use of a payphone constituted the use of a facility that, based on its interstate capabilities rather than actual interstate use, qualified inherently as a "facility in interstate commerce."[77] Without deciding which approach to adopt, the court noted that the routing of the telephone calls caused the communication signal to travel outside of Georgia before the agent received them.[78] Accordingly, even if the interstate movement approach did apply, the jurisdictional prong had been satisfied when the signal traveled from Georgia to Florida, and back to Georgia.[79]

Thus, an advocate of narrow jurisdictional ability to prosecute teenagers for sexting under the PCASEA should argue that the burden is on the government to prove that the images of child pornography traveled between state boundaries. The argument

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71. *See, e.g.*, *Schaefer*, 501 F.3d at 1205 (rejecting the per se approach for any electronic transmission and holding that § 2252(a) confers federal jurisdiction only when government proves the signal or transmission carrying the proscribed material traveled between state boundaries).

72. 396 F.3d 1303, 1306–07 (11th Cir. 2005).

73. *Id.*

74. *Id.* at 1307.

75. *Id.*

76. *Id.* at 1312. However, Drury argued that the interstate movement of the communication signal must actually be intentional under the statute. *Id.* The court did not find this argument persuasive. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 1313.

would assert that, in the absence of sufficient evidence showing the SMS signal traveled an interstate route, the court lacks jurisdiction, and the action must be dismissed or the conviction reversed.[80]

V. THE PRINCIPLES OF STATUTORY INTERPRETATION

Recent amendments to the PCASEA have staggering implications for the future prosecution of sexting cases.[81] In evaluating whether the per se approach or the interstate movement approach is the appropriate framework for deciding the question of jurisdiction, it is helpful to turn to the principles of statutory interpretation.[82] When § 2252(a) is meticulously dissected with these principles in mind, an analysis of the current statutory language indicates that the per se approach should be applied in all sexting cases, regardless of whether the charged offense is transportation of child pornography in violation of § 2252(a)(1), receiving or distributing child pornography in violation of § 2252(a)(2), or possession of child pornography in violation of § 2252(a)(4).

Several principles of statutory interpretation are helpful in resolving whether Congress intended for courts to use the per se approach or the interstate movement approach when interpreting the jurisdictional language of § 2252(a). When attempting to give meaning to the terms of a statute, courts "'must interpret statutes as a whole, giving effect to *each word* and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.'"[83] The plain meaning of a statute controls unless a literal application of the statutory language will produce a result demonstrably at odds with the intent of the drafters, or if the language itself is ambiguous.[84] Different terms within a statute are

80. *See, e.g.*, United States v. Beltran-Hernandez, No. CR 08-0726 WHA, 2009 WL 928169, at *1 (N.D. Cal. Apr. 3, 2009) (discussing defendant's motion to dismiss on the basis that the prosecution could not adduce evidence in accordance with the interstate movement approach).

81. ECPPA, Pub. L. 110-358, 122 Stat. 4001, 4002–03 (2008) (codified as amended at 18 U.S.C. §§ 2251–52 (Supp. II 2008)).

82. United States v. Hinckley, 550 F.3d 926, 946 (10th Cir. 2008) (noting that the principles of statutory interpretation are used to discern congressional intent).

83. Mitchell v. Chapman, 343 F.3d 811, 825 (6th Cir. 2003) (quoting Lake Cumberland Trust, Inc. v. EPA, 954 F.2d 1218, 1222 (6th Cir. 1992)) (emphasis added).

84. Kelley v. E.I. DuPont de Nemours & Co., 17 F.3d 836, 842 (6th Cir. 1994) (quoting United States v. Steele, 933 F.2d 1313, 1317 (6th Cir. 1991)).

presumed to have different meanings.[85] "[I]dentical words used in different parts of the same statute are generally presumed to have the same meaning."[86] To understand why the principles of statutory interpretation support the application of the per se approach, it is necessary to briefly apply them to the relevant provisions of § 2252(a).

Section 2252(a)(1) provides, in relevant part, that any person who "knowingly transports or ships [child pornography] using any means or facility of interstate or foreign commerce *or* in *or* affecting interstate or foreign commerce by any means" is in violation of federal law.[87] In interpreting prior versions of this provision, courts found it contained a single jurisdictional hook proscribing the transport of child pornography in interstate or foreign commerce.[88] However, if *each* word in the current provision is given meaning and the *different* terms within the provision are presumed to have *different* meanings,[89] § 2252(a)(1) should be read as currently containing three distinct jurisdictional hooks. Section 2252(a)(1) proscribes transporting or shipping child pornography (1) "using any means or facility of interstate or foreign commerce," (2) "in . . . interstate or foreign commerce," or (3) in a manner "affecting interstate or foreign commerce."[90]

Section 2252(a)(2) provides, in relevant part, that it is unlawful to receive or distribute child pornography "using any means or facility of interstate or foreign commerce *or* that has been mailed, or has been shipped or transported in *or* affecting interstate or foreign commerce, *or* which contains materials which have been mailed or so shipped or transported . . . ."[91] Courts interpreting prior versions of the statute read this provision as containing a "shipped or transported in interstate or foreign commerce" jurisdictional hook and a "materials which have been mailed or so

85. States Roofing Corp. v. Winter, 587 F.3d 1364, 1370 (Fed. Cir. 2009) (citing United States v. Maria, 186 F.3d 65, 71 (2d Cir. 1999)).

86. IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005).

87. 18 U.S.C. § 2252(a)(1) (Supp. II 2008) (emphasis added).

88. *See, e.g.*, United States v. Gallardo, No. 94-50125, 1995 WL 71025, at *1 (5th Cir. Jan. 24, 1995); Montiel Garcia v. United States, 987 F.2d 153, 154 (2d Cir. 1993); United States v. Pabon-Cruz, 255 F. Supp. 2d 200, 205 (S.D.N.Y. 2003).

89. *See* Mitchell v. Chapman, 343 F.3d 811, 825 (6th Cir. 2003) (quoting Lake Cumberland Trust, Inc. v. EPA, 954 F.2d 1218, 1222 (6th Cir. 1992)); *States Roofing Corp.*, 587 F.3d at 1370 (citing *Maria*, 186 F.3d at 71).

90. 18 U.S.C. § 2252(a)(1) (Supp. II 2008).

91. *Id.* § 2252(a)(2) (emphasis added).

shipped or transported" jurisdictional hook.[92] However, when giving effect to *each* word in the present version of the provision and presuming that *different* words within the statute have *different* meanings,[93] § 2252(a)(2) is read as currently containing four jurisdictional hooks. The statute proscribes receiving or distributing child pornography: (1) "using any means or facility of interstate commerce;" (2) mailed, shipped, or transported "in . . . interstate or foreign commerce;" (3) in a manner "affecting interstate or foreign commerce;" or (4) containing "materials . . . shipped or transported" in interstate or foreign commerce.[94]

Similar jurisdictional language found in § 2252(a)(4)(B) makes it illegal for any person to possess child pornography "that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce *or* in *or* affecting interstate or foreign commerce," or "which was produced using materials" mailed, transported, or shipped in interstate commerce.[95] As with the other provisions of § 2252(a), courts interpreted prior versions of § 2252(a)(4)(B) as containing a "transported in interstate or foreign commerce" jurisdictional hook and a "materials transported in interstate or foreign commerce" jurisdictional hook.[96] However, applying the principles of statutory interpretation discussed above to the provision reveals the statute currently contains four distinct jurisdictional hooks. The statute proscribes possessing child pornography (1) shipped or transported "using any means or facility of interstate or foreign commerce;" (2) shipped or transported "in . . . interstate or foreign commerce;" (3) "affecting interstate or foreign commerce;" or (4) "produced using materials" mailed, shipped, or transported in interstate commerce.[97]

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92. *See, e.g.*, United States v. Beltran-Hernandez, No. CR 08-0726 WHA, 2009 WL 928169, at *3 (N.D. Cal. Apr. 3, 2009) (emphasis omitted); *see also* Shannon, *supra* note 61, at 88.

93. *Mitchell*, 343 F.3d at 825 (quoting *Lake Cumberland Trust*, 954 F.2d at 1222); *Staffing Roof Corp.*, 587 F.3d at 1370 (citing *Maria*, 186 F.3d at 71).

94. 18 U.S.C. § 2252(a)(2).

95. *Id.* § 2252(a)(4)(B) (emphasis added).

96. *See, e.g.*, United States v. Zimmerman, 171 F. App'x 8, 9 (9th Cir. 2006); United States v. Adams, 343 F.3d 1024, 1030 (9th Cir. 2003); United States v. Kallestad, 236 F.3d 225, 227 (5th Cir. 2000) (citing United States v. Bausch, 140 F.3d 739, 740–42 (8th Cir. 1998)); United States v. Robinson, 137 F.3d 692, 654–55 (1st Cir. 1998); United States v. Zimmerman, 529 F. Supp. 2d 778, 791 n.19 (S.D. Tex. 2007).

97. 18 U.S.C. § 2252(a)(4)(B).

While meticulously dissecting each provision may appear tedious, it is necessary to establish that § 2252(a)(1), (a)(2), and (a)(4) each contain a "transported or shipped in interstate or foreign commerce" jurisdictional hook as well as a "using any means or facility of interstate or foreign commerce" jurisdictional hook.[98] Given that Congress used the same language in various portions of the same statute, the language presumably carries the same meaning in each provision.[99] Thus, it is reasonable to conclude that whatever jurisdictional reach the "using any means or facility of interstate or foreign commerce" language creates, Congress intended for federal prosecutors to have that reach available to prosecute all offenses enumerated in § 2252(a).[100]

The plain meaning of the language referring to shipping or transporting an item in interstate or foreign commerce appears to require that the item involved must cross state or international borders during transit.[101] Therefore, under this jurisdictional hook, the government can prosecute the alleged offense when the child pornography involved has crossed state or national borders.[102] Were this language the only jurisdictional language in the various provisions discussed above, courts would be justified in requiring the government to adduce the sort of evidence required under the interstate movement approach. However, the presence of additional jurisdictional language evidences a congressional intent to regulate child pornography operations at the intrastate level—namely, the "using any means or facility of interstate or foreign commerce" and the "affecting" language.[103]

The plain meaning of the language "using any means or facility of interstate or foreign commerce" suggests the use of a commercial means or facility that is national or international in presence

98. *Id.* § 2252(a)(1)–(2), (4)(B).

99. *See* IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005) ("[I]dentical words used in different parts of the same statute are generally presumed to have the same meaning.").

100. *See id.*

101. United States v. Schaefer, 501 F.3d 1197, 1201 (10th Cir. 2007) (citing United States v. Hunt, 456 F.3d 1255, 1264–65 (10th Cir. 2006)).

102. *Id.* at 1202 ("Under this framework, the plain terms of § 2252(a) convey that Congress intended to punish only those who moved images or 'materials' across state lines (*i.e.*, in interstate commerce).").

103. *See* 18 U.S.C. § 2252(a)(1)–(2), (4)(B).

or capability.[104] The statutory language does not require an interstate or international use of the mean or facility.[105] Rather, it appears that any use will suffice.[106] Therefore, the "using any means or facility of interstate or foreign commerce" language criminalizes the intrastate transportation, receipt, distribution, or possession of child pornography if accomplished by a means or facility that is national or international in presence and capability, such as a mobile phone network.[107] Given the national or international presence and capability of most mobile phone service carriers,[108] courts are likely to be justified in applying the per se approach over transportation, receipt, distribution, or possession of child pornography accomplished via sexting. This conclusion is bolstered by the fact that the insertion of the term "affecting" in the statute indicates a congressional intent to exercise the full extent of its power under the Commerce Clause.[109]

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104. The language "using any facility of interstate or foreign commerce" is a clear manifestation of congressional intent that the "interstate commerce element is met whenever any interstate commerce facility is used . . . , regardless of whether that use was interstate or purely intrastate in nature." United States v. Means, 297 F. App'x 755, 759 n.4 (10th Cir. 2008) (interpreting 18 U.S.C. § 1958(a) (2006)); *see also* United States v. Giordano, 442 F.3d 30, 39–41 (2d Cir. 2006) (interpreting a different statute with identical jurisdictional language and with a similar substantive purpose).

105. *Means*, 297 F. App'x at 759 n.4.

106. Both intrastate and interstate telephone communications are part of an aggregate telephonic system as a whole. And as long as the instrumentality itself is an integral part of an interstate system, Congress has power, when necessary for the protection of interstate commerce, to include intrastate activities within its regulatory control.

Kerbs v. Fall River Indus., Inc., 502 F.2d 731, 738 (10th Cir. 1974) (citations omitted).

107. While there does not appear to be case law adopting the per se approach under § 2252(a)'s "using any means or facility of interstate or foreign commerce" language, courts interpreting other statutes with identical jurisdictional language have reached this conclusion. *See, e.g.*, United States v. Nestor, 574 F.3d 159, 161 (3d Cir. 2009) (finding use of the Internet and phone networks to be using a mean of interstate commerce to coerce a child to engage in sexual activity in violation of 18 U.S.C. § 2422(b)); *Giordano*, 442 F.3d at 39–41 (finding the use of a phone network to transmit the name of minors for the purpose of soliciting sexual activity from them to be an illegal use of a mean or facility of interstate commerce in violation of 18 U.S.C. § 2425 (citing United States v. Perez, 414 F.3d 302, 304 (2d Cir. 2005) (finding that a national telephone network is a "facility of interstate . . . commerce" for purposes of the federal murder-for-hire statute))); United States v. Ochoa, No. 8-CR-1980, 2009 WL 3878520, at *3 (D.N.M. Nov. 12, 2009) (finding the use of pay phones, cell phones, and the internet to assist in kidnapping a child to be using means of interstate commerce in violation of 18 U.S.C. § 1201(a)(1) (2006)).

108. Oregon Student Public Interest Research Group, Cell Phone Plans, http://www.ospirgstudents.org/cell-phone-plans (last visited Apr. 1, 2010).

109. United States v. Schaefer, 501 F.3d 1197, 1201 (10th Cir. 2007) (citing Russell v. United States, 471 U.S. 858, 859 (1985)).

Therefore, the Effective Child Pornography Prosecution Act of 2007 ("ECPPA") amended § 2252(a) in such a manner that the end of the interstate movement approach is inevitable.[110] Under the current statutory language, jurisdiction can be sufficiently proved by showing that the defendant transported, received, distributed, or possessed child pornography through the use of a mobile phone network.[111] However, recognizing the difference between the interstate movement approach and the per se approach remains critical as defendants may face charges for violating the statute prior to these amendments taking effect.[112]

VI. SPECIFIC OFFENSES IMPLICATED BY SEXTING

A. *Sexting as a Transporting/Shipping Offense*

1. Overview of Requirements

Section 2252(a)(1) is the statutory provision proscribing the affirmative transmission of child pornography.[113] The provision expressly governs transportation of child pornography using physical or electronic means.[114] A transportation of child pornography charge in violation of § 2252(a)(1) consists of "(1) the defendant knowingly transport[ing] in interstate or foreign commerce (2) a visual depiction of the minor (3) engaging in sexually explicit conduct."[115] Thus, § 2252(a)(1) expressly contemplates a knowledge requirement and an "interstate or foreign commerce" jurisdictional requirement as requisites for conviction of the offense.[116]

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110. Pub. L. 110-358, 122 Stat. 4001, 4002–03 (2008) (codified as amended at 18 U.S.C. § 2252(a) (Supp. II 2008)).

111. 18 U.S.C. § 2252(a)(1)–(2), (4)(B) (Supp. II 2008).

112. *See, e.g.*, United States v. Beltran-Hernandez, No. CR 08-0726 WHA, 2009 WL 928169, at *1–4 (N.D. Cal. Apr. 3, 2009) (discussing defendant's motion to dismiss in light of the fact that the trial would be decided on the language of § 2252(a) before the 2008 amendments took effect).

113. United States v. Gourde, 440 F.3d 1065, 1069 n.3 (9th Cir. 2006) (noting that § 2252(a)(1) criminalizes shipping child pornography).

114. 18 U.S.C. § 2252(a)(1) (Supp. II 2008).

115. Plaintiff B. v. Francis, No. 5:08-cv-79/RS-AK, 2010 WL 497375, at *4 (N.D. Fla. Feb. 5, 2010).

116. United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (discussing knowledge requirement); United States v. Schaefer, 501 F.3d 1197, 1200–01 (10th Cir. 2007) (discussing the burden of proof regarding § 2252(a)'s jurisdictional provisions).

In *United States v. X-Citement Video, Inc.*, the Supreme Court held that the term "knowingly" in § 2252(a)(1) extended not only to the verbs following that term (mails, transports, or ships), but also to the sexually explicit nature of the materials and the age of the children depicted.[117] However, the knowledge requirement does not require the prosecution to show that the defendant knew his conduct would violate federal law.[118] Rather, the government need only prove knowledge as to the general nature of the content depicted in the images.[119] The knowledge requirement is not likely to pose a significant hurdle for the government when attempting to prosecute an individual for sexting. In the context of sexting, "transporting" or "shipping" child pornography is likely to occur in one of two general scenarios: (1) a minor text messages a visual depiction of himself or herself engaged in sexually explicit conduct to a romantic interest, or (2) an individual receives a text message containing a visual depiction of a minor engaged in sexually explicit conduct and uses mobile phone technology to further transport or ship the image.[120] In each of these scenarios, the individual transmitting the message is usually aware of the explicit image contained in the text message and is transmitting the message for that very reason.[121] Therefore, in most circumstances involving sexting, the controversy in transporting and shipping charges will focus on whether the jurisdictional requirement has been met.

2. Jurisdictional Hooks of Transportation

Section 2252(a)(1) offers three distinct jurisdictional hooks, all of which focus on the specific conduct of the accused—namely, whether the accused transported or shipped child pornography: (1) using a means or facility of interstate commerce, (2) in interstate or foreign commerce, or (3) affecting interstate commerce.[122]

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117. 513 U.S. at 78.

118. United States v. Knox, 977 F.2d 815, 825 (3d Cir. 1992) ("[T]o fulfill the knowledge element of section 2252, a defendant simply must be aware of the general nature and character of the material and need not know that the portrayals are illegal.") (citing United States v. Moncini, 882 F.2d 401, 404 (9th Cir. 1989)); United States v. Tolczeki, 614 F. Supp. 1424, 1429 (N.D. Ohio 1985)).

119. *Id.*

120. LENHART, *supra* note 8, at 6–7.

121. *See id.*

122. 18 U.S.C. § 2252(a)(1) (Supp. II 2008).

Congress inserted the first jurisdictional hook into the provision to allow the prosecutor to prove the jurisdictional element of the offense in accordance with the per se approach.[123] Thus, in most sexting cases, the government will establish jurisdiction merely by showing the child pornography had been transmitted by mobile phone.[124]

However, the per se provision did not become effective until October 8, 2008.[125] Therefore, if the alleged offense occurred before that date, the prosecution will need to show the defendant transported the proscribed material by interstate or foreign commerce. In this situation, the primary concern for a federal prosecutor or defendant approaching the jurisdictional question will be whether the court applies the per se or the interstate movement approach with regard to transmissions of child pornography made via telecommunications devices.[126] A court adhering to the per se approach will find transmitting child pornography via text message automatically confers federal jurisdiction under § 2252(a)(1) because of the nationwide presence and capabilities of the mobile phone calling network.[127] A court adhering to the interstate movement approach will look to the specific transmissions made by the individual and require proof that the text caused child pornography to travel over state boundaries.[128]

B. *Sexting as a Distribution Offense*

1. Overview of Requirements

Section 2252(a)(2) is the statutory provision proscribing the affirmative distribution of child pornography.[129] The elements of a

123. *See supra* Part V.

124. The application of the per se approach to transporting child pornography in interstate or foreign commerce has been thoroughly discussed in an earlier portion of this comment. *See* discussion *supra* Part IV.B.

125. ECPPA, Pub. L. 110-358, 122 Stat. 4001 (2008) (codified as amended at 18 U.S.C. § 2252(a) (Supp. II 2008)).

126. *See* discussion *supra* Part IV.A–C.

127. *See, e.g.*, United States v. Smith, 47 M.J. 588, 592 (N-M. Ct. Crim. App. 1997) (holding that an electronic transmission of information, whether across state lines or across the street, via the internet is a means of transmission in interstate commerce).

128. *See, e.g.*, United States v. Schaefer, 501 F.3d 1197, 1201 (10th Cir. 2007) ("We do not read § 2252(a) as contemplating that the mere connection to the Internet would provide the interstate movement required by the statute.").

129. United States v. Gourde, 440 F.3d 1065, 1069 n.3 (9th Cir. 2006) (noting that §

distribution of child pornography charge under § 2252(a)(2) consist of the defendant (1) knowingly, (2) distributing an item of child pornography, and (3) a sufficient nexus to interstate or foreign commerce.[130] Thus, like the transporting offense, there is a knowledge requirement under the distribution statute as well as an "interstate or foreign commerce" jurisdictional requirement.[131]

The United States Court of Appeals for the Sixth Circuit has held that the "knowingly" requirement pertains to both the distribution of the material through interstate commerce and the sexually explicit content of the material itself.[132] The legislative history of the statute suggests that actual knowledge of the explicit content is required; constructive knowledge will not suffice.[133] As with transporting or shipping child pornography, the knowledge requirement of the distribution charge is not likely to pose a significant hurdle for the government when prosecuting an individual for sexting. This is because distribution of child pornography through sexting is likely to occur in one of two general scenarios: (1) a minor text messages a visual depiction of himself or herself engaged in sexually explicit conduct to a romantic interest, or (2) an individual receives a text message containing a visual depiction of a minor engaged in sexually explicit conduct and uses mobile phone technology to further distribute the image to friends, peers, or other individuals.[134] In both of these scenarios, the individual transmitting the message is usually aware of the explicit image contained in the text message and is distributing the message because it contains that image.[135] Therefore, as with transporting causes, controversy in sexting distribution cases will often center on whether the jurisdictional requirement has been met.

2252(a)(2) criminalizes distributing or receiving child pornography). It is worth noting that § 2252(a)(2) also criminalizes knowingly duplicating child pornography. *See* 18 U.S.C. 2252(a)(2) (Supp. II 2008) (criminalizing "knowingly reproduc[ing]" child pornography). However, this offense will not be discussed in this comment.

130. 18 U.S.C. § 2252(a)(2); *see* United States v. White, 506 F.3d 635, 641 (8th Cir. 2007) (discussing the elements of the charge of receiving child pornography under pre-amendment § 2252(a)(Q)).

131. 18 U.S.C. § 2252(a)(2); *see White*, 506 F.3d at 641.

132. United States v. Brown, 25 F.3d 307, 309 (6th Cir. 1994).

133. "[T]he phrase 'knowingly' insures that only those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography . . . are subject to prosecution . . . ." 123 CONG. REC. S33,050 (1977) (statement of Sen. Roth).

134. LENHART, *supra* note 8, at 6–7.

135. *Id.*

The statute provides some guidance. Section 2252(a)(2) lists several methods in which the necessary nexus with interstate commerce may be satisfied: (1) directly distributing child pornography using a means or facility of interstate or foreign commerce; (2) distributing child pornography that had been previously mailed, shipped, or transported in interstate or foreign commerce; (3) distributing child pornography affecting interstate or foreign commerce; or (4) distributing child pornography containing materials that were mailed, shipped, or transported using any means of interstate or foreign commerce.[136] The first two jurisdictional hooks have particular relevance in the context of sexting and will be discussed below. However, the third and fourth jurisdictional hooks do not appear particularly relevant to the topic of sexting and will not be addressed.

2. Jurisdictional Hooks for Distribution

The first jurisdictional hook is a congressional endorsement of the per se approach.[137] Thus, a showing that the defendant used a mobile phone to distribute child pornography will sufficiently prove the jurisdictional requirement. However, this hook did not become effective until October 8, 2008.[138] Therefore, if the offense was committed prior to that date, jurisdiction must be proved under the second jurisdictional hook.

The second jurisdictional hook focuses on the total history of the proscribed material—whether the distributed child pornography has been previously transported in interstate or foreign commerce *at any point and by any person.*[139] If the offense occurred prior to October 8, 2008, it will be necessary to determine if the jurisdiction adheres to the per se approach or the interstate

136. 18 U.S.C. § 2252(a)(2) (Supp. II 2008).

137. *See supra* Part V.

138. ECPPA, Pub. L. 110-358, 122 Stat. 4001, 4001–03 (2008) (codified as amended at 18 U.S.C. § 2252(a) (Supp. II 2008)).

139. 18 U.S.C. § 2252(a)(2) (emphasis added). In light of the recent amendments to the statute, this jurisdictional hook may be moot in sexting cases. Logically, if the court considers a transmission by mobile phone to automatically be a transmission using a means or facility of interstate or foreign commerce, there is no need to carry the analysis beyond the accused's conduct (because her use of the mobile phone in sending the image is all that is needed to confer jurisdiction to prosecute that individual for distributing child pornography in violation of § 2252(a)(2)). However, this provision still has significant value in establishing jurisdiction for offenses committed prior to October 8, 2008 and in an interstate movement jurisdiction.

movement approach regarding mobile phone communications.[140] A court adhering to the per se approach will find that a previous transmission of the child pornography via text message automatically confers jurisdiction under § 2252(a)(2) because of the phone network's national presence and ability to power interstate or foreign communication.[141] A court adhering to the interstate movement approach will look to determine if, prior to the defendant distributing the material, a communication signal transmitted the child pornography across state boundaries or foreign borders.[142]

Thus, even if the accused distributes the image in an intrastate manner, the jurisdictional hook can still be satisfied through evidence that the child pornography crossed state lines at some

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140. *Compare* United States v. Kimler, 335 F.3d 1132, 1139 (10th Cir. 2003) (finding sufficient evidence to uphold conviction on distribution charges because the evidence demonstrated that defendant transmitted proscribed images over the Internet and across state lines via telephone wires), *with* United States v. 7046 Park Vista Road, 537 F. Supp. 2d 929, 939 (S.D. Ohio 2008) (noting that transmission of child pornography over the internet is sufficient to establish the jurisdictional element for a distribution charge (citing United States v. Runyan, 290 F.3d 223, 239 (5th Cir. 2002))). It is worth noting that when analyzing § 2252(a)(2) in the context of sexting, there does not appear to be a significant legal distinction between "distributing" child pornography under § 2252(a)(2) and "transporting" or "shipping" it under § 2252(a)(1). *Compare* United States v. Kirchhof, 505 F.3d 409, 411 (6th Cir. 2007) (noting a defendant's guilty plea for transporting child pornography under § 2252(a)(1) because he distributed it over the Internet), *and* United States v. Smith, 20 F. App'x 412, 415–16 (6th Cir. 2001) (describing defendant's guilty plea to transporting child pornography under § 2252(a)(1) as a result of emailing it to an undercover agent), *with* United States v. Snyder, 189 F.3d 640, 644 (7th Cir. 1999) (charging the defendant with distribution of child pornography under § 2252(a)(2) as a result of emailing the material to others), *and* United States v. 7046 Park Vista Road, 537 F. Supp. 2d 929, 939–40 (S.D. Ohio 2008) (holding transmission of child pornography during instant message chat session is evidence of distribution of child pornography under § 2252(a)(2)). One possible distinction is that "distribution" under § 2252(a)(2) contemplates that the individual distributing the material intends for another to view it, whereas "transportation" under § 2252(a)(1) is targeted at an individual's efforts to physically or electronically change the image's location regardless of whether another views it. *See* United States v. Merrill, 578 F. Supp. 2d 1144, 1150–51 (N.D. Iowa 2008) (finding defendant did not distribute child pornography for sentencing purposes when he transmitted fifteen images of child pornography from his phone to his computer because there was no indication that he stored the images on his computer in such a way that others would view them). However, *Merrill* represents the rare situation of a defendant sexting himself. The majority of sext messages will likely be sent with the intention that someone else will view them, and could probably be categorized as "transportation" under § 2252(a)(1) or "distribution" under § 2252(a)(2). LENHART, *supra* note 8, at 6–7.

141. *See, e.g.*, United States v. Lewis, 554 F.3d 208, 215 (1st Cir. 2009) (holding that the jurisdictional hook of § 2252(a)(2) is met when the government shows that the images were received over the Internet).

142. *See, e.g.*, United States v. Schaefer, 501 F.3d 1197, 1205 (10th Cir. 2007) (holding that the jurisdictional element of § 2252(a)(2) requires the government to show the child pornography crossed state lines).

point, even if someone other than the accused caused the interstate transmission.[143] In the context of sexting, this is a powerful jurisdictional tool in the prosecutor's arsenal. If the government can present evidence that the child pornography embedded in a text message crossed state lines during some prior transmission of the message, a federal prosecutor may establish jurisdiction to prosecute a defendant that subsequently distributed the message, regardless of the particularized route that the defendant's transmission took.[144] Accordingly, federal jurisdiction to prosecute an individual for distribution of child pornography under § 2252(a)(2) may exist, even though the same facts do not create jurisdiction to prosecute the individual for transporting child pornography under § 2252(a)(1).[145] Therefore, in seeking to establish jurisdiction, a prosecutor should not limit her investigation solely to the accused's particularized conduct with the image in question.[146] Rather, an investigation into the chain of transmissions that brought the image under the accused's control may result in federal jurisdiction to prosecute for distribution that would otherwise not exist.[147]

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143. United States v. Smith, 47 M.J. 588, 591–92 (N-M. Ct. Crim. App. 1997) (noting that the "'has been shipped or transported in interstate or foreign commerce'" language of § 2252(a)(2) means that the jurisdictional hook will be satisfied "if the pornographic materials were *ever* shipped or transported in interstate commerce"). *Smith* involved a defendant who had been convicted of receiving child pornography under § 2522(a)(2). *Id.* He had received the pornography via e-mail from another Marine stationed in the same state. *Id.* at 591. Smith argued that the intrastate nature in which he received the proscribed material supported reversing his conviction on the grounds that the jurisdictional hook had not been satisfied. *Id.* at 591–92. However, the court noted that the chain of transmissions for that same pornography (before reaching Smith) was of an interstate nature, and this was sufficient to meet the jurisdictional requirement of § 2522(a)(2). *Id.*

144. *See id.* at 591–92.

145. A brief hypothetical may be helpful in understanding this concept. A sends self-produced child pornography to B via text message. During the transmission from A to B, the signal carrying the image crosses state lines. B receives the message and forwards it via text message to C. During the transmission from B to C, the signal carrying the image does not travel across state lines. Jurisdiction to prosecute A for transporting child pornography under § 2252(a)(1) is present, regardless of whether the jurisdiction adheres to the per se approach or the interstate movement approach. Jurisdiction to prosecute B for transporting child pornography under § 2252(a)(1) may be present, depending on if the jurisdiction applies a per se approach or interstate movement approach to mobile phone communications. Nonetheless, jurisdiction to prosecute B for distributing child pornography under § 2252(a)(2) is clearly present, regardless of what approach the jurisdiction practices. This is because the image passed across state lines at some point, which is all that § 2252(a)(2) requires.

146. *Smith*, 47 M.J. at 591–92.

147. *Id.*

C. *Sexting as a Receipt Offense*

1. Overview of Requirements

Section 2252(a)(2) is the statutory provision proscribing the receipt of child pornography.[148] The elements of a receipt of child pornography charge under § 2252(a)(2) consist of the defendant (1) knowingly, (2) receiving an item of child pornography, and (3) a sufficient nexus to interstate or foreign commerce.[149] Receipt of child pornography is governed by the same statutory provision as distribution of child pornography.[150] Therefore, a receipt offense carries the same knowledge requirement and interstate or foreign commerce jurisdictional requirement as a distribution offense.[151]

Regarding the knowledge requirement of receiving child pornography under § 2252(a)(2), the government must establish that the recipient had actual knowledge that the message received contained child pornography.[152] It is not sufficient to show that the defendant had constructive knowledge of the contents.[153] Therefore, knowingly receiving child pornography, for the purposes of § 2252(a)(2), does not include the scenario of an unaware mobile phone owner that unexpectedly receives an image of child pornography via text message.[154] Rather, the knowledge element narrows the scope of the provision to those situations more akin to soliciting or ordering child pornography, and receiving the pornography as a result of those efforts.[155]

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148. 18 U.S.C. § 2252(a)(2) (Supp. II 2008); *see* United States v. Gourde, 440 F.3d 1065, 1069 n.3 (9th Cir. 2006) (noting that § 2252(a)(2) criminalizes distributing or receiving of child pornography).

149. 18 U.S.C. § 2252(a)(2); *see* United States v. White, 506 F.3d 635, 641 (8th Cir. 2007) (evaluating the statute prior to the 2008 amendments and noting that § 2252(a)(2) required the "defendant to knowingly receive an item of child pornography, and the item to be transported in interstate or foreign commerce"); United States v. Fabiano, 169 F.3d 1299, 1303 (10th Cir. 1999).

150. 18 U.S.C. § 2252(a)(2).

151. *Id.*

152. United States v. Brown, 25 F.3d 307, 310 (6th Cir. 2004) (noting that § 2252(a)(2) is only intended to reach those individuals who actually knew they were receiving child pornography). However, specific knowledge of the actual age of the child is not required. *Fabiano*, 169 F.3d at 1303. The prosecution need only show the defendant had knowledge as to the "general nature" of the content. *Id.*

153. *Fabiano*, 169 F.3d at 1303.

154. United States v. Colavito, 19 F.3d 69, 71 (2d Cir. 1994) (citing United States v. Osborne, 935 F.2d 32, 34 n.2 (4th Cir. 1991)).

155. *Id.*

Proving the recipient had knowledge that the text message contained child pornography will be a challenge for the prosecution because receiving child pornography through sexting is likely to occur in one of two general scenarios: (1) an individual receives self-produced child pornography from a romantic interest, or (2) an individual receives a text message containing a visual depiction of a minor engaged in sexually explicit conduct simply because the sender is interested in sharing the contents of the image with the recipient.[156] In both of these scenarios, there is a possibility that the sender transmitted the message without any request or solicitation by the recipient.[157] Therefore, a defendant charged with receipt of child pornography through text message should seek dismissal of the charge if the prosecution cannot produce evidence that the defendant knew the message would contain child pornography when received.[158] The prosecution should focus on securing evidence from which the jury could infer the defendant knew that the message contained child pornography and received the message regardless.[159] Evidence that a prosecutor could seek out to support this inference includes (1) previous text messages by the sender informing the recipient that the sender had the images and wanted to forward them to the recipient; (2) text messages by the recipient requesting the images; (3) previous e-mails that record such a dialogue; or (4) messages sent through social networking sites such as Facebook, MySpace, or Twitter that record such a dialogue.[160]

The jurisdictional hook for receipt of child pornography can be satisfied through the exact same methods as a distribution offense.[161] These methods include (1) directly receiving child porno-

156. LENHART, *supra* note 8, at 6–7.

157. *Id.* at 7.

158. *See* United States v. Skotzke, No. 06-20475, 2007 WL 1584219, at *4 (E.D. Mich. May 31, 2007) (citing United States v. X-Citement Video, 513 U.S. 64, 78 (1994)) (noting that § 2252(a)(2) "encompasses only situations in which the defendant knows that the material he is receiving depicts minors engaged in sexually explicit conduct").

159. *See, e.g.*, United States v. Driscoll, 852 F.2d 84, 85 (3d Cir. 1988) (noting that a letter requesting more information about child pornography and an order for child pornography led to defendant being convicted under § 2252); United States v. Edwards, No. 92 CR 884, 1993 WL 453461, at *1 (N.D. Ill. Nov. 4, 1993) (noting that the government submitted letters from defendant expressing interest in receiving child pornography).

160. In many cases, sexting is done in response to requests for the images. LENHART, *supra* note 8, at 7–8. Given the popularity of text messaging, e-mail, and social media sites among teenagers, it is possible they are requesting child pornography from each other through those mediums. *Id.* at 2–3; LENHART, *supra* note 10, at 8–9.

161. *See* 18 U.S.C. 2252(a)(2) (Supp. II 2008).

graphy using a means or facility of interstate or foreign commerce; (2) receiving child pornography that had been previously mailed, shipped, or transported in interstate or foreign commerce; (3) receiving child pornography affecting interstate or foreign commerce; or (4) receiving child pornography containing materials which were mailed, shipped, or transported using any means of interstate or foreign commerce.[162] As with a distribution offense, the first two jurisdictional hooks have a significant legal impact in the context of sexting and will be discussed below. However, the third and fourth jurisdictional hooks do not seem particularly relevant to the topic at hand and will not be addressed.

2. Jurisdictional Hooks for Reception

The first jurisdictional hook is a codification of the per se approach.[163] Thus, showing that the defendant used a mobile phone network to receive child pornography will sufficiently prove the jurisdictional requirement of the offense. However, this hook did not become effective until October 8, 2008.[164] Therefore, if the offense was committed prior to that date, jurisdiction must be proved under the second jurisdictional hook.

The second jurisdictional hook focuses on the total history of the proscribed material—whether the received child pornography has been previously transported in interstate or foreign commerce *at any point and by any person*.[165] No different than a distribution offense, if the alleged receipt occurred prior to October 8, 2008, it will be necessary to determine if the jurisdiction adheres to the per se approach or the interstate movement approach regarding

162. *Id.*

163. *See supra* Part IV.B.

164. ECPPA, Pub. L. 110-358, 122 Stat. 4001, 4001–03 (2008) (codified as amended at 18 U.S.C. § 2252 (Supp. II 2008)).

165. 18 U.S.C. § 2252(a)(2). In light of the recent amendments to the statute, this jurisdictional hook may be moot in sexting cases. Logically, if the court considers receiving child pornography by mobile phone to automatically be receiving "using a means or facility of interstate or foreign commerce," there is no need to carry the analysis beyond the accused's conduct. However, just as with a distribution offense, this provision still has significant value in establishing jurisdiction for offenses committed prior to October 8, 2008 and in an interstate movement jurisdiction.

mobile phone communications.[166] A court adhering to the per se approach will find that previous transmission of child pornography via text message automatically confers jurisdiction under § 2252(a)(2) because of the phone network's national presence and ability to power interstate or foreign communication.[167] A court adhering to the interstate movement approach will look to determine if, prior to the defendant receiving the material, a communication signal transmitted the child pornography across state boundaries or foreign borders.[168]

Thus, even if the accused receives the image through a purely intrastate transmission, the jurisdictional hook can still be satisfied through evidence that demonstrates the child pornography crossed state lines during transmissions between completely unrelated parties.[169] In the context of sexting, the implications of this jurisdictional hook are staggering. Even if the only transmission that carried a particular image of child pornography across state lines is the initial one, every knowing recipient of the image subsequent to that transmission is under the jurisdictional reach of § 2252(a)(2).[170] Therefore, just as with a distribution charge, a prosecutor should not limit her investigation solely to the accused's particularized interaction with the image in question.[171] An investigation into the chain of transmissions that brought the image under the accused's control may reveal federal jurisdiction does exist under § 2252(a)(2), even though not readily apparent at initial glance.[172]

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166. *Compare* United States v. Schaefer, 501 F.3d 1197, 1205 (10th Cir. 2007) (holding when an individual is charged with receiving child pornography under § 2252(a)(2), the government must show the process of receiving the child pornography caused the image to cross state lines), *with* United States v. MacEwan, 445 F.3d 237, 244 (3d Cir. 2006) (interpreting an identically worded provision proscribing reception of child pornography in § 2252A(a)(2)(B) and finding that receiving the image through the internet will automatically establish the "interstate commerce" jurisdictional hook).

167. *See MacEwan*, 445 F.3d at 244.

168. *See Schaefer*, 501 F.3d at 1205 (holding that § 2252(a)(2) requires a showing that the child pornography crossed state lines).

169. *See* United States v. Smith, 47 M.J. 588, 591–92 (N-M. Ct. Crim. App. 1997) (holding that use of the Internet constitutes interstate commerce, regardless of the location of the parties involved).

170. *Id.*

171. *See id.*

172. *See id.*

D. *Sexting as a Possession Offense*

1. Overview of Requirements

Section 2252(a)(4)(B) is a broad statutory provision proscribing the possession of child pornography.[173] The elements of a possession of child pornography charge under § 2252(a)(4)(B) consist of the defendant (1) knowingly possessing or accessing with intent to view one or more books, magazines, periodicals, films, video tapes, or other matter which contain child pornography and (2) having the necessary nexus to interstate commerce.[174] Therefore, like all of the other offenses enumerated in § 2252(a), the charge contains both a knowledge requirement and a jurisdictional hook requirement.[175]

"Knowingly," under the possession offense, applies to both the sexually explicit nature of the conduct and the ages of persons depicted in the materials.[176] Therefore, the prosecution has the burden of proving the defendant's knowledge of both.[177] Unlike knowledge for reception, which contemplates knowing the nature of the material before receiving it,[178] the knowledge requirement for possession can be met by showing that the defendant became aware of the nature after viewing the image and retained it regardless.[179] Although there are an innumerable amount of scenarios in the context of sexting in which an individual could come into possession of child pornography, the knowledge requirement for possession will not pose a significant hurdle for the prosecu-

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173. 18 U.S.C. § 2252(a)(4)(B) (Supp. II 2008); *see* United States v. Gourde, 440 F.3d 1065, 1069 n.3 (9th Cir. 2006) (noting that § 2252(a)(4) criminalizes possession of child pornography).

174. 18 U.S.C. § 2252(a)(4)(B); *see* United States v. White, 506 F.3d 635, 641 (8th Cir. 2007) (noting that § 2252(a)(4)(B) required that the defendant knowingly possess child pornography and that the pornography had traveled across state lines, even prior to the 2008 amendments).

175. *See* 18 U.S.C. § 2252(a)(4)(B); *White*, 506 F.3d at 641.

176. United States v. Grimes, 244 F.3d 375, 380 (5th Cir. 2001).

177. *See id.* at 380 & nn.11–12.

178. United States v. Skotzke, No. 06-20475 2007 WL 1584219, at *4 (E.D. Mich. May 31, 2007) (noting that § 2252(a)(2) "encompasses only situations in which the defendant knows that the material he is receiving depicts minors engaged in sexually explicit conduct" (citing United States v. X-Citement Video, 513 U.S. 64, 78 (1994))); *see also* United States v. Miller, 527 F.3d 54, 63–64 (3d Cir. 2008) (citing United States v. Myers, 355 F.3d 1040, 1042 (7th Cir. 2004) (discussing the difference between the knowledge requirement of receipt under § 2252(a)(2) and possession under § 2252(a)(4))).

179. *Myers*, 355 F.3d at 1042 (citing 18 U.S.C. §§ 2252(a)(4)(B), 2252(c) (2006)).

tion. The government need only show the defendant received the message containing child pornography and did not delete it.[180] The knowledge requirement is further simplified by the fact that the government need not show that the defendant had knowledge that the pornography or the materials used to produce it were transported in interstate commerce.[181]

Section 2252(a)(4)(B), identifies several situations in which the necessary nexus with interstate commerce will be satisfied. The jurisdictional requirement to charge a defendant with possession of child pornography under § 2252(a)(4)(B) will be sufficiently proved if the government can show the defendant came into possession of child pornography (1) transported or shipped using any means or facility of interstate or foreign commerce; (2) transported or shipped in interstate or foreign commerce; (3) affecting interstate or foreign commerce; or (4) produced using materials mailed, shipped, or transported in interstate commerce.[182] The combination of the first, second, and fourth jurisdictional hooks makes it difficult to imagine a scenario in which jurisdiction to prosecute an individual in possession of child pornography sent via mobile phone does not exist. Given that the third jurisdictional hook does not appear to be relevant in the context of most sexting situations, it will not be addressed.

2. Jurisdictional Hooks for Possession

The first jurisdictional hook inserts the per se approach into the provision. Thus, if the defendant is in possession of child pornography sent by text message, the government will be able to sufficiently prove the jurisdictional hook by showing a previous transmission of the pornography via mobile phone.[183] For any alleged possession offense committed through sexting that occurred after October 8, 2008, the government will need to look no further

180. *See, e.g.*, United States v. Hall, 142 F.3d 988, 997 (7th Cir. 1998) (rejecting defendant's argument that he lacked the knowledge requirement for possession under § 2252(a)(4) because he could have deleted the images from his computer and did not do so).

181. United States v. Robinson, 137 F.3d 652, 655 (1st Cir. 1998).

182. 18 U.S.C. § 2252(a)(4)(B); *see* United States v. Lewis, 554 F.3d 208, 213 n.6 (1st Cir. 2009) (identifying the two methods through which the jurisdictional element may be satisfied); United States v. Zimmerman, 171 F. App'x 8, 9 (9th Cir. 2006) (discussing the two jurisdictional hooks of § 2252(a)(4)(B)).

183. *See supra* Part V.

than this hook.[184] However, if the alleged offense occurred prior to this date, the government will need to prove the jurisdictional element using the second or fourth jurisdictional hook.

The second jurisdictional hook focuses on the transmission history of the image in the possession of the accused—the focus of the jurisdictional analysis being whether any individual previously transported the image in interstate or foreign commerce.[185] Therefore, if the date of the alleged offense is prior to October 8, 2008, it will be necessary to determine whether the presiding jurisdiction applies a per se approach or an interstate movement approach to child pornography transmitted through mobile phones. A jurisdiction adopting the per se approach will automatically find the jurisdictional hook has been satisfied because of the phone network's national presence and ability to power interstate or foreign communication.[186] A jurisdiction adopting the interstate movement approach will require evidence demonstrating that the image traveled between state boundaries at some point in order to consider the jurisdictional hook sufficiently proved.[187] While more difficult to satisfy than their counterpart discussed below, the government should seek to use either the first or second jurisdictional hooks, if possible, because the fourth jurisdictional hook is susceptible to "as applied" challenges.[188]

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184. ECPPA, Pub. L. 110-358, 122 Stat. 4001, 4001–03 (codified as amended at 18 U.S.C. § 2252 (Supp. II 2008)).

185. 18 U.S.C. § 2252(a)(4)(B).

186. *See Lewis*, 554 F.3d at 213 n.6, 215 (interpreting § 2252(a)(4)(B)'s "transported" jurisdictional hook to be the same as § 2252(a)(2)'s "transported" jurisdictional hook, which requires only a showing that the defendant used the Internet had been used in transmitting the images).

187. *See* United States v. Wilson, 182 F.3d 737, 744 (10th Cir. 1999) (finding that § 2252(a)(4)(B)'s "transported" jurisdictional hook requires the proscribed images to travel in interstate commerce and discussing how the government may produce enough evidence to meet this burden).

188. United States v, Zimmerman, 171 F. App'x 8, 9 (9th Cir. 2006) (citing United States v. McCoy, 323 F.3d 1114, 1126 (9th Cir. 2003) (finding the "materials" jurisdictional hook of 18 U.S.C. § 2252(a)(4)(B) useless, and an "as applied" challenge will prevail without a showing that the particular conduct of the defendant had a substantial effect of interstate commerce)). An "as applied" challenge simply means that the statute, while not facially unconstitutional, may be unconstitutional in its application to a particular case. United States v. Corp, 236 F.3d 325, 327–32 (6th Cir. 2001) (analyzing the facial constitutionality of the "materials" jurisdictional hook and the constitutionality of the hook "as applied" to the defendant's actions). The Tenth Circuit provides a helpful discussion on evidence that may be used to meet each jurisdictional hook. *See Wilson*, 182 F.3d at 743–44.

The fourth jurisdictional hook focuses on the materials used to "produce" the pornographic image. The jurisdictional hook is satisfied if those materials have passed through interstate or foreign commerce.[189] Taking a picture of a minor performing sexually explicit conduct is considered production of child pornography within the meaning of the statute.[190] Accordingly, film, cameras, and digital cameras have all been found to be materials used to produce photographic child pornography.[191] It follows logically from these holdings that a mobile phone with a built-in digital camera could also be considered a material used to produce the child pornography. Therefore, if a mobile phone used to generate child pornography traveled in interstate or foreign commerce for any reason and the government can adduce evidence to that effect, the language of the statute seemingly permits prosecuting any individual in subsequent possession of the child pornography generated by that phone as a violation of § 2252(a)(4).[192] However, courts have expressed concerns about the apparent limitless reach of the jurisdictional hook.[193] In this regard, it is possible for the defendant to argue that his or her possession of the child por-

189. 18 U.S.C. § 2252(a)(4)(B) (Supp. II 2008).

190. *See* United States v. Chambers, 441 F.3d 438, 443, 454–55 (6th Cir. 2006); United States v. Gann, 160 F. App'x 466, 472 (6th Cir. 2005); United States v. Andrews, 383 F.3d 374, 376–77 (6th Cir. 2004).

191. *See, e.g.*, *Chambers*, 441 F.3d at 451–55 (finding that Polaroid film produced in either Massachusetts or the Netherlands provided sufficient interstate/foreign commerce nexus); United States v. Robinson, 137 F.3d 652, 653 (1st Cir.1998) (upholding conviction under § 2252(a)(4) because "the fifty photographs [of child pornography] were all taken using a Kodak instant camera and Kodak instant film, both of which were manufactured by the Eastman Kodak Company outside of Massachusetts"); *Andrews*, 383 F.3d at 376–78 (interpreting similar jurisdictional language of § 2251 and finding the jurisdictional requirement satisfied because the defendant photographed child pornography using a pen camera that had traveled in interstate commerce); *Gann*, 160 F. App'x at 469–73 (interpreting similar jurisdictional language of § 2251 and finding jurisdictional hook satisfied when the computer used to receive and store the child pornography, the compact discs used to store child pornography, the video camcorder used to videotape child pornography, and the digital camera used to photograph child pornography were all produced outside the state).

192. *See* United States v. Rodia, 194 F.3d 465, 473 (3d Cir.1999) (noting that the jurisdictional element will be satisfied, as a procedural matter, in nearly every case involving child pornography).

193. *Zimmerman*, 171 F. App'x at 9 (citing United States v. McCoy, 323 F.3d 1114, 1126 (9th Cir. 2003)) (finding the "materials" jurisdictional hook of § 2252(a)(4)(B) useless and that an "as applied" challenge will prevail without a showing that the particular conduct of the defendant had a substantial effect of interstate commerce); *Rodia*, 194 F.3d at 473 ("As a practical matter, the limiting jurisdictional factor is almost useless here, since all but the most self-sufficient child pornographers will rely on film, cameras, or chemicals that traveled in interstate commerce and will therefore fall within the sweep of the statute.").

nography bears so tenuous a link to interstate commerce that the jurisdictional hook is unconstitutional as applied to the facts of the particular situation.[194]

VII. OTHER IMPLICATIONS

A. *Pretrial Motions*

Federal Rule of Criminal Procedure 12(b)(3) allows a criminal defendant to make "a motion alleging a defect in the indictment or information . . . ."[195] Specifically, the defendant may assert that the indictment "fails to invoke the court's jurisdiction . . . ."[196] Therefore, the defendant may argue that the facts, asserted by the prosecution in the indictment or information fail to invoke the court's jurisdiction under the standards of the interstate movement approach and the action must be dismissed.[197] However, such a motion will succeed only if the defendant is being tried under § 2252(a) as it existed before the ECPPA.[198]

There are two effective responses to such a motion. First, the government should highlight that Congress amended the provisions of § 2252(a) to include the jurisdictional language "using any means or facility of interstate commerce."[199] This amendment could be seen as evidence that Congress always intended courts to interpret § 2252(a) in accordance with the per se approach and it simply provided statutory clarification on the point. Additionally, the government can argue that the jurisdictional element in the provisions of § 2252(a) are intertwined with the elements defining an offense. Therefore, jurisdiction is a jury issue and is

194. *See, e.g.*, United States v. Corp, 236 F.3d 325, 331–32 (6th Cir. 2001) (finding that in applying the jurisdictional hook, there must be a determination on a case-by-case basis about whether the activity involved in a certain case had a substantial effect on commerce); *Rodia*, 194 F.3d at 473 (finding it doubtful that § 2252(a)(4)'s jurisdictional hook adequately performs the function of guaranteeing that the final product regulated substantially affects interstate commerce); *Robinson*, 137 F.3d at 653, 654–56.

195. FED. R. CRIM. P. 12(b)(3)(B).

196. *Id.* It is important to note that Rule 12(b)(3) specifically allows the defendant to raise the issue of jurisdiction. *Id.*

197. *See, e.g.*, United States v. Beltran-Hernandez, No. CR 08-0726 WHA, 2009 WL 928169, at *1 (N.D. Cal. Apr. 3, 2009).

198. Pub. L. 110-358, 122 Stat. 4001, 4001–03 (2008) (codified as amended at 18 U.S.C. § 2252 (Supp. II 2008)). The ECPPA became effective October 8, 2008. *Id.* at 4001.

199. *Id.* at 4002.

properly challenged by a motion for judgment of acquittal after the government has presented its case in accordance with Federal Rule of Criminal Procedure 29.[200]

B. *Due Process*

The ECPPA amended the relevant provisions of the PCASEA to allow the government to establish jurisdiction by adducing evidence that would satisfy the per se approach.[201] Nonetheless, defendants that were tried under § 2252(a) as it existed before these amendments took effect have a possible due process argument if evidence did not satisfy the jurisdictional hook of the provision in accordance with the interstate movement approach.[202]

It is settled that Due Process requires the prosecutor to prove beyond a reasonable doubt every element in the offense charged.[203] The jurisdictional element is a material element for conviction under the provisions § 2252(a).[204] Application of any presumption, which acts to relieve the prosecution of its burden to prove the jurisdictional element, is constitutionally impermissible unless certain due process protections are in place.[205] Therefore, a defendant may be able to argue that application of the per se approach has the impermissible impact of relieving the prosecution of proving a material element of the offense—namely, by relieving the prosecution of proving that the defendant transported, received, distributed, or possessed the proscribed image in or through interstate or foreign commerce.

C. *Sufficiency of the Evidence*

As a final consideration, a defendant convicted under § 2252(a) for an act committed before October 8, 2008 should consider appealing the conviction on the basis of the sufficiency of the evidence. The sufficiency of the evidence to sustain a conviction is a

200. United States v. Nukida, 8 F.3d 665, 673 (9th Cir. 1993).

201. Pub. L. 110-358, 122 Stat. 4001, 4002 (2008) (codified as amended at 18 U.S.C. § 2252 (Supp. II 2008)).

202. The amendments took effect October 8, 2008. *Id.* at 4001.

203. *In re* Winship, 397 U.S. 358, 364 (1970).

204. United States v. Beltran-Hernandez, No. CR 08-0726 WHA, 2009 WL 928169, at *3 (N.D. Cal. Apr. 3, 2009).

205. Mullaney v. Wilbur, 421 U.S. 684, 702 n.31 (1975).

question of law the appellate court reviews de novo.[206] However, the evidence will be viewed in the light most favorable to the government.[207] Nonetheless, given that the jurisdictional element is a material element of the offense,[208] an appellant may obtain a reversal of a conviction if the government failed to tender evidence that sufficiently proved the jurisdictional hook in accordance with the interstate movement approach.[209]

VIII. CONCLUSION

Section 2252 enables the federal government to prosecute individuals for certain crimes involving child pornography including (but not limited to) transporting, distributing, receiving, or possessing child pornography. To convict an individual of any of these offenses, the government must prove the "jurisdictional hook" that connects the conduct of the accused with interstate or foreign commerce. As electronic transmissions of child pornography have become more prevalent, two theories have emerged on how electronic transmissions of child pornography interacted with the jurisdictional hooks: the per se approach and the interstate movement approach.

With the advent of sexting among teenagers, federal prosecutors will face the choice of prosecuting young adults for transporting, shipping, receiving, or distributing child pornography via mobile phone. The current language of § 2522(a) supports application of the per se approach and the existence of federal subject matter jurisdiction in almost any situation where a child pornography crime has been committed by sexting. However, the statutory language that allows for the use of the per se approach did not become effective until October 8, 2008. Thus, if the defendant committed the alleged offense prior to that date, there is a strong argument that the prosecution must prove jurisdiction in accordance with the interstate movement approach.

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206. United States v. Chavis, 461 F.3d 1201, 1207 (10th Cir. 2006).

207. United States v. Triana, 477 F.3d 1189, 1194 (10th Cir. 2007) (quoting United States v. Platte, 401 F.3d 1176, 1180 (10th Cir. 2005)).

208. *Beltran-Hernandez*, 2009 WL 928169, at *3.

209. United States v. Schaefer, 501 F.3d 1197, 1205 (10th Cir. 2007) (holding that the evidence presented was insufficient to sustain conviction where government did not prove proscribed images had crossed state lines).

However, the interstate movement approach has a very short lifespan. As the appeals for offenses committed before October 8, 2008 grow less frequent, as well as the prosecution for more offenses committed subsequent to that date, it will continue to fade in legal significance. Ultimately, the interstate movement approach will find its resting place in the graveyard of rejected jurisdictional theories, laid to rest by the ECPPA.

And so, we return to Hiro and Peter to watch how the scene concludes. Hiro's arm is outstretched and holding an evidence bag that contains all the proof Peter needs to establish jurisdiction—the cheerleader's cell phone. Peter walks over to Hiro and begins to reach for the bag. Then, he pauses. There is no doubt in his mind that he can take the bag. There is no doubt in his mind that he can prosecute the cheerleader. Rather, he hesitates for a different reason—a single doubt whispering in his mind—if he prosecutes the cheerleader, will it really save the world?

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