UNITED STATES V. SCHAEFER AND *UNITED STATES V. STURM*: WHY THE FEDERAL GOVERNMENT SHOULD REGULATE ALL INTERNET USE AS INTERSTATE COMMERCE

ABSTRACT

Technology is always evolving and at an ever-increasing rate. This evolution leaves the law playing catch-up, with courts left to apply existing laws to new realities. The rapid growth and adoption of the Internet is a prime example, leaving some courts and prosecutors at odds with which laws Internet crimes should be tried under. . Should Internet use, by itself, constitute interstate commerce, thereby invoking federal jurisdiction? This question is explored by reviewing two child pornography cases decided by the Tenth Circuit: *United States v. Schaefer* and *United States v. Sturm*, and the history of Commerce Clause jurisprudence.

In 2007, an admitted possessor of child pornography was acquitted by the Tenth Circuit, which held that proof of child pornography materials moving across state lines was required for a conviction under the federal child pornography laws. This ruling by the Tenth Circuit contradicted several decisions from other federal circuits, which held that proof of Internet use alone in connection with child pornography was enough for a conviction. Seeking to clarify the intent of the child pornography laws, Congress passed the Effective Child Pornography Prosecution Act of 2007 (ECPPA). The ECPPA declared that use of the Internet to receive, possess, and distribute child pornography fell under Congress's Commerce Clause powers.

Following the enactment of the ECPPA, the Tenth Circuit was again asked to interpret the federal child pornography laws in *United States v. Sturm*. Interpreting the same child pornography laws applicable in *Schaefer*, the court overruled its *Schaefer* decision, ultimately leading to a conviction in *Sturm*. These two inconsistent rulings reveal the difficulties that courts have in interpreting existing laws to new technology. This Comment urges Congress to act proactively, rather than reactively as it did with the ECPPA, by declaring that Internet use constitutes interstate commerce for all federal laws, and contends that such a declaration is within Congress's Commerce Clause powers.

TABLE OF CONTENTS

INTRODUCTION

Confess to a crime and punishment follows—not always. Enter the Tenth Circuit decisions of *United States v. Schaefer*[1] and *United States v. Sturm*.[2] In *Schaefer*, the defendant admitted to searching for child pornography on the Internet;[3] however, the confession was not enough to uphold a conviction.[4] The *Schaefer* court held that the Government did not carry its burden of proof because it failed to establish that pornographic images had ever traveled across state lines.[5] Congress responded to the *Schaefer* decision by enacting the Effective Child Pornography Prosecution Act of 2007 (ECPPA) to give federal prosecutors the full reach of the Commerce Clause by amending the statute to read "in or affecting commerce."[6] Following the ECPPA, the Tenth Circuit overturned its decision in *Schaefer*, holding that the term "visual depiction" contained in federal child pornography statutes meant the "substantive content" of the image contained on the tangible media.[7] Although the *Sturm* decision led to a conviction,[8] it was far from clear-cut.

1. 501 F.3d 1197 (10th Cir. 2007), *overruled by* United States v. Sturm, 672 F.3d 891 (10th Cir. 2012) (en banc).
2. 672 F.3d 891 (10th Cir. 2012) (en banc).
3. *Schaefer*, 501 F.3d at 1198.
4. *Id.* at 1207.
5. *Id.*
6. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 103, 122 Stat. 4001 (2008) (codified in various sections of 18 U.S.C.).
7. *Sturm*, 672 F.3d at 901. "Visual depiction," or the "substantive content" of the image, means the thing that is portrayed within the file or photograph, and is only created once. For example, say you take a picture of your new car using your digital camera. The moment you snap a photograph of your new car, you have created a visual depiction of your new car. Making a copy of this

In passing the ECPPA, Congress clearly intended that anybody who used the Internet in connection with child pornography be punished.[9] Did Congress go too far? Has the Internet become such an interstate activity that the federal government should have free reign to prosecute all cybercrime? This Comment argues that Congress has reacted appropriately by equating Internet use to interstate commerce, and that this broader commerce definition based on Internet usage should be applied to all federal laws.

Although the cases of *Schaefer* and *Sturm* both involve crimes related to child pornography,[10] this Comment will look beyond that context. This Comment will use the decisions in *Schaefer* and *Sturm* as a platform to discuss issues with regulating the Internet like traditional methods of communication, in an effort to show that Congress's move to declare use of the Internet as interstate commerce in the child pornography statutes should be adopted in all federal laws. Part I of this Comment will look at the development of the child pornography laws and why a change was needed. Part II will analyze why treating all Internet use as interstate commerce does not violate the Constitution, and why it falls within the powers granted to Congress under the Commerce Clause. Part III will discuss the benefits of adopting a policy that classifies Internet use as interstate commerce. This Comment will conclude that a clear mandate from Congress to adopt such a policy for all Internet use will provide a straightforward answer to all courts and citizens, and such a policy is the only way to effectively prosecute those criminals who use the Internet as their weapon of choice.

I. EVOLUTION OF THE CHILD PORNOGRAPHY LAWS

A. A Brief History

The early child pornography statutes were enacted prior to the Internet becoming a part of everyday life.[11] In passing these early statutes, Congress realized the dangers to society that child pornography presented.[12] Recognizing this, Congress sought to remedy the problem by pass-

photograph does not create a new visual depiction; it simply creates a copy of the visual depiction. This visual depiction may be saved in a digital file on your camera or computer. Although the digital file is the media that you can share with friends and family via e-mail, social networks, etc., the substantive content of that digital file is the picture or image of your new car that you see when you view the file on your camera or open the digital file on your computer screen.

8. United States v. Sturm, 673 F.3d 1274, 1288 (10th Cir. 2012).

9. *See id.*; *see also* David M. Frommell, Comment, *Pedophiles, Politics, and the Balance of Power: The Fallout from* United States v. Schaefer *and the Erosion of State Authority*, 86 DENV. U. L. REV. 1155, 1166 (2009).

10. *Sturm*, 672 F.3d at 892; *Schaefer*, 501 F.3d at 1197.

11. Frommell, *supra* note 9, at 1156–58 (discussing the history of the child pornography statutes beginning with the Protection of Children Against Sexual Exploitation Act of 1977 through the first child pornography statute to address computer use in the Child Protection Act of 1988).

12. Michael D. Yanovsky Sukenik, *Distinct Words, Discrete Meanings: The Internet & Illicit Interstate Commerce*, 2011 U. ILL. J.L. TECH. & POL'Y 1, 7.

ing legislation that would stop child pornography from spreading using "instrumentalities of interstate . . . commerce."[13] By 1988, Congress saw the dangerous potential that new technology, such as computers and the Internet, could play in the spread of child pornography.[14] As a result, Congress amended the Child Protection Act of 1984 by prohibiting any "knowing transportation, shipment, receipt or distribution of child pornography . . . by any means, including by computer."[15] It is under this version of the statute that we begin our review of the case law.

Prior to the Tenth Circuit's ruling in *Schaefer*, many other circuits were asked to interpret the language of the child pornography statutes.[16] In each of these earlier cases, the interpretation by the federal courts of appeals reached the same conclusion—Internet use constituted interstate commerce.[17] The *Schaefer* court, however, decided to rule differently,[18] arguably going against congressional intent.[19]

In *Schaefer*, the district court convicted the defendant for possession of child pornography based in part on evidence that he had subscribed to websites that contained images of child pornography.[20] The Tenth Circuit, however, reversed the district court's conviction, holding that the Government failed to prove actual "movement across state lines."[21] Rejecting the view of the other circuits,[22] the Tenth Circuit required clear evidence that the images of child pornography possessed by Schaefer had in fact "moved across state lines."[23] The court reasoned that the plain language of the statute supported its ruling.[24] The Tenth Circuit's ruling, however, allowed Schaefer to escape conviction, even though he had

13. *Id.* (quoting S. Rep. No. 95-438, at 5 (1977)) (internal quotation mark omitted); *see also* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2252, 92 Stat. 7 (1978) (codified at 18 U.S.C. §§ 2251–2259 (2012)) (regulating any "visual or print medium" that depicts child pornography).

14. *See* Frommell, *supra* note 9, at 1158.

15. *Id.* (citing Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7511, 102 Stat. 4181 (codified at 18 U.S.C. §§ 2251–53, 2423 (2012)).

16. *See* United States v. MacEwan, 445 F.3d 237, 242 (3d Cir. 2006) (holding that use of the Internet is sufficient evidence to show interstate activity); United States v. Runyan, 290 F.3d 223, 242 (5th Cir. 2002) ("[C]ircumstantial evidence linking a[n] . . . image to the Internet . . . can be sufficient evidence of interstate transportation . . . ."); United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997) ("Transmission . . . by means of the Internet is tantamount to moving . . . across state lines and thus constitutes transportation in interstate commerce.").

17. *See* cases cited *supra* note 16; *see also* Frommell, *supra* note 9, at 1164–65.

18. United States v. Schaefer, 501 F.3d 1197, 1198 (10th Cir. 2007), *overruled by* United States v. Sturm, 672 F.3d 891 (10th Cir. 2012) (en banc).

19. Sukenik, *supra* note 12, at 14.

20. *Schaefer*, 501 F.3d at 1198.

21. *Id.*

22. *See* cases cited *supra* note 16; *see also* Frommell, *supra* note 9, at 1165.

23. *Schaefer*, 501 F.3d at 1198.

24. *Id.* at 1207 (holding that 18 U.S.C. § 2252(a)(2) and § 2252(a)(4)(B) require "movement across state lines").

confessed to searching for child pornography on the Internet.[25] This outcome outraged Congress, prompting an immediate reaction.[26]

The ECPPA made it clear that Congress intends all use of the Internet to constitute interstate commerce.[27] Congress responded to the Tenth Circuit's *Schaefer* decision in an effort to prevent a similar "misreading" by a court in the future.[28] Later, the Tenth Circuit was asked again to interpret the child pornography statutes in *United States v. Sturm*.

In *Sturm*, the Tenth Circuit was required to interpret the child pornography statutes it had previously interpreted in *Schaefer*.[29] As was the defendant in *Schaefer*, the defendant in *Sturm* was charged with possession of child pornography based on pornographic images found on his hard drive that had been saved while using the Internet.[30] Unlike the *Schaefer* court, however, this court was acting in the wake of the new ECPPA, which made it clear that the *Schaefer* decision was at odds with the intent of Congress.[31] Arguably succumbing to the wishes of Congress, the *Sturm* court overruled its prior decision in *Schaefer*.[32] In overruling *Schaefer*, however, the *Sturm* court did not change its reading of the statute requiring proof of actual movement across state lines.[33] Instead, it found a different reading of "visual depiction,"[34] allowing the Tenth Circuit to reach the result Congress intended in a roundabout way.[35] This ruling meant that it is the image portrayed in the digital file that must move across state lines, rather than the digital file itself.[36] The court even went on to suggest how the Government may prove this necessary interstate element, on remand, by showing that the "substance of

25. *Id.* at 1198.

26. Sukenik, *supra* note 12, at 14 ("[R]eversal of a conviction of a man who 'was found to be in possession of child pornography' on trivial textual grounds… [was] 'a truly unfortunate and . . . wrongly decided decision.'" (quoting Rep. John Conyers Jr., Democrat from Michigan)).

27. Act of Oct. 8, 2008, Pub. L. No. 110-358, § 102(7), 122 Stat. 4001 (codified as amended at 18 U.S.C. § 2251 (2012)); *see also* Frommell, *supra* note 9.

28. *See* Sukenik, *supra* note 12, at 14.

29. *See* United States v. Sturm, 672 F.3d 891, 897 (10th Cir. 2012) (en banc).

30. *Id.* at 896.

31. *Compare* Pub. L. No. 110-358, § 102(7), 122 Stat. 4001 (2008) ("The transmission of child pornography using the Internet constitutes transportation in interstate commerce.") (codified as amended at 18 U.S.C. § 2251 (2012)), *with* United States v. Schaefer, 501 F.3d 1197, 1207 (2007) (holding that evidence of Internet use was insufficient to satisfy jurisdictional requirement of interstate commerce).

32. *See Sturm*, 672 F.3d at 901.

33. *Id.* at 897.

34. *Id.* at 900.

35. *See* Sukenik, *supra* note 12, at 14 (discussing Congress's dissatisfaction with the Tenth Circuit's strict textual interpretation, contradicting the intent of Congress).

36. *Sturm*, 672 F.3d at 900 (construing "the term visual depiction to mean the substantive content of an image"). To further explain the ruling by the court, imagine taking a photograph of your car in front of your Denver, Colorado house. The photographed car was built at a factory in Detroit, Michigan. At some point, the car traveled from the factory in Detroit to your house in Denver. Under the *Sturm* ruling, the physical photograph that you can hold in your hand depicting the car does not need to travel across state lines. The interstate jurisdictional requirement is met because the car you photographed was built in a different state and at some point traversed state lines to arrive in your driveway.

an image of child pornography was made in a state and/or country other than the one in which the defendant resides."[37] The Tenth Circuit's ruling accomplished two things. First, the court satisfied Congress.[38] Second, the court remained committed to *Schaefer*'s strict textual interpretation of the statute by requiring actual interstate movement,[39] thereby enabling the court to continue rejecting the reasoning of the other federal circuits—that Internet use constitutes interstate commerce.[40]

B. Why the Previous Framework Was Not Working

The inconsistency the Tenth Circuit exhibited in its interpretation of an identical statute in *Schaefer* and *Sturm* demonstrates a need for change in how Congress addresses the relationship between law and technology. Until the *Schaefer* decision, Congress was pleased with the interpretations provided by the courts.[41] Although some scholars have criticized Congress for not acting sooner,[42] there was no need for Congress to act when the decisions were following the intent of Congress.[43] The decisions by the Tenth Circuit should not come as a surprise, however, because courts have long struggled to apply the laws in our new technological age.[44]

In 1996, the Sixth Circuit was the first to apply obscenity standards to the Internet.[45] The standards applied by the Sixth Circuit in *United States v. Thomas* were established by the Supreme Court in 1973,[46] long before the mainstream adoption of the Internet.[47] In *Thomas*, the Sixth Circuit attempted to determine what "community standards" it should apply when Internet users access pornography from different jurisdictions.[48] The court ultimately held that "varying community standards"

37. *Id.* at 901–02.

38. *See Sturm*, 673 F.3d at 1277 (affirming conviction after remand); *see also* Sukenik, *supra* note 12, at 14 (discussing the negative reaction to the *Schaefer* decision by members of Congress).

39. *Sturm*, 672 F.3d at 901 ("[T]he Government is . . . required to prove that the visual depiction 'has been' . . . transported in interstate . . . commerce at any point in time." (quoting 18 U.S.C. § 2252(a)(2)(B) (2012)); United States v. Schaefer, 501 F.3d 1197, 1206 (10th Cir. 2007) ("The government needed to prove that the images . . . moved between states."), *overruled by* United States v. Sturm, 672 F.3d 891 (10th Cir. 2012) (en banc).

40. *See* Frommell, *supra* note 9, at 1164 ("[T]he First, Fifth, and Third Circuits . . . embrace the inference that mere Internet use involves interstate commerce . . . .").

41. *See* Sukenik, *supra* note 12, at 13 ("Having grown accustomed to the judicial interpretation furnished by the majority circuits, Congress did not previously have occasion or incentive to consider whether its statutory drafting failed to account for advances in modern technology.").

42. *See id.* at 31 (noting that Congress decided not to broaden statutory language to clearly explain congressional intent over the course of several statutory amendments).

43. *Id.* at 13.

44. Mitchell P. Goldstein, *Congress and the Courts Battle over the First Amendment: Can the Law Really Protect Children from Pornography on the Internet?*, 21 J. MARSHALL J. COMPUTER & INFO. L. 141, 155 (2003).

45. United States v. Thomas, 74 F.3d 701, 709 (6th Cir. 1996).

46. *See* Goldstein, *supra* note 44, at 151 (citing Miller v. California, 413 U.S. 15, 24 (1973)).

47. *NSF and the Birth of the Internet—1990s*, NAT'L SCI. FOUND., http://www.nsf.gov/news/special_reports/nsf-net/textonly/90s.jsp (last visited Feb. 15, 2013).

48. *Thomas*, 74 F.3d at 710–12.

may apply, which can result in a more conservative standard.[49] It remains unclear, however, whether this idea of community standards is suited for the Internet due to its pervasiveness.[50]

The confusion among the courts extends beyond pre-Internet statutes.[51] In 1996, Congress passed the Child Pornography Prevention Act (CPPA).[52] Unlike earlier versions of child pornography statutes, the CPPA targeted the exploitation of minors that is facilitated by new technology.[53] The CPPA attempted to prohibit the use of technology to create "virtual child pornography."[54] Even in the current age of everyday technology use, the courts again were unable to come to a common understanding.[55] In the end, the Supreme Court stepped in to resolve the circuit split, finding that the law overstepped the protections of the First Amendment.[56]

The cases of *Schaefer* and *Sturm* further demonstrate the difficulties the courts have in applying the law in today's world of ever-increasing technological innovation. Despite their best efforts, the courts have been unable to consistently apply the law to new technology.[57] A member of Congress echoed this concern, stating that "[w]e live in a world of very quickly transforming technology[, and t]he courts sometimes have difficulty keeping up with that."[58] This leaves the law unsettled, requiring one of two things: allowing the courts to continue to stretch existing laws to new realities or demanding that Congress take action. The Tenth Circuit's decisions in *Schaefer* and *Sturm* demonstrate that leaving courts to apply outdated laws to new technology is not the best solution in the long term.[59] These inconsistent decisions leave congressional action as the

49. *See id.* at 711.

50. *See* Goldstein, *supra* note 44, at 155–57.

51. *Id.* at 171.

52. Onmibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121, 110 Stat. 3009 (1996) (codified as amended at 18 U.S.C. §§ 2251, 2252, 2252A, 2256 (2012)).

53. *Id.*

54. *Id.*

55. *See* United States v. Fox, 248 F.3d 394, 397 (5th Cir. 2001); United States v. Mento, 231 F.3d 912, 915 (4th Cir. 2000); Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999); United States v. Acheson, 195 F.3d 645, 650 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61, 65 (1st Cir. 1999).

56. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002).

57. *Compare* cases cited *supra* note 16 (holding in each case that use of the Internet alone was sufficient to show interstate movement), *with* United States v. Sturm, 672 F.3d 891, 892 (10th Cir. 2012) (en banc) (holding that the Government met its burden of proof by showing "the substantive content of the images" traveled in interstate commerce), *and* United States v. Schaefer, 501 F.3d 1197, 1198 (10th Cir. 2007) (holding that proof of Internet use does not prove interstate commerce); *see also* Goldstein, *supra* note 44, at 173 (noting the circuit split interpreting the CPPA); Frommell, *supra* note 9, at 1164–65 (discussing the circuit split interpreting child pornography jurisdictional requirements).

58. Sukenik, *supra* note 12, at 14 (first alteration in original) (quoting Rep. Christopher Cannon, Republican from Utah).

59. *See Sturm*, 672 F.3d at 901 (overturning *Schaefer* in the wake of congressional action amending child pornography statutes).

only method available to establish clear law to be applied in today's technology-driven world.

II. WHY CLASSIFYING INTERNET USE AS INTERSTATE COMMERCE DOES NOT VIOLATE THE CONSTITUTION

Congress's decision to expand federal jurisdiction through the ECPPA is firmly rooted in the Commerce Clause powers. Commerce Clause jurisprudence can be traced as far back as 1824. In *Gibbons v. Ogden*,[60] Chief Justice Marshall laid the foundation for Congress's commerce power, stating that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[61] Congress's power under the Commerce Clause has a history of expanding with the way business is conducted.[62] In *NLRB v. Jones & Laughlin Steel Corp.*,[63] the Supreme Court held that the right of employees to organize was a labor practice affecting commerce.[64] In doing so, the Court broke free from the more limited reach that Congress's commerce power previously had.[65] The *Jones & Laughlin* decision established the idea that intrastate activities may affect interstate commerce, thereby recognizing the power of Congress to regulate local business activities based on the effect it may have on the national economy.[66] More recently, the Supreme Court has clarified the commerce power and its application with its decisions in *United States v. Lopez*,[67] *United States v. Morrison*,[68] and *Gonzales v. Raich*.[69] A review of this modern Commerce Clause jurisprudence will show that the congressional mandate—Internet use constitutes interstate commerce—is supported by the Constitution.[70]

A. The Federal Government's Powers Under the Commerce Clause

1. *Lopez* Lays the Groundwork

In *Lopez*, the Rehnquist-led Court reviewed a century of Commerce Clause jurisprudence to establish "three broad categories of activity that Congress may regulate."[71] The first category is the "channels of interstate

60. 22 U.S. (9 Wheaton) 1 (1824).
61. *Id.* at 189–90.
62. *See* United States v. Lopez, 514 U.S. 549, 556 (1995).
63. 301 U.S. 1 (1937).
64. *Id.* at 43.
65. *Lopez*, 514 U.S. at 556.
66. *See Jones & Laughlin*, 301 U.S. at 37.
67. 514 U.S. 549 (1995).
68. 529 U.S. 598 (2000).
69. 545 U.S. 1 (2005).
70. *See* Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (codified throughout 18 U.S.C.); *see also* Frommell, *supra* note 9 (noting the new child pornography statute "equates Internet use with interstate commerce").
71. *Lopez*, 514 U.S. at 558.

commerce."[72] "Channel" is defined as a waterway, or more precisely, a "groove through which a stream flows."[73] Applying this definition to interstate commerce, one can logically conclude that a channel of interstate commerce is a path, route, or course that commerce may flow or move through. This application aligns with Supreme Court precedent.[74]

The second category is the "instrumentalities of interstate commerce."[75] An "instrumentality" is defined as "a thing used to achieve an end or purpose."[76] The *Lopez* Court clarified that application of an instrumentality to interstate commerce included things used in interstate commerce, "or persons or things in interstate commerce."[77] The authority to regulate instrumentalities under the Commerce Clause extends to intrastate activities.[78]

The third category includes those activities that "substantially affect interstate commerce."[79] The "substantially affects" category applies primarily to those activities that are economic in nature.[80] The *Lopez* Court identified four factors to determine if an activity substantially affects interstate commerce: (1) is the statute regulating economic activity? (2) does the statute have a jurisdictional element limiting its reach to interstate commerce? (3) is there legislative history linking the statute to interstate commerce? and (4) is the relationship between the regulated activity and interstate commerce "attenuated"?[81] Like instrumentalities, the substantially affects test permits regulation of intrastate activities.[82] The Court went on to explain that although the power to regulate the first two categories is clear, the power to regulate those activities that fall under the third category may be murky.[83]

Having established these three categories, the *Lopez* Court then turned to the case at hand involving the Gun-Free School Zones Act of

72. *Id.*

73. BLACK'S LAW DICTIONARY 264 (9th ed. 2009).

74. *See Lopez*, 514 U.S. at 558 ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." (alteration in original) (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917)) (internal quotation mark omitted).

75. *Id.*

76. BLACK'S LAW DICTIONARY, *supra* note 73, at 870.

77. *See Lopez*, 514 U.S. at 558.

78. *Id.* (providing examples such as "destruction of an aircraft, or . . . thefts from interstate shipments" (alteration in original)).

79. *Id.* at 558–59.

80. United States v. Morrison, 529 U.S. 598, 613 (2000) ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

81. *Id.* at 610–12; *see also Lopez*, 514 U.S. at 559, 561–62.

82. *Lopez*, 514 U.S. at 559 ("[The Court has] upheld a wide variety of congressional Acts regulating intrastate activity where [the Court has] concluded that the activity substantially affected interstate commerce.").

83. *Id.*

1990.[84] Indicating that the Act could only be supported by the third category,[85] the Court proceeded to review the Act against the four previously noted factors to determine if the Act regulated activity that substantially affected interstate commerce.[86] The Court concluded that the Act failed under the third category because it "ha[d] nothing to do with 'commerce' or any sort of economic" activity.[87]

2. *Lopez* Applied in *Morrison*

The *Morrison* Court addressed whether the Violence Against Women Act (VAWA) fell within the third *Lopez* category.[88] VAWA was a federal law that provided civil remedies to women who were victims of gender-motivated violence.[89] VAWA, like the statute at issue in *Lopez*, was a criminal statute containing no element related to commerce or economics.[90] Though not ruling out the possibility, the Court concluded that such a "noneconomic" statute does not allow for federal regulation of a purely intrastate activity.[91] Thus, as did the *Lopez* Court, the *Morrison* Court found that the statute lacked the required connection to interstate commerce.[92]

3. *Lopez* Applied in *Raich*

In *Raich*, the Supreme Court was again asked to determine whether Congress had the power to regulate seemingly non-commercial activity under the Commerce Clause.[93] *Raich* considered the effects of homegrown medical marijuana for personal possession and use under the Controlled Substances Act (CSA), and whether the CSA was a valid application of the Commerce Clause.[94] Finding significant support from *Wickard v. Filburn*,[95] the Court ruled that there was sufficient connection be-

84. *Id.* at 551 (making it illegal to possess a gun in a school zone).
85. *Id.* at 559.
86. *Id.* at 559, 561–62.
87. *Id.* at 561.
88. United States v. Morrison, 529 U.S. 598, 609 (2000) (reviewing whether VAWA regulated an activity substantially affecting interstate commerce).
89. *Id.* at 601–02.
90. *Id.* at 613.
91. *Id.* ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").
92. *Id.* at 617–18.
93. *See* United States v. Raich, 545 U.S. 1, 8 (2005) ("The Court of Appeals distinguished prior Circuit cases . . . by focusing on what it deemed to be the '*separate and distinct class of activities*' at issue in this case: the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes . . . ." (quoting Raich v. Ashcroft, 352 F.3d 1222, 1228 (9th Cir. 2003)) (internal quotation mark omitted)).
94. *Id.* at 15.
95. 317 U.S. 111 (1942).

tween the interstate regulation of marijuana and the homegrown marijuana that the defendant was using.[96]

As was the statute in *Wickard*, the CSA was enacted to control the interstate market of controlled substances, such as marijuana.[97] Reasoning that purely intrastate wheat production and consumption would affect the interstate market for wheat, the *Wickard* Court concluded that Congress had a "rational basis" for regulating intrastate wheat activity.[98] Here, the *Raich* Court came to the same conclusion, stating that "failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."[99]

These cases establish the current scope and reach of what may be regulated under the Commerce Clause. Additionally, the cases demonstrate that the federal government may regulate purely intrastate activity so long as the thing being regulated has an economic effect on interstate commerce. As will be explained below, the Internet has come to play a vital role in personal and commercial economic activity, thereby lending itself to be fully regulated under the Commerce Clause.

B. The Commerce Power Applied to the Internet Under Lopez

To understand how the commerce power applies to the Internet, we first must determine which category it falls under. As summarized above, the *Lopez* Court established three areas of interstate commerce that Congress may regulate under the Commerce Clause: channels, instrumentalities, and activities that substantially affect interstate commerce. The Internet arguably falls within all three *Lopez* categories: channels, instrumentalities, and substantial effect. Although only one category is needed to enable Congress to regulate, an activity must fall outside all three categories to escape Congress's commerce power.[100] These categories, and their application to the Internet, will be examined below.

1. The Internet as a Channel

A channel of interstate commerce is a path, route, or course that commerce may flow or move through.[101] Traditional examples of interstate commerce channels are rivers, highways, and railways.[102] If you go

96. *Raich*, 545 U.S. at 32–33.

97. *Id.* at 18–19 ("Just as the Agricultural Adjustment Act [in *Wickard*] was designed 'to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses. . .' and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets." (second alteration in original) (citations omitted) (quoting *Wickard*, 317 U.S. at 115)).

98. *Id.* at 19.

99. *Id.* at 22.

100. United States v. Lopez, 514 U.S. 549, 558 (1995).

101. *See supra* Part II.A.1.

102. Nathaniel H. Clark, Comment, *Tangled in a Web: The Difficulty of Regulating Intrastate Internet Transmissions Under the Interstate Commerce Clause*, 40 MCGEORGE L. REV. 947, 954 (2009).

to your local electronics retail store and purchase a television, you have participated in interstate commerce because prior to you purchasing the television, it was manufactured and delivered to your local electronics retail store, most likely by highway. Although your purchase of the television was entirely intrastate, it traveled through a channel of interstate commerce, the highway, to reach you.

Much like the path of the television in the example above, the Internet is a channel of interstate commerce, one that continues to grow in popularity.[103] The Internet allows you to connect with people and businesses worldwide. Each transmission you send or receive over the Internet is transported through various computer networks to reach its intended destination.[104] Although there are many non-commercial, personal uses of the Internet, more people than ever are turning to the Internet to conduct business.[105] One example of this is Internet shopping, or e-commerce. E-commerce is the business of buying and selling goods or services via the Internet.[106] The goods being purchased may include a television or a software product that is sent to you electronically. In either case, you have used the Internet as a channel of interstate commerce.

2. The Internet as an Instrumentality

As established in *Lopez*, an instrumentality is something used in interstate commerce "or persons or things in interstate commerce."[107] The Supreme Court has previously stated that "railroads, highways, and bridges constitute instrumentalities of interstate commerce."[108] These examples seem to describe some of the channels just discussed. But it is important to note that a channel can be an instrumentality, and vice versa.[109]

The Internet meets the definition of instrumentality as does a highway, railroad, or bridge, being both a channel and instrumentality of interstate commerce. We can use each of these as a tool to traverse state and national boundaries, but each one is also a path that commerce trav-

103. *Internet World Stats—Usage and Population Statistics*, INTERNETWORLDSTATS.COM, http://www.internetworldstats.com/stats.htm (last updated Jan. 17, 2013) (citing world growth of Internet use at 566.4% between 2000 and 2012).

104. *See generally* United States v. MacEwan, 445 F.3d 237, 241 (3d Cir. 2006) (explaining the process of routing Internet traffic); Clark, *supra* note 102, at 952–53 (explaining the process for intrastate Internet transmissions).

105. Pascal-Emmanuel Gobry, *The Internet is 20% of Economic Growth*, BUS. INSIDER INTELLIGENCE (May 24, 2011, 8:37 AM), http://www.businessinsider.com/mckinsey-report-internet-economy-2011-5?op=1 (noting the Internet represents over 20% of economic growth during the last five years).

106. Rifat Azam, *E-Commerce Taxation and Cyberspace Law: The Integrative Adaptation Model*, 12 VA. J.L. & TECH. 5, 14 (2007).

107. United States v. Lopez, 514 U.S. 549, 558 (1995).

108. United States v. Bishop, 66 F.3d 569, 588 (3d Cir. 1995).

109. *See MacEwan*, 445 F.3d at 245 (concluding that the "Internet is an instrumentality and channel of interstate commerce"); *see also* 15 C.J.S. COMMERCE § 110 (2012) ("The Internet is generally an instrumentality and a channel of interstate commerce.").

els through. The Internet meets this dual classification because of the Internet's nature as being both the thing we use to buy a DVD, and the network of channels that the payment information we use to purchase the DVD travels through.

Identifying the Internet as an instrumentality of interstate commerce in this manner is not a novel concept.[110] Contrary to the views of some,[111] numerous courts have established that the Internet is an instrumentality of interstate commerce,[112] with some going so far as to say that finding something more "intertwined" with interstate commerce would be "difficult."[113] Although the Supreme Court has not expressly declared that the Internet is an instrumentality of interstate commerce, several cases decided by the Court concerning other interstate facilities support the proposition that the Internet is an instrumentality of interstate commerce.[114] In addition to the courts, many scholars have supported the idea that the Internet is an instrumentality of interstate commerce.[115] Thus, it seems evident that the Internet meets the definition of an instrumentality of interstate commerce.

3. Use of the Internet Substantially Affects Interstate Commerce

The substantially affects test focuses on economic activity.[116] As the *Morrison* Court put it, "While we need not adopt a categorical rule against aggregating . . . noneconomic activity . . . , thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[117] If the activity is shown to substantially affect interstate commerce, Congress may regulate such activity even if it is purely local in nature.[118] We now turn to the factors discussed in *Lopez* to determine if the Internet substantially affects interstate commerce.

110. *See* sources cited *supra* note 109.

111. *See* Clark, *supra* note 102, at 958–59 (identifying a computer or mobile device as the instrumentality used to access the Internet).

112. United States v. Faris, 583 F.3d 756, 759 (11th Cir. 2009); Utah Lighthouse Ministry v. Found. for Apologetic Info. & Res., 527 F.3d 1045, 1054 (10th Cir. 2008); *MacEwan*, 445 F.3d at 245.

113. *MacEwan*, 445 F.3d at 245.

114. Kenneth D. Bassinger, Note, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889, 904 n.102 (1998) (citing Fed. Power Comm'n v. Union Elec. Co., 381 U.S. 90, 94 (1965) (holding the transmission of electricity is subject to commerce power); Head v. N.M. Bd. of Exam'rs in Optometry, 374 U.S. 424, 427 (1963) (holding that radio station broadcasts over state lines constitute interstate commerce)).

115. *See* Frances E. Zollers et al., *Fighting Internet Fraud: Old Scams, Old Laws, New Context*, 20 TEMP. ENVTL. L. & TECH. J. 169, 181 (2002); Bassinger, *supra* note 114, at 926; Greg Y. Sato, Note, *Should Congress Regulate Cyberspace?*, 20 HASTINGS COMM. & ENT. L.J. 699, 716 (1998).

116. *See supra* note 80 and accompanying text.

117. United States v. Morrison, 529 U.S. 598, 613 (2000).

118. *See supra* note 82.

To reiterate, the *Lopez* Court identified four factors to help determine if an activity substantially affects interstate commerce: (1) is the statute regulating economic activity? (2) does the statute have a jurisdictional element limiting its reach to interstate commerce? (3) is there legislative history linking the statute to interstate commerce? and (4) is the relationship between the regulated activity and interstate commerce "attenuated"?[119] I will apply these factors to the ECPPA to better illustrate how the Internet substantially affects interstate commerce.

First, is the ECPPA regulating economic activity? The ECPPA was enacted to combat the receipt, possession, and distribution of child pornography.[120] As early as 2005, the child pornography industry was estimated to be a $3 billion per year industry.[121] In 2006, worldwide pornography revenues reached $97.06 billion.[122] That same year, revenues for Internet pornography in the United States reached $2.84 billion, or 21.3% of the entire United States pornography market.[123] Additionally, about 20% of all Internet pornography involves children.[124] These figures make it very clear that child pornography is a thriving economic industry. But can these figures serve as the basis for holding that the ECPPA is actually regulating economic activity? To answer this question, compare the ECPPA with the statute in *Lopez* that dealt with the "possession of a gun in a local school zone."[125] The *Lopez* statute did not deal with the receipt or distribution of a gun, whereas the ECPPA expressly mentions receipt and distribution of child pornography.[126] By mentioning receipt and distribution, the ECPPA is connected to an activity that "through repetition" may substantially affect interstate commerce.[127] Possession of anything alone, without considering its movement, provides no "tie to interstate commerce."[128] This difference, although small, provides the "economic activity that might . . . substantially affect . . . interstate commerce" and does not require courts "to pile inference upon inference" as did the statute in *Lopez*.[129] For these reasons, the ECPPA regulates an economic activity.

119. *Morrison*, 529 U.S. at 610–12.

120. 18 U.S.C. § 2252A (2012), *amended by* Child Protection Act of 2012, Pub. L. No. 112-206, 126 Stat. 1490 (2012) (codified throughout 42 U.S.C.).

121. *Statistics on Pornography, Sexual Addiction and Online Perpetrators*, SAFEFAMILIES.ORG, http://www.safefamilies.org/sfStats.php (last visited Feb. 15, 2013) [hereinafter *Statistics on Pornography*].

122. Jerry Ropelato, *Internet Pornography Statistics*, TOPTENREVIEWS.COM, http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html (last visited Feb. 15, 2013).

123. *Id.*

124. *Statistics on Pornography*, *supra* note 121.

125. United States v. Lopez, 514 U.S. 549, 567 (1995).

126. *Compare* 18 U.S.C. § 922(q)(1)(A) (2012) (making it illegal "for any individual to . . . possess a firearm i[n] a school zone"), *with* 18 U.S.C. § 2252A(a) (2012) ("Any person who . . . receives or distributes . . . any child pornography . . . . shall be punished . . . .").

127. *Lopez*, 514 U.S. at 567.

128. *Id.*

129. *Id.*

Second, does the ECPPA have a jurisdictional element limiting it to interstate commerce? The ECPPA prohibits the use of "any means or facility of interstate commerce" or "in or affecting interstate" commerce in connection with child pornography.[130] These elements effectively limit the reach of the ECPPA by excluding the intrastate possession and delivery of child pornography because the Act requires child pornography to have a relationship with interstate commerce.[131] This is unlike the statute in *Lopez* that sought to regulate any possession of a gun in a school zone, regardless of any connection to interstate commerce.[132] Therefore, the ECPPA is limited to the receipt, possession, and distribution of child pornography that has an "explicit connection with" interstate commerce.[133]

Third, is there legislative history linking the ECPPA to interstate commerce? Prior to passing the ECPPA, Congress established that child pornography was "estimated to be a multibillion dollar industry."[134] Furthermore, Congress realized the danger that the Internet presented in making child pornography easily accessible, and even commented that "[t]he Internet is . . . a method of distributing goods and services across State lines."[135] Congress concluded that "transmission of child pornography using the Internet constitutes transportation in interstate commerce."[136] Having shown that the child pornography industry is worth billions of dollars, and that use of the Internet is a known method of delivering child pornography, one can conclude that there is a connection between the ECPPA and interstate commerce.

Fourth, to what degree is the relationship between regulated activity and interstate commerce attenuated? This question almost requires a limit to be articulated on the reach of the federal power under the statute.[137] The ECPPA has provided for limited reach by expressly stating that use of the Internet constitutes interstate commerce.[138] Using the Internet to obtain and search for child pornography would fall under the ECPPA, whereas would-be criminals that receive, possess, or distribute images of child pornography through purely local sources would not be liable under

130. 18 U.S.C. § 2252A(a)(2)(B) (2012); *see also* Frommell, *supra* note 9, at 1166–67.

131. *See Lopez*, 514 U.S. at 562 (discussing the failure of the statute in *Lopez* to have a jurisdictional element because possession of a firearm alone does not have a "nexus to interstate commerce," and without it there is no "limit [to] its reach").

132. *Id.* at 561–62.

133. *See id.* at 562 (discussing why the statute in *Lopez* failed under the Commerce Clause). "Unlike the statute in *Bass*, [the statute in *Lopez*] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an *explicit connection with* or effect on interstate commerce." *Id.* (emphasis added).

134. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102(1), 122 Stat. 4001 (2008) (codified throughout 18 U.S.C.).

135. *Id.* § 102(6).

136. *Id.* § 102(7).

137. *See* United States v. Morrison, 529 U.S. 598, 615 (2000) (discussing the ramifications if the Court were to follow the "but-for causal chain" presented by the Government).

138. *See supra* note 136 and accompanying text.

the ECPPA.[139] Therefore, a clear separation between federal and state prosecution exists under the ECPPA.

The Internet has an almost infinite number of uses, and this analysis of the ECPPA was just one example of how the Internet may be used in a manner that substantially affects interstate commerce. The Internet can be found in many areas of commercial activity.[140] Whether that commercial activity is local in nature or not, it does not change the fact that your use affects commerce internationally.[141] And as *Wickard* plainly established decades ago, "The power of Congress over interstate commerce is plenary" and if "activities intrastate . . . so affect interstate commerce" then "the reach of that power extends to those intrastate activities."[142]

C. Internet Use Is Interstate Commerce

Understanding how the Internet fits into the *Lopez* categories, we can now turn to the amount of power Congress has to regulate its use. It is well-settled law that Congress has plenary power under the Commerce Clause, enabling Congress to regulate both interstate and intrastate activities.[143] This plenary power includes the ability to regulate both channels and activities that substantially affect interstate commerce.[144] Having established that the Internet is a channel,[145] an instrumentality,[146] and that use of the Internet substantially affects interstate commerce,[147] it is unequivocal that the Internet is inherently interstate in nature and thus may be regulated by Congress to the fullest extent of its Commerce Clause powers.[148]

Although the Internet has previously been recognized as being sufficient for exercising federal regulation,[149] skepticism still exists as to whether mere use of the Internet constitutes interstate commerce.[150] As

139. By limiting the reach of the ECPPA to the Internet, a person who snapped pictures of his or her neighbor's minor daughter engaged in sexual conduct would not be liable under the ECPPA if those pictures were kept or distributed locally without the assistance of the Internet but may be liable under state laws.

140. *See generally* Steve Schifferes, *How the Internet Transformed Business*, BBC NEWS (Aug. 3, 2006, 11:53 PM), http://news.bbc.co.uk/2/hi/business/5235332.stm (noting the history of the Internet and its broad penetration into business).

141. *See id.*

142. Wickard v. Filburn, 317 U.S. 111, 124 (1942).

143. Michele Martinez Campbell, *The Kids Are Online: The Internet, the Commerce Clause, and the Amended Federal Kidnapping Act*, 14 U. PA. J. CONST. L. 215, 244 (2011) ("Congress's Commerce Clause authority . . . includes the power to reach purely intrastate conduct.").

144. *Compare id.* at 245 ("[C]ongressional power to regulate the channels . . . of commerce includes . . . purely local [activities]." (quoting United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005)) (internal quotation marks omitted)), *with Wickard*, 317 U.S. at 124 (explaining the commerce power "extends to those activities intrastate which so affect interstate commerce").

145. *See supra* Part II.B.1.

146. *See supra* Part II.B.2.

147. *See supra* Part II.B.3.

148. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995).

149. 2 RAYMOND T. NIMMER, INFORMATION LAW § 9:12 (2012) ("[V]irtually all uses of Internet and Internet-related services have an interstate component . . . .").

150. *See* Clark, *supra* note 102, at 959–60.

this Part explains, it is hard to think of the Internet as being anything but interstate. After all, the Internet is known as the "information superhighway,"[151] a "spiderweb-like" network of computers that facilitates communication and business worldwide.[152]

III. THE BENEFITS OF CLASSIFYING INTERNET USE AS INTERSTATE COMMERCE

In passing the ECPPA, Congress sent a clear message: "[U]sing the Internet constitutes . . . interstate commerce."[153] The mandate, though not without its critics,[154] ensures that mistakes in applying the law to the Internet will no longer lead to questionable decisions in child pornography cases.[155] This mandate, however, should not be limited to child pornography laws. Instead, it should be adopted in all federal statutes because many federal statutes suffer from the same problem child pornography laws faced before Congress enacted the ECPPA—When is interstate commerce triggered? For example, take the recent Second Circuit case of *United States v. Aleynikov*.[156] Aleynikov was a programmer employed by Goldman Sachs.[157] While at Goldman Sachs, he developed a software product to facilitate high-speed trading of securities and commodities.[158] Aleynikov later left Goldman Sachs for a position at a different firm, but before leaving, he took the trading platform's source code with him to his new employer.[159] Aleynikov was later charged with stealing the trading platform under the Economic Espionage Act of 1996 (EEA), among other things.[160] The EEA prohibits the conversion of another's trade secret "that is related to or included in a product that is produced for or placed in interstate . . . commerce."[161] The Second Circuit, focusing on this interstate commerce element, decided that the source code did not constitute a product "produced for or placed in interstate . . . commerce."[162] The court based its reasoning on the fact that Congress had used limiting language and did not "purport to exercise the full scope of

151. Jeffrey Kahn, *Building and Rescuing the Information Superhighway*, LBL RES. REV., Summer 1993, at 10, 10.

152. *Id.* at 11.

153. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (codified throughout 18 U.S.C.); *see also* Frommell, *supra* note 9.

154. *See* Clark, *supra* note 102, *passim*; *see also* Frommell, *supra* note 9, at 1172–73.

155. *See* Sukenik, *supra* note 12, at 14 (noting Congress's reaction to the *Schaefer* decision).

156. 676 F.3d 71 (2d Cir. 2012).

157. *Id.* at 73.

158. *Id.*

159. *Id.* at 74.

160. *Id.* at 73–75 (noting other charges under the National Stolen Property Act and under the Computer Fraud and Abuse Act).

161. Economic Espionage Act of 1996, Pub. L. No. 104-294, § 1832(a), 110 Stat. 3488 (codified at 18 U.S.C. §§ 1831–1839 (2012)).

162. *Aleynikov*, 676 F.3d at 73 (quoting Economic Espionage Act of 1996, Pub. L. No. 104-294, § 1832(a), 110 Stat. 3488 (codified at 18 U.S.C. §§ 1831–1839 (2012))) (internal quotation mark omitted).

[its] congressional authority" under the Commerce Clause.[163] Agreeing with the majority's explanation, Judge Calabresi questioned if the court had given effect to Congress's intent and requested Congress to revisit the statute to make its intention clear.[164] On December 20, 2012, Judge Calabresi's request was answered when an amendment to the EEA was enacted to include any "product or service used in or intended for use in" interstate commerce,[165] providing perhaps the answer to Judge Calabresi's question of Congress's actual intent under the EEA.[166] Although the *Aleynikov* decision did not deal directly with whether the trading platform itself had entered interstate commerce, the court was still grappling with whether the interstate commerce element of the EEA was satisfied.[167] As *Aleynikov* illustrates, regardless of what cybercrime statute is at issue, the idea remains the same: Congress needs to make it clear that Internet use constitutes interstate commerce and do so before another "alleged misreading" of a cybercrime statute takes place.[168]

I have identified two benefits provided by Congress's mandate in the ECPPA that Internet use constitutes interstate commerce. First, it will provide clear instruction to the courts, yielding more predictable results. Second, it will bring certainty to the laws, resulting in prosecutions that are more effective. Although the discussion of these benefits below is in the context of child pornography, the benefits could be experienced in all federal cases if the mandate—Internet use constitutes interstate commerce—were adopted in all federal laws.

A. Clear Instruction for the Courts

The language in the prior child pornography statutes left the courts to interpret the scope of its reach.[169] To interpret the statute, courts focused on the jurisdictional language contained in 18 U.S.C. § 2252(a)(2) and § 2252(a)(4)(B), specifically whether child pornography "has been mailed, or has been shipped or transported in interstate or foreign commerce . . . by any means including by computer."[170] Despite the seemingly clear intent of this statute,[171] the language prompted confusion among the courts—When does Internet child pornography constitute interstate

163. *Id.* at 81.
164. *Id.* at 83 (Calabresi, J., concurring).
165. Theft of Trade Secrets Clarification Act of 2012, S. Res. 3642, 112th Cong. (enacted).
166. *See Aleynikov*, 676 F.3d at 83 (Calabresi, J., concurring).
167. *Id.* at 79–83 (majority opinion).
168. *See id.* at 83 (Calabresi, J., concurring) (questioning whether the court reached the decision Congress intended); *see also* Sukenik, *supra* note 12, at 14 ("Congress . . . criticiz[ed] . . . the [*Schaefer*] court's alleged misreading of legislative intent.").
169. Frommell, *supra* note 9, at 1163–66 (discussing the split among the federal courts of appeals).
170. 18 U.S.C. § 2252(a)(2), (a)(4)(B) (2012); *see also* Frommell, *supra* note 9, at 1159.
171. *See* Frommell, *supra* note 9, at 1163–64 (showing a consensus among the federal courts of appeals in equating Internet use with interstate commerce).

commerce?[172] To address this question, Congress enacted a new version of the statute, removing any hint of guesswork.[173]

The new statute, in relevant part, reads "any person who . . . receives or distributes any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer."[174] By amending the language as it did, Congress made it clear to the courts that it intended the statute to reach the full extent of Congress's Commerce Clause power.[175] Using traditional Commerce Clause buzzwords such as "any means or facility" and "in or affecting,"[176] Congress answered the call from the Tenth Circuit in *Schaefer* demanding more precise language.[177]

In demanding specific language, the Tenth Circuit seemingly relied exclusively upon the strictest of textual interpretations,[178] giving no weight to any of the other established canons of statutory interpretation.[179] The court's reliance on this textual interpretation resulted in the Tenth Circuit handing down a decision that even a concurring member of the court admitted was incorrect.[180] Although some of the blame should be placed on the prosecution,[181] the majority of the blame rests with the court, which ultimately made the decision, going against the other circuits to overturn a conviction that should have been upheld.[182]

Five years later in *Sturm*, the Tenth Circuit was again asked to interpret the child pornography laws it had interpreted in *Schaefer*.[183] Unlike *Schaefer*, however, the *Sturm* court ruled in favor of the Government by redefining the term "visual depiction" in the statute to mean the "substantive content of an image."[184] Prior to *Sturm*, courts focused on the

172. *See id.* at 1166 (discussing the split in the federal courts of appeals following the *Schaefer* decision).

173. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (codified throughout 18 U.S.C.); *see also* Frommell, *supra* note 9 ("The updated legislation unambiguously equates Internet use with interstate commerce . . . .").

174. 18 U.S.C. § 2252A(a)(2)(A) (2012).

175. *See id.*; *see also* Frommell, *supra* note 9.

176. *See supra* note 174 and accompanying text.

177. *See* United States v. Schaefer, 501 F.3d 1197, 1201–02 (10th Cir. 2007) ("Congress's use of the 'in commerce' language, as opposed to phrasing such as 'affecting commerce' or a 'facility of interstate commerce,' signals its decision to limit federal jurisdiction . . . ."), *overruled by* United States v. Sturm, 672 F.3d 891 (10th Cir. 2012) (en banc).

178. *See id.*; *see also* Sukenik, *supra* note 12, at 14 ("Congress moved quickly . . . , criticizing . . . the textual-interpretation methodology . . . .").

179. *See* Frank B. Cross, *The Significance of Statutory Interpretative Methodologies*, 82 NOTRE DAME L. REV. 1971, 1972–78 (2007) (discussing some of the common methods of statutory interpretation).

180. *See Schaefer*, 501 F.3d at 1207 (Tymkovich, J., concurring) ("I have no doubt the images traveled across state and national borders.").

181. Frommell, *supra* note 9, at 1161–62 (discussing the failures of the prosecution).

182. *Schaefer*, 501 F.3d at 1204–05 (majority opinion).

183. United States v. Sturm, 672 F.3d 891, 898 (10th Cir. 2012) (en banc).

184. *Id.* at 901.

digital file or tangible media itself that contained the image, not the substance of the image it contained.[185] By redefining "visual depiction," the Tenth Circuit was able to stick to its interpretation in *Schaefer* requiring proof of actual interstate movement by holding that the "substantive content of an image" must move in interstate commerce.[186] This interpretation by the court resulted in the outcome Congress intended,[187] albeit in a way that is arguably not how Congress intended.[188]

The Tenth Circuit's inconsistency in interpreting the same statute is prima facie evidence that a congressional mandate was needed. Congress delivered the needed clarity in the ECPPA, leaving no doubt how the courts should read the new law.[189] This mandate benefits the courts and the public by adding predictability in the outcome of cases dealing with child pornography and the Internet.

B. Prosecutions that Are More Effective

Prosecutorial success should be measured by its effectiveness in carrying out the legislative intent that Congress had when passing a specific law.[190] This is, after all, how our government is supposed to work—giving effect to a law based on the intent of our democratically elected members of Congress.[191] The intent of child pornography laws has remained the same over the years: punish those individuals who receive, possess, or distribute child pornography.[192] Prior to *Schaefer*, to obtain a conviction under the child pornography laws, the Government needed only to show that the defendant used the Internet to obtain child pornography.[193] Relying on this common theme from other courts,[194] the Government presented evidence in *Schaefer* to prove that the defendant used the Internet to obtain child pornography.[195] Unbeknownst to the Gov-

185. *See, e.g.*, *Schaefer*, 501 F.3d at 1205 ("[T]he government needed to prove the visual images . . . moved across state lines."); *see also supra* note 7.

186. *Sturm*, 672 F.3d at 901.

187. *See* Sukenik, *supra* note 12, at 14 (discussing the disgust of Congress over the decision in *Schaefer*).

188. *See id.* (commenting that Congress intended Internet use to constitute interstate commerce).

189. *Id.* at 15.

190. *See id.* at 14 (quoting several members of Congress who criticized the decision in *Schaefer* because the court's interpretation went against alleged legislative intent).

191. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("If a court . . . ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

192. *See* Effective Child Pornography Prosecution Act of 2007, 18 U.S.C. § 2252(a) (2012), *amended by* Child Protection Act of 2012, Pub. L. No. 112-206, 126 Stat. 1490 (codified throughout 42 U.S.C.); *see also* Frommell, *supra* note 9, at 1156–58 (discussing the history and expansion of federal child pornography laws and the common goal of punishing those who deal in child pornography).

193. Frommell, *supra* note 9, at 1164–65.

194. *See* cases cited *supra* note 16.

195. United States v. Schaefer, 501 F.3d 1197, 1206 (10th Cir. 2007) ("The government maintains that this evidence was sufficient to establish the interstate commerce element because it permit-

ernment, however, the *Schaefer* court would require proof that the images actually moved between states to uphold a conviction.[196] Following the *Schaefer* decision, the Government had to consider the relevant jurisdiction to determine the amount of evidence required to prove the interstate component of the child pornography laws.[197] Congress's mandate in the ECPPA—equating Internet use with interstate commerce—established a clear standard for proving interstate commerce, removing a key hurdle to effective prosecution.[198]

In *United States v. Carroll*,[199] the First Circuit interpreted the jurisdictional requirement in 18 U.S.C. § 2251(a).[200] To secure a conviction under this child pornography statute, the Government needed to show that the defendant "knew or had reason to know" that the child pornography "would be transported in interstate commerce."[201] The Government relied on the testimony of the victim indicating that the defendant intended to upload images to a computer and "distribute them on the Internet."[202] The court said that such transmission "by means of the Internet" would satisfy the statutory interstate commerce requirement.[203]

The Fifth Circuit followed the First Circuit's lead and came to a similar conclusion in *United States v. Runyan*.[204] Runyan was indicted on four separate charges.[205] The first charge was based on the same provision at issue in *Carroll*, whereas the remaining three were under a different section of the child pornography laws, 18 U.S.C. § 2252A.[206] The *Runyan* court agreed with the interpretation of 18 U.S.C. § 2251 advanced by the First Circuit.[207] Turning to the charges under § 2252A, the Government offered Runyan's confession as proof that the images of child pornography were in interstate commerce.[208] Runyan admitted that the images of child pornography he possessed came from the Internet.[209]

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ted a reasonable fact-finder to determine that the images of child pornography . . . were obtained from the Internet."), *overruled by* United States v. Sturm, 672 F.3d 891 (10th Cir. 2012) (en banc).

196. *Id.* ("[I]t was not enough for the government to prove that the child-pornography images . . . were obtained from the Internet. The government needed to prove that the images . . . moved between states.").

197. Frommell, *supra* note 9.

198. Sukenik, *supra* note 12, at 15.

199. 105 F.3d 740 (1st Cir. 1997).

200. *Id.* at 741–42.

201. *Id.*

202. *Id.* at 742.

203. *Id.*

204. 290 F.3d 223, 239 (5th Cir. 2002).

205. *Id.* at 238.

206. *See id.*

207. *Id.* at 239 ("We join the First Circuit in holding that '[t]ransmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce' for the purposes of 18 U.S.C. § 2251.") (alteration in original) (quoting United States v. Carroll, 105 F.3d 740, 742 (1st Cir.1997)).

208. *Id.* at 241.

209. *Id.*

Finding that this confession was sufficient to link the images to the Internet, the court upheld Runyan's conviction.[210]

Finally, in *United States v. MacEwan*,[211] the Third Circuit came to a similar verdict.[212] MacEwan was charged with receiving child pornography under 18 U.S.C. § 2252A(a)(2)(B).[213] After seizing MacEwan's computers, the Government found over 250 images of child pornography along with links to child pornography websites in his Internet history.[214] The Government attempted to prove that these images were in interstate commerce from expert testimony that "summarized the flow of data over the Internet."[215] This testimony noted the mere possibility that transmission of data over the Internet could cross state lines.[216] The Third Circuit concluded that because of the "very interstate nature of the Internet," proof of Internet use to download images of child pornography was enough to show the images had "traveled in interstate commerce."[217]

Following these decisions, the burden on the Government was clear: show the child pornography images were linked to the Internet and the interstate commerce requirement will be satisfied.[218] However, the Tenth Circuit rejected this notion in *Schaefer*, abandoning nonbinding, persuasive precedent.[219] Despite a showing by the Government in *Schaefer* that the defendant had "subscribe[d] to websites containing images of child pornography" and that child pornography images were found on his computer,[220] the Tenth Circuit held that this evidence was insufficient proof of interstate commerce, instead requiring evidence that the images of child pornography actually moved "across state lines."[221] This inconsistent burden of proof requirement not only resulted in an acquittal in

210. *Id.* at 242–43.
211. 445 F.3d 237 (3d Cir. 2006).
212. *Id.* at 239.
213. *Id.*
214. *Id.* at 240.
215. *Id.* at 241.
216. *See id.* at 241–42.
217. *Id.* at 244.
218. Sukenik, *supra* note 12, at 9 ("The majority of circuits . . . held that evidence of Internet use alone satisfied the jurisdictional requirement in the statute.").
219. *Compare* United States v. Schaefer, 501 F.3d 1197, 1198 (10th Cir. 2007) (holding that actual movement across state lines is required), *overruled by* United States v. Sturm, 672 F.3d 891 (10th Cir. 2012) (en banc), *with MacEwan*, 445 F.3d at 244 (holding that use of the Internet is sufficient evidence to show interstate activity), *and* United States v. Runyan, 290 F.3d 223, 242 (5th Cir. 2002) ("[C]ircumstantial evidence linking a[n] . . . image to the Internet . . . can be sufficient evidence of interstate transportation . . . ."), *and* United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997) ("Transmission . . . by means of the Internet is tantamount to moving . . . across state lines and thus constitutes transportation in interstate commerce.").
220. *Schaefer*, 501 F.3d at 1198.
221. *Id.* at 1201.

Schaefer[222] but also highlighted potential difficulties in prosecuting criminals in the Internet age.[223]

Congress's mandate that Internet use constitutes interstate commerce eases the difficulty in prosecuting child pornography crimes involving the Internet.[224] This will ultimately result in prosecutions that are more effective because the burden of proof is clear.[225] Additionally, prosecutorial efficiency will improve because proving Internet use is far easier than explaining the intricacies of how data moves over the Internet.[226] After all, it is the guilt or innocence of a party that should be of primary concern, not deciphering expert testimony about the particular path a specific image or data file followed through the elaborate worldwide network of the Internet.

CONCLUSION

In *Schaefer*, a man who admitted to searching for child pornography was set free because a court made a decision with blinders on. Taking quick action, Congress amended the statute to ensure similar, shortsighted decisions would not occur in the future. The Tenth Circuit, realizing its mistake, overturned *Schaefer*, and with it found a new way to interpret the law. But its *Sturm* decision ended up being just another example of the dangers involved in allowing courts the opportunity to use their statutory interpretation canon of choice.

The congressional mandate in the Effective Child Pornography Prosecution Act of 2007 stating that "using the Internet constitutes transportation in interstate commerce" should be extended to all federal laws. It allows for predictability in the courts and more consistent prosecutions of alleged criminals. This mandate is not outside the powers granted to the federal government by the Constitution. The Internet is an inherently interstate mode of communication and method to transport data. Let's

222. *Id.* at 1207.

223. *Id.* ("The development and growth of the Internet . . . complicates the statutory analysis in this case.")

224. Sukenik, *supra* note 12, at 15 ("Congress's legislation . . . clarif[ied] the appropriate jurisdictional standard to be applied . . . .").

225. *See id.*

226. *See generally* United States v. MacEwan, 445 F.3d 237, 241 (explaining the process of routing Internet traffic); Clark, *supra* note 102, at 952–53 (explaining the process for intrastate Internet transmissions).

enter the twenty-first century by declaring all Internet use as interstate commerce.

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* J.D. Candidate, 2014. First and foremost, I would like to thank my family and friends, specifically my parents, for always believing in me and supporting me in all aspects of my life. I would also like to thank my colleagues on the *Denver University Law Review* and Professor John T. Soma for their helpful insights.