"VIRTUAL CHILD" PORNOGRAPHY ON THE INTERNET: A "VIRTUAL" VICTIM?

Child pornography is an exception to First Amendment freedoms because it exploits and abuses our nation's youth.[1] The latest trend in that industry is "virtual child" pornography. "Virtual child" pornography does not use real children or images of real identifiable children. When the object of desire is not a child, but merely a combination of millions of computer pixels crafted by a skilled artist, can the government ban this allegedly victimless creation?[2]

Introduction

Congress enacted the Child Pornography Prevention Act of 1996 ("CPPA") to fight the ongoing battle against the sexual exploitation of children.[3] However, Congress drafted the CPPA very broadly, and with the advancement of technology the statute may encroach on First Amendment rights to free speech.[4] Most people would agree that the use of actual children in the production of sexually explicit videos or photographs is grotesque child abuse. The question remains whether the government may criminalize the production and possession of "virtual child" pornography if no child is used in the production of pornography and the images are completely fictional. In *Ashcroft v. The Free Speech Coalition*, the U.S. Supreme Court held that the government may not criminalize such action because the production of "virtual child" pornography does not sexually abuse an actual child.[5] The Court rejected the government's argument that "virtual child" pornography encourages pedophiles to abuse children. This argument is the intellectual equivalent of a claim that *Romeo and Juliet* encourages teenagers to kill themselves and should be banned from high school reading lists. More people would find greater social value in *Romeo and Juliet* than in "virtual child" pornography, but if there is some

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[1] New York v. Ferber, 458 U.S. 747, 762 (1982).

[2] Technology advances daily with the invention of computer software used to create realistic artwork. Using a commercial software package, it is possible to create "people" without using an actual image. There is a second type of creation using the process known as "morphing" in which the image of an actual person may be altered to create a distinct image. "'Morphing' is short for 'metamorphosing,' a technique that allows a computer to fill in the blanks between dissimilar objects in order to produce a combined image." Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, n.5 (1997). This iBrief discusses only true virtual pornography, not pornography consisting of morphed images.

[3] 18 U.S.C. §§ 2252, 2252A (2000).

[4] U.S. CONST. amend. I (providing that "Congress shall make no law. . . abridging the freedom of speech, or of the press").

[5] Ashcroft v. The Free Speech Coalition, 122 S. Ct. 1389 (2002).

social or artistic value to a piece of work, it should be protected under the freedom of speech clause of the First Amendment.[6] "Virtual child" pornography must be distinguished from actual child pornography in order to be protected under the First Amendment. The Supreme Court held the CPPA to be unconstitutional by making the distinction between "virtual" and actual child pornography and by doing so, expanded the field of free speech.[7]

Ashcroft v. The Free Speech Coalition and the Effect of the Decision

In *Ashcroft v. The Free Speech Coalition*, the Ninth Circuit held the CPPA to be unconstitutional, a decision contrary to those in four other circuits.[8] The U.S. Supreme Court granted certiorari to resolve the circuit split and held that the speech prohibited by the CPPA's ban on "virtual child" pornography is distinguishable from actual child pornography.[9] As written, § 2256(8)(B) of the CPPA "abridges the freedom to engage in a substantial amount of lawful speech."[10] The Court held that the ban on "virtual child" pornography could not be upheld because it was overbroad and unconstitutional under the First Amendment.

Unlike cases in other circuits, which involved violations of the CPPA, the Free Speech Coalition ("the Coalition") was an association of businesses in the adult-entertainment industry that produced and distributed adult material. The Coalition sought to overturn the law pre-enforcement, alleging that the "appears to be" and "conveys the impression" provisions of the CPPA are overbroad and vague.[11] The CPPA expanded the ban on child pornography to include "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct."[12] The Coalition argued that the CPPA was not supported by and goes beyond earlier decisions regarding obscenity and child pornography,[13] extending to images that were not obscene or even necessarily offensive, but would prohibit "visual depictions, such as movies,

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[6] *Id.* at 1400-01.
[7] *Id.* at 1405.
[8] *See* United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 231 F.3d (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 167 (1st Cir.1999).
[9] *The Free Speech Coalition*, 122 S. Ct. at 1405.
[10] *Id.*
[11] *Id.* at 1392.
[12] 18 U.S.C. § 2256(8)(A).
[13] *See* Miller v. California, 413 U.S. 15 (1973) (holding that pornography can only be banned if it is obscene); *Ferber*, 458 U.S. at 758 (holding that pornography including actual children can be prohibited whether or not obscene due to the State's interest in protecting children exploited by the making of the pornography).

even if they have redeeming social value."[14] Additionally, these provisions would extend to items such as reproductions of paintings "depicting a scene from classical mythology" because the subject matter "appears to be" minors involved in sexually explicit conduct.[15] Even when real children are not used (such as in "virtual child" pornography, a Hollywood movie using adult actors or a painting or cartoon involving sexually active minors), the CPPA would criminalize any depiction of sexually explicit situations involving what appear to be minors.[16]

The government presented four arguments supporting the CPPA's constitutionality. First, it claimed that "virtual child" pornography causes indirect harm to actual children,[17] contending that the production of virtual pornographic images can lead to child abuse.[18] The Court did not accept the government's indirect harm argument noting instead that "virtual child pornography is not 'intrinsically related' to the sexual abuse of children"[19] and that "the causal link is contingent and indirect."[20] The government relied on the *Ferber* case, but to no avail. The *Free Speech Coalition* court held that *Ferber* provides no support for the elimination of the distinction between actual and "virtual child" pornography.[21] In fact, the court in *Ferber* recognized that some works might have societal value as an alternative means of expression.[22]

Second, the government argued that "virtual child" pornography could have the tendency to persuade the audience to commit crimes.[23] The Court struck down this argument, stating, "the prospect of crime, however, by itself does not justify laws suppressing protected speech."[24] Even if virtual pornography encourages unlawful acts, "it is not a sufficient reason for banning it."[25] "The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse" therefore, the government may not prohibit the speech expressed in "virtual child" pornography based on this unsupported

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[14] *The Free Speech Coalition*, 122 S. Ct. at 1396.
[15] *Id.* at 1397.
[16] *Id.* at 1397.
[17] *Id.* at 1402.
[18] *Id.*
[19] *Id.*
[20] *The Free Speech Coalition*, 122 S. Ct. at 1402.
[21] *Id.* (citing *Ferber*, 458 U.S. at 763).
[22] *Ferber*, 458 U.S. at 763 (stating that "a person over the statutory age who perhaps looked younger could be utilized." The court acknowledged a distinction between actual and virtual child pornography.)
[23] *The Free Speech Coalition*, 122 S. Ct. at 1398.
[24] *Id.* at 1399 (citing *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 680 (1959). *See also* Stanley v. Georgia, 394 U.S. 577, 566 (1969).
[25] *The Free Speech Coalition*, 122 S. Ct. at 1403.

argument.[26] The government can punish the perpetrators of sexual abuse of children and punish people who provide explicit materials to children in order to seduce or convince the child to engage in sexual activities.[27] Also, the government may not prohibit adults from material protected by free speech in an attempt to prevent children from obtaining it.[28]

Third, the government argued that eliminating the market for actual child pornography was a sufficient reason for the Court to uphold the constitutionality of the law.[29] The Court disagreed and noted that the market for actual child pornography might be eliminated if there was an alternative source.[30] "If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."[31] The Court held that virtual pornography does not necessarily promote the market for actual child pornography and recognized the distinction between the two.[32] The Court stated that the government's market theory was unpersuasive especially because there is no crime involved in "virtual child" pornography since no children are used in the production of the work.[33]

Fourth, the government also argued that "virtual child" pornography could result in more difficult prosecutions of actual child molesters and pornographers since the virtual images look so realistic.[34] The government wants to pass this difficulty on to the potential defendant through the statute's affirmative defense option.[35] The defendant can rely on the affirmative defense if he can prove that the alleged child pornography was made using real persons who were adults and the material was not marketed as depicting children.[36] The affirmative defense option raises other constitutional concerns because the defendant would have the burden of proving that the material was protected by the First Amendment. The Court noted that, "the Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected speech merely because it resembles the latter."[37] All four of the government's

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[26] *Id.*
[27] *Id.*
[28] *Id.*; *see also* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989).
[29] *The Free Speech Coalition*, 122 S. Ct. at 1404.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *The Free Speech Coalition*, 122 S. Ct. at 1404
[36] 18 U.S.C. § 2252A.
[37] *Id.*

arguments were unsuccessful and the Supreme Court held that the CPPA was unconstitutionally overbroad.[38]

Should "virtual child" pornography be prohibited?

The easiest and most popular answer would be yes. Parents arrested for the online sharing of explicit photos of their own children are just one example of how child pornography, though extremely socially unacceptable, is an already created and unfortunately booming market.[39] Banning "virtual child" pornography might spur the actual child pornography market if the penalties are the same and it is more expensive to create virtual pornography. If "virtual child" pornography were allowed, the perpetrators of actual child pornography might think twice about exploiting real children since there would be a legal and victimless alternative. "If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."[40]

"The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people."[41] The relevant primary objectives of the government are and should be to protect the children from sexual abuse and to prosecute those who abuse children.[42] However, a ban on "virtual child" pornography is *not* a viable solution for preventing sexual abuse. "Virtual child" pornography could potentially shield children from abuse since pedophiles could use this alternative source to fulfill their desires, however repugnant. Since "virtual child pornography is not 'intrinsically related' to the sexual abuse of children," the government's interest in preventing the exploitation of children might be too tenuous to enforce.[43] If the government's goal truly is to eliminate the sexual exploitation of children, the most logical solution would be to find a solution to the illegal market. It is evident that the current criminal statutes do not entirely deter child abusers.[44] The *Free Speech Coalition* court believes that the alternative of legal "virtual child" pornography would reduce the production of actual child pornography because people could not be punished for the creation or possession of this

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[38] *Id.* at 1406.
[39] Connie Cass, *20 Charged in Child Porn Ring*, WASHINGTON POST, Aug. 10, 2002 at A1.
[40] *The Free Speech Coalition*, 122 S. Ct. at 1404.
[41] *Id.* at 1399.
[42] *Id.* at 1396.
[43] *Id.* at 1402.
[44] *See* Cass, *supra* note 39, at A1.

substitute.[45] In addition, stiffer penalties for actual child pornographers and sexual abusers would prevent more abuse than prohibiting "virtual child" pornography as an alternative to abuse.

New Legislative Attempts to Ban "Virtual Child" Pornography

The CPPA is unconstitutional as written, but new bills are attempting to re-write the legislation to make it an actionable criminal law without violating the First Amendment. New bills have been introduced in the House of Representatives and the Senate to amend the CPPA (now entitled the Child Obscenity and Pornography Prevention Act of 2002).[46] Section 2256(8)(B) would be amended to read, "such visual depiction is a computer image or computer-generated image that is, or appears virtually indistinguishable from, that of a minor engaging in sexually explicit conduct."[47] The new bills still maintain the prohibition of "virtual child" pornography even though the Supreme Court has indicated it is protected speech.

The bill maintains the affirmative defense to a charge of violating the law if "the alleged offense did not involve child pornography produced using a minor engaging in sexually explicit conduct or an attempt or conspiracy to commit an offense involving such child pornography."[48] This affirmative defense could be used in the prosecution of an adult actor playing the role of a minor in sexually explicit situations in a Hollywood movie. The affirmative defense could also be used by a producer of "virtual child" pornography if the virtual image is "virtually indistinguishable" from reality. This affirmative defense shifts the burden of proof from the government to the producer of the work. In *The Free Speech Coalition*, the Court emphasized that if the government would have a difficult time prosecuting virtual pornographers, then the defendant would have just as hard of a time proving his innocence by demonstrating that real children were not used especially if the defendant was not the producer but a mere possessor of the virtual pornography.[49]

On July 17, 2002, a Joint Resolution was proposed to add a constitutional amendment respecting real and "virtual child" pornography.[50] "Section 1. Neither the Constitution nor any State constitution shall be construed to protect child pornography, defined as visual depictions by any technological means of minor persons, whether actual or virtual, engaged in explicit sexual activity. Section 2. The Congress shall have the power to enforce this article by appropriate

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[45] *The Free Speech Coalition*, 122 S. Ct. at 1404.
[46] H.R. 4623, 107th Cong. § 3 (2002); S. 2511, 107th Cong. § 2 (2002).
[47] S. 2511.
[48] S. 2511.
[49] *The Free Speech Coalition*, 122 S. Ct. at 1404.
[50] H.R.J. Res. 106, 107th Cong. (2002).

legislation."[51] This proposed amendment is again overbroad and contradicts the First Amendment because it would eliminate a substantial subsection of artistically valuable work. Hollywood movies and television programs have many examples of visual depictions of "minors" engaged in explicit sexual activity. The proposed amendment bans not only explicit pictures of prepubescent children but depictions of 17 year-olds engaged in sexual activities that might not be offensive to community standards much like the original CPPA.[52]

Conclusion

The proposed amendment is so broad that it would encompass much of the entertainment industry. Imagine if all the movies depicting minors in sexually explicit situations were removed from the store shelves. Some very popular movies and works of art would suddenly become illegal contraband. It could happen if Congress passes this proposed amendment. Congress has again failed to narrowly tailor the law but hopefully, for the sake of our freedom of speech, the proposed amendment shall fail as well. The Supreme Court's decision in *Ashcroft v. The Free Speech Coalition* indicates that there is a way to tailor the revision of the CPPA without violating the First Amendment.[53] If the government believes that "virtual child" pornography will be used by child abusers to convince their victims to participate in sexual activities,[54] Congress could narrowly tailor a criminal statute to punish such uses of the materials severely without banning the creation and possession of the work. Banning "virtual child" pornography will not effectively protect the nation's children from perpetrators. It will simply eliminate a victimless alternative that is substantially less repugnant than the abuse of actual children. The proposed constitutional amendment and congressional bills are plagued with the same problem of being overbroad as the CPPA and violate the First Amendment's protection of the freedom of speech.

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[51] H.R.J. Res. 106.
[52] *The Free Speech Coalition*, 122 S. Ct. at 1400.
[53] 122 S. Ct. 1389 (2002).
[54] *See The Free Speech Coalition*, 122 S. Ct. at 1402.