HAS THE COMPUTER REVOLUTION PLACED OUR CHILDREN IN DANGER? A CLOSER LOOK AT THE CHILD PORNOGRAPHY PREVENTION ACT OF 1996

ALISON R. GLADOWSKY*

I. INTRODUCTION

"While it has long been beyond debate that the government can make it a crime to possess or to distribute child pornography, . . . [*Free Speech Coalition v. Reno*,[1] a case the Supreme Court recently accepted,] poses a new constitutional question for the computer age: whether the First Amendment permits criminalizing child pornography that depicts not actual children but computer-generated images that look like actual children."[2] In 1996, Congress enacted the Child Pornography Prevention Act[3] ("CPPA") to attack the rise of computerized or "virtual" child pornography.[4] The federal circuit courts are split as to the constitutionality of the CPPA, questioning whether it is a violation of the First Amendment.[5]

The rapid expansion of computer technology has opened several doors for child pornographers. Traditionally, child pornogra-

---

* The Author wishes to thank her parents Joni and Elliot, her brother Jason, her grandparents, Allison, Jonathan, and the rest of her family and friends for their constant support and guidance.

1 198 F.3d 1083 (9th Cir. 1998), *cert. granted, sub nom.* Holder v. Free Speech Coalition, No. 00-795 (U.S. Jan. 22, 2001).

2 Linda Greenhouse, *Justices to Weigh Issue of Child Pornography and Computer-Generated Images*, N.Y. TIMES, January 23, 2001, at A19 (citing *Free Speech Coalition*, 198 F.3d 1083).

3 18 U.S.C.A. § 2256(8) (West 1999). The CPPA defines child pornography as:

> any visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
> (A) the production of such visual depiction involves the use of a minor engaging in sexual explicit conduct;
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct;
> (D) or such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

Id.

4 For purposes of this Note, "virtual child pornography" means photo-realistic, computer-generated images of children, involved in sexually explicit conduct that may or may not involve an actual minor, which are indistinguishable from child pornography created with real, identifiable minors.

5 U.S. CONST. amend. I.

phy was limited to magazines and videotape.[6] Today, however, child pornography is capable of entering into any home through a computer with an Internet connection.[7] "New and increasingly less complex and expensive photographic and computer imaging technologies make it possible for individuals to produce on home computers visual depictions of children engaging in sexually explicit conduct that are virtually indistinguishable from unretouched photographic images of actual children engaging in sexually explicit conduct - material that is outside the scope of current federal law."[8] To keep pace with this technological revolution, Congress enacted the CPPA to prohibit child pornographers from taking advantage of the loopholes in prior laws, and to make the creation of pornographic images of computer-generated children illegal.[9]

Although it is unclear whether the CPPA is constitutional, Congress has strong reasons for enacting legislation preventing child pornography. "The prevention of the sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[10] Congressional reports cite the dangers linked to the use child pornography.[11] For example, "[c]hild molesters[12] and pedophiles[13] use child pornography to convince potential victims that the depicted sexual activity is a normal practice; that other children regularly participate in sexual activities with adults or peers."[14] Moreover, "[c]hild pornography can be used to blackmail victims of sexual abuse."[15]

Part I of this Note sets out the legislative and judicial history of the CPPA since its first enactment in 1977.[16] The Note explores how advances in computer technology have forced Congress to constantly amend the law to keep pace with new developments.

---

6 *See Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. 14 (1996) [hereinafter *Child Pornography Prevention Hearing*].

7 *See id.*

8 *Id.*

9 *See* Child Pornography Prevention Act of 1995, S. REP. No. 104-358, at 2 (1996).

10 *Child Pornography Prevention Hearing, supra* note 6.

11 *Id.*

12 While "child molester" is a generic term, in this Note it refers to persons who sexually abuse children.

13 The term "pedophile" is used liberally in this Note, applying to every person who has sexual interests in children and finds it difficult to avoid them. However, a "pedophile" is usually defined as a person who has a "clear sexual preference for children . . . who can only satisfy the demands of that preference through child victims." *See* 1986 ATT'Y GEN. FINAL REP. 649.

14 S. REP. No. 104-358, at 13-14 (1996).

15 *Id.* at 14.

16 *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-255, 92 Stat. 7 (1978).

The Note also discusses the relevant case law interpreting the CPPA, particularly the view of the Ninth Circuit,[17] which has held that the CPPA is unconstitutional, and the views of the First,[18] Fourth,[19] and Eleventh Circuits,[20] which have upheld the CPPA. Part II defends Congress' justifications for enacting the CPPA. Part III examines the factors the Supreme Court should consider when determining the constitutionality of the CPPA. Finally, Part IV offers some compromising solutions and attempts to combat the opposition the CPPA has faced.

II. HISTORY OF THE CPPA

"Child pornography is no new problem; its presence in cyberspace is."[21] Although the First Amendment declares that "Congress shall make no law. . . abridging freedom of speech,"[22] the Supreme Court has always held that children are entitled to additional protection; within this realm, "child pornography is not entitled to First Amendment protection, and has not been since 1982 with the *Ferber* decision."[23] This section lays out the chronological steps Congress has taken to protect and safeguard children from the potential dangers[24] caused by child pornography.

A. The CPPA

Prior to the passage of the CPPA, a work was considered pornographic if it depicted an actual child (under the age of eighteen) engaging in actual or computer-simulated "sexually explicit conduct."[25] When the Protection of Children Against Sexual Exploitation Act was enacted in 1977[26] and when it was subsequently

---

17 Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1998), *cert. granted, rev'd sub nom.* Holder v. Free Speech Coalition, No. 00-795 (U.S. Jan. 22, 2001) (holding that the language of the CPPA is unconstitutionally vague and overbroad).

18 *See generally* United States v. Hilton, 167 F.3d 61 (1st Cir. 1999).

19 *See generally* United States v. Mento, 231 F.3d 912 (4th Cir. 2000).

20 *See generally* United States v. Acheson, 195 F.3d 645 (11th Cir. 1999).

21 *Id.* at 648.

22 U.S. CONST. amend. I.

23 *Nightline: National Center for Prosecution of Child Abuse* (ABC television broadcast, February 12, 2001) (italics added). *See also* New York v. Ferber, 458 U.S. 747 (1982) (upholding the constitutionality of a state law proscribing the distribution of material depicting sexual performances by children under the age of sixteen). The Supreme Court did away with the earlier requirement under Miller v. California, 413 U.S. 15, 23 (1973), that pornographic material not be considered obscene.

24 *See* J.S. v. R.T.H., 714 A.2d 924, 933 (N.J. 1998) (recognizing that the sexual abuse of children is traumatizing to the victims).

25 18 U.S.C.A. § 2252A (1994).

26 *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-255, 92 Stat. 7 (1978), *noted in* Lydia W. Lee, Note, *Child Pornography Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISC. L.J. 639, 648 (1999).

amended in 1984,[27] 1986,[28] 1988,[29] and 1994,[30] both case law and federal child pornography legislation assumed that a work was pornographic if it involved the participation of actual minors.[31] Courts most likely restricted the definition of pornography to actual minors because, at the time of those early decisions, the technology necessary for the creation of "virtual" child pornography was either unavailable or still in its infancy.[32]

In 1996, the CPPA expanded the definition of child pornography to encompass both entirely virtual child pornography and computer-generated child pornography involving an "identifiable minor."[33] The CPPA is controversial because it "criminalizes the creation or possession of fake but sometimes startlingly exact images of children in sexual settings."[34]

1. Legislative and Judicial History

a. *Protection of Children Against Sexual Exploitation Act of 1977*

Congress' first step in prohibiting child pornography was the enactment of the Protection of Children Against Sexual Exploitation Act of 1977.[35] This law prohibited the production of any visual depiction of a minor engaging in sexually explicit conduct with the knowledge that the depiction was or would be transported in interstate or foreign commerce.[36] The Act was enacted based upon congressional findings that child pornography and prostitution were highly organized and profitable and that they exploited countless numbers of real children in their production.[37] However, the 1977 law was too narrow, and only one person was convicted during its existence.[38]

---

27 *See* Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984), *noted in* Lee, *supra* note 26, at 648.

28 *See* Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510 (1986), *noted in* Lee, *supra* note 26, at 648.

29 *See* Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4485 (1988), *noted in* Lee, *supra* note 26, at 648.

30 *See* Child Abuse Accountability Act of 1984, Pub. L. No. 103-358, 108 Stat. 3420 (1994), *noted in* Lee, *supra* note 26, at 648.

31 Lee, *supra* note 26, at 648.

32 *See* David B. Johnson, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311, 326-27 (1994).

33 18 U.S.C.A. § 2256(8) (1998).

34 Adam Liptak, *When Is a Fake Too Real? It's Virtually Uncertain*, N.Y. TIMES, January 28, 2001, at D3.

35 Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (codified as amended at 18 U.S.C.A. § 2251-53 (1977)).

36 18 U.S.C.A. § 2252 (1984).

37 *See* New York v. Ferber, 458 U.S. 747, 749 (1982).

38 *See* 1986 ATT'Y GEN. FINAL REP., *supra* note 13, at 649.

b. *Child Protection Act of 1984*

In response to the 1977 Act's limited usefulness and the Supreme Court's decision in *New York v. Ferber*,[39] Congress passed the Child Protection Act of 1984.[40] This Act did away with the earlier requirement that prohibited material be "obscene"[41] before its production, dissemination, or receipt was considered criminal.[42] The 1984 Act extended the age of protected children from sixteen to eighteen years.[43] Moreover, the Act criminalized the production of sexually explicit material[44] regardless of whether it was produced or distributed for later sale.[45]

c. *Child Protection and Obscenity Enforcement Act of 1988*

During the 1980's, the technological revolution advanced at an accelerated rate. Congress acknowledged the improvement in technology and continually modified these outdated laws.[46]

By 1988, Congress extended the scope of the statute making it unlawful to use a computer to transport, distribute, or receive child pornography.[47]

In 1990, the Supreme Court in *Osborne v. Ohio*[48] upheld an Ohio child pornography statute proscribing the possession and viewing[49] of pornographic materials.[50] The *Osborne* court accepted the statute's three justifications for criminalizing the possession of child pornography: (1) decreasing the production and supply of child pornography to decrease the demand;[51] (2) encouraging possessors of child pornography to destroy the material, which is a permanent record of a child's abuse;[52] and (3) destroying material

---

39 458 U.S. 747, 749 (1982) (holding that child pornography is unprotected speech and falls outside the scope of First Amendment protection).

40 Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C.A. § 2251-53 (1994)).

41 *See* Miller v. California, 413 U.S. 15 (1973).

42 *See id.*

43 *Id.*

44 *See* 18 U.S.C.A. § 2252 (1984). This Act did away with the prior requirement that sexually explicit material be obscene.

45 *See id.* Congress recognized that a great deal of pornographic trafficking involving children was not for profit. *See* Child Pornography Prevention Act of 1995, S. REP. No. 104-358, at 17 (1996). The 1984 law, therefore, did away with the previous requirement. *See* 18 U.S.C.A. § 2252 (1984).

46 *See* Child Pornography Prevention Act of 1995, S. REP. No. 104-358, at 15 (1996); *see also*, Liptak, *supra* note 34, at D3.

47 Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended at 18 U.S.C.A. § 2251A-52 (1988)).

48 Osborne v. Ohio, 495 U.S. 103 (1990).

49 The court further extended viewing to include one's own home. *See id.*

50 *Osborne*, 495 U.S. at 111.

51 *Id.* at 109-10.

52 *See id.* at 111.

that pedophiles use as tools to seduce children.[53] By accepting this third rationale, the Supreme Court signaled its willingness to go beyond *Ferber* and to recognize that harm caused to children generally, not just those victimized in the production of child pornography, qualifies as a compelling government interest in proscribing child pornography.[54]

In 1990, in response to *Osborne*,[55] Congress also criminalized the possession of child pornography.[56] The statute was amended again in 1994 to criminalize the production or importation of sexually explicit depictions of a minor.[57] Yet each time Congress passed laws, child pornographers found ways around the laws' prohibitions.[58] This cycle recently repeated itself and prompted Congress to enact the CPPA.

d. *Child Pornography Prevention Act of 1996*

Congress most recently amended the CPPA in 1996 to criminalize the mere possession of computer generated or "virtual" child pornography.[59] Subsection B of the CPPA extended the definition of child pornography to include visual depictions that *appear to be* of minors engaging in sexually explicit conduct.[60] The "appears to be" language includes "virtual" child pornography that is created with a computer but portrays no actual living child.[61] Subsection C expanded the definition of child pornography to include depictions of "identifiable minors."[62]

The "appears to be" language of the statute has created conflict amongst the circuit courts. Adversaries of the CPPA strike down the "appears to be" language as unconstitutional on over-

---

53 *Id.* at 111 n.7.

54 United States v. Mento, 231 F.3d 912, 919 (4th Cir. 2000).

55 *Osborne*, 495 U.S. at 103.

56 *See* Pub. L. No. 101-647, § 301, 104 Stat. 4789 (codified as amended at 18 U.S.C.A. § 2252(a)(4) (1990)).

57 *See* Child Sexual Abuse Prevention Act of 1994, Pub. L. No. 104-208, § 121, 110 Stat. 3009-31 (codified at 18 U.S.C.A. § § 2252A, 2256 (1998)).

58 *See* Child Pornography Prevention Act of 1995, S. REP. No. 104-358, at 26 (1996) (statement of Sen. Grassley).

59 *See* 18 U.S.C.A. § 2252A (West Supp. IV. 1998).

60 *See id.*

61 A technique used to create computer-generated pornography is "morphing." Metamorphosing is a technique that allows a computer to fill in the blanks between dissimilar objects in order to produce a combined image. For a demonstration of morphing, see *3D Volume Morphing* (May 15, 1996), *at* http://www.graphics.Stanford.edu/tolis/morph.html.

62 Congress defined an identifiable minor as a person "who was a minor at the time a visual depiction was created, adapted, or modified or whose image as a minor was used in creating, adapting, or modifying the visual depiction." 18 U.S.C.A. § 2259(G)(9) (West Supp. 1997).

breadth and vagueness grounds.[63] CPPA opponents also argue that the statute infringes on First Amendment[64] rights and punishes people for evil ideas and thoughts.[65] CPPA proponents conclude that the statute represents the least restrictive means of advancing the vitally important government interest of effectively protecting minors from sexual exploitation and abuse.[66] To understand why the First, Fourth, and Eleventh Circuits are correct in upholding the CPPA, it is essential to explore these cases thoroughly.

2. Recent Case Law: Understanding the Conflict Among the Circuit Courts

a. *United States v. Hilton*

The first case to consider the constitutionality of the CPPA was *United States v. Hilton*.[67] On December 17, 1997, defendant Hilton was indicted for criminal possession of computer disks containing three or more images of child pornography in violation of 18 U.S.C.A. § 2252A(a)(5)(B).[68] Hilton "argued that the statute, by its terms, was unconstitutionally vague and overbroad, and therefore unenforceable."[69] The district court agreed with Hilton and overturned his indictment.[70] On appeal, the First Circuit reversed the District Court and upheld the statute's constitutionality.[71]

---

63 *See* Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), *cert. granted, sub nom.* Holder v. Free Speech Coalition, No. 00-795 (U.S. Jan. 22, 2001); Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 470 (1997) (concluding that provisions of Child Pornography Prevention Act of 1996 which only prohibit visual depictions that appear to be of minors engaging in sexually explicit conduct violate First Amendment because they are not sufficiently compelling nor narrowly tailored to survive strict scrutiny); Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 115-17 (1996) (questioning the CPPA's constitutionality); Gary Geating, *Obscenity and Other Unprotected Speech:* Free Speech Coalition v. Reno, 13 BERKELEY TECH. L.J. 389 (1998); Amy Tridgell, Note, *Newsgathering and Child Pornography Research: The Case of Lawrence Charles Matthews*, 33 COLUM. J. L. & SOC. PROBS. 343 (2000).

64 U.S. CONST. amend. I.

65 John Gibeaut, *Image is Everything: Court Slams Child Porn Law as Covering Digital Works and Art, Too*, 86 A.B.A. J. 20 (May, 2000) (quoting H. Louis Sirkin of Cincinnati, lawyer for the Ninth Circuit plaintiffs, who compares the dangers of upholding the CPPA to charging someone with murder merely for staging a killing).

66 *See* Lee, *supra* note 26, at 648. *See also* Johnson, *supra* note 32, at 326-27; Adam J. Wasserman, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996*, 35 HARV. J. ON LEGIS. 245, 281 (1998).

67 167 F.3d 61 (1st Cir. 1999).

68 *Id.* at 61.

69 *Id.*

70 *See id.*

71 *Id.*

Although the appellate court acknowledged that the CPPA implicates the First Amendment,[72] the First Circuit relied on the Supreme Court's decisions in *Ferber*[73] and *Osborne*[74] in holding that Congress could constitutionally expand the definition of child pornography to include virtual child pornography.[75] The *Hilton* court found that where child pornography was concerned, considerations beyond the prevention of direct harm to real children could provide compelling government interests.[76]

Next, the appellate court considered whether the CPPA was so overbroad as to capture constitutionally protected speech. In ruling against this overbreadth challenge, the court reasoned that Congress intended the "appears to be" language of the CPPA[77] to target only those visual depictions that are "virtually indistinguishable to unsuspecting viewers from unretouched photographs" of real children engaging in sexually explicit activity.[78] Furthermore, since child pornographers cater to pedophiles, who by definition have a preference for pre-pubescent children, the CPPA would only cover those images of pre-pubescent children "who otherwise clearly appear to be under the age of eighteen."[79] Thus, the *Hilton* court concluded that the CPPA was not unconstitutionally overbroad.[80]

On the issue of vagueness, the First Circuit concluded that the CPPA provides ordinary people with "sufficient definiteness" as to what conduct is prohibited and does not "encourage arbitrary or discriminatory enforcement."[81] The court found that the standard for evaluating key language of the CPPA is an objective one.[82] It stated, "[a] jury must decide, based on the totality of the circumstances, whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of eighteen engaged in sexual activity."[83] Moreover, the First Circuit found that under the statute[84] a prosecutor must prove the ele-

---

72 *Id.*

73 485 U.S. 747, 756 (1982).

74 495 U.S. 103, 111 (1990).

75 *See Hilton*, 167 F.3d at 76.

76 *See id.* at 70.

77 18 U.S.C.A. § 2256(8)(B) (West Supp. IV 1998).

78 *Hilton*, 167 F.3d at 72 (quoting Child Pornography Prevention Act of 1995, S. REP. No. 104-358, at 16 (1996)).

79 *Id.* at 73.

80 *See id.* at 74.

81 *Id.* at 75 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

82 *Id.*

83 *Id.*

84 *See* 18 U.S.C.A. § 2252A(a)(5)(B) (West Supp. IV 1998).

ment of scienter to obtain a valid conviction under the CPPA.[85] In addition, the First Circuit found that the CPPA offers the additional safeguard of an affirmative defense[86] to a charge under the CPPA if the person depicted in the sexually explicit material was actually an adult at the time the image was produced.[87] Taken together, these elements of the CPPA led the court to rule against the defendant on his vagueness challenge.[88]

b. *United States v. Acheson*

Almost one year after the First Circuit upheld the constitutionality of the CPPA in *Hilton*,[89] the Eleventh Circuit likewise rejected a facial challenge to the CPPA as overbroad and vague in *United States v. Acheson*.[90] Like the *Hilton* court, the *Acheson* court considered certain factors which led to the conclusion that the CPPA is constitutional. First, the Eleventh Circuit reviewed the purposes behind the enactment of the CPPA. The *Acheson* court concluded that "defining child pornography in a manner which captures images that 'appear to be' minors engaged in sexually explicit activity serves the two goals of the Act which are 'the elimination of child pornography and the protection of children from sexual exploitation.'"[91]

Next the court considered the overbreadth doctrine. The "crux of Acheson's overbreadth argument is that [there] appears to be language [which] impermissibly expands the scope of the CPPA to the point where it captures so much constitutionally protected conduct as to render the statute invalid."[92] The Eleventh Circuit rejected Acheson's argument, holding that "[t]he CPPA's overbreadth is minimal when viewed in light of its plainly legitimate sweep."[93]

---

85 *See Hilton*, 167 F.3d at 75.

86 18 U.S.C.A. § 2252A(c) states:

> It shall be an affirmative defense to a charge of violating . . . [the CPPA] that—
> (1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;
> (2) each such person was an adult at the time the material was produced; and
> (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C.A. § 2252A(c) (West Supp. IV 1998).

87 *See Hilton*, 167 F.3d at 75.

88 *See id.* at 76.

89 *See id.*

90 195 F.3d 645, 650 (11th Cir. 1999).

91 *Id.* at 649.

92 *Id.* at 650.

93 *Id.*

Acheson contended that the statute captures a substantial amount of adult-oriented material which falls outside the reach of the statute.[94] The *Acheson* court directed its attention to the definitional language and to the statute's other provisions to assuage concerns about possible overbreadth.[95] The Eleventh Circuit undermined the possibility of overbreadth by citing the affirmative defense[96] and the scienter requirements.[97] Finally, the court concluded that the legitimate scope of the statute dwarfs the risk of impermissible applications.[98]

Having decided that the CPPA is not substantially overbroad, the court finally determined whether it is impermissibly vague.[99] Acheson argued that the statute is void for vagueness because it fails to define the criminal offense with sufficient definiteness so that an ordinary person can understand what conduct was prohibited, and because it fails to discourage arbitrary or discriminatory enforcement.[100] Instead, the court found that "the CPPA defines the criminal offense with enough certainty to put an ordinary person on notice of what conduct is prohibited," and "that possessing images appearing to be children engaged in sexually explicit conduct is illegal."[101] Like the *Hilton* court, the *Acheson* court determined that under the CPPA, a jury must decide "whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of eighteen engaged in sexual activity."[102] Moreover, the appellate court found the provisions of the CPPA to be objective.[103]

Thus, like the First Circuit, the Eleventh Circuit confirmed that "virtual" child pornography is an unprotected category of expression and may be freely regulated.[104]

c. *United States v. Mento*

The CPPA has been tested three times at the United States Court of Appeals level.[105] "The First and Eleventh Circuits have

---

94 *Id.* at 651.
95 *See id.* at 650-51.
96 *Id.*
97 *Id.* at 652.
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.* (quoting United States v. Hilton, 167 F.3d 61, 61 (1st Cir. 1999)).
103 *Id.* at 653.
104 *Id.* (quoting *Hilton*, 167 F.3d at 69).
105 The First and Eleventh Circuits upheld the constitutionality of the CPPA. *See, e.g., Acheson*, 195 F.3d at 650; *Hilton*, 167 F.3d at 61. The Ninth Circuit found the CPPA to be unconstitutional. New York v. Ferber, 458 U.S. 747 (1982).

upheld the federal act against constitutional challenges, but the Ninth Circuit . . . struck down the CPPA as an unlawful abridgment of the free-speech guarantees secured by the First Amendment."[106] The Fourth Circuit, mindful of the conflicting views that had emerged, concurred with the First and Eleventh Circuits in *United States v. Mento*,[107] "conclud[ing] that the Act passes constitutional muster."[108]

Mento "contends that the government's true purpose in combating child pornography has impermissibly shifted from preventing tangible harm to real children, toward eradicating certain ideas that it considers inherently evil."[109] Moreover, *Mento* maintained that the CPPA's reach is improper in light of *Ferber*.[110] The Fourth Circuit, in upholding the constitutionality of the CPPA, extended *Ferber*[111] to include both virtual child pornography and actual child pornography.[112] The Fourth Circuit disagreed with the Ninth Circuit after determining that there is not a substantial difference between child pornography in the traditional sense and child pornography where the minor is "virtual."[113]

The *Mento* court next discussed whether the CPPA was unconstitutionally overbroad and void for vagueness. The Fourth Circuit aligned itself with the findings of the First and Eleventh Circuits, quoting the First Circuit which "upheld the CPPA, ruling that the 'appears to be' language is neither so overbroad nor so vague as to render the Act unconstitutional."[114]

d. *Free Speech Coalition v. Reno*

Unlike the First and Eleventh Circuits, the Ninth Circuit held that the "appears to be" language of the CPPA is substantially overbroad and unconstitutionally vague, rendering the statute unconstitutional.[115]

In this case,[116] the plaintiffs filed a First Amendment challenge to the CPPA's new definition of child pornography.[117] The plain-

106 United States v. Mento, 231 F.3d 912, 915 (4th Cir. 2000).
107 *Id.*
108 *Id.* at 915.
109 *Id.* at 919.
110 *Ferber*, 458 U.S. 747 (1982).
111 *Id.* at 747.
112 *Mento*, 231 F.3d at 919.
113 *Id.* at 920.
114 *Id.* at 917 (quoting *Hilton*, 176 F.3d at 71-77).
115 New York v. Ferber, 458 U.S. 747 (1982).
116 On January 22, 2001, the Supreme Court granted certiorari in *Free Speech Coalition v. Reno*. *See* Holder v. Free Speech Coalition, No. 00-795 (U.S. Jan. 22, 2001).
117 Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir 1999).

tiff was a trade association of businesses involved in the production and distribution of "adult-oriented materials."[118] "Even though Free Speech Coalition does not 'tolerate' the distribution of child pornography,"[119] the association argued that the federal statute prohibits constitutionally protected speech.[120] The court held that the First Amendment prohibits Congress from enacting a statute that criminalizes the generation of images of fictitious children engaged in imaginary but explicit sexual conduct.[121]

The court explained that while such virtual pornographic pictures are unquestionably morally repugnant, they do not involve real children, and there is no demonstrated basis to link computer-generated images with harm to real children.[122] Any victimization of children that may arise from pedophiles' sexual responses to digitally-created pornography depicting children engaging in explicit sexual activities is not a sufficiently compelling justification for the CPPA's speech restrictions.[123] The *Free Speech* court rationalized that if it held otherwise, it would enable "the criminalization of foul figments of creative technology that do not involve any human victim in their creation or in their presentation."[124]

The Ninth Circuit accepted the defendant's contention that the CPPA is unconstitutionally overbroad.[125] The court held that the shift in the language of the statute, which criminalizes those materials that do not involve a recognizable minor, is a significant departure from *Ferber.*[126] Moreover, the *Free Speech Coalition* court found that the articulated compelling state interest in protecting children could not be justified since no actual children were in-

---

118 *Id.*

119 David Hudson, *Federal Courts Split over Constitutionality of Computer Child Porn Law, First Amendment, at* http://www.freedomforum.org/templates/document.asp?documentID=9972 (Sept. 11, 1998).

120 The Free Speech Coalition claimed it filed its lawsuit because many of its members produced films, photographs and other materials that were sexually explicit. *Id.*

121 *See id.* (holding that the phrases "appears to be" a minor and "conveys the impression" that the depiction portrays a minor are vague and overbroad and thus do not meet the requirements of the First Amendment).

122 *See Free Speech Coalition,* 198 F.3d at 1094.

123 *See id.* at 1093.

124 *Id. See also* John Gibeaut, *Image Is Everything: Court Slams Child Porn Law as Covering Digital Works and Art, Too,* 86 A.B.A. J. 20 (May, 2000).

125 *Free Speech Coalition,* 198 F.3d at 1092.

126 *Id.* (quoting New York v. Ferber, 459 U.S. 747, 756 (1982)). The Ninth Circuit held that the CPPA's reach to include virtual child pornography is invalid under the *Ferber* decision, which stated that "while the government is given greater leeway in regulating child pornography, materials or depictions of sexual conduct 'which does [sic] not involve live performance or photographic or other visual reproduction of live performances, retains [sic] First Amendment protection.'" *Free Speech Coalition,* 198 F.3d at 1095.

volved in the illicit images either by production or depiction.[127] Therefore, the CPPA is unconstitutionally overbroad.

"A statute is void for vagueness if it fails to 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement.'"[128] The court found "two phrases in the statute to be highly subjective."[129] These phrases "provide no measure to guide an ordinarily intelligent person about prohibited conduct and any such person could not be reasonably certain about whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution."[130] Furthermore, the court rationalized that the lack of definitions for the phrases "appears to be" or "conveys the impression" allow law enforcement officials to exercise their subjective discretion.[131] Thus, the Ninth Circuit concluded that the vagueness of the statute's key phrases regarding computer images permits enforcement in an arbitrary and discriminatory fashion.[132]

In his dissent, Judge Ferguson shed some light on the defects in the majority's reasoning.[133] Like the First and the Eleventh Circuits'[134] holdings regarding the federal law, the dissent focuses on Congress' compelling evidence that virtual child pornography causes real harm to real children.[135] As a result, Judge Ferguson believes that "virtual child pornography should join the ranks of real child pornography as a class of speech outside the protection of the First Amendment."[136]

III. Congress' Justifications for Enacting the CPPA

"The development of computer technology capable of producing child pornographic depictions virtually indistinguishable from photographic depictions of actual children threatens the Federal Government's ability to protect children from sexual exploitation and the production, distribution and possession of materials pro-

127 *Id.*
128 *Id.* (citation omitted).
129 *See id.*
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.* at 1097.
134 *See* United States v. Hilton, 167 F.3d 61 (1st Cir. 1999); *see* United States v. Acheson, 195 F.3d 645 (11th Cir. 1999).
135 *See Free Speech Coalition*, 198 F.3d at 1098.
136 *See id.*

duced using minors engaging in sexually explicit conduct."[137] "Child pornography, both photographic and computer-generated depictions of minors engaging in sexually explicit conduct, poses a serious threat to the physical and mental health, safety and well-being of our children."[138] Congress validates the compelling governmental interest behind the CPPA because the statute protects children from pedophiles and child abusers who use pornographic depictions as a tool to entice victims, and these depictions have little or no social value.[139]

A. The CPPA Protects Our Children from Child Molesters and Pedophiles

"While federal law has failed to keep pace with technology, the purveyors of child pornography have been right in line with it."[140] "Neither the courts nor the experts foresaw the quality of modern digital simulations and the ease with which they can be distributed over the World Wide Web."[141] These technological advances prompted Congress to ban simulated child pornography, based on the indirect, real-world consequences of the simulations.

The prevention of the sexual exploitation and abuse of children constitute "government objective[s] of surpassing importance."[142] Child pornography stimulates the sexual appetites and encourages the activities of child molesters and pedophiles who use pornography to feed their sexual fantasies.[143] Child pornography is used by pedophiles and child molesters as a facilitator or "training manual" in satisfying their own deviation and as a device to break down the resistance and inhibitions of their victims or the targets of their molestation.[144] There are also findings that pornography is used to blackmail victims of sexual abuse.[145]

Research supports that child pornography has harmful effects on victims of child abuse.[146] Sexual abuse of children is traumatizing to the victims and may cause psychosocial problems.[147]

---

137 S. REP. No. 104-358, at 7 (1996).
138 *Id.*
139 *Id.*
140 Adam Liptak, *supra* note 34, at D3.
141 *See id.*
142 S. REP. No. 104-358, at 12 (1996).
143 *Id.*
144 *Id.*
145 *Id.* at 14 ("The existence of sexually explicit photographs or other materials, and the threat that they will be shown to family or friends, can effectively silence a victim into not revealing the abuse to parents or the authorities.").
146 *See* J.S. v. R.T.H., 714 A.2d 924, 932 (N.J. 1998).
147 *Id.*

These problems include chronic depression and anxiety, isolation and poor social adjustment, substance abuse, suicidal behavior, and involvement in physically or sexually abusive relationships.[148] These problems are more common in adults molested as children.[149] The change in federal law to include virtual child pornography was therefore justified in that it ensures that pedophiles and child abusers do not take advantage of potential loopholes using virtual child pornography instead of actual child pornography.

B. The Compelling Interests to Protect Virtual Child Pornography

1. Virtual Child Pornography Poses the Same Threat as Actual Child Pornography

"Child pornography is a particularly pernicious evil, something that no civilized society can or should tolerate."[150] Prior to the enactment of the CPPA, purveyors of child pornography were capable of exploiting this evil by taking advantage of new technology that did not violate any federal law. Child pornographers used computers to "alter perfectly innocent pictures of children, taken from books, magazines, catalogs, or videos, to create visual depictions of those children engaging in any imaginable form of sexual conduct."[151] The technological revolution has begun to blur the line between virtual and actual reality. It is not necessary to actually molest children to produce child pornography; all that is necessary is an inexpensive computer, readily available software, and a photograph of a neighbor's child shot while the child walked to school or waited for the bus.[152] "Logically, then, the connection between virtual child pornography and the sexual abuse of children is as powerful as the causal link that justifies the utter prohibition of pornographic images involving actual child participants."[153]

Virtual child pornography makes it possible for child pornography to be produced without ever using an actual child. Opponents of the CPPA dwell on this fact and argue that because no actual child was ever used in producing such material, there can-

---

148 *Id.*

149 *Id.*

150 S. REP. No. 104-358, at 12 (1996).

151 *Id.*

152 A child molester or pedophile can create, alter, or modify a perfectly innocuous image or picture of a child he finds sexually attractive or desirable, and he can produce any manner and number of pornographic depictions featuring that child. He can then use the image or picture to stimulate his own sexual appetite for that particular child, with potentially tragic consequences to the child. *See id.*

153 *See* United States v. Mento, 231 F.3d 912, 920 (4th Cir. 2000).

not possibly be any harm to an actual child.[154] Under this theory, the Ninth Circuit declared the CPPA unconstitutional and reasoned that there was no established link between generated child pornography and the subsequent sexual abuse of children.[155] Congressional reports acknowledge this argument, suggesting that we must "turn a blind legal eye" to the existence of virtual child pornography.[156] However, these reports also explain that this argument "ignores the reality of child sexual abuse and exploitation, and the critical role child pornography plays in such criminal conduct."[157]

Pornographic depictions which appear to be of children engaging in sexually explicit conduct, including computer-generated images, deserve no First Amendment protection. The State's compelling interest in protecting children is directly advanced by prohibiting the possession or distribution of such material, for many of the reasons applicable to the child pornographic material at issue in *Ferber*.[158] Moreover, a computer-generated, sexually explicit depiction which does not use an actual child but is "virtually indistinguishable" from an image using an actual child, poses the same threats and dangers to children.[159] "Congress found that when child pornography is used as a means of seducing or breaking down a child's inhibitions, the images are equally effective regardless of whether they are real photographs or computer-generated pictures that are virtually indistinguishable."[160]

---

154 Free Speech Coalition v. Reno, 198 F.3d 1083, 1094 (9th Cir. 1998), *cert. granted, sub nom.* Holder v. Free Speech Coalition, No. 00-795 (U.S. Jan. 22, 2001).

155 *Id.* at 1094.

156 *Child Pornography Prevention Hearing, supra* note 6.

157 *Id.*

158 New York v. Ferber, 458 U.S. 747, 764 (1982). The Court upheld a State law banning the production and promotion of any picture of a child engaging in sexual conduct or lewd exhibition of the genitals because children are entitled to a greater leeway in the regulation of pornographic depictions of them for the following reasons:

> (1) a state's interest in safeguarding the physical and psychological well-being of a minor is compelling;
>
> (2) the distribution of photographs and films depicting sexual activity is intrinsically related to the sexual abuse of children;
>
> (3) the advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials;
>
> (4) the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest; and
>
> (5) recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with earlier decisions.

Id. at 756-63.

159 S. REP. No. 104-358, at 35 (1996).

160 Free Speech Coalition v. Reno, 198 F.3d 1083, 1099 (9th Cir. 1998) (Ferguson, J., dissenting) (quoting *Child Pornography Prevention Hearing, supra* note 6, at 8).

2. Virtual Child Pornography Is Used by Pedophiles and Child Abusers as a Tool

Congress found that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children."[161] "[S]uch use of child pornography," Congress determined, "can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer."[162] Law enforcement has recognized that in many cases the arousal and fantasies fueled by child pornography are a prelude to actual sexual activity with children, and a majority of pedophiles "use child pornography . . . as a model for their own sexual acting-out with children."[163]

Congress' compelling interest in preventing harm to children by banning the use of child pornography is clear. When these materials are used "as a means of seducing or breaking down a child's inhibitions," the images are equally as effective regardless of whether they are real photographs or computer-generated pictures that are "virtually indistinguishable."[164] Consider the consequences if virtual child pornography was not regulated: child molesters and pedophiles could take advantage of this "loophole" in the CPPA and use computer-generated depictions of children to lure child victims. Absent the CPPA, the government would have in child pornography cases the almost impossible burden of proving a real child was used[165] because the accused could simply assert a "built-in reasonable doubt argument."[166] There will always be the argument that the child is not real but virtual, enabling the defendant to establish a reasonable doubt that a real child was used in the pornography.[167]

---

161 S. REP. No. 104-358, at 37 (1996).

162 *Id.*

163 S. REP. No. 104-358, at 35 (1996) (testimony of Dr. Cline); *see id.* at 37 (statement of Dee Jepsen: "[t]herapists who treat sexually addicted persons declare, and studies confirm, that pornography, often child pornography, does play a major role in the molestation process with children"); *id.* at 93 (testimony of Bruce Taylor citing studies "establishing the direct link between the actual molestation of children and the use of adult and child pornography").

164 *Free Speech*, 198 F.3d at 1099 (Ferguson, J., dissenting) (quoting *Child Pornography Protection Hearing*, *supra* note 6, at 8).

165 See Michael J. Eng, Note, Free Speech Coalition v. Reno: *Has the Ninth Circuit Given Child Pornographers a New Tool to Exploit Children?*, 35 U.S.F. L. REV. 109, 127 (2000).

166 *Child Pornography Protection Hearings*, *supra* note 6, at 71 (testimony of Bruce A. Taylor, President and Chief Counsel for the National Law Center for Children and Families).

167 This loophole in the child pornography laws was raised as a legal defense in United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995). S. REP. No. 104-358, at 18 (1996). The defendant argued that the government must prove that each item of alleged child pornography did depict an actual minor. The prosecution prevailed only because of its "carefully

3. Virtual Child Pornography Has Little or No Social Value

The majority in the Ninth Circuit did not consider the fact that real and virtual child pornography have little or no social value. Judge Ferguson noted in his dissent that "virtual child pornography, like its counterpart real child pornography, is of 'slight social value' and constitutes 'no essential part of the exposition of ideas.'"[168] Moreover, he reasoned that "Congress' interests in destroying the child pornography market and in preventing the seduction of minors outweigh virtual child pornography's exceedingly modest social value."[169] It is well accepted that the First Amendment "was fashioned to assure [an] unfettered interchange of ideas for bringing about the political and social changes desired by people."[170] In holding that child pornography is outside the protection of the First Amendment, the Supreme Court in *Ferber* found that the value of child pornography "is exceedingly modest, if not de minimus."[171]

In terms of social value, virtual child pornography should be treated the same as real child pornography. First, in both forms of pornography children are depicted as engaging in sexually explicit activity.[172] Second, to the unsuspecting viewer (a child or an adult), virtual child pornography is practically indistinguishable from real child pornography.[173]

Based on the reasons listed above, it is clear that virtual child pornography must be regulated to protect children from harm.[174] Since there is no substantial difference between actual and virtual child pornography and since child molesters and pedophiles use pornographic images of children as a tool, there is no real social value in virtual child pornography.

---

executed cross-examination and production, in court, of some of the original magazines from which the computer-generated images were scanned." *Id.*

168 *Free Speech*, 198 F.3d at 1101 (Ferguson, J., dissenting) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

169 *Id.* (Ferguson, J., dissenting).

170 *Id.* at 1100 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

171 New York v. Ferber, 458 U.S. 747, 762 (1982).

172 Eng, *supra* note 165, at 129.

173 *See id.*

174 In order for Congress to regulate protected speech to promote a compelling governmental interest, Congress must select the least restrictive means to further articulate this interest. *See* Sable Comm. of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989). Opponents of the CPPA argue that Congress did not select the least restrictive means, however this is not the case. "In light of recent improvements in technology, 'efforts to eradicate the child pornography industry could be effectively frustrated if Congress were prevented from targeting material that appears to be of real children.'" United States v. Mento, 231 F.3d 912, 920-21 (4th Cir. 2000) (citing United States v. Hilton, 167 F.3d 61, 73 (4th Cir. 1999)). Thus, the statutory language cannot be improved upon while still achieving the compelling government purpose of banning child pornography. *Id.* at 921.

IV. Factors the Supreme Court Will Consider in Determining the Constitutionality of the CPPA

The Supreme Court should consider the following three factors when it evaluates the constitutionality of the CPPA: (1) whether the language is substantially overbroad; (2) whether it is too vague; and (3) whether the government's compelling interest in proscribing "virtual" child pornography outweighs the freedoms granted by the First Amendment.[175]

A. The CPPA Is Not Substantially Overbroad

The Ninth Circuit focused on the CPPA's new definition of child pornography.[176] Child pornography, as defined in the CPPA, is any visual depiction that "appears to be" or is promoted or distributed to "convey the impression that the material is . . . of a minor engaging in sexually explicit conduct."[177] The Ninth Circuit majority erred in ruling that this language is overbroad.

The Supreme Court has admonished that "the overbreadth doctrine is strong medicine that should be utilized only as a last resort."[178] "The key question is whether the CPPA poses substantial problems of overbreadth sufficient to justify overturning the judgment of the lawmaking branches."[179]

Opponents of the CPPA argue that the "appears to be" language of the CPPA is so broad that it criminalizes speech that has been accorded First Amendment protection.[180] However, congressional findings suggest otherwise, showing that the CPPA's purpose is to address computer-generated child pornography that is virtually indistinguishable from actual child pornography.[181] This particular language targets the narrow class of visual depictions that are "virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct."[182] The "appears to be" language "applies to the same type of photographic images already prohibited, but . . . does not require the use of an actual minor in its production."[183] In

---

175 *See supra* Part III.

176 Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1998), *cert. granted, sub nom.* Holder v. Free Speech Coalition, No. 00-795 (U.S. Jan. 22, 2001).

177 18 U.S.C.A. § 2256(8)(B), (D) (West Supp. IV 1998).

178 United States v. Hilton, 167 F.3d 61, 71 (1st Cir. 1999) (quoting New York v. Ferber, 458 U.S. 747, 769 (1982)).

179 *Id.* at 71.

180 *Free Speech Coalition*, 198 F.3d at 1095.

181 *See* S. Rep. No. 104-358, at 7 (1996).

182 *Id.*

183 *Id.* at 21.

upholding the CPPA against an overbreadth challenge, the *Hilton* court concluded that "drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses plainly lie beyond the reach of the Act."[184] The reason is that "[b]y definition, they would not be 'virtually indistinguishable' from an image of an actual minor."[185]

The concern that the CPPA prohibits constitutionally protected photographic images of adults in sexually explicit poses is unwarranted. The CPPA explicitly states that:

> "[i]t shall be an affirmative defense" to a charge of distributing, reproducing or selling child pornography that the pornography (1) "was produced using an actual person or persons," (2) each of whom "was an adult at the time the material was produced," and (3) "the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains visual depictions of a minor engaging in sexually explicit conduct."[186]

Despite the passage of the CPPA, the First Amendment continues to protect sexually explicit visual depictions so long as they are produced using actual adults and so long as "the material has not been pandered as child pornography."[187]

As the First, Fourth, and Eleventh Circuits held,[188] the CPPA's sweep is clearly no broader than prior constitutional child pornography laws.

B. The CPPA Is Not Vague

The Ninth Circuit's finding that the CPPA is unconstitutionally vague is also unfounded. "It is well settled that a statute is not void for vagueness unless it fails to 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited.'"[189] The *Free Speech* court found fault with the CPPA because it believed that the phrase "appears to be" is highly subjective and could be enforced in an arbitrary and dis-

---

184 *Hilton*, 167 F.3d at 72.

185 *Id.*

186 Free Speech Coalition v. Reno, 198 F.3d 1083, 1102 (9th Cir. 1998) (Ferguson, J., dissenting), *cert. granted, sub nom.* Holder v. Free Speech Coalition, No. 00-795 (U.S. Jan. 22, 2001).

187 S. REP. No. 104-358, at 10, 21 (1996).

188 *Hilton*, 167 F.3d at 61; United States v. Mento, 231 F.3d 912, 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645, 650 (11th Cir. 1999).

189 *Free Speech Coalition*, 198 F.3d at 1102 (Ferguson, J., dissenting) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

criminatory fashion.[190] However, despite the passage of this version of the CPPA, the government can still use the same type of objective evidence that was relied on before the CPPA went into effect to determine the age of the child portrayed in a photograph. "A jury must decide, based on the totality of the circumstances, whether an unsuspecting viewer would consider the depiction to be an actual individual under the age of eighteen engaging in sexual activity."[191] As an additional "safeguard against arbitrary prosecutions, the government must satisfy the element of scienter before it can obtain a valid conviction under the CPPA."[192]

In sum, the CPPA is not, as the *Free Speech* court held, an attempt to regulate evil ideas.[193] Instead, the CPPA is an important tool in the fight against child sexual abuse. The CPPA's definition of child pornography provides adequate notice of the type of images that are prohibited and does not substantially encroach on expression protected by the First Amendment.

V. Proposed Solutions in Upholding the Constitutionality of the CPPA

Although the federal circuit courts are divided regarding the CPPA's constitutionality, there is a consensus that obscene child pornography is a severe problem today. Although the Ninth Circuit contests the validity of the CPPA, it recognizes that it must find an alternate solution which is not inconsistent with the First Amendment.[194] Here is one compromising solution.

A. *The Standard Articulated by the Court in* Miller v. California *Provides Sufficient Protection in the Distribution of Virtual Child Pornography*

The *Miller* court established guidelines the trier of fact can use to determine whether material is obscene.[195] The three factors for consideration are: (1) whether the average person, applying for contemporary community standards would find that the work as a whole appeals to the Prurient interest;[196] (2) whether the work depicts or describes in a "patently offensive" way sexual conduct specifically defined in the applicable state law; and (3) whether the

190 *Id.* at 1095.
191 *Hilton*, 167 F.3d at 75.
192 *See* 18 U.S.C.A. § 2252A (West Supp. 1999).
193 *Free Speech Coalition*, 198 F.3d at 1095.
194 *See id.* at 1097.
195 Miller v. California, 413 U.S. 15, 15 (1973).
196 *Id.* (citation omitted).

work as a whole lacks serious literary, artistic, political, or scientific value.[197]

Two advantages stem from using the *Miller* test to regulate virtual child pornography over the tests used in *Osborne*[198] or statutes akin to the CPPA.[199] First, the potential explosion of virtual child pornography would not be a threat because the *Miller* standard would only allow prosecution of truly "obscene" pictures.[200] Second, the government would bear the burden of proving that the work is illegally obscene.[201]

Applying the obscenity standard in *Miller* ensures that child pornography (both real and virtual) will be prohibited on the Internet; and, this plays a significant role in the technology revolution. The obscenity standard, and not the CPPA which critics believe is too harsh,[202] would continue to ban child pornography (both real and virtual), therefore, satisfying Congress' compelling interest in regulating virtual child pornography.

The *Miller* test is also well-suited to effectively regulating and prohibiting virtual child pornography. It still enables Congress to achieve its purpose of safeguarding minors through the regulation of child pornography that may have harmful effects.

VI. Conclusion

The technological advancement of computer capabilities is a wondrous and efficient blessing to many people. However, this blessing has the capacity to become one of society's most dangerous curses. Computer-generated images of children can be created without the use of a real child resulting in virtual child pornography. Congress has fervently amended and passed laws prohibiting child pornography because of the compelling interest in protecting children from harm. To keep pace with the ever-changing society, Congress passed the CPPA which prohibits virtual child pornography. The Ninth Circuit and other CPPA opponents argue that the CPPA violates First Amendment protections and therefore must be found unconstitutional. However, other federal circuits have found that it is within Congress' power to proscribe computer-generated pornography under the CPPA, and they have up-

197 *Id.*
198 Osborne v. Ohio, 495 U.S. 103 (1990).
199 Brenda M. Simon, United States v. Hilton, 14 Berkeley Tech. L.J. 385, 398-99 (1999).
200 *Id.*
201 *Id.*
202 *Id.*

held its constitutionality. Until the United States Supreme Court resolves this issue, the circuits will be mixed as to the constitutional validity of the CPPA.

Congress' justifications for finding that child pornography (both real and virtual) is harmful to children should be at the forefront of the Supreme Court's mind when hearing the *Free Speech* case. Congress' holding that protecting and safeguarding minors from the impurities and harmful effects of sexually explicit depictions of minors is of utmost importance. It is imperative to realize that in the absence of the CPPA, child pornographers and pedophiles can effectively manipulate the federal law and use virtual child pornography to lure child victims. There are several factors the Supreme Court should consider when deciding *Free Speech Coalition v. Reno.*[203] In particular, the Court must decide whether the CPPA is too overbroad or vague to be held constitutional. Finally, to strike a balance between the two opposing views, it might be beneficial to apply the *Miller* obscenity standard as an efficient way to regulate child pornography. The *Miller* test is less harsh than the CPPA, yet it has similar effects of prohibiting child pornography (both real and virtual) that may eventually damage minors. In conclusion, one of Congress' main purposes for enacting the CPPA is to close the loophole created by prior legislation in order to protect children. For this purpose to be satisfied, the Supreme Court should uphold the CPPA.

[203] Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1998), *cert. granted, sub nom.* Holder v. Free Speech Coalition, No. 00-795 (U.S. Jan. 22, 2001).