CURRENT DEVELOPMENTS IN THE LAW

A SURVEY OF FEDERAL CASES INVOLVING THE CHILD PORNOGRAPHY PREVENTION ACT OF 1996

This section presents a broad selection of cases recently decided in the federal court system, but it is not intended to be a comprehensive collection.

The Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999). THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HELD THAT: (1) THE FREE SPEECH COALITION HAD STANDING TO BRING AN ACTION CHALLENGING THE CHILD PORNOGRAPHY PREVENTION ACT OF 1996 ("CPPA"); (2) THE CPPA IS NOT CONTENT NEUTRAL; (3) THE CPPA OUTLAWED A TYPE OF VISUAL DEPICTION PROTECTED BY THE SUPREME COURT'S INTERPRETATION OF THE FIRST AMENDMENT, AND THE ARTICULATED COMPELLING STATE INTERESTS CANNOT JUSTIFY THE CRIMINAL PROSCRIPTION WHEN NO CHILDREN ARE INVOLVED IN PORNOGRAPHY; (4) SUCH PROVISIONS ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD; BUT (5) THE CPPA DOES NOT INVOLVE PRIOR RESTRAINT; AND (6) THE CONSTITUTIONALLY INFIRM PROVISIONS ARE SEVERABLE.

I. INTRODUCTION

The plaintiff, The Free Speech Coalition, a trade association of businesses that produce or distribute books, paintings, or photographs involving nude and erotic subjects, filed an action for declaratory and injunctive relief by a pre-enforcement challenge to certain provisions of the Child Pornography Prevention Act of 1996 ("CPPA"). The United States District Court for the Northern District of California, Samuel Conti, J., granted the defendant's motion for summary judgement, and the plaintiff appealed. The court of appeals held that: (1) The Free Speech Coalition had standing to bring an action challenging the CPPA; (2) the CPPA is not content neutral; (3) the CPPA outlawed a type of visual depiction protected by the Supreme Court's interpretation of the First Amendment, and the articulated compelling state interests cannot justify the criminal proscription when no children are involved in pornography; (4) such provisions are unconstitutionally vague and overbroad; but (5) the CPPA does not involve prior restraint on speech; and (6) the constitutionally

infirm provisions are severable, leaving the remaining terms of the CPPA constitutional.

II. BACKGROUND

Congress first enacted legislation aimed at preventing the sexual exploitation of children with the Protection of Children Against Sexual Exploitation Act of 1977.[1] The law criminalized using anyone under the age of sixteen in sexually explicit conduct to produce any visual depiction of such conduct with knowledge that it was or would be transported in interstate or foreign commerce. The prohibited material had to be considered obscene under *Miller v. California*, 413 U.S. 15 (1973), before its production was criminal.[2] The Act also extended the Mann Act prohibitions, 18 U.S.C. §§ 2421-2424, criminalizing the interstate transportation of children for prostitution.[3] Because the Act resulted in only one conviction,[4] Congress passed the Child Protection Act of 1984.[5]

The Child Protection Act eliminated the *Miller* requirement,[6] and raised the age of protected children from sixteen to eighteen years.[7] The law also eliminated the requirement that the material be produced or distributed for sale.[8] Congress also ensured that depicting children in sexual acts was illegal even if it did not meet adult obscenity standards.[9]

Congress amended the law again by passing the Child Sexual Abuse and Pornography Act of 1986,[10] which banned the production and use of advertisements for child pornography. Congress passed another amendment that subjected offenders to liability for children's personal injuries resulting from the material's production.[11] Congress then passed the Child Protection and Obscenity Enforcement Act of 1988, which criminalized computer use to transport, distribute, or receive child pornography.[12] It also prohibited the buying, selling, or otherwise

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[1] *See* Pub.L. No. 95-225, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C. §§ 2251-53).

[2] *See id.*

[3] *See* Pub.L. No.. 95-225, § 3, 92 Stat. 7 (1977).

[4] *See* Attorney General's Comm'n on Pornography, Final Report 604 (1986) (hereinafter "AG Report").

[5] *See* Pub.L. No. 98-292, 98 Stat. 204 (1984) (codified as amended in 18 U.S.C. §§ 2251-53).

[6] *See id.* at § 4.

[7] *See id.* at § 5.

[8] *See id.* at §§ 4, 5.

[9] *See id.* at § 5.

[10] *See* Pub.L. No. 99-628, § 2, 100 Stat. 3510 (1986) (codified as amended in 18 U.S.C. § 2251).

[11] *See* Child Abuse Victims' Rights Act of 1986, Pub.L. No. 99-500, 100 Stat. 1783 (1986) (codified as amended at 18 U.S.C. § 2255).

[12] *See* Pub.L. No. 100-690, § 7511, 102 Stat. 4181 (1988) (codified as amended at 18 U.S.C. §§ 2251A-2252).

obtaining of temporary custody or control of children for the purpose of producing child pornography.[13] The law required record keeping and imposed disclosure requirements on the producers of certain sexually explicit material.[14]

In response to *Osborne v. Ohio*, which upheld an Ohio law prohibiting and viewing child pornography,[15] Congress passed the Child Protection Restoration and Penalties Enhancement Act of 1990, criminalizing possession of three or more child pornography materials.[16] In 1994, Congress acted again by criminalizing the production or importation of sexually explicit depictions of minors.[17]

Congress then passed the Child Pornography Prevention Act of 1996,[18] the subject of the lawsuit. The law criminalized using computer technology to produce images that look like children engaged in sexual acts,[19] when no children are actually involved. The law also criminalized visual depictions that create the impression that children are involved in sexually explicit acts.[20]

III. ANALYSIS

A Standing

The Ninth Circuit affirmed the district court's finding that The Free Speech Coalition had standing.[21] The plaintiff withheld or stopped distributing products for fear they would be prosecuted.[22] The government did not question the lower court's decision.[23]

B. The CPPA Is Not Content Neutral

Any statute that restricts speech by its content is presumptively invalid.[24] The CPPA prohibits any sexually explicit depiction that appears to involve children as opposed to sexually explicit depictions that do not appear to involve children. The law also prohibits material that creates the impression that a child is involved in a sexually explicit depiction as opposed to material that does not create such an impression. The CPPA distinguished favored speech from disfavored speech based

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[13] *See id.* at § 7512.

[14] *See id.* at § 7513.

[15] *See* 495 U.S. 103 (1990).

[16] *See* Pub.L. No. 101-647, § 301, 323, 104 Stat. 4789 (1990).

[17] *See* Pub.L. No. 103-322, § 16001, 108 Stat. 2036 (1994) (codified as amended at 18 U.S.C. § 2259).

[18] *See* 18 U.S.C.A. § 2256(8) (West Supp. 1999).

[19] *See id.* at § 2256(8)(B).

[20] *See id* at § 2256(8)(D).

[21] *See* The Free Speech Coalition v. Reno, 198 F.3d 1083, 1090 (9th Cir. 1999).

[22] *See id.*

[23] *See id.*

[24] *See id.* at 1091 (citing Crawford v. Lungren, 96 F.3d 380, 385 (9th Cir. 1996)).

on content.[25] The Court agreed with the First Circuit's conclusion in *United States v. Hilton*[26] that the CPPA was content-based because it was a blanket suppression of an entire type of speech.[27]

C. *The Articulated Compelling State Interests Cannot Justify the Criminal Proscription When No Children Are Involved in Pornography*

Because the CPPA is content-based, to survive constitutional inquiry, the government must establish a compelling interest for which the CPPA is narrowly tailored.[28] For curbing child pornography actually involving children, three compelling interests are advanced.[29] First, child pornography requires for actual child participation in sexually explicit situations to create the images, which is harmful to children.[30] Second, the dissemination of such material may encourage more sexual abuse because it whets pedophiles' appetites.[31] Third, such images are morally and aesthetically repugnant.[32]

The CPPA criminalizes the use of images that do not involve human beings, whether the fictional person is over the statutory age and looks younger or whether the fictional person is under the statutory age.[33] The focus, however, is on the harm to the children actually involved in the production of the material.[34] The Supreme Court in *New York v. Ferber*[35] limited state statutes criminalizing child pornography to materials that depict sexual conduct by children below a certain age.[36] The Supreme Court, however, acknowledged that a person over the statutory age who looked younger could be involved in a sexually explicit depiction if needed for the literary or artistic value of the work.[37] Simulations of sexually explicit acts involving non-recognizable minors are implicitly constitutional.[38] Case law confirms that Congress does not have a compelling interest in regulating sexually explicit materials that do not contain sexual depictions of actual children.[39]

The Seventh Circuit in *American Booksellers Ass'n, Inc. v. Hudnut*[40] invalidated a city ordinance prohibiting pornography that portrayed women submissively or in

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[25] *See id.* (citing *Crawford*, 96 F.3d at 384).
[26] 167 F.3d 61, 68-69 (1st Cir. 1999).
[27] *See The Free Speech Coalition*, 198 F.3d at 1090-91.
[28] *See id.* at 1091 (citing *Crawford*, 96 F.3d at 385-86).
[29] *See id.*
[30] *See id.*
[31] *See id.*
[32] *See id.* at 1092.
[33] *See The Free Speech Coalition*, 198 F.3d at 1092.
[34] *See id.*
[35] 458 U.S. 747 (1982).
[36] *See The Free Speech Coalition*, 198 F.3d at 1092 (citing *Ferber*, 458 U.S. at 764).
[37] *See id.* (citing *Ferber*, 448 U.S. at 763).
[38] *See id.*
[39] *See id.*
[40] 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

a degrading manner.[41] The court acknowledged that the subordination of women in visual materials begets women's subordination in other aspects of society, but that effect is due to the mental state of the viewer.[42] Regulating speech because it plays a role in mental conditioning would actually end freedom of speech.[43] Child abuse that may result from a pedophile's sexual responses to visual materials depicting fictional children engaging in sexual activity is not a compelling justification for the CPPA. No factual studies link computer-generated child pornography and subsequent child abuse.[44] The legislative justification for CPPA was based on a report that predates existing technology.[45] Without a connection that computer-generated images harm children, the CPPA cannot withstand constitutional scrutiny.[46] Accepting a secondary effects argument to determine whether a statute is constitutional would be a unprecedented shift from First Amendment jurisprudence.[47]

D. CPPA Is Unconstitutionally Vague and Overbroad

A statute is void for vagueness if an ordinary person cannot understand what conduct is prohibited and encourages arbitrary or discriminatory enforcement.[48] The CPPA's phrases that criminalize material that "appears to be a minor" or "convey[s] the impression" that the material is a minor engaged in sexual acts are highly subjective.[49] The phrases do not allow an ordinary intelligent person to know what conduct is prohibited because there is no guide about whose perspective defines the appearance of a minor or whose impression that a minor is involved leads to prosecution.[50] The absence of definitions allows law enforcement officials to exercise their discretion subjectively about what "appears to be" or what "conveys the impression" of prohibited material, allowing for arbitrary and discriminatory enforcement.[51]

A statute must be substantially overbroad before being facially invalidated.[52] The CPPA prohibits non-obscene sexual expression that does not involve children, which is protected under the First Amendment.[53] While technological advances

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[41] *See The Free Speech Coalition*, 198 F.3d at 1093 (citing *Hudnut*, 771 F.2d at 334).

[42] *See id.* (citing *Hudnut*, 771 F.2d at 329).

[43] *See id.* (citing *Hudnut*, 771 F.2d at 330).

[44] *See id.* (citing Ronald Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. Marshall J. Computer & Info. L. 483, 488, 490 (1996)).

[45] *See id.* (citing Adelman, at 490).

[46] *See id.* at 1094.

[47] *See The Free Speech Coalition*, 198 F.3d at 1094

[48] *See id.* at 1095 (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

[49] *Id.*

[50] *See id.*

[51] *See id.* (citing City of Chicago v. Morales, 527 U.S. 41 (1999)).

[52] *See id.* (citing *Ferber*, 458 U.S. at 769).

[53] *See The Free Speech Coalition*, 198 F.3d at 1096 (citing *Ferber*, 458 U.S. at 764-65).

may make visual depictions of fictional child pornography indistinguishable from actual child pornography,[54] child porn has been restricted because of the harm caused to actual minors in its creation, not because of the consequences of its creation.[55] With real child porn, there is a real harm to a child, but there cannot be real harm to a child when no child is involved in computer-generated porn.[56] The inclusion of constitutionally protected activity with legitimately prohibited activity makes CPPA overbroad.[57]

E. The CPPA Does Not Involve Prior Restraint of Speech

Prior restraint involves administrative and judicial orders forbidding certain communication before the communication occurs.[58] Because the CPPA only penalizes speech as it occurs, it is not a prior restraint on speech.[59] The possibility of self-censorship does not amount to prior restraint.[60]

F. The Constitutionally Infirm Provisions Are Severable

Per the language of the statute, the CPPA is severable.[61]

IV. DISSENT

Furguson, J., dissented, writing that the majority was incorrect because: (1) Congress provided compelling evidence that virtual child pornography harms children; and (2) the statutory terms "appears to be" and "conveys the impression" are not vague or overbroad.[62]

The majority is incorrect in thinking the only reason to ban child pornography is to protect actual children.[63] Child pornography is also banned because children are harmed when coerced into sexual activity by the pornography.[64] Protecting children not used in pornography is a compelling state interest.[65] Congress passed the CPPA by relying on U.S. Supreme Court precedent.[66] Congressional findings track the Supreme Court's decision in *Osborne v. Ohio*.[67]

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[54] *See* S.Rep. No. 104-358, at 21 (1996).

[55] *See The Free Speech Coalition*, 198 F.3d at 1096.

[56] *See id.*

[57] *See id.* (citing Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)).

[58] *See id.* (citing Alexander v. United States, 509 U.S. 544, 550 (1993)).

[59] *See id.*

[60] *See id.* (citing Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 60 (1989)).

[61] *See* Pub.L. No. 104-208, 110 Stat. 3009, § 101 (1996).

[62] *See The Free Speech Coalition*, 198 F.3d at 1098.

[63] *See id.*

[64] *See id.* at 1099 (citing Osborne v. Ohio, 498 U.S. 103, 110-11 (1990)).

[65] *See id.* (citing *Osborne*, 498 U.S. at 111; United States v. Hilton, 167 F.3d 61, 70 (1999)).

[66] *See id.* (citing *Osborne*, 498 U.S. at 111).

[67] *See id.* (citing *Osborne*, 498 U.S. at 110-11; 18 U.S.C.A. §§ 2251 (West Supp. 1999),

Congress should be given a wide berth when legislating to protect children.[68] The majority fails to address that computer technology makes it more difficult to prosecute successfully a child pornography case.[69]

Child pornography has little or no societal value.[70] The First Amendment does not protect speech with no redeeming social importance.[71] Virtual child pornography is not transformed into meaningful speech because actual children were not used in its production.[72] It should, therefore, be treated like actual child pornography.[73]

The majority should not have applied strict scrutiny to the CPPA.[74] The proper analysis is to weigh the state's interest in regulating child pornography with the pornography's social value.[75] The balance of interests tips in favor of the government.[76]

The language "appears to be" and "conveys the impression" is not overbroad or vague.[77] A court should not invalidate a statute as overbroad unless the overbreadth is substantial compared to the statute's sweep or when a limiting construction can be placed on it.[78] Legislative history indicates that the CPPA would only apply to images that are indistinguishable from actual children engaging in sexual conduct, and not to everyday artistic expressions,[79] or constitutionally protected adult pornography.[80] Instead of invalidating the CPPA, problems should be dealt with case-by-case.[81]

The CPPA is not unconstitutionally vague.[82] The government can rely on the same objective evidence relied upon before the CPPA's passage, like showing the jury the pictures so they can determine whether the image "appears to be" of a minor.[83] With post-pubescent children, expert witnesses can testify to the physical

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Historical Findings at Statutory Notes, Congressional Findings [hereinafter "Congressional Findings"]).

[68] *See The Free Speech Coalition*, 198 F.3d at 1099 (citing *Ferber*, 458 U.S. at 756).

[69] *See id.* at 1100 (citing S.Rep. No. 104-358, at 20).

[70] *See id.* (citing *Ferber*, 458 U.S. at 762).

[71] *See id.* (citing Roth v. United States, 354 U.S. 476, 484 (1957); R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992)).

[72] *See id.*

[73] *See id* at 1100-01.

[74] *See The Free Speech Coalition*, 198 F.3d at 1001.

[75] *See id.* (citing *Ferber*, 458 U.S. at 756-64; *Osborne*, 495 U.S. at 108-11).

[76] *See id.*

[77] *See id.*

[78] *See id.* (citing *Broadrick*, 413 U.S. at 613, 615).

[79] *See id.* at 1102 (citing S.Rep. No. 104-358, at 7, 21; Congressional Findings, at 5, 8, 13).

[80] *See The Free Speech Coaltion*, 198 F.3d at 1102 (citing the CPPA, 18 U.S.C.A. § 2252A(c) (West Supp. 1999); S.Rep. No. 104-358, at 10, 12).

[81] *See id.* (citing *Ferber*, 458 U.S. at 781 (Stevens, J., concurring)).

[82] *See id.*

[83] *See id.* at 1103 (citing United States v. Arvin, 900 F.2d 1385, 1390 n.4 (9th Cir. 1990)).

development of the depicted person and the government can present evidence about the pornography's packaging.[84] The standard for evaluating the provisions of the CPPA is objective, based on the totality of the circumstances.[85] Scienter is a final safeguard against arbitrary enforcement.[86]

V. CONCLUSION

The United States Court of Appeals for the Ninth Circuit held: (1) the CPPA is content neutral; (2) the CPPA is not unconstitutionally vague; (3) the affirmative defense the CPPA provides is constitutional; and (4) the CPPA does not impose a prior restraint on protected speech and that it does not permanently chill protected expression. The court of appeals held that: (1) The Free Speech Coalition had standing to bring an action challenging the CPPA; (2) the CPPA is not content neutral; (3) the CPPA outlawed a type of visual depiction protected by the Supreme Court's interpretation of the First Amendment, and the articulated compelling state interests cannot justify the criminal proscription when no children are involved in pornography; (4) such provisions are unconstitutionally vague and overbroad; but (5) the CPPA does not involve prior restraint on speech; and (6) the constitutionally infirm provisions are severable, leaving the remaining terms of the CPPA constitutional. Therefore, the Ninth Circuit affirmed the United States District Court for the Northern District of California on the questions of standing and prior restraint, reversed on the constitutionality of the statute's language, and remanded the case.

Anthony Miranda

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[84] *See id.* (citing United States v. Robinson, 137 F.3d 652, 653 (1st Cir. 1998)).

[85] *See id.* (citing *Hilton*, 167 F.3d at 75).

[86] *See The Free Speech Coalition*, 198 F.3d at 1103 (citing the CPPA, 18 U.S.C.A. § 2252A (West Supp. 1999); United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994)).

United States v. Acheson, 195 F.3d 645 (11th Cir. 1999). ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, THE ELEVENTH CIRCUIT COURT OF APPEALS AFFIRMED THE CONSTITUTIONALITY OF THE CHILD PORNOGRAPHY PROTECTION ACT (CPPA), HOLDING THAT: (1) THE CPPA WAS NOT FACIALLY INVALID; (2) THE CPPA WAS NOT OVERBROAD; AND (3) THE CPPA WAS NOT VOID FOR VAGUENESS.

I. INTRODUCTION

After his arrest for violating the Child Pornography Protection Act of 1996 (CPPA)[1] the defendant, Jack Acheson, Jr. pled guilty to: (1) knowingly receiving visual depictions of minors engaged in sexually explicit conduct transported in interstate commerce by means of a computer; and (2) knowingly possessing material containing three or more images of child pornography. During his plea, Acheson reserved the right to dispute the constitutionality of the CPPA.[2] Rejecting Acheson's subsequent challenge, the Eleventh Circuit Court of Appeals affirmed the constitutionality of the CPPA. The Court specifically found that the CPPA: (1) did not, on its face, violate the First Amendment by banning protected speech; (2) was not overbroad in its burden on speech; and (3) was not impermissibly vague such that it captured protected conduct.

II. BACKGROUND

In 1996, Congress enacted the CPPA, which criminalizes the transmission and receipt of child pornography via computer.[3] In 1997, the defendant, Jack Acheson, Jr., was arrested for violating the Act by receiving and possessing multiple images of child pornography on his home computer.[4]

Acheson's arrest stemmed from information received by German authorities indicating that an individual with the America Online screen-name of Firehawk96 had downloaded graphic images of child pornography.[5] The FBI, identifying Acheson as Firehawk96, entered the suspect's home and seized his computer.[6] Bureau officials discovered over 500 images of child pornography that Firehawk96 had downloaded between January 1996 and November 1997.[7]

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[1] 18 U.S.C.A. § 2251 et seq.
[2] *See id.*
[3] 18 U.S.C.A. § 2256.
[4] *See Acheson*, 195 F.3d at 648.
[5] *See id.*
[6] *See id.*
[7] *See id.*

After his arrest and during his subsequent hearing, Acheson pled guilty to knowingly violating several of the CPPA's provisions.[8] During his initial court appearance, however, Acheson concomitantly reserved the right to contest the constitutional validity of the CPPA.[9]

Pursuantly, Acheson filed a motion to dismiss in the United States District Court for the Northern District of Florida alleging that the CPPA was impermissibly overbroad, vague, and facially violative of the Constitution's First Amendment.[10] The District Court rejected Acheson's constitutional objections and sustained his superseding indictment.[11] Justice Story, sitting by designation, delivered the opinion of the Eleventh Circuit Court of Appeals.[12]

III. ANALYSIS

A. The CPPA

Although federal regulations have banned the possession and trade of child pornography since 1977, continually advancing technology used for the transmission of illegal explicit images has required regular amendments and improvements to hard core, anti-child pornography legislation.[13] The 1996 enactment of the CPPA demonstrates congressional concern for the use of computers as a novel medium for the exchange of pornographic materials.

The CPPA specifically prohibits "virtual" childhood pornography: computer altered images that are practically indistinguishable from actual photos of minors in sexual situations.[14] To effectuate the ban on such images, Congress defined "child pornography," within the meaning of the CPPA, as follows:

> Any visual depiction . . . whether made or produced by electronic, mechanical or other means, of sexually explicit conduct where—. . .
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct. . .[15]

Acheson argued that the "appears to be" language renders the CPPA unconstitutionally vague, overbroad, and in violation of the First Amendment.[16]

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[8] *See id.*

[9] *See id.*

[10] *See Acheson*, 195 F.3d at 648.

[11] *See id.*

[12] *See id.*

[13] *See id.* Congress initially sought to regulate child pornography through the Sexual Exploitation of Children Act. Pub. L. No. 95-222, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C.A. §§ 2251-2253 (West 1984 & Supp. 1999).

[14] 18 U.S.C.A. § 2256(8) (West Supp. 1999).

[15] *Id.*

[16] *See Acheson*, 195 F.3d at 649.

To appropriately frame the defendant's constitutional objections to the legislation, the court considered the overall purpose of the legislation. The "appears to be" language at issue, the court reasoned, serves important social goals.[17] "Virtual porn," as much as actual pornography, whets the pedophiles and encourages the molestation of children.[18] Similarly, computer altered images enable abusers, by displaying images of childhood sex to reluctant minors, to convince children to engage in illegal sexual activity.[19] The statute's expansive scope, therefore, serves dually important goals of eliminating child pornography and protecting children from the advances of pedophiles.

B. First Amendment Challenge

Acheson contended that the CPPA violated the First Amendment by banning protected speech.[20] Challenging the legislation on its face rather than as applied to the particular facts of his case, Acheson argued that the Act constituted an impermissible, content-discriminatory restriction on an entire class of protected speech.

In light of Congress's unfettered power to regulate child pornography, however, the court affirmed the First Amendment constitutionality of the CPPA.[21] The content based restriction implicit in the legislation represented a legitimate exercise of Congress's overridingly compelling interest in regulating child pornography. Accordingly, Acheson's objection to the facial validity of the CPPA fails as a matter of law.[22]

C Overbreadth

Acheson's overbreadth objection essentially focused on the fact that the statute's "appears to be" language wrongfully captures broad categories of protected speech so as to render the law invalid.[23] The court rejected Acheson's arguments on the basis of the CPPA's minimal overbreadth in light of the rule's legitimately broad scope.[24]

The crux of Acheson's argument refers to the possibility that the statute's ban on images that "appear to be" of minors, might capture otherwise lawful depictions of

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[17] *See id.* (recognizing that new technologies make it increasingly easier to produce images of child pornography).

[18] *See id.*

[19] *See id.*

[20] *See id.* at 650.

[21] *See id.* citing United States v. Hilton, 167 F.3d at 69 (1999) ("It is well-settled that child pornography, an unprotected category of expression identified by its content, may be freely regulated.").

[22] *See Acheson,* 195 F.3d at 650.

[23] *See id.*

[24] *See id.*

youthful looking adult models.[25] The legislative history behind the CPPA, the court reasoned, evinces valid justifications for the statute's potentially sweeping effect.

Congress recognized that virtual child pornography, if unregulated, might generally lead to the explosive growth of illegally explicit images.[26] The broad language of the CPPA, therefore, validly reflects Congress's pursuit of its permissible goal of entirely eradicating child pornography.[27] Even where no minor is directly harmed by the production of child pornography, the underlying rationale of the legislation justifies its expansive language.

The court similarly rejected Acheson's argument that the CPPA might wrongly capture protected images of younger looking adult actors. The court acknowledged that the de minimis value of images of child pornography allows for a broad construction of the legislation that might capture, on its fringes, forms of protected speech.[28]

Other considerations mitigate the potential overbreadth of the CPPA. The statute offers an affirmative defense for producers of pornographic images who can establish that their materials were made with actors of legal age.[29] The Act's scienter requirement also limited the sweep of the legislation. Concerns for prosecutorial efficiency, in conjunction with the scienter requirement, would compel officials to pursue only cases of individuals who possess materials of actors who "clearly appear to be under 18."[30]

Finally, because the demand for child pornography among pedophiles is largely for images falling well within the range of constitutionally proscribable materials, the CPPA legitimately serves the important purpose of regulating the most prevalent forms of explicit pornography.[31]

D. Vagueness

Acheson's vagueness argument seeks to invalidate the CPPA on grounds that it encourages arbitrary and capricious enforcement and fails to provide sufficient notice.[32] Because the legislation does not define the extent of the prohibited conduct, Acheson contends, the CPPA "abuts upon sensitive areas of First

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[25] *See id.* at 651.

[26] *See id.*

[27] *See id.* at 650.

[28] *See Acheson,* 195 F.3d at 651 (explaining that the section of New York v. Ferber, 458 U.S. 747 (1982), that Acheson relied upon to make his argument was read out of context because the case also recognized that it is "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." *Ferber*, 458 U.S at 763-64).

[29] 18 U.S.C. § 2252(C).

[30] *Acheson*, 195 F.3d at 651, quoting *Hilton*, 167 F.3d at 73.

[31] *See id.*at 652.

[32] *See id.*

Amendment freedoms."[33] The court found, however, that sexually graphic images falling close to the line of proscribable conduct are not sufficiently valuable, in terms of the First Amendment, to render the Act unconstitutionally vague.[34]

Acheson fundamentally alleged that a reasonable person could not, because of the statute's vague language, be on notice as to whether they possess images that "appear to be" of minors.[35] In rejecting Acheson's interpretation of the legislation, the court reasoned that the physical characteristics of the person in the image, or the explicit file name of the image, can provide individuals with sufficient notice that they possess illegal materials in violation of the CPPA.[36]

The court similarly emphasized the CPPA's inherent safeguards against arbitrary enforcement in dismissing Acheson's vagueness objections. As previously discussed, the Act's scienter requirement requires that any defendant who honestly believed that the actor in the picture "appears to be at least 18 years old (and is believed by the jury), must be acquitted . . . ."[37] The court therefore affirmed the constitutionality of the CPPA in light of these safeguards against improper enforcement and the effect of the scienter requirement in promoting selective prosecutions under the Act.[38]

IV. CONCLUSION

The Eleventh Circuit Court of Appeals held that the CPPA constitutionally regulates the transmission and possession of child pornography. The court specifically reaffirmed the Act's broad prohibition of "virtual porn," computer altered images that appear to be of minors engaged in illegal sexual conduct. The statute's wide scope and expansive regulations are neither facially violative of the First Amendment, nor unconstitutionally vague or overbroad.

Gregory E. Peterson

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[33] *Id.*

[34] *See id.*

[35] *See id.*

[36] *See Acheson*, 195 F.3d at 652 (in this case, the names of files retrieved from Acheson's computer, such as "KIDS1.JPG," and "SEXKD001.JPG," would indicate that the images contained child pornography).

[37] *See id.* quoting *Hilton*, 167 F.3d at 75.

[38] *See id.* at 653.

United States v. Hilton, 167 F.3d 61 (1st Cir. 1999). THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT HELD THAT: (1) A COMPELLING GOVERNMENTAL OBJECTIVE CONCERNING CHILD PORNOGRAPHY MAY INCLUDE CONSIDERATIONS BEYOND PREVENTING THE DIRECT ABUSE OF ACTUAL CHILDREN; (2) THE CHILD PORNOGRAPHY PREVENTION ACT (CPPA) IS NOT SO OVERBROAD AS TO CONTRAVENE THE FIRST AMENDMENT, EVEN IN ITS PROHIBITION OF SEXUALLY EXPLICIT MATERIAL INVOLVING A PERSON WHO "APPEARS TO BE" A MINOR; (3) SUCH PROHIBITION WAS INTENDED TO TARGET ONLY A NARROW CLASS OF IMAGES, I.E., VISUAL DEPICTIONS THAT ARE VIRTUALLY INDISTINGUISHABLE TO UNSUSPECTING VIEWERS FROM UNTOUCHED PHOTOGRAPHS OF ACTUAL CHILDREN ENGAGING IN SEXUALLY EXPLICIT ACTS; (4) THE CPPA IS NOT UNCONSTITUTIONALLY VAGUE, IN VIOLATION OF DUE PROCESS; (5) THE STANDARD OF WHETHER A PERSON ENGAGED IN SEXUALLY EXPLICIT CONDUCT "APPEARS TO BE A MINOR" IN VIOLATION OF THE CPPA IS AN OBJECTIVE ONE; AND (6) SCIENTER MUST BE PROVED TO OBTAIN A CONVICTION.

I. INTRODUCTION

The CPPA was enacted by Congress in 1996 to attack the rise of computerized child pornography.[1] The Act prohibits, inter alia, the knowing possession of visual images that depict minors (or those who "appear to be minors") engaging in sexually explicit conduct. Defendant, David Hilton, was indicted by a federal grand jury for criminal possession of computer disks containing three or more images of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B).[2] The district court dismissed the case on the ground that the Act is unconstitutional. The United States appealed. The court of appeals reversed and held that: (1) a compelling governmental objective concerning child pornography may include considerations beyond preventing the direct abuse of actual children; (2) the child pornography prevention act (CPPA) is not so overbroad as to contravene the First Amendment, even in its prohibition of sexually explicit material involving a person who "appears to be" a minor; (3) such prohibition was intended to target only a narrow class of images, i.e., visual depictions which are virtually indistinguishable to unsuspecting viewers from untouched photographs of actual children engaging in sexually explicit acts; (4) the CPPA is not unconstitutionally vague, in violation of due process; (5) the standard of whether a person engaged in sexually explicit conduct "appears to be a minor" in violation of the CPPA is an objective one, and (6) scienter must be proved to obtain a conviction.

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[1] *See* United States v. Hilton, 167 F.3d 61, 65 (1st Cir. 1999).

[2] *See* 18 U.S.C. § 2252A(a)(5)(B).

II. BACKGROUND

In 1996, Congress passed the Child Pornography Prevention Act (CPPA), which was intended to modernize the federal law by enhancing its ability to battle child pornography in the cyberspace era.[3] The drafters wished to "improve law enforcement tools to keep pace with technological improvements that have made it possible for child pornographers to use computers to 'morph' or alter innocent images showing them in sexually explicit poses."[4] Congress desired to: reduce the volume of computerized child pornography; ban computer-generated images that are virtually indistinguishable from those of real children, but are made without live children; protect the privacy of children whose harmless images were distorted to create sexually explicit pictures; and to deny child abusers a "criminal tool" often used to facilitate the sexual abuse of children.

Before trial, the defendant argued that the statute was unconstitutionally vague and overbroad, and therefore unenforceable.[5] On March 26, 1998, the United States District Court for the District of Maine agreed and determined that the CPPA was a content-neutral regulation which was "designed to ameliorate significant harmful secondary effects of the protected speech rather than suppress the speech itself."[6] Regardless, the court held that the statutory definition of "child pornography" was both vague and unconstitutionally overbroad. The court then found that the "appears to be a minor" language was overly subjective and dismissed the indictment.[7]

The government appealed with attacks on the district court's analysis. First, it questioned the court's conclusion that the statute was overbroad.[8] Next, the government claimed that the statute was not unconstitutionally vague.[9] The court of appeals sought to determine whether the CPPA's definition of child pornography satisfied the First Amendment, and whether the law was adequately precise as to provide fair notice of the kinds of images to avoid.[10]

III. ANALYSIS

A. Defining the Contours of Child Pornography

The court began its analysis by defining the CPPA as a context-specific statute which cannot be understood as a time, place, or manner regulation.[11] It went on to

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[3] *See Hilton*, 167 F.3d at 65.
[4] *Id.*
[5] *See id.* at 67.
[6] United States v. Hilton, 999 F. Supp. 131, 134 (D. Me. 1998).
[7] *See id.*
[8] *See Hilton*, 167 F.3d at 67-68.
[9] *See id.*
[10] *See id.* at 69.
[11] *See id.*

remind the parties that it is a well-settled principle that child pornography is an unprotected category of speech which can be freely regulated.[12] The court stated that anti-child pornography statutes must be "adequately defined" to pass constitutional muster.[13]

The court cited various cases, concluding that four lessons can be learned from them; sexually explicit material falls along a continuum entitling it to varying degrees of protection; considerations beyond preventing the direct abuse of children can qualify as compelling government objectives where child pornography is concerned; a criminal statute must contain government authority by adequately defining the type of image to be proscribed; and wherever the line between constitutional and unconstitutional is to be drawn, greater leeway ought to be given to legislatures regulating the sexual depictions of children.[14]

B. *The CPPA Is Not Unconstitutionally Overbroad*

A statute will not be invalidated unless its overbreadth is "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[15] There is a judicial disinclination to striking down statutes by employing the overbreadth doctrine.[16] The court concluded that the CPPA does not pose substantial problems of overbreadth sufficient to strike the statute down.[17] The court reasoned that the government's interests in destroying the child pornography trade and protecting children from sexual abuse justified such Act.[18]

C. *Regulation of Child Pornography Is Not Limited to Images Created With the Use of Live Children*

The court discussed the language of the statute which proscribes material that "appears to be" of a minor. The court recognized this as "troublesome" and potentially violative of the First Amendment.[19] However, the court said that the proper rule to employ when a statute is susceptible to two constructions, one of which gives rise to constitutional questions, is to adopt the meaning which is innocuous.[20] Therefore, the court concluded that the statute was intended to target only a narrow class of images, i.e., those that are "virtually indistinguishable to

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[12] *See id.*

[13] *See id.* (citing New York v. Ferber, 458 U.S. 747, 764 (1982)).

[14] *See Hilton*, 167 F.3d at 70-71.

[15] *Id.* (citing Osborne v. Ohio, 495 U.S. 103, 112 (1990)).

[16] *See id.* at 71 (reasoning that there are wide-reaching effects of striking down a statute on its face, and that it may be inefficient to do so. The Court stated that "[I]t makes little sense to strike down an entire statute in response to a facial attack when potential difficulties can be remedied in future cases through fact-specific as-applied challenges.") *Id.*

[17] *See id.*

[18] *See id.*

[19] *See id.* at 71-72.

[20] *See Hilton*, 167 F.3d at 71-72.

unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct."[21]

Defendant argued that the First Amendment only permitted the regulation of sexually explicit material where actual children were abused in its creation.[22] However, the court countered by claiming that it was a logical extension of *Osborne* and *Ferber* to allow the regulation of sexually explicit materials that appear to be of children, but are actually not.[23] The court reasoned that the government's interests in safeguarding the welfare of children, as well as the court's reluctance to second-guess Congress's goal of abating child pornography, justified such an analysis.[24]

Defendant next claimed that there was an inherent difficulty in deciphering between the depicted person was seventeen or eighteen.[25] Defendant feared that people would be convicted for portraying adults who merely looked young.[26] The court, however, countered by stating that the majority of convictions under the "appears to be" section of the statute involve pre-pubescent children, who are clearly under the age of eighteen.[27] Additionally, the court stated that the few possible mistaken applications of the Act do not warrant striking down the entire piece of legislation.[28]

D. The CPPA Is Not Unconstitutionally Vague

The standard for overturning a law on vagueness grounds is stringent. Specifically, a statute will not be held void for vagueness unless 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."[29] The district court found the CPPA unduly vague, because it believed the "appears to be a minor" standard to be purely subjective.[30] However, the court of appeals held that the standard was objective, i.e., whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of eighteen engaging in sexually explicit behavior.[31] The court qualified this by stating that the element of scienter must be satisfied by the prosecution before a criminal conviction could be obtained.[32]

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[21] *Id.* at 72.
[22] *See id.*
[23] *See id.* at 72-73.
[24] *See id.* at 73.
[25] *See id.*
[26] *See Hilton*, 167 F.3d at 73.
[27] *See id.* at 73-74.
[28] *See id.* at 74.
[29] *Id.* at 75.
[30] *See id.*
[31] *See id.*
[32] *See Hilton*, 167 F.3d at 75.

IV. CONCLUSION

The United States Court of Appeals for the First Circuit held that the Child Pornography Protection Act was not so overbroad as to contravene the First Amendment, nor so vague as to violate due process. The court held that considerations beyond preventing the direct abuse of children could qualify as compelling government objectives where child pornography was concerned. The standard of whether a person engaged in sexually explicit conduct "appears to be a minor" is an objective one, and scienter must be proven to obtain a valid conviction.

Rashmi Luthra