FREE SPEECH COALITION V. RENO

By Gary Geating

A college student decides to create a pictorial of Romeo and Juliet in a sexual embrace for her art class. She turns on her computer and scans in two photographs of her and her boyfriend naked from the waist up. Then using graphics software, she alters their pictures to create new images resembling adolescents, and poses them in a loving embrace in an Elizabethan bedroom. Has she produced child pornography? Her boyfriend returns from a trip to Japan with ten *manga*, Japanese comic books, and gives them out to fellow language students to practice reading Japanese. Each *manga* contains about ten short comic stories ranging from baseball to superheros. At least one story in each *manga* depicts a young high school girl who must battle evil and in the process usually slips out of her school girl uniform. Has the boyfriend just distributed child pornography? Does child pornography need to depict an actual child engaged in sexual activity, and if it does not, how do we avoid the conclusion that we are punishing mere thought and not conduct?

Past federal child pornography statutes have tracked the constitutional limits set forth by the Supreme Court. The first child pornography statute, the Sexual Exploitation of Children Act enacted in 1977, prohibited only pornographic material that was obscene under the *Miller* test.[1] In 1982, the Supreme Court separated child pornography from pornography governed by the *Miller* test, creating a special class of pornography that can be prohibited regardless of whether it is obscene or not.[2] Congress responded to the Supreme Court's decision with the Child Protection Act of 1984, which removed the obscenity requirement from the federal child pornog-

1. *See* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 449-50 (1997). In *Miller v. California*, Miller v. California, 413 U.S. 15 (1973), the Supreme Court set forth constitutional guidelines for statutes regulating obscenity on how to determine if material is obscene. The basic guidelines for the trier of fact are: (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *See id.* at 24.

2. *See* New York v. Ferber, 458 U.S. 747, 764-65 (1982).

raphy statute.[3] In a 1990 decision, the Supreme Court upheld the constitutionality of prohibiting the private possession of child pornography.[4] Congress then amended the child pornography statute to prohibit the possession of three or more pieces of child pornography.[5]

In 1996, Congress leaped ahead of the Supreme Court by expanding the federal statute's definition of child pornography to include simulated child pornography, which is child pornography made without the participation of an actual child. The inclusion of simulated child pornography in the statute's definition of child pornography appears to be beyond the scope of pornographic material that the Supreme Court has categorized as child pornography.[6] Why has Congress decided to leap ahead of the Supreme Court after following its lead in the area of child pornography for twenty years? Technology has created new possibilities in the child porn industry. Computer graphics software can create lifelike images, which until now could only be expected from photographs. Therefore, Congress has taken the first step to face these new computer-generated simulations in hopes that Supreme Court will follow.[7] In *Free Speech Coalition v. Reno*,[8] a district court in the Northern District of California took this step with Congress by upholding the constitutionality of prohibiting simulated child pornography.

I. BACKGROUND

In *Free Speech Coalition v. Reno*, the plaintiffs filed a First Amendment challenge to the new definition of child pornography contained in the Child Pornography Prevention Act of 1996 (CPPA).[9] Under the CPPA, photographs, film, videos, computer-generated pictures, and pictures fall within the statute's definition of child pornography if: (a) their production involves the use of a minor in sexually explicit conduct, (b) they depict what is or appears to be a minor engaging in sexually explicit conduct, (c)

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3. *See* Burke, *supra* note 1, at 449-50.

4. *See* Osborne v. Ohio, 495 U.S. 103, 111 (1990); *but cf.* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding private possession of obscene materials may not be banned).

5. Burke, *supra* note 1, at 451.

6. *See Ferber*, 458 U.S. at 764-65.

7. *See* 142 CONG. REC. S11840-41 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch).

8. No. C 97-0281, 1997 WL 487758 (N.D. Cal. Aug. 12, 1997).

9. *See id.* at *1. The plaintiffs include an association that defends First Amendment rights, a publisher of a book dealing with nudism, and individual artists whose works include nude photographs and paintings. *See id.*

they have been modified to make it appear that an identifiable minor is engaging in sexually explicit conduct, or (d) they are advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is a visual depiction of a minor engaging in sexually explicit conduct.[10] The plaintiffs argued that these provisions constitute impermissible content-based regulations, and that they are vague and overbroad.[11] Both the plaintiffs and the government defendants moved for summary judgment.[12] Senior District Judge Conti held that the CPPA did not violate the First Amendment and granted the defendants' motion for summary judgment.[13]

A. Content-Neutral Standard of Review

The district court did not address whether the CPPA's definition of child pornography includes material beyond the scope of the Supreme Court's category of child pornography.[14] Instead, the district court began its discussion by determining the standard of review under which to scrutinize the CPPA's contested provisions.[15] The district court found that the CPPA is a content-neutral rather than a content-based regulation, and held that "the contested provisions of the CPPA survive the intermediate scrutiny set forth by the Supreme Court for content-neutral regulations."[16]

The district court decided that the contested provisions of the CPPA are content-neutral because they can be justified without reference to the content of the regulated speech.[17] The aim of regulating computer-generated pornography centers on preventing the devastating secondary

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10. *See* 18 U.S.C. § 2256(8) (1997).
11. *See Free Speech Coalition*, 1997 WL 487758, at *1.
12. *See id.*
13. *See id.* at *7
14. *See infra* note 38.
15. The district court succinctly decided that the plaintiffs had standing to bring this pre-enforcement challenge to the CPPA. The defendants argued that the plaintiffs' activities fell within the affirmative defense provided by the statute and therefore they had suffered no injury to confer standing. *See Free Speech Coalition*, 1997 WL 487758, at *2. The plaintiffs countered that they had been injured by the CPPA because they had stopped distribution and production of some materials due to fear of prosecution. *See id.* at *3. In addition, the plaintiffs argued that the affirmative defense does not protect people who consume and distribute the potentially illegal material because they cannot meet its requirements. *See id.* In the First Amendment context, a party may challenge a statute's overbreadth by claiming it may be unconstitutionally applied to other persons not involved in the case. *See* Massachusetts v. Oakes, 491 U.S. 576, 581 (1989).
16. *See Free Speech Coalition*, 1997 WL 487758, at *4-5.
17. *See id.* at *4.

effects that such material has on children and society.[18] Even though no child participated in making the simulations, simulated child pornography nonetheless exploits and degrades children, stimulates and fans the sexual appetites of child molesters and pedophiles, and can be used as a tool to break down a child's resistance to participating in sexual activity.[19] The district court concluded that the CPPA is designed to counteract the effects that simulated child pornography has on the children seduced by it and the pedophiles who view it, and its purpose is not to regulate the ideas themselves.[20]

Then, the district court laid out three requirements that content-neutral legislation must pass to comply with the intermediate standard of review: (1) the restrictions must advance important governmental interests, (2) they must not burden substantially more speech than necessary to further those government interests, and (3) they must leave open alternative channels for communication of the information.[21]

The district court found that the CPPA advanced important governmental interests and did not burden more speech than necessary to further them.[22] Relying on the Supreme Court's decision in *New York v. Ferber*[23] and congressional reports, the district court found that the government has a compelling interest in protecting children from sexual exploitation.[24] The burdens placed on any protected speech are minimized by the detailed definitions of "sexually explicit conduct" and "child pornography."[25] In addition, the affirmative defense laid out by the CPPA further narrows the range of conduct regulated by the provisions.[26]

Finally, the district court decided that the CPPA did leave open alternative channels for communication.[27] The district court reasoned that be-

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18. *See id.*

19. *See id.* at *1, 4.

20. *See id.* at *4.

21. *See id.* at *3-5.

22. *See id.* at *4.

23. 458 U.S. 747, 756-57 (1982) (finding that the state has interest in protecting well being of children).

24. *See Free Speech Coalition*, 1997 WL 487758, at *4.

25. *Id.* at *4. An affirmative defense can be raised if "(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, 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. § 2252A(c) (1997).

26. *See Free Speech Coalition*, 1997 WL 487758, at *5.

27. *See id.*

cause plaintiffs' material did not use actual minors and it was not marketed as child pornography, their activities could be conformed to fit within the affirmative defense provided by the CPPA.[28] Thus, the affirmative defense left an alternative outlet for this type of expression.[29]

B. Overbroad and Vague

After classifying the CPPA as content-neutral and ruling that it passed this intermediate level of scrutiny, the district court turned to the plaintiffs' next arguments that the CPPA is overbroad and vague. Regulations that prohibit constitutionally protected speech in addition to speech that may legitimately be prohibited are considered unconstitutionally overbroad.[30] In dismissing the plaintiffs' overbreadth argument, the district court reasoned that because the CPPA is content-neutral it may permissibly regulate protected speech in order to prevent the secondary dangers of simulated child pornography.[31] Because the CPPA's provisions are narrowly tailored to only prohibit those works necessary to prevent these secondary dangers (and the district court believed that there was little chance that the CPPA would deter works devoid of these dangers), the statute only covers speech which may be prohibited.[32]

Next, the district court held that the CPPA is not unconstitutionally vague.[33] A statute is unconstitutionally vague if it does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.[34] According to the district court, the CPPA contained all of the elements that the Supreme Court requires child pornography legislation to contain in order to pass constitutional muster: (1) the CPPA clearly defines the conduct prohibited as the depiction of minors engaged in sexually explicit conduct, (2) it limits the visual depictions prohibited to persons under the age of eighteen, and (3) it describes what constitutes sexual conduct.[35] The CPPA has merely expanded visual

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28. *See id.*
29. *See id.*
30. *See* Grayned v. City of Rockford, 408 U.S. 104, 114-15 (1972).
31. *See Free Speech Coalition*, 1997 WL 487758, at *6.
32. *See id.*
33. *See id.*
34. *See Grayned*, 408 U.S. at 108.
35. *See Free Speech Coalition*, 1997 WL 487758, at *6. The Supreme Court in *Ferber* required that child pornography legislation adequately define the conduct to be prohibited, "be limited to works that visually depict sexual conduct by children below a specified age," and define and limit the category of sexual conduct proscribed. New York v. Ferber, 458 U.S. 747, 764 (1982).

depiction to include images produced by artificial means.[36] Therefore, the CPPA gives all the required notice a child pornography statute is directed to give.[37]

II. DISCUSSION

In order to evaluate the constitutionality of the CPPA, the first issue that needs to be addressed is what constitutes unprotected child pornography as set out by the Supreme Court's decision in *New York v. Ferber*. The district court skipped this issue and jumped straight to the second issue.[38] The second issue is whether the CPPA's definition of child pornography includes material outside the scope of the Supreme Court's definition of child pornography. If so, the CPPA regulates potentially protected speech. When statutes regulate protected speech, they are classified as either content-neutral or content-based, which affects the level of constitutional scrutiny they receive. Finally, an investigation must be made into whether the CPPA's inclusion of simulated child pornography in its definition of child pornography has rendered the statute unconstitutionally vague or overbroad.

A. Application of *New York v. Ferber* to the CPPA

In *Ferber*, the Supreme Court separated child pornography from pornography governed by the *Miller* standard, placing it in a special category of speech that can be banned regardless of whether or not it is obscene.[39] The Supreme Court provided five reasons why attempts to legislate child pornography should be given this extra leeway.[40] First, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," because "the use of children as subjects

36. *See Free Speech Coalition*, 1997 WL 487758, at *6.

37. *See id.*

38. The district court's analysis dives right into the standard of review that should be used to evaluate legislation that infringes on protected speech, and skips the first step of determining whether the CPPA's definition of child pornography conflicts with the Supreme Court's definition of child pornography. If simulated child pornography fits within the Supreme Court's parameters of what constitutes child pornography, then the CPPA's regulations would not infringe on any protected speech and there would be no First Amendment issue. Because the district court begins its discussion by choosing the standard of review for legislation infringing on protected speech, there is an implicit decision that simulated child pornography does not qualify as unprotected child pornography. Otherwise, the district court would not have needed to reach the second step of choosing a standard of review for legislation infringing on the First Amendment.

39. New York v. Ferber, 458 U.S. 747, 764-65 (1982).

40. *See id.* at 756-64.

of pornographic materials is harmful to the physiological, emotional, and mental health of the child."[41] Second, the distribution of visual depictions of children engaged in sexual activity is related to the sexual abuse of children in two ways: materials produced are a permanent record of the child's participation and the harm is exacerbated by their circulation, and the distribution network must be shut down if the production of materials requiring sexual abuse of children is to be eliminated.[42] Third, the advertising and selling of child pornography play an integral part in the production of these materials.[43] Fourth, "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis."[44] Fifth, "[r]ecognizing and classifying child pornography as a category of material outside the protection of First Amendment is not, incompatible with our earlier decisions."[45] In all of these considerations, the Supreme Court emphasized the participation of the child.

Next, the Supreme Court noted that "the distribution or descriptions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."[46] When dealing with the question of whether children engaged in sexual conduct could ever pose an important and necessary part of an educational, scientific, or artistic work, the Supreme Court observed that "a person over the statutory age who perhaps looked younger could be utilized" or "[s]imulation outside of the prohibition of the statute could provide another alternative."[47] Thus, the Supreme Court has limited this new category of unprotected speech, child pornography, to a visual depiction of an actual minor.[48]

Turning to the CPPA's four provisions defining child pornography, three of the four provisions prohibit situations where a child did not actually engage in sexually explicit conduct, 18 U.S.C. § 2256(8)(B)-(D). They define child pornography as any visual depiction which (B) depicts what "is, or appears to be [a minor]" engaging in sexually explicit con-

41. *See id.* at 757-58.
42. *See id.* at 759.
43. *See id.* at 761.
44. *Id.* at 762.
45. *Id.* at 763.
46. *Id.* at 764-65.
47. *Id.* at 763.
48. *See* Burke, *supra* note 1, at 459-61; Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S.1237*, 14 J. MARSHALL L.J. COMPUTER & INFO L. 483, 487 (1996).

duct, (C) has been modified to make it appear that an identifiable minor is engaging in sexually explicit conduct, or (D) is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is a visual depiction of a minor engaging in sexually explicit conduct.[49]

The material covered by provisions (D) and (C) appears to fall within the Supreme Court's category of unprotected child pornography. Provision (D) is based on falsely advertising that the simulated child pornography is a depiction of an actual child engaging in sexual conduct.[50] As one commentator observed, "since nonobscene speech can be considered obscene and unprotected if it is pandered as such, then there appears no reason why similarly pandered virtual child pornography should not be treated as actual."[51] Thus, if simulated child pornography is considered actual child pornography, it falls squarely within *Ferber*'s category of child pornography. Also, the conduct defined in (D) may be unprotected speech because of "the fact that commercial speech does not enjoy full First Amendment protection and false advertising enjoys none."[52]

Provision (C) centers on taking an actual child's image and placing it in an artificial setting where the child appears to be engaged in sexual conduct.[53] This situation directly raises the *Ferber* Court's rationale for granting more leeway when regulating child pornography.[54] Altered pictures of an identifiable minor still form a "permanent record" where "the harm is exacerbated by their circulation."[55] Because the identifiable minor provision focuses on an actual child who will suffer harm, this places it within *Ferber*'s definition of child pornography. Some legislators within Congress also believed provision (C) fits squarely within *Ferber*.[56] The identifiable minor provision was included as a safeguard in case provision

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49. 18 U.S.C. § 2256(8)(B)-(D) (1994).

50. *See* 18 U.S.C. § 2256(8)(D).

51. Burke, *supra* note 1, at 469; *see also* Ginzburg v. United States, 383 U.S. 463, 472 (1966) (finding that a book advertised as obscene can be found obscene even though evidence pointed towards scientific merit).

52. Burke, *supra* note 1, at 469.

53. *See* 18 U.S.C. § 2256(8)(C). The scenario in 2256(8)(C) may sound odd, but with today's graphics software, it is quite easy to scan a photograph into a computer, cut a person out of the photograph, and paste him into a different image.

54. *See* Burke, *supra* note 1, at 469.

55. New York v. Ferber, 458 U.S. 747, 759 (1982).

56. *See* 142 CONG. REC. S11840-41 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch).

(B)'s broader definition of "is, or appears to be [a minor]" is struck down by Supreme Court.[57]

By contrast, provision (B)'s definition includes protected speech. Defining child pornography as "is, or appears to be [a minor]" prohibits pornographic material not included within Supreme Court's category of child pornography because the material does contain a visual depiction of an actual child.[58] The Supreme Court's language in *Ferber* directly places pictures of simulated children in the realm of potentially protected speech.[59] Because a depiction of simulated children engaged in sexual conduct does not fall within the *Ferber* definition of child pornography, this type of speech retains First Amendment protection unless it is obscene. Using the *Miller* standard,[60] would the average person, applying contemporary community standards, find that all depictions of simulated children engaged in sexual conduct appeal to the prurient interest, are patently offensive, and lack serious value?[61] Considering the two earlier examples of the morphed Romeo and Juliet and the Japanese comic books, it is possible that a community would find these pornographic materials nonobscene, and therefore they could constitute protected speech under *Miller*.

The district court reached the conclusion that the entire CPPA was constitutional.[62] However, the district court did not compare the statute's new provisions defining child pornography with the Supreme Court's definition of child pornography. Provisions (D) and (C) prohibit unprotected speech and thus they should withstand the plaintiffs' First Amendment challenge.

B. Standard of Review: Content-Neutral versus Content-Based

Because 2256(8)(B)'s definition of "is, or appears" to be a minor includes protected speech, the CPPA's regulation of this protected speech must undergo constitutional scrutiny. Statutes regulating protected speech can be divided into two categories: content-neutral and content-based. Content-neutral regulations are subject to an intermediate level of scru-

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57. *See id.*

58. *See* Burke, *supra* note 1, at 459.

59. "[T]he distribution or descriptions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." New York v. Ferber, 458 U.S. 747, 764-65 (1982).

60. *See* Miller v. California, 413 U.S. 15, 24-25; *see also supra* note 1.

61. *See* Burke, *supra* note 1, at 457.

62. *See* Free Speech Coalition v. Reno, No. C 97-0281, 1997 WL 487758, at *7 (N.D. Cal. Aug. 12, 1997).

tiny[63] because they prohibit speech for reasons unrelated to the content of the speech.[64] Content-based regulations prohibit speech based on its content, and therefore they are subject to strict scrutiny.[65] Content-based regulations are presumptively invalid[66] and only survive constitutional review if they promote a "compelling interest" and employ the "least restrictive means to further the articulated interest."[67]

The district court incorrectly classified the CPPA as a content-neutral regulation.[68] The district court held that the CPPA was content-neutral because it targeted the secondary effects of simulated child pornography, and thus CPPA's regulation of simulated child pornography could be justified without reference to the content of simulated child pornography.[69] According to the district court, simulated child pornography produces secondary effects because it exploits and degrades children, encourages pedophiles to molest children by whetting their appetites, and can be used by child molesters to convince a resistant child to participate in sexual activities.[70]

Banning simulated child pornography because it can be used as a tool to entice child victims probably qualifies as a justification not related to the content of the speech. Under this justification, the regulation aims at the criminal ways that pedophiles use the material and not the material itself.[71] However, the other two justifications target the content of simulated child pornography, not its secondary effects.[72] First, when the government bans simulated child pornography because it exploits and degrades children as sexual objects, the government is making a determination about which conduct to prohibit based on the message the material conveys. Under the district court's rationale, a statute outlawing pornography could be deemed content-neutral if its aim was preventing the ex-

63. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

64. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

65. *See* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641-42 (1994).

66. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992).

67. Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

68. *See* Free Speech Coalition v. Reno, No. C 97-0281, 1997 WL 487758, at *4 (N.D. Cal. Aug. 12, 1997).

69. *See id.*

70. *See id.*

71. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (finding that a city ordinance restricting the placement of adult theaters was aimed at the crime associated with these theaters and not the message of the films they show).

72. *See* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 643 (1994) (reasoning that "as a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based").

ploitation of women as sexual objects.[73] Second, the Supreme Court has stated that viewers' reactions to the speech do not qualify as secondary effects of speech.[74] Therefore, the effect that simulated child pornography has on pedophiles does not constitute a secondary effect unrelated to the content of the speech. By attempting to protect a pedophile from himself by regulating the material he can view, the government is making decisions about which material is suitable based on its content.

Moreover, the CPPA does not allow any expression if simulated persons are used. Provision (B)'s definition completely bans simulated child pornography retaining First Amendment protection, and the affirmative defense provided by the CPPA requires the use of actual adults.[75] Statutes that have been deemed content-neutral restrict merely the time, place, and/or manner of the protected speech rather than banning it completely.[76] In fact, the Supreme Court has questioned whether a statute that imposes a complete ban on protected speech could ever be deemed content-neutral.[77]

Because the CPPA's prohibition of protected speech cannot be analyzed as content-neutral, the CPPA should be analyzed as a content-based regulation. Because it is content-based, provision (B)'s "is, or appears to be [a minor]" definition is presumptively invalid[78] and only survives constitutional review if it promotes a "compelling interest" and employs the "least restrictive means to further the articulated interest."[79] There are two compelling governmental interests that should be considered.

First, the government may have a compelling interest in preventing pedophiles from using simulated child pornography to entice children to participate in sexual activity.[80] This argument has its basis in the Supreme

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73. *But cf.* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325-32 (7th Cir. 1985) (treating an ordinance banning pornography which depicts the sexual subordination of women, in order to prevent the exploitation of women, as a content-based regulation); Brennan Neville, *Anti-Pornography Legislation as Content Discriminating under R.A.V.*, 5 KAN. J.L. & PUB. POL'Y 121, 128 (1995) (arguing that anti-pornography legislation is a content-based legislation because it seeks to prohibit expression based on its message, the sexually explicit subordination of women).

74. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 394 (1992) (citing Boos v. Barry, 485 U.S. 312, 321 (1988)).

75. 18 U.S.C. § 2252A(c) (1994).

76. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791-93 (1989); *Playtime Theatres, Inc.*, 475 U.S. at 54; American Library Ass'n v. Reno, 33 F.3d 78, 86-88 (D.C. Cir. 1994).

77. *See R.A.V.*, 505 U.S. at 394.

78. *Id.* at 382.

79. Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

80. *See* Adelman, *supra* note 48, at 488-89; Burke, *supra* note 1, at 465; David B. Johnson, *Why the Possession of Computer-Generated Child Pornography Can Be Con-*

Court's decision in *Osborne v. Ohio*,[81] where the Court "specifically cited the use of child pornography to seduce children as a valid state interest in support of the Ohio law that criminalized private possession."[82] However, the *Osborne* situation differs in a significant way from that presented here. In *Osborne*, the state law prohibited the private possession of unprotected child pornography, and so the case turned on weighing the right of privacy against the government's interest in protecting children, specifically preventing the material from being used to seduce further victims.[83] In contrast, the CPPA does not deal with unprotected speech because a nonobscene depiction of simulated children engaged in sexual conduct retains First Amendment protection. Pedophiles also use adult pornography as a tool to seduce children.[84] Such use of this protected speech has not justified its suppression, so why should it justify the suppression of simulated child pornography retaining protection?[85] First Amendment protection should trump this governmental interest.[86]

Second, the government may need the "is, or appears to be [a minor]" definition of child pornography to successfully prosecute child pornogra-

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stitutionally Prohibited, 4 ALB. L.J. SCI. & TECH. 311, 327 (1994); John C. Scheller, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 1000 (1994).

81. 495 U.S. 103, 111 (1990).

82. Burke, *supra* note 1, at 466.

83. *See Osborne*, 495 U.S. at 108-11.

84. *See id.* at 145 n.18 (Brennan, J., dissenting); Burke, *supra* note 1, at 466.

85. *See Osborne*, 495 U.S. at 145 n.18 (Brennan, J., dissenting); Burke, *supra* note 1, at 466.

86. One commentator has argued that computers create an evil new spin on child pornography's use as tool to seduce children. *See* Johnson, *supra* note 80, at 327. Because computer graphics software can produce a picture of the victim's sibling or best friends partaking in sexual conduct, these pictures can prove much more persuasive in convincing the child victim that this conduct is acceptable and fun. *See id.* Therefore, the government's interest increases tremendously when computer simulations are involved. *See id.* However, Because these types of morphed images would entail an identifiable child, they fit within § 2256(8)(C). Because (C) prohibits only unprotected speech, no compelling interest is required to regulate it. Therefore, this line of argument is not relevant to the discussion of the constitutionality of § 2256(8)(B).

Another commentator has attacked the validity of the assumption that simulated child pornography will be used to entice children. *See* Adelman, *supra* note 48, at 490-92. Simulated child pornography is just as likely to satisfy a pedophile's needs and reduce the likelihood of engaging in child abuse. *See id.* at 491-92. The report Congress based their findings on in formulating the CPPA did not provide conclusive evidence that simulated child pornography would be used in this fashion. *See id.* at 490-92 Therefore, without further evidence this reason cannot qualify as a compelling interest. *See id.* at 488-89.

phy cases in the future.[87] Computer graphics technology has already advanced to the point where it is difficult to differentiate between a photograph of an actual event and a computer generated image of a virtual event.[88] In the future, it might be impossible to distinguish between an image of a simulated child and an image of a real child.[89] Under the pre-CPPA child pornography statute, the prosecutor had to prove the depiction was of an actual minor.[90] As graphics software programs grow more powerful, thereby making simulations easier to create, the spread of simulated child pornography could make the prosecutor's burden of proof impossible without § 2256(8)(B). A criminal defendant could always raise the defense that his material is simulated, requiring the prosecutor to prove that it is real.

The CPPA is not the first legislation in which Congress has reacted to the needs of prosecutors in child pornography cases. A 1990 amendment to the Child Protection and Obscenity Enforcement Act of 1988 requires "producers of materials depicting sexually explicit acts to maintain certain records documenting the names and ages of the persons portrayed and to attach statements to the materials indicating where the records are located."[91] Congress amended the statute because both distributors and producers could avoid prosecution by claiming ignorance to the child performer's true age or that they had been deceived.[92] Contrary to the CPPA, the Child Protection and Obscenity Enforcement Act was deemed content-neutral because it did not actually ban any form of protected speech.[93]

The treatment of this 1990 amendment sheds light on why the government's interest in provision (B)'s definition should fail to pass content-based scrutiny. The impossibility of proving the picture is not a simulation should qualify as a compelling government interest, so the next question is whether it employs the "least restrictive means to further the articulated interest." Provision (B)'s definition completely bans simulated child pornography retaining First Amendment protection. The law could require that producers and distributors of simulated child pornography keep records indicating that the material is a simulation and place the burden on the defendant to prove the material is a simulation through these

87. Burke, *supra* note 1, at 471-72; Johnson, *supra* note 80, at 328-29.

88. *See* Burke, *supra* note 1, at 471.

89. *See id.*

90. *See* United States v. Lamb, 945 F. Supp. 441, 454 (N.D.N.Y. 1996).

91. American Library Ass'n v. Reno, 33 F.3d 78, 81 (D.C. Cir. 1994); *see* 18 U.S.C. § 2257 (1988 & Supp. II 1990).

92. *See id.*

93. *See id.* at 86.

records. Therefore, CPPA does not employ the least restrictive means to ensure that prosecutors will successfully be able to prove their case in the future.

The CPPA's regulation of simulated child pornography retaining First Amendment protection cannot be termed content-neutral, and therefore it must be analyzed as a content-based regulation. Section 2256(8)(B)'s definition of "is, or appears to be [a minor]" cannot not survive the strict constitutional scrutiny required of content-based legislation and should be struck down.

C. The Overbreadth and Vagueness of the "is, or appears to be [a Minor]" Definition

Even though section 2256(8)(B)'s definition of "is, or appears to be [a minor]" should not pass constitutional scrutiny, it still should be determined whether this definition makes the statute overbroad or unconstitutionally vague. Regulations that prohibit constitutionally protected speech in addition to speech that may legitimately be prohibited are considered overbroad.[94] Because the overbreadth doctrine is used to invalidate a statute, the Supreme Court has limited the availability of this drastic remedy; in order to invoke this doctrine, the statute's overbreadth must not only be real but substantial as well, especially where speech is joined with conduct.[95] Because the "is, or appears to be [a minor]" definition bans an entire field of protected speech—nonobscene depictions of simulated children—its overbreadth appears substantial.

Second, a statute is unconstitutionally vague if it does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he or she may act accordingly.[96] A vague statute regulating speech raises special concerns, especially when it has criminal penalties.[97] The fear of criminal sanctions may cause a party to decline to exercise protected constitutional rights and thus have a chilling effect on free speech.[98]

The Supreme Court requires that child pornography statutes contain "some element of scienter on the part of the defendant."[99] In *United States*

94. *See* Grayned v. City of Rockford, 408 U.S. 104, 114-15 (1972).

95. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973).

96. *See Grayned*, 408 U.S. at 108.

97. *See* Reno v. American Civil Liberties Union, __ U.S. __, 117 S. Ct. 2329, 2344-45 (1997).

98. *See id.*

99. New York v. Ferber, 458 U.S. 747, 765 (1982).

v. X-Citement Video, Inc.,[100] a case dealing with the pre-CPPA version of the federal child pornography statute, the Supreme Court held that the statute's term "knowingly" applied to the age of the performer depicted in the material.[101] Although the CPPA altered the statute, the CPPA should contain some form of scienter as to the age of the participants.[102]

If the scienter requirement is "knowing" the age of the participants, the "is, or appears to be [a minor]" definition of child pornography may have blurred this requirement.[103] If the child-like persona is a cartoon character, how can a person know the age of this performer? Or if the child-like persona is an adult morphed to look like a teenager, how can a person know the age of this person when this character is not real? Thus, a person of ordinary intelligence would have difficulty discerning the age of the performers and not be sure whether his or her conduct falls within the prohibitions of the CPPA. The "is, or appears to be [a minor]" definition reads the *mens rea* knowingly out of the statute, thereby resulting in strict liability because of the difficulty of discerning the age of a simulated person. However, the scienter requirement of child pornography statute does not have to be knowingly; the *mens rea* could be recklessness.[104] If the "is, or appears to be [a minor]" definition were paired with recklessness, the vagueness risk might be reduced. A person who cannot discern the age of performers could at least be able to discern when it might be a minor and take reasonable precautions.

III. CONCLUSION

The CPPA goes too far in trying to prevent the dangers technology now makes possible. While the identifiable minor and the false advertising definitions of child pornography only prohibit unprotected child pornography, the "is, or appears to be [a minor]" definition bans a whole field of expression protected by the First Amendment. Depictions of simulated

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100. 513 U.S. 64 (1994).

101. *Id.* at 78.

102. "The majority [in *X-Citement Video, Inc.*] was correct to conclude that the provision governing distributors of pornography required scienter as to the age of minority. The First Amendment does not permit Congress to impose onerous criminal sanctions on the basis of strict liability where doing so would chill protected speech." Christina Egan, *Level of Scienter Required for Child Pornography Distributors: The Supreme Court's Interpretation of "Knowingly" in 18 U.S.C. § 2252*, 86 J. CRIM. L. & CRIMINOLOGY 1341, 1370 (1996); *see also X-Citement Video, Inc.*, 513 U.S. at 78 (noting that a statute void of a scienter requirement as to the age of the performers would raise constitutional doubts).

103. *See* Burke, *supra* note 1, at 453-54.

104. *See* Egan, *supra* note 102, at 1366-67.

minors involves nothing more than expressions of thought which should not be prohibited if they are not obscene.