

## **ASHCROFT v FREE SPEECH COALITION<sup>1</sup> NOTWITHSTANDING: “Virtual-child” pornography IS child abuse**

“Increasingly, graphic software packages and computer animation are being used to manipulate or ‘morph’ images and to create ‘virtual’ images indistinguishable from photographic depictions of actual human beings. This technology, while revolutionising the computer and entertainment industries, has also breathed new life into the world of child pornography, creating unparalleled challenges to law enforcement officers and prosecutors across the country.”<sup>2</sup>

### **Introduction**

Many child protection practitioners have commented on the difficulties<sup>3</sup> of defining “child pornography”, pointing, in particular, to the different definitions in the legislation of different jurisdictions. I suggest, however, that these differences are more apparent than real, and that there are sufficient similarities among and between definitions in the various jurisdictions to provide scope for international cooperation in dealing with this disturbing crime. However, there are two areas in which the differences are very real and require harmonisation of national

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<sup>1</sup> John D Ashcroft, Attorney General, et al., *Petitioners v The Free Speech Coalition et al*; and see, Lize van der Westhuizen, *The virtual reality of child pornography: Ashcroft v Sharpe*, *FPB Annual Report 2002*.

<sup>2</sup> Daniel S Armagh, *Virtual Child Pornography: Criminal Conduct or Protected Speech*, *Cardozo Law Review*, 1994

<sup>3</sup> Lize van der Westhuizen, *op. cit*; Max Taylor and Ethel Quayle, *Child Pornography: An Internet Crime*, Brunner-Routledge, 2003; Jens Waltermann and Marcel Machill (eds), *Protecting Our Children on the Internet: Towards a New Culture of Responsibility*, Bertelsmann Foundation Publishers, 2000.

legislations for effective international cooperation: “virtual” child pornography and written or descriptions<sup>4</sup> of child pornography.

Virtual child pornography was the issue in the *Free Speech Coalition* appeal before the United States Supreme Court. The case presented the Court with an opportunity to affirm the consistency of child pornography laws in the United States with the findings of child protection practitioners and law enforcement agencies that child pornography, in any form, is harmful and criminal. “*There is little argument that real harm is perpetrated on children who are depicted in child pornography...Scanners and inexpensive software packages now allow offenders to create virtual child pornography, which they often trade for more explicit images of real children...Child pornographers are always seeking more, and more explicit, child pornography. Virtual child pornography feeds this cycle and sustains the market.*”<sup>5</sup>

However, much to the surprise and dismay of child protection practitioners, the Court failed “*to grasp the compelling justification for the prohibitions*”<sup>6</sup> on virtual child pornography set out in the *Child Pornography Prevention Act*. Worse still, the persuasive impact of its ruling has, it

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<sup>4</sup> Under Canadian laws, any written material “*that advocates or counsels sexual activity with a person under the age of 18 years*” is an offence, while the amendments to the *Films and Publications Act* brings “*descriptions*” within the definition of “child pornography”. In the United Kingdom, child pornography is defined by reference to an “*indecent photograph*” and excludes materials falling outside the definition of “*photograph*”, such as books, magazine articles, audio cassettes, tapes and CDs but includes computer-generated images.

<sup>5</sup> Daniel S Armagh, *op.cit*

<sup>6</sup> Daniel S Armagh, *op.cit*

seems, cowed even the US Congress<sup>7</sup> into respecting the right of child abusers to create and distribute child pornography as long as no actual child is harmed in the process.

The Court has appeared to deliberately ignore the fact that the only substantial difference between “virtual” and “actual” child pornography is that no actual child is harmed in the creation of virtual child pornography. The response of Congress in section 151 of the *Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act (PROTECT Act of 2003)*, suffers from the same flaw. The evidence, including of the market for pornography itself, suggests that there is no difference between “actual” and “virtual” children as far as child abusers, paedophiles and collectors of child pornography are concerned.

The Court and Congress also failed to appreciate either the pervasive impact of the Internet or that the Internet is more than just another medium of communication. The Internet has given birth to a “virtual world” with “virtual communities” of “netizens” with shared interests. It provides a supportive context,<sup>8</sup> for paedophiles and child abusers. In the real world, the child abuser or paedophile is, usually, a lonely figure, not able to share his interest with his neighbours or colleagues. And, if discovered, is generally shunned and even hounded out of the neighbourhood and workplace. In the “virtual world”, he is among like-minded “netizens”, free to express and share his deepest desires among “friends”. The Court ought to have considered the

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<sup>7</sup> The *PROTECT Act of 2003*

<sup>8</sup> See, for instance, Castells, *The Culture of Real Virtuality in the Rise of the Network Society*, Blackwell, 1996

psychological impact of the Internet in determining an issue which is almost entirely defined by the Internet.

The Court's response to the argument that virtual child pornography is used in the grooming or seduction of child-victims, to lower the inhibitions of the innocent into accepting that sexual activities between adults and children is normal, is, with due respect to their Lordships, perverse. The real question is not whether or not *“the prospect of crime justifies suppressing protected speech”* but whether or not “unprotected speech is transformed into protected speech merely because it is produced by a different method.”<sup>9</sup> “Child pornography” is about images of the sexual abuse of children. It is not about the actual abuse of children but representations of the abuse of children. The relevant question should, therefore, be whether or not the image is that of the sexual abuse of a child and not whether or not the child depicted is real or fictitious. For the purpose of “child pornography”, the identity of the child is not a relevant consideration. Whether the image is that of a real child, or of a person who is no longer a child or of a person who has long since passed away or of a fictitious child should not be relevant in determining whether or not the image represents the sexual abuse of a child.

### “Virtual” child pornography

Until recently, most child abuse images were of actual child-victims. Sophisticated modern technology, however, has made it possible to create child abuse images without using actual children and which are, but to the trained eye, indistinguishable from actual child-victims.

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<sup>9</sup> Daniel S Armagh, *op.cit*

These “virtual”-child abuse images may be created either by a process known as “morphing” or by using sophisticated software that allows the creation of life-like animations, such as are found in most interactive computer games.

“Morphing”, from “metamorphosing”, is a technique through which a child’s head is “cropped” and superimposed on to the body of another person, usually an adult. In other words, an image is created by superimposing the picture of a child’s face, “cropped” from a photograph of a real child, onto the body of another real person in a photograph to create a single image. Parts of the adult body may be “air-brushed” to make it appear more like that of a young person. The resulting image is not of a real person, though it is composed of different parts of real persons.

A “computer-generated” image, on the other hand, is the product of the imagination. An image is created, by using computer technology to “draw” an image, which may be animated to produce movements as well. These images may be so life-like that they are almost indistinguishable from images of actual people.

The difference between a “morphed” image and a computer-generated image is that a “morphed” image is an image created by altering the images of real persons, while a computer-generated image is produced by using computer software to create an image without using any actual person.

South African<sup>10</sup>, Canadian<sup>11</sup> and United Kingdom<sup>12</sup> laws do not distinguish between “real-child” pornography and “virtual-child” pornography. However, the Supreme Court’s majority decision in the *Ashcroft* case has led to the exclusion of “virtual -child” pornography from child pornography criminal law provisions in the United States. This has, not unexpectedly, delighted the freedom of expression lobby and the “coalition” of adult-entertainment businesses that produces and distributes pornography, much to the dismay of child protection practitioners and law enforcement agencies.

### ***Ashcroft v Free Speech Coalition: the issues***

The inclusion of “virtual” child pornography in the *Child Pornography Prevention Act of 1996* (CPPA) was a response to the technological changes of the 1990s which “materially impacted on the

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<sup>10</sup> Child pornography is defined in the *Films and Publications Act* as including ... “any image, real or simulated, however created ... ”

<sup>11</sup> See, for instance, the approach of the Canadian Supreme Court in *R v Sharpe* [2001] 1 S.C.R....“The danger associated with the representation does not depend on what was in the mind of the maker or possessor, but in the capacity of the representation to be used for purposes like seduction. It is the meaning which is conveyed by the material which is critical, not necessarily the meaning that the author intended to convey....The test must be objective, based on the depiction rather than what was in the mind of the author or possessor. The question is this: would a reasonable observer perceive the person in the representation as being under 18 and engaged in explicit sexual activity?” The point is not whether or not the person depicted is an actual person but whether or not a reasonable observer might perceive the person depicted as a child engaged in sexual activities.

<sup>12</sup> Referred to as “pseudo-photographs”: section 7(7) of the *Protection of Children act, 1978*.

*enforcement of child pornography laws ... computers can also be used to alter sexually explicit photographs, films and videos in such a way as to make it virtually impossible for prosecutors to identify individuals, or to prove that the offending material was produced using children.*<sup>13</sup> The intention was not to criminalise “virtual” child pornography *per se* but to expand the prohibition on sexually explicit depictions of actual children to include depictions that *appear to be* of actual children. This was necessary because prosecutors, given the sophistication of computer technology, are unable to identify the children depicted in child pornography.

At least four<sup>14</sup> circuit courts of appeals upheld the constitutionality of these provisions in the CPPA until a coalition of associations of businesses involved in the production and distribution of pornography challenged the provisions in the Ninth Circuit Court under the *First Amendment*. The Ninth Circuit’s invalidation of the provisions against “virtual” child pornography was subsequently affirmed by the US Supreme Court in the infamous *Ashcroft v Free Speech Coalition*, 122 S. Ct. 1389 (2002). “Section 2256(8)(B)<sup>15</sup> covers materials beyond the categories recognised in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in this Court’s precedents or *First Amendment* law” (Page 619). Since no actual child is abused in its production, “virtual” child pornography enjoys *First Amendment* protection.

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<sup>13</sup> Report of the Committee on Judiciary, 108<sup>th</sup> Congress of the United States, 108 – 2.

<sup>14</sup> The 5<sup>th</sup> Cir. in *United States v Fox*; the 4<sup>th</sup> Cir. in *United States v Mento*; the 11<sup>th</sup> Cir. in *United States v Acheson* and the 1<sup>st</sup> Cir. in *United States v Hilton*.

<sup>15</sup> CPPA.

Attorney General Ashcroft presented four arguments in support of the constitutionality of the CPPA:

- (1) The production of “virtual child” pornographic images can lead to child abuse and therefore causes indirect harm to actual children. The Supreme Court rejected this argument on the grounds that “virtual” child pornography is not *intrinsically related* to the sexual abuse of children and that the “*causal link is contingent and indirect.*”
- (2) “Virtual child” pornography could persuade someone to commit crimes against children. The Court dismissed this argument stating that, “*the prospect of crime, however, by itself does not justify laws suppressing protected speech... The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse ...*”
- (3) The prohibitions on “virtual child” pornography would help in eliminating the market for actual - child pornography. The Supreme Court disagreed. On the contrary, according to the Court, the market for actual - child pornography might be eliminated if there was an alternative source! “*If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerised images would suffice.*”<sup>16</sup>

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<sup>16</sup> The Supreme Court seems to have ignored studies that show that most collectors of child pornography are paedophiles with a sexual interest in real children. See, for

- (4) Attorney General Ashcroft's fourth argument is a re-statement of the very reason the CPPA was expanded to include images that *appear to be* of children: "virtual child" pornography could result in more difficult prosecutions of actual child abusers and pornographers since virtual images look so realistic. This argument was also rejected by the Court: "*Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected speech merely because it resembles the latter.*" (Lize van der Westhuizen's analogy<sup>17</sup> of "virtual child" images and "counterfeit currency" is looking more and more attractive.)

Since that ruling, defendants in child pornography possession cases have consistently claimed, successfully in a number of cases<sup>18</sup>, that the images in question could be "virtual" and not real children. Consequently, prosecutors had to prove that the child depicted is real. In the *Reilly* case, for instance, (see footnote), a motion to withdraw a guilty

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instance, K Durkin, *Misuse of the Internet by paedophiles: implications for law enforcement and probation practice*, *Federal Probation*, 61(2). At issue, also, is the psychological functions of pictures, whether of "virtual" or "real" children, and the relationship between child pornography and contact offences. There are studies, which suggest that pornography is a by-product of contact offences, or is used to facilitate the seduction of new victims. See Goldstein, *The Sexual Exploitation of Children: A Practical Guide to assessment, Investigation and Intervention* (1999); Itzen, *Pornography and the organisation of intrafamilial and extrafamilial child sexual abuse*, *Child Abuse Review*, 6 and Tyler and Stone, *Child pornography: perpetuating the sexual victimisation of children*, *Child Abuse and Neglect: The International Journal*, 9 (1985).

<sup>17</sup> Lize van der Westhuizen, *op.cit.*

<sup>18</sup> *United States v Sims*, 220 F.Supp.2d 1222 (D.N.M. 2002); *United States v Reilly*, 01 Cr. 1114 (RPP), 2002 WL 31307170 (S.D.N.Y. 2002).

plea was granted, the court holding that the prosecution must prove beyond a reasonable doubt that the defendant knew that the images depicted real children, an almost impossible evidentiary burden given the sophistication of computer technology. All that the defendant needs to establish is that he believed that the images depicted "virtual" children. After all, if law enforcement cannot tell the difference, would it be so difficult for a court to buy into that defence?

### US Congress response to the Free Speech Coalition decision

Attorney General John Ashcroft's much-publicised disquiet with the invalidation of the "virtual child" pornography provisions of the CPPA persuaded the US Congress to re-visit the issue to "*restore the government's ability to prosecute child pornography offenses successfully.*" The result is the *Prosecutorial Remedies and Tools Against the Exploitation of Children Act* or, aptly, the "*PROTECT Act of 2003.*"

In its report to the 1<sup>st</sup> session of the 108<sup>th</sup> Congress in February 2003, the Committee on the Judiciary made the following arguments in recommending passage of the bill:

*"The Supreme Court's decision in Free Speech Coalition has greatly impaired the government's ability to bring successful child pornography prosecutions. This is so because prosecutors typically are unable to identify the children depicted in child pornography..... Left unchecked, this problem threatens to cripple a large number of child pornography prosecutions. Indeed, proving the existence of an actual minor beyond a reasonable doubt from a digital image is extremely difficult when technological advancements have made it possible to disguise*

depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated.”

“The *Free Speech* decision has placed prosecutors in a difficult position. With key portions of the CPPA gone, the decision invites all child porn defendants, even those who exploit real children, to assert a “virtual porn” defense in which they claim that the material at issue is not illegal because no real child was used in its creation. The increasing technological ability to create computer images closely resembling real children may make it difficult for prosecutors to obtain prompt guilty pleas in clear-cut child porn cases and even to defeat such a defense at trial, even in cases where real children were victimised in producing the sexually explicit material. In short, unless we attempt to rewrite portions of the CPPA, the future bodes poorly for the ability of the federal government to combat a wave of child pornography made ever more accessible over the Internet.”

Apart from providing defendants with an almost watertight defence, the *Free Speech Coalition* ruling has dissuaded a number of prosecutors from bringing proceedings in some child pornography cases and many prosecutions were, in fact, dismissed.<sup>19</sup>

### **The PROTECT Act**

The response of the US Congress to the *Free Speech Coalition* ruling, however, still stops short of making “virtual child” pornography illegal. Section 151 of the *PROTECT Act* responds only to problems faced by prosecutors: it allows the prosecution to establish a *prima facie* case

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<sup>19</sup> Report from the Committee on the Judiciary, *op.cit.*

when the children depicted in sexually explicit images *appear* virtually indistinguishable from actual children. Once the prosecution meets this burden, section 151 provides an absolute defence if the defendant can show that the child pornography was not produced by using any actual children. Section 151 also amends the definition of “child pornography” in section 2256(8)<sup>20</sup> and introduces a new definition of “*identifiable minor*” in section 2256(9). In terms of the new definitions, read in conjunction with section 2252A, it is now unlawful to possess or distribute any visual depiction of sexually explicit conduct involving “a computer image, computer-generated image, or digital image that is of, or is virtually indistinguishable from that of, an actual minor.” (Emphasis added)

That the *PROTECT Act* is not intended to place “virtual child” pornography on the same, illegal level as “actual child” pornography is emphasised in two ways. *Firstly*, section 151 defines a “*virtually indistinguishable*” depiction to be one that “*an ordinary person would conclude is of an actual minor*”. Drawings, cartoons and sculptures, for instance, do not qualify as *virtually indistinguishable*. Only depictions that look just like actual children to the ordinary person would qualify as *virtually indistinguishable*.

*Secondly*, section 151 narrows the definition of *identifiable minor* by introducing a new definition of “*sexually explicit conduct*” applicable in cases where the prosecution proves that the computer image is *virtually indistinguishable* from an actual child. The broader definition in section 2256(2)(A) of Title 18, United States Code, will only be applicable where the prosecution has to prove the *existence* of an actual child.

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<sup>20</sup> *United States Code: Title 18 – Crimes and Criminal Procedure, Chapter 110 – Sexual Exploitation and Other Abuse of Children.s*

Section 151, in so far as making any contribution to eliminating child pornography in any form is concerned, is the proverbial “one step forward, two steps back” solution, although it may be argued that it is, still, given the *Free Speech Coalition* ruling, a step forward. But, as the Report from the Judiciary Committee points out, the defence created by section 151 is considerably broader than the provisions it replaces: ... “*Unlike existing section 2252A(c), the new affirmative defense is not limited to youthful - looking adults, and does not include a requirement that the material was never represented to be child pornography. The Committee intends the affirmative defense provision created by section 151 to be a complete defense whenever the defendant can show that no actual children were used in creating the depictions which form the basis of the prosecution.*” (Author’s own emphasis added)

## Conclusions

I am not unaware of the *First Amendment* impediment that faces law-makers in the United States. In fact, even before the *Free Speech Coalition* ruling, “virtual child” pornography was held to be *protected speech* under the *First Amendment*. Over 20 years ago, the Court in *Ferber*<sup>21</sup>, clearly based its decision on the distinction between actual and virtual child pornography: “*If it were necessary for artistic<sup>22</sup> or literary value, a person over the statutory age who perhaps looked younger could*

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<sup>21</sup> *New York v Ferber*, 458 U.S. 747 (1982).

<sup>22</sup> The *Films and Publications Act* specifically excludes any exemption from the child pornography offence provisions on the basis of “art”. (Schedules 5 and 9).

*be utilized. Simulation outside of the prohibition of the statute could provide another alternative.*” Under the *First Amendment*, therefore, child pornography images created without using actual children or using older children who appear to be minors, is protected speech *because such images record no crime and create no victims.*

The response of the US Congress to the *Free Speech Coalition* ruling via the *PROTECT Act*, is cold comfort to child protection practitioners even within the United States. While it may assist in the conviction of some defendants who might otherwise escape on the basis of that ruling, it is little more than a superficial *token* response to the concerns of child protection practitioners and law enforcement agencies. The coalition of association of businesses that produce and distribute child pornography has been advised on how to keep their vile trade *legit*: make sure that the children depicted in your images are either virtual and *distinguishable* from actual children or are of youthful-looking adults.

1 The basis of the Act remains an affirmation of the “no-victim-no-crime” principle. “Virtual child” pornography is victim-less since no child has been abused or harmed in its creation, just as no child is abused or harmed in the production of written descriptions of child pornography, even if that description is based on actual child abuse. (The actual abuse, of course, is an offence but writing about it for profit is not child pornography but a *First Amendment* Right and a legitimate, and very profitable, pursuit). But could not the same argument be made of a *viewer* who is a “second-generation” possessor of actual child pornography downloaded from the Internet? There is no direct link between the *viewer/possessor* and the child in the image: the *viewer/possessor* is distanced in time and place from the child and does not participate in the sexual abuse of that child *except* in his or her imagination. The

suggestion<sup>23</sup> that such images may be used to facilitate the seduction of new victims as part of a “grooming” process would be true of any form of child pornography – actual, virtual or descriptive. This is so conspicuously obvious that the logic of providing a new “anti-grooming” provision which does not include all forms of child pornography in section 151 escapes me! In circumstances where “sexual activity” with a minor is illegal, why exclude virtual child pornography and descriptions from the prohibitions on using child pornography “for purposes of inducing or persuading a minor to participate in any activity that is illegal”?

2 It is apparent that neither the Supreme Court nor the US Congress considered the Internet as anything more than another medium of communication, and that the traditional approach that works effectively with other communications media would be just as effective with regard to the Internet. The *First Amendment* itself predates the Internet by centuries. The nature, power and scope of the Internet is obvious and we are yet to direct our attention towards an enquiry about whether or not instruments crafted long before modern technology made, and will continue to make in ways and to the extent we have yet to grasp, such profound impact on so many aspects of our lives, should be re-examined and changed of necessity.

The Internet is not just another “medium of communication”. “As an international community of users and providers of information, we are at a dramatic turning point. The Internet will change the way people live: it offers extraordinary opportunities for enhancing creativity and learning, for trading and relating across borders, for safeguarding human rights, for

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<sup>23</sup> See, for instance, R P Tyler and L E Stone, *Child pornography: perpetuating the sexual victimisation of children, Child Abuse and Neglect: The International Journal*, 9 (1985).

*realising democratic values and for strengthening pluralism and cultural diversity. The change holds promise and it holds challenges.*”<sup>24</sup>

Castells<sup>25</sup> describes it as: “..... a new communication system, increasingly speaking a universal, digital language ... both integrating globally the production and distribution of words, sounds and images of our culture, and customising them to the tastes of identities and moods of individuals ... growing exponentially, creating new forms and channels of communication, shaping life and being shaped by life at the same time.”

3 The Internet is a means of communication and much more. “There is increasing evidence, however, of the Internet itself, and the social and psychological processes that are involved in accessing it, being both a process and a factor in its own right that is both cumulative and additional to other means of communication.”<sup>26</sup> For child protection practitioners and law enforcement agencies, what is of concern is evidence of the Internet’s role in the facilitation of paedophilic acts, “... not merely through the transfer of child pornography, **but by providing a supportive context** and by changing opportunities individuals might have for contact with children through chat rooms, web sites and e - mail.”<sup>27</sup> Time, space, borders and distances make no difference to who can communicate with whom. A lawyer in Cape Town communicates with a priest in New York on a server in Tokyo. “The virtual world is quite different than the in - person world. Digitising people, relationships, and

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<sup>24</sup> Jens Waltermann and Marcel Machill (eds), *Protecting Our Children on the Internet: Towards a New Culture of Responsibility*, Bertelsmann Foundation Publishers, 2000.

<sup>25</sup> Manuel Castells, *The Information Age: Economy, Society and Culture: The Rise of the Network Society*, Blackwells, 1996.

<sup>26</sup> Max Taylor and Ethel Quayle, *Child Pornography: An Internet Crime*, Brunner-Routledge, 2003.

<sup>27</sup> Taylor and Quayle, *op.cit.*

*groups has stretched the boundaries of how and when humans can interact.*<sup>28</sup>

4 The Internet is, in fact, a *virtual world*, a part of and yet also existing side by side with the actual world i.e. the world as we knew it before the Internet! Its effect on a user must be seen as potentially greater than a passive means of quick, easy and cheap transmission of information. It is not fanciful to speak of “netizens” of the virtual world, as opposed to “citizens” of the actual world. As Castells observes, although most public use of the Internet has taken place for less than a decade, its social, educational, organisational and commercial benefits are already embedded within its system. I believe, in fact, that it was the commercial impact of the Internet on their particular businesses that prompted the “Coalition” to challenge the constitutionality of the prohibition on virtual child pornography. It may be time to examine our institutions and prescripts to assess whether or not the Internet will respond, for regulatory, law enforcement or any other purposes, to the traditional methods applied to other communications media

My concern is that neither the Court nor the US Congress seems to have considered the profound implications and the impact of the Internet in dealing with “virtual child” pornography. Virtual child pornography is, in fact, not only a product of the technology of the Internet but is also distributed via this technology to its “virtual” community or “netizens”. Awareness of the potential of the Internet - its speed of communication, its global reach, its borderless nature, the facility it provides for anonymity, and so on – does not tell us enough about how it affects and changes our lives. If the commission of a contact offence has

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<sup>28</sup> John Suler, *The Psychology of Cyberspace*, Rider University, 1998.

been presented as an extension of online behaviour<sup>29</sup>, can a distinction be drawn between virtual child pornography and actual child pornography? In addition, if a reason for making “second-generation” viewing/possession of child pornography illegal because it is aiding and abetting child abuse by providing a market and creating a demand for child pornography, does it make a difference whether it is virtual child pornography or actual child pornography? Is it too implausible to accept that the collector of even virtual child pornography will want to engage with actual child pornography and abuse of children?

5 In my view, and more importantly, is the fact that the *PROTECT Act*, which is intended to “restore the government’s ability to prosecute child pornography offenders successfully” and to close the loop-hole provided by the ruling in the *Free Speech Coalition* ruling, is the proverbial “double-edged sword”. The absolute affirmative defense that the child pornography was created either without using actual children or by using youthful-looking adults, encourages those who might otherwise have been dissuaded by a more robust response by the US Congress, to manipulate and disguise their images of actual children to make them appear to be virtual children. Curiously, this possibility did not escape the Committee on the Judiciary, though it is not reflected in any way in the Act.

*“...Even though the use of real children is still the most cost - effective and empirically demonstrated method of producing child pornography, the mere existence of a virtual porn defense ... (it) encourages producers and distributors of child pornography to alter depictions of actual children in slight ways to make them not only unidentifiable, but also appear as if they were virtual creations. Unlike the*

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<sup>29</sup> See, for instance, Max Taylor and Ethel Quayle, *op.cit.*

*weighty task of creating an entire image out of whole cloth, it is not difficult or expensive to use readily available technology to disguise depictions of real children to make them unidentifiable or to make them appear computer-generated.*<sup>30</sup>

But, according to the *Free Speech Coalition*, the *First Amendment* may not be turned upside down. Protected speech may not be prohibited merely because it increases the chance that an unlawful act may be committed. *"The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process"*<sup>31</sup>

The *Child Pornography Prevention Act* (CPPA) expanded the Federal prohibition on child pornography to include child pornographic images made without using actual children – virtual child pornography. It was an Act of the US Government, passed by the US Congress and the US Senate, institutions of hundreds of duly-elected representatives of the people. Six judges, unelected and therefore not representative of the people, declared that provision unconstitutional, invalid and of no force and effect. Thus the Government's concern was the protection of children whilst the concern of the six judges was *their* interpretation of the *First Amendment* and their notions of what is "protected" and "unprotected"

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<sup>30</sup> Report of the Committee on the Judiciary, *op.cit.*

<sup>31</sup> *Ashcroft, Attorney General, et al v Free Speech Coalition, op.cit.*

speech and what constitutes harm to society. The rights of children not only to protection from sexual exploitation but also to dignity and from degradation has been sacrificed for the benefit of those who profit from child pornography, on the basis of a freedom that exists, in actual practice, only for a section of the citizenry.

There is no doubt that the *PROTECT Act* will also face a *First Amendment* challenge, *"for the sake of our freedom of speech .... Banning "virtual child" pornography will not effectively protect the nation's children from perpetrators. It will simply eliminate a victimless alternative that is substantially less repugnant than the abuse of actual children."*<sup>32</sup>

The coalition of associations of businesses producing and distributing child pornography and the defenders of freedom of speech have spoken and have been heard. Their loud voices, defending their right to produce and distribute virtual child pornography, have drowned out the muffled cries of children who were being abused and tortured, even as the judges were delivering their decision.

The "no-harm-no-victim-no-offence" approach is, at worst, a betrayal of children everywhere. It ignores the use that paedophiles and child molesters make of child pornography, both visual and textual. It does not take into account the fact that society is itself harmed by the very existence of such materials in its midst. It ignores the fact that parents, too, are traumatised by the sexual abuse and exploitation of their children and are therefore victims. And it encourages the objectification of children.

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<sup>32</sup> Dannielle Cisneros, *"Virtual Child" Pornography on the Internet: A "Virtual" Victim?*

Child pornography, in any form, has no redeeming virtues. It has no value as free speech. It is *contra bonos mores* and harmful to society itself. It neither protects nor promotes any core social value. It is an assault on the dignity of every child. Virtual child pornography is no less harmful than actual child pornography and its creation, possession and distribution should be prosecuted no less vigorously. The child pornography provisions of the *Films and Publications Act*, recently identified as only one of 5 international legislations that provides a comprehensive response to the problem of child pornography,<sup>33</sup> provides for exactly that – it does not distinguish between “actual”, “virtual”, “visual” or “textual” expressions of child pornography. To that extent, section 27 of that Act is an appropriate response to section 28(1) of the children’s rights provisions in the Constitution.

Iyavar Chetty (2005)

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<sup>33</sup> *Child Pornography: Model Legislation and Global Review*, International Centre for Missing & Exploited Children 2006