Ashcroft v. Free Speech Coalition: The U.S. Supreme Court Upholds the Legality of Virtual Child Pornography (2002)

In a significant free speech decision, the U.S. Supreme Court earlier this year affirmed the holding of the U.S. Court of Appeals for the Ninth Circuit that two key provisions of The Child Pornography Prevention Act of 1996 (CCPA) are overbroad and, therefore, violate the First Amendment. The first provision would have criminalized "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct, 18 U.S.C. 2256(8)(B). This language would have reached virtual pornography that appears to depict minors, but is actually made without using real children: for example, youthful-looking adults or computer-created images. The second provision would have proscribed any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that it shows a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(D). Even if the materials did not actually contain such content, this section would have prevented the production, distribution and possession of pornographic materials presented as child pornography.

18 U.S.C. 2256(8)(B):

1. "Any visual depiction" -- The Court's holding in Miller requires the Government to view a work in its entirety, and prove that the work appeals to prurient interests; is patently offensive in light of community standards; and lacks serious literary, artistic, political or scientific value. A criminal prosecution under the CCPA, by contrast, is not tied to the Miller elements and, significantly, if a film contains even a single graphic depiction of sexual activity within the statutory definition, a possessor would be subject to severe criminal penalties. Thus, popular movies like "Romeo and Juliet," "Traffic," and "American Beauty" might fall within the prohibitions of the statute, even though they also have serious literary and artistic value.

2. "Is, or appears to be" -- The CCPA is also inconsistent with the Court's holding in Ferber, which involved the use of real children. Ferber upheld the prohibition on the acts of distribution, sale and production of child pornography because these acts are "intrinsically related" to the actual sexual abuse of the children. First, as a permanent record of a child's abuse, continued circulation of images harm the child; second, because traffic in child pornography is the economic motive for the acts, the State has an interest in closing the distribution network. Under Ferber, pornography showing actual minors can be banned without reference to the Miller factors.

The Court distinguished the CCPA from the Ferber approach: speech under Ferber is more closely linked to the crime of child abuse, while the CCPA prohibits *virtual* pornography, which records no crime and creates no victims by its production. Because no actual children are used in virtual pornography, it is not "intrinsically related" to the sexual abuse of children. Moreover, the Ferber holding is based on *how* the pornography is made, not on *what* is communicated. Most significantly, Ferber held that some child pornography may have significant value and permitted virtual images as an *alternative and permissible means of expression*. In sum, where speech is neither obscene nor the product of actual sexual abuse, it is protected by the First Amendment.

18 U.S.C. 2256(8)(D):

1. "Conveys the impression" -- This language, the Court also held, is substantially overbroad. This provision requires little judgment about the content of an image: under the CCPA a work must be sexually explicit, but content is otherwise irrelevant. Thus, even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that such scenes will be found in the movie. The determination turns on *how* speech is presented, not on *what* is actually depicted. So, under the statute it would be unlawful merely to possess mislabeled materials, even if one were not responsible for the marketing, sale or description of the materials. And since the

statute does not require commercial exploitation, it does more than prohibit pandering, instead reaching even those possessors who had no part in exploiting the materials.

Conclusion:

The CCPA could, in fact, be amended to survive constitutional challenge, but not with the breadth of coverage that Congress intended. The Miller and Ferber decisions circumscribe the permissible scope of Government regulation of speech under the First Amendment. Ferber bars the use of actual children in pornography, but allows virtual images where content would otherwise be permitted under Miller. Presumably, the CCPA drafters were aware of the Supreme Court's First Amendment precedent, so unless they thought the Court would gut Ferber and now prohibit the use of virtual images, it is curious how Congress ever expected that the CCPA would survive judicial review.