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Pixel as Paintbrush: An Inquiry into Virtual Images and the Child Pornography Prevention Act

What about paintings? They are not transparent. We do not see Henry VIII when we look at his portrait; we see only a representation of him. There is a sharp break, a difference of kind, between painting and photography.¹

Earlier last year, I recall reading a news story with the following headline: *U.S. Supreme Court Overturns Ban on ‘Virtual’ Child Porn*. Like most, my initial reaction involved the disgust of someone actually finding pleasure in such an act. And aside from the legal questions involved, which are many, the deeper question that arose in my mind was the seemingly obvious fact that there is a sharp difference between a real photograph of a child, and the virtual depiction of one. Visions of animated characters like Jessica Rabbit danced in my head, and it was painfully obvious that no one could ever mistake a virtual child from a real one. But that was before I saw Chuck Close’s *Self-Portrait*.



Figure 1: Chuck Close, *Self Portrait*²

¹ Walton, Kendall L. *Transparent Pictures: On the Nature of Photographic Realism*, P253.

² <http://www.artsconnected.org/artsnetmn/identity/close5.html>

The detail in this acrylic painting is absolutely incredible. From the stubble of his beard, the reflection of his glasses, or the crookedness of his nose, one could easily mistake this for a photograph. And for the first time, I think I understood why “Congress and the Justice Department argued that virtual pornography...makes it difficult for police to distinguish between what is legal and what is illegal.”³ “It really does look to us as though we are seeing someone via the medium of photography, and at first we are fooled.”⁴ This can be illustrated by examining an actual photograph of Chuck Close. When we compare the two renderings, it becomes more obvious that the painting is probably not a real photograph, though our initial examination may have only led us to the conclusion that it might be a slightly out of focus portrait.



Figure 2: Comparing a real photo of Chuck Close⁵ (left) to a painting (right).

So what does all of this have to do with child pornography? Initially, congress had expanded the federal law banning child pornography to include *computer generated images*, though this addition has been recently struck down by the Supreme Court due to First Amendment infringements:

³ Mauro, Tony. “U.S. Supreme Court Overturns Ban on 'Virtual' Child Porn”, *American Lawyer Media*. 04-17-2002.

<http://www.law.com/jsp/newswire_article.jsp?id=1022183115610>

⁴ Walton P256.

⁵ <http://www.fawc.org/images/news/2001/close.jpg>

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.⁶

Consider the case of *Winter v. DC Comics*. According to a unanimous California Supreme Court, “DC Comics' outlandish portrayal of the Winters in 1995's "Jonah Hex: Riders of the Worm and Such" is protected by the First Amendment.” Furthermore, “The depictions of the Winters as the evil "Johnny and Edgar Autumn" brothers, the court ruled, contain "significant creative elements" that transform them into more than mere celebrity likenesses.”⁷ This leads us to an important point, that “in general, photographs and paintings (and comparable nonphotographic pictures) affect us very differently.”⁸ In this case, the court refers to *significant creative elements* as being a determinative factor in the decision, and this leaves me with two important questions:

1. What possible guidelines exist (or could exist) for determining what is to be considered ‘significant creative elements’?
2. How does this notion of *creativity* relate to the problem of virtual Child Pornography?

Let us first examine why congress would have added the change to the existing law in the first place, so we may consider such questions. The primary fear is that “virtual pornography jeopardizes real children by stimulating the market for illegal materials”.⁹ Consider your childhood bubblegum cigarettes for a moment. Would you expect children who “smoke” this candy to develop a desire to smoke the real thing? Probably not. But what if the candy became

⁶ <http://www.house.gov/Constitution/Amend.html>

⁷ McKree, Mike. “The Verdict’s In, and It’s Art”, The Recorder. 06-04-2003. <http://www.law.com/jsp/newswire_article.jsp?id=1052440827932>

⁸ Walton P247.

⁹ Mauro.

so similar to real cigarettes that the differences soon became non-existent at first glance (or taste)? Would you want your children running to the ice-cream truck for them now? Not quite convinced? Perhaps a better analogy will do the trick. Consider the popular game of paintball. In this case, individuals gather on a playing field full of obstacles and barriers with the object of surviving without getting ‘shot’ by a small plastic ball full of paint. Novices generally rent their equipment at the range, while advanced competitors often bring their own specialized gear. In this case, I would probably characterize the beginners as not unlike the candy bubblegum smokers. There isn’t much fear of them running out to buy a real gun to kill people. There is, unfortunately, often times a significant difference between these novices and those who own their own equipment. At times, some of these players tend to go beyond the guidelines of ‘fair play’ and continue to fire off rounds at players leaving the field for having already been hit for example. Where might we draw the distinction for what is “harmless” here? Is this simply a sport to be played? Or is it fostering more dangerous behavior? These are difficult questions, though this illustrates the rationale behind the desired change.

Let us consider another related case, where recently a professor at New York Law School was found to have “images of naked young girls in sexually explicit positions”¹⁰ on his faulty PC. The most interesting fact in this case is not the arrest or the guilty plea of the professor involved, but rather the fact that the two IT support specialists who reported the findings were shortly thereafter fired from their own jobs. Though their employer, Collegis, denies any link between the incident and their eventual termination, Dorothea Perry and Robert Gross aren’t so

¹⁰ Foley, John. “Troubling Discovery”, Information Week. May 12, 2003.P22
<<http://www.informationweek.com/story/showArticle.jhtml?articleID=9800082>>

sure. As the article suggests, such a case definitely raises questions about IT's responsibility in dealing with the serious problem of child pornography on workplace computers.¹¹

1. Do businesses have clear policies that forbid employees from storing child pornography on computers and guidelines for what system administrators should do if they encounter it?
2. Should the law, as it does in at least one state, South Carolina, require that IT professionals report incidents of suspected child pornography?

One would expect the answers to both of these questions to be a definite 'Yes'. Considering that child pornography is illegal conduct, IT departments and businesses alike should have clear guidelines in place to prevent such activities from occurring. And more importantly, such entities have the responsibility for reporting any suspected violations. Any less would be unacceptable. But what if we slightly altered these considerations:

1. Do businesses have clear policies that forbid employees from storing *virtual* child pornography on computers and guidelines for what system administrators should do if they encounter it?
2. Should the law, as it does in at least one state, South Carolina, require that IT professionals report incidents of suspected *virtual* child pornography?

Aah, now the law becomes more complicated, doesn't it? One would presume that as far as company guidelines go, virtual pornography would be treated the same as real pornography since the desired effect is the same, which in turn is deemed inappropriate for the workplace. As far as reporting such incidents, this probably amounts to a personal decision. If you happened to come across such materials on a co-worker's computer, would you report it? If you would, why would you do so? Would your decision depend on whether you have children of your own? Would it

¹¹ Foley P2-23.

change your opinion of that person, or make you leery of them in the future? These are all important questions, and precisely why congress had probably added virtual pornography to the existing law at the time.

Yet surely, photography and virtual images¹² *are* still different. Of course, we may not be able to distinguish them at times, but there is still a critical difference, is there not? Photography “is commonly thought to excel in one dimension especially, that of realism.”¹³ It can only represent things that actually are (or were), while painting and other creative mediums can only portray the imagination and abilities of the artist. “There is one clear difference between photography and painting. A photograph is always a photograph of something which actually exists”.¹⁴ Kendall Walton presents the case of the painter and photographer who both attempt to capture the presence of a dinosaur. If a dinosaur appears in a photograph, we can say that the dinosaur really existed at that moment. If a dinosaur appears in a painting, we can only attribute this to the artist’s imagination. “The artist draws his hallucination; the camera bypasses the photographer’s hallucination and captures what is in the jungle”.¹⁵ This is where the notion of creativity comes into play. Virtual child pornography has been removed from the law for the very fact that it is only a depiction, a representation of the artist’s conception.

But though the event depicted in a virtual image may never have actually taken place, viewers might not be able to distinguish such an image from a real photograph. And if viewers cannot determine that a photo has been altered, could it not be argued that it should be treated as though it were a real photograph? This leads us to two possibilities:

¹² For the purposes of this discussion, I will consider paintings, drawings, computer generated images, photo montages, and all other non-photographic images as ‘virtual images’. The main difference I have in mind here is that photographs represent an unaltered depiction of events that have actually occurred.

¹³ Walton P246.

¹⁴ Walton P250.

¹⁵ Walton P264.

1. Photography and virtual images are different mediums, and therefore should not be treated as the same under the eyes of the law.
2. Photography and virtual images can, at times, be indistinguishable. If they can be indistinguishable, they should be treated as the same under the eyes of the law.

As I have mentioned earlier, a business would probably consider virtual child pornography to be as serious as real child pornography under company guidelines. Why should the law be any different? Should it really matter that a virtual depiction doesn't actually harm a child? What if virtual images tend to provoke viewers to search out the real thing? If 20% of virtual child pornography viewers possess real child pornography photos, is that enough to change the law? 50%? 90%? I do not believe there is an easy answer to this question, since there are serious implications. Was the Supreme Court right in their decision? Possibly. Was congress right in protecting our children? Undoubtedly. So where does that leave us if we can't tell a simple painting from a photograph?