UIC John Marshall Journal of Information Technology & Privacy Law

Volume 13
Issue 3 *Journal of Computer & Information Law - Spring 1995*

Article 7

Spring 1995

1994 John Marshall National Moot Court Competition in Information and Privacy Law: Brief for the Petitioner, 13 J. Marshall J. Computer & Info. L. 505 (1995)

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Recommended Citation

Jeffrey Gold, Anne Gurnsey & Joseph Horzepa, 1994 John Marshall National Moot Court Competition in Information and Privacy Law: Brief for the Petitioner, 13 J. Marshall J. Computer & Info. L. 505 (1995)

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MOOT COURT COMPETION

BENCH MEMORANDUM

SYSOP, USER AND PROGRAMMER LIABILITY: THE CONSTITUTIONALITY OF COMPUTER GENERATED CHILD PORNOGRAPHY

by GARY L. GASSMAN

THE THIRTEENTH ANNUAL JOHN MARSHALL LAW SCHOOL NATIONAL MOOT COURT COMPETITION IN INFORMATION TECHNOLOGY AND PRIVACY LAW

No. 94-241
IN THE SUPREME COURT
OF THE
STATE OF MARSHALL

Dede Domingo, a minor, by Douglas and Madeline Domingo, her parents and next friends,

Respondents,

v.

George Gress,

Petitioner.

I. STATEMENT OF THE CASE

Plaintiff, Dede Domingo, is fifteen years old and lives with her legal parents and guardians, plaintiffs Douglas and Madeline Domingo, in the city of Melrose in the State of Marshall.

Defendant, George Gress, lives in the city of Melrose in the State of Marshall. Mr. Gress owns and operates a photography studio in the City of Melrose and specializes in photographing child models for department store and mail-order catalogues. Gress is also a skilled amateur computer programmer who, as a hobby, is the operator or "sysop" of an electronic bulletin board system (BBS) which can be accessed through the Internet. The Internet is an international electronic network easily available to the public for linking computers and transmitting information.

As sysop, Gress has managed the operations of the BBS, checking the system for security problems and conducting routine maintenance checks. Also, Gress handles all subscriptions, inquiries and contributions to the BBS. Gress personally contributes material to the BBS as well.

In February, 1993, Gress was commissioned to photograph children for summer catalogues. Gress set up the shots, posed the children and took the pictures. The photographs displayed children in summer clothes, underwear and beach attire. Plaintiff Dede was one of the children employed by Gress in this project. Plaintiffs signed a release permitting the use of the photographs of Dede in specified catalogues but for no other purpose.

After the photo sessions, Gress developed the negatives and printed the pictures, providing copies of the photos to his clients and to the child models for their individual portfolios. Gress kept copies for his own files.

In May, 1993, Gress finished developing a software program which he made available on his BBS. The program was an interactive sex program entitled "Kid Stuff." Gress was able to scan the photograph of any person into his computer database and make that image part of the program. Gress used some of the children's pictures he had taken for his catalogue work and scanned them into his computer, including a bikini photo of plaintiff Dede Domingo. Using his computer's graphics capabilities Gress could supply the images with any missing details and then permit the program user to animate the images and portray them in fictionalized sexual scenarios. The program permits the user to create scenarios that depict fellatio, sodomy, masturbation, cunnilingus and a variety of other aspects of foreplay and sexual intercourse. The graphics quality is very good and the animations are life-like.

In his answer to the plaintiffs' complaint, Gress explained the procedure involved in accessing and subscribing to his BBS. The Defendant stated that when someone using the Internet encounters Gress' BBS he or she has the option of entering the BBS or bypassing. If he or she enters the BBS, there are three minutes of free browsing time in which to learn what features are on the BBS. In order to access "Kid Stuff" the

user must first fill out a questionnaire which appears on the screen, providing name, age and address information. Gress requires a subscriber to send him a copy of his or her driver's license or other identification showing proof of birth date. Access to the sex program also requires the user to pay an extra monthly fee and Gress assigns a personal identifying number (PIN) to each subscriber who must type in his or her age and PIN each time access to the program is desired.

In July, 1993, sixteen-year-old Johnny Sawyer, a friend of Dede's, logged onto his computer and, while browsing the BBS operated by Gress, learned of the existence of "Kid Stuff." Johnny subscribed to Gress' BBS by filling out the BBS questionnaire, giving his twenty-two year old brother's identification information. Johnny also secured a photocopy of his brother's driver's license and mailed that to Gress along with the subscription fee.

On August 20, 1993, Johnny logged onto "Kid Stuff" for the first time, entering his PIN and "22" when the program asked the user's age. After a few seconds the program ran a one minute explanation describing exactly what a user was capable of doing with the program. The instructions did not depict any sexually explicit material nor did they contain a demonstration of images in sexually explicit scenarios. Then, a variety of children's images appeared on his monitor screen and Johnny, as any user, was prompted to select a child's image and to select sexual acts in which the image would participate. Johnny was shocked to see that one of the images on the screen was that of his friend, Dede Domingo. He immediately phoned Dede and told her about the use of her image. He also told her how to access the program on the BBS, supplying Dede with his PIN. Dede has taken computer classes at school and has been working with computers for four or five years.

Later that day, Dede logged onto her computer and searched for "Kid Stuff" on the BBS. Once Dede found the sex program she typed in "22" and Johnny's PIN and was prompted to run the explanation, after which she was permitted to run the program. Dede saw her own image among the others and realized it could be manipulated in explicit sexual scenarios with images of adults or other children. Dede immediately informed her parents.

Plaintiffs subsequently filed a complaint against Gress in the Melrose County Circuit Court. In the complaint the plaintiffs claimed that Gress' conduct violated Marshall's pornography laws, specifically chapter 45, section III, paragraphs A through D. The applicable statutory provisions follow:

MARSHALL REVISED STATUTES
OBSCENITY, PORNOGRAPHY, CHILD PORNOGRAPHY
CHAPTER 45

§ III. CHILD PORNOGRAPHY:

A. Child Pornography Defined

1. Any material or performance constitutes child pornography if:

(a) the work appeals to the prurient interest;

(b) the work depicts or describes fornication, sadomasochistic sexual acts, masturbation, excretory functions or lewd exhibition of the genitals, whether normal or perverted, actual or simulated and involves a person under the age of eighteen engaged in such acts; and

(c) the work, lacks serious literary, artistic, political or scientific value.

2. Any person who creates or disseminates child pornography will be liable for not less than $50,000.00 for each individual offense.

B. A person creates Child Pornography when he or she videotapes, films, photographs, or otherwise uses, depicts, displays or portrays by means of any visual medium or reproduction, stage play or live performance, any child whom he or she knows or reasonably should know to be under the age of eighteen, actually or by simulation engaged in any act or conduct defined in ¶ A herein, alone or with other children or adults.

C. A person disseminates child pornography to a minor when he or she recklessly or knowingly supplies, distributes, displays or exhibits, or by his or her recklessness causes to be supplied, distributed, displayed or exhibited, to anyone under the age of eighteen years, any material or performance described in ¶ A herein. For purposes of this section, a person is reckless who fails to take adequate means to prevent the dissemination of pornographic materials described herein to anyone under eighteen years of age.

D. Civil Action by Parent or Guardian:

(1) A parent or legal guardian of a minor child used in the creation of child pornography as defined herein may bring a cause of action for damages on behalf of said child in an amount not less than $50,000.00 for each individual violation of paragraph B of this section.

(2) A parent or legal guardian of a minor child to whom child pornography has been disseminated as defined herein may bring a cause of action for damages on behalf of such minor child in an amount not less than $50,000.00 for each individual violation of paragraph C of this section.

The plaintiffs alleged that Gress is personally civilly liable under Ch.45 MRS, §III, for the creation and dissemination of child pornography, and claimed damages of not less than $50,000.00 for use of their daughter Dede in the creation of child pornography and not less than $50,000.00 for the dissemination of material depicting their daughter Dede.

In his answer, the defendant admitted the foregoing facts in the plaintiffs' complaint, alleged additional facts previously stated regarding the procedures involved in subscribing to and accessing the defendant's BBS and raised affirmative defenses. First, the defendant asserted that the Marshall statute is unconstitutional and that his program is protected from censorship by the First Amendment.

Second, Gress maintained that, even if the computer program at issue can be constitutionally proscribed, Gress is not liable as a creator or disseminator of prohibited material because he did not use Dede herself to create pornography and it is the user who determines what shall be depicted; Gress does not personally create or communicate any prohibited material over the BBS.

Finally, the Defendant asserted that he took adequate precautions to prevent minors from accessing his BBS by requiring proof of age from subscribers.

On February 10, 1994, the Plaintiffs moved for judgment on the pleadings. Judge Hanson of the Melrose County Circuit Court, for purposes of the Plaintiffs' motion, accepted as true the facts supplied in the Defendant's answer and set forth above. Judge Hanson, in granting the Plaintiffs' motion for judgment on the pleadings, held that, as a matter of law: 1) The defendant's bulletin board program constituted offensive material constitutionally proscribed under the Marshall Revised Statutes; and, 2) the defendant is civilly liable for the creation and dissemination of the prohibited pornography. Consequently, Judge Hanson ruled that the Plaintiffs were entitled to statutory damages of $100,000 and costs.

The Marshall Appellate Court accepted appeal on the plaintiffs' motion for judgment on the pleadings. Because the trial court granted plaintiffs' motion for judgment on the pleadings, the appellate court accepted as true all facts set forth in the pleadings and reviewed *de novo* the questions of law. The appellate court affirmed the trial court's holdings.

Having found that the Marshall Appellate Court had jurisdiction to hear the appeals involved, this court granted the defendant's leave to appeal the appellate court's findings as to both issues.

II. ISSUES PRESENTED

A. Whether The Marshall Statute, Which Prohibits The Creation Or Dissemination Of Sexually Explicit Material, Is Constitutional.

B. Whether The Defendant, George Gress, Can Be Held Liable For The Creation And Dissemination Of The Prohibited Material.

III. BACKGROUND

A. Introduction

The facts which make up the scenario in this case create a unique situation made possible only by technology. This type of scenario has never been addressed by a court, and whether analogies from past case law aid in analysis of the scenario created is questionable. This fictionalized case is so challenging because, unlike precedent involving child pornography, no actual children engaged in sexual conduct to create the pornography in the present case. Moreover, obscene scenarios in the present case are actually created by users of the computer program since the program itself does not display any pornographic scenario; the program only makes it possible for a user to create a sexually explicit scenario.

B. Internet And Bulletin Board Systems

Computer graphics programs available today permit photographs to be scanned into computer databases. Current software allows programmers and users to manipulate scanned photographs. In fact, certain software programs have the capability to allow a user to change details of scanned photographs and animate the photographs. In such instances users may also involve the new images in active animations through further manipulation.

"A computer bulletin board system is the computerized equivalent to a bulletin board one hangs on the wall." *E-Law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 3 ALB. L.J. SCI. & TECH. 79, 82 (1993). Anyone with knowledge of computers and $2,500 can start a national bulletin board. "[T]he bulletin board user connects his or her personal computer to the 'host' computer," which runs the software and stores the messages, "usually via telephone line." *Id.* at 82. The Internet alone connects over 5,500 bulletin board systems (BBS's). Elmer-DeWitt, *Battle for the Soul of the Internet*, TIME, July 25, 1994, at 51.

The Internet, a blend of thousands of computer systems, links together people from all over the world. Its original purpose was to provide access to expensive hardware resources to researchers. It has shown tremendous effectiveness as a means of communication and is now used by librarians, educators, the business community, government employees and the general public for a variety of purposes. Users may access the Internet any time day or night and gain access to books and resources or communicate with others around the world. It currently reaches perhaps 25 million users, and the number increases every year.

The Internet, which is based in the United States, has connections with networks in the United Kingdom, Germany, France, the Nordic countries, Canada, Japan and Australia. It consists of over 8000 global networks extending to more than 45 countries, many communications services and thousands of universities, corporations and government entities. The networks are connected by regular telephone lines, leased high speed lines, fiber optics, microwave links and satellites. The linked computers talk to each other by using the same protocol (agreed upon standards of communication) at the same time. To connect to the Internet, all one needs is a personal computer, communications software to set up the connection, a modem and a phone line. A modem is the device by which telephone line connection is accomplished. Modems convert computer data into audio signals which are received by other computers over telephone lines. A modem at the receiving computer then converts the audio signals back to computer data. The data can then be read on the receiving computer's screen. Elmer-Dewitt, at 54.

C. Obscenity, Child Pornography And The Court

In 1957, the Supreme Court held that obscene material is not protected by the First Amendment. *Roth v. United States*, 354 U.S. 476, 485 (1957). In *Roth*, the defendant was convicted of violating a federal obscenity statute for mailing an obscene book and some sexually explicit fliers. *Id.* at 480. The Court defined obscenity as "material which deals with sex in a manner appealing to prurient interests." *Id.* at 487. The Court also articulated the first obscenity test which provided for a finding of obscenity if "to the average person, applying contemporary community standards, the dominant theme of the material as a whole appeals to the prurient interest." *Id.* at 489. The significant elements of the *Roth* test were the required assessment of the work "as a whole" and the use of the "average person's" point of view in the evaluation of the work.

Nine years later, the Supreme Court limited the scope of the *Roth* opinion in its clarification of the definition of obscenity and articulated a new test in *A Book Named John Cleland's Memoirs of a Woman of Plea-*

sure v. Attorney General, 383 U.S. 413 (1966). The book in *Memoirs*, an erotic novel about a London prostitute, was found obscene by the courts in Massachusetts. *Id.* at 419. The Supreme Court held that three factors must be established independently for a finding of obscenity. First, the dominant theme of the material at issue, taken as a whole, must appeal to the prurient interest in sex. *Id.* at 418. Second, the material at issue must be found patently offensive because it offends contemporary community standards relating to the representation or description of sexual matters. *Id.* Third, the material must be found to be utterly without redeeming social value. *Id.* Here, the Court significantly altered the *Roth* obscenity standard by adding this third element. *Id.* at 419.

In *Stanley v. Georgia*, 394 U.S. 557 (1969), the defendant was seized in his own home for the possession of obscene films in violation of a Georgia statute. *Id.* at 558. The Court held that states lack the power to regulate or prohibit the possession of obscenity in the privacy of one's home, even though obscenity does not constitute constitutionally protected speech. *Id.* at 568. The Court stated that, the "right to receive information and ideas, regardless of their social worth, is fundamental to our free society." *Id.* "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id.* at 565. "[T]he State may no more prohibit mere possession of [obscenity] on the ground that it may lead to anti-social conduct than it may prohibit possession of chemistry books on the ground that it may lead to the manufacture of homemade spirits." *Id.* at 567.

The Supreme Court altered the obscenity test once again in 1973, in *Miller v. California*, 413 U.S. 15 (1973). The defendant was convicted under a California statute for mailing unsolicited sexually explicit material advertising adult books. *Id.* at 16. The California statute incorporated the *Memoirs* obscenity test. *Id.* The Court vacated Miller's conviction (*id.* at 37), and provided the following three-prong test for determining whether material constitutes obscenity, discarding the *Memoirs* "utterly" requirement:

> (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.

Id. at 24-25.

The Court also restricted state regulation to only "hard core" depictions or descriptions of sexual conduct. *Id.* at 27. The Court provided the following examples of material considered "hard core:" a) "patently offen-

sive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated;" and b) "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25.

The Court elaborated on the *Miller* test's third prong in *Pope v. Illinois*, 481 U.S. 497 (1987). The defendant there was arrested for violating an Illinois statute by selling materials deemed obscene. *Id.* at 499. The trial court had instructed the jury to evaluate the materials at issue through the viewpoint of "ordinary adults in Illinois." *Id.* at 499. The Supreme Court, however, held that the third prong of the *Miller* test asks whether a "reasonable person would find such value in the material taken as a whole," rather than finding approval by the majority of people in a particular community. *Id.* at 500-01.

Note: In a recent case decided in the United States District Court in Memphis, Tennessee, the defendants were convicted in Tennessee of transmitting obscene material through interstate phone lines via a computer bulletin board located in California. One of the defense's major arguments concerned the applicability of the "contemporary community standards" element of the first prong of the *Miller v. California* obscenity test. Stephen Bates, Senior Fellow at the Annenberg Washington Program stated that "the essential impact [of judging obscenity by local community standards in today's social, political and technological climate] is that the most puritanical, blue-nosed district in the country could dictate policy on this issue for the entire nation." *Landmark Trial Tests Legality of Cyberporn*, SAN FRANCISCO EXAMINER, A1, July 21, 1994. This problem does not arise in our factual scenario, however, since the parties reside in the same jurisdiction. Furthermore, our case does not involve the cyberspace question concerning where exactly the prohibited material was received and the wrong occurred.

In 1982, the Supreme Court addressed the specific issue of child pornography in *New York v. Ferber*, 458 U.S. 747 (1982). There, the United States Supreme Court held that any advertising or selling of child pornography receives no First Amendment protection. *Id.* at 764.

In *Ferber* the Supreme Court gave five reasons for granting the states greater leeway with regard to the prohibition of child pornography: 1) states have a compelling interest when it comes to ensuring the psychological and physical well being of minors, *id.* at 756-757; 2) the distribution of material depicting minors engaged in sexual activity furthers the sexual abuse of children, *id.* at 759; 3) the advertisement and sale of sexually explicit material involving minors provides an economic incentive for the continued production of child pornography, *id.* at 761; 4) any value of child pornography "is exceedingly modest, if not de minimis," *id.* at 762; 5) child pornography constitutes the type of material which fails to warrant First Amendment protection. *Id.* at 763. The

Court stated that "descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproductions of live performances, retains [sic] First Amendment protection." *Id.* at 765.

Later in a case similar to *Stanley*, the Supreme Court held that states could constitutionally prohibit the possession of child pornography in the privacy of one's home. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990). The defendant had been apprehended in his home with pictures of minors masturbating. *Id.* at 107. Under Ohio's statute, possession of any material depicting a nude minor was prohibited. *Id.* at 106-107. The defendant was convicted and sentenced to six months in jail. *Id.* at 107.

Ohio argued that banning the possession of child pornography would help to eliminate its production, *id.* at 109, rid the state of existing child pornography, *id.* at 111, and help to prevent pedophiles from seducing other children to have sex by showing the children child pornography. *Id.* The Supreme Court found the Ohio interests compelling and held the prohibition constitutional. *Id.*

To date, the Supreme Court of Georgia is the only court which has reviewed a state statute "that was unclear as to whether it restricted child pornography to depictions of real children." *Aman v. State*, 409 S.E.2d 645 (Ga. 1991). The statute involved stated that "[i]t is unlawful for any person knowingly to possess or control any material which depicts a minor engaged in any sexually explicit conduct." GA. CODE ANN. § 16-12-100(b)(8); *Aman*, 409 S.E.2d at 646. The Georgia court narrowed the scope of the portion stating "depicts a minor" to "any photographic representation that was made of a [live child model] . . . " to avoid unconstitutional overbreadth. *Id.*

D. THE ATTORNEY GENERAL'S PORNOGRAPHY COMMISSION REPORT

The Attorney General's Commission on Pornography was established on February 22, 1985 by the Attorney General of the United States at the specific request of President Reagan, pursuant to the Federal Advisory Committee Act. 1 Att'y Gen. Commission on Pornography, Final Report 215 (1986). The Commission was asked to examine and determine how great, and what type, of an impact pornography had on the United States, and to formulate ways for the Attorney General to more effectively and constitutionally combat the spread of pornography. *Id.* Many issues it addressed are relevant to the case at hand.

The Commission enumerated the significant harm resulting from the creation of child pornography:

The first problem is that of the permanent record of the sexual practices in which children may be induced to engage. [*Id.* at 411.] Second, there is substantial evidence that photographs of children engaged in

sexual activity are used as tools for further molestation of other children. [*Id.*] Third, photographs of children engaged in sexual practices with adults often constitute an important form of evidence against those adults in prosecutions for child molestation. [*Id.* at 412.] Finally, an argument related to the last is unquestioned special harm to the children involved in both the commercial and the noncommercial distribution of child pornography. [*Id.*]

The Attorney General's Commission on Pornography emphasized that in child pornography a child is sexually abused. *Id.* at 406. The characteristic of child pornography distinguishing it from obscenity, as generally understood, is that real children are photographed while performing some form of sexual conduct, either with other children or adults. *Id.* at 405. The Commission stated that clearly, the inevitably permanent record of sexual activity created by a photograph will harm the children for years. *Id.* at 406. But the sexual exploitation which occurs in the making of the photograph inextricably links the issues related to the sexual abuse of children and those related to child pornography. *Id.*

The United States government has had a much more difficult time regulating child pornography than other forms of obscenity since the aim is to stop the production and distribution of child pornography entirely. The Commission explained that, as demonstrated by the *Ferber* decision, the classification of "child pornography" is both more broad and more narrow than material classified as "obscenity" under *Miller v. California*. *Id.* at 597. "Broader in that it includes materials which are not 'patently offensive,' which do not appeal to the 'prurient interest of the average individual,' and which show children in sexual conduct even as an incidental part of the work (rather than 'taken as a whole')." *Id.* at 597-98. The category is more narrow, however, because it excludes written materials and visual materials which fail to exhibit real children engaged in sexual conduct. *Id.* at 598.

Thus, the Commission explained that the Federal Child Protection Act of 1984 is designed to "prohibit employing, using, persuading, inducing, enticing, or coercing any minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." 18 U.S.C. §§ 2251-2252 (1985). *Id.* at 619. Finally, the Commission on Pornography made recommendations concerning legislation to regulate child pornography: one is to prohibit the use of computer networks for the exchange of child pornography;[1] another would add unde-

1. Recommendation number 39 states that Congress should enact legislation to prohibit the exchange of information concerning child pornography or children to be used in child pornography through computer networks. Att'y Gen. Commission on Pornography, *supra*, at 628.

veloped film to the definition of "visual depiction" in the federal child pornography statute.[2]

E. Discussion Of The Problem

The threshold issue of the problem is whether computer-generated scenarios involving images of children engaged in sexual conduct can constitute child pornography. The petitioners should argue that the images which evolve from use of the program do not constitute child pornography because no real child ever engaged in actual sexual conduct to create the scenarios. Therefore, the petitioner should conclude that because the statute covers such depictions it is overbroad and unconstitutional.

The respondents should argue that the rationale of *Ferber* and other cases and studies involving traditional child pornography should be extended to cover computer-generated child pornography. The respondents should rely on arguments emphasizing the harm which occurs after images depicting a child are disseminated to others, as well as the effect such images have on viewers. Furthermore, the respondents should contend that even if the court finds that the images created by the program do not constitute child pornography, the ultimate product at the very least constitutes obscenity under *Miller*, the distribution of which may be proscribed by the state. Consequently, the respondents may ask the court to sever the potentially overbroad elements of the statute, narrowly construing the statute in accordance with constitutional dictates.

The second issue involves the petitioner's liability for the creation and dissemination of prohibited material. This issue is meant to address WHO actually executed the creation and dissemination of the material rather than focusing on whether child pornography or obscenity was created at all. The petitioner should argue that he merely provided the tools by which a user could create the material. Moreover, the petitioner should assert that he exercised the necessary precautions to prevent children from accessing the BBS program.

Conversely, the respondents should argue that the petitioner is directly liable for the creation and dissemination of the material and failed to take adequate precautions against children accessing the BBS program. Alternatively, the respondents should assert that the petitioner should be found liable under the theory of vicarious liability.

2. Recommendation number 41 states that Congress should amend 18 U.S.C. § 2255 to define the term "visual depiction" and include undeveloped film in that definition. Att'y Gen. Commission on Pornography, *supra*, at 637. In an effort to curb the continued exploitation of children, it is necessary to define the term "visual depictions" to include images contained on rolls of undeveloped film, video tape and sketches, drawings or paintings of actual persons. *Id.*

IV. ANALYSIS

A. Whether The Marshall Statute, Which Prohibits The Creation Or Dissemination Of Sexually Explicit Material, Is Constitutional.

1. *Whether the Computer-Generated Sexually Explicit Depictions Constitute Child Pornography*

a. *Gress' Child Pornography Argument*

Because the images of children engaged in sexual acts in "Kid Stuff" are made without the use of live children Gress will likely argue that they do not constitute child pornography. The Supreme Court stated in *New York v. Ferber*, "descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproductions of live performances, retains [sic] First Amendment protection." *New York v. Ferber*, 458 U.S. 747, 765 (1982). Thus, Gress could argue that First Amendment protection should attach to computer-generated pornography because no child is exploited when someone creates an image without the use of a real child.

In *United States v. Nolan*, 818 F.2d 1015 (1st Cir. 1987), the defendant challenged his conviction under a federal child pornography statute which required the actual use of a minor who engaged in sexually explicit conduct. The court, addressing an issue similar to the one in the present case, acknowledged a difference between the use of actual photographs and drawings or other images which did not rely on the use of actual subjects. *Id.* at 1017. However, since the defendant failed to produce evidence that the pictures involved had been doctored or that they were computer-generated images, the government was not required to disprove that possibility. *Id.* at 1020.

Gress may also analogize his program to "pseudo child pornography," which is created through the use of older adolescents or adults portraying children in sexually explicit depictions. Att'y Gen. at 618. Arguably, this is not child pornography since no children have been exploited in the production of the material. *Id.* Consequently, "pseudo child pornography" should be treated as obscenity.

b. *The Domingos' Child Pornography Argument*

The Domingos will likely assert that computer-generated pornography depicting children is indistinguishable from traditional child pornography and does not warrant constitutional protection. The Domingos will claim that there is no requirement that a child display any sexual connotations in his or her gestures or demeanor while being photographed. *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). The photograph of a fully-clothed child may lead to the liability of the photog-

rapher, depending on the circumstances in which the child's picture is used. *United States v. Knox*, 977 F.2d 815 (3d Cir. 1992), *vacated and remanded*, 1994 U.S. App. LEXIS 13919 at 69 (June 9, 1994).

The Domingos may contend that this court should define "creation" expansively and look beyond the child's actions and instead concentrate on the pornographer's use of the resulting work. The *Wiegand* court proposed a test to judge child pornography by several factors including whether the depiction of the child "is intended or designed to elicit a sexual response in the viewer."[3] Moreover, many courts analyze factors such as the focal point of the visual depiction and whether the depiction suggests willingness to engage in sexual behavior to determine whether the visual depiction of a minor constitutes unprotected child pornography.[4]

In the present case, the Domingos will argue that Dede's non-pornographic photograph was manipulated, changed, and used solely to arouse the lusts of others. Gress created child pornography by using her picture in this manner. Gress added genitals and placed Dede's image in a setting designed to elicit sexual responses. The fact that Dede did not participate in those actions through a LIVE performance does not weaken the impact of Gress' conduct. Thus, the Domingos will contend that this court should find the depictions portrayed in "Kid Stuff" to constitute child pornography.

Although the Domingos will admit that Dede was not photographed while performing sexual acts, they may assert that the lack of a pornographic performance by a child does not exonerate a defendant who used that child as an object to fulfill the desires of other pedophiles. *Cross*, 928 F.2d 1030. Child pornography statutes, such as Marshall's, seek to punish the actions of those responsible for using children, in any way, to produce child pornography. Accordingly, the Domingos will want this court to focus on a pornographer's intent and the nature of the audience

3. *Wiegand*, 812 F.2d at 1239 (defining lasciviousness as a characteristic of the exhibition which the photographer sets up for an audience, not of the child photographed.); *Nebraska v. Saulsbury*, 498 N.W.2d 338, 344 (Neb. 1993) (The sexuality of depictions of children is often imposed upon them by the attitude of the viewer or photographer, thus the photographer's motive in taking the pictures should be a factor in the determination of lasciviousness.).

4. *U.S. v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989). The cases outline six factors considered in the determination of lasciviousness: 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area, 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. *Id.*, (quoting *U.S. v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)).

when analyzing this child pornography claim, without considering that Dede was not physically victimized. *Cross*, 928 F.2d 1030 (affirming conviction where defendant filmed the child with parental permission but then cropped photos to highlight child's nude torso and further added photographs of adult female genitalia to the video strip); *Missouri v. Foster*, 838 S.W.2d 60 (Mo. Ct. App. 1992) (holding that a defendant "created" child pornography by photographing a photograph of a child).

2. *Overbreadth*

Overbroad statutes are drawn to prohibit specific activities which do not warrant constitutional protection, but sweep too broadly and include constitutionally protected activities within their scope, thus chilling protected expression. *Board of Airport Commissioners of L.A. v. Jews for Jesus*, 482 U.S. 569, 574 (1982). "The overbreadth doctrine serves as a 'constitutional safeguard,' ensuring that laws do not include in their scope constitutional speech which has been 'immunized from government control.'" *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969). Overbreadth must be "real and substantial in relation to [an] ordinance's plainly legitimate sweep," to strike the statute on First Amendment grounds. *New York v. Ferber*, at 770. To be determined overbroad, a statute must cover a substantial amount of protected activity. *Broadrick v. Oklahoma*, 413 U.S. 601, 615-18 (1973). In overbreadth analysis, the Supreme Court recommends that courts narrowly construe seemingly overbroad statutes, if possible, to regulate only unprotected speech, rather than striking statutes down for overbreadth. *Ferber*, at 768-69. However, the Supreme "Court's invalidation of overbroad laws reflects the substantive First Amendment principle that laws regulating expression be the 'least restrictive means' of accomplishing their ends." *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 262 (1994).

a. Gress' Overbreadth Argument

The United States Supreme Court has been increasingly willing to reconstruct a statute deemed overbroad rather than eliminating it entirely. L. Tribe, *American Constitutional Law*, at § 12-28 p.1027 (2d. ed. 1988). For example, in *Brockett v. Spokane Arcades, Inc.*, the Supreme Court reviewed a decision which completely invalidated a Washington statute which sought to prevent and punish publication of obscene material. 472 U.S. 491 (1985). In reversing the holding of the appellate court, the Supreme Court stated that "a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it. . . ." *Id.* at 501. Consequently, the Court severed the prohibi-

tion of materials which excited normal lust leaving the statute with a constitutional ban on genuinely obscene matter. *Id.*

Similarly, in *Osborne v. Ohio*, 495 U.S. 103, 112 (1990), the Supreme Court stated that while the Ohio statute seemed to prohibit depictions of nudity that may be constitutionally protected the Ohio Supreme Court sufficiently construed the statute to survive any overbreadth scrutiny. *Id.* On the other hand, the Court facially invalidated an entire municipal ordinance prohibiting the solicitation of any contributions by charitable organizations not using at least 75 percent of receipts for charitable purposes in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

Gress could assert that the Marshall statute must be drawn carefully and must justify incidental restrictions on First Amendment behavior by providing a compelling interest in prohibiting the computer program "Kid Stuff." *American Booksellers Ass'n, Inc. v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 475 U.S. 1001, *and reh'g denied*, 475 U.S. 1132 (1986). He will likely assert that since the program does not pose a direct threat to a child's physical, emotional or mental well being the state's interest is minimal.[5] Gress could also assert that the Marshall legislature must choose the least restrictive means to achieve the goal of controlling specific conduct.[6]

b. Domingos' Overbreadth Argument

The Domingos will likely argue that the Marshall Statute at issue is not unconstitutionally overbroad. The statute contains language commonly found constitutional in state child pornography statutes as well as the federal statute dealing with child pornography. *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1287-88 (9th Cir. 1992), *cert.*

5. In *Butler v. State*, the Supreme Court struck down a statute proscribing material which had a "deleterious influence upon youth." *Butler*, 352 U.S. 380, 383 (1957). The state contended that the statute's breadth was justified by the state's compelling interest in "shielding juvenile innocence" and the promotion of general welfare. *Id.* However, the Court held that the statute was overbroad because it would "reduce the adult population of Michigan to reading only what is fit for children," even though the state articulated a compelling interest. *Id.*

6. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *see also*, *American Booksellers Ass'n, Inc. v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 475 U.S. 1001, *and reh'g denied*, 475 U.S. 1132 (1986). In *American Booksellers*, the court invalidated an Indianapolis municipal anti-pornography ordinance because the city could not provide a compelling interest to regulate general pornography which constituted protected speech. *Id.* at 1329. The city argued that pornography subjected women to sexual discrimination and thus women needed special protection. Although the court acknowledged that the protection of women's civil rights constituted a legitimate state interest, the court explained that women could protect their own civil rights unlike the children in the *Ferber* case. *Id.* at 1333-34.

granted, 114 S. Ct. 1186 (1994); Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2251 *et. seq.*

In *Ferber* the Supreme Court provided that, "[i]t is evident beyond the need for elaboration that a State's interest 'in safeguarding the physical and psychological well-being of a minor is compelling.'" *Ferber*, 458 U.S. at 756. Congress has also indicated that depictions of children in pornographic material harms the emotional and mental health of the children. Sen. Rep. No. 438, 95th Cong., 1st Sess. 5, reprinted in 1978 U.S.C.C.A.N. 40, 43.

The Domingos could assert that the Marshall statute seeks to protect both the physical and emotional harm to minors and is not substantially overbroad. Children need protection from all types of child pornography whether it consists of films or photos, or computer-generated images. Unlike the statute in Missouri, the Marshall statute does not provide that child pornography "shall not include material which is not the visual reproduction of a live event." Mo. Rev. Stat. § 573.025 (1986). Thus, absent clear statutory intent to the contrary, the Domingos will likely ask this Court not to read a limitation into the Marshall statute.

In the present case, the harm to Dede was psychological and emotional. Without statutory protection Dede would go through life knowing that people could access the BBS and see her image depicted in sexually explicit scenarios. Moreover, Dede or other children could suffer physical harm by the depiction if a pedophile used it to seduce other children or if a pedophile approached Dede to mimic the behavior depicted in the program.

Accordingly, the Supreme Court found that the child pornography distribution network must be closed if production of material which required the sexual exploitation of children was to be effectively controlled, and upheld the child pornography statute in New York. *Ferber*, 458 U.S. at 759. The only practical method of prohibiting child pornography was to impose penalties on those persons selling, advertising or otherwise promoting the product. *Id.* at 760. Moreover, while the statute in *Ferber* did not make allowance for literary, artistic, political or scientific works, the Marshall statute provides for those exceptions. Thus, the Marshall statute effectively protects children like Dede Domingo by penalizing those who wish to produce, distribute or possess any sexual depictions of children without unconstitutionally sweeping protected activity within its scope.

B. Whether The Defendant, George Gress, Can Be Held Liable For The Creation And Dissemination Of The Prohibited Material.

1. *Gress' Liability Argument*

a. *Creation*

Gress will likely claim that his actions do not fall within the boundaries of proscribed conduct since, as the developer of an interactive computer game, he did not "create" the final images that appeared on the screen. Gress will argue that, since the material at issue is an "interactive" video, it is the user, and not Gress, who actually determines who and what shall be depicted in a sexual situation.

When developing software programs made available to users, programmers provide computers with sets of instructions, in essence telling the computer what to do and how to perform a given task. John T. Soma, *Computer Technology and the Law* 8 (1983 & Supp. 1993). Programming is devoted to designing the "user interface component," which assembles codes that perform tasks on a user's display screen at the user's direction. David B. Fonda, *The Interdependent Nature of Computer Software: Another Reason Why User Interfaces Should Not Be Protected by Copyright Law*, 25 J. Marshall L. Rev. 737, 739 (1992). Thus, interactive programs are designed to give users the ability to independently interact with the program and direct it to perform specific tasks.

Here, the tasks the users directed the program to perform consisted of the creation of sexually explicit scenarios involving images of children. Therefore, Gress will assert that if anyone should be found liable for the creation of prohibited material it should be the individual users of "Kid Stuff."

b. *Dissemination*

Gress will first assert that since he did not "create" the proscribed material he never disseminated the material. In fact, Gress should assert that he only disseminated the program, "Kid Stuff." Moreover, Gress will assert that even though he disseminated "Kid Stuff" to a minor, liability should not attach because he exercised adequate means to prevent the dissemination of the program to minors.

In a number of states, when a defendant is charged with disseminating proscribed material to minors, he is usually offered a defense. New Jersey, for example, has a three-pronged defense which requires: 1) that the defendant falsely misrepresented his age as over 18; 2) that the appearance of the person was one that an ordinary, prudent individual would believe the minor to be over 18; and 3) the sale was made in good faith relying on the representations of the minor. N.J. Stat. Ann.

§ 2A:115-1.10 (West 1986). However, the appellate court in New Jersey determined that the sole fact that a minor appears over 18 will not exculpate a defendant who is charged with disseminating pornography. *State v. Blecker* 382 A.2d 400 (N.J. Super. Ct. App. Div., 1978).

In *Sable Communications of Cal., Inc. v. Federal Communications Commission.*, 492 U.S. 115, 120-22 (1989), the Supreme Court considered the restriction of access by minors to dial-a-porn services. In *Sable*, the Court discussed regulations proposed by the Federal Communications Commission which were validated by the Second Circuit Court of Appeals. *Id.* at 122. The regulations included three methods for restricting minors' access to dial-a-porn services, one of which was the use of personal identification numbers. *Id.* The process of obtaining a PIN involved a written application to verify the age of the applicant. *Id.* at 121-22. The Appellate Court approved the process stating that it was an effective and feasible way to serve the states' compelling interest in protecting minors. *Carlin Communications, Inc. v. Federal Communications Commission*, 837 F.2d 546, 555 (2d Cir. 1988).

New York's obscenity statute also provides a defense for defendants charged with distributing prohibited material to minors. *Ginsberg v. New York*, 390 U.S. 629, *reh'g denied*, 391 U.S. 971 (1968). The *Ginsberg* Court noted that the statute was revised to provide a defense when a defendant had "reasonable cause to believe that the minor involved was seventeen years old or more; or that such minor exhibited to the defendant a draft card, [or] driver's license." *Id.* at 633, n.1. The Court held that the term "knowingly" in the statute meant that a defendant must either have reason to know about the sale of pornographic materials to a minor or that the defendant made an honest mistake about the minor's age, if a bona fide attempt was made to ascertain his age. *Id.* at 643-44.

Additionally, a recent FCC regulation provides a defense to "dial-a-porn" services charged under the Communications Act for the dissemination of indecent telephone messages to minors. The regulation sets up a procedure to prevent minors from accessing the services which will operate as an honest mistake or good faith attempt defense if followed. 47 C.F.R. § 64.201 (1993). The procedure requires services to accept payment by credit card before message transmission or by issuing a PIN through the mail after receiving a written application stating that the applicant is at least eighteen. *Id.* The regulation also provides that services should have a procedure to cancel the PIN if it is lost or stolen. *Id.*

Gress could argue that in order to access "Kid Stuff" the user must first fill out a questionnaire which appears on the screen, providing name, age and address information. Next, he requires a subscriber to send him a copy of his or her driver's license or other identification showing proof of birth date. Access to the sex program also requires the user to pay an extra monthly fee and Gress assigns a personal identifying

number (PIN) to each subscriber who must type in his or her age and PIN each time access to the program is desired.

Gress' precautions are analogous to the precautions taken in *Sable*. Moreover, the FCC has indicated that access codes or PINs are a sufficient means of restricting access of dial-a-porn messages to minors. Therefore, Gress will likely insist that he exercised adequate precautions under the statute and that even though minors gained access, he can claim a reasonable defense.

2. *The Domingos' Liability Argument*

a. *Creation*

The Marshall child pornography statute holds a person liable if he or she "creates" child pornography. The statute provides that a person "creates" child pornography when he or she "depicts, displays or portrays by means of any visual medium or reproduction . . . any child . . . actually or by simulation engaged in any conduct defined in pargraph A herein . . . ." Thus, the Domingos may assert that, since Gress created the program which allowed a user to display child pornography, Gress is the creator of the child pornography. *United States v. Cross*, 928 F.2d 1030 (11th Cir. 1991), *cert. denied*, 112 U.S. 594 (1991).

Courts have made clear that the interaction of an end-user with a video-game does not transform the end-user into the "creator." *Stearn Elec. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982). In *Stearn*, the appellant, a game user, claimed that each play of a video game transformed the existing game into a new original work simply due to the player's participation in the game. *Stearn*, 669 F.2d at 856. The court rejected this argument stating that:

> [T]he argument overlooks the sequence of the creative process. Someone first conceived what the audio-visual display would look and sound like. Originality occurred at that point. Then the program was written. Finally, the program was imprinted into the memory devices so that, in operation with the components of the game, the sights and sounds could be seen and heard.

Id. at 856-857. Therefore, the court concluded that authorship vested in the original writer of the program because the game's memory devices determined the game's appearance and movement while the variations in movement occurred only in response to the player's operation. *Id.* at 854.

Moreover, in *Williams Elec., Inc. v. Arctic Int'l., Inc.*, 685 F.2d 870 (3d Cir. 1982), the plaintiff, a computer program developer, claimed he was the creator of the entire video game, even though the game changed depending on the user-interface. *Id.* The defendant, argued that each player became a co-author of that which appeared on the screen as a

result of video-game play. *Id.* at 874. The court rejected the defendant's argument and explained that although action varied according to player participation, a significant portion of the game was already developed and remained constant from player to player. *Id.*

The Domingos may emphasize that Gress created the program from which the options flow to the user. They could contend that pornography was created through Gress' manipulation of Dede's photograph. Gress had already provided a limited number of visual depictions of children and the acts they may perform, and detailed them within the confines of the program. The Domingos should stress that a user cannot now add any new image or action to the screen, thus it should be of little significance that the user controls the path the program takes while he or she plays. It was Gress who created every tool which allows a user to view child pornography; exactly the conduct Marshall seeks to punish.

b. Dissemination

Since Gress placed the program on an Internet BBS for others to access, including minors, the Domingos could argue that Gress disseminated the child pornography. *State v. Blecker*, 382 A.2d 400 (N.J. Super. Ct. App. Div. 1978). Also, the Domingos will likely claim that Gress is liable for disseminating pornographic material to minors because he failed to take adequate precautions to ensure that minors did not receive the material. The Internet is used by many pedophiles to disseminate and exchange child pornography, thus regulated the dissemination of certain material to minors is critical. *Attorney General's Commission on Pornography*, at 326. States may exercise more control over the conduct of children than they may exercise over adults. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). Moreover, because states have an exigent interest in preventing the distribution of objectionable material to children, states can control such distribution. *Ginsburg v. New York*, 390 U.S. 629 at 635, *reh'g denied*, 391 U.S. 971 (1968) (holding "obscenity" as applied to minors is a broader definition of "obscenity" as applied to adults). For instance, states have regulated the sale of cigarettes, alcohol and firearms to minors. *American Booksellers v. Rendell*, 481 A.2d 919, 933 (Pa. Super. Ct. 1984) (States also regulate a minor's operation of automobiles, juvenile trials, and aspects of a minor's education, welfare and employment.). Therefore, if a state chooses, it can regulate the dissemination of obscenity to children, because states may adjust the definition of "obscenity" in regulating its dissemination to minors.[7]

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7. *Ginsberg*, 390 U.S. at 635-36; *American Booksellers*, 481 A.2d at 936 (The judiciary and legislature of Pennsylvania have distinguished between children and adults in the obscenity context for years.).

The regulation of child pornography is always permissible. Marshall recognizes the greater harm which could be caused by the child pornography if accessed by minors. Thus, the Marshall statute protects its children at all stages of the child pornography process.

Here, the Domingos could assert that Gress did not take adequate precautions to prevent minors from accessing his BBS. The fact that Dede and Johnny Sawyer were both able to access "Kid Stuff" indicates that Gress did not use adequate means to prevent such dissemination. Gress should have exercised additional reasonable precautions since "Kid Stuff" was certain to attract children's attention. Additional precautions are necessary when dealing with the Internet because BBS operators never see potential subscribers in person and children have been targeted and encouraged to explore the Internet by the government and by private operators. Elmer-DeWitt, at 54; Consequently, many children have greater access to pornography on the Internet than in bookstores or video stores.

Gress could have spoken with potential subscribers directly to approximate the age of the person. Also, he could have sent PIN numbers through registered mail to subscribers, ensuring that the holder of the driver's license or other identification would receive the number. (In this case, Johnny Sawyer's older brother would have received the PIN.) Consequently, since Gress did not exercise these types of precautions the Domingos will assert that Gress should be liable for the dissemination of child pornography.

c. *Vicarious Liability*

Even if this Court finds that Gress does not constitute the "creator" of the pornography, and that Gress took adequate steps to prevent the dissemination of the material to minors, the Domingos may argue that this Court should hold Gress liable for the creation and dissemination of child pornography through vicarious liability. As the operator of the BBS, the Domingos will claim that Gress should be liable for ALL prohibited activity which occurs through use of his BBS. The Domingos will assert that as sysop, Gress had complete control over the contents of his BBS, subjecting him to liability. Moreover, Gress should be liable for providing the instrumentality which makes the production of child pornography possible. *Kelly v. Grinnell*, 476 A.2d 1219 (N.J. 1984).

As operator or "sysop" of the BBS, the Domingos may assert that Gress can be liable for the actions of users of his BBS.[8] The Domingos

8. Sysops have been found liable for the posting of passwords, access numbers, credit card numbers, and bank account numbers. Sysops have also been held responsible where users have traded pirated software over their BBS, violated copyrights and targeted groups of people for hate crimes. Eric Schlachter, *Cyberspace, the Free market and the Free Mar-*

may argue that, as sysop, Gress is the person best able to control the content of the material on his BBS, and thus should be liable for illegalities which occur on his BBS. Schlachter, *supra*, at p.4.

In *Cubby Inc.*, a court found the operator, CompuServe, was not liable for actions on its BBS because there were three levels of suppliers: 1) Compuserve, an on-line general information service; 2) special interest "forums" within Compuserve which consisted of bulletin boards, and other interactive online services, one of which was the "Journalism Forum" which was edited and controlled by a company not affiliated with Compuserve; and 3) "Rumorville U.S.A," a BBS portion of the "Journalism Forum," which was published by another company not affiliated with Compuserve. *Cubby, Inc., v. Compuserve Inc.*, 776 F. Supp. 135, 137 (S.D.N.Y. 1991). Compuserve lacked the authority to review the contents of "Rumorville" and did not receive a percentage of the fees that "Rumorville" charged its users. *Id.* The only monies that Compuserve received as a result of "Rumorville" were the on-line charge and membership fees that all Compuserve subscribers paid. *Id.* The action was instituted when another company began competing against "Rumorville." "Rumorville" then printed alleged defamatory statements about the competitor, and the competitor sued Compuserve for the statements. *Id.* at 138.

The court explained that Compuserve "will have little or no editorial control over the publication's contents." *Id.* at 140. The court looked at four factors to determine Compuserve's level of control over "Rumorville:" (1) Rumorville was responsible for regulating subscriptions to its BBS, (2) Rumorville reviewed the contents of the BBS, (3) Rumorville directly received the revenues from the BBS, and (4) Compuserve had no notice of the illegal activity occurring. *Id.* The court held that Compuserve acted as a distributor with minimal control over the content of "Rumorville" and did not impose liability. *Id.* at 141.

Similarly, using *Cubby, Inc.* as a basis for analyzing Gress, the Domingos could assert that Gress possessed sufficient control over his BBS to impose liability. Here, Gress was the only person who had control, like the publisher of "Rumorville" in the *Cubby* case.

The Domingos may assert that, although users accessed Gress' BBS through the Internet, they provided Gress, with the information needed to subscribe to his BBS, Gress personally assigned a PIN to the user and Gress was in charge of reviewing the contents of his BBS and had full knowledge of the material offered through his BBS, unlike Compuserve. Also, Gress, not Internet, had access to the BBS, could block or delete

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ketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions, 16 HASTINGS COMM/ENT L.J. 87, at n.24, 25, 29 (1993); Jonathan Gilbert, *Computer Bulletin Board Operator Liability for User Misuse*, 54 FORDHAM L. REV. 439 (1985).

messages or new material which appeared and received all revenues from his BBS.

Gress had complete control over the sale of "Kid Stuff" and received an extra fee from users who paid to access "Kid Stuff." Additionally, Gress had knowledge of the illegal activity occurring on his BBS. Gress knew the program was capable of creating illegal material once in the hands of any user. Thus, he knew that even if he did not personally "create" prohibited material, illegal material would be created through use of the program on his BBS.

BRIEF FOR PETITIONER

No. 94-241

IN THE SUPREME COURT
OF THE
STATE OF MARSHALL

GEORGE GRESS,
Petitioner,

v.

DEDE DOMINGO, a minor, by
Douglas and Madeline Domingo,
her parents,

Respondents.

ON APPEAL FROM A
JUDGMENT OF THE COURT OF
APPEALS OF THE
STATE OF MARSHALL

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

I. WHETHER CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES IS UNCONSTITUTIONAL AS APPLIED TO PETITIONER'S COMPUTER PROGRAM, FACIALLY WITH RESPECT TO THE OVER BREADTH OF THE STATUTE AND AS A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

II. WHETHER PETITIONER CAN BE HELD LIABLE FOR THE CREATION AND DISSEMINATION OF CHILD PORNOGRAPHY UNDER CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES WHEN HE OFFERED THE COMPUTER PROGRAM "KID STUFF" ON THE INTERNET?

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OPINIONS BELOW

The order and opinion of the Melrose County Circuit Court is unreported. The opinion of the Court of Appeals of the State of Marshall is set forth in the record. (R. at 1-9.)

STATEMENT OF JURISDICTION

The Statement of Jurisdiction is omitted in accordance with §1020 (2) of the Rules of the John Marshall National Moot Court Competition.

STATUTORY PROVISIONS INVOLVED

Chapter 45, section III of the Marshall Revised Statutes, is the statute relevant to the present action.

STATEMENT OF THE CASE

This is an appeal from a judgment of the Court of Appeals of the state of Marshall. (R. at 1.) The court of appeals affirmed the Melrose County Circuit Court's order for judgment on the pleadings that the computer program "Kid Stuff" constituted prohibited material under the laws of the state of Marshall. (R. at 9.) The court of appeals also affirmed the lower court's finding that Petitioner ("Mr. Gress") was liable for the creation and dissemination of the material at issue. (R. at 8, 9.) Mr. Gress filed a timely notice of appeal and on June 5, 1994, this Court granted Mr. Gress leave to appeal the order granting Douglas and Madeline Domingo's ("Respondents") motion for judgment on the pleadings.

Mr. Gress lives in the city of Melrose in the state of Marshall. (R. at 1.) Mr. Gress owns and operates a photography studio in the city of Melrose and specializes in photographing models for department stores and mail-order catalogues. (R. at 1.) In addition to his work as a photographer, Mr. Gress is a skilled amateur computer programmer who, as a hobby, is the operator or "sysop" of a bulletin board system ("BBS") which can be accessed through the Internet. (R. at 1, 2.) As sysop, Mr. Gress has managed the operations of the BBS, contributed material, handled all subscriptions, inquiries and contributions to the BBS, conducted routine maintenance checks and checked the system for security problems. (R. at 2.)

In February, 1993, Mr. Gress was hired to photograph children for summer catalogues. (R. at 2.) Mr. Gress set up the shots, posed the models and took the pictures. (R. at 2.) The photographs displayed youngsters in summer clothes, underwear and beach attire. (R. at 2.) Fifteen year old, Dede Domingo, daughter of Respondents, was one of the teenagers employed by Mr. Gress as a model. (R. at 1, 2.) Ms. Domingo also lives in the city of Melrose in the state of Marshall, where she resides with Respondents. (R. at 1.) Respondents signed a release allowing Mr. Gress to use Ms. Domingo's photographs only in specified catalogues. (R. at 1, 2.) After Mr. Gress obtained Respondents' permission, he photographed, developed and printed the pictures for the specified clothing catalogues. (R. at 2.) In addition to providing copies of the photographs to Ms. Domingo for her portfolio, Mr. Gress retained copies for his own files. (R. at 2.)

In May, 1993, Mr. Gress completed a computer program which he made available on the BBS. (R. at 2.) The program was an interactive application entitled "Kid Stuff." (R. at 2.) Mr. Gress was able to scan a photograph of any person into his computer database and make that image part of the program. (R. at 2.) Mr. Gress used some of the pictures he had taken for his catalogue work and scanned them into his computer, including a bikini photo of Ms. Domingo. (R. at 2, 3.) Using his com-

puter's graphics capabilities, Mr. Gress supplied the images with any missing details. The user of the computer program then manipulated these images to animate them and portray the life-like images in fictionalized sexual scenarios. (R. at 3.)

Mr. Gress instituted a security procedure for accessing and subscribing to his BBS. (R. at 3.) When someone using the Internet encounters the BBS, the user has the option of entering or bypassing it. (R. at 3.) When users enter the BBS, there are three minutes of free browsing time in which they may familiarize themselves with the features available on the BBS. (R. at 3.) In order to access the computer program Kid Stuff, the user must satisfy a number of security measures including completing a questionnaire which appears on the screen, providing name, age and address information to Mr. Gress; sending him a copy of the user's driver's license or other identification showing proof of age; and paying an extra monthly fee to access the computer program. After fulfilling these requirements, Mr. Gress assigned a personal identifying number (PIN) to each subscriber. (R. at 3.) Access to Kid Stuff was only possible by entering the user's age and PIN. (R. at 3.)

In July, 1993, sixteen-year-old Johnny Sawyer, a friend of Ms. Domingo, logged onto his computer and while using Mr. Gress's BBS, learned of the existence of Kid Stuff. (R. at 3.) He subscribed to Kid Stuff by falsifying the BBS questionnaire with his twenty-two year old brother's identification information. (R. at 4.) Mr. Sawyer also submitted a photocopy of his brother's driver's license to Mr. Gress along with the subscription fee. (R. at 4.)

On August 20, 1993, Mr. Sawyer logged onto Kid Stuff for the first time, entering his PIN and "22" when the program asked the user's age. (R. at 4.) After a few seconds the program ran a one minute explanation describing exactly what a user was capable of doing with the program. (R. at 4.) Then, a variety of children's images appeared on his monitor and Mr. Sawyer was prompted to select a child's image and to select sexual acts in which the image would participate. (R. at 4.) When Ms. Domingo's image appeared on the screen, Mr. Sawyer immediately notified her. (R. at 4.) He also told Ms. Domingo how to access Kid Stuff, supplying Ms. Domingo with his PIN and his brother's age. (R. at 4.)

Later that day, Ms. Domingo logged onto her computer and searched for Kid Stuff on the BBS. (R. at 4.) Once Ms. Domingo found Kid Stuff she typed in "22" and Mr. Sawyer's PIN and was prompted to run the explanation, after which she was permitted to run the program. (R. at 4.) Ms. Domingo saw her own image among the others and realized it could be manipulated by the user in sexual scenarios with images of other people. (R. at 4, 5.) Ms. Domingo immediately informed Respondents. (R. at 5.)

Respondents initiated a civil suit in the Melrose County Circuit Court alleging violations of Chapter 45, Section III of the Marshall Revised Statutes. The Circuit Court granted Respondent's motion for judgement on the pleadings. The Circuit Court's decision was affirmed by the Court of Appeals of the state of Marshall. Mr. Gress appeals the order of the Court of Appeals of the State of Marshall for two reasons. First, the Marshall statute in question is unconstitutional. Second, even if Kid Stuff can be constitutionally proscribed, Mr. Gress can not be held liable for the creation and dissemination of the prohibited material.

SUMMARY OF THE ARGUMENT

Chapter 45, Section III of the Marshall Revised Statutes does not withstand constitutional scrutiny and as such may not be applied to Mr. Gress. The statute must be declared unconstitutional for a number of reasons. First, the statute is unconstitutional as applied to Mr. Gress. Because Mr. Gress's computer program is protected by the First Amendment and because Marshall lacks a compelling state interest, its regulation of Mr. Gress's computer program is improper. Additionally, the statute is unconstitutionally overbroad in that it violates computer users' First Amendment rights by denying them access to constitutionally protected material. Further, the statute violates the Fourteenth Amendment's guarantee of due process of the law in that it fails to put individuals on notice of the illegality of their conduct. The motion for a finding against Mr. Gress based solely on the pleadings must therefore be denied until these constitutional issues are resolved. Finally, interpreting the language of the statute in light of the facts shows that the statute was not violated regardless of whether it is valid.

Mr. George Gress's creation and dissemination of his computer program Kid Stuff fall outside the scope of civil actions defined by the legislature in the state of Marshall. Mr. Gress's actions did not violate the statute's language. His program does not meet the definition of child pornography as defined by the statute's three criterion. No appeal to prurient interests can be inferred since no lascivious poses were presented in the computer program's images. No children ever engaged in any pornographic activities during the program's creation. Finally, the computer program as a whole has scientific value.

Mr. Gress's act of posting his program Kid Stuff on his computer bulletin board also would not violate the statute's prohibition of disseminating child pornography to minor's even if the program were pornographic. Mr. Gress took adequate measures to ensure that minors did not gain access to the program as is required by the statute. Numerous similar statutes describing security measures similar to Mr. Gress's further show that his measures were adequate. A motion for judgment on

the pleadings against Mr. Gress can not be sustained in light of these infirmities.

ARGUMENT

I. CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES IS UNCONSTITUTIONAL AS APPLIED TO MR. GRESS AS IT IS OVERLY BROAD AND IT IS UNCONSTITUTIONAL BECAUSE ITS VAGUE TERMINOLOGY VIOLATES THE FOURTEENTH AMENDMENT'S GUARANTEE OF DUE PROCESS OF THE LAW.

Chapter 45, Section III of the Marshall Revised Statutes[1] (the "Child Pornography Law") must be declared unconstitutional because it suffers from a number of constitutional infirmities. First, the Child Pornography Law is unconstitutional as applied to Mr. Gress because it impermissibly regulates his constitutionally protected activity. Because Mr. Gress's computer program does not pose the risks to children that are associated with conventional child pornography, his computer program is protected by the First Amendment. Protected activity may be regulated only upon the government demonstrating a compelling state interest. *Stanley v. Georgia*, 394 U.S. 557 (1967). Because the government lacks a compelling state interest in this instance, its regulation of Mr. Gress's activity is unconstitutional.

Second, the Child Pornography Law is unconstitutional because it is overly broad. In order for a statute to be invalidated as overly broad, the overbreadth of the statute must not only be real but it must be substantial as well. *Parker v. Levy*, 417 U.S. 733 (1974); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). In the case at hand, the Child Pornography Law violates the First Amendment rights of an entire class of persons. Materials, such as Mr. Gress's computer program, which do not involve a live performance of real children engaged in sexual conduct are protected by the First Amendment. Because the Child Pornography Law prohibits computer users from receiving this type of information, the statute violates computer users' First Amendment rights to receive information and ideas in the privacy of their homes and their right to be free from unwanted government interference.

Finally, The Child Pornography Law violates the Fourteenth Amendment's guarantee of due process of the law. The due process clause of the Fourteenth Amendment requires that a statute carefully define the conduct it is to prohibit in order to put individuals on notice of

1. The pertinent parts of chapter 45, section III of the Marshall Revised Statutes are attached hereto as exhibit A.

the illegality of their activity. Furthermore, in examining statutes that seek to regulate constitutionally protected material, the Supreme Court noted that "[t]he Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material." *Mishkin v. New York*, 383 U.S. 502, 511 (1966). The vague terminology of the Child Pornography Law and the fact that it does not contain a mens rea requirement as to the conduct prohibited by it render the statute unconstitutional.

A. *CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES IS UNCONSTITUTIONAL AS APPLIED TO MR. GRESS BECAUSE IT VIOLATES MR. GRESS'S RIGHT TO FREE EXPRESSION BY PROHIBITING HIS ACTIVITIES WHICH ARE PROTECTED UNDER THE FIRST AMENDMENT OF THE CONSTITUTION.*

A state may regulate speech that is protected by the First Amendment only upon the showing of a compelling state interest. *Stanley v. Georgia*, 394 U.S. 557 (1967); *American Booksellers Ass'n, Inc. v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 475 U.S. 1001 (1986). Because Mr. Gress's computer program does not pose the risks to children that the Child Pornography Law seeks to prevent, it retains First Amendment protection. As such, Mr. Gress's computer program may be regulated only if Marshall can demonstrate a compelling state interest. Because Marshall has no compelling state interest, the prohibition of Mr. Gress's computer program is unconstitutional.

1. MR. GRESS'S COMPUTER PROGRAM DOES NOT POSE THE RISKS TO CHILDREN THAT ARE ASSOCIATED WITH CONVENTIONAL CHILD PORNOGRAPHY AND AS SUCH THE COMPUTER PROGRAM IS PROTECTED BY THE FIRST AMENDMENT.

Distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproductions of live performances, retain First Amendment protection. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982). Mr. Gress's computer program does not involve either a live performance or a reproduction of a live performance involving minors engaging in sexual conduct as described in the Child Pornography Law. Therefore, according to the standards established by the Supreme Court in *Ferber*, Mr. Gress's program is protected by the First Amendment.

The significant leeway given to states in the regulation of child pornography is premised upon both the nature of the danger posed to children by participation in the child pornography industry and the state's compelling interest in the protection of its children. *Ferber*, 458 U.S. at 737. However, Mr. Gress's program does not pose the risks associated

with the child pornography industry that are the subject of regulation by Marshall's Child Pornography Law. While numerous courts and commentators have acknowledged that the use of children as subjects of pornographic material is harmful to the physiological, emotional and mental well-being of a child, a fact that is not disputed, such harm is not present in the computer program produced by Mr. Gress. *See* Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. AM. ACAD. CHILD PSYCHIATRY 289, 296 (1980).

The harm sought to be curtailed by child pornography laws is the sexual and physical subjugation of children for the purposes of engaging them in actual sexual conduct or for the purposes of engaging them in conduct that simulates such sexual activity. *See* Schoettle, 19 J. AM. ACAD. CHILD PSYCHIATRY 289 at 296. While "photographs and films depicting sexual activity by juveniles [are] intrinsically related to the sexual abuse of children," it is not the resulting photograph that harms the child but rather the participation in the conduct giving rise to such photograph that harms the child. *Ferber*, 458 U.S. at 737. The harm attendant most child pornography results from the minor's engaging in sex, be it simulated or actual. While the resulting photograph serves as a permanent record of the abuse, the actual abuse occurs in the child's participation in the sexual conduct that is the subject of the photo. In Mr. Gress's program, Ms. Domingo never engaged in any such conduct. Ms. Domingo was never forced to humiliate herself by striking sexually graphic poses or by engaging in sexual conduct. Rather, Ms. Domingo posed for a child's clothing catalogue — an activity that poses no risk of harm to Ms. Domingo. At no time was Ms. Domingo exposed to any of the dangers that the Marshall legislature sought to protect children from when enacting its Child Pornography Law.

In order to further Marshall's compelling interest in protecting children within the bounds of the Constitution, the Child Pornography Law must be narrowly construed such that it prohibits only the photographing or depicting of actual children that are engaged in sexual conduct at the time the photograph or depiction is created. In construing a state law prohibiting the possession or control of material "depicting a minor engaged in sexually explicit conduct," Georgia's highest court restricted the prohibition to material that used real children as actors. *Aman v. Georgia*, 409 S.E.2d 645, 646 (Ga. 1991). The court noted that "the statutory term 'depict a minor' must be understood as limited to any photographic representation that was made of a human being who at the time was a minor and was engaged in any sexually explicit conduct." *Aman*, 409 S.E.2d at 646. A member of the court also noted in commenting on the state's interest in regulating child pornography that

> the interest is served by banning the possession of child pornography that is based on the use of a live child model. [The state's interest] is

> not served, nor is there a legitimate basis for, legislation prohibiting other clearly constitutionally protected materials which "depict" a minor engaged in sexually explicit conduct.

Id. at 647. By requiring that the prohibition apply only to material that depicts real children engaged in actual or simulated sexual conduct, the court narrowly tailored the statute to serve the state's compelling interest. It follows that where no real children are used to engage in actual or simulated sex, the material retains First Amendment protection.

The Supreme Court has suggested that simulations not involving real children would be constitutionally sound alternatives to the use of real children in sexually explicit material. Mr. Gress's computer program comports with the very alternative suggested by the Court in *Ferber*. *Ferber*, 458 U.S. at 763. The *Ferber* Court, noted that "simulation outside of the prohibition of the statute could provide another alternative." *Id.*

The statute at issue in *Ferber* prohibited the inducing of a child to engage in a sexual performance. By using a computer to manipulate an image of a child, a sexually explicit image can be created without the child ever engaging in a sexual performance. It follows that such an image is outside of the prohibition of the statute because it does not pose that type of harm sought to be prevented by the statute. Therefore, in order to be within the ambit of the statute, the sexual performance must involve real children. Mr. Gress at no time photographed or filmed real children engaging in actual or simulated sexual conduct of the types enumerated in the Child Pornography Law. Therefore, Mr. Gress's computer program complies with the guidelines established in *Ferber* as an alternative to the use of minors in the production of child pornography. Because Mr. Gress's photographs of Ms. Domingo do not involve live performances and because there was never any live performance by Ms. Domingo to be reproduced, his computer program is entitled to First Amendment protection.

2. CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES VIOLATES MR. GRESS'S FIRST AMENDMENT RIGHT BECAUSE THE STATUTE PROHIBITS MR. GRESS'S CONSTITUTIONALLY PROTECTED ACTIVITY.

Marshall's attempt to regulate activity that is protected by the First Amendment is not supported by Supreme Court precedent. A state law proscribing activity that is protected by the First Amendment will survive constitutional scrutiny only if the state's interest in prohibiting the speech is so compelling as to outweigh the constitutionally protected interest of free speech. *Stanley v. Georgia*, 394 U.S. 557, 562-65 (1964); *American Booksellers Ass'n, Inc. v. Hudnut*, 598 F. Supp. 1316, 1326 (S.D.Ind. 1984). Marshall lacks a compelling state interest in prohibit-

ing Mr. Gress's computer program. Mr. Gress's computer program does not pose the risk of physiological, emotional or mental harm that is associated with child pornography involving live performances by real children or reproductions of such performances. Mr. Gress never photographed any live performance by Ms. Domingo involving sexual conduct of the type proscribed by the Child Pornography Law. The lack of any compelling state interest as applied to Mr. Gress removes this case from the ambit of Supreme Court decisions such as *Osborne* and *Ferber*, in which a compelling state interest was identified. *See Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982). The case at hand is analogous to and governed by decisions such as *American Booksellers Ass'n, Inc.* and *Stanley*, in which the lack of a compelling state interest was deemed persuasive as to the unconstitutionality of the statutes at issue.

In *American Booksellers Ass'n, Inc.*, the Southern District of Indiana invalidated an Indianapolis municipal anti-pornography ordinance because the city could not demonstrate a compelling interest in the regulation of pornographic material that used words or pictures to depict women in sexually subordinate roles. *American Booksellers Ass'n, Inc.*, 598 F. Supp. at 1329. While the court noted that the city may properly regulate material that falls within the ambit of "obscenity" as defined in *Miller v. California*, 413 U.S. 15 (1973), the city could regulate protected speech only upon a showing of a compelling state interest. *American Booksellers Ass'n, Inc.*, 598 F. Supp. at 1326.

The court rejected the city's argument that pornographic material subjects women to sexual discrimination and that women were in need of special protection. The court emphasized that although the protection of women's civil rights was a legitimate state interest, women, unlike the children in *Ferber*, were capable of protecting their own civil rights and were in no need of special protection. *Id.* at 1333-34. Therefore, in the absence of any compelling state interest the court found that an abridgment of the First Amendment right implicit in protected speech was not warranted. *Id.* A similar situation is present in the case at hand. No one disputes the legitimate interest that Marshall has in protecting the well-being of children. However, because Mr. Gress's computer program poses no threat to children, Marshall has no compelling state interest that would warrant its abridgment of Mr. Gress's First Amendment right.

In *Stanley*, the Supreme Court struck down a Georgia statute that sought to criminalize the possession of obscene material in the privacy of one's home. *Stanley*, 394 U.S. at 559-64. The Court held that Georgia had no compelling interest in the regulation of its citizens' minds nor did the Court find that possession of such material would lead to antisocial or deviant activity by the possessor. *Id.* at 565-68. The Court concluded

that in the absence of a compelling state interest, the placement of restrictions upon the consumption of free ideas was not warranted. *Id.* Neither is a similar prohibition warranted in the case at bar. Mr. Gress's computer program simply does not impose upon children the risks associated with child pornography that served as predicates for the compelling state interest in cases upholding the constitutionality of child pornography laws. *See Ferber*, 458 U.S. at 757-58; *Osborne*, 495 U.S. at 109. Because there is no compelling state interest in the case at hand, the infringement upon Mr. Gress's First Amendment right is unwarranted and as such is unconstitutional.

The Supreme Court's decision in *Osborne* is distinguishable from the case at bar and must be limited to the context in which it was decided. In *Osborne*, there was present the compelling interest of the state in protecting the "physical and psychological well-being of a minor" because the material at issue involved reproductions of live performances. *Osborne*, 495 U.S. at 109. Therefore, despite the constitutionally protected nature of the material prohibited, the Court upheld the validity of the child pornography law. However, Marshall lacks the compelling state interest identified by the Court in *Osborne*. In the absence of such state interest, Marshall may not regulate Mr. Gress's activity.

Invalidation of the child pornography law, as applied to Mr. Gress, is also consistent with the Supreme Court's upholding of a child pornography statute in *Ferber*. The Supreme Court, in examining New York's child pornography law, held that such a statute was entitled to significant leeway in any constitutional adjudication. *Ferber*, 458 U.S. at 756. However, the Court noted that this leeway was premised upon the interest in protecting children and was not without limits. *Id.* Such leeway should end when the compelling state interest is not present. Because such compelling interest was present in *Ferber*, regulation of the otherwise constitutionally protected material was tolerated by the Court. However, Mr. Gress's program is unlike the situation present in *Ferber*. Because no compelling state interest is present in the case at issue, regulation of Mr. Gress's constitutionally protected activity is not warranted.

In *Ferber*, the Supreme Court provided that where a statute proscribes constitutionally protected speech in the course of its valid regulation of other non-protected speech, "whatever overbreadth may exist should be cured through a case-by-case analysis of the fact situations to which its sanctions, assertedly, may be applied." *Id.* at 770. This case presents such a "fact situation" where it is necessary to declare the statute unconstitutional as applied to Mr. Gress.

B. *CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES IS OVERLY BROAD AND SHOULD BE INVALIDATED BECAUSE ITS APPLICATION REACHES A SUBSTANTIAL NUMBER OF CONSTITUTIONALLY PROTECTED ACTIVITIES.*

The scope of the Child Pornography Law is so broad as to prohibit a real and substantial number of constitutionally protected activities. *Parker v. Levy*, 417 U.S. 733 (1974); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The overbreadth doctrine is premised upon the notion that "persons whose expression is constitutionally protected may refrain from exercising their rights for fear of criminal sanction by a statute susceptible to application to protected expression." *Village of Schaumbrug v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980). The overbreadth doctrine is an exception to the traditional rule that prohibits a person to whom a statute may constitutionally be applied from challenging the statute on the grounds that it may conceivably be applied unconstitutionally to others in situations not before the court. *Broadrick*, 413 U.S. 601 (1973). Therefore, regardless of the validity of the application the Child Pornography Law to Mr. Gress, he may challenge the statute as unconstitutionally overly broad upon a showing of a substantial number of impermissible applications of the statute to the rights of individuals not presently before this Court.

The Child Pornography Law at issue poses precisely the situation where the expansive reach of the statute results in an intolerable chilling effect upon individuals' exercise of their First Amendment rights. More specifically, the Child Pornography Law violates computer users' First Amendment rights to receive information and ideas and their right to be free from unwanted government intrusions. This impairment of an entire class of persons' First Amendment rights is both real and substantial and mandates that this court declare the Child Pornography Law unconstitutional.

1. CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES PREVENTS COMPUTER USERS FROM RECEIVING IN THEIR HOMES INFORMATION THAT IS PROTECTED BY THE FIRST AMENDMENT, THEREBY VIOLATING COMPUTER USERS' RIGHT TO RECEIVE INFORMATION AND IDEAS.

The Child Pornography Law violates the well established constitutional right to receive information and ideas. *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969). The right to receive information and ideas is protected by the First Amendment regardless of the social value of the ideas or information conveyed. *Stanley*, 394 U.S. at 566 ("the line between the transmission of ideas and mere entertainment is much too

elusive for this court to draw, if indeed such a line can be drawn at all."); *Winters v. New York*, 333 U.S. 507, 510 (1948). Therefore, regardless of the social value of Mr. Gress's computer program, computer users have a First Amendment right to receive such information in the privacy of their own homes.

Because computer programs, such as Mr. Gress's, are protected by the First Amendment, any statute that prohibits the creation or dissemination of such material impermissibly infringes upon a computer user's First Amendment right to receive such information. *Stanley*, 394 U.S. at 566. Mr. Gress created and maintained the computer program Kid Stuff on his own home computer. In order to utilize the program, other computer users, working from the privacy of their own homes, must access Mr. Gress's computer. However, the Child Pornography Law prevents such computer users from accessing computer programs that are maintained on a non-commercial private bulletin board contained on an individual's home computer. The computer user has a right to receive information and ideas via his home computer regardless of the offensive nature of the information in much the same fashion that Stanley had a right to view obscene movies in the privacy of his own home. *Id.* The Child Pornography statute impermissibly infringes upon this right.

2. CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES CONSTITUTES AN IMPERMISSIBLE INTRUSION BY THE GOVERNMENT INTO THE HOMES OF INDIVIDUALS AND AS SUCH VIOLATES COMPUTER USERS' RIGHT TO BE FREE FROM UNWANTED GOVERNMENT INTRUSIONS.

The prohibition imposed upon Mr. Gress by the Child Pornography Law also violates Mr. Gress's right to be free from unwanted governmental intrusions into one's privacy. *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Olmstead v. United States*, 277 U.S. 438 (1928). The First Amendment prevents the government from interfering in the individual's right to "satisfy his intellectual and emotional needs in the privacy of his own home." *Stanley*, 394 U.S. at 565. The Supreme Court stated "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id.* Nor may the government tell such man what computer programs may be written, disseminated or utilized in the privacy of his own home. The computer program at issue was created and maintained in the privacy of Mr. Gress's home. Moreover, the users of his computer bulletin board, like Stanley, use such computer programs in the privacy of their own homes. The state of Marshall has no more right to censor or prohibit the contents of an individual's home computer than Georgia had a

right to inquire into the contents of Stanley's library. *Id.* Any effort by Marshall to censor or prohibit what material may be received by computer users constitutes an impermissible intrusion by the state and violates such computer users' right to be free from unwanted government intrusions.

C. *CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES VIOLATES THE FOURTEENTH AMENDMENT GUARANTEE OF DUE PROCESS OF THE LAW IN THAT THE VAGUENESS OF THE STATUTE AND ITS LACK OF ANY SCIENTER ELEMENT FOR THE CONDUCT PROSCRIBED BY IT DOES NOT PUT INDIVIDUALS ON NOTICE OF THE PROHIBITION OF THEIR ACTIVITY.*

The broad statutory language used in the Child Pornography Law does not put an individual on notice as to the prohibition of the conduct it is intended to encompass. The vagueness of the statute is further magnified by the failure of Marshall to include a scienter element as to the conduct prohibited. The resulting strict liability can be avoided only if an individual chooses not to create such material thereby engaging in precisely the chilling self-censorship that the right to due process seeks to avoid. As such the Child Pornography Law violates the Fourteenth Amendment and must be declared unconstitutional.

1. CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES DOES NOT DEFINE THE PROHIBITED CONDUCT WITH A SUFFICIENT DEGREE OF SPECIFICITY TO PUT INDIVIDUALS ON NOTICE OF THE ILLEGALITY OF THEIR CONDUCT.

The Child Pornography Law does not sufficiently define the conduct that it is intended to prohibit. In order to avoid the overly broad application of a statute, courts have required that statutes adequately define the conduct to be prohibited. *New York v. Ferber*, 458 U.S. 747, 764 (1982); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *United States v. Long*, 831 F. Supp. 582, 587 (W.D. Ky. 1993). The clearer the definition of the prohibited conduct, the less likely it is that the statute will have a chilling effect on an individual's exercise of their First Amendment right. *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485 (1984). Paragraph B of the Child Pornography Law defines the prohibited conduct that constitutes the creation of child pornography. Marshall includes in this definition any person who "portrays by means of any visual medium . . . any child whom he or she knows . . . to be under the age of eighteen . . ." engaged in prohibited sexual conduct. Chapter 45, Section III, Paragraph B of the Marshall Revised Statutes. It follows from the broad definition of the term "portray" that use of virtually any medium in a visual manner to depict children engaged in sexual conduct would

result in the creation of child pornography, regardless of whether the portrayal posed any actual danger to the children depicted.

The vague definition of prohibited conduct includes a significant number of portrayals that pose none of the risks sought to be avoided by child pornography statutes. Such a broad definition poses considerable risks to individuals that create material portraying children engaged in sexual conduct if such material is created without the use of live performances or reproductions thereof. In the absence of such clear statutory guidance, individuals, such as Mr. Gress, must resort to self-censoring in an effort to avoid violating the statute. Mr. Gress's computer program is but one example of a portrayal that does not pose a risk to children but that falls squarely within the broad ambit of paragraph B's vague definition.

While the Child Pornography statute encompasses a significant quantity of material that should properly be deemed child pornography, distinct limitations must be placed upon such categorization so that individuals may adjust their conduct accordingly. The Supreme Court has noted that there are "limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment." *Ferber*, 458 U.S. at 764. In *Ferber*, the Court suggested that simulations not involving a live performance or a reproduction of a live performance would serve to limit the material prohibited by the statute. *Id.* No such limitation can be read into Marshall's statute and individuals may not adjust their conduct accordingly. As such the Child Pornography Law is not "narrowly tailored to further the State's legitimate interest," and must fail because of vagueness. *Grayned v. Rockford*, 408 U.S. 104 (1972). The vagueness surrounding the statute is further exacerbated by the lack of any scienter element as to the conduct that the statute prohibits.

2. CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES DOES NOT PROVIDE ANY SCIENTER ELEMENT AS TO THE CONDUCT IT PROSCRIBES.

The Child Pornography Law is unconstitutional because it fails to provide a mens rea requirement for the conduct prohibited by the statute. It is well established that the First Amendment mandates that a criminal statute prohibiting the distribution of child pornography must contain a mens rea for the prohibited conduct. *Mishkin v. New York*, 383 U.S. 502, 511 (1966) ("[t]he Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material."); *United States v. Colavito*, 19 F.3d 69 (2d Cir. 1994); *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 1186 (1994); *United States v. Thomas*, 893 F.2d 1066 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990). The requirement of scienter has been

found to be equally applicable in civil statutes as well. *See United States v. Buena Vista*, — U.S. —, 113 U.S. 1126 (1993); *United States v. One 1990 Lincoln Town Car*, 817 F. Supp. 1575 (N.D. Ga. 1993) (real property not subject to forfeiture where lienholder lacked actual knowledge of fraud).

Although most decisions passing upon the issue of scienter have dealt with its application to the minority of the child participants, the chilling effect of self-censorship is equally dangerous when a statute lacks scienter as to the conduct prohibited. The Child Pornography Law does contain a scienter requirement as to the minority of the participant. However, the statute lacks any scienter element as to the conduct that constitutes the creation or dissemination of child pornography. This shortcoming has a particularly acute effect on Mr. Gress because of the manner in which the material at issue was produced. Mr. Gress did not have knowledge that he was creating child pornography. Mr. Gress merely created a program that has the capability to produce images of children engaged in sexual conduct. Ultimately, it is the user of the program who is responsible for the selection and manipulation of these images. Without requiring that Mr. Gress know, or have some other mens rea, that the conduct will create child pornography, the statute impermissibly imposes strict liability upon Mr. Gress and results in the chilling effect of self-censorship.

II. ACCORDING TO CHAPTER 45, SECTION III, PARAGRAPHS B AND C OF THE MARSHALL REVISED STATUTES, PETITIONER NEITHER CREATED NOR DISSEMINATED CHILD PORNOGRAPHY BECAUSE HIS COMPUTER PROGRAM DOES NOT FALL WITHIN THE AMBIT OF THE STATUTE.

The Marshall court was incorrect in deciding that Mr. Gress's activities were proscribed by the Child Pornography Law. The photographs that Mr. Gress created did not have as their focus an obsessive interest in immoral or lascivious matters nor an excessive or unnatural interest in sex. Rather, the photos that Mr. Gress took were of children in beach attire and undergarments. In no way could these pictures have encouraged lustful or lewd thoughts in the average person applying community standards. Furthermore, the photographs, as altered, did not depict sexual conduct under the Child Pornography Law.

The pictures did not depict fornication, sadomasochistic sexual acts, masturbation, excretory functions or lewd exhibition of the genitals. A specific six factor test has been endorsed by the Third Circuit to decide if a work is "lascivious." *See United States v. Villard*, 885 F.2d 117 (3d Cir. 1989). Of the six factors outlined in *Villard*, only one, the fact that the

models are nude, is satisfied by Mr. Gress's altered photographs. The courts have repeatedly argued that mere nudity does not constitute pornography. *See United States v. Villard*, 700 F. Supp. 803, 811 (D. N.J.) *aff'd* 885 F.2d at 126 (1988) (Roth, J., dissenting on other grounds); *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd*, 813 F.2d 1231 (9th Cir. 1987); *Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341 (N.D. Texas 1985), *aff'd* 799 F.2d 1000 (5th Cir. 1986), *cert. denied* 479 U.S. 1088 (1987). Finally, the pictures did not portray a live performance of sexual conduct or a simulation of a live performance of sex or lascivious expression, which is a requirement under *Ferber*. *See New York v. Ferber*, 458 U.S. 747, 764 (1982).

Mr. Gress complied with the mandates of the Child Pornography Law with respect to dissemination by undertaking security measures that were adequate. Mr. Gress took numerous precautions to prevent minors from subscribing to Kid Stuff, including the screening of users and requiring proof of age. Strict liability should not be inferred by the statute which requires "adequate" measures and proscribes "reckless" behavior. Because Mr. Gress made a bona fide attempt to ascertain the age of the minor and curtail their use of Kid Stuff, absolute liability can not apply to restrict the distribution of information via the Internet.

A. *The Court of Appeals improperly concluded that Mr. Gress had created child pornography under Chapter 45, Section III of the Marshall Revised Statutes.*

According to the plain meaning of the Child Pornography Law, Mr. Gress did not create child pornography. Paragraph B of the Child Pornography Law provides the definition of what conduct constitutes the creation of child pornography. Paragraph A further qualifies this definition by requiring that the conduct meet a standard similar to the obscenity standard enunciated in *Miller v. California*, 413 U.S. 15 (1973). When interpreting the meaning of any statute, one must look first at the plain meaning of the words that comprise the statute. It is axiomatic that when the statutory language is clear, the words must be interpreted in accordance with their ordinary meaning. *Malloy v. Eichler*, 860 F.2d 1179, 1183 (3d Cir. 1988). Only the most extraordinary showing of contrary congressional intent may justify altering the plain meaning of the statute. *Id.* There exists no legislative history for the Marshall statute and, as such, the plain meaning rule must be applied. If the language of a statute is clear, it is assumed that the intention is expressed by the words themselves and therefore there is no need to construe the statute.

1. PETITIONER'S COMPUTER PROGRAM DOES NOT SATISFY THE PLAIN MEANING OF THE THREE STANDARDS REQUIRED BY CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES.

The Child Pornography Law sets forth three standards, all of which must be met, in order for conduct to constitute child pornography. *See* Chapter 45, Section III, Paragraph A of the Marshall Revised Statutes. The first prong of the test is whether the material in question appeals to the prurient interest. "Prurient" is defined as "tending to excite lust; lewd." WEBSTER'S NEW WORLD DICTIONARY 481 (David B. Guralnick ed., 1983). "Prurient interest" is defined as "a shameful or morbid interest in nudity, sex or excretion . . . an obsessive interest in immoral or lascivious matters . . . [or] an excessive or unnatural interest in sex." BLACK'S LAW DICTIONARY 1226 (6th ed. 1990).

In *Miller* the "prurient interest standard" was developed by the United States Supreme Court. *Miller*, 413 U.S. at 24. The basic guidelines for the trier of fact in that case were (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." *Id.* at 24. While this standard generally does not apply to child pornography, it does closely parallel the Marshall Child Pornography Law. *See New York v. Ferbèr*, 458 U.S. 747 (1982).

It seems clear that with respect to the "prurient interest" standard, the pictures taken by Mr. Gress, which were subsequently altered, would not rise to the level of prurience in the eye of the "average person, apply[ing] contemporary community standards." *Miller*, 413 U.S. at 24. The photographs that Mr. Gress took of children in summer attire and underwear do not in any way conjure up lustful thoughts for an average viewer. Even the nude photographs which Mr. Gress created with a computer do not have as their focus a shameful or morbid interest in sex. One must bear in mind that it is the computer program user that manipulates the images to simulate sexual conduct. The subject matter, created by Mr. Gress, therefore, fails the first prong of the Child Pornography Law.

2. THE PHOTOGRAPHS THAT MR. GRESS SUPPLIED TO THE COMPUTER BULLETIN BOARD DO NOT PORTRAY MINORS ENGAGING IN ANY OF THE SEXUAL CONDUCT PROHIBITED BY CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES.

The second element of the Child Pornography Law dealing with what constitutes sexual conduct under the statute is more complicated.

The pictures created by Mr. Gress did not depict fornication, sadomasochistic sexual acts, masturbation, excretory functions or lewd exhibition of the genitals. As to what constitutes a "lewd exhibition of the genitals," the Third Circuit, relying on the district court for the Southern District of California, has outlined a workable definition of this terminology. *See United States v. Villard*, 885 F.2d 117 (3d Cir. 1989).

In *United States v. Dost*, the Southern California district court held that two photographs taken by the defendants violated the federal Child Protection Act, which prohibited the taking of photographs of a minor engaging in "lascivious exhibition of the genitals or pubic area." *United States v. Dost*, 636 F. Supp. 828 (S.D. Ca. 1986), *aff'd* 813 F.2d 1231 (9th Cir. 1987). In *Dost*, the court made the distinction between "lewd" and "lascivious," where the federal law had adopted a definition of sexual conduct that included "lascivious exhibition of the genitals." *Id.* at 1243. However, in a more recent case, the Ninth Circuit, in *United States v. Wiegand*, understood the terms "lascivious" and "lewd" to be interchangeable. *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987). The Child Pornography Law, however, seems to follow the guidelines of the obscenity standard outlined in *Miller* and, thus, any photographs analyzed under the Child Pornography Law should rise to the level of obscenity to qualify as child pornography.

However, if the Supreme Court of Marshall refuses to embrace the obscenity standard for child pornography, the *Dost* test provides a succinct definition of what constitutes a "lascivious exhibition of the genitals or pubic area." The District Court in *Dost* explained that the following factors should be considered in determining what lascivious means:

- Whether the focal point of visual depiction was on minor's genitalia or pubic area;
- Whether setting of visual depiction was sexually suggestive;
- Whether minor was depicted in unnatural pose or in inappropriate attire considering his or her age;
- Whether child was fully or partially clothed or nude;
- Whether visual depiction suggested sexual coyness or willingness to engage in sexual activity; and
- Whether visual depiction was intended or designed to elicit sexual response in viewer.

Id. at 832. In a Third Circuit case decided three years after *Dost*, the language of the statute makes clear that the depictions must consist of more than mere nudity; otherwise, inclusion of the term "lascivious" would be meaningless. *Villard*, 885 F.2d at 117.

The Court noted that the "lascivious exhibition" determination must be made on a case-by-case basis using general principles as guides for analysis. *Dost*, 636 F. Supp. at 831-832. Additionally, the Ninth Circuit

has noted that child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo. *Wiegand*, 812 F.2d at 1245. In *Wiegand*, the court held that "[p]rivate fantasies are not within the statute's ambit." *Id.* at 1245. "When a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it." *Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341 (N.D. Tex. 1985), *aff'd* 799 F.2d 1000 (5th Cir. 1986). In Gress's case, the mere placing of non-pornographic material on the computer bulletin board, thereby supplying nude pictures in a forum where pedophiles might enjoy it, does not constitute the creation or production of child pornography, even if such images are later manipulated by computer users to create pornographic scenes.

In applying the *Dost* test to the case at bar, it is important to keep in mind that the photographs taken by Mr. Gress were of children in bathing suits and undergarments. There were no nude pictures taken of minors; rather, the nude pictures were created by a computer program. Furthermore, it was the computer program user that manipulated the images in order to depict scenes involving sexual conduct. If the analysis begins with Mr. Gress's final product, namely, the altered images of children who are nude, it is impossible to find a showing of a "lewd exhibition of the genitals" in the instant case. The materials that Mr. Gress created did not have as their focal point a visual depiction of the minor's genitalia, the setting was not sexually suggestive, the minor was not depicted in an unnatural pose or in inappropriate attire, the visual depiction suggested neither sexual coyness nor willingness to engage in sexual activity, nor was the photograph in and of itself designed to elicit sexual response in the viewer. Of the six factors in *Dost*, only the fourth, the fact that the child was nude, is relevant. However, the court acknowledges that in determining the depiction of a "lascivious exhibition of the genitals" a jury is called upon often to make a more careful evaluation based on subtle visible nuances. "This is because the law does not prohibit . . . visual depictions of mere nudity." *Villard*, 700 F. Supp. at 811.

Mr. Gress was never involved in the manipulation of the figures through the computer program Kid Stuff. It is the subscriber to the BBS who is creating simulated child pornography. The requirement of more than mere nudity does not mean that nudity is a prerequisite to the existence of child pornography. Rather, as in *Villard*, the court simply stated the obvious principle that nudity alone is insufficient to constitute a lascivious exhibition. No one seriously could think that a painting of a nude child or a snapshot of a naked child in a bathtub violates the Child Pornography Law. Nudity must be coupled with other circumstances that make the visual depiction lascivious or sexually provocative in order to fall within the parameters of the statute. *United States v. Knox*, 977

F.2d 815, 820-21 (3d Cir.), *cert. granted*, 113 S. Ct. 2926, *and vacated*, 114 S. Ct. 375 (1993). It is the introduction of the bulletin board user who manipulates the computer program that imbues Mr. Gress' product with a lascivious nature. Respondents would be better served by attaching blame to these parties rather than Mr. Gress himself. In *United States v. Cross*, the Eleventh Circuit held that photographs of nude children that did not portray the models as sexually coy or inviting were nevertheless deemed to be lascivious because the defendant had arranged them to satisfy the sexual interest of himself and other pedophiles. *United States v. Cross*, 928 F.2d 1030 (11th Cir.), *cert. denied* 112 S. Ct. 594 (1991). Again, Mr. Gress's photographs were not arranged in any particular order but were selected by the computer program user to simulate sexual conduct.

In *Faloona v. Hustler Magazine, Inc.*, the district court for the Northern District of Texas, affirmed by the Fifth Circuit, held that nude pictures of the plaintiffs were not "child pornography" under *Ferber*, because they did not show the plaintiffs engaged in any sexual activity or in a lewd exhibition of their genitals. *Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1342, n.4 (N.D. Texas 1985) *aff'd* 799 F.2d 1000 (5th Cir. 1986). In *Faloona*, minors, joined by their mother, brought an invasion of privacy action against that magazine which published the minors' nude pictures after they had appeared in what plaintiffs determined to be an artistic and educational book about sexuality called *The Sex Atlas*. *Faloona*, 607 F. Supp. at 1343-44. The district court held that the nude pictures did not portray children engaged in sexual conduct. "Accordingly, neither the publication of the plaintiff's nude pictures in *Hustler* nor their publication in *The Sex Atlas* constituted child pornography, as defined in *Ferber*." *Id.* at 1345.

In *Faloona*, the plaintiffs asserted that a release which had been signed was void as an illegal contract because it permitted the publication of "child pornography" — i.e., the nude pictures of the plaintiffs — in *Hustler*. *Id.* at 1344. "The nude photographs of the plaintiffs — admired, and admittedly not obscene, when published in *The Sex Atlas* — did not become 'child pornography' when they appeared in *Hustler*." *Id.* at 1355, n. 44. The Court concluded that the plaintiffs' desire to censor Hustler could not be reconciled with the constitutional protections of free speech. They went on to say that a successful censoring of *Hustler*, would necessarily extend to books like *The Sex Atlas* and other works of scientific or literary value merely because they contained pictures of nude children.

In Mr. Gress's case, none of the children he photographed were depicted engaging in any sexual acts. Rather, the pictures that he created were merely pictures of nude children, which do not constitute child pornography as defined by the Supreme Court in *Ferber*. Similarly, the pictures that Mr. Gress created when incorporated into the Kid Stuff

program did not become child pornography. The photographs can not be characterized as pornographic merely because of the subject matter of the computer program. In fact, it remains the province of the user of Kid Stuff to manipulate the photographs and this manipulation is not in any way conducted under the dominion and control of Mr. Gress. Furthermore, as articulated in *Faloona*, the courts must tread carefully in matters where the First Amendment protections of speech and press may block efforts at censorship. *Faloona*, 607 F. Supp. at 1360. Mr. Gress did not create child pornography when he altered the photographs of the children and neither did the inclusion of the nude photographs in Kid Stuff alter their character. The courts should carefully assess who, in fact, is the creator of child pornography in a case like the one at bar and award damages based on that assessment. In Mr. Gress's case, the creator of child pornography is the user of Kid Stuff.

3. THE PICTURES TAKEN BY MR. GRESS WERE NOT OF A LIVE SEXUAL PERFORMANCE BY A MINOR AND THUS DO NOT CONSTITUTE PORNOGRAPHY UNDER CHAPTER 45, SECTION III OF THE MARSHALL REVISED STATUTES.

As previously outlined, the Supreme Court in *New York v. Ferber*, 458 U.S. 747 (1982), provided judicial authority for deciding cases that involved child pornography. The *Ferber* court concentrated primarily on the use of real children as subjects in the creation of child pornography. There is little doubt that where a child is made to engage in these sexual acts listed in the Child Pornography Law or is encouraged to act lasciviously in exhibiting his or her genitalia, physical and/or emotional harm will result. However, in the case of Dede Domingo, she was never made to perform sexual acts or to lasciviously exhibit her genitalia.

In fact, as previously discussed, the *Ferber* court made an important distinction with respect to live performances. The Supreme Court held that "distributions of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other reproduction of live performances by children retain First Amendment protection." *Ferber*, 458 U.S. at 764. In *Ferber*, the nature of the harm to be combated required that the state offense be limited to works that visually depict sexual conduct by children below a specified age. *Id.* The visual depictions that are the subject of this appeal do not involve a live performance or photographic or other visual reproduction of live performances by children. Furthermore, the offense must be limited to works that visually depict sexual conduct, which these pictures do not. The materials created by Gress retain First Amendment protection under the *Ferber* rationale and, because of this protection, do not constitute child pornography under the Child Pornography Law.

4. THE MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST MR. GRESS MUST BE DENIED BECAUSE MR. GRESS'S COMPUTER PROGRAM, TAKEN AS A WHOLE, COULD REASONABLY BE FOUND TO HAVE SCIENTIFIC VALUE.

The Child Pornography Law exempts works that have "scientific value" from those that can be considered child pornography. This language is similar to the language in *Miller v. California*, 413 U.S. 15 (1973), where the Supreme Court held that, with regard to obscene material, the

> basic guidelines for the trier of fact must be: (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.

Miller, 413 U.S. at 24. While the *Ferber* court did not change the standard used to determine what material has scientific value, the Supreme Court held that the "contemporary community standards" application is not relevant to the determination of serious value. "The proper inquiry is not whether an ordinary member of any given community would find serious value in the allegedly obscene material but whether a reasonable person would find such value in the material, taken as a whole." *Pope v. Illinois*, 481 U.S. 497 (1987). Since the Child Pornography Law uses the words scientific value, the same standard must apply. *Shannon v. United States*, — U.S. —, 114 S. Ct. 2419, 2426 (1994) ("[A] court, in interpreting "borrowed" statutory language, should apply the same construction to that language that was placed upon it by the courts in the jurisdiction from which it was borrowed.").

Applying the *Miller* standard to Mr. Gress's work, the demonstration of high technology computer graphics, could certainly be of scientific value. "Taken as a whole," as suggested by *Miller*, the computer program demonstrates graphics capable of remarkable animation and versatility. One must examine the technology utilized to create these images and not the images themselves. A Louisiana court employed precisely this analysis in examining a magazine that contained pornographic pictures. The court concluded that a magazine, taken as whole, could not be said to lack serious political or scientific or literary value beyond a reasonable doubt, even though the magazine depicted hard core sexual conduct which appealed to prurient interest. *State v. Walden Book Co.*, 386 So. 2d 342 (La. 1980). The intellectual process of applying what one has seen or experienced to other uses is critical to the process of technological development. These types of innovations must not be stifled

because of the subject matter of the material. As such, a jury could find that Mr. Gress's work has serious scientific value.

B. *THE MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST PETITIONER MUST BE DENIED AS PETITIONER'S ACTIONS DID NOT VIOLATE CHAPTER 45, SECTION III OF THE MARSHALL STATUTE SINCE PETITIONER TOOK ADEQUATE MEASURES TO PREVENT THE DISSEMINATION OF CHILD PORNOGRAPHY TO MINORS.*

Mr. Gress's actions do not represent dissemination to minors based on the language of the Marshall Statute. The statutory language of Paragraph C of the Child Pornography Law does not require that security measures be fool-proof but rather "adequate." Because of the lack of case law and legislative history regarding the interpretation of the word adequate, similar statutes must be examined. Mr. Gress's measures for preventing minors' access to his computer program were adequate and thus he did not disseminate child pornography under the Child Pornography Law.

Simply because minors could gain access to Kid Stuff does not, ipso facto, imply that Mr. Gress's security measures were inadequate. Paragraph C of the Child Pornography Law requires that a person take "adequate means to prevent the dissemination" of child pornography to minors. Chapter 45, Section III, Paragraph C of the Marshall Revised Statutes. In the case at bar, Mr. Gress took numerous precautions to prevent minors from gaining access to his computer program. He required that potential users fill out a questionnaire affirming their age, mail in a copy of their driver's license or other identification showing proof of their age, and pay a fee. These measures place a substantial burden on an underage user who would have to misrepresent himself, as did the minors in the instant case, in order to gain access.

Furthermore, the court should hold in Mr. Gress's favor because the language of the Child Pornography Law does not define the word adequate. Interpretation of the word "adequate" within the statute is necessary to determine whether Mr. Gress's precautions in attempting to prevent underage users from gaining access to Kid Stuff were sufficient to preclude his liability. "When interpreting a statute, the starting point is always the language of the statute itself." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). In examining the statute, there are no references as to what constitutes adequate measures. Moreover, there is no legislative history describing what the legislature intended when it used the word adequate. If the legislature had meant to infer that to be adequate, a measure taken must be fool-proof, strict liability would be inferred. Had this been the intended standard, the statute would not have contained language such as "recklessness" or "adequate" at all. The

very existence such terminology in the statute implies some measure of fallibility. Mr. Gress's measures, though fallible, are adequate when examined in light of analogous case law.

Looking to established case law, situations where minors have gained access to "dial-a-porn" phone lines have been addressed and are analogous. This approach is suggested in *An Electronic Soapbox: Computer Bulletin Boards and the First Amendment*, 39 FED. COMM. L.J. 217, P.5 (1987):

> In 1983, Section 233 [47 U.S.C. §233] was amended to cover "dial-a-porn" services. While not intended to apply to bulletin boards, the amended portions seem applicable to bulletin board operators whose boards are used by minors. It states
>
> Whoever knowingly—
>
> (A). . . by means of a telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person under eighteen years of age. . . regardless of whether the maker of such communication placed the call. . . .

(citing 47 U.S.C. §233(b)(1)(Supp. III 1985)). *Electronic Soapbox, supra*, goes on to state that

> [c]urrent FCC regulations require the dial-a-porn vendor to allow access to [their] service only if the caller has a credit card number or vendor-supplied identification code. The code can be supplied only after the vendor has insured that the applicant is over eighteen. 47 C.F.R. §64.201 (1985).

These precautions are similar to those used by Mr. Gress to keep minors from accessing Kid Stuff. Mr. Gress required a driver's license with proof of age before he issued users their personal identification number. This PIN had to be entered each time a user tried to gain access to Kid Stuff. Ms. Domingo was made aware of Mr. Gress's computer program by an underage friend who had gained access to Mr. Gress's Kid Stuff program by mailing a copy of an adult's driver's license and misrepresenting his identity and age. Ms. Domingo then gained access by claiming to be that person and using his PIN. Without the ability to detect exactly who is calling and from where, nothing more could have been done, as implied by the FCC regulation. As such, Mr. Gress's methods must be viewed as adequate under the Child Pornography Law.

Additionally, the Supreme Court has held that in a similar statute forbidding the distribution of pornography to minors, the "statute expressly provided that a defendant must be acquitted on the ground of 'honest mistake' if he proves that he made 'a reasonable bona fide attempt' to ascertain the true age of the minor." *Ginsberg v. New York*, 390 U.S. 629 (1968). Similarly, New York has held that

> [a]bsolute liability without regard to whether the [vendor] was put on notice that his customer was under age would necessarily restrict and

> curtail the distribution of literature to adults. . . . In its efforts to protect children, the State is not privileged to so hinder the flow of information and ideas.

People v. Tannenbaum, 220 N.E.2d 783 (N.Y. 1966). By instituting the access requirements to Kid Stuff, Mr. Gress clearly made a reasonable, bona fide attempt to ascertain the true age of users and also placed them on notice that they were required to be at least 18 years old to use Kid Stuff. These standards further demonstrate that Mr. Gress's precautions must be held to be adequate.

In addition to the case law discussed above, a California statute is instructive in the case at bar. In banning cigarette sales to minors, the statute recognizes that even the interaction with a salesperson can be imperfect in stating "[p]roof that a defendant . . . demanded, was shown, and reasonably relied upon evidence of majority shall be [a] defense to any action brought." CAL. PENAL CODE § 308(a) (West 1994). Similarly, Mr. Gress put forth an adequate effort to prevent minors from gaining access to his computer bulletin board. Only with substantial effort and misrepresentation could minors, such as those in the instant case, gain access to Kid Stuff. Mr. Gress and other bulletin board operators must not be held liable for such breaches in their security measures.

The foregoing situations are sufficient to demonstrate that Mr. Gress's precautions were adequate, especially considering the fact that very few situations involving dissemination of material via a computer bulletin board have come to bar. Furthermore, those that have are situations of copyright infringement, where materials have been made available to users of a bulletin board. *See Sega v. Maphia*, 1994 W.L. 378641 (N.D.Cal. 1993); *Playboy v. Frena*, 839 F. Supp. 1552 (M.D.Fl. 1993). In these cases, the disseminated material placed on the bulletin boards for anyone to take as they pleased. Also, no issue of illegal distributions to minors or access requirements were addressed, so these cases are distinguishable and not relevant to the case at bar.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the Court of Appeals' grant of the motion for judgment on the pleadings in favor of Respondents and remand this action to the Melrose County Circuit Court for a trial on the merits of the case.

EXHIBIT A

MARSHALL REVISED STATUTES
OBSCENITY, PORNOGRAPHY, CHILD PORNOGRAPHY
CHAPTER 45

§ III. Child Pornography

¶ A. Child Pornography Defined

1. Any material or performance constitutes child pornography if:
   (a) the work appeals to the prurient interest;
   (b) the work depicts or describes fornication, sadomasochistic sexual acts, masturbation, excretory functions or lewd exhibition of the genitals, whether normal or perverted, actual or simulated and involves a person under the age of eighteen engaged in such acts; and
   (c) the work, lacks serious literary, artistic, political or scientific value.
2. Any person who creates or disseminates child pornography will be liable for not less than $50,000.00 for each individual offense.

¶ B. A person creates Child Pornography when he or she videotapes, films, photographs, or otherwise uses, depicts, displays or portrays by means of any visual medium or reproduction, stage play or live performance, any child whom he or she knows or reasonably should know to be under the age of eighteen, actually or by simulation engaged in any act or conduct defined in ¶ A herein, alone or with other children or adults.

¶ C. A person disseminates child pornography to a minor when he or she recklessly or knowingly supplies, distributes, displays or exhibits, or by his or her recklessness causes to be supplied, distributed, displayed or exhibited, to anyone under the age of eighteen years, any material or performance described in ¶ A herein. For purposes of this section, a person is reckless who fails to take adequate means to prevent the dissemination of pornographic materials described herein to anyone under eighteen years of age.

¶ D. Civil Action by Parent or Guardian

(1) A parent or legal guardian of a minor child used in the creation of child pornography as defined herein may bring a cause of action for damages on behalf of said child in an amount not less than $50,000.00 for each individual violation of paragraph B of this section.

(2) A parent or legal guardian of a minor child to whom child pornography has been disseminated as defined herein may bring a cause of action for damages on behalf of such minor child in an amount not less than $50,000.00 for each individual violation of paragraph C of this section.

BRIEF FOR RESPONDENT

No. 94-241

IN THE
SUPREME COURT OF THE STATE OF MARSHALL
OCTOBER TERM 1994

GEORGE GRESS,

Petitioner,

v.

DEDE DOMINGO, A MINOR,
BY DOUGLAS AND MADELINE DOMINGO,
HER PARENTS AND NEXT FRIENDS,

Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Marshall

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

I. WHETHER THE MARSHALL STATUTE PROHIBITING THE CREATION OF OR DISSEMINATION TO MINORS OF CHILD PORNOGRAPHY IS CONSTITUTIONAL?

II. WHETHER THE PETITIONER BECAME LIABLE UNDER THE MARSHALL STATUTE FOR CREATING AND DISSEMINATING CHILD PORNOGRAPHY WHEN HE WROTE A COMPUTER PROGRAM WHICH GENERATED SEXUAL IMAGES OF CHILDREN, AND WHEN HE PERMITTED MINORS TO ACCESS THE PROGRAM?

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OPINIONS BELOW

The order of the Melrose County Circuit Court which granted Respondents' motion for judgment on the pleadings is unreported. The opinion of the Court of Appeals of the State of Marshall which affirms the circuit court's order is likewise unreported and is set out in the Transcript of Record, (R. at 1-9, Ct. App. Op.).

STATEMENT OF JURISDICTION

The Statement of Jurisdiction is omitted in accordance with section 1020(2) of the 1994 Rules of the John Marshall National Moot Court Competition.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are relevant to the determination of the present action: Marshall Revised Statutes, Chapter 45, Section III, paragraphs A-D; and 18 U.S.C. sections 2251-2256 (1994). The relevant portions of the statute are set out in Appendix A.

STATEMENT OF THE CASE

I. *SUMMARY OF THE FACTS*

Dede Domingo, Respondent, is a 15-year-old girl who resides in Marshall with her parents and legal guardians, Douglas and Madeline Domingo, also Respondents. (R. at 1.) On occasion, Dede models children's clothes for department store catalogues. (R. at 2.)

Petitioner is also a resident of Marshall, where he specializes in photographing child models. (R. at 1.) In addition, Petitioner is a skilled computer programmer, and the system operator, or "sysop," of an on-line bulletin board system (BBS). (R. at 1.) As sysop, Petitioner manages the operation of the BBS, including all new subscription and access procedures, and also personally creates programs for the BBS. (R. at 2.)

In February 1993, Petitioner hired Dede to model summer clothes for layouts in summer catalogues. (R. at 2.) Dede's parents signed a release permitting Petitioner to use the photographs of Dede in these catalogues only. (R. at 2.)

A few months later, Petitioner digitally scanned a photograph of Dede modeling a bikini into his computer database. (R. at 2.) Then, using his programming skills and a computer graphics package, Petitioner created an interactive sex program entitled Kid Stuff. (R. at 3.) This program had the capability to depict Dede's image on screen engaged in simulated sexual scenarios, specifically fellatio, sodomy, masturbation, cunnilingus and other aspects of sexual intercourse. (R. at 3.) Petitioner then made his sex program available to international computer network

(Internet) subscribers via his BBS. (R. at 3.) Petitioner never contacted Dede or attempted to obtain a release from Dede's parents for the use of her photograph in the pornographic computer program before releasing it to the public. *See* (R. at 2).

In July 1993, Johnny Sawyer, a friend of Dede's, saw Petitioner's sex program on the BBS and followed Petitioner's basic subscription procedure to obtain a personal identification number (PIN). (R. at 3-4.) Although Sawyer was a minor, Petitioner issued him a PIN because he employed no adequate means of verifying the age of the user. (R. at 4.) On August 30, Johnny logged onto Kid Stuff and was shocked to see the image of his friend, Dede Domingo, on his screen. (R. at 4.) He immediately notified Dede, who logged onto the program and saw her own image and the explicit sexual scenarios into which it could be manipulated. (R. at 4-5.) Dede promptly informed her parents. (R. at 5.)

Mr. and Mrs. Domingo, as parents and next friends of Dede, filed a complaint against Petitioner in the Melrose County Circuit Court. (R. at 5.) The Domingos alleged that Petitioner had violated the Marshall Child Pornography Statute chapter 45, section III, paragraphs A-D, of the Marshall Revised Statutes (hereinafter "the Statute"), and was civilly liable for the creation and dissemination of child pornography. (R. at 5-6.) The Domingos claimed damages of not less than $50,000 for the use of their daughter Dede, a minor, in the creation of child pornography, and not less than $50,000 for the dissemination of the child pornography to her. (R. at 6.)

II. *Summary of the Proceedings*

On February 10, 1994, the Domingos filed a motion for judgment on the pleadings. (R. at 1, 7.) Judge Michelle Hanson of the Melrose County Circuit Court granted the Domingos' motion for judgment on the pleadings, and held that, as a matter of law: (1) Petitioner's bulletin board program constituted offensive material that is constitutionally proscribed under the Marshall Child Pornography Statute; and (2) Petitioner was civilly liable to the Domingos since he created and disseminated prohibited pornography. (R. at 7.) Judge Hanson ruled that the Domingos were entitled to statutory damages of $100,000 and costs. (R. at 7.)

Petitioner filed a timely appeal of Judge Hanson's order to the Court of Appeals of the State of Marshall, and contended that (1) the Marshall Child Pornography Statute is unconstitutional under the First Amendment to the United States Constitution, or, in the alternative, (2) even if the computer program at issue can be constitutionally proscribed, he is not personally liable as a creator or disseminator of any prohibited material. (R. at 6, 7.) The Marshall Appellate Court affirmed the circuit

court's order granting the Domingos' motion for judgment on the pleadings on all counts, and held that the statute is within the First Amendment, that Petitioner's program constitutes prohibited material under the statute, and that Petitioner is liable for creation and dissemination of the child pornography. (R. at 8, 9.) It is from this decision that Petitioner appeals.

SUMMARY OF THE ARGUMENT

I.

The Marshall Court of Appeals correctly held that the State of Marshall may constitutionally regulate computer technology which contains child pornography. An interactive computer program is not the type of expression to which the First Amendment affords full protection because certain forms of entertainment do not merit First Amendment protection. Further, because the program is accessed via telephone lines, it is subject to greater regulation than other forms of speech. Assuming that the First Amendment does apply to an interactive computer program, Marshall may constitutionally regulate an interactive computer program which contains child pornography because a state has a compelling interest in protecting its children. Moreover, the Statute is suitably limited to achieve this compelling interest. Thus, the court of appeals was correct when it held that the Marshall Statute comports with the First Amendment.

II.

The court of appeals was correct when it held Petitioner liable under the Statute for creating child pornography and disseminating it to a minor. Petitioner's interactive sex computer program constitutes child pornography under the statute. Because the program depicts a child engaged in various sex acts sufficiently described by the Statute as prohibited depictions, appeals solely to the viewer's prurient interest, and lacks serious literary, artistic and political value, the program meets the statutory definition of child pornography. Petitioner, a systems operator on a computer bulletin board network, wrote this program and thus "created" child pornography. He then recklessly disseminated this material to a child when he permitted access to it without implementing adequate controls to ensure children would not receive the program. Thus, the district court's order granting judgment on the pleadings in favor of the Domingos was proper.

ARGUMENT AND AUTHORITIES

I. THE MARSHALL COURT OF APPEALS CORRECTLY HELD THAT THE STATE OF MARSHALL MAY CONSTITUTIONALLY REGULATE COMPUTER TECHNOLOGY WHICH CONTAINS CHILD PORNOGRAPHY.

The need to protect children is one of society's highest priorities and a paramount duty of government. Alan E. Sears, *The Legal Case for Restricting Pornography*, Phoenix, Arizona, Citizens for Decency Through Law, Inc. (1994). Sixteen years ago, the United States Congress recognized that child pornography had become a highly organized, multimillion-dollar industry and a serious national problem. *See* S. Rep. No. 438, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S.C.C.A.N. 40, 43. Estimates range from thousands to hundreds of thousands of children being sexually exploited as a consequence of being used in or exposed to child pornography. Howard A. Davidson & Gregory A. Loken, U.S. Dep't of Justice, *Child Pornography and Prostitution: Background and Legal Analysis* at v (1987); SHIRLEY O'BRIEN, CHILD PORNOGRAPHY at vii (1983).

Historically, the focus of the inquiry into child pornography has been the process by which children became subjects of pornographic material. *See* 1 U.S. Dep't of Justice, *Attorney General's Commission on Pornography: Final Report* § 7.1 (1986). The Justice Department Commission on Pornography, writing in 1986, stated that "pornography necessarily includes the sexual abuse of a real child." *Id.* In 1986, however, the Commission's understanding of what was "necessary" to create child pornography was limited to the then-existing methods of producing child pornography.

Today, technological advances allow computer users to achieve photo-realistic quality by scanning photographs into digital form, and then using a graphics program to manipulate the scanned images. *See* James R. Norman, *Lights, Cameras, Chips!*, FORBES, Oct. 26, 1992, at 260, 261; Philip Elmer-Dewitt, *Through the 3-D Looking Glass: Computer Graphics Comes of Age*, TIME, May 1, 1989, at 65. This technology has been used to create a new form of pornography: interactive computer images combining fixed variables selected by the user. *Id.* (citing John C. Dvorak, *America, Are You Ready for Simulated Sex and Virtual Reality?*, PC-COMPUTING, May 1992, at 78). Experts agree that within 20 years, a viewer will be unable to tell the difference between a real and a computer-generated actor. Kathleen K. Wiegner & Julie Schlax, *But Can She Act?*, FORBES, Dec. 10, 1990, at 278.

Computer technology has advanced at a faster pace than the laws governing it. David B. Johnson, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J.

SCI. & TECH. 311 (1994); *There's an X-rated Side to Home Computer, Parents Warned*, L.A. TIMES, Dec. 25, 1987, at 47. Computer technology is growing so fast that society is unprepared to deal with the questions it will pose for human privacy. Lou Ming, *Computer Explores Realm of Senses in Age of Hyperreality*, THE REUTER LIBRARY REPORT, July 23, 1992.

Currently, all 50 states and the United States have passed legislation targeted to eradicating child pornography. *See, e.g.*, ILL. ANN. STAT. ch. 720, § 5/11-20.1 (Smith-Hurd 1994) (listing comparative child pornography laws of 48 states). Marshall has also enacted such a statute. *See* Appendix A. The constitutionality of including computer-generated images among the prohibited materials in child pornography statutes is a unique question of law. This Court should guard against the harms that threaten thousands of children if these statutes are not interpreted to protect them.[1]

In this case, the Domingos obtained a judgment on the pleadings against Petitioner after he violated the Statute by creating and disseminating a pornographic interactive computer program involving their 15-year-old daughter, Dede. (R. at 3.) The Marshall Rules of Procedure provide for judgment on the pleadings. (R. at 1.) Since the state rule is modeled after the federal rule, the state court should look to federal law in construing the rule. *See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993). On a plaintiff's motion for judgment on the pleadings, the question is whether the plaintiff is entitled to judgment as matter of law on the facts admitted. FED. R. CIV. P. 12(c); *see United States v. Blumenthal*, 315 F.2d 351, 352-53 (3d Cir. 1963); *see also National Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357 (7th Cir. 1987). The court considers all undenied facts alleged in the complaint and assumes as true all material allegations of fact in the answer. *Blumenthal*, 315 F.2d at 352.

Petitioner asserts that his program is protected by the First Amendment. (R. at 6.) The United States Supreme Court has held that First Amendment protection is a question of law over which a court should exercise *de novo* review. *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91, 108 (1990).[2]

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1. Florida is the only state to date to specifically proscribe "Computer Pornography." *See* FLA. STAT. ANN. § 847.0135 (West 1994).

2. Because Petitioner does not assert that the Statute is outside any constitutional provision other than the First Amendment, this Court need not consider any other theory. *See R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2619 (1992) (concurring opinion); *see also* L. Anita Richardson, *Obscenity, Erotica and the First Amendment*, American Bar Association Preview of the United States Supreme Court Cases, December 31, 1992, at 147 (discussing Eighth Amendment challenge); James M. Strauss, *The Second Circuit Review—1987-1988*

The trial court was correct when it granted the Domingos' motion for judgment on the pleadings because Petitioner's interactive sex program is proscribed by the Statute. Marshall may constitutionally regulate child pornography because such material is not the type of "expression" to which the First Amendment extends full protection. Further, the context of the program—child pornography—does not merit First Amendment protection. Moreover, The Statute is suitably limited to achieve the State's compelling interest of protecting children. For these reasons, the Domingos respectfully request that this Court affirm the decisions of the courts below and hold that the Statute is within the First Amendment.

A. An Interactive Computer Program Is Not The Type Of Expression To Which The First Amendment Affords Full Protection.

The First Amendment to the United States Constitution provides that Congress shall make no law which abridges the freedom of speech, or of the press. U.S. Const. amend. I; *see Gitlow v. New York*, 268 U.S. 652, 666 (1925). The right to express oneself freely is a far-reaching but limited right. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

A threshold question in evaluating the extent of First Amendment protection available to certain conduct is whether one has engaged in speech or expression at all. *See Metromedia, Inc. v. San Diego*, 453 U.S. 490, 505 (1981); *Cohen v. California*, 403 U.S. 15, 15-26 (1971). If there has been no expression of ideas or communication, the First Amendment does not afford protection to the conduct. *Cohen*, 453 U.S. at 505.

For First Amendment purposes, each medium must be assessed by standards specifically suited to it, for each medium presents its own problems. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). The Supreme Court has not articulated any precise test for determining whether a given medium, such as entertainment, is "expression." *Kaye v. Planning & Zoning Commission*, 472 A.2d 809, 810 (Conn. Super. Ct. 1983). The primary inquiry is whether the medium informs as well as entertains. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (holding that movies are protected speech as a "significant medium for the communication of ideas").

In this case, Petitioner may not successfully invoke the First Amendment because his interactive computer program is not sufficiently expressive. Further, even if the program is sufficiently expressive to merit First Amendment protection, it may be heavily regulated as "common carrier" media. Thus, Marshall may constitutionally regulate this

Term: Civil Forfeiture: Shouldn't the Punishment Fit the Crime?, 55 Brooklyn L. Rev. 417 (1989) (addressing civil-criminal dichotomy in Fourth and Fifth Amendment context).

type of speech. For these reasons, Respondents request that this Court affirm the judgments of the courts below, and hold that the Statute is within the First Amendment.

1. CERTAIN FORMS OF ENTERTAINMENT DO NOT MERIT FIRST AMENDMENT PROTECTION BECAUSE THE MEDIUM DOES NOT COMMUNICATE INFORMATION.

"Entertainment," as well as political and ideological speech, may be protected expression. *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981). To gain protected status, the entertainment must be designed to communicate some idea or information. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 505 (1981); *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring).

Courts across the country have consistently held that computer programs in the form of video games are not sufficiently expressive to be characterized as a form of speech which implicates the free speech provisions of the Constitution. *See America's Best Family Showplace Corp. v. New York Dep't of Bldgs.*, 536 F. Supp. 170 (E.D.N.Y. 1982); *Caswell v. Licensing Commission for Brockton*, 444 N.E.2d 922 (Mass. 1982); *Tommy & Tina, Inc. v. Department of Consumer Affairs*, 464 N.Y.S.2d 132 (App. Div.), *aff'd*, 464 N.E.2d 988 (N.Y. 1984); *Rothner v. City of Chicago*, 725 F. Supp. 945 (N.D. Ill.), *aff'd*, 929 F.2d 297 (7th Cir. 1991); *Kaye v. Planning & Zoning Commission*, 472 A.2d 809 (Conn. Super. Ct. 1983).

The basis for these holdings is that a video game is pure entertainment and not meant to inform. *America's Best*, 536 F. Supp. at 174. Thus, the games are not fairly characterized as a form of speech which implicates First Amendment protection. *Id.*; *see Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 857 (2d Cir. 1982). In fact, a video game is nothing more than a computer program with a rigid structure and a dedicated purpose of entertainment. *See* Christopher M. Mislow, *Computer Microcode: Testing the Limits of Software Copyrightability*, 65 B.U. L. REV. 733, 736 (1985). *See also Williams Elecs., Inc. v. Arctic Int'l, Inc.*, 685 F.2d 870, 872 (3d Cir. 1982); *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 854 (2d Cir. 1982).

Petitioner's program is essentially a video game, in substance and in technology. Both provide the user with pure entertainment rather than information; both execute a fixed set of rigid commands geared toward a dedicated purpose. *See* Steven C. Bishop, Comment, *The Case Against Copyright Protection for Programmable Logic Devices*, 68 WASH. L. REV. 139, 141 (1993).

Petitioner created a de facto child pornography video game which allows users to select children's images on a computer screen and manip-

ulate them in various sexual acts. (R. at 3.) There is no evidence in the record which indicates that Kid Stuff includes any information or ideas. Like any typical video game, it is intended solely for the user's entertainment.

Because Kid Stuff is essentially a video game, it is not entitled to First Amendment protection. Therefore, the judgment of the court of appeals should be affirmed.

2. EVEN IF THE FIRST AMENDMENT DOES APPLY TO COMPUTER BULLETIN BOARDS, THESE ARE SUBJECT TO GREATER REGULATION THAN OTHER FORMS OF SPEECH BECAUSE THEY ARE ACCESSED THROUGH TELEPHONE LINES.

Broadcasted speech is not entitled to the same First Amendment protection as other forms of speech. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (permitting regulation of radio broadcasts); *Hamling v. United States*, 418 U.S. 87 (1974) (allowing regulation of mail). These types of speech are referred to as "common carrier" media. Mark S. Nadel, *A Technology Transparent Theory of First Amendment and Access to Communications Media*, 43 FED. COMM. L.J. 157, 158 (1991).

The United States Supreme Court has considered whether the Federal Communications Commission could ban obscene and indecent "dial-a-porn" telephone messages. *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989); *accord R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992). The Court upheld the ban on obscene speech because such expression is excepted from First Amendment protection. *Sable*, 492 U.S. at 125. Child pornography, like obscenity, is without constitutional protection. *See New York v. Ferber*, 458 U.S. 747, 757 (1982). Therefore, banning such material from telephone lines is not in violation of the First Amendment.

Like the dial-a-porn considered in *Sable*, computer users access bulletin boards like Internet over telephone lines via a device called a modem. Peter D. Aufrichtig, Note, *Copyright Protection for Computer Programs in Read Only Memory Chips*, 11 HOFSTRA L. REV. 329, 337 (1982). Therefore, the lower court was correct when it held that restricting the dissemination of Petitioner's BBS program is constitutional.

B. EVEN IF THE FIRST AMENDMENT DOES APPLY TO AN INTERACTIVE COMPUTER PROGRAM, MARSHALL MAY CONSTITUTIONALLY REGULATE THE CONTENT OF PETITIONER'S KID STUFF PROGRAM BECAUSE IT CONTAINS CHILD PORNOGRAPHY.

Even if Petitioner's program is sufficiently expressive to invoke First Amendment protections, the Statute passes constitutional muster under

the First Amendment. A statute regulating the content of speech will survive judicial review if it furthers a compelling governmental interest by narrowly drawn means necessary to achieve the end. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 277 (1981); *Carey v. Brown*, 447 U.S. 455, 465 (1980).

This free speech guarantee is not, however, absolute. There are certain well-defined and narrowly limited categories of speech which states may prevent and punish without raising a constitutional problem since the communication of ideas is not involved. *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (fighting words); *see Beauharnais v. Illinois*, 343 U.S. 250, 252 (1952) (libelous speech); *Roth v. United States*, 354 U.S. 476, 486 (1957) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (incitement to riot); *New York v. Ferber*, 458 U.S. 747, 762 (1982) (child pornography).

The Supreme Court has consistently rejected the argument that obscene speech deserves First Amendment protection. *See Roth*, 354 U.S. at 486; *Miller v. California*, 413 U.S. 15, 20 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 (1973). Both the states and the federal government have long regulated the trade in sexually explicit materials under the label of "obscenity" because of its slight social value. *Roth*, 354 U.S. at 486; *see United States v. Reidel*, 402 U.S. 351, 354 (1971) (holding that 18 U.S.C. § 1461 is constitutional as applied to the distribution of obscene materials). The basis for obscenity regulation is the theory that states have the power to make a morally neutral judgment that commerce in obscene material has a tendency to injure the community as a whole. *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting).

The Supreme Court has recognized that requiring child pornography to meet the same standard as obscenity does not further the compelling interest in prosecuting those who promote sexual exploitation of children. *Ferber*, 458 U.S. at 757. Thus, a state may regulate child pornography without offending the First Amendment as long as the statute is suitably limited in scope to achieving the state's objective. *Id.* at 773. Because Petitioner's program is child pornography and merits no First Amendment protection, Marshall may constitutionally regulate it. Further, the Statute is suitably limited to achieve Marshall's compelling interest in prohibiting child exploitation. As such, the Statute is within the First Amendment. This Court should therefore affirm the decision of the court of appeals.

1. BECAUSE MARSHALL HAS A COMPELLING INTEREST IN PROTECTING CHILDREN, IT MAY CONSTITUTIONALLY REGULATE AN INTERACTIVE COMPUTER PROGRAM WHICH CONTAINS CHILD PORNOGRAPHY.

A state's interest in "safeguarding the physical and psychological well-being of a minor is compelling." *Ferber*, 458 U.S. at 756; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Legislation which protects children receives wide judicial latitude when juxtaposed against the interests protected by the Bill of Rights. *United States v. Kantor*, 677 F. Supp. 1421, 1428 (C.D. Cal. 1987). Thus, the Supreme Court has upheld legislation which protects the well-being of youth even when the laws affect constitutionally protected rights. *See, e.g.*, *Ferber*, 458 U.S. at 756; *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (upholding a statute prohibiting use of a child to distribute literature on the street despite effect on First Amendment activity); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968) (upholding a New York law protecting children from exposure to non-obscene literature).

In fulfilling their duty to protect children, the United States Supreme Court and Congress have recognized that child pornography, like obscenity, does not deserve First Amendment protection. *See Ferber*, 458 U.S. at 757. *See also* H.R. Rep. No. 536, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 492. However, child pornography is distinguished from obscenity because courts must focus on the harm suffered by the child victim, rather than on the effects of the material on the audience. *Ferber*, 458 U.S. at 757. In contrast to the *Miller v. California* obscenity standard, the trier of fact in a child pornography case need not find that the material appeals to the prurient interest of the average person; the sexual conduct portrayed need not be done so in a patently offensive manner; and the material at issue need not be considered as a whole. *Id.* at 764. In other words, child pornography need not meet the *Miller* definition of obscenity in order to be constitutionally regulated. *See Miller*, 413 U.S. at 20 (articulating obscenity standard).

The *Ferber* Court held that the states are entitled to great leeway in the regulation of child pornography. 458 U.S. at 756. The Court identified five factors which justify this leeway: (1) a state's interest in safeguarding the well-being of minors is "compelling"; (2) distribution of child pornography is intrinsically related to sexual abuse of children; (3) the distribution of child pornography provides an economic motive for its production; (4) the value of permitting child pornography is exceedingly modest, if not de minimis; (5) classifying child pornography as outside the protection of the First Amendment is compatible with precedent. *Id.* at 356-64.

In response to *Ferber*, Congress amended the Federal Child Pornography Statute to eliminate the requirement that the visual depiction of the minor engaged in sexual conduct be obscene. H.R. Rep. No. 536, 98th Cong., 2d Sess. 2, 7, *reprinted in* 1984 U.S.C.C.A.N. 492-493; *see* 18 U.S.C. §§ 2251-2254 (1988 & Supp. 1993). Many states followed suit in their child pornography statutes. *See, e.g.*, ILL. ANN. STAT. ch. 720, § 5/ 11-20.1 (Smith-Hurd 1994); GA. CODE ANN. § 16-12-100 (1994); FLA. STAT. ANN. § 827.071 (West 1994). Accordingly, child pornography has become obscene per se.

Applying *Ferber*, courts have held that several different types of material constitute "child pornography" and are thus subject to governmental regulation. In *Illinois v. Lerch*, the court found "child pornography" where the defendant photographed his six-year-old child in the nude with her pubic area exposed. 480 N.E.2d 1253 (Ill. App. Ct.), *appeal denied*, 483 N.E.2d 888 (Ill. 1985). Similarly, the Eighth Circuit found "child pornography" where the defendant videotaped a 16-year-old girl wearing only a see-through scarf and focused on her genitals. *United States v. Freeman*, 808 F.2d 1290, 1292 (8th Cir.), *cert. denied*, 480 U.S. 922 (1987).

In this case, Kid Stuff is child pornography because it uses the photographs of *real* children to depict simulated sexual scenarios. (R. at 3.) The children's faces and bodies can be combined with computer-generated images of body parts to show the child engaged in fellatio, sodomy, masturbation, cunnilingus, or foreplay and intercourse. (R. at 3.) In particular, a picture of 16-year-old Dede Domingo was scanned into this interactive sex program and released into a database accessible to the public. (R. at 2-3.)

Petitioner argues that the Supreme Court intended to draw a distinction between images that were created by using an actual child actor and those that were not when it stated that "depictions of sexual conduct, not otherwise obscene, which do not involve live performances or . . . visual reproduction of live performances, retain First Amendment protection." *Ferber*, 458 U.S. at 765; *see* John Quigley, *Child Pornography and the Right to Privacy*, 43 FLA. L. REV. 347, 392 (1991).

This argument should fail. Although the *Ferber* Court did rely heavily on the harm associated with actual participation of children in sexual acts, its rationale was not limited to physical abuse. The Court recognized that a major component of child pornography is the extensive emotional harm to the child. 458 U.S. at 759 n.10. Specifically, when a child's image is used in pornography, it: (1) arouses feelings that the child does not have the experience with which to cope; (2) degrades the child's self-image; (3) suggests that the child wanted to engage in the conduct and, therefore, is willing to participate in real sexual experiences; (4) makes the child vulnerable to sexual dependency; (5) inhibits

healthy sexual functioning in later life; (6) invades the child's privacy; and (7) distorts the child's sense of what is appropriate behavior. SHIRLEY O'BRIEN, CHILD PORNOGRAPHY at xi-xii (1983). *See generally* U.S. Dep't of Justice, *Beyond the Pornography Commission: The Federal Response* (1988).

Prohibiting computer-generated child pornography directly advances Marshall's interest. *See* David B. Johnson, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311 (1982). Regulation of computer-generated child pornography will prevent pedophiles from using these images to seduce children into sexual activity. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990); 1 U.S. Dep't of Justice, *Attorney General's Commission on Pornography: Final Report* 646, 649-50 (1986). In addition, child pornography laws will be rendered ineffective if the market is flooded with computer-generated child pornography; as the technology becomes more advanced, computer pornographic images will become indistinguishable from real children's photographs. *See* Johnson, *supra*, at 311. As such, law enforcement efforts against this sexual abuse of children will become nearly impossible. *Id.* Although Dede was not physically abused, she suffered significant harm. She and at least one of her friends saw her portrayed in graphic sexual acts. (R. at 4.) These sexual scenarios could be accessed by her other friends at school as well as by strangers. Therefore, Dede has been exposed to the betrayal and emotional harm associated with child pornography. For these reasons, this Court should affirm the judgments of the courts below.

2. BECAUSE THE STATUTE IS LIMITED TO ACHIEVE THE COMPELLING INTEREST OF PROTECTING CHILDREN, IT IS NOT VAGUE OR OVERBROAD.

Statutes which restrict or burden free speech must be narrowly drawn. *Cinema I Video v. Thornburg*, 351 S.E.2d 305, 313 (N.C. Ct. App.), *aff'd*, 358 S.E.2d 383 (N.C. 1989); *see Widmar v. Vincent*, 454 U.S. at 274. Courts, however, must construe a statute to avoid constitutional problems unless such construction is plainly contrary to the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

To convey an adequate warning under the Constitution, a statute need not satisfy "impossible standards" of precision; rather, the language must convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *United States v. Petrillo*, 332 U.S. 1, 8 (1947). In order to overcome First Amendment protection, the *Ferber* Court required that child pornography statutes "adequately define" the conduct to be prohibited. 458 U.S. at 764. Fur-

ther, the "sexual conduct" proscribed must also be suitably limited and described. *Id.* In other words, the statute must comply with the related doctrines of overbreadth and vagueness.

OVERBREADTH

The overbreadth doctrine allows a person to whom a statute may constitutionally be applied to challenge it on the ground that it may be unconstitutional when applied to situations not before the Court. *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989); *see United States v. Raines*, 362 U.S. 17, 21 (1960). The overbreadth doctrine is "strong medicine" and should be employed "only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Before a statute will be invalidated on its face, the overbreadth involved must be "real" and "substantial." *Broadrick*, 413 U.S. at 615; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976). Thus, even if there are some situations in which a statute would infringe on the First Amendment, it is inappropriate to invalidate a statute if it covers a whole range of constitutionally proscribable conduct. *United States Civil Serv. Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548, 580-81 (1973); *see* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 860-61 (1970) (observing that few laws are devoid of potential for unconstitutionality in some application).

A statute is not overbroad if it provides a broad range of permissible exceptions to the prohibited speech. *See Osborne v. Ohio*, 495 U.S. 103, 112 (1990). In *Osborne*, the statute's definition of "nudity" was limited by the Court to avoid penalizing persons for possessing innocuous photographs of naked children. *Id.* As a result, the Court held that the Ohio statute survived overbreadth scrutiny. *Id.* at 114. Similarly, a statute which lists the forbidden acts with precision and sufficiently describes a category of material which is not entitled to First Amendment protection is not overbroad. *Ferber*, 458 U.S. at 773 (holding N.Y. PENAL LAW art. 63 (McKinney 1980) constitutional). The Marshall Statute lists with precision the material and activities prohibited. Therefore, the Statute survives overbreadth scrutiny.

VAGUENESS

A law is unconstitutionally vague if persons of common intelligence must guess at its meaning or differ as to its application. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *Illinois v. Calvert*, 629 N.E.2d 1154, 1159 (Ill. App. Ct. 1994). Conversely, a statute is not vague if it is explicit enough to serve as a guide to those who must comply with it. *Calvert*, 629 N.E.2d at 1159.

In *United States v. Freeman*, the defendant violated the Federal Child Protection Act when he videotaped a nude 16-year-old girl, focusing on her genitals. 808 F.2d 1290, 1292 (8th Cir.) (construing 18 U.S.C. § 2252 (1988 & Supp. 1993)), *cert. denied*, 480 U.S. 922 (1987). The court rejected the defendant's argument that the phrase "lascivious exhibition of the genitals" was unconstitutionally vague. *Id.*; *see United States v. Langford*, 688 F.2d 1088, 1090 (7th Cir.), *cert. denied*, 461 U.S. 959 (1983). The court stated: "We fail to see how men of reasonable intelligence, guided by common understanding and practices, would believe that such conduct is permissible." *Freeman*, 808 F.2d at 1292; *accord United States v. Reedy*, 845 F.2d 239, 241 (10th Cir.), *cert. denied*, 489 U.S. 1055 (1988).

Similarly, the Ninth Circuit held that the Protection of Children Against Sexual Exploitation Act was not unconstitutional for including "actual or simulated bestiality and sadistic or masochistic abuse." *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1288-89 (9th Cir. 1992).[3] The court also upheld the term "lascivious" because it is a common sense term whose constitutionality was specifically upheld in *Miller v. California* and in *Ferber*. *Id.*; *United States v. Wiegand*, 812 F.2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987).

State child pornography statutes which suitably limit and describe the category of "sexual conduct" proscribed have been upheld. In *Ferber*, the New York child pornography statute limited the prohibited sexual conduct to "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." 458 U.S. at 751. Similarly, the Illinois child pornography statute described the prohibited conduct as actual or simulated sexual intercourse; masturbation; lewd fondling; any act of excretion or urination within a sexual context; sadistic, masochistic, or sadomasochistic abuse in any sexual context; or any lewd exhibition of the unclothed genitals, pubic area or buttocks. *See Illinois v. Ewen*, 551 N.E.2d 426, 430 (Ill. App. Ct.), *appeal denied*, 555 N.E.2d 379 (Ill.), *cert. denied*, 498 U.S. 854 (1990) (construing ILL. ANN. STAT. ch. 720, § 5/11-20.1 (Smith-Hurd 1994)). Such description was held to be sufficient to give notice of the prohibited material, and thereby avoid being struck for vagueness. *Id.*

The Statute is not overbroad or vague because it suitably limits the unlawful conduct. The Statute defines child pornography as "(1) [a]ny material or performance [in which] . . . (b) the work depicts or describes fornication, sadomasochistic sexual acts, masturbation, excretory functions, or lewd exhibition of the genitals, whether normal or perverted,

3. The United States Supreme Court recently granted certiorari in this case on the issue of scienter. *See* 114 S. Ct. 1186 (1994).

actual or simulated, and involves a person under the age of eighteen . . . ." *See* Appendix A. The list of proscribed sexual conduct by a minor in part (1)(b) of the definition closely mirrors that of the child pornography statutes held constitutional above. Thus, the Statute's regulation of material which depicts these activities and involves a person under the age of 18 is not a violation of the First Amendment.

In fact, the Statute provides even *more* First Amendment protection than *Ferber* mandates because it requires that child pornography satisfy aspects of the more stringent obscenity standard. *See Ferber*, 458 U.S. at 764. An Illinois child pornography statute, which, like the Marshall Statute, included the three-part obscenity test in its definition of child pornography, was upheld as constitutional. *See Illinois v. Lerch*, 480 N.E.2d 1253, 1257 (Ill. App. Ct.), *appeal denied*, 483 N.E.2d 888 (Ill. 1985).[4] Similarly, in *American Booksellers Ass'n, Inc. v. Superior Court*, the court addressed a California child pornography statute and held that the term "prurient interest" provided sufficient notice of the type of material proscribed. 181 Cal. Rptr. 33, 36 (Ct. App. 1982).

The Statute, like the California and Illinois statutes, incorporates parts of the *Miller* obscenity standard in its definition of child pornography. *See* Appendix A. As a result, Marshall's child pornography statute protects an individual's First Amendment rights to a greater extent than *Ferber* requires and to a greater extent than child pornography statutes which, without such obscenity requirements, have been held constitutional. For these reasons, this Court should find Marshall's statute constitutional, and affirm the courts below.

II. THE MARSHALL COURT OF APPEALS CORRECTLY HELD THAT PETITIONER IS LIABLE UNDER THE MARSHALL CHILD PORNOGRAPHY STATUTE SINCE HE CREATED AND DISSEMINATED CHILD PORNOGRAPHY.

Petitioner maintains that even if his sexually graphic computer program can be constitutionally proscribed, he is not liable under the Statute. (R. at 7.) Petitioner's claim is a matter of statutory construction; therefore, this Court should review *de novo* the questions of law in this case. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

Words used in a statute are symbols of communication and are not invested with the quality of a scientific formula. *See Utah v. Jordan*, 665 P.2d 1280, 1286 (Utah), *cert. dismissed*, 464 U.S. 910 (1983). It is enough that they can be construed with reasonable certainty. *Id.* Where

4. The current Illinois child pornography statute, ILL. ANN. STAT. ch. 720, § 5/11-20.1 (Smith-Hurd 1994), contains no requirement that the material proscribed be "obscene."

the language used in a child pornography statute is modified by other qualifying purposes, these qualifiers will be used to construe the statute narrowly so as to achieve its purpose. *Id.* at 1284. *See Payne v. Kentucky*, 623 S.W.2d 867, 870-71 (Ky. 1981), *cert. denied*, 456 U.S. 909 (1982).

The Illinois Supreme Court construed a child pornography statute strikingly similar to the one before this Court. *See Illinois v. Geever*, 522 N.E.2d 1200, 1205 (Ill.), *cert. dismissed*, 488 U.S. 920 (1988). The *Geever* court stated that a court is to consider a statute in its entirety and give effect to the legislature's intent in construing a statute. *Id.* When that legislative purpose is indicated from the context of the statute as a whole, a defendant may not isolate a word from its context in order to give it a new meaning. *See, e.g., Arizona v. Shepler*, 684 P.2d 924, 925-26 (Ariz. Ct. App. 1984) (holding that statute's use of plural did not prevent conviction resulting from child pornography involving one minor).

The purpose of the Statute is clear on its face: to prevent sexual abuse and exploitation of children, and effectively eliminate the resulting physical and psychological harms, by destroying the market for child pornography. *See Osborne v. Ohio*, 495 U.S. 103, 109 (1990). The means for achieving this goal are set forth in the Statute by prohibiting the creation of child pornography and by prohibiting its distribution to minors. *See* Appendix A; *see also Geever*, 522 N.E.2d at 1206; *Illinois v. Spargo*, 431 N.E.2d 27, 31-32 (Ill. App. 1982); *Illinois v. Lerch*, 480 N.E.2d 1253, 1259 (Ill. App. Ct.), *cert. denied*, 483 N.E.2d 888 (1985).

The Marshall Legislature provided a broad means for eliminating the harms to children attributable to such sexual depictions, regardless of the medium used. Petitioner's action in creating images of Dede and other children engaged in sexual activity via an interactive computer program constitutes the creation of child pornography. His action in placing these images on a computer bulletin board easily accessed by children constitutes dissemination of child pornography under the Statute. Therefore, Petitioner's actions were the type that the Marshall Legislature intended to punish. Accordingly, this Court should affirm the lower court's decision that Petitioner is liable under the Statute.

A. Petitioner's Interactive Computer Program Which Depicts Children Engaging In Graphic Sexual Acts Constitutes Child Pornography Under The Laws Of Marshall.

The Statute initially requires the material in question to meet the Statute's definition of child pornography. (R. at 5.) This requirement comports with the Supreme Court's holding in *New York v. Ferber* which held that states could enact statutes prohibiting child pornography. 458 U.S. at 764; *see, e.g., Washington v. Shuck*, 661 P.2d 1020, 1022 (Wash.

Ct. App. 1983) (affirming a conviction under a Washington statute defining prohibited conduct as depiction of children in actual or simulated sexually explicit activity, and specifically listing masturbation, sadomasochistic abuse, and lewd exhibition of the genitals); *Griffin v. Florida*, 396 So. 2d 152 (Fla. 1981) (upholding statutory definition of child pornography to include both actual and simulated depictions).

The Statute sets out the prohibited material, described with sufficient precision to give adequate notice as *Ferber* requires. *See Ferber*, 458 U.S. at 764-65; Appendix A. This definition involves a three-pronged test for determining whether material constitutes child pornography. *See* Appendix A. First, the material must appeal solely to the viewer's prurient interest. *Id.* Next, the material must depict sexual practices involving a child under the age of 18. *Id.* Last, the material must lack serious literary, artistic, and political value. *Id.*

Because Petitioner's interactive computer program permits the user to select from a variety of actual children's pictures, and then to manipulate those images so that the selected child engages in various sex acts, the Kid Stuff program meets the statutory definition. Therefore, the court below was correct when it held that the interactive computer program constitutes child pornography.

1. PETITIONER'S PROGRAM APPEALS SOLELY TO THE VIEWER'S PRURIENT INTEREST.

The Supreme Court held that "prurient appeal" is one element of obscenity. *FCC v. Pacifica Found.*, 438 U.S. 726, 740 (1978). The text of the Statute indicates that the legislature chose to require this single element, but not the entire set of elements required for a finding of obscenity. *Compare* Appendix A *with Miller v. California*, 413 U.S. 15, 23-24 (1973).

While the *Ferber* Court indicated that, unlike obscenity, the definition of child pornography did not require an appeal to the prurient interest as an element, the states are not precluded from including this component in their statutory definitions of child pornography. *See Ferber*, 458 U.S. at 764. Inclusion of the phrase does not indicate that the legislature intended that material meet the test for obscenity; rather, it merely serves to increase protection of defendants in child pornography cases. *See id.*

A statute need not define "prurient." *See Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1026 (5th Cir. Unit A June 1981), *cert. denied sub nom. Theatres West, Inc. v. Holmes*, 455 U.S. 913 (1982); *Leach v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 749-50 (Tenn. 1979). Instead, "prurient" commonly means that which appeals to the shameful or morbid interest in sex. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S.

491, 491 (1985); *Roth v. United States*, 354 U.S. 476, 491 (1957). In *New York v. P.J. Video, Inc.*, for example, the Supreme Court focused on the conduct depicted (cunnilingus, fellatio, intercourse, and ejaculation on the face) and concluded that the material was prurient. 475 U.S. 868, 878-79 (1986).

The Supreme Court analyzed the meaning of "prurient" in *Mishkin v. New York*, 383 U.S. 502, 508 (1966). The petitioner in *Mishkin* argued that his sexually explicit material did not meet the definition of "prurient" because only a limited group of individuals would become aroused by the material. *Id.* at 508. The Court stated that material has prurient appeal if the dominant theme of the material, taken as a whole, appeals to the prurient interest in sex of the members of its intended recipient group. *Id.* at 508-09; *see Illinois v. Lerch*, 480 N.E.2d 1253, 1254 (1985); *American Booksellers Ass'n, Inc. v. Superior Court*, 181 Cal. Rptr. 33 (Ct. App. 1982).

Like the material in *Mishkin* and *P.J. Video*, Petitioner's program is targeted at a very limited group who are aroused by sex with children. The program provides no information; instead, the viewer may manipulate images of children to engage in sodomy, masturbation, fellatio, cunnilingus, and other sexual acts. (R. at 3, 4.) As such, the depictions are prurient, and the lower court was correct when it held these depictions to be child pornography. For these reasons, this Court should affirm the courts below.

2. PETITIONER'S PROGRAM DEPICTS SEXUAL PRACTICES INVOLVING AN ACTUAL CHILD UNDER AGE 18.

The Statute specifies that to constitute child pornography, the prohibited material must depict or describe fornication, sadomasochistic sexual acts, masturbation, excretory functions or lewd exhibition of the genitals, whether normal or perverted, actual or simulated; and that the material must involve a person under the age of 18 engaged in such acts. *See* Appendix A. The depictions for which Petitioner was found liable satisfy this element of the definition.

Petitioner admitted that his sex program permitted the user to manipulate Dede Domingo's image in sexually graphic scenarios. (R. at 3, 6.) Any person of ordinary intelligence would readily conclude that the sexual depictions constitute prohibited conduct under the plain meaning of the Statute. *See Arizona v. Limpus*, 625 P.2d 960, 964 (Ariz. Ct. App. 1981); *Griffin v. Florida*, 396 So. 2d 152, 154 (Fla. 1981).

It is undisputed that Dede Domingo was under age 18 when Petitioner scanned her photograph into his pornographic program. (R. at 2-3.) Furthermore, Petitioner employed her just three months before as a child model and knew that she was a minor because her parents signed

the contract permitting the use of Dede's photographs. (R. at 2.) For these reasons, this Court should affirm the trial court's determination that the sex program's depictions met this element of the Statute's definition of child pornography.

3. PETITIONER'S INTERACTIVE COMPUTER PROGRAM WHICH DEPICTS GRAPHIC SEXUAL ACTIVITY BY CHILDREN LACKS SERIOUS LITERARY, ARTISTIC AND POLITICAL VALUE.

The Statute also inquires into whether the material lacks serious literary, artistic, political or scientific value. *See* Appendix A. Although not required, the inclusion of this element does not invalidate the Statute as a permissible restriction on child pornography or transform the Statute into one that must meet the obscenity test. *See, e.g.*, *Ohio v. Meadows*, 503 N.E.2d 697, 703 (Ohio), *cert. denied*, 480 U.S. 936 (1986). A state's purpose in including this element is to exempt from liability uses having a bona fide artistic, medical, educational, judicial, or other proper purpose. *See Osborne*, 495 U.S. at 114 nn.9, 11.

There is a paucity of discussion by both federal and state courts of the meaning of "serious literary, artistic, political, or scientific value." Edward J. Main, *The Neglected Prong of the Miller Test for Obscenity: Serious Literary, Artistic, Political, or Scientific Value*, 11 SO. ILL. L. REV. 1159, 1165 (1986). The Supreme Court has focused on the creator's intent to produce a serious work as a whole; as long as an individual has "something to say," he ought to be allowed to say it as long as his intent is sincere. *See Kois v. Wisconsin*, 408 U.S. 229, 231 (1972); *see also Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1362-63 (5th Cir.), *cert. dismissed*, 447 U.S. 931 (1980). For example, in *Illinois v. Lerch*, the defendant's contention that photographs depicting a mother lying on top of her six-year-old had artistic merit was rejected. 480 N.E.2d 1253, 1260 (1985).

In this case, Petitioner has neither asserted nor demonstrated that his graphic sexual portrayals of Dede Domingo has any serious value. Any such value, if it exists at all, is certainly negligible. Thus, Petitioner's program easily meets prong three of the Statute's definition. For these reasons, this Court should affirm the order granting the Domingos' judgment on the pleadings.

B. DEVELOPING A COMPUTER PROGRAM DEPICTING CHILDREN IN SEXUALLY EXPLICIT SCENARIOS CONSTITUTES CREATION OF CHILD PORNOGRAPHY IN VIOLATION OF THE MARSHALL STATUTE.

In the last decade, technology has changed dramatically. The number of personal computers in offices rose more than twenty fold in

just the 11 years from 1981 to 1992. George Gilder, LIFE AFTER TELEVISION: THE COMING TRANSFORMATION OF MEDIA AND AMERICAN LIFE 45 (rev. ed. 1994). Use in homes rose more than one-hundredfold. *Id.* Between 1989 and 1993, the portion connected to networks rose from under 10 percent to over 60 percent. *Id.* Likewise, the digital imaging capability of computers has become highly sophisticated, and will continue to improve. Because these images are practically indistinguishable from real films and photographs, the harms to children like Dede have not changed from those discussed over a decade ago in *Ferber*. *See* 458 U.S. at 747, 759. For this reason, the Marshall Legislature enacted a statute broad enough to encompass all pornographic depictions involving children, including computer graphics. *See* Appendix B.

Petitioner created a computer program for the sole purpose of animating images of real children engaged in sexual acts and depicted Dede Domingo engaged in simulated sexual acts. Therefore, Petitioner's development of the interactive sex program constitutes creation of prohibited material under the Statute. For these reasons, this Court should affirm the judgment of the court of appeals.

1. AS THE AUTHOR OF THE KID STUFF PROGRAM CODE, PETITIONER WAS THE CREATOR OF THE PROGRAM'S CHILD PORNOGRAPHY.

Petitioner does not dispute that Internet subscribers across the country are able to access visual images of Dede Domingo engaged in masturbation, cunnilingus, fellatio, and sodomy. (R. at 3, 6.) He asserts that he did not create child pornography because, although he created the computer codes which produced the sexual animations, he did not personally place the image of Dede Domingo's head upon the sexually engaged bodies. (R. at 7.) Petitioner argues that because his program is an interactive one, it is the user who determines what shall be depicted in the images, and that, therefore, it is the program user who creates pornography, not Petitioner. (R. at 7.)

Courts have rejected this overly rigid interpretation of the term "create" when analyzing the development of computer programs. The elements of a computer program, such as the source and object code, are "authored" by the person who compiles them into a specific program. *See Apple Computer v. Franklin Computer*, 714 F.2d 1240, 1249 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 698 (2d Cir. 1992) (holding that "creation" of a computer program extends to the non-literal elements of the program).

Cases resolving the issue of computer program "creation" for the purpose of copyright are analogous here. In *Softel, Inc. v. Dragon Medical & Scientific Communs., Inc.*, No. 87 Civ. 0167 (S.D.N.Y. June 29, 1992), the district court examined the issue of creation of interactive

computer programs in a copyright context. *Id.* The court held that the person who writes the code of an interactive computer program is the creator of that program for the purpose of a copyright. *Id.* at 16-17. While the court did not address the issue of whether users could be considered "creators," the court found that persons who contribute ideas and design to the program, but do not contribute to the writing of the actual code, are not "creators." *Id.* at 16-17; *see also S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1086-87 (9th Cir. 1989) (holding that computer programmer is the sole author of the program he creates).

Petitioner's argument is also comparable to that of the defendant in *United States v. Smith*, 795 F.2d 841 (9th Cir.), *cert. denied*, 481 U.S. 1032 (1986). Smith argued that his unprocessed, undeveloped film of unclothed girls did not constitute a "visual depiction" within the meaning of the statute under which he was charged. *Id.* at 846; *see also* 18 U.S.C. § 2251(a) (1988 and Supp. 1993). The Ninth Circuit rejected this argument, stating that the issue was not whether the film actually reached the point of "visual depiction," but whether the defendant intended to produce such visual depictions. *Smith*, 795 F.2d at 847; *see Kansas v. Peltier*, 819 P.2d 628, 643 (Kan. 1991).

The fact that Petitioner's "unprocessed, undeveloped" computer binary codes, while still in his control, may not reach the point of a "visual depiction" of a sexually engaged child does not relieve him of liability under the Statute. Petitioner, like the defendant in *Smith*, admits that the purpose of these codes is to produce pornographic images of children via graphic sexual animations. *See* (R. at 2-3). As such, Petitioner created child pornography. For these reasons, this Court should uphold Petitioner's liability under the Statute.

2. THE PROGRAM USED AN ACTUAL PHOTOGRAPH OF DEDE AND DEPICTED HER ENGAGING IN SIMULATED SEXUAL ACTS.

Petitioner challenges his liability as a creator of child pornography since he created pornographic digital computer images instead of photographing a child actually engaged in sexual conduct. (R. at 7.)

The Statute specifically imposes liability for creation of child pornography even when the conduct is "simulated." *See* Appendix A. The Supreme Court of Utah has addressed the meaning of "simulated" sexual conduct as it relates to child pornography. *Utah v. Jordan*, 665 P.2d 1280, 1285-86 (Utah), *cert. dismissed*, 464 U.S. 910 (1983). The *Jordan* court found that under the common definition of the word, "simulated" means "to assume the outward qualities or appearance of [usually] with the intent to deceive." *Id.* (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY (1976)). Applying this definition to a child pornography case, the court found that the language "simulated sexual conduct" is "sufficiently

clear to convey a warning as to the proscribed conduct when measured by common understanding and practices." *Id.*; *see United States v. Petrillo*, 332 U.S. 1, 8 (1947).

In the present case, the Statute's plain language and context gave clear notice that Marshall prohibited visual depictions of a child engaged in sexual conduct. *See* Appendix A. A state's compelling interest in protecting children is sufficient to apply a child pornography statute broadly to include any use of children as subjects of pornographic material, even if no actual sexual conduct occurs. *See Jordan*, 665 P.2d at 1287. When measured by common understanding and practices, Petitioner's computer program, which uses Dede's image taken from an actual photograph, and generates lifelike sexual animations of her, is recognizable as child pornography.

Petitioner admits that he used Dede's image by scanning photographs he took of her modeling a bikini into the computer. (R. at 3.) This scanning process uses actual photographs which are reduced to computer binary codes and can be manipulated with image processing programs. *See generally* PHILLIP ROBINSON & NANCY TAMOSAITIS, THE JOY OF CYBERSEX 9 (1993). By writing specific codes, Petitioner developed a program capable of manipulating Dede's image, and simulating sexual performances in which Dede appears by supplying the missing details and necessary animation for these acts. (R. at 3, 6.) Because creation of this program constitutes creation of child pornography, this Court should affirm the judgment of the courts below.

C. PETITIONER DISSEMINATED CHILD PORNOGRAPHY TO A CHILD IN VIOLATION OF THE MARSHALL STATUTE.

Computers are now among the most common technologies in America. George Gilder, LIFE AFTER TELEVISION: THE COMING TRANSFORMATION OF MEDIA AND AMERICAN LIFE 175 (rev. ed. 1994). The census bureau reports that by October 1989, of children between ages 3 and 17, 46 percent used a computer either at home or at school. *Id.* One commentator has noted that the problem of access by minors to online pornography is growing. *See* Charles D. Baker, *Offenses Against Minors: Prohibit the Electronic Furnishing of Obscene Material to Minors*, 10 GA. ST. U.L. REV. 104, 112 (1993) (citing *Computer Porn Problem Grows Digitally in the U.S.*, TORONTO STAR, Mar. 15, 1993, at C5).

To protect youth from child pornography in this age of technology, Marshall incorporated into the Statute a stringent control on communicative material available to minors when that material involves sexual depictions of children. *See* Appendix A. The Statute prohibits knowing or reckless dissemination of child pornography to a minor. *Id.* By failing to impose sufficient procedures to impede access, Petitioner recklessly

disseminated child pornography to children. (R. at 3, 4-5.) For these reasons, this Court should affirm the lower court's holding that Petitioner is liable for dissemination.

1. As a systems operator on a computer billboard, Petitioner disseminated child pornography to children.

The Statute assigns liability for dissemination of child pornography to a minor when a person recklessly or knowingly distributes child pornography, or causes it to be supplied or distributed. *See* Appendix A. Petitioner maintains he did not disseminate child pornography to minors under the statute because, as the computer bulletin board system (BBS) operator, he merely included a program on a computer bulletin board onto which a user must actively enter to access a particular program. (R. at 7.)

A systems operator ("sysop") does not, however, play a passive role in the computer industry. While the end user temporarily controls the computer program through system commands, this "control" is strictly limited to the program that is made available *by the sysop*. Dennis Fiery, *Secrets of a Super Hacker* 105 (1994). One court discussed the sysop's responsibility as the disseminator of material placed on the BBS for access by users. *See Steve Jackson Games, Inc. v. United States Secret Serv.*, 816 F. Supp. 432 (W.D. Tex. 1993). The court recognized that a sysop had the ability to review anything on the system, and, more importantly, the ability to delete any documents or information from the BBS. *Id.* at 435-36. The court also found that material available on a BBS is disseminated when a caller logs into the bulletin board, and receives the available information. *Id.* at 442.

As a sysop, Petitioner made Kid Stuff available to users of his BBS. (R. at 3-4.) Petitioner personally handled all subscriptions and was responsible for issuing PINs for access to the programs. (R. at 3-4.) Were it not for Petitioner's actions, the pornographic images of Dede Domingo would never have been released. As such, Petitioner became liable for the dissemination of child pornography to Dede Domingo when she logged onto the program Kid Stuff. For this reason, this Court should affirm the courts below.

2. Petitioner recklessly allowed minors access to his pornographic program.

The Statute states that a person is "reckless," and thus liable under the Statute, when he "fails to take adequate means to prevent the dissemination" of pornographic materials to minors. *See* Appendix A. "Reckless" may also mean an awareness and conscious disregard of a

substantial risk that the prohibited circumstances exist. *Arizona v. Jannamon*, 819 P.2d 1021, 1024 (Ariz. 1991).

Petitioner would have this Court believe that he may not be held liable under the Statute because he required proof of age from subscribers to prevent children from accessing the program. (R. at 7.) The record in this case and precedent from other courts, however, suggests otherwise.

As a sysop on an interactive computer network, Petitioner was responsible for verifying that disseminations were made properly. *See Steve Jackson Games*, 816 F. Supp. at 435, 442. In addition, as a computer insider, he was aware that improper use of passwords and access without passwords are common. *See* FIERY, SECRETS OF SUPER HACKER 40 (1994).

Petitioner assigned passwords to users based on answers to an on-screen questionnaire and a photocopy of age identification sent to him by mail or facsimile. (R. at 3.) He made no attempt to verify or corroborate the information supplied by would-be users. *Id.* He merely assumed the information was true. *See id.* Without more, Petitioner's method of assuring the majority of potential users sinks to the level of recklessness, because the only methods he employed were inherently unreliable. This fact is demonstrated by the record; John Sawyer, all of 16 years old, skirted Petitioner's inadequate "safeguards" by the simplest, unsophisticated means.

Further, even if the age information sent to Petitioner was correct, he had no method to ensure that the approved user was the only one to access the program. *Id.* In this case, Petitioner received false information from John Sawyer, and failed to even attempt to verify it. *Id.* Later, Dede Domingo easily accessed the program by using a borrowed PIN. *Id.* Had Petitioner implemented adequate measures of security, neither child would have been able to do so. Because Petitioner failed to take adequate means to prevent his pornography from being accessed by minors, this Court should affirm the trial court's determination that Petitioner is liable for reckless dissemination under the Statute.

CONCLUSION

The influx of technological advancements into the business of producing and distributing sexually explicit material requires the application of regulatory policies to address these innovations. Sexually explicit material has taken the form of television programming, telephone messages, and computer-generated messages. Like the traditional forms of sexually explicit material—books, magazines and films—these new forms pose a significant threat to children.

This Court should continue the judicial and legislative trend of protecting children from child pornography by holding Petitioner accountable under the Statute. For these reasons, Respondents request that this Court affirm the judgments of the courts below.

APPENDIX A

Marshall Revised Statutes
Obscenity, Pornography, Child Pornography
Chapter 45

§ III. Child Pornography:

¶ A. Child Pornography Defined

1. Any material or performance constitutes child pornography if:

(a) the work appeals to the prurient interest;

(b) the work depicts or describes fornication, sadomasochistic sexual acts, masturbation; excretory functions or lewd exhibition of the genitals, whether normal or perverted, actual or simulated and involves a person under the age of eighteen engaged in such acts; and

(c) the work, lacks serious literary, artistic, pclitical or scientific value.

2. Any person who creates or disseminates child pornography will be liable for not less than $50,000.00 for each individual offense.

¶ B. A person creates Child Pornography when he or she videotapes, films, photographs, or otherwise uses, depicts, displays or portrays by means of any visual medium or reproduction, stage play or live performance, any child whom he or she knows or reasonably should know to be under the age of eighteen, actually or by simulation engaged in any act or conduct defined in ¶ A herein, alone or with other children or adults.

¶ C. A person disseminates child pornography to a minor when he or she recklessly or knowingly supplies, distributes, displays or exhibits, or by his or her recklessness causes to be supplied, distributed or displayed or exhibited, to anyone under the age of eighteen years, any material or performance described in ¶ A herein. For purposes of this section, a person is reckless who fails to take adequate means to prevent the dissemination of pornographic materials described herein to anyone under eighteen years of age.

¶ D. Civil Action by Parent or Guardian:

(1) A parent or legal guardian of a minor child used in the creation of child pornography as defined herein may bring a cause of action for damages on behalf of said child in an amount not less than $50,000.00 for each individual violation of paragraph B of this section.

(2) A parent or legal guardian of a minor child to whom child pornography has been disseminated as defined herein may bring a cause of action for damages on behalf of such minor child in an amount not less than $50,000.00 for each individual violation of paragraph C of this section.