No First Amendment Protection for “Morphed” Child Pornographic Photos

By Grace M. Colonnese, J.D.

In one of the first major federal decisions to address “morphing,” the United States Court of Appeals for the Second Circuit held that images of children morphed into pornography could constitute child pornography. The court specifically held that (1) child pornography created by digitally altering sexually explicit photographs of adults to display the face of an actual child is not protected speech under the First Amendment and (2) that the imposition of an enhanced sentence is proper when the images portrayed are of a sadistic or masochistic nature.

In United States v. Hotaling, the defendant digitally altered and created sexually explicit images of six minor females by a process known as “morphing.” Morphing is a technological process that allows a computer user to distort, compress, or transform one picture into another. Morphing, which derived from the word “metamorphosis,” has quickly become part of many computer-savvy users’ language. Morphing software is extensively used in the creation of movies, commercials, television programs, and music videos. The quickly expanding market of digital technology has allowed many people to purchase morphing software at relatively little expense.

The process of morphing is quite simple; the software allows computer users to morph images in minutes. A computer user only needs to provide two photographs, match up certain points on a matrix graph, and command the program to superimpose one photo on to the other. The case with which “morphing” technology can be exploited by child pornographers has led to tension between individual rights under the First Amendment of the U.S. Constitution and the constantly evolving statutory prohibitions against child pornography.

In this case, the defendant obtained one girl’s photograph from a computer he had been repairing for her family and the other five photographs were taken by his daughter and her friends. The heads of the minor girls were cut from the original photograph and superimposed over the bodies of women engaged in sexually explicit behavior. One photograph, in particular, displayed an image of a minor that appeared to be partially nude, handcuffed, shackled, wearing a collar and leash, and tied to a dresser.

The defendant was convicted for knowingly possessing material that contained an image of child pornography under 18 U.S.C. § 2252A(a)(5)(8). To address morphing, Congress had defined child pornography under 18 U.S.C. § 2256(8) to include: “[A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where . . . such visual depiction has been created,
adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct.\textsuperscript{15}

The defendant's sentence was enhanced using the United States Sentencing Guidelines Manual § 2G2.2(b)(4).\textsuperscript{16} The defendant appealed his conviction, arguing the court erred in holding that the First Amendment does not protect child pornography created by digitally altering sexually explicit photographs of adults to display the face of a child and the imposed enhanced sentence.\textsuperscript{17}

The defendant argued that the statute prohibiting possession of child pornography was unconstitutionally overbroad, vague, and violated his First Amendment right to free speech.\textsuperscript{18} The defendant asserted that the morphed child pornography he created was protected speech because the photographs were merely for his personal use, serving as a "record of his mental fantasies," and no actual minor was harmed or exploited during the creation of the photographs.\textsuperscript{19} Furthermore, he argued that the personal interests of the girls, whose face images he used, were not implicated as they were not actually engaged in sexual activity during the creation of the photographs.\textsuperscript{20}

Unpersuaded, the court noted that the six minor girls' faces were recognizable regardless of whether the bodies in the photographs did not belong to the six minor girls.\textsuperscript{21} Further, the girls' names were written on many of the photos connecting the children to the sexually explicit images.\textsuperscript{22} The court stated, "We have six identifiable minor females who were at risk of reputational harm and suffered the psychological harm of knowing that their images were exploited and prepared for distribution by a trusted adult."\textsuperscript{23}

The defendant also argued that his case was distinguishable from the Eighth Circuit decision of United States v. Bach,\textsuperscript{24} in which the defendant was convicted for having morphed the face of a known minor onto the sexually posed body of another minor.\textsuperscript{25} In that case, the Eighth Circuit court found that the child's face was easily identifiable and held that although "there is no contention that the nude body actually is that of [the minor] or that he was involved in the production of the image, a lasting record has been created of [him], an identifiable minor child, seemingly engaged in sexually explicit activity."\textsuperscript{26}

Here, citing Ashcroft v. Free Speech Coalition,\textsuperscript{27} the court concluded that the photographs at issue were not protected expressive speech under the First Amendment.\textsuperscript{28} The court noted that the underlying inquiry was whether an image of child pornography implicates the interests of the children.\textsuperscript{29} Finding the standard clearly met, the court stated that "actual minors are implicated" by morphing.\textsuperscript{30}

The defendant's arguments that the photographs would not be distributed because they were created for mere personal use were equally unconvincing to the court. This argument was inconsistent with the manner in which he had indexed, labeled, and encoded the images in a format consistent with publication on the Internet.\textsuperscript{31} In fact, the format in which the images had been encoded was consistent with Congress's findings that child pornography is usually found on "computer hard drives, computer disks, and related media."\textsuperscript{32}

After finding no error in the defendant's convictions, the court then addressed whether the sentence enhancement was proper.\textsuperscript{33} Under United States Sentencing Guidelines Manual § 2G2.2 (b)(4), a four-level enhancement sentence may be imposed for images portraying sadistic or masochistic conduct.\textsuperscript{34} Sadistic conduct is defined as the "subjection of a young child to a sexual act that would be painful."\textsuperscript{35} The defendant argued that the photograph that portrayed a young girl partially nude, handcuffed, shackled, wearing a collar and leash, and tied to a dresser constituted insufficient restraint to amount to a four level enhancement,\textsuperscript{36} especially since the child was not harmed during the production of the image, and she was not actually involved in a sexual act at the time the photograph was created.\textsuperscript{37}

The court, however, found that this enhancement can apply in cases of morphed child pornography where a court finds by a preponderance of the evidence that the morphed image portrays sexual activity involving a minor coupled with "sadistic conduct," which includes the infliction of pain, depictions of violence, or excessive cruelty.\textsuperscript{38} The court affirmed the district court, finding that the photograph when viewed objectively portrayed the minor in a sadistic manner that included the likely "infliction of pain, delight in physical or mental cruelty, the use of excessive cruelty, or other depictions of violence."\textsuperscript{39}

Ultimately, both the district court's conviction and 78-month sentence were affirmed.\textsuperscript{40} The defendant's attorney stated that he is in the process of deciding whether to seek a rehearing by the Second Circuit en banc or appeal to the U.S. Supreme Court.\textsuperscript{41}

Over the years, federal statutes prohibiting child pornography have been frequently challenged. In 2002, the Free Speech Coalition challenged the Child Pornography Prevention Act of 1996, arguing that the act prohibited constitutionally protected speech and was overbroad and vague.\textsuperscript{42} In a 6-3 decision, the Supreme Court struck down two overbroad provisions of the Child Pornography Prevention Act of 1996 because they "abridged the freedom to engage in a substantial amount of lawful speech."\textsuperscript{43}

The Coalition, however, did not challenge morphed pornography and the Court did not consider the issue. Nevertheless, Chief Justice Rehnquist did mention morphed pornography in his dissent.\textsuperscript{44} Judge Rehnquist noted that rapidly advancing technology made it very difficult to distinguish between pornography made with actual children and pornography made with photographs of children. Congress, he said, "has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography, and we should defer to its findings that rapidly advancing technology soon will make it all but impossible to do so."\textsuperscript{45}

In Hotaling this issue of morphed pornography was for the first time directly addressed. With its holding, the Second Circuit clarified that child pornography created by digitally altering sexually explicit photographs of adults to display the face of an actual child is not protected speech, and is thus properly subject to criminal prosecution.\textsuperscript{46}

Id. at *1.

Id.


§ 2G2.2(b)(4). “If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence a defendant’s offense level is increased by four levels.”

Hotaling at *2.

Id. at *2.

Id.

Id. at *3.

Id. at *4.

Id.

Id. at *4.

United States v. Bach, 400 F.3d 622 (8th Cir. 2005).

Id. at 632.


Hotaling at *4.

Id. at *3.

Id. at *3.


Hotaling at *4.

Under U.S.S.G. § 2G2.2(b)(4) “if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence” a defendant’s offense level is increased by four levels.

See United States v. Freeman, 578 F.3d 142, 148 (2d Cir. 2009).

Hotaling at *5.

Id. at *5.

Id.

Id.

Id.

Id. at *6.


Free Speech Coalition v. Reno, 198 F. 3d 1083 (9th Cir. 1999); aff’d sub nom Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

Id. at 243.

Id. at 242.

Id. at 266.

Hotaling at *6.