

An
Overview
of Selected
Legal
Issues
Involved in
Computer
Related
Child
Exploitation:
Many
Questions,
Few
Answers

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Section

FEATURE

Scenario #1 A concerned parent calls the local police department because her 12-year-old child has received "suggestive" e-mail messages on the computer at home. She wants the police to "do something" about it.

Scenario #2. A 16-year-old teenager is several hours late returning home from school, and her parents are worried. They have copies of e-mail messages received by the teen from "Bob," suggesting that they meet and "get to know each other better." Attached to these messages are images of what appears to be adult pornography.

Scenario #3. While 'surfing the Net,' a teacher comes across sites offering "hot pics" of "preteens." He downloads some of these images, and contacts the local police department. He describes some of them as "drawings" (e.g., cartoons), and others as appearing to be photographs.

These scenarios represent cases involving potential child exploitation which are increasingly coming to the attention of law enforcement throughout the country. What can the police do in each of these situations? Have any crimes been committed? The answers to these questions are not necessarily clear nor well-settled, and may depend, in part, on the state (or states) in which the events happened. Traditional notions of jurisdiction in criminal matters are difficult to apply to such cases, since computer communication can so quickly and easily cross state and national boundaries. Two observations are evident in these scenarios: first, more information is needed to make a reasonable decision; and second, there is reason to be concerned about the use of computers to facilitate harm to children under each of the circumstances described above.

While computer technology has developed very rapidly, applicable laws have lagged behind. And though it is nearly impossible to fully anticipate how computer technology will evolve and be used in the future, a number of states have crafted legislation addressing the use of computer-related technology to exploit children. By the end of 1997, at least 18 states¹, as well as the U.S. Congress, included language in their child pornography statutes which specifically mentions the use of computers, computer tape or disks, or visual depictions by electronic means. Many of these laws prohibit the use of computers to pro-

¹Arizona, Arkansas, California, Florida, Idaho, Illinois, Indiana, Kansas, Maryland, Michigan, Mississippi, Montana, Nevada, New Jersey, New Mexico, Pennsylvania, Texas, Virginia (*Child Abuse and Neglect State Statute Series, Computer Crimes*, December 31, 1997.)

duce, disseminate, sell or possess child pornography. At least seven states², in addition to the federal law, also have specific provisions which ban the use of computers to solicit or lure children into engaging in sexual activity.

Federal Statutes

The federal statutes commonly invoked to charge computer-related child pornography offenses are found in 18 U.S.C. §§ 2252 and 2252A. Section 2252 prohibits the transportation, shipment, distribution, receipt, reproduction, and sale, or possession with the intent to sell, of any visual depiction of a minor engaging in sexually explicit conduct³, by any means, including by computer, and also prohibits the possession of 3 or more items, as discussed below, which contain a sexually explicit visual depiction. The federal possession offense, found in 2252(a)(4)(B), criminalizes the knowing possession of "3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction . . ." (Emphasis added.) Three computer diskettes, as well as 1 hard drive and 2 diskettes, have been the subject of successful federal prosecutions as "other matter."

There are two grounds for federal jurisdiction found in this statute: 1) that the visual depictions themselves traveled in interstate or foreign commerce; or 2) that the materials used to produce the visual depictions traveled in interstate or foreign commerce.

Section 2252A, effective September 30, 1996, added another possession offense which prohibited the possession of three or more images (on any one medium, for example one hard drive or one CD-Rom) of "child pornography." As of October 30, 1998, possession of even a single image is banned by statute (18 U.S.C. 2252(a)(4)(b) and 18 U.S.C. 2252A(a)(5)(B)). (The new Protection of Children from Sexual Predators Act of 1998 contains a number of provisions which change federal law in this area. For a listing of some of the key provisions, see the box

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²Alabama, Florida, Illinois, Indiana, New Mexico, North Carolina, Oklahoma. (*Child Abuse and Neglect State Statute Series*, December 31, 1997). Burns Ind. Code Ann. § 35-42-6 (1997); 98 N.M. ALS 64, 1998 N.M. Laws 64, N.M. Ch. 64, 1998 N.M. SB 127; N.C. Gen. Stat. § 14-202.3 (1997).

³"Sexually explicit conduct" is defined in 18 U.S.C. § 2556(2), and includes the "lascivious exhibition of the genitals or pubic area of any person."

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accompanying this article.) "Child pornography" is defined in 18 U.S.C. § 2256(8) as encompassing any visual depiction, to include a computer or computer-generated image, which "is, or appears to be, of a minor engaging in sexually explicit conduct" (Emphasis added.) Federal law also criminalizes conduct related to the production of a sexually explicit visual depiction when the image(s) have been transported in interstate or foreign commerce or mailed, or the offender has reason to know the image(s) will be so transported. (18 U.S.C. 2251)

Other federal law provisions prohibit individuals who themselves travel, or who transport a child, across state or national lines intending to engage in prohibited sexual acts with a child (18 U.S.C. § 2241, 2243, 2422, and 2423). The use of computers to communicate with a child (or someone whom the offender believes to be a child) is often an integral part of these crimes, despite the fact that the statutes themselves do not make specific reference to computers. Depending on the particular provision being considered, the age of the child may be important: some provisions require that the child be younger than 12 years, while others refer to crimes as defined by state law ("sexual activity for which any person can be charged with a criminal offense") (18 U.S.C. §§ 2422 (a) and (b), and 2423 (a)).

The following section will examine each of the examples provided at the beginning of this article and discuss legal considerations related to possible criminal prosecution of the described activity.

Scenario #1

In this scenario, the content of the e-mail messages received by the 12-year-old will be crucial. If the messages reveal an attempt by the sender to solicit, lure or entice the child to engage in any sexual act, a state criminal violation may have occurred, particularly if venue lies in one of the seven states indicated above, which have statutes addressing solicitation by computer. Even a more general 'luring' statute which does not make specific mention of computers, if it exists, should apply. In order to proceed in most states, there would have to be some indication that the individual who sent the e-mail messages knew the recipient's age, and hence, intended to entice a child/minor. In this investigation, law enforcement might want to assume the identity of the 12-year-old, continue communicating with the sender, and further explore his or her intentions, allowing the sender to graphically describe the expected encounter with the child. Often at this juncture, the sender's actual identity is unknown. To establish or confirm the individual's real name and address, investigators can subpoena account information from the sender's e-mail service provider, and/or can "chat" with the sender about at least general information (e.g., what city s/he lives in, where s/he works, etc.). If the sender lives in a state different than the 12-year-old's, and intends to travel interstate to engage in sexual activ-

ity with the child, federal prosecution is a possibility.

If, instead of e-mail messages sent to the 12-year-old, the "suggestive" material which upset the parent was adult pornography posted on a Web site visited by the child, there may be limits as to what law enforcement can do. The portion of the federal Communications Decency Act of 1996 ("CDA") which attempted to prohibit the display of "patently offensive" materials to persons under 18 was deemed by the U.S. Supreme Court to be vague, overbroad and an unconstitutional infringement of free speech (*Reno v. American Civil Liberties Union et al*, 1997).

Some states have attempted to regulate content on the Internet. For example, the legislature in New Mexico, in a statute which became effective July 1, 1998, has outlawed the "dissemination of material that is harmful to a minor by computer," when it "depicts actual or simulated nudity, sexual intercourse or any other sexual conduct" (New Mexico Stat Ann., 1998). Defenses are provided in this New Mexico statute if efforts have been made to restrict access to the material by minors. Alabama law prohibits the transmission of "obscene material to a child" by means of computer, (Alabama Code, Code 13A-6-111) and Georgia's statutes include the crime of "electronically furnishing obscene materials to minors" (Ga. Code Ann. 16-12-100.1.) It remains to be seen whether such statutes adequately address the concerns about unconstitutional vagueness and overbreadth found to exist in the federal CDA statute. (See Birch's article in this issue of the *Advisor* for an update on new federal legislation designed to regulate content online.)

Scenario #2

In this scenario involving a missing 16-year-old girl, law enforcement would clearly want to take immediate steps to find the teenager and be sure she is safe. Obviously, an assault, kidnaping, forcible sexual contact, or other criminal activity could be prosecuted. However, if the girl met with "Bob" voluntarily, even if they engaged in sexual activity, criminal sanctions may not necessarily apply. Under this scenario, the state in which the sexual contact takes place makes all the difference in whether and what criminal sex offense charge(s) could be filed. For example, if the

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⁴The "age of consent" is 14 in Hawaii; 15 in Colorado; and 16 in Alabama, Alaska, Arkansas, Connecticut, Delaware, Georgia, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Washington, and West Virginia. (Phipps, 1997)

⁵The "age of consent" is 17 in Illinois, Louisiana, Missouri, New Mexico, New York, Texas; and 18 in Arizona, California, Florida, Idaho, Mississippi, North Dakota, Oregon, Tennessee, Utah, Virginia, Wisconsin, and Wyoming. (Phipps, 1997).

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investigation revealed that there was consensual sexual contact with Bob, the 16-year-old would be at, or older than, the "age of consent" in 32 states⁴. In 18 states where the "age of consent" is either 17 or 18⁵, Bob could potentially be charged with a relatively serious sex offense. In states where the age of consent is 16 or lower, Bob's conduct may still violate statutes which prohibit 'corrupting the morals of a minor,' 'contributing to the delinquency of a minor,' or an equivalent offense, since a minor is generally considered to be someone under the age of 18. However, such crimes are typically classified as misdemeanors, and treated as less serious than "traditional" child sex offenses

Bob's sending of adult pornography to the teen, unless the images could be found to be "obscene,"⁶ is also likely to be difficult to prosecute. Absent a special statute which outlaws the transmission of such material to someone under 18, if it could legally be provided to adults, it can also be made available to the 16-year-old, unless law enforcement and the prosecutor are willing to pursue a 'contributing' or 'morals' charge, as discussed above.

Scenario #3

The third scenario involves the discovery of what is, or could be, child pornography on the Internet. To the extent possible, law enforcement would want to evaluate whether the "helpful" teacher was himself a collector of child pornography. Undoubtedly, investigators would be wise to advise the teacher to cease any "investigative" efforts, and provide all copies of suspect images to law enforcement, retaining none. Otherwise, the teacher would technically be in violation of federal laws prohibiting the receipt and possession of child pornography.

While almost every state bans the production, sale, distribution, exchange and possession with intent to distribute or sell, of child pornography, there were 11 states, as of 1997, whose statutes did not prohibit the simple *possession* of child pornography⁷. As a result, unless a suspect who has child pornography on his or her computer or other media (e.g., diskettes, zip disks, CD ROMs) can be shown to have produced, sold, disseminated, or possessed with the intent to sell or disseminate, then prosecution under state law in those 11 jurisdictions would be unlikely.

A federal criminal charge for possession is possible under §2252(a)(4)(B) when, assuming the other

⁴For the federal obscenity standard, see *Miller v. California*, 1973.

⁷Alaska, Arkansas, Connecticut, Maine, Massachusetts, Mississippi, Missouri, New Mexico, Rhode Island, South Carolina, Vermont. *Child Abuse and Neglect State Statute Series, Child Pornography*, December 31, 1997.

elements are met, "... the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct ...". This provision has led to defenses which assert either that the person in the depiction may be over the age of 18 and thus not a minor, or that the image itself could have been "manipulated" and thus does not involve an actual minor, a real person. Computer programs which allow for the manipulation, or "morphing", of digital images are easy to use and widely available today. The quality of this software continues to improve and it can be difficult, if not impossible, to detect whether an image has been manipulated, particularly if done well and when there is no known "original" image for comparison.

The Child Pornography Protection Act of 1996 was passed, in part, to address the manipulation issue. That Act added 18 U.S.C. § 2252A to the federal law, which for the first time uses the term "child pornography," defined to include images which are or "appear to be" of minors engaging in sexually explicit

conduct, or are presented in a manner which "conveys the impression" that the material contains such a depiction (18 U.S.C. §2256(8)). As a result, images which may have been manipulated, as long as they appear to be child pornography, could be the subject of federal prosecution. Application of this statute has, to date, led to differing results in the federal courts. For example, in *U.S. v. Hilton*, the District Court in Maine declared 18 U.S.C. § 2252A(a)(5)(B)⁶, and the incorporated definition found in § 2256(8)(B), unconstitutionally overbroad (*U.S. v. Hilton*, 1998). In the Northern District of California, the Court in *The Free Speech Coalition, et al. v. Reno*, found the same statute constitutional. Both of those cases are pending appeal. Under these circumstances, the ability to use this portion of the new definition of "child pornography" found in § 2256(8)(B) may vary, depending on the federal district in which the case is heard.

The overwhelming majority of state child pornography crimes appear to require the involvement of a real child, whether the crime is possession, production, or distribution. In fact, Kansas law regarding possession of child pornography states that the image involved must show "a real child under 16 years of age...." (Kansas Stat. Ann. §21-3516) Our research located only one state with language similar to the federal provision, Indiana, where knowing possession of an image which "depicts or describes sexual conduct by a child who is less than 16 years of age, or appears to be less than 16 years of age, ..." (emphasis added) is defined as a crime (Ind. Code §35-42-4-4). Ohio law allows for an inference "that a per-

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son in the material or performance involved is a minor if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor." (Ohio Rev Code Ann. §2907.321.) Both of these statutes still arguably require the involvement of an actual identifiable person, albeit one whose true age is misrepresented. The manipulation defense, therefore, is one that can be expected with regularity in state prosecutions of computer child pornography cases. In addition, cartoons which are sexual in nature may not be subject to criminal prosecution based on similar reasoning, unless state law specifically includes drawn images as a prohibited item. Because the language of state statutes varies widely, whether a particular case falls within the protection of any jurisdiction's law, will depend on the interpretation of professionals and courts within that state.

One final consideration in the response to the third scenario is that law enforcement will almost certainly be interested in ascertaining the source of the child pornography. Both state and federal criminal prosecutions of the originator of the child pornography are possible, depending on the specific facts discovered. In order to gather the information necessary to build a case in either state or federal court, investigators should be familiar with provisions of federal wiretap law (18 U.S.C. §§2510 - 2522), the Electronic Communications Privacy Act and the Privacy Protection Act. These federal laws require special care to be taken when intercepting electronic communications, when obtaining information from service providers, and when seizing information which could be considered to be work product or documentary materials if intended for public dissemination or publication. Violation of the dictates of these statutes can lead to possible personal civil liability for law enforcement investigators. In addition, state laws regarding privacy (especially involving computer com-

munications) and wiretaps may apply, and be even more restrictive.

There is no doubt that those who exploit children will continue to take increasing advantage of available technology to facilitate their crimes. In order to respond to these situations in the most effective way, investigators and prosecutors will need to educate themselves about this complicated area, take advantage of specialized training opportunities, and increase efforts to implement federal and state coordination. (See Jezycki's article, this issue of the *Advisor*; for more information on training opportunities. See also Whitcomb and Eastin, 1998 and the Education Development Center and the Massachusetts Child Exploitation Network, 1995.) The legal system will continue to evolve as it deals with more cases, and new and better legislation can be expected, leading to greater justice for exploited children.

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"PROTECTION OF CHILDREN FROM SEXUAL PREDATORS ACT OF 1998"

Passed by U.S. Senate on 10/9/98, Passed by U.S. House of Representatives on 10/11/98
Signed by President Clinton 10/30/98

- "Zero Tolerance" for Possession of Child Pornography," amending 18 U.S.C. 2252(a)(4) by replacing '3 or more' with '1 or more,' and adding subsection (c) "Affirmative Defense." Amending 18 U.S.C. 2252A(a)(5) by replacing '3 or more images' with 'an image,' and adding subsection (d) "Affirmative Defense."
- New 18 U.S.C. § 2425 "Use of interstate facilities to transmit information about a minor."
- Adding another jurisdictional base for production of child pornography, 18 U.S.C. § 2251(a) and (b).
- New 18 U.S.C. § 1470 "Transfer of obscene material to minors." Where minor is an individual who has not attained the age of 16 years. Sentence: not more than 10 years.
- Adding to 42 U.S.C. 13001, a § 227 "Reporting of Child Pornography by Electronic Communication Service Providers."
- New 18 U.S.C. § 3486A "Administrative subpoenas in cases involving child abuse and child sexual exploitation"