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High road in regulating online child pornography in South Africa

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ABSTRACT

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Online child pornography is a repulsive reality which cannot be ignored; the biggest child pornography manufacturing ring in South African history was cracked with the arrest of eight family members. There are more than 116 000 Internet searches daily for child pornography. Pornography is no longer confined to consenting adults, children are not only being exposed to pornographic material but are increasingly being used as victims of child pornography. In South Africa, the Internet and Cell phone Pornography Bill tabled in 2010 aims to make it illegal for Internet and mobile phone service providers to distribute pornography or permit it to be distributed. The objective of the Bill is to protect children from child pornography and women from the indignity of being seen as objects of pornography. This paper takes as its focal point the continuing crisis which centres on the conceptual framework, the existing legislation regulating online child pornography and measures to curb infringement.

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1. Introduction

As in the case referred to in the abstract,¹ the incidence of sexual acts concerning children is certainly not a new phenomenon but a problem of international proportion. The history of child pornography shows that it has existed time immemorial. The development of photography and motion pictures in the 19th and 20th centuries contributed greatly to the explosion of pornography, as did the advent of the Internet in the late 20th century.² Child Pornography has been one of the most controversial topics arising from using the

Internet. The international community has recognized that children are at risk from those who engage in the production, distribution and possession of such material.

The Internet is not responsible for the invention of abuse images, nor has it created a demand that was not already there. What the Internet does is to make abuse images of children relatively easily available.³ The availability of child pornography on the Internet has caused fear and a moral panic among law enforcement bodies and governments. Pornography is available in different formats; however, it is mostly available through World Wide Web (WWW) pages.⁴

¹ The Times, 3 December 2010. The charges include raping and sexually assaulting minor children, sexually grooming children, exposing children to pornography and benefiting from child pornography. On 17 November 2011 the accused have been granted bail by the High Court after the Pretoria North Magistrate Court refused to grant them bail (SA Time, 23 November 2011).

² Max Taylor and Ethel Quayle, 2003 Child Pornography: An Internet Crime. Hove Brunner Routledge p 42–46.

³ Ibid.

⁴ Akdeniz Y 'The Regulation of Pornography and Child Pornography on the Internet' 1997 (1) *The Journal of Information Law and Technology* (JILT) available at http://elj.wareick.ac.uk/jilt/Internet/97_1akdz/.

Pornography is the central focus of public concern in South Africa,⁵ since the Internet has transformed the production and possession of child pornography into a sophisticated global cottage industry. The Internet has become increasingly a factor in child sexual exploitation in the exchange of child pornography.⁶ The Internet offers paedophiles,⁷ pornographers and child sexual abusers real, virtual and international opportunities to access markets and provides a safe easily accessible and supportive context for posting, trading and collecting child pornography.⁸ The existence of social networks,⁹ e-mail,¹⁰ instant messages and discussion boards has created new global avenues for sending images and downloading pornographic material. Increasing access to technology and mobile Internet poses risks in the creation and distribution of child pornography.

The global nature of computer technology makes it difficult to address the challenge of online child pornography in many countries. The task of identifying, successfully investigating and prosecuting online child pornography offenders poses ever-increasing demands on law enforcement agencies across the world. This is further exacerbated by the fact that many such agencies still lack the capability to operate effectively in cyberspace. The speed at which child pornography is created and distributed, as well as the borderless nature of the Internet, also complicates matters.

This paper is devoted to a consideration of the way in which the law deals with the regulation of online child pornography in South Africa. This will involve a study of whether, and in what

manner, increasing technology can compromise, exploit, and expose children's privacy or security, together with an analysis of the legislation. It is beyond the scope of this paper to engage in an in-depth analysis of child grooming,¹¹ sexting,¹² commercial sexual exploitation¹³ paedophilia and pornography.

2. The conceptual framework of pornography

Pornography is easily available on the Internet. Watney¹⁴ states that the major difficulty that arises is whether anything should be done about the accessibility thereof and if the answer thereto is in the affirmative, it needs to be considered to what extent the regulation thereof should be allowed to infringe upon the constitutionally protected rights such as the right to privacy.¹⁵ The universal approach in the regulation of pornography appears to be to distinguish between the diverse forms thereof, to prohibit the possession, production, importation, exportation and distribution of certain categories thereof and to regulate the accessibility of the remainder to specific age groups.

Certain forms of Internet pornography¹⁶ constitute cyber-crime and may be prosecuted in terms of the Films and Publications Act.¹⁷ Cybercrime is widely defined as any unlawful conduct involving a computer system irrespective of whether the computer is the object of the crime (as would be the case with hacking or the launching of a virus) or the instrument with which the crime has been committed (such as with theft of information or the possession of child pornography) or incidental to the commission of the crime (for example the storage of information relating to the commission of a crime).¹⁸

¹¹ Actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child, in order to lower the child's inhibitions in preparation for sexual activity with the child, or exploitation (such as child labour Accessed from <http://www.answers.com/topic/child-grooming#ixzz1VB1bTCg3> and <http://www.inhope.org> on 12 August 2011).

¹² Chetty defines sexting as the distribution and creation of child abuse images through the use of a mobile cellular phone, regardless of the destination or intended recipient of the image (Iyavar Chetty 'The Convergence of Technology and Behaviour' 2008).

¹³ Commercial sexual exploitation is defined in section 1 of the Child Care Act 74 of 1983 to mean the procurement of a child to perform a sexual act for a financial or other reward payable to a child, the parents or guardian of the child, the procurer or any other person. While the Children's Act 38 of 2005 adds the trafficking in a child for use in sexual activities, including prostitution or pornography, as commercial sexual exploitation.

¹⁴ Murdoch Watney 'Regulation of Internet Pornography in South Africa' accessed on 12 August from <http://www.isrcl.org/Papers/2005/Watney.pdf>.

¹⁵ Section 14 of The Constitution of the Republic of South Africa (hereinafter referred to as The Constitution). This right is not absolute; it may be limited in terms of section 36 of the Constitution. This right is protected also in terms of common law.

¹⁶ Also referred to as cyber porn.

¹⁷ Act 65 of 1996 (hereinafter referred to as FPA).

¹⁸ There is no uniform definition of cybercrime. See Watney "Criminal and Procedural Aspects in the Prevention of Cyber-crime" (part 1) 2003 *Journal of South African Law* 56.

⁵ An article in The Sowetan, titled 'Sies' 15 August 2011 published sexually explicit material of two officers, this material was also circulating on cellular phones and was also posted on the Internet. A particular focus of contemporary story in the media involving pornography, one would wonder whether the question of exposing or children accessing the sexually explicit material was adequately assessed. See also The Times *supra*.

⁶ Child Pornography: An International Perspective accessed from http://www.csecworldcongress.org/PDF/en/Stockholm/Background_reading/Theme_papers/Theme%20paper%20Pornography%201996_EN.pdf on 18 August 2011.

⁷ A paedophile can be defined as a person having sexual attraction to children. See Oxford dictionary and Thesaurus 1997 and Glasser, D 1990, 739–748. The American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV 527–528 (1994) defines paedophiles as a disorder in which an adult's primary sexual attraction is to prepubescent children, generally from age 13 and under. See also <http://www.answers.com/topic/pedophilia> accessed 12 August. The International Classification of Diseases (ICD) defines paedophilia as a disorder of adult personality and behaviour in which there is a sexual preference for children of pre-pubertal or early pubertal age. A paedophile ring is a group of persons working together across the Internet from different countries to collect and distribute child pornographic material. See <http://www.inhope.org> accessed 19 August 2011.

⁸ O'Connell, R (1999), "Paedophile networking and the Internet: Newsgroups", Summary of O'Connell's paper to UNSECO's Expert meeting, by News on Children and Violence on the Screen, Vol. 3, No. 1, pp 6–7.

⁹ Facebook, see <http://wikileaksnews.net/paedophiles-sharing-child-pornography-pictures-on-facebook.html>, MXit, Tweeter etc.

¹⁰ E-mail offers an additional means for children to be exposed to sexually explicit material.

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