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Combatting those who intentionally access images depicting child sexual abuse on the Internet: A call for a new offence in England and Wales

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ABSTRACT

In England and Wales, there are four main categories of offence surrounding images depicting child sexual abuse, those of making/taking, publishing, distributing and possession. Despite being in force for almost 40 years, it is argued that now, additional regulation is required. In response to technological provision such as private browsing, streaming and encryption which are providing investigative difficulties for digital forensic analysts, this article proposes the need to implement a fifth offence, one of 'intentional accessing' and debates the feasibility and justifications for doing so. This proposal coincides with the recent enactment of the Investigatory Powers Act 2016, which enforces new data retention requirements on Internet Service Providers allowing offender Internet connection records to be stored for up to 12 months and retrospectively investigated.

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1. Introduction

Material that constitutes pornography is subject to debate as attitudes surrounding vulgarity vary along with ever-changing levels of tolerance and acceptability in societies (O'Donnell and Miller, 2007). The major problem initiated by pornography is that it has sexualised not only the abuse of adults but also that of children who are unable to consent to such acts (MacKinnon, 1985). In seeking sexual gratification, an individual does not have free rein to seek or produce sexualised material of any type, and many jurisdictions have sought to legislate on the type of content that is legally acceptable as a form of imagery. Illegal forms of sexual imagery in England and Wales can generally be categorised into two main types, images depicting child sexual abuse (IDCSA) (it must be noted that this content should not be referred to as pornography (see Horsman, 2016 for an elaboration of this discussion)) and extreme pornography; the former remains the focus of this article.

Offences of child sexual abuse often trigger significant public outrage, demonstrated by the recent investigations into Jimmy Savile (BBC News, 2014) and Ian Watkins (BBC News, 2013b). Further, IDCSA which stem from physical acts of child abuse are now arguably considered by today's society as one of the worst form of material that an individual can engage with due to the harm it causes to both the child depicted and to society as a whole (Silbert, 1989). The concerns raised

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regarding IDCSA in England and Wales have been acknowledged for the past 40 years, leading to the implementation of offences under the Protection of Children Act 1978. Now, the Internet has enabled new forms of child abuse and provides a platform to view child abuse material with relative ease in comparison to before its existence, with IDCSA now widespread online and considered more accessible than ever before (Akdeniz, 2013; Houtepen et al., 2014; Seigfried-Spellar, 2014; Seto and Ahmed, 2014).

2. The Internet and IDCSA

Seigfried-Spellar (2014) states that law enforcement are now encountering more cases involving IDCSA because of the Internet, with new sites hosting this content continually being discovered (Powell et al., 2015). Offences surrounding IDCSA are now widespread, providing a global regulatory problem (United Nations Office on Drugs and Crime, 2013). The vast majority of prosecutions for IDCSA now involve images that are found on digital storage media in computing equipment (Willmore, 2012) where often they are acquired from online sources. In the United States (U.S.), Wolak et al. (2014) identified during the course of their study 244,920 U.S. computers shared 120,418 unique known IDCSA on the Gnutella peer-to-peer file sharing network. The National Center for Missing & Exploited Children Annual Report (NCMEC, 2014) highlighted that in 2014 it received more than 1.1 million reports to its CyberTipline, of which 98% surrounded IDCSA, with the organisation reviewing 28 million IDCSA to assist law enforcement investigations and victim identification. Within the United Kingdom (UK), since 2009 over 100,000 offences surrounding IDCSA have been recorded (CPS, 2015). Children's charity Barnardo's sexual exploitation services is reported to have witnessed a 22% increase in the number of sexually exploited children in 2011-12 of which the majority of cases were linked to the use of the Internet (House of Commons Deb, 2013a). In the UK alone, it is estimated that approximately fifty thousand individuals are involved in the acquisition and distribution of IDCSA (CEOP, 2013). The volume of IDCSA in circulation has become unmanageable, largely due to the Internet and the regulatory issues it causes. Statistics indicate a relatively large number of individuals are being prosecuted for possessing or creating IDCSA (Lukas, 2013; CPS, 2015). However, in absence of a definitive figure which accurately quantifies both the number of IDCSA in circulation and the actual number of individuals involved with them, it is not possible to establish whether these prosecution numbers represent all or only a small proportion of those interacting with IDCSA.

2.1. *Increased accessibility and the development of a 'Non-Contact Offender'*

As of 2015, the Internet has over 3 billion users world-wide (Statista, 2016) where arguably, with increased accessibility comes a potential increase in the number of offenders interacting with IDCSA online. Statistics show that in 2015, 86% of households in the UK have Internet access, with 78% of UK adults accessing the Internet on a daily basis (Office for National Statistics, 2015). When combined with lowering device costs, the majority of UK households now own a personal computer or mobile smartphone device which offers potential access to sexualised content. The fallout from these technological developments remains that those who want to engage with IDCSA no longer need to be involved physically with acts of child abuse or with those carrying out these acts, effectively creating a non-contact offender who can passively engage with this material online. The Internet offers a seemingly anonymous method of fuelling those who can already be termed as having a fascination with this material (Diez, 2006).

Non-contact offenders are often dependent on technology in order to access and acquire IDCSA and as a result, the Internet has now arguably increased the volume of this type of offender by allowing a wider audience access to it. The Internet has transformed an offence from what would previously have maintained a physical element of child sexual abuse (when IDCSA are being produced), to now one where the only evidence of the offence may exist in cyberspace as individuals seek out and view hosted imagery online (Merdian et al., 2013). Despite providing substantial benefits to society as well as almost single-handedly revolutionising modern day living, the Internet has provided a number of facilities for accessing and acquiring IDCSA (Balfe et al., 2015). Through websites, forums and peer-to-peer sharing, the Internet offers an accessible and affordable source of IDCSA in comparison to more tangible forms such as magazines, photographs or books which prior to the Internet's popularity formed a predominant source (Balfe et al., 2015). Jenkins (2003) argues that the acquisition of non-electrical forms of IDCSA is now (and has been for several years) more difficult than digital forms due to the ease that digital data can be created, replicated and transferred across networks. Further, consideration must also now be given to the 'Deep Web', a portion of the Internet, which cannot be found using traditional search engines. The Deep Web offers access to numerous hidden services, which are often cited to have links to IDCSA distribution (Phelps and Watt, 2014). Recently, Moore and Rid (2016) identified that the most frequent "use of hidden services through Tor are criminal, including drugs, illicit finance and pornography involving violence, children and animals".

2.2. *The effect of the Internet and regulatory attempts*

The Internet poses the unique issue of causing the user to become disinhibited and more likely to access material which they would not normally seek out, providing for an "unprecedented degree of inquisitiveness, and the danger is that curiosity hardens into deviance" as inhibitions are lost (O'Donnell and Miller, 2007). Similarly it offers a false sense of protection and a sense of anonymity to the user as they feel that they are not physically identifiable while carrying out their online actions (Horsman, 2016b). Taylor and Quayle (2003) highlight that the Internet provides the environment for which a curiosity surrounding IDCSA can flourish where individuals can seek out material based on their own interests and desires as well as seek communication with self-justifying online communities interested in the illegal material (Krone, 2004).

Calls have been made for Internet service providers (ISPs) to take more of an active role in the policing of IDCSA to stem

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