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LegalCURRENTS

Court of Appeals grapples with Internet porn

Last week, the New York Court of Appeals handed down its decision in *People v. Kent*, 2012 N.Y. Slip Op. 03572. In this decision, the court considered whether the defendant, by simply viewing images of child pornography on his computer screen, had knowingly procured or possessed child pornography in violation of Penal Law § 263.15 (Promoting a Sexual Performance by a Child) and Penal Law § 263.16 (Possessing a Sexual Performance by a Child).

By NICOLE BLACK
Daily Record Columnist

The issue presented was a narrow one and required an analysis of whether "accessing and displaying" the images in a Web browser — where the browser, unbeknownst to the defendant, stored the images in its Web cache — constituted "control" over the images sufficient to amount to procurement or possession of the images.

After analyzing the applicable statutory definitions, case precedent, and the legislative intent behind the enactment of the relevant statutes, the court concluded that in the above scenario, sufficient "control" was not shown:

"We hold ... that regardless of a defendant's awareness of his computer's cache function, the files stored in the cache may constitute evidence of images that were previously viewed; to possess those images, however, the defendant's conduct must exceed mere viewing to encompass more affirmative acts of control such as printing, downloading or saving."

The court then explained that New York's current statutory framework was enacted prior to the large scale use of the Internet and was thus arguably in need of an update to include language like that found in the correlating federal statute:

"The federal statute regulating conduct related to child pornography, 18 USC § 2252A, provides a useful contrast. Section 2252A was amended in 2008 to provide that any person who either "knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography" is subject to a fine and imprisonment ..."

I agree with the court's analysis of the law as written and believe that the law is in need of revision in order to keep up with changing technologies.

That being said, what interested me most about this decision was not the court's holding but the discussion found in the concurring opinions centered around whether simply viewing child pornography should be a crime.

In his concurring opinion, Judge Smith agreed that the legislative intent behind the New York statutes was to target consumers of child pornography, but he seems to (mistakenly) believe that those who simply view it do little to contribute to demand for child pornography since their actions don't profit those who distribute it:

"I ... acknowledge that, as Judge Graffeo says, Penal Law §§ 263.15 and 263.16 are designed to target the consumers of child pornography, in the hope of eliminating the market for it. ... Under Judge Graffeo's reading, someone who does no more than click on a link for the purpose of looking at a pornographic picture for free — someone who has never interacted with a child victim, has never copied, downloaded or saved a pornographic picture of a child, and has never put a penny in the pocket of a child pornographer — is subject to up to seven years in prison for a first offense (see Penal Law § 70.00[2][d]). This is surely a stringent punishment for someone whom many would think more pathetic than evil."

What Judge Smith doesn't take into account is that the act of simply visiting most websites results in profits for the website owners. Even owners of websites that require no entry fee for the viewing of some images — especially those as profit-savvy as the purveyors of online pornography — are undoubtedly earning passive income from, at the very least, ads appearing on the site.

As the website receives more traffic, it becomes more appealing to advertisers and the website owner can thus charge more for ads placed on the site. So, every time someone visits a free website that contains images of child pornography, that individual is undoubtedly lining the pockets of — and increasing the future earning potential of — distributors of child pornography.

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Accordingly, the inquiry should not focus on whether the consumer must pay a fee to access the images, since the mere act of visiting these websites supports the child pornography trade. If the legislative intent is to decrease demand by instilling the fear of prosecution in those who might view online child pornography, then the act of simply viewing any online image of child pornography should be unlawful. Whether payment is required for the "privilege" of doing so is irrelevant; the producers of online child pornography are profiting from the violation of our children nonetheless.

Nicole Black is VP at MyCaseInc.com, a cloud-based law practice management platform. She is also of counsel to Fiandach & Fiandach in Rochester and is a GigaOM Pro analyst. She is the author of the ABA book Cloud Computing for Lawyers, co-authors the ABA book Social Media for Lawyers: the Next Frontier, and co-authors Criminal Law in New York, a West-Thomson treatise. She speaks regularly at conferences regarding the intersection of law and technology. She publishes three legal blogs and can be reached at niki@mycaseinc.com.