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Obscenity & Child Porn

OBSCENITY

Federal law and every state has an anti-obscenity statute. The definition of obscenity is limited by the First Amendment. To be constitutional, the statute can only prohibit materials that fit the Miller test.

- Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest,
- Whether the work depicts/describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law,
- Whether the work, taken as a whole, lacks serious literary, artistic, political, and scientific value.

What is obscene?

- Mere nudity is not obscene
- Pornography/sexual content is not necessarily obscene
- Obscenity laws are often used when prosecutors have trouble proving the elements for child pornography
- Obscenity is not necessarily limited to visual depictions

Internet-Specific Legal Issues:

- Which community's values apply when the work is distributed over the Internet?
- Does any jurisdiction have the right to pursue you if the work is distributed over the Internet?
- Do other countries with more restrictive standards have authority over you when work is distributed over the internet?

POSSESSION, DISTRIBUTION OF CHILD PORNOGRAPHY

Federal law and every state has a child pornography law prohibiting possession, distribution, creation of child pornography.

Definition of Possession Under the Federal Statute (18 USC 2252A(4)(B))

- Defendant knowingly possessed materials
- Defendant knew the materials contained a visual depiction of a minor engaged in sexually explicit conduct;
- Defendant knew the visual depiction was of a minor
- Defendant knew that production of the visual depiction involved use of a minor in sexually explicit conduct; and
- Interstate commerce

Internet-Specific Legal Issues:

- Are the images “knowingly possessed” if you view them on the internet, but don’t act to store them on your computer? www.law.com/jsp/article.jsp?id=1182848790153
- Is “virtual child porn” (images manufactured to look like minors engaged in sexually explicit conduct) illegal? One such statute struck down in 2002, new law passed in 2003 now before the Supreme Court.
- 42 U.S.C. § 13032 requires anyone who is engaged in providing certain online services to the public, and obtains knowledge of a violation of the child exploitation statutes, to report such violation to a law enforcement agency or agencies.

2257 REGULATIONS

The federal law requires porn producers to keep documentation showing performers are above the age of majority.

New regulations implemented in 2005, expand the category of entities to which the regulations apply to include anyone “who inserts on a computer site or service a digital image of” sexually explicit conduct. Social networking, live video cam sites and other entities are arguably under the regulations. Currently little to no enforcement, partially as a result of injunction issued in pending lawsuit by the adult entertainment industry. The judge there held that the regulations only apply to those who participate in “hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted,” not those who merely publish or distribute preexisting pornographic materials. This is now on appeal in the Tenth Circuit, and the Department of Justice is in the process of another rulemaking.

Internet Specific Legal Issues:

- Who is a “secondary producer”?
- When websites aggregate video feeds from multiple sources, how can site owner be responsible for the live performers’ identification documents when such performers live in other countries?

Potential future child pornography abatement legislation:

- Required filtering of known images
- Requiring email registration as part of sex offender registration
- Required or “voluntary” filtering against sex offender registries
- Restricting access to social-networking sites on school and library computers
- Labeling Web sites containing “sexually explicit” content
- Requiring Internet service providers to retain records about their subscribers for a certain period of time for law enforcement access.
- Increased penalties for failure to report child pornography on your servers.