CASE REPORT

COURT OF APPEAL CLARIFIES THE LAW ON DOWNLOADING PORNOGRAPHY FROM THE WEB

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In the recent years the law courts had to deal with a considerable number of cases involving child pornography received or downloaded through the Internet.[1] Moreover, there has been a considerable number of appeals involving not only sentencing issues but also the interpretation provided to the making offences under section 1(1) of the Protection of Children Act 1978 (the 1978 Act) since the decision of the Court of Appeal in R v Bowden.[2] The Court of Appeal has now had an opportunity to explain the law. Yaman Akdeniz reports.

1. INTRODUCTION

In the appeal cases involving **R v Graham Westgarth Smith and Mike Jayson** (CA, [2002] EWCA Crim 683, (No.2001/00251/Y1), 7 March 2002), the appellants were convicted of the offence of making an indecent photograph or pseudo-photograph of a child contrary to section 1(1) of the 1978 Act. In the case of Smith, the image in question was received as an attachment to an email message. In the case of Jayson, the images were downloaded by the appellant from the Internet. In each case, the image in question was saved in the temporary Internet cache as a result of the automatic function of the computer.

So far as Smith's case is concerned, he was convicted of one count of making indecent pseudo-photographs of a child and was sentenced to two years' probation in December 2000, at Lewes Crown Court, before His Honour Judge Kemp and a jury.

The police found an email with attachments in Smith's computer which showed images of a naked girl called Eva, apparently taken by her mother, an internationally renowned photographer. According to the appeal decision the attachments had been sent to the appellant on 26 July 1998 by someone calling herself "Yvonne Nystrom", whose email address is "smallthings@hotmail.com". An important fact of the case was that the images were not sent unsolicited to Smith, but according to the case report, Smith asked this person to send him the Eva images. The images in question had not been deleted and remained as an attachment to an email in the Smith's mailbox. The defence on behalf of Smith suggested that:

> "upon the proper construction of section 1(1)(a) of the Act the appellant had not 'made' a pseudo-photograph within the meaning of that provision by simply opening an attachment to an email and looking at the images, without doing more."

However, the Crown submitted that the appellant had effectively solicited the photographs by email, had shown an interest in receiving them and in opening them, and in failing to delete them, he had "made" the photographs in question.

Following the interpretation of this issue in the cases of **Bowden,**[3] and **Atkins v DPP**,[4] the trial judge ruled that Smith "has sought to 'make' photographs, in effect by proliferating them rather than taking the option, which was otherwise available to him, which was to delete them altogether."

The defence, however, argued that "section 1(1)(a) of the Act should be construed as narrowly as is reasonably possible, and it should not be construed so as to apply to a case such as the present." The defence's argument was that Smith's actions should be distinguished "from that of a conscious and deliberate downloading of an image from the Internet."

2. THE SMITH APPEAL

The Court of Appeal agreed that "a person is not guilty of an offence of "making" or "being in possession" of an indecent pseudo-photograph contained in an email attachment if, before he opens the attachment, he is unaware that it contains or is likely to contain an indecent image." This would mean that liability should not arise if the indecent photographs are received unsolicited. Such a defence would have been available under section 160(2)(c) of the Criminal Justice Act 1988 if Smith was charged with a possession offence. Obviously, the courts and the prosecutors would also look into the behaviour and actions of an accused following the unsolicited receipt of such images via email. It is very much doubted that liability would arise if the images and the message in question is immediately deleted upon the realization of its nature. However, it may be a completely different scenario if the images are looked at and the message moved into a folder named hypothetically as "my naughty folder". At that point the unsolicited nature of the message in question may not be so relevant for the purposes of a prosecution under section 1(1) of the 1978 Act.

However, it should be noted that when charged with a section 1(1)(a) offence of making an indecent photograph or a pseudo-photograph, no defence along the lines of section 160(2)(c) of the Criminal Justice Act 1988 is open to a defendant, "that the photograph [or pseudo-photograph] was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time." The defences which are available under section 1(4) of the

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1978 Act[5] are not upon to charges under section 1(1)(a) of the 1978 Act. Although the provisions of section 1(1)(a) seem to create absolute offences, this is not the case on its true construction according to the judgment of the Court of Appeal in **Atkins v Director of Public Prosecutions; Goodland v Director of Public Prosecutions.**[6]

The Court of Appeal concluded that Smith's case

> "comes nowhere near the paradigm case of the innocent person who, wholly unsuspecting, opens an unsolicited email or attachment quite unaware of what it contains."

There is no doubt that Smith should be guilty of an offence involving possession under section 160 of the Criminal Justice Act 1988. But it remains doubtful whether Smith should be guilty for a making offence under section 1(1)(a) of the 1978 Act. The Court of Appeal since Bowden has been reluctant to re-consider the meaning of "making" but the Bowden interpretation is not strong nor the only possible interpretation that can be given to the meaning of "making". Although the Court of Appeal's desire to send a very strong message to those who deal with such indecent photographs of children is admirable, downloading should be equal to simple possession rather than making or taking indecent photographs of children. The decision in **Bowden** eliminated the offence of simple possession under the 1988 Act and as a result of the Bowden decision, it is hardly used for cases involving Internet child pornography.

3. THE JAYSON APPEAL

On the other hand, Jayson pleaded guilty to seven counts of making an indecent photograph of a child, in the Crown Court at Luton in October 2001. In August 2000, the police found images of child pornography in Jason's computer. The images found were stored in the cache directory of Jason's computer rather than in a specific folder in his hard disk. All of the images had been automatically emptied from the cache directory before the computer was seized by the police. The images were retrieved by a special process undertaken by the prosecution computer expert.

Jayson was sentenced to concurrent sentences of 12 months' imprisonment. His plea of guilty followed a ruling by the trial judge on the definition of "making" for the purposes of section 1(1)(a) of the 1978 Act. The trial judge ruled that the browsing of the Internet for child pornography amounted to the offence of making an indecent photograph if it resulted:

- in an image being displayed on the computer screen of the browser, or
- the automatic downloading of the image to a temporary Internet cache, provided that there was the requisite mens rea.

The prosecution argued that (a) searching the worldwide web and selecting images to appear on the computer monitor was sufficient to amount to "making" under the 1978 Act; or (b) the fact that images were stored automatically in the temporary Internet cache amounted to "making" an indecent photograph of a child. Furthermore, the prosecution argued that Jayson having had thirty years' experience with computers, must have been aware of the fact that images called up on to his screen would be automatically downloaded into the temporary cache.

Jayson in fact admitted that he was aware of how the temporary Internet cache operated. The prosecution following **Bowden** argued that "the positive action of causing the photograph to be downloaded from the web page on to the screen involves the making of a photograph," and that this is "analogous to copying in that it is replicating the image from the web." Moreover, the storage of the images in the cache directory for a finite period was irrelevant as these were revisitable and viewable and that the images may have been stored in the cache directory to evade liability.

The defence argued that Jayson did not intend subsequent retrieval of the images even though he viewed them. The defence submitted that:

> "in order to be guilty of the offence of making a photograph or pseudo-photograph by causing data to be stored on a computer disc, the necessary mens rea is that an offender must intend to store and intend to retrieve the material subsequently."

But the Court of Appeal ruled that "the act of voluntarily downloading an indecent image from a web page on to a computer screen is an act of making a photograph or pseudo-photograph."[7] The Court of Appeal reached a conclusion:

> "as a matter of the ordinary use of language, and giving to the word "make" its ordinary and natural meaning, as did this court in **Bowden**. By downloading the image, the operator is creating or causing the image to exist on the computer screen. The image may remain on the screen for a second or for a much longer period. Whether its creation amounts to an act of making cannot be determined by the length of time that the image remains on the screen."

Furthermore, according to the Court of Appeal, the "question of retrieval is irrelevant to the issue of whether the downloading of the image on to the screen amounts to an act of making."[8] The Court of Appeal also explained that the mens rea for the act of making should be "a deliberate and intentional act with knowledge that the image made is, or is likely to be an indecent photograph or pseudo-photograph of a child,"[9] and this "did not require an intention on the part of the maker to store the images with a view to future retrieval."[10]

The Court of Appeal also clarified the requirement in section 7(4)(b) of the 1978 Act, and that "data stored on a computer disc or by other electronic means 'should be capable of conversion into a photograph'. It is not a requirement that the data should be retrievable." So the appeal was dismissed. It was hinted that there may be an appeal to the House of Lords following the decision of the Court of Appeal in Jayson.

Jayson to some extent clarifies issues surrounding Internet cache and images stored in cache directories. But as in the case of Smith, Jayson's actions resulted in an offence of "making" under section 1(1)(a) of the 1978 Act being committed rather than a simple possession offence being committed under section 160 of the 1988 Act. Therefore, it is perhaps time to reconsider the **Bowden** interpretation, perhaps this time by the House of Lords as the Court of Appeal seems reluctant to overrule itself in relation to this issue.

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FOOTNOTES

[1] See generally Akdeniz, Y., "Child Pornography," in Akdeniz, Y., & Walker, C., &, Wall, D., (eds), *The Internet, Law and Society*, Addison Wesley Longman, 2000, 231-249; and Akdeniz, Y., *Internet Child Pornography and the Law: National and International Responses*, Ashgate, forthcoming in late 2002.
[2] [2000] 1 Cr App R 438.
[3] **R v Bowden** [2000] 2 All ER 418.
[4] **Atkins v Director of Public Prosecutions and Goodland v Director of Public Prosecutions** [2000] 2 All ER 425.
[5] This subsection does not include a similar defence to which has been provided for possession offences under section 160(2)(c) of the Criminal Justice Act 1988.
[6] [2000] 2 All ER 425, [2000] 1 WLR 1427. According to Simon Brown LJ "whilst 'making' includes intentional copying (**R v Bowden**), it does not include unintentional copying."
[7] Para 33, [2002] EWCA Crim 683, (No. 2001/00251/Y1), 7 March 2002.
[8] Para 34, [2002] EWCA Crim 683, (No. 2001/00251/Y1), 7 March 2002.
[9] *Ibid.*
[10] Para 36, [2002] EWCA Crim 683, (No. 2001/00251/Y1), 7 March 2002.

BOOK REVIEW

The Internet and Freedom of Speech

Republic.com by Cass Sunstein, 2002, soft-cover, Princeton University Press, 236pp., US $ 12.95, ISBN 0 691 09589 2.

This text offers an examination of the Internet and its impact on free speech. It deals with the dilemma of the Internet which can be both an effective means of communication as well as a device for suppressing that. If democracy requires both a range of common experiences and unanticipated unchosen exposures to diverse topics and ideas then: "For those who accept this claim, democracy might well be jeopardized by a system in which each person decides, in advance, what to see and what not to see". The book argues that: "The Internet is bad for democracy because it is reducing common experiences and producing a situation in which people live in echo chambers of their own design. For those who accept this second claim, the current communications system is in theory similar to one in which general interest intermediaries dominate the scene". The author calls for the establishment of 'deliberative domains', voluntary self regulation, and 'must-carry' rules, in the form of links, imposed on highly partisan websites, there to encourage viewers to learn about sites with opposing views.

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BOOK REVIEW

Genetic Privacy

Genetic Privacy – a Challenge to Medico-legal Norms by Graeme Laurie, 2002, hard-cover, Cambridge University Press, 335pp, £55.00, (US$ 80.00), ISBN 0 521 66027 0.

The substance of this book is the threat to privacy raised by advances in genetics. The author investigates what the role of privacy should be in protecting individual and familial interests surrounding genetic information and its uses. The author questions whether patient consent should be the sole legitimating factor in all dealings with patients. He argues that this "Ignores the limitations of consent as a means of respecting and empowering individuals, and because it tends to prefer individualistic interests over crucial public interests, such as the procedure of genetic and other medical research". The book is divided into three parts. Part 1 – Privacy: the general part – considers historical, philosophical and legal treatments of privacy and explains why it is often the poor relation in the family values that lie at the heart of many cultures. The second part – Genetic Knowledge – the existing models – examine current responses to genetic advances in the light of the interest of the parties who might seek and claim to genetic information or material. The final part – A New Privacy Paradigm – argues for a greater role for privacy in guiding ethical and legal responses to these issues. The author places as a vital element in his argument the protection of rights of personality. Such an approach: "Should lead us to recognize yet other personality rights, most notably those of property rights in the person".

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