

An Investigative Determination – Child Pornography or Child Erotica?

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The law enforcement community is typically reactive in nature. With this factually supported statement established, there is little surprise that law enforcement has been slow to respond to the investigation of Internet crimes against children. Can we fear what we do not see? The physical absence of the sexual offender, cloaked by the barrier of a computer monitor and modem, is no less dangerous than the registered sexual predator that has been released from prison and moved into your neighborhood. Investigators with online experience would strongly agree with this presumption. The sexual offender uses this perceived absence to methodically develop a comfortable relationship that commonly leads to a meeting between the offender and the child victim. Sexual exploitation in cyberspace is a very real threat to our children and a tremendous challenge to investigators entering the online arena.

The investigations that occur via computers require new investigative techniques and technology-based skills. Law enforcement is standing at a threshold where proactive investigations in cyberspace are becoming the norm. Laws are generally non-specific to computer-related crimes against children. Not only is law enforcement unfamiliar with the cyber-environment, prosecutorial officers and judges are even less informed. This article will address a primary concern of online investigations: the legal difference between child pornography and child erotica. Prior to initiating an online contact, there must exist an explicit understanding of what constitutes an illegal computer file image. As laws vary from state to state, the topic will be discussed from the perspective of federal application. Once the distinction has been made, it is imperative that investigators thoroughly understand the local jurisdictional applications.

According to federal law, there is a distinction between child pornography and child erotica. Child pornography is clearly defined within 18 USC 2256. It should be noted that the Code does not provide a definition for child erotica. Instead, child erotica is differentiated from child pornography by the absence of elements defining child pornography. To cite Title 18, United States Code, Section 2256, Chapter 110:

For the purposes of this chapter, the term "minor" means any person under the age of eighteen years; "sexually explicit conduct" means actual or simulated: (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person; (3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising; (4) "organization" means a person other than an individual; (5) "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image; (6) "computer" has the meaning given that term in section 1030 of this title; (7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained; (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where: (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or (D) such

visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct; and (9) "identifiable minor": (A) means a person: (i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or (II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and (ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and (B) shall not be construed to require proof of the actual identity of the identifiable minor.

Of particular interest to the investigation is the making of a determination, with reasonable certainty, that the person(s) and activities depicted in the computer file image is a violation of law. There are two specific issues relative to the topic. The first area of concern is age. The person(s) depicted in the computer file image must be under the age of eighteen. The courts have consistently accepted prima facie evidence where the age of the person is so clearly under the age of eighteen that reasonable certainty is evident without proof or reasoning. This determination would be based upon the investigator's training, experience, and expertise. Outside the scope of prima facie evidence, it is typically required that the investigator obtains medical determination to establish probable cause. I encourage investigators to include prosecutors from the onset of each investigation. This investigator-prosecuting agent relationship strengthens the prosecutorial effort through a mutual understanding of procedural and investigative expectations.

A second area of concern is the activity depicted in the computer file image. 18 USC 2256 defines clearly that the primary considerations are (1) actual or simulated sexual intercourse or (2) lascivious exhibition of the genitals or pubic area of any person. Absent these two activities, you have child erotica. Child erotica, in and of itself, is not a violation of 18 USC 2252 and 18 USC 2251 (Sexual Exploitation and Other Abuse Of Children) to possess, produce, direct, manufacture, publish, or distribute. Child erotica depicts a person under the age of eighteen in a partial or complete state of nudity. The genitalia or breasts may be clearly displayed, but lacking actual or simulated sexual intercourse or lascivious exhibition of the genitals or pubic area, the investigator has no violation. It is the burden of the government or state to establish the elements of the violation. It is therefore recommended to step forth with caution when articulating your probable cause. If the computer file image undeniably fails to display actual or simulated sexual intercourse, lascivious exhibition of the genitals or pubic area, or a person whose age is difficult to determine, move on to the next investigation.

A final issue that must be considered: Does child erotica provide a foundation for the establishment of probable cause? The answer is it depends on the facts and circumstances of the case. Child erotica, in and of itself, is not a violation of federal law. Therefore the establishment of probable cause is unlikely. Yet, the totality of circumstances in an investigation may develop probable cause based upon expert opinion and testimony. It is difficult in an online investigation to positively place an individual at a particular computer at the time of transmission of a child pornographic computer file image. Subpoenaed records can reveal subscriber information, user logs, detailed telephone records, assigned Internet provider addresses, and other relevant information. Even with this tremendous volume of information, one can rarely place a single individual at the computer prior to the interview of potential suspects. One must also understand that online accounts can be accessed from remote locations. So how can probable cause be established? It is difficult under the best of circumstances. If the investigator can establish, with prosecutorial support, a nexus between the child erotica and the offender's predisposition to crimes against children, probable cause may develop.

A significant obstacle to the establishment of probable cause will be dependent upon how state laws are written and the general lack of knowledge concerning the investigation of cyber-crimes. In Florida, for example, there is virtually no legislated provision to establish probable cause when the only evidence is child erotica. The computer file image must depict child pornography. Another example of how federal and state laws differ is that 18 USC 2256 defines as a violation any altered or modified image that “conveys the impression that the material is ... of a minor engaging in sexually explicit conduct.” Florida State Statute establishes no provision for altered or modified computer file images. If it can be established the computer file image has been altered, no violation exists.

The criminal justice community has a long way to go in combating the sexual exploitation of children by means of a computer. Investigators must be trained in the technical and legal aspects of these crimes. Court officers must become more aware, and less intimidated, in prosecuting and judging the merits of these investigations. Strong legislation must be enacted to eliminate barriers to the identification, apprehension, and prosecution of sexual offenders who prey on our children. With these provisions accomplished, the criminal justice community will then be capable of providing a safer community for our children, free of fear from sexual exploitation and abuse.

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