

Child Pornography Defense Primer

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WACDL
December 6, 2002
Renaissance Madison Hotel, Seattle WA

Statutes Governing Child Pornography

Enforceable

Child Protection Act, Pub. L. No. 95-225, 92 Stat 7 (codified as amended as 18 U.S.C. §§ 2251-2252, 2256).

Making illegal the **production** of child pornography illegal . . .

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (d) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(c) (1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering--

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct: shall be punished as provided under subsection (d).

(2) The circumstance referred to in paragraph (1) is that--

(A) such person knows or has reason to know that such notice or advertisement will be transported in interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported in interstate or foreign

commerce by any means including by computer or mailed.

(d) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title or imprisoned not less than 10 years nor more than 20 years, and both, but if such person has one prior conviction under this chapter, chapter 109A, or chapter 117, or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 30 years, but if such person has 2 or more prior convictions under this chapter, chapter 109A, or chapter 117, or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 30 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

Hallmark features of this section include a mandatory minimum (10 years) and a scienter element that only extends to the act of transporting; ignorance of the child's age is not a defense except where, by clear and convincing evidence, the defendant proves s/he did not know, and could not reasonably have learned, that the actor or actress was under 18 years of age. *United States v. U.S. Dist. Court for Cent. Dist. of California*, 858 F.2d 534 (9th Cir. 1988); *United States v. Thomas*, 1990, 893 F.2d 1066 (9th Cir.), cert. denied 498 U.S. 826 (1990).

Making illegal the **distribution, receipt and possession** of child pornography illegal . . .

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who--

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means, including by computer, if--

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if--

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) (1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but if such person has a prior conviction under this chapter, chapter 109A, chapter 117 or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 5 years, or both, but if such person has a prior conviction under this chapter, chapter 109A, or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

(c) Affirmative defense.-- It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant--

- (1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and
- (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof--
 - (A) took reasonable steps to destroy each such visual depiction; or
 - (B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

Note the provision of an affirmative defense to mere possession.

Lastly, some important definitions, portions of which have been recently declared unconstitutional . . .

§ 2256. Definitions for chapter

For the purposes of this chapter, the term--

- (1) "minor" means any person under the age of eighteen years;
- (2) "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.

For sentencing purposes, see Federal Sentencing Guidelines §§ 2F1.1, 2G1.2, 2G2.2, and 2G2.4, . And see the section on sentencing, below.

The constitutionality of criminalizing non-obscene child pornography was upheld in *New York v. Ferber*, 458 U.S. 747 (1982). The distinction between obscene works and non-obscene child pornography is highlighted at *Ferber*, 458 U.S. at 753 (contrasting the classic obscenity test found in *Miller v. California*, 413 U.S. 15 (1973) from child pornography).

In standard 1st Amendment parlance, child pornography is subject to criminal sanction due society's compelling reasons to suppress the activity, not to "prurient" elements or a lack of serious literary, artistic, political or scientific value. It should therefore be fruitless to argue that a particular item of child pornography has some special value: the argument, even if accepted as true, would only qualify the work as non-obscene. It would still be subject to criminalization as a depiction of a minor engaged in "sexually explicit conduct." Some courts, however, will permit an affirmative defense for serious works. See *United States v. Lamb*, 945

F.Supp. 441 (NDNY 1996).

Unenforceable

Ashcroft v. Free Speech Coalition, 2002 WL 552476, ___ U.S. ___, 22 S.Ct. 1389 (2002) ruled unconstitutional the Child Pornography Prevention Act, codified at 18 USC § 2256 (8)(b) and (d). “Virtual” or “morphed” depictions of child sexual conduct is constitutionally protected.

Following the Free Speech Coalition decision, 17 alternative legislative amendments have been proposed. As of this date, four are engrossed, the remainder have been introduced. Serious progress is doubtful from the standpoint of the FSC decision, but proponents of new and broader statutes are well-funded, organized and zealous.

Patterns in Detection

Active Investigation Schemes

Southern Travel Scam

Active investigations into child pornography are handled by Customs, Postal and local law enforcement authorities.

Fortuitous Discovery & Private Party Detection

A Hard Drive's Gonna Fall (with apologies to Dylan)

Third party detection, especially at the defendant's workplace, raise special problems for suppression. For application of the Fourth Amendment in a government office, see *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000). In *Simons*, the office computer-use policies warning employees that their machines were subject to search was sufficient to destroy the defendant's claim to a justified expectation of privacy. A similar argument was advanced and adopted by the Washington State Supreme Court in analyzing privacy interests in email and “chat” sessions. See *State v. Townsend*, 2002 WL 31477600 (November 7, 2002), below

Defenses

Suppression

No specialized 1st Amendment defenses. *United States v. Ferber*, 458 U.S. 747, 764 (1982).

Privacy and the internet

Washington's "2-Party" consent rule for recording conversations

State v. Townsend, 2002 WL 31477600 (November 7, 2002)

Slip Op. 6-8

Alexander, C.J.

C. Did Townsend *consent* to the recording of his private communications?

Having determined that the private e-mail and ICQ communications between Townsend and Amber fall under the purview of the aforementioned provision in Washington's privacy act because they were recorded by a device, we must next confront the question of whether Townsend consented to the recording of his private communications. If he did the recording was not unlawful. That is so because, as we have noted above, it is not unlawful to record a communication on a device where the "consent of all the participants in the communication" has been obtained. RCW 9.73.030(1)(a). A party is deemed to have consented to a communication being recorded when another party has announced in an effective manner that the conversation would be recorded. RCW 9.73.030(3). In addition, a communicating party will be deemed to have consented to having his or her communication recorded when the party knows that the messages will be recorded. See *In re Marriage of Farr*, 87 Wash.App. 177, 184, 940 P.2d 679 (1997), *review denied*, 134 Wash.2d 1014, 958 P.2d 316 (1998), in which the Court of Appeals held

that a party had consented to the recording of his messages when he left the message on a telephone answering machine, the only function of which is to record messages.

Although Townsend did not explicitly announce that he consented to the recording of his e-mail and ICQ messages to Amber, we are of the view that his consent may be implied. Insofar as Townsend's e-mail messages are concerned, in order for e-mail to be useful it must be recorded by the receiving computer. We entirely agree with the observation of the Court of Appeals that:

A person sends an e-mail message with the expectation that it will be read and perhaps printed by another person. To be available for reading or printing, the message first must be recorded on another computer's memory. Like a person who leaves a message on a telephone answering machine, a person who sends an e-mail message anticipates that it will be recorded. That person thus implicitly consents to having the message recorded on the addressee's computer.

Townsend, 105 Wash.App. at 629, 20 P.3d 1027. In sum, because Townsend, as a user of e-mail had to understand that computers are, among other things, a message recording device and that his e-mail

messages would be recorded on the computer of the person to whom the message was sent, he is properly deemed to have consented to the recording of those messages.

The question of whether the Court of Appeals erred in holding that Townsend consented to the recording of his ICQ communications is a closer question than the question of whether his consent to the recording of his e-mail messages may be implied. We say that because, unlike e-mail, ICQ technology does not require that messages be recorded for later use. Rather, it functions with both communicators online at the same time. In other words, each party talks in "real time" by sending their message on to the computer monitor of the other party who may respond with an answering message. Necessarily, the computer message is saved long enough to allow the person to whom the communication is addressed to answer. Whether the ICQ communication is saved for a longer period of time depends on the computer software used by the recipient. [FN3] Here, as we have noted above, the recipient of the ICQ messages was Detective Keller and his ICQ Software program was defaulted to automatically record messages from Townsend that he received. The more pertinent question is whether Townsend was aware that the software was or could be defaulted. Significantly, Townsend's ICQ contained a "privacy policy" that specifically warned users that "[s]ome versions of the software allow any party to an ICQ session to record the content of the session" and that "[t]he ICQ program default in some versions is set to record message and other event dialog and traffic." CP at 139. The ICQ privacy policy also warned users that they risk "[u]nauthorized exposure of information and material you listed or sent, on or through the ICQ system, to other users, the general public or any other specific entities for which the information and material was not intended by you." CP at 136. In addition, the ICQ Software privacy policy warned users against use of ICQ Software for " 'Content Sensitive' applications and purposes" and advised them that if they

wish not to be exposed to these risks, they should not use the software. CP at 136. The Court of Appeals concluded that by "using the ICQ client-to-client communications, Mr. Townsend impliedly consented to recording of the communications" to Amber. *Townsend*, 105 Wash.App. at 630, 20 P.3d 1027.

Townsend asserts that the Court of Appeals' decision conflicts with this court's opinions in *State v. Faford*, 128 Wash.2d 476, 481, 910 P.2d 447 (1996); *Kadoranian v. Bellingham Police Dep't*, 119 Wash.2d 178, 192, 829 P.2d 1061 (1992); *State v. Young*, 123 Wash.2d 173, 186, 867 P.2d 593 (1994); and *State v. Myrick*, 102 Wash.2d 506, 513-14, 688 P.2d 151 (1984). Pet. for Review at 3-4. He primarily focuses on our opinion in *Faford*, in which we rejected an argument by the State that warning labels on cordless telephones and/or in the owner's manual constituted a waiver of one's privacy protections. Pet. for Review at 4 (quoting *Faford's* holding that " 'the mere possibility that intrusion on otherwise private activities is technologically feasible' " does not strip citizens of their privacy rights. *Faford*, 128 Wash.2d at 485, 910 P.2d 447).

We believe our decision in *Faford* is not controlling here. That is so because in *Faford* we were confronted with communications over a cordless telephone that were intercepted by someone who was not a party to the telephone conversations. There was no suggestion there that the communicators had either consented to the communications being recorded or advised that they might be recorded. Here, the recording of the ICQ client-to-client communication was undertaken not by a third party but by a party who was the recipient of the communication. Furthermore, as we have observed, the ICQ privacy policy advised users such as Townsend that if they did not wish to be subjected to the risks of recording, they should not use the software.

Although no evidence was presented at trial establishing that Townsend had acquainted himself with the ICQ privacy policy, his

familiarity with it may reasonably be inferred. In that regard we agree with the superior court judge who ruled on Townsend's motion to dismiss that the saving of messages is inherent in e-mail and ICQ messaging. In addition, the fact that Townsend encouraged the recipient of his ICQ messages, the fictitious Amber, to set up an ICQ account strongly suggests that he was familiar with the technology. We are satisfied, in sum, that Townsend was informed by ICQ software privacy policy and by his general understanding of ICQ technology that the recording of ICQ messages by a recipient is a possibility. Consequently, like other users of ICQ technology, he took a risk that his messages might be recorded by the recipient. The Court of Appeals, therefore, correctly concluded that under these circumstances Townsend impliedly consented to the recording of his ICQ messages.

* * *

SMITH, JOHNSON, MADSEN,
CHAMBERS and OWENS, JJ., concur.

Bridge, J. (concurring) [omitted] * * *

SANDERS, J. (dissenting).

The majority engrafts by *inference* an unstated consent exception to Washington's privacy act ("one of the most restrictive in the nation," majority at ----); and then *implies* consent to satisfy the inferred exception (majority at ----). Inference plus implication equals loss of privacy.

The fact of the matter is Townsend did not *actually* consent to recording his private ICQ messages and, unlike e-mail, he had no reason to believe these particular ICQ messages would necessarily be recorded prior to viewing by the intended recipient. The most that can be said is that the extremely technologically astute communicator might be aware that under some circumstances the ICQ message might be recorded. *See* majority at ---- - ----. But that isn't enough.

Although the majority refuses to be bound

by our holding previously expressed in *State v. Faford*, 128 Wash.2d 476, 485, 910 P.2d 447 (1996) that "the mere possibility that intrusion on otherwise private activities is technologically feasible" does not equate to consent for that to happen (majority at --- -), it does not overrule *Faford*. Nor does it convincingly distinguish it by merely attempting to differentiate between recording by the intended recipient and recording by a third person. I see no such distinction in the statute. The statute prohibits recording by either.

Likewise, the distinction made by the concurring opinion is also not found in the statute. According to the concurrence, the privacy act applies only to communications recorded on a device different from the device used to communicate. Concurring opinion at ----, ---- - ----. To the contrary, RCW 9.73.030 prohibits any recording of private communications "by *any* device electronic or otherwise designed to record *and/or* transmit said communication." (Emphasis added.) To that extent, I agree with the majority and Court of Appeals. *See* majority at ----; *State v. Townsend*, 105 Wash.App. 622, 628, 20 P.3d 1027 (2001) (noting the kind of distinction made by the concurrence is one "without legal difference"). [FN1]

The majority is simply rewriting the statute to allow invasions of privacy when it is the state in a criminal investigation that does the invading. But protection of our privacy from the government is an important reason the legislature enacted this statute. So too, the "possibility" that the state may invade our privacy, a possibility that this majority opinion makes more probable, is hardly a legal justification for the unlawful practice to continue nor adequate grounds to conclude one has "consented" to the very invasion which the statute is designed to prohibit.

"We recognize as technology races ahead with ever increasing speed, our subjective expectations of privacy may be unconsciously altered. Our right to privacy may be eroded without our awareness, much less our consent. We

believe our legal right to privacy should reflect thoughtful and purposeful choices rather than simply mirror the current state of the commercial technology industry."

184, 867 P.2d 593 (1994)).

Accordingly I dissent.

Faford, 128 Wash.2d at 485, 910 P.2d 447 (quoting *State v. Young*, 123 Wash.2d 173,

Defenses, cont.

Negating Elements

Among the various detection scenarios there are possible defenses to the statutory elements. For example, in a sting where LE is sending photographs to the target, the existence of interstate usage is foregone. Customs or the Postal Service will make certain that the delivery is across state lines. Even if they fail to actively meet that element themselves, their selection of material can be designed so as to create an insurmountable impression that the depiction was produced elsewhere.

The remaining defenses are few: is the depiction real or is there evidence that it is a composite ("morph") or computer generated ("virtual")? Expert examination of the depiction itself may be required. The government will bring expert testimony (which may be challengeable under *Daubert/Kuhmo Tire*) that the models in the photographs are real and under age. Using a controversial "scale" of human development, an expert may testify that the evident development or lack of development of primary and secondary sex characteristics shows that the model was underage. This becomes highly problematic where the models are not prepubescent but teen-aged. Differences in race can also affect the determination of age based upon standardized developmental milestones. Formation and density of public hair, breast tissue, descent of testes, etc. is not universal among all races, nor among even a single biological family.

Consider, too, that some sentencing factors (especially the federal Specific Offense Scores) are triggered by specific age categories. Assuming a depiction appears to show an obviously prepubescent child, is the child 12 or more years of age, or under 12.¹

¹ United States Sentencing Guidelines, 2G2.2(b)(1) provides for a 2 level increase if the child is under 12 or prepubescent. Other guidelines apply as much as a 4 level increase for

Entrapment

Jacobson v. United States, 112 S.Ct. 1535 (1992)

... from the West Syllabus:

At a time when federal law permitted such conduct, petitioner Jacobson ordered and received from a bookstore two Bare Boys magazines containing photographs of nude preteen and teenage boys. Subsequently, the Child Protection Act of 1984 made illegal the receipt through the mails of sexually explicit depictions of children. After finding Jacobson's name on the bookstore mailing list, two Government agencies sent mail to him through five fictitious organizations and a bogus pen pal, to explore his willingness to break the law. Many of those organizations represented that they were founded to protect and promote sexual freedom and freedom of choice and that they promoted lobbying efforts through catalog sales. Some mailings raised the spectre of censorship. Jacobson responded to some of the correspondence. After 2 1/2 years on the Government mailing list, Jacobson was solicited to order child pornography. He answered a letter that described concern about child pornography as hysterical nonsense and decried international censorship, and then received a catalog and ordered a magazine depicting young boys engaged in sexual activities. He was arrested after a controlled delivery of a photocopy of the magazine, but a search of his house revealed no materials other than those sent by the Government and the Bare Boys magazines. At his jury trial, he pleaded entrapment and testified that he had been curious to know the type of sexual actions to which the last letter referred and that he had been shocked by the Bare Boys magazines because he had not expected to receive photographs of minors. He was convicted, and the Court of Appeals affirmed.

Held: The prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that Jacobson was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails. In their zeal to enforce the law, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. *Sorrells v. United States*, 287 U.S. 435, 442, 53 S.Ct. 210, 212, 77 L.Ed. 413. Jacobson was not simply offered the opportunity to order pornography, after which he promptly availed himself of that opportunity. He was the target of 26 months of repeated Government mailings and communications, and the Government has failed to carry its burden of proving predisposition independent of its attention. The preinvestigation evidence — the Bare Boys magazines — merely indicates a generic inclination to act within a broad range, not all of which is criminal. Furthermore, Jacobson was acting within the law when he received the magazines, and he testified that he did not know that they would depict minors. As for the evidence gathered during the investigation, Jacobson's responses to the many communications prior to the criminal act were at most indicative of certain personal inclinations and would not support the inference that Jacobson was predisposed to violate the Child Protection Act. On the other hand, the strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and

similar distinctions. For defendants with little or no criminal history a 2-level rise translates into a 10-12 month increase; for higher levels of criminal history the increase can go as high as two years. A four-level increase for a child pornography producer easily adds 2+ years.

constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited Jacobson's interest in material banned by law but also exerted substantial pressure on him to obtain and read such material as part of the fight against censorship and the infringement of individual rights. Thus, rational jurors could not find beyond a reasonable doubt that Jacobson possessed the requisite predisposition before the Government's investigation and that it existed independent of the Government's many and varied approaches to him.

Other Affirmative Defenses

Possession of child pornography contains a narrow affirmative defense.

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof--

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

18 U.S.C. § 2252.

Sentencing Issues

Counting Victims Under the Guidelines

Heartland Departures

“Porn Cases Decided Differently,” ABA Journal E-Report, November 1, 2002. Retrievable on Westlaw at 1 No. 42 ABAJEREP 5.

Experts & Computer Issues

Slack space? Talk to my tailor . . .

A primer on computer forensics is essential, but there's now a reported case that at least acknowledges the need for thorough preparation.

United States v. Triumph Capital Group, 2002 WL 31487754 (D. Conn, Nov 4, 2002).

Of special interest, see footnotes 4 – 12 for a nice glossary. This decision goes so far as to analyze the actual key words and search strings used by the government's forensic witness. Use the standards described in this case to support your request for higher than usual expert fees, for extensive

discovery, for a continuance, or to attack a sloppy job by the government's expert. If nothing else, use this case to educate yourself and — maybe — intimidate the prosecutor.

More on M(or)F, Morph, and Morphing

Fantasy Defense: see *The Champion*, Aug 2002 and Sept/Oct 2002, "Internet Sexual Entrapment: the uses and misuses of 18 U.S.C. 2423(b)"