

## **“SEXTING” OF REVEALING IMAGES OF CHILDREN IS THE DISTRIBUTION CHILD PORNOGRAPHY**

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### **1 INTRODUCTION**

Recent reports<sup>1</sup> on cell-phone “sexting” activities by young people suggest that parents and young people are ignorant of the fact that ***taking a sexually-suggestive or semi-nude or nude picture of oneself and sending it via cell phone to friends amounts to the creation, possession and distribution of child pornography.***<sup>2</sup> Learners as young as 12 years are reportedly exchanging salacious pictures and messages through their cell phones. Young people may think “sexting” is fun - and teenage girls might think it makes a sexy present for boyfriends - but the consequences can be quite serious.

When teenager Phillip Alpert’s 16-year-old girlfriend broke off their relationship, Phillip decided to get back at her by “sexting” nude photos that she had previously “sexted” him, to her parents, grandparents, teachers and other teenagers via e-mails. Phillip Alpert was charged with distributing child pornography. He was convicted, sentenced to 5 years probation and was registered as a sex-offender, a label he has to “wear” until he turns 43 years. He lost his friends because “they just don’t want to be friends with a sex-offender kid”, he explained. And he was kicked out of Valencia Community College because he is a registered sex-offender.<sup>3</sup>

“.....last month, a Brevard County teen was jailed after forwarding a cell-phone picture of his 16-year-old ex-girlfriend’s naked breasts to another teen. The girlfriend allowed the photo to be taken while the two were dating, police said. **And an Ohio teen hanged herself in May after her ex-boyfriend forwarded nude photos of her, sharing them with other high-school girls.**”<sup>4</sup>

Dalia Lithwick also reported, in an article *Teens, Nude Photos and the Law*, published in *Newsweek International* on 14 February 2009, that “three girls (ages 14 or 15) in Greensburg, Pa., were charged with disseminating child pornography for sexting their boyfriends. The boys who received the images were charged with possession. A teenager in Indiana faces felony obscenity charges for sending a picture of his genitals to female classmates. A 15-year-old girl in Ohio and a 14-year-old girl in Michigan were charged with felonies for sending nude images of themselves to classmates. Some of these teens have pleaded guilty to lesser charges. Others have not. If convicted, these young people may have to register as sex offenders, in some cases for a decade or two. Similar charges have been brought in cases reported in Alabama, Connecticut, Florida, New Jersey, New York, Pennsylvania, Texas, Utah and Wisconsin.”

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<sup>1</sup> See, for instance, ‘Gang-rape’ teen tells of her ordeal, Sunday Times Extra, 22 March 2009; *Pennsylvania Girl, 15, Faces Child Porn Charges After ‘Sexting’*, Associated Press, Friday, February 20, 2008; “Clearfield County District Attorney William Shaw says the girl has been charged as a juvenile with possessing, distributing and creating child pornography.....”; *Cape youths face charges for “sexting”*, capecodonline.com, February 11, 2009: “Six middle school students could face child pornography charges after snapping a photo of a nude female classmate and distributing it through their cell phones....”

<sup>2</sup> See *Pennsylvania Girl, 15, Faces Child Porn Charges After ‘Sexting’*, Associated Press, Friday, February 20, 2008. “Clearfield County District Attorney William Shaw says the girl has been charged as a juvenile with possessing, distributing and creating child pornography.....”; *Cape youths face charges for “sexting”*, capecodonline.com, February 11, 2009: “Six middle school students could face child pornography charges after snapping a photo of a nude female classmate and distributing it through their cell phones....”

<sup>3</sup> *Teenager Listed as Sex Offender for E-mailing Nude Photos*, Carol Forsloff, March 2009. See, also, ‘Sexting’ teenagers face child-porn charges, Bianca Prieto, Sentinel Staff Writer, 8 March 2009

<sup>4</sup> Bianca Prieto, Sentinel Staff Writer, 8 March 2009

In New Jersey, a 14-year-old girl has been accused of child pornography after posting nearly 30 explicit nude pictures of herself on MySpace.com. The teenager, whose name cannot be released because of her age, was arrested and charged with possession and distribution of child pornography. If convicted, the girl would be forced to register as a sex offender under the US's "Megan's Law."<sup>5</sup> And that is not the only consequences she will have to live with for the rest of her life. Her pictures will most likely – almost certainly – end up in the hands of paedophiles and will be exploited even beyond her life time.

1.1 One may argue that these are children and not paedophiles or child predators. And that they see this as fun and not an "investment" in the exploding child pornography industry. But the photos will most certainly end up as part of the child pornography industry so these children are not just exploiting themselves but satisfying the increasing demand for child abuse images and are therefore helping to keep alive an industry that survives on the sexual abuse, torture and brutalisation of children. What these children seem to be unaware of is that these revealing photos will end up on the Internet to become part of the child pornography industry. And they will end up on the Internet not only through their actions but through the actions of, especially, boyfriends as revenge for breaking up relationships.

1.2 The tragic case of the Ohio girl who hanged herself after her boyfriend posted nude pictures of her to all her friends is a "wake-up" call to all teenagers, and parents, of the consequences of "sexting". The argument that these children should be helped and not prosecuted is weak, especially with regard to those boys who seek revenge on their girlfriends for breaking up with them by deliberately, and with the intention of "getting back" at them, posting their nude photos to others, via mobile cellular phones and the Internet. The consequences of prosecution are serious. But feeding the appetites of the perverted for child abuse images is even more serious. Until an effective alternative is available, prosecution seems the only way to send a clear message to teenagers and parents that "sexting" is not funny when it becomes part of the child pornography industry.

## 2 WHAT IS "SEXTING" AND IS "SEXTING" AN OFFENCE IN SOUTH AFRICA?

2.1 "Texting" is the practice of sending text messages, usually through a cell phone's "sms"<sup>6</sup> facility. "Sexting", a combination of "sex" and "texting", is the practice of sending sexually-suggestive text messages or photos mainly through cell phones and social networking sites. MXit is a popular "sexting" site for teenagers in South Africa. "Sexting" revealing photos of oneself, in the case of any person under the age of 18 years, is, in fact, the creation, possession and distribution of child pornography.

2.2 **"Sexting" in this paper refers to the creation and distribution of child abuse images through the use of a mobile cellular phone, regardless of the "destination" or intended recipient of the image.**

2.2 The handling of the Northmead Secondary School case<sup>7</sup>, by the police, the parents of the teenage victim and the teachers, as well as those who had knowledge of the distribution of the explicit footage, reveals a disturbing ignorance of anti-child pornography laws in South Africa.

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<sup>5</sup> *Girl faces child porn charges after nude photos*, The Associated Press, 26 March 2009

<sup>6</sup> Short Message Service

<sup>7</sup> *'Gang-rape' teen tells of her ordeal*, Sunday Times Extra, 22 March 2009

### 3 CHILD PORNOGRAPHY AND THE LAW IN SOUTH AFRICA

3.1 The creation, production, distribution, use and possession of child pornography are offences in terms of both the *Films and Publications Act, No 65 of 1996* (FPAAct) and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 32 of 2007* (SOAct).

3.2 “Child pornography”, if one is to combine the definitions in the FPAAct and the SOAct with specific relevance to “sexting”

*is any image, however created, or any description or representation of a person, real or simulated, who is depicted, made to appear, look like, represented or described or presented as being under the age of 18 years of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person-*

- (a) *engaged in sexual conduct*<sup>8</sup>
- (b) *engaged in an act that constitutes a sexual offence*<sup>9</sup>
- (c) *participating in or assisting another person to participate in sexual conduct*
- (d) *engaged in an act of sexual penetration*<sup>10</sup>
- (e) *engaged in an act of sexual violation*<sup>11</sup>
- (f) *engaged in an act of self-masturbation*
- (g) *displaying the genital organs of such person in a state of arousal or stimulation*
- (h) *unduly displaying the genital organs or anus of such person*
- (i) *displaying any form of stimulation of a sexual nature of such person's breasts*
- (j) *engaged in sexually suggestive or lewd acts*
- (k) *engaged in or as the subject of sadistic or masochistic acts of a sexual nature*

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<sup>8</sup> “Sexual conduct” is defined in the FPAAct as “male genitals in a state of arousal or stimulation; the undue display of the genitals or of the anal region; masturbation; bestiality; sexual intercourse, real or simulated, including anal sexual intercourse; sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any object; the penetration of a vagina or anus with any object; oral genital contact or oral anal contact.”

<sup>9</sup> “Sexual offence” is defined in the SOAct as “any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1)” of the SOAct

<sup>10</sup> “Sexual penetration”, in terms of the SOAct, “includes any act which causes penetration to any extent whatsoever by- (a) the genital organs of one person into or beyond the genital organs, anus or mouth of another person; (b) any other part of the body of one person or any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or (c) the genital organs of an animal into or beyond the mouth of another person

<sup>11</sup> “Sexual violation” includes, in terms of the SOAct, “any act which causes (a) direct or indirect contact between the- (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal; (ii) mouth of one person and - (aa) the genital organs or anus of another person or, in the case of a female, her breasts; (bb) the mouth of another person; (cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could- (aaa) be used in an act of sexual penetration; (bbb) cause sexual arousal or stimulation; or (ccc) be sexually aroused or stimulated thereby; or (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or (iii) mouth of the complainant and the genital organs or anus of an animal; (b) the masturbation of one person by another person; or (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration.” And see *The Sexual Offences Act and the Kissing Controversy*, Iyavar Chetty (2008)

- (l) *engaged in an conduct or activity characteristically associated with sexual intercourse*
- (m) *showing or describing such person-*
  - (i) *participating in, or facilitating or assisting another person to participate in; or*
  - (ii) *being in the presence of another person who commits or in any other manner being involved in any act of a sexual nature; or*
- (n) *showing the body, or parts of the body, of such person in a manner or in circumstances which, within context, amounts to sexual exploitation or violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or in such a manner that it is capable of being used for the purpose of sexual exploitation or is capable of being used for the purpose of violating or offending the sexual integrity of that person, any person or group or categories of persons.*

3.2.1 The question of whether or not the sexual conduct depicted in the image was consensual or coerced is irrelevant – what is relevant is whether or not the image contains a person under the age of 18 years engaged or involved in an act or conduct of a sexual nature. Children do not “consent” to being sexually abused, raped, tortured, brutalised and even murdered for the production of child pornography.

#### 4 THE NORTHMEAD SECONDARY SCHOOL CASE

4.1 According to reports, a teenage female learner, aged 16 years, was filmed while being raped, forced to perform oral sex and sexually violated by “five schoolboys, aged between 15 and 17” and two adults. Any footage that contains images and scenes of explicit sexual conduct involving persons under the age of 18 years will clearly constitute child pornography in terms of both the FPAAct and the SOAct.

4.2 **In terms of both the FPAAct and the SOAct, it is an offence to create, produce, to be in possession of or distribute child pornography. There is no provision either in the FPAAct or the SOAct that allows for, or exempts, the creation, production and distribution of child pornography under any circumstances.**

#### 5 “SEXTING” OFFENCES

5.1 The sending or distribution of sexually-explicit images of adults or children via mobile cellular phones – “sexting” - is not a new offence but a new activity facilitated by the convergence of technologies and, since the unsupervised invasion of mobile cellular phones among children, the *convergence of technology and behaviour*.<sup>12</sup> “Sexting”, which, in fact, amounts to the *distribution of sexually-explicit images or pornography or child pornography* has been part of South African criminal law since the enactment and coming into force of the *Films and Publications Act, No 65 of 1996* and, more recently, the *Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 32 of 2007*.

5.2 The obsession of thousands of South African youth with MXit, as the Special Assignment<sup>13</sup> programme showed, is evidence of this convergence of technology and behaviour. Young girls, especially,

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<sup>12</sup> See Special Assignment's *Cellphone Sleaze*, produced by Sasha Wales-Smith, SABC 3 (2008) and *The Convergence of Technology and Behaviour*, Iyavar Chetty (2008); *Strategic Overview 2007-2008* of the Child Exploitation and Online Protection Centre (CEOP), UK; Wolak, Finkelhor, Mitchell and Ybarra (2008) and *Internet Usage in South African Schools*, FPB Research Report (2007)S

<sup>13</sup> *Cellphone Sleaze*

are not only revealing very personal information about themselves and their friends but are also “sexting” sexually-suggestive, revealing semi-nude and nude pictures of themselves to their friends and even strangers they meet in chatrooms – and setting themselves up for disaster. If the young girl interviewed in *Cellphone Sleaze* is typical, South African children are spending more time on social networking sites, like MXit, than on any other activity, including school work.<sup>14</sup>

5.3.1 The unsupervised use of mobile cellular phones by children to access the Internet and social networking sites, like MXit, has “inspired” paedophiles and child predators to shift to mobile cellular phones as the medium of choice not only for the distribution of sexually-explicit materials<sup>15</sup> but also for targeting child victims.<sup>16</sup> And the integration of *location based services* (or GPS) into mobile cellular phone services has significantly increased the risk of offline contact – constant online access via cell phones and the ability to locate a child via this media is now a real risk to children from child predators.

5.3.2 The new electronic environment now makes it easier to apply offline grooming techniques online – offenders are able to build a range of contacts and express shared interests and opinions with children who are increasingly used to having the world as their audience in online forums. Cell phone technology has transformed the phone from a simple voice communication tool to a wider, more integrated facility for the distribution of information. The cell phone is now a sophisticated instrument facilitating an interaction of the three major sectors of telecommunications, media and information technology. Any cell phone user can now surf the Internet, send and receive images and text messages – and talk – all at the same time. *“It has progressed in its design and value from an initial talking device to an instrument whereby its applications fulfill industry, cultural, emotional and informative objectives. The future will see the device performing more operations and comprising more technologies and information so as to intensify its intrinsic links to how people function in their daily lives and business.....The mobile phone is a first-rate example of proving the impact that convergence has had on society. This is because it can change the users’ behaviour and lifestyle pattern..... new mobile phone empowers people to engage in various communications and activities, while at the same time being free from the constraints of physical proximity and spatial immobility.”*<sup>17</sup>

## 6 “SEXTING” OFFENCES IN THE FPACT AND THE SOACT

6.1 The overlap between the FPAct and the SOAct with respect to offences related to child pornography may seem somewhat confusing at times. This paper will focus only on those criminal law provisions in the FPAct and the SOAct that relate, directly or indirectly, to “sexting” and will attempt to “deconfuse” the confusion between the two pieces of legislation.

6.2 A point to note is that, in terms of the FPAct, child pornography offences extend not only to images and descriptions of a sexual nature involving children but also to films and publications which advocate, advertise or promote child pornography or the sexual exploitation of children even if they do not contain any images or descriptions of child pornography.

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<sup>14</sup> “My Mom would wake me up and the first thing I do is go on my phone on MXit to see if anyone left me an offline message. Then I get dressed and while I’m dressing, I leave my phone on the bed. I’d go to school and in between breaks and classes I’d go on my phone and go on MXit. I’d get home at two o’clock and eat lunch. While I’m watching TV, I’d go on MXit and chat until supper time. Supper time is about 15 minutes long and that is basically the longest I’d been off (MXit) the whole day.....” Special Assignment’s *Cellphone Sleaze*

<sup>15</sup> One only has to watch late-night broadcasts on *etv* to appreciate the abuse of mobile cellular phones for the distribution of pornography. Despite drawing the attention to *etv* to the fact that they are advertising, and therefore promoting, the illegal distribution of pornography, *etv* continues to advertise these mobile cellular phone services

<sup>16</sup> See story annexed to this paper

<sup>17</sup> *Towards a Sociological Theory of the Mobile Phone*, Hans Geser, University of Zurich (2004)

6.3 The use of the expression “complainant”<sup>18</sup> in certain of the offence provisions of the SOAct needs clarification. The question is whether or not those offence provisions which refer to a *complainant* would apply only if a complaint is made? A complainant is usually understood to refer to a person who lodges a complaint – not simply one who complains but one who actually lodges a complaint. Generally, it is an expression used in the context of criminal law to refer to a person who alleges that another person has committed a criminal act against her or him. In civil law, the complainant is the plaintiff. But a complainant in criminal law is not the person who lodges the complaint but the prosecutor who files charges on behalf of the State – charges which, of course, may be based on the complaint lodged by a person. Technically, therefore, a complainant in criminal law is the State Prosecutor and not the person who lodges a complaint. The person who lodges the complaint becomes, generally, a witness for the prosecution.

The use of the expression “complainant” in sections 10 and 20 of the SOAct cannot be interpreted, in the context of the obvious intention of Parliament in enacting the SOAct, to mean that sections 10 and 20 will only apply if a person actually lodges a complaint. What if the victim is a three-month-old toddler?

Section 20(1)(a) of the SOAct creates the offence of *unlawfully and intentionally using a **child complainant**, with or without the consent of that child.....for the purpose of creating, making or producing child pornography*. The creation of child pornography involves the sexual abuse of a child, including the sexual penetration of toddlers as young as three months. It seems strange that section 20(1)(a) of the SOAct refers to *child complainant* while sections 15 and 16 of the SOAct make the sexual penetration of a *child* and an act of sexual violation with a *child* both criminal offences – the reference is to a “child” and not a “child complainant”. Using a child to create child pornography also involves, more often than not, the sexual penetration and sexual violation of a child. “Child complainant”, in the context of the objectives of the criminalisation of child pornography should be interpreted as “child victim” and not as a person who lodges a complaint about a criminal act.

## 6.4 POSSESSION OF CHILD PORNOGRAPHY

The *possession* of child pornography is an offence in terms of **section 27(1)(a)(i) of the FPAAct**. Both the distributor and recipient of a “sexted” image of child pornography may be charged with being in possession of child pornography.

6.4.1 **Receiving a “sexted”<sup>19</sup> image of a person under the age 18 years will amount to *the possession of child pornography* and a section 27(1)(a)(i) offence-**

- (i) **if the image was actually solicited, or**
- (ii) **the image was opened with the knowledge that it was child pornography, or**
- (iii) **the image was opened without knowledge that it was child pornography but was not immediately deleted, or**
- (iv) **the image was saved *except for the purpose of reporting it to the police, or***
- (v) **the image was copied in any way.**

6.4.1.1 **Failure to report receipt of “sexted” child pornography to the police will amount to a section 27(2) of the FPAAct offence.**

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<sup>18</sup> See SOAct, sections 10 and 20

<sup>19</sup> “Sexting” is not the same as accessing child pornography on Internet websites

## 6.5 THE CREATION AND PRODUCTION OF CHILD PORNOGRAPHY

**Section 27(1)(a)(ii) of the FPAAct** makes the *creation, production or any contribution towards or assistance in the creation or production* of child pornography a criminal offence. It should be noted that a person downloading child pornography from the Internet should be charged with the two separate offences of the *possession* and the *creation* of child pornography.<sup>20</sup> Information is transmitted via the Internet in *binary language* or batches of zeroes and ones and not as an analogue image. In order to bring an image embedded in the binary language of computers into view as an analogue image, requires a deliberate act – a “point and click” act. Such an act *brings the image into existence* and therefore amounts to *creating* that image where, before, there were only zeroes and ones. Downloading child pornography from the Internet would, therefore, amount to two separate offences: the section 27(1)(a)(i) offence of possession and section 27(1)(a)(ii) offence of creation. Even in its ordinary meaning, *to create* is to *bring into existence* and the act of downloading brings an image into existence where prior to that act there were only batches of zeroes and ones.

**Section 20 of the SOAct** makes the *use* of a child *complainant* for the purposes of *creating, making or producing or in any manner assisting to create, make or produce* child pornography a criminal offence.

6.5.1 Section 20 of the SOAct mirrors section 27(1)(a)(ii) of the FPAAct, although it is narrower. Section 20 of the SOAct will apply *only when an actual child* is used. Section 20 of the SOAct will not apply to child pornography as a product of one’s imagination where no real child was involved, such as child pornography created through computer-graphics software. Section 20 will also exclude images created by using adults depicted, made to appear, represent or look like children since no *child* was used. In terms of the FPAAct, the manner of the creation of child pornography is irrelevant as long as the image depicts, is made to appear, represents or looks like a person under the age of 18 years. Child pornography created through the use only of computer-graphics<sup>21</sup>, not involving a real child, or created through drawing, is still child pornography for the purposes of section 27(1)(a) of the FPAAct. Downloading child pornography from the Internet will trigger both sections 27(1)(a)(i) (*possession*) and 27(1)(a)(ii) (*creation*) of the FPAAct but not section 20 of the SOAct since no child was used – even if the image downloaded is that of a real child. Producing or making child pornography by *copying* images is also not covered by section 20 of the SOAct, but is covered by section 27(1)(a)(ii) of the FPAAct. It is arguable, also, whether or not the concept of *using a child* can be sustained with respect to *descriptions* of child pornography – unless, of course, a child has been sexually abused for the purpose of describing that sexual abuse in writing!

The position is, therefore, that *when child pornography is created or made by (ab)using real children*, both sections 20 of the SOAct and section 27(1)(a)(ii) of the FPAAct will apply, and section 27(1)(a)(ii) of the FPAAct will apply to all child pornography images created or made without using real children.

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<sup>20</sup> *R v Smith and Jayson (2002)* and *R v Bowden (2002)*, UK Criminal Court of Appeal and *People of the State of Michigan v Brian Lee Hill (2006)*, USA

<sup>21</sup> The making of child pornography through *morphing* may also be excluded from the application of section 20 of the SOAct but not from section 27(1)(a)(ii) of the FPAAct. *Morphing* is the creation of a single image by superimposing parts from different images onto a single image, such as superimposing the head of a child onto the body of a nude adult woman and “air-brushing” the breasts and genitals of the adult woman to make the *morphed image* appear to be that of a child. The technique involves not the use of actual people but different photographs to create one image

6.5.2 Section 20 of the SOAct raises an issue raised by Judge Thomas of the US Supreme Court in the case of *Ashcroft v Free Speech Coalition*<sup>22</sup>: “..... technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children.” That “evolution” is now a fact. Try and identify which of these four images are of real children<sup>23</sup>. (Answer at end of this paper)



Under section 20 of the SOAct, the State must establish that the image is that of a real child<sup>24</sup>. That presents a problem since it is estimated that, out of the hundreds of thousands of child abuse images on the Internet, less than 5% of the children have been identified. It would be difficult to establish that the image is that of a real child without identifying the child. Given that it is almost impossible to determine whether or not the child in a child abuse image is a real child or a “virtual child”, it is suggested that, unless the identity of the child has been clearly established, section 27(1)(a)(ii) of the FPAAct be used.

6.5.3 **Taking revealing pictures of oneself for strictly personal and private use and not for “sexting” is not an offence. But-**

- (i) **taking a revealing picture of a person under the age of 18 years, or of oneself if under the age of 18 years<sup>25</sup>, with the intention of “sexting” it amounts to the offences of-**
  - **the creation of child pornography in terms of section 27(1)(a)(ii) of the FPAAct, and**
  - **where the person taking the picture is not the self, making use of a child for creating, making or producing child pornography under section 20(1) of the SOAct.**
  
- (ii) **An image of child abuse downloaded onto a mobile cellular phone from any source, in addition to constituting possession, will amount to the offence of the creation of child pornography under section 27(1)(a)(ii) of the FPAAct.<sup>26</sup>**

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<sup>22</sup> *John D Ashcroft, Attorney General, et al, Petitioners v The Free Speech Coalition et al*, 535 U.S. (2002)

<sup>23</sup> I have lost the source of these images and therefore apologise for not acknowledging the person or persons who produced these images

<sup>24</sup> The SOAct defines a “child” as a *person* under the age of 18 years

<sup>25</sup> The fact that the intention was to send the revealing picture to a boyfriend as a “sexy present” is irrelevant. What is relevant is that a revealing picture of a person under the age of 18 years was “sexted”

<sup>26</sup> See *R v Smith and Jayson (2002)* and *R v Bowden (2002)* in the UK and *People of the State of Michigan v Brian Lee Hill (2006)* in the USA. Digital transmission uses binary language - batches of zeroes and ones. When an image is transmitted via the Internet, the image is transmitted as batches of zeroes and ones and not as an analogue image. The act of downloading uses computer software to “decode” the batches of zeroes and ones and converts the digital information into an analogue image – thus *creating or making* an image from zeroes and ones. Photocopying an image, on the other hand, produces an analogue copy of an analogue image.

## 6.6 IMPORTING OR TAKING STEPS TO PROCURE, OBTAIN OR ACCESS CHILD PORNOGRAPHY

**Section 27(1)(a)(iii) of the FPAAct** makes the importing or the taking of steps to procure, access or obtain child pornography a criminal offence. Accessing a *known* child pornography website, for instance, even if no images were viewed or downloaded, would amount to the offence of *taking steps to access child pornography*. Subscribing to a website that hosts child abuse images, even if no such images were viewed or downloaded, would also amount to the offence of *taking steps to procure, access or obtain child pornography*.

6.6.1 In so far as child abuse images are concerned, soliciting or asking for the “sexting” of such images by, for instance, providing another with a mobile cellular phone number to which the image should be “sexted” will amount to the FPAAct’s section 27(1)(a)(iii) offence of taking steps to procure, obtain or access child pornography.

## 6.4 EXPORTING, BROADCASTING OR DISTRIBUTING CHILD PORNOGRAPHY

In terms of **section 27(1)(a)(iv) of the FPAAct** it is an offence to export, broadcast or distribute, or cause to be exported, broadcast or distributed, any child pornography, while **section 10 of the SOAct** creates the offence of *unlawfully and intentionally exposing or displaying or causing the exposure or display of child pornography to a complainant 18 years or older*, and **section 19 of the SOAct** makes *the exposure or display or causing the exposure or display of child pornography or pornography to a child a criminal offence*. It may be noted that section 10 of the SOAct refers to a *complainant*, while section 19 of the SOAct refers to a *child* and not a child complainant.

6.4.1 It should be noted that “*distribution*,” has a meaning wider than its normal usage. For the purposes of sections 25(a), (b) and (c), 26(1)(a) and (b) and 28(1) and (2)<sup>27</sup> of the FPAAct, for instance, “distribute” includes *to hand or exhibit* such a film or publication containing sexually-explicit material to a child and includes the failure to take reasonable steps to prevent access to such materials by a child. Failure to take reasonable steps to prevent children from accessing sexually-explicit materials could also be interpreted, in the context of sections 10 and 19 of the SOAct, as *causing exposure or display*. In terms of both the FPAAct and the SOAct, to “distribute”, “expose”, “exhibit” “display” child pornography means to show children images of child pornography.

6.4.2 “Sexting” is the distribution, display, exposure, or exhibition, as well as the *causing of a display or exposure and could also amount to the failure to take reasonable steps to prevent access to “sexted” child pornography*. “Sexting” revealing images of persons under the age of 18 years will constitute the following offences-

- (i) *exporting or distributing child pornography* in terms of section 27(1)(a)(iv) of the FPAAct
- (ii) *exposing or displaying or causing the exposure or display* of child pornography under section 10 of the SOAct
- (iii) *exposing or displaying or causing the exposure or display of pornography or child pornography* in terms of section 19 of the SOAct
- (iv) where the mobile cellular phone to which the image was “sexted” is also accessible or used by a person under the age of 18 years, *failure to take reasonable steps to prevent access to a person under the age of 18 years* under section 27(3) of the FPAAct

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<sup>27</sup> Offences dealing with the distribution of unclassified films or films and publications classified “X18” or publications which contain sexually-explicit visual presentations or descriptions

- (v) ***distributing a film that was not classified by the Film and Publication Board in terms of section 26(1)(a) of the FPAAct, read with the definitions of “distribute” and “film”***

7 **Failure to report, to the police, knowledge or suspicion of “sexting” images of persons under the age of 18 years, as soon as possible, is an offence in terms of section 27(2) of the FPAAct.**

## COMMENTS

8 A number of parents and child protection practitioners have questioned the appropriateness of using criminal law provisions against children who are neither paedophiles nor child predators. These are young persons who are not aware of the consequences of their actions. Many parents believe that these children should be counselled and educated about the consequences of “sexting” and not prosecuted.

8.1 The recent report of the decision of the US District Court for the Middle District of Pennsylvania to issue a temporary restraining order blocking child pornography charges against three teenage girls who appeared in photographs distributed by cell phones through their High School was not based on the inappropriateness of using criminal law against teenagers involved in “sexting”. The temporary restraining order was based on the fact that the Wyoming County District Attorney, George Skumanick Jr, had told the girls and their parents that they would not be charged if they completed an after-school re-education programme and the submission by the defence that the images did not constitute child pornography but even if they did, there is no evidence that the girls were involved in any distribution of the images. The Judge accepted that there was a reasonable prospect of a successful defence since no distribution charges were brought against the teenagers.

9 It is important that children involved in “sexting” are made to understand, clearly and unambiguously that “sexting” of revealing images of themselves exposes them to two very real dangers:

9.1 The possibility of facing *creation, possession and distribution of child pornography* charges, each of which is a separate count, carrying a maximum of 10 years imprisonment, and

9.2 The very real likelihood that the images will not only end up in the hands of paedophiles and child pornography collectors but also as part of the international trade in child pornography. The embarrassment of being identified in their schools and communities, of knowing that their revealing photos are being viewed by thousands, many of who will find sexual gratification from them and the fact that, once on the Internet, the photos will be providing sexual gratification to paedophiles and sexual perverts long after their lifetimes, are some of the traumatising consequences of “sexting”. And there is nothing that any of these teenagers, or anyone else for that matter, can do to prevent such consequences. **The tragedy of the Ohio teenager<sup>28</sup> who hanged herself when she discovered that her ex-boyfriend had “sexted” nude pictures of her to other high-school girls should be a “wake-up” call to parents, educators and the general public. It is not the criminal consequences of “sexting”, though that is serious enough to persuade teenagers against seeing “sexting” as fun, but the consequences upon their lives, and the lives of their family members and friends, that is the more important reason for ensuring that children do not engage in “sexting” revealing photos of themselves. Children must be made to understand that one dumb moment of seeming innocent fun will end up as more than a moment in cyberspace and result in more than a moment of trauma.**

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<sup>28</sup> See Footnote 4 above

10 It may be that a lifetime of “cyberhumiliation” from the exploitation of an image by paedophiles is enough of a punishment for what started off as fun, without suffering the consequences of criminal charges. But, until an effective alternative is found to make children appreciate the dangers of “sexting”, the criminal-justice system may be the only option to the increasing problem of this convergence of technology and behaviour and the danger to the lives of many children.

**Answer to question in paragraph 6.5.2: ALL four images are computer-generated, “virtual” children.**

***“Girl, 15, terrified of MXit stalker”  
The Star, 28 March 2009***

By Fiona Gounden

*“A Durban mother is preparing to take legal action against a man who apparently is harassing her daughter for naked photos of herself.*

*The mother, Sarah Govender, who lives at Montford in Chatsworth, said she became suspicious when she started receiving calls late at night on her home telephone line from a man who wanted to speak to her 15-year-old daughter.*

*‘I became a bit concerned when these calls kept coming at about 1am and 2am and my daughter was acting really strangely. She did not want to go to school or anywhere with her friends. When the phone rang she ran to answer it and became very tense.*

*‘After I questioned her she told me she was being harassed by an older man who had bought her airtime. She had started talking to this man over the 30-something chatroom on MXit. This is a chatroom that caters for older people. She said she had decided to go onto this site because she was curious to know what it was all about’*

*According to Govender, the man then started chatting privately with her daughter. ‘He then bought R100 worth of airtime and sent her the voucher numbers. He said she had to send him pictures of herself in ‘lacey sexy underwear’. He said once this was received he would send her about R300 worth of airtime.*

*‘He said he would double that if she sent naked pictures of herself. But when she failed to provide these photos, he started harassing her. We are now working on tracing these calls. This man knows what school she goes to and he even threatened to attack her there. My daughter is terrified and just regrets entertaining his messages on MXit. As soon as his whereabouts are traced we will proceed with legal action.’*

*Terena Pillay, who is part of the concerned group of parents who are logged onto MXit, said this was just one of the incidents taking place throughout Durban.*

*‘These cases are just getting worse as time goes by. The men out there are resorting to really desperate measures to get photos of these girls. We are working with police on this case and are expecting results soon.’*

*SAPS Superintendent Vincent Mdunge said these were serious cases and police would be assisting parents whose daughters were being harassed and threatened.*

*This follows previous incidents where parents from the concerned group found these men were posting adverts offering up to R500 for photos of young women dressed in sexy underwear.*

*Some of the requests asked for the women to be dressed in ‘tight black underwear and g-strings’ and more money was offered for young women who ‘lie naked on the bed in various poses’. There were also promises of drugs in return for these photos.”*