What Are We Doing?

Thoughts On Prosecution Of Near-Aged P2P Exploitation Cases

Jim Tanner, Ph.D.
President, KBSolutions Inc.
www.kbsolutions.com

© Copyright 2012 by Jim Tanner, Ph.D. All rights reserved.

I have worked in the criminal justice system for the past four decades. Throughout that time I have sought to protect victims, provide responsible supervision of offenders, and foster change in offenders to promote public safety. Since 1970, I have worked with convicted sex offenders in a wide variety of capacities, and in the past two decades have focused on the digital behavior of sex offenders.

Rapidly changing technology combined with the mind-boggling rate of adoption of technology by society, especially those born into a digital world, have added complexity to investigating, prosecuting, and managing sex offenders.

Exploitation of children is a crime, and a heinous one at that. Exploitive images of children harm children everywhere, whether they are the actual individual in the image or not. To produce, possess, consume, or distribute exploitive images is illegal - as it should be. I have spent a considerable amount of my life (about 80%) fighting against exploitation of children.

However, as technology collides with youthful ignorance, I am seeing new forms of exploitation emerge which have little to do with the sending and receiving of sexual content focused on children. In short, I am witnessing the justice system itself becoming exploitive of children by engaging in a time-worn phenomenon in our profession: net-widening.

Much to my dismay, I have witnessed over-zealous, politically motivated prosecution of youth for behavior that is admittedly illegal, but not criminal under any reasonable definition of what constitutes a crime. Technology has allowed today's youth to engage in normal explorative sexual behavior in ways that were unavailable to their parents and older siblings. What young people used to do with Polaroid cameras is now done with web cams, phone cams, and digital recorders. To label youthful stupidity as criminal, and more egregiously as sex offending, is destroying the lives of 'felony stupid' youth at an alarmingly increasing rate.

Felony stupid youth are those who engage in fairly typical behavior for their age group, but in doing so violate child exploitation laws. Their violation of the law is out of ignorance of technology, narrow world view, and simply not thinking about long-term consequences of behavior. It is not, under any reasonable definition, criminal.

In January of 2011, I posted a paper addressing issues concerning the prosecution of minors engaging in "Sexting" (www.kbsolutions.com/SextingGrid.pdf). This paper was an attempt to counteract what I saw as an emerging problem of jurisdictions blindly charging youth with possession and distribution of exploitive images when the sharing was between two involved youth. In that paper I proposed a grid of questions that should be asked when making charging decisions regarding sexting. In brief, I proposed that we should examine four critical factors regarding sexual content passed via SMS or MMS:

1. Who took the picture?
2. Who is in the picture?
3. Who sent the picture?
4. Who received the picture?

To blindly prosecute a 15 year old girl who snaps a picture of herself nude and sends it to her 17 year old boyfriend with producing and distributing exploitive images is ludicrous. To charge the boyfriend with possession is equally insane. While technically they are both guilty of these offenses, to label them as criminals and force them to register as sex offenders is abusive beyond measure. What they need is a "dope slap", some education and common sense, not involvement in the criminal justice system.

A 17 year old boy who distributes to his friends, or the entire school, the image of his15 year old girlfriend has committed a crime. But, it is not a sex offense and charging distribution of exploitive images is over-reaching. Charging him with harassment or a related charge is appropriate. Branding him a sex offender is inappropriate. An exception to this might be if he was attempting to force the girlfriend into unwanted behaviors by threats of distribution. Under these circumstances a careful examination of the elements of the case would help determine whether it was extortion or a sex offense.

Obviously, an "older person" taking and distributing images of the 15 year old would be a sex offense. Prosecuting them for production and distribution of exploitive images is warranted and I encourage it.

After posting the Sexting Grid paper, I felt I had done my duty as a responsible professional in providing a tool which jurisdictions could meaningfully and carefully use to examine when to charge and what to charge in sexting cases.

Recently, however, I am increasingly aware of jurisdictions making charging decisions regarding Peer to Peer (P2P - file sharing) cases. Once again, I am writing to express my concern with net-widening in these cases.

P2P is a popular platform for file sharing. Most everyone has heard of Napster and how it was used to move music files. They were ultimately shut down by a series of litigation. More recently Limewire has been used to move files between Users. All of us in law enforcement/computer forensics have long known that Limewire was the platform of choice for moving child exploitive materials. It, too, has shut down but the underlying technology (file sharing through Peer to Peer) is still with us and is still the major vehicle through which child exploitation material is being moved from User to User.

Not all sexual material available through P2P is illegal. In fact, most of it is legal pornography depicting adults. There are two primary problems for felony stupid youth when using P2P to search for legal sexual material. The first problem is one of sharing. Once you 'join' a P2P network, you can search for materials by keyword and download them to your computer. By definition, peer to peer sharing relies on most Users to have the materials downloaded available to others in the network. This increases the availability of materials and speed of transfer. Hence, most P2P networks have their clients set to download materials directly into the shared folder. This means unless it is specifically moved by the local User, it is 'public' to the other users of the network. Law enforcement has tools which can locate material within the P2P network, so any illicit material left in a shared folder is likely to be eventually found by law enforcement.

The second problem for felony stupid youth is that most pornography on P2P networks is passed between Users in a compressed (zipped) format. This means many images or videos are found inside the file you are downloading across the P2P network. You cannot tell what is actually in the file until you have it downloaded, unpack (unzip) the file and examine the actual contents. In essence, when using P2P to acquire legal pornography, you are at the mercy of the individual who put the package together. If they include illegal material in the package, you can and will, download it without knowing.

One searches content on P2P networks by using 'keywords'. If I'm looking for videos of Madonna, I can enter a search string looking specifically for videos of madonna. Theoretically this will give me only those Users who have Madonna videos available. Prosecution often relies on search strings to prove the element of intent in exploitive cases. Hence, the 45 year old man who is using search strings to look for preteen pornography is probably not going to prevail in his defense.

Herein lies another of the problems for youth when using P2P to search for pornography. A 16 year old male searching for 15 year old girls is seeking 'age appropriate' material. However, the search string could be the same as the 45 year old seeking exploitive materials. Both could be in possession of identical results of that search, which could constitute child exploitation. But is the youth really a sex offender? Is he really criminal?

Admittedly these cases can be occasionally difficult to sort out. There are youthful sex offenders. There are those youth who are predatory and who do knowingly produce, possess, and distribute exploitive materials. The question becomes how can we differentiate between criminal and 'felony stupid' behavior among youth.

I propose five simple factors to help us address this issue. By looking at five elements of the P2P case when the defendant is a minor, I believe we can reasonably separate true criminals from felony stupid youth. These five factors are what I call the "Five D's"; Descriptors, Deftness, Deletion, Download, Duration. I have listed the factors in order of importance. Hence, Descriptors in and of itself could indicate a sex crime, while Download or Duration may not.

1. **Descriptors**

   An analysis of the descriptors used in the search strings can tell us a great deal about the intent of the User. Felony stupid youth will use normal language descriptors and seek age appropriate materials. A 15 year old male using searches for 14 year old nude girls or junior high girls is most likely seeking materials about girls his age. I contend they are not criminal, and certainly not a sex offender. A sex offender will use terms which narrow the focus to exploitive materials. Sex offenders will use terms like "PTHC" or "PTSC" "kiddie" "preteen" or "lolita". Use of these types of specific terms are indicators the User should be charged with a crime.

2. **Deftness**

   What is the youth's demonstrated level of knowledge regarding P2P? How facile are they in computer technology. Simple use of P2P does not imply or demonstrate deftness in the technology. Many youth use P2P to download music and videos. It is a logical extension for them to use this platform to find legal pornography. Investigators, prosecutors, and supervising agents should examine how informed about P2P the youth actually is. Do they, for example, understand that files in the shared folder are SHARED? Do they understand what that means? Do they handle the sexual materials differently than they handle music or videos they have downloaded? How do they manage their P2P materials? How many P2P clients do they use? Are they in 'silo' or protected P2P networks (e.g. gigatribe). All of these factors can help us determine the User's deftness with the technology. The more facile and knowledgeable the youth is, the less likely they are felony stupid.

3. **Deletion**

   Is there evidence the youth found age inappropriate exploitive material and NOT deleted it? In other words, the 15 year old male who finds images of a 7 year old girl and who retains those images is demonstrating interest in age inappropriate materials. Conversely, is there evidence the youth has found age inappropriate materials and deleted it? This indicates a lack of interest in exploitive materials.

   Keeping materials that are exploitive, but age appropriate is not, in and of itself, indication of sexual deviance. While it technically constitutes exploitation, the issue of intent gets murky here. Do we really want to brand a youth as a sex offender for life simply because (s)he has interest in sex with someone their age? I'm with Justice Black on this one... I'd rather give the benefit of doubt to nine guilty youth than destroy the life of one innocent youth.

   Having said the above, I have to add the caveat regarding the age of the youth. Below a certain age, sexual knowledge and interest is an indication of problems. Obviously, an eight year old in possession of sexual materials is a problem. I don't think it is a sex offender problem, but that child certainly needs intervention. Whether the intervention is criminal justice in nature is complex and not the topic of this paper.

4. **Download**

Download size and ratio of types of material is important. What portion of the downloaded materials are exploitative? Do the exploitive materials constitute one or two percent of the material or 98% of the material in the possession of the youth? Were the exploitive materials contained in a file with non-exploitive materials? If so, what proportion of the material in the file was exploitive? Was the download large, suggesting it was done without supervision (i.e. overnight). Is there any indication the youth has actually opened or examined the content of the file? Is the size of the shared folder such that it would take the youth time to examine it at all?

5. **Duration**

Duration has two facets; length of time using P2P, and length of time materials were in possession.

Length of time using P2P: Does the User have enough experience with sexual content in P2P to realize returns on searches cast a wide net at best and inaccurate one at worst? A youth who has been using P2P to download sexually explicit materials only a short period of time should lean the investigation toward 'innocent possession'. Has the youth had significant enough experience with results of returns on searches of sexual material to understand there are wide ranges in the content of even the most specific search and download. A youth who has been using P2P for a long period of time should lean the investigation toward 'knowingly' possessing.

Length of time materials were in possession: How long were the files containing the illicit materials in the possession of the youth? Did the youth have the time to open and examine the materials? Is there any indication they actually did open and examine the materials (this relates to Download factor above)?

A careful and complete examination of the Five D's should help investigators, prosecutors, evaluators and supervising agents discriminate between those youth who are sex offenders and those who are simply felony stupid. We cannot continue to widen the net simply because the technology used by law enforcement has advanced to the point we are more easily able to find those in possession of exploitive materials.

SUMMARY AND CONCLUSION

The law has always lagged behind technology. Certainly the past two decades have put enormous strains on those of us seeking to protect children. Pornography is the largest industry on the web, child exploitation materials abound digitally, and our fight against abuse of children has been significantly challenged. We have made progress to the point that there are now automated tools which help us find exploitive materials being passed. These tools have increased our ability to find, prosecute and punish those who seek to exploit children.

Youth have embraced technology at a remarkable pace. Despite their sophistication in the area of technology, youth are still youth - having lived less than two decades. Youth's interest in things sexual has not waned with the advent of technology, in fact I believe it has increased as information is now more readily available through technology. As a result, the collision between youth's normal curiosity about sexual issues and the available technology with which to explore this interest have created a legal and ethical conundrum for us all.

Some jurisdictions have adopted a rigid and narrow approach to youth possessing sexual material which meets the legal standard of being exploitive. I find this approach disagreeable. There is no disagreement that the material possessed is illegal, my issue is the way cases are handled and the charges brought. Jurisdictions which

routinely and rigidly charge youth as sex offenders for possession of ‘age appropriate’ sexual content which meets exploitive standards are casting a net that is far too wide. Finding a youth guilty of sexual offense and requiring them to register as a sex offender in these circumstances is a travesty of justice. It is, in simple terms, child abuse.

Admittedly, it is sometimes difficult on the surface to discriminate between what I have termed as felony stupid youth and those who are actually sex offenders. But to ignore the fact that felony stupid behavior among youth exists is to amplify the problem and potentially destroys children’s lives.

In this paper I have suggested five simple factors to consider when examining Peer to Peer possession and/or distribution cases. These factors, the “Five D’s”, help us differentiate between youth who innocently violate the law and those who are predatory and participatory in the exploitation of children. As a professional who has dedicated more than 40 years to protecting children, I encourage my colleagues in the justice system to consider and implement these factors when making charging and sentencing decisions. I am all for getting bad guys. I’ve been doing it a long time and will continue to do it. But as I stated earlier in this paper, I’m with Justice Black on this issue... I’d rather give the benefit of doubt to nine guilty youth than destroy the life of one innocent youth. It is my hope that this paper will help all of us in the field take a moment to pause and ask the question, “**What are we doing?**”