

**A CRITICAL ASSESSMENT ON THE  
EFFICACY OF KENYAN LEGISLATION IN  
ADDRESSING OF INTERNET CHILD  
PORNOGRAPHY**

**BY**

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## **DEDICATION**

I dedicate this paper to my mother, Priscilla Sifuma. You are a warrior!

## DISSERTATION DECLARATION FORM

I, **Sifuma Vision Khakali** declare that this dissertation is my original work and has not been submitted for the award of a degree in any other university.

Signed: *Khakali* Date: 31 MARCH 2016

Researcher: **SIFUMA VISION KHAKALI**

Supervisor

This dissertation has been submitted for examination with my approval as University Supervisor.

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## **ABSTRACT**

The development on the internet has brought about entirely impenetrable conduits for distribution of illegal pornography. Individuals are collecting and sharing Child Pornography images through virtually every type of Internet technology. The internet provides a uniquely safe, easily accessible, and supportive context for posting, trading and collecting Child Pornography.

This paper seeks to determine how effectively the Sexual Offences Act and Children's Act can regulate Child Pornography in the environment of the Internet. The research done on this paper is from online content as little to no information on this subject has been documented in books. The content is also largely foreign as there is very little information on the subject in Kenya as it is still a developing area of law.

This research makes a comparative analysis between the United Kingdom and the United States and seeks to make recommendations for Kenya based on the best practices of these Nations.

## **LIST OF ABBREVIATIONS**

CRC- Convention on the Rights of the Child

IM- Instant Messaging

IRC- Internet Relay Chat

ISP- Internet Service Provider

IWF- Internet Watch Foundation

P2P- Peer to Peer

## **LIST OF INTERNATIONAL INSTRUMENTS**

AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION  
AGAINST WOMEN

CONVENTION ON THE RIGHTS OF THE CHILD

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON  
THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY

UNIVERSAL DECLARATION OF HUMAN RIGHTS

## **LIST OF CASES**

*Karttunen V. Finland, ECTHR Judgement of October 2011*

*R V Fellows and Arnold [1997] 2 All Er 548*

*R V Porter [2006] Ewca, Crim 560*

*United States V. Kuchinski, 469 F.3d 853, 862 (9th Cir. 2006)*

*United States V. Romm, 455 F.3d 990 (9th Cir. 2006)*

## CHAPTER 1: PROJECT PROPOSAL

### BACKGROUND

Child Pornography refers to any form of content that depicts sexually explicit activities involving a child.<sup>1</sup> This is often the actual documentation of words, images, sounds, videos, or by means of audio-visual, print, or any other media that depict the abuse of a child that is then circulated for personal consumption.<sup>2</sup> It is also the showing, display, or exposure of obscene material knowingly to a child.<sup>3</sup> Such exposure is often with intention of encouraging or enabling a child to engage in sexual acts.<sup>4</sup> Child Pornography is a global issue, one that is not limited to specific countries or cities.<sup>5</sup>

The treatment of children as sexual objects has existed through the ages, and so too has the production of erotic literature and drawings involving children.<sup>6</sup> Seemingly, Child Pornography existed before the invention of the internet.<sup>7</sup> Even so, Child Pornography remained a restricted activity through most of the twentieth century as images were usually locally produced, of poor quality, expensive, and difficult to obtain.<sup>8</sup> Despite concern about the extent of Child Pornography, law enforcement agencies had considerable success in stemming the trafficking of these traditional hard-copy forms.<sup>9</sup> However, the advent of the internet in the 1980s dramatically changed the scale and nature of the Child Pornography problem, and has required new approaches to investigation and control.<sup>10</sup>

Pedophilia and Child Pornography have become more pronounced with the widespread use of the internet.<sup>11</sup> Computers act as an aid for those who are sexually interested in children and

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<sup>1</sup> 'Thorn S: Child Sex Trafficking and Pornography Aided by Internet Anonymity,' 24 February 2014, <https://www.wearethorn.org/child-sex-trafficking-child-pornography-aided-internet-anonymity> on March 4, 2015

<sup>2</sup> 'Thorn S: Child Sex Trafficking and Pornography Aided by Internet Anonymity,' 24 February 2014, <https://www.wearethorn.org/child-sex-trafficking-child-pornography-aided-internet-anonymity> on March 4, 2015

<sup>3</sup> Section 16(1)(a), *Sexual Offences Act* CAP 62A

<sup>4</sup> Section 16(1)(a), *Sexual Offences Act* CAP 62A

<sup>5</sup> 'Thorn S: Child Sex Trafficking and Pornography Aided by Internet Anonymity,' 24 February 2014, <https://www.wearethorn.org/child-sex-trafficking-child-pornography-aided-internet-anonymity> on March 4, 2015

<sup>6</sup> Wortley R and Smallbone S, 'Child Pornography on the Internet,' *Center For Problem-Orienting Policing* (2006)

<sup>7</sup> Krone T, 'A Typology of Online Child Pornography Offending,' Australian Institute of Criminology

<sup>8</sup> Wortley R and Smallbone S, 'Child Pornography on the Internet,'

<sup>9</sup> Wortley R and Smallbone S, 'Child Pornography on the Internet,'

<sup>10</sup> Wortley R and Smallbone S, 'Child Pornography on the Internet,'

<sup>11</sup> Akdeniz Y, *Internet Child Pornography and the law: National and International Responses*, Ashgate publishing, 2008



allow for the production, viewing, storage, and distribution of Child Pornography.<sup>12</sup> Computers also allow pedophiles to communicate with each other and act as a conduit for contact with potential victims.<sup>13</sup>

Most disturbingly, unlike pornographic magazines, movies, and adult book stores, online pornography is easily accessible to children.<sup>14</sup> Without even searching it out, pornographic material is present in pop-up ads, e-mails, bulletin boards, chat rooms, and can be accidentally found on mistyped or innocuously named Web addresses.<sup>15</sup> Regulating Pornography online is extremely difficult because the architecture of the Web is set up so that users can access information stored in computers all over the world and almost anyone can create a Web site without significant barriers.<sup>16</sup>

The figures are devastating. At any one time on the Internet it is estimated there are around three quarters of a million predators searching for sites featuring Child Pornography.<sup>17</sup> There are estimates of 14 million pornographic sites some of which carry an estimated one million pornographic images of children.<sup>18</sup>

The UN Special Rapporteur on the sale of children, child prostitution and child pornography, pointed to estimates that over a three year period between 2001 and 2004 the number of sites carrying Child Pornography nearly doubled to around 480,000.<sup>19</sup> Estimates of the number of children who are victims vary hugely, from ten thousand to 100,000.<sup>20</sup> Pornographic images of children, from babies through to teenagers are posted on the web.<sup>21</sup> Figures cited in the report estimate nearly 20 percent of individuals possessing Child Pornography had images of babies and children aged below 3 years and more than 80 percent had images of children aged between 6 years and 12 years old.<sup>22</sup> This highlights the irony that the prevalence of child

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<sup>12</sup> Akdeniz Y, '*Internet Child Pornography and the Law: National and International Responses*,'

<sup>13</sup> Quayle E and Taylor M, '*Child Pornography and the Internet: Perpetuating a Cycle of Abuse*', *University College Cork*, (2002), Volume 23

<sup>14</sup> Kaufman E, '*Protecting Children from Online Pornography*' *LBJ School of Public Affairs* (2003)

<sup>15</sup> For example, typing in [www.whitehouse.com](http://www.whitehouse.com) instead of [www.whitehouse.gov](http://www.whitehouse.gov), will bring you to a Pornographic Web site

<sup>16</sup> Kaufman E, '*Protecting Children from Online Pornography*'

<sup>17</sup> OHCHR, '*Child Pornography flourishes in a world with no borders*', Special Rapporteur on the sale of children, child prostitution and Child Pornography

<sup>18</sup> OHCHR, '*Child Pornography flourishes in a world with no borders*'

<sup>19</sup> OHCHR, '*Child Pornography flourishes in a world with no borders*'

<sup>20</sup> OHCHR, '*Child Pornography flourishes in a world with no borders*'

<sup>21</sup> OHCHR, '*Child Pornography flourishes in a world with no borders*'

<sup>22</sup> OHCHR, '*Child Pornography flourishes in a world with no borders*'



sexual is often not reported therefore difficult to determine.<sup>23</sup> Indeed experts agree that the incidence is far greater than what is reported to authorities.<sup>24</sup>

In Kenya, there have been very few reported cases dealing with Child Pornography. An even smaller figure is recorded for the number of cases that have been prosecuted in Kenya on the same. One example is a 2014 case where a 59-year-old U.S. man was sentenced to 50 years in jail for circulating pornographic images of children on the Internet.<sup>25</sup> Terry Ray Krieger, who initially pleaded not guilty but then changed his plea to guilty, was convicted by Nairobi's senior principal magistrate Joseph Karanja.<sup>26</sup> Krieger had been charged with circulating obscene depictions of children on social media sites between May 2013 and October 2014. Karanja said Krieger had faced similar charges in Michigan in the United States in the past.<sup>27</sup>

Another reported incident was that of a 2005 case where Kenyan police were investigating a retired German national who frequently visited Kenya after he was arrested the previous week photographing children's genitals and found to be in possession of a pornographic video featuring minors.<sup>28</sup> The 68-year-old man from Cologne was arrested in the Kenyan port city of Mombasa in May 2005 after concerned parents called the police.<sup>29</sup> In the course of his arrest, authorities discovered and seized a locally made pornographic movie featuring him and adult women as well as scenes involving children, photos of naked women and Viagra tablets.<sup>30</sup>

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<sup>23</sup> Child Sexual Abuse Statistics 2010, <https://www.victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics> on 19/11/2015

<sup>24</sup> Child Sexual Abuse Statistics 2010, <https://www.victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics> on 19/11/2015

<sup>25</sup> 'Reuters: Kenyan Court sentences U.S man to 50 years for Child Pornography,' 2 December 2014, <http://www.reuters.com/article/us-kenya-usa-crime-idUSKCN0JG1DC20141202> on 15 January 2015

<sup>26</sup> 'Reuters: Kenyan Court sentences U.S man to 50 years for Child Pornography,' 2 December 2014, <http://www.reuters.com/article/us-kenya-usa-crime-idUSKCN0JG1DC20141202> on 15 January 2015

<sup>27</sup> 'Reuters: Kenyan Court sentences U.S man to 50 years for Child Pornography,' 2 December 2014, <http://www.reuters.com/article/us-kenya-usa-crime-idUSKCN0JG1DC20141202> on 15 January 2015

<sup>28</sup> 'DW.DE: German Probed over Child Porn in Kenya', 25 May 2005, <http://www.dw.com/en/german-probed-over-child-porn-in-kenya/a-1592987-1> on 6 March 2015

<sup>29</sup> 'DW.DE: German Probed over Child Porn in Kenya', 25 May 2005, <http://www.dw.com/en/german-probed-over-child-porn-in-kenya/a-1592987-1> on 6 March 2015

<sup>30</sup> 'DW.DE: German Probed over Child Porn in Kenya', 25 May 2005, <http://www.dw.com/en/german-probed-over-child-porn-in-kenya/a-1592987-1> on 6 March 2015

## STATEMENT OF PROBLEM

The explosion of at-home internet use, especially over the last several years, has increased opportunities for accessing and disseminating Child Pornography.<sup>31</sup> It led to a proliferation of commercial activity involving Child Pornography, and contributed to a rise in the number of abusive images and videos of children available.<sup>32</sup> In response, governments around the world have enacted legal regimes specifically designed to combat Child Pornography as well as to address the problems emerging technology pose to its production, distribution, and handling.<sup>33</sup> In this same fashion, Kenya has also set in place legislation to curb the menace of Child Pornography: the Children's Act<sup>34</sup> and the Sexual Offences Act<sup>35</sup>. By ratifying various international instruments such as the Universal Declaration on Human Rights, International Covenant on Economic, Social and cultural rights, Convention on the Rights of the child, The African Charter on the Rights and Welfare of the Child, as well as the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Kenya committed herself to adhering to international standards in the fight to protect the rights of the Child in general and against Child Pornography in specific. Subsequently national legislation has been passed to fight the same. The Children's Act states that a child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials.<sup>36</sup> Further, The Sexual Offences Act illegalizes Child Pornography as well as gives a penalty for those who will be found guilty of the same.<sup>37</sup>

Pornography has come to be known as a multibillion dollar business which can be found on many thousands if not millions of sites on the Web.<sup>38</sup> In addition to that, restrictions on what can be accessed on the World Wide Web have tightened.<sup>39</sup> Entirely impenetrable conduits for distribution of illegal pornography have emerged such as limited-access peer-to-peer (P2P) networks also known as darknets.<sup>40</sup> Pornographic images are also swapped via direct conduits

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<sup>31</sup> Akdeniz Y, *Internet Child Pornography and the law*,

<sup>32</sup> Akdeniz Y, *Internet Child Pornography and the law*,

<sup>33</sup> Singer J "Akdeniz Y, *Internet Child Pornography and the Law: National and International Responses*," Book Review, *Journal of High Technology Law*, Suffolk University Law School

<sup>34</sup> *Children's Act* Kenya CAP 141

<sup>35</sup> *Sexual Offences Act* CAP 62A

<sup>36</sup> "Section 15, *Children's Act*, CAP 141

<sup>37</sup>Section 16, *Sexual Offences Act*, CAP 62A

<sup>38</sup> 'Kaufman E, *'Protecting Children from Online Pornography'*

<sup>39</sup> Edwards L, *'Pornography, Censorship and the Internet'*,

<sup>40</sup> Edwards L, *'Pornography, Censorship and the Internet'*,



such as instant messaging (IM)<sup>41</sup> and new applications such as Snapchat.<sup>42</sup> By fact, individuals are now collecting and sharing Child Pornography images through virtually every type of Internet technology.<sup>43</sup> These channels include email, websites, Internet Relay Chat (IRC), instant messaging newsgroups, bulletin boards, peer-to-peer networks, social networking sites, internet gaming sites, and more.<sup>44</sup> The internet provides a "uniquely safe, easily accessible, and supportive context for posting, trading and collecting Child Pornography".<sup>45</sup>

Illegal Pornographic images swapped these ways can now also be encrypted, so that even if intercepted they would be non-identifiable as such.<sup>46</sup> It is well known that anonymising P2P systems such as Freenet and Tor, which were originally designed to allow users to preserve their freedom of expression in the face of state censorship, are now regularly used by pedophile rings to pass round their wares.<sup>47</sup> While the prevalence of pornography on websites is at least visible, the volume of pornography swapped via P2P, IM and even older protocols such as File Transfer Protocol (FTP) remains unquantifiable.<sup>48</sup> These technological changes have had considerable implication for the current national strategies for stopping access to pornography, which are still on the whole focused on a Web- based model of Child Pornography.<sup>49</sup>

It is difficult to assess how effective, if at all, national laws are in controlling internet illegal or offensive internet content due to the lack of a baseline for the exact amount and whereabouts of illegal pornographic material on the internet.<sup>50</sup> Nonetheless, being seen to "do something about Child Pornography on the internet" remains a political imperative for most

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<sup>41</sup> Edwards L, 'Pornography, Censorship and the Internet',

<sup>42</sup> Edwards L, 'Pornography, Censorship and the Internet',

<sup>43</sup> Edwards L, 'Pornography, Censorship and the Internet',

<sup>44</sup> 'Thorn S, Child Sex Trafficking and Pornography Aided by Internet Anonymity, 24 February 2014, <https://www.wearethorn.org/child-sex-trafficking-child-pornography-aided-internet-anonymity> on March 4, 2015

<sup>45</sup> R. O'Connell, 'An analysis of paedophile activity on the internet from a structural and social organisational perspective and the implications for investigative strategies', 14th BILETA Conference: CYBERSPACE 1999: Crime, Criminal Justice and the Internet

<sup>46</sup> Edwards L, 'Pornography, Censorship and the Internet',

<sup>47</sup> Edwards L, 'Pornography, Censorship and the Internet',

<sup>48</sup> Edwards L, 'Pornography, Censorship and the Internet',

<sup>49</sup> Wortley R and Smallbone S, 'Child Pornography on the Internet',

<sup>50</sup> Edwards L, 'Pornography, Censorship and the Internet',

governments.<sup>51</sup> This therefore explains the multiple local and international instruments that have been ratified by Kenya against Child Pornography.

The report on UN Committee on the Rights of the Child<sup>52</sup>: Concluding Observations stated that while the Committee recognized certain efforts to take preventive action, it expressed concern over the rising number of children internally trafficked and engaged in prostitution as part of sex tourism, particularly in the coastal regions of Kenya.<sup>53</sup> The Committee held concern that present preventive measures, including those to address Child Pornography, remain insufficient.<sup>54</sup> With the numerous codifies by Kenya, why don't we have more convictions of Child Pornography? Child Pornography is a global issue that is not limited to specific countries or cities.<sup>55</sup> Kenya is therefore not immune to this virus. The Problem is that the existing laws in Kenya may not be effective in tackling the emerging situation of Child Pornography. The internet is so vast and has created a wider scope of crime in this field.<sup>56</sup> Is our legislation armed for battle?

## RESEARCH QUESTIONS

1. What International and municipal laws already exist in Kenya which can be applied to regulate criminal pornographic content distributed or accessed via the internet or telecommunications?
2. Has the internet created novel problems in this area which cannot be adequately regulated by existing legal or regulatory framework?
3. What are the limitations of legislation? Should control of content be undertaken only by state law enforcement agencies and courts, or by private bodies such as ISPs and search engines?
4. What best practices from other nations can be applied to the context of Kenya?

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<sup>51</sup> Edwards L, 'Pornography, Censorship and the Internet',

<sup>52</sup> CRC, *Concluding Observations, Kenya*, 19 June 2007, CRC/C/KEN/CO/2

<sup>53</sup> CRC, *Concluding Observations, Kenya*, 19 June 2007, CRC/C/KEN/CO/2

<sup>54</sup> CRC, *Concluding Observations, Kenya*, 19 June 2007, CRC/C/KEN/CO/2

<sup>55</sup> 'Thorn S: Child Sex Trafficking and Pornography Aided by Internet Anonymity,' 24 February 2014, <https://www.wearethorn.org/child-sex-trafficking-child-pornography-aided-internet-anonymity> on March 4, 2015

<sup>56</sup> Akdeniz Y, 'Governance of Pornography and Child Pornography on the Global Internet: A Multi-Layered Approach,' in Edwards L, and Waelde C eds, *Law and the Internet: Regulating Cyberspace*, Hart Publishing, 1997, pp 223-241



## HYPOTHESIS

The existing laws in Kenya are not equipped to tackle the emerging situation of Internet Child Pornography

## NORMATIVE FRAMEWORK

Worldwide, children face significant risks. In order to clarify the international normative framework on the right of the child to protection from child pornography, there will be an attempt by the researcher to look at international children's rights framework.

The foundation of the concept of rights of the child is the United Nations Charter.<sup>57</sup> The Charter which was adopted in 1945 after the Second World War identifies the promotion and encouragement of respect for human rights for all without discrimination of any kind as one of the three purposes of the organization.<sup>58</sup> Further the Universal Declaration on Human Rights<sup>59</sup> elucidates the need for protection of fundamental human rights.<sup>60</sup> This declaration as adopted in 1948 has inspired various international instruments including the Convention on the Rights of the Child (CRC)<sup>61</sup> and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)<sup>62</sup>. The Universal Declaration was proclaimed as a common standard of achievement for all peoples and all nations towards the advent of a world in which every member of the human family shall enjoy freedom of speech and belief and freedom from fear and want.<sup>63</sup> As the Universal Declaration recognises, everyone is entitled to the rights and freedoms which are equal and inalienable, inherent to the dignity of the human person and which constitute the foundation of freedom, justice and peace in the world.<sup>64</sup> United Nations conventions adopted thereafter, in particular: the two International Covenants on Civil and Political Rights<sup>65</sup> and on Economic, Social and Cultural Rights<sup>66</sup> further highlight on the need for rights to be accorded to every human person.

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<sup>57</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI

<sup>58</sup> Santos M, 'A human rights conceptual framework for UNICEF,' United Nations Children's Fund International Child Development Centre, Florence, Italy

<sup>59</sup> *Universal Declaration of Human Rights* (1948), 217 A (III)

<sup>60</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

<sup>61</sup> *Convention on the Rights of The Child* (1989), United Nations, Treaty Series, vol. 1577, p. 3

<sup>62</sup> *Convention on the Elimination of All Forms of Discrimination Against Women* (1979), United Nations, Treaty Series, vol. 1249, p. 13

<sup>63</sup> Santos M, 'A human rights conceptual framework for UNICEF,'

<sup>64</sup> Santos M, 'A human rights conceptual framework for UNICEF,'

<sup>65</sup> *International Covenant on Civil and Political Rights* (1966), United Nations, Treaty Series, vol. 999, P. 171

<sup>66</sup> *International Covenant on Economic, Social and Cultural Rights* (1966), United Nations, Treaty Series, vol. 993, p. 3

The idea said to be behind these and other human rights instruments in the world is that there is something about each and ‘every human being, simply by virtue of being a human being’ that dictates that certain choices should be made while others should be totally abandoned.<sup>67</sup>

The Convention on the rights of the Child<sup>68</sup> brings the subject home by specifically speaking to the rights that ought to be accorded to every child.<sup>69</sup> In the light of the Convention, children are no longer envisaged as mere recipients of services or beneficiaries of protective measures.<sup>70</sup> Rather, they are subjects of rights and participants in actions affecting them. They need to be respected in their individuality and in their evolving capacity to influence decisions relevant to their lives.<sup>71</sup> Respect for children’s rights cannot be perceived as an option, as a question of favor or kindness to children, or as an expression of charity.<sup>72</sup> Children’s rights generate obligations and responsibilities that must be honored.<sup>73</sup> They need to be perceived as an expression of solidarity and partnership, empowering children to participate actively in the improvement of their situation and in the broader process of social change.<sup>74</sup>

The Convention highlights that children must be protected from all forms of sexual exploitation including Child Pornography.<sup>75</sup> The protection of children from sexual exploitation is embedded on the principle of dignity which affirms that children who are deprived of these rights are denied of the opportunity to live their lives with dignity.<sup>76</sup> The Convention ultimately indicates in an unequivocal manner that children’s rights are human rights.<sup>77</sup> They are not special rights: they are simply the fundamental rights inherent to the human dignity of every person.<sup>78</sup> The rights of the child are indivisible and interrelated; all are important and essential to the harmonious development of the child.<sup>79</sup>

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<sup>67</sup> Perry M, *The Idea of Human Rights: Four Inquiries*, p.13.

<sup>68</sup> *Convention on the Rights of The Child* (1989)

<sup>69</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577

<sup>70</sup> Santos M, ‘*A human rights conceptual framework for UNICEF*,’

<sup>71</sup> Santos M, ‘*A human rights conceptual framework for UNICEF*,’

<sup>72</sup> Santos M, ‘*A human rights conceptual framework for UNICEF*,’

<sup>73</sup> Santos M, ‘*A human rights conceptual framework for UNICEF*,’

<sup>74</sup> Santos M, ‘*A human rights conceptual framework for UNICEF*,’

<sup>75</sup> Article 34, *Convention on the Rights of The Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577

<sup>76</sup> Pierre de Vos, *Substantive Equality after Grootboom: the Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence*, (2001) *Acta Juridica* 52, 64 (2001)

<sup>77</sup> Santos M, ‘*A human rights conceptual framework for UNICEF*,’

<sup>78</sup> Santos M, ‘*A human rights conceptual framework for UNICEF*,’

<sup>79</sup> Santos M, ‘*A human rights conceptual framework for UNICEF*,’



It is based on this framework that my analysis confirms legitimacy. I shall seek to assert that the dignity of the child is important and fundamental right of a child. Having laws that do not efficiently deal with the sexual exploitation of the child is as good as denying them their dignity all together.

## **RESEARCH METHODOLOGY**

A doctrinal research methodology will be adopted in the quest to complete the research on the efficacy of Kenyan legislation in curbing the menace of Child Pornography. This will be in form of a systematic exposition of the rules governing Internet Child Pornography, that analyses the relationship between rules, explains the areas of difficulty and, perhaps, predicts future developments. Research will be conducted through analysis of statutory provisions and cases by the application of power of reasoning. It will give emphasis on analysis of legal rules, principles or doctrines. The researcher will also draw best practices from other jurisdictions such as the United Kingdom, and the United States of America in a bid to seek what qualities should be adopted in Kenyan legislation in helping to curb Child Pornography.

## **CHAPTER BREAKDOWN**

Chapter two of the proposed dissertation shall consist of the analysis of International and municipal laws (the Sexual Offences Act and the Children's Act) in Kenya and the extent to which they legislate against Internet Child Pornography.

Chapter three will seek to investigate the novel problems that the Internet has created in the area of Child Pornography which cannot be adequately regulated by The Sexual Offences Act and The Children's Act.

Chapter four will seek to analyze the limitations of legislations in governance of the problems cited in the field of Internet child Pornography. It will also seek to determine whether alternative forms of governance can be sought that can aid legislation.

Chapter 5 shall conclude by giving recommendations while drawing up a comparative analysis to foreign jurisdictions, particularly the United Kingdom and the United States of America.

## **DURATION**

The Research Paper pursuant to this proposal shall be written between July, 2015 and March, 2016.

## **CHAPTER TWO: EXISTING INTERNATIONAL AND MUNICIPAL LAWS WHICH CAN BE APPLIED TO REGULATE CRIMINAL PORNOGRAPHIC CONTENT DISTRIBUTED OR ACCESSED VIA THE INTERNET**

The Constitution of Kenya<sup>80</sup> is the supreme law of the country. It states that every person has inherent dignity and a right to have that dignity respected and protected.<sup>81</sup> In furthering this notion, the Constitution further states that every child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment or hazardous or exploitative labor.<sup>82</sup> It was against this background that the Sexual Offences Act (2006) and the Children's Act (2002) were mooted and eventually passed by parliament. These Acts endeavor to tackle the issue of Child Pornography in Kenya. It is worth noting that based on Article 2(5) of the Constitution, the general rules of International Law dealing with Child Pornography form part of the laws of Kenya.<sup>83</sup> Moreover, as a result of Article 2(6) of the Constitution, International instruments on Child Pornography that have been ratified by Kenya form part of the laws of Kenya as well.<sup>84</sup> Therefore, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, social and cultural rights, Convention on the Rights of the child, the African Charter on the Rights and Welfare of the Child, as well as the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography are applicable in the Kenyan context as legislation against Child Pornography.

My goal in this chapter is to highlight the various sections of the International instruments as outlined above as well as the Sexual Offences Act, the Children's Act and that can be applied to regulate criminal pornographic content distributed or accessed via the internet.

### **UNIVERSAL DECLARATION OF HUMAN RIGHTS**

The Universal Declaration of Human Rights<sup>85</sup> was adopted on December 1948 by the General Assembly of the United Nations.<sup>86</sup> It is essentially the backdrop that birthed all other international instruments that highlight the notion of Human Rights. Right from the preamble,

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<sup>80</sup> *Constitution of Kenya 2010*

<sup>81</sup> Article 28, *Constitution of Kenya 2010*

<sup>82</sup> Article 53(1)(d), *Constitution of Kenya 2010*

<sup>83</sup> Article 2(5), *Constitution of Kenya 2010*

<sup>84</sup> Article 2(6), *Constitution of Kenya 2010*

<sup>85</sup> UN General Assembly, *Universal Declaration of Human Rights* (1948), 217 A (III)

<sup>86</sup> *Universal Declaration of Human Rights*



the Declaration recognizes that the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.<sup>87</sup>

The Declaration states that every person is entitled to all rights and freedom without any form of bias against them based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>88</sup> It further highlights that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>89</sup>

## **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

The International Covenant on Civil and Political Rights<sup>90</sup> was adopted on 16 December 1966.<sup>91</sup> This Covenant Echoes the words of the Universal Declaration stating correctly in its preamble that the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.<sup>92</sup> Further, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his or her economic, social and cultural rights, as well as his or her civil and political rights.<sup>93</sup> It goes on to state that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>94</sup>

The Universal Declaration and The International Covenant on Civil and Political Rights have come to be regarded as historic documents articulating a common definition of human dignity and values.<sup>95</sup>

## **CONVENTION ON THE RIGHTS OF THE CHILD**

Kenya ratified the United Nations Convention on the Rights of the Child in 1990.<sup>96</sup> The Convention seeks to specifically protect all the rights pertaining to children and ensure that all children are protected and cared for.

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<sup>87</sup>Preamble, *Universal Declaration of Human Rights*

<sup>88</sup> Article 2, *Universal Declaration of Human Rights*

<sup>89</sup> Article 5, *Universal Declaration of Human Rights*

<sup>90</sup> UN General Assembly, *International Covenant on Civil and Political Rights* (1966), United Nations, Treaty Series, vol. 999,

<sup>91</sup> *International Covenant on Civil and Political Rights*,

<sup>92</sup> Preamble, *International Covenant on Civil and Political Rights*,

<sup>93</sup> Preamble, *International Covenant on Civil and Political Rights*,

<sup>94</sup> Article 7, *International Covenant on Civil and Political Rights*,

<sup>95</sup> 'Worldwide Influence Of The Universal Declaration Of Human Rights And The International Bill Of Rights'

<http://www.universalrights.net/main/world.htm> on 18 January 2016

The Convention states that States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.<sup>97</sup> It further states that such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention.<sup>98</sup> In addition, it provides for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described above, and, as appropriate, for judicial involvement.

More specifically, Article 34 of the Convention stipulates that, “States must Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.”<sup>99</sup> It highlights that States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent the exploitative use of children in pornographic performances and materials.<sup>100</sup>

The Convention offers a more detailed framework on how to deal with forms of sexual abuse against the child such as Child Pornography by authorising legislative, administrative, social and educational measures to be undertaken by state parties with regard to the matter. It is therefore provides a suitable platform through which appropriate schemes can be created by Kenya to tackle the giant of Child Pornography.

## **OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY**

This Protocol was adopted on 25<sup>th</sup> May 2000 in order to further achieve the purposes of the Convention on the Rights of the Child and the implementation of its provisions. It was deemed to be appropriate to extend the measures that the States Parties should undertake in order to guarantee the protection of the child from the sale of children, child prostitution and

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<sup>96</sup> *CRC, International Human Rights Standards: Reporting Obligations*, The Kenyan Section of the International Commission of Jurists, 2004, ISBN No. 9966-958-26-6

<sup>97</sup> Article 19(1), *Convention on the Rights of The Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

<sup>98</sup> Article 19(2), *Convention on the Rights of The Child*

<sup>99</sup> Article 34, *Convention on the Rights of The Child*

<sup>100</sup> Article 34, *Convention on the Rights of The Child*



Child Pornography.<sup>101</sup> The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography by all means seems to give the most comprehensive guidelines on how to deal with the menace of Child Pornography.

The protocol notes with grave concern that there is significant and increasing international traffic of children for the purpose of the sale of children, child prostitution and Child Pornography.<sup>102</sup> It highlights the growing availability of Child Pornography on the Internet and other evolving technologies, and recalling the International Conference on Combating Child Pornography on the Internet and, in particular, its conclusion calling for the worldwide criminalization of the production, distribution, exportation, transmission, importation, intentional possession and advertising of Child Pornography, and stressing the importance of closer cooperation and partnership between Governments and the Internet.<sup>103</sup>

Based on this background, the Protocol states that States Parties shall prohibit the sale of children, child prostitution and Child Pornography.<sup>104</sup> Article 2 defines Child Pornography as any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.<sup>105</sup> This is a very comprehensive definition that may be used by courts to eliminate the ambiguity created by the Kenya Sexual Offences Act.

Based on this definition, the Protocol stipulates as a minimum, Each State Party must ensure Producing, distributing, disseminating, importing, exporting, offering, selling or possessing Child Pornography as defined in Article 2 is fully covered under its criminal or penal law, whether these offences are committed domestically or trans-nationally or on an individual or organized basis.<sup>106</sup>

In determination of jurisdiction to try matters of Child Pornography, the Protocol stipulates that the offence shall be deemed to be included as extraditable extradition treaty existing

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<sup>101</sup> Preamble, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 25<sup>th</sup> May 2000, United Nations, Treaty Series, vol 2171, p. 227

<sup>102</sup> Preamble, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*

<sup>103</sup> Preamble, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*

<sup>104</sup> Article 1, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*

<sup>105</sup> Article 2, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*

<sup>106</sup> Article 3(c), *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*

between States Parties and shall be included as an extraditable offence in every extradition treaty subsequently concluded between them, in accordance with the conditions set forth in those treaties.<sup>107</sup>

It is a requirement under this Protocol for each State Party to submit, within two years following the entry into force of the Protocol for that State Party, a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol.<sup>108</sup> This provides a system of checks and balances for each individual State. Accountability and transparency helps to ensure that each State is pulling its own weight as it should in order to contribute to a better world.

### **AFRICAN CHARTER ON THE RIGHTS AND THE WELFARE OF THE CHILD**

Kenya ratified African Charter on the Rights and the Welfare of the Child on 25<sup>th</sup> July 2000. The African Charter seeks to further amplify the stipulations elucidated in the Convention on the Rights of The Child and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The African Charter goes hand in hand with the spirit of the Convention by codifying legislation to deal with Child Pornography.

Primarily, the Charter stipulates that all its States Parties shall take specific legislative, administrative, social and educational measures to protect the child from all, forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.<sup>109</sup> More particularly, States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent the use of children in pornographic activities, performances and materials.<sup>110</sup>

The African Charter similar to the aforementioned International instruments provides an accurate framework for Kenya to begin to draft comprehensive legislation on Child Pornography. It paves the way for various measures to be put in place while encouraging State Parties to nationalize laws on the same.

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<sup>107</sup> Article 5(1), *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*

<sup>108</sup> Article 12(1), *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*

<sup>109</sup> Article 16, *African Charter on the Rights and the Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49(1990)

<sup>110</sup> Article 27, *African Charter on the Rights and the Welfare of the Child*



Kenya has done its due diligence in drafting legislation to protect the rights of children and in specific to fight Child Pornography. Below is a break-down of the said legislations.

## **SEXUAL OFFENCES ACT**

The Sexual Offences Act was enacted in July 2006. It is one of the key legislations in Kenya that seeks to regulate Internet Child Pornography.

According to the Act, any person including a juristic person is guilty of Child Pornography if such a person displays, shows, exposes or exhibits obscene images, words or sounds by means of print, audio-visual or any other media by any person including a juristic person, knowingly to a child with intention of encouraging or enabling a child to engage in sexual acts.<sup>111</sup> The Act in section 16 further states that a sale, letting to hire, distribution, public exhibit or any manner of circulation, or making, production or possessing for purposes of sale, hire, distribution, public exhibition or circulation of any obscene book, pamphlet, paper, drawing, painting, art, representation or figure or any other obscene object whatsoever which depict the image of any child shall constitute the offence of Child Pornography.<sup>112</sup> Bearing this definition, the Act criminalises both the exposure of a child to obscene images, words or sounds or depicting a child in obscene images words or sounds. In addition to the above definition, the Act criminalises importing such obscene object for sale hire, distribution as well as public exhibition.<sup>113</sup> Moreover, it is also an offence under the Act to receive profits from any business that a person believes stems from the proceeds of such obscene objects as mentioned before.<sup>114</sup>

In addition to Child Pornography, the Sexual Offences Act criminalises promotion of sexual offences with a child.<sup>115</sup> It states that it is an offence to manufacture or distribute any article that promotes or is intended to promote a sexual offence with a child.<sup>116</sup> Any person therefore who supplies or displays to a child any article which is intended to be used in the performance of a sexual act with the intention of encouraging or enabling that child to perform such sexual act, is guilty of an offence and is liable upon conviction to imprisonment

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<sup>111</sup> Section 16(1)(a), *Sexual Offences Act* CAP 62A

<sup>112</sup> Section 16(1)(aa), *Sexual Offences Act* CAP 62A

<sup>113</sup> Section 16(b), *Sexual Offences Act* CAP 62A

<sup>114</sup> Section 16(c), *Sexual Offences Act* CAP 62A

<sup>115</sup> Section 12, *Sexual Offences Act* CAP 62A

<sup>116</sup> Section 12(a), *Sexual Offences Act* CAP 62A

for a term of not less than five years and where the accused person is a juristic person to a fine of not less than five hundred thousand shillings.<sup>117</sup>

While the title of section 16 suggests that it deals with Child Pornography, it is worth noting that the main test used throughout the section is ‘obscenity which is defined as ‘laviscious’ material or material that appeals to the ‘prurient interest’ or tends to ‘deprave’ or ‘corrupt’ the persons who have access to it.<sup>118</sup> This may be seen to be an eminently subjective definition that relies on the ‘gut-feeling’ instincts of the government of the day.<sup>119</sup> It therefore creates a thin line between the protection of the rights of a child and infringement of freedom of expression. Such a definition therefore creates massive ambiguity on what can or cannot be considered obscene. The Act however makes an attempt to criminalise Internet Child Pornographic content.

## CHILDREN’S ACT

The Children’s Act was enacted in 2001 to fulfill the Repealed Constitution’s mandate to protect the rights of a child.

The Children’s Act states that all children must be protected from abuse whether physical or psychological.<sup>120</sup> The Act further states that a child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials.<sup>121</sup>

Under the Act, any child who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography shall be considered as a child in need of care and protection.<sup>122</sup>

It is therefore an offence under the Children’s Act to subject children to abuse by exposing them to such obscene materials or involving them in the production of the same. Such exposure or involvement automatically puts such a child into the category of one in need of care and protection.

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<sup>117</sup> Section 12(b), *Sexual Offences Act* CAP 62A

<sup>118</sup> Kenya: Cybercrime and Computer Related Crimes Bill: legal analysis, Article 19, Free Word Centre, 60 Farringdon Rd, London EC1R 3GA, [www.article19.org](http://www.article19.org)

<sup>119</sup> Kenya: Cybercrime and Computer Related Crimes Bill: legal analysis, Article 19, Free Word Centre, 60 Farringdon Rd, London EC1R 3GA, [www.article19.org](http://www.article19.org)

<sup>120</sup> Section 13, *Sexual Offences Act* CAP 62A

<sup>121</sup> Section 15, *Children’s Act* CAP 141

<sup>122</sup> Section 119(n), *Children’s Act* CAP 141

The Act therefore highlights the need for the protection of the rights of a child against Child Pornography. It picks up on the definition stipulated by the Sexual Offences Act by referring to the term 'obscene materials'.<sup>123</sup>

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<sup>123</sup> Section 16, *Sexual Offences Act* CAP 62A



### **CHAPTER 3: NOVEL PROBLEMS CREATED BY THE INTERNET IN THE AREA OF CHILD PORNOGRAPHY WHICH CANNOT BE ADEQUATELY REGULATED BY EXISTING LEGAL OR REGULATORY FRAMEWORK**

Gone are the days when a computer was a large piece of equipment that was inaccessible to the common man. Digital technology is all around us.<sup>124</sup> One can go to his local coffee shop or fast food restaurant and access the Internet on his smart phone, a task which would have seemed implausible just a few years ago.<sup>125</sup> This has mostly worked for the good of society and betterment of communication. However, nothing good comes without a fault. Child pornography has risen drastically as a result.

Just as the question on flexibility of the law in dealing with the novel problems in child pornography has been raised in Kenya, likewise this has been a dilemma that is equally faced in many countries in the world such as the United Kingdom. These are questions that Kenya needs to begin to consider.

#### **I. THE PROBLEM OF COPIES**

Possession as internationally defined is the physical control or occupancy of land, property, etc, whether or not accompanied by ownership.<sup>126</sup> In Kenya, the Sexual Offences Act defines states that any person who has in his possession any obscene material is guilty of Child Pornography.<sup>127</sup> It does not define possession neither does it give a scope where possession can legally be inferred.

As opposed to the past where images of Child sexual abuse were secretly traded, and multiple duplication led to degraded image quality, today, one can produce Child Pornography utilizing readily available equipment: digital video recorders, digital cameras or phones.<sup>128</sup>

Technological advances have made it possible to produce and distribute Child Pornography inexpensively and quickly, as well as enabling “collectors” with the means to acquire it.<sup>129</sup> With access to a credit card and the internet, a user can choose to subscribe to a site with Child pornography content and on payment have the images sent directly to him.

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<sup>124</sup> Grantham P.M, Temporary Internet Files, Web Browser Cache Files, and Child Pornography

<sup>125</sup> Grantham P.M, Temporary Internet Files, Web Browser Cache Files, and Child Pornography

<sup>126</sup> “possession definition”, the free dictionary,

<http://www.thefreedictionary.com/possession> on 25 January 2016

<sup>127</sup> Article 16 (1) (aa), Sexual Offences Act, CAP 62A

<sup>128</sup> Grantham P.M, Temporary Internet Files, Web Browser Cache Files, and Child Pornography

<sup>129</sup> Grantham P.M, Temporary Internet Files, Web Browser Cache Files, and Child Pornography

When contemplating the term “possession,” the general public would agree that it involves the actual presence of a physical object – a weapon, for example that can be touched, held, or locked in a gun safe.<sup>130</sup> No one would assume that a person possesses a gun because they happened to see it behind glass at a gun shop.<sup>131</sup> What of the possession of Child Pornography? Can one be guilty of possessing Child Pornography when they “merely viewed” the image on their computer screen?<sup>132</sup>

A good example of such a problem can be taken from English case law relating to the England Protection of Children’s Act 1978<sup>133</sup>. In *R v Fellows and Arnold*,<sup>134</sup> the Court of Appeal had to consider whether the Act applied in a case involving the use of a computer by two pedophiles.<sup>135</sup> In this case,

*“Images of Child Pornography which were maintained on an electronic database and access allowed to other pedophiles by issue of a password which allowed the images to be viewed and downloaded. The main issue for the court was whether the images stored in the computer memory could be defined as “photographs” in terms of the 1978 Act. At the time of the alleged offences, the Act merely defined a photograph as “including” an indecent film, a copy of an indecent photograph or film and an indecent photograph comprised in a film. The court held that according to the definition of the Act, the accused persons did not have the photograph as they did not print the images, but merely had a ‘copy of the photograph’ which then fell into the definition given above.”<sup>136</sup>*

Kenya may face a similar challenge when it comes to determining whether the possession of copies of images or sounds constitute the crime of possession of Child Pornography. Where the Sexual offences Act stipulates that it is an offence to possess images or sounds<sup>137</sup>, the dilemma arises on whether copies of such material still constitutes the crime of possession as stipulated by the Act.

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<sup>130</sup> Grantham P.M, Temporary Internet Files, Web Browser Cache Files, and Child Pornography,2

<sup>131</sup> Grantham P.M, Temporary Internet Files, Web Browser Cache Files, and Child Pornography,2

<sup>132</sup> Grantham P.M, Temporary Internet Files, Web Browser Cache Files, and Child Pornography,2

<sup>133</sup> Section 7(2), Protection of Children’s Act 1978, United Kingdom

<sup>134</sup> *R v Fellows and Arnold* [1997] 2 All ER 548

<sup>135</sup> Edwards L, ‘Pornography, Censorship and the Internet’, Social Science Research Network, 15

<sup>136</sup> Edwards L, ‘Pornography, Censorship and the Internet’, 15

<sup>137</sup> Article 16(1)(aa), Sexual Offences Act, CAP 62A



If "possession" just means that you have some material or a copy of the material, for access any time, then we need a serious rethinking of that term and the laws that rely on it.<sup>138</sup> Currently, a shrewd Child Pornography enthusiast could completely obey the law while taking advantage of illegal material everywhere.<sup>139</sup>

The international definition of possession remains vague while Kenyan legislation remains silent and thus unable to apply to the technological advances that redefine what "possession" is. Both have not embraced what technology has developed into. There is need for a larger understanding of what "possession" is. It is estimated that in 2015, 46.4% of the world has access to the Internet.<sup>140</sup> Moreover, the internet has not yet achieved its full potential.<sup>141</sup> We are moving to a time when we may not ever have to "download" anything, at least by the old definition (which is actually just copying a file from one place to another).<sup>142</sup> The vastness of the internet and movement of technology makes this an issue we simply cannot ignore.

## II. POSSESSION, CACHING AND MENS REA

There are two questions which arise in the area of possession, caching and mens rea. First, does having indecent photographs stored on the cache of a computer system belonging to a certain person constitute "possession" by that person for the purpose of section 16 of the Sexual Offences Act; and secondly, does the downloading (saving) of indecent photographs to a particular drive on that computer system, from the Internet, constitute the separate offence of the "manufacturing" of an indecent photograph under section 12(a) of the Sexual Offences Act?

Surfing the Internet involves significant interaction and exchange of information between a user's computer and the web servers visited.<sup>143</sup> Furthermore, the user retains a significant

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<sup>138</sup> 'Dan Nosowitz: Do You "Possess" What You View Online?', *Popular Science*, 9 May 2012  
<http://www.popsci.com/technology/article/2012-05/do-you-possess-what-you-view-online> on 18 January 2016

<sup>139</sup> 'Dan Nosowitz: Do You "Possess" What You View Online?', *Popular Science*, 9 May 2012  
<http://www.popsci.com/technology/article/2012-05/do-you-possess-what-you-view-online> on 18 January 2016

<sup>140</sup> Internet Growth Statistics: *Internet World Stats*,  
<http://www.internetworldstats.com/emarketing.htm>

<sup>141</sup> Internet Growth Statistics: *Internet World Stats*,  
<http://www.internetworldstats.com/emarketing.htm>

<sup>142</sup> 'Dan Nosowitz: Do You "Possess" What You View Online?', *Popular Science*, 9 May 2012  
<http://www.popsci.com/technology/article/2012-05/do-you-possess-what-you-view-online> on 18 January 2016

<sup>143</sup> Marin G, 'Possession Of Child Pornography: Should You Be Convicted When The Computer Cache Does The Saving For You?'



level of control over the information on the computer.<sup>144</sup> Nevertheless, at this point, despite the user's apparent control over the image, the average defendant will still argue that he does not possess Child Pornography.<sup>145</sup>

To speed up repeat viewing of a previously visited website, computers automatically make a copy of the data from visited websites in the form of "temporary Internet files" and store the data in what is called the "cache."<sup>146</sup> A cache is a storage device in a computer's main memory meant to improve download speed.<sup>147</sup>

This is a problematic subject because an image browsed on a Web page can be saved to a computer's cache without either the knowledge or intent of the browser.<sup>148</sup> Few people know that given the default set up of most home machines, an image which is clicked on is automatically stored (or "cached") on the machine's hard disc.<sup>149</sup> Even users that have a general idea of the process's function and operation might not know how to prevent it.<sup>150</sup>

What about streaming? Streaming is technically downloading.<sup>151</sup> One is merely watching it in real time as it downloads, and then neglecting to keep the file once finished.<sup>152</sup> The law views downloading and streaming as two separate things.<sup>153</sup> Copyright holders see a difference here too. There is a reason it costs more to "purchase" and download a movie on iTunes than "stream" it via your monthly Netflix subscription.<sup>154</sup> But Netflix, Hulu, Rdio, and Spotify, plus MegaVideo, Videoweed.es, couchtuner, awesome dl, vimeo, vodlocker, vidbull, and all

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<sup>144</sup> Marin G, 'Possession Of Child Pornography: Should You Be Convicted When The Computer Cache Does The Saving For You?', 9

<sup>145</sup> United States v. Romm, 455 F.3d 990 (9th Cir. 2006)

<sup>146</sup> Marin G, 'Possession Of Child Pornography: Should You Be Convicted When The Computer Cache Does The Saving For You?' 9

<sup>147</sup> Cache definition, Merriam Webster Collegiate Dictionary

<sup>148</sup> Edwards L, 'Pornography, Censorship and the Internet', 17

<sup>149</sup> Edwards L, 'Pornography, Censorship and the Internet', 17

<sup>150</sup> Marin G, 'Possession Of Child Pornography: Should You Be Convicted When The Computer Cache Does The Saving For You?' 10

<sup>151</sup> 'Dan Nosowitz: Do You "Possess" What You View Online?', *Popular Science*, 9 May 2012  
<http://www.popsci.com/technology/article/2012-05/do-you-possess-what-you-view-online> on 18 January 2016

<sup>152</sup> 'Dan Nosowitz: Do You "Possess" What You View Online?', *Popular Science*, 9 May 2012  
<http://www.popsci.com/technology/article/2012-05/do-you-possess-what-you-view-online> on 18 January 2016

<sup>153</sup> 'Dan Nosowitz: Do You "Possess" What You View Online?', *Popular Science*, 9 May 2012  
<http://www.popsci.com/technology/article/2012-05/do-you-possess-what-you-view-online> on 18 January 2016

<sup>154</sup> 'Dan Nosowitz: Do You "Possess" What You View Online?', *Popular Science*, 9 May 2012  
<http://www.popsci.com/technology/article/2012-05/do-you-possess-what-you-view-online> on 18 January 2016

the other "streaming" services, legal and illegal, are the future.<sup>155</sup> When you can stream a song or video from anywhere, with any device, in full quality, should that count as "possession"? Is it just a technicality that you can't point to a file on your computer?<sup>156</sup>

The simple legal definition of possession may create an immense ambiguity in the scope of digital possession. Downloading an image requires a positive effort by the viewer to make a copy of the image in his hard drive.<sup>157</sup> The person must instruct the computer to save or download the image and designate where it should store the image.<sup>158</sup> This would constitute possession in the traditional sense. There is sudden ambiguity where the law of programming is activated and one's computer automatically begins to save searched files onto the computer's hard drive.

Courts' have not been uniform in their approaches to determining what constitutes possession. In foreign jurisdictions such as the United States, some courts have held that images in cache are sufficient to show possession, while others have rejected this view. In *United States v. Romm*,<sup>159</sup> the defendant admitted to viewing Child Pornography on his computer but argued he was never in possession of it because he did not download any of the images.<sup>160</sup> In rejecting this argument, the Ninth Circuit held that defendant's ability to control the images on the screen was sufficient to show possession.

Other courts, however, have held that statutes prohibiting the knowing possession of Child Pornography do not criminalize the mere viewing of these images on a computer. These courts reason that the presence of Child Pornography in cache files is evidence only of the fact that the images were at one time viewed on the computer screen.<sup>161</sup> This was the holding in the case of *United States v. Kuchinski*,<sup>162</sup> where the court held that a defendant cannot be guilty of possession and control of Child Pornography located in a computer's cache files

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<sup>155</sup> 'Dan Nosowitz: Do You "Possess" What You View Online?', *Popular Science*, 9 May 2012  
<http://www.popsci.com/technology/article/2012-05/do-you-possess-what-you-view-online> on 18 January 2016

<sup>156</sup> 'Dan Nosowitz: Do You "Possess" What You View Online?', *Popular Science*, 9 May 2012  
<http://www.popsci.com/technology/article/2012-05/do-you-possess-what-you-view-online> on 18 January 2016

<sup>157</sup> Marin G, 'Possession Of Child Pornography: Should You Be Convicted When The Computer Cache Does The Saving For You?',<sup>7</sup>

<sup>158</sup> Marin G, 'Possession Of Child Pornography: Should You Be Convicted When The Computer Cache Does The Saving For You?',<sup>7</sup>

<sup>159</sup> *United States v. Romm*, 455 F.3d 990 (9th Cir. 2006)

<sup>160</sup> *United States v. Romm*, 455 F.3d 990 (9th Cir. 2006)

<sup>161</sup> Grantham P.M, "But Your Honor, I Didn't Possess Those Pictures; My Computer Did.",<sup>7</sup>

<sup>162</sup> *United States v. Kuchinski*, 469 F.3d 853, 862 (9th Cir. 2006)



without evidence that he exercised dominion and control over the images.<sup>163</sup> This case is interesting because in *Kuchinski*, the defendant's computer contained, in various forms, more than 15,000 images of Child Pornography.<sup>164</sup> *Kuchinski* successfully argued that he lacked knowledge of a computer mechanism that automatically downloads any images viewed while a user surfs the Internet.<sup>165</sup> Ultimately, *Kuchinski* was convicted for possession of only 110 of the 15,000 images.<sup>166</sup>

The *Kuchinski* approach may be used as a new defence for willing users of Child Pornography: lack of knowledge regarding the inner workings of their computers, even though a user does not need any advanced computer knowledge to search, view, and control web images.<sup>167</sup>

When it comes to prosecution of possession, it is necessary to include a mental requirement while criminalising Child Pornography.<sup>168</sup> There is potential that those who acquire Child Pornography unsolicited can be culpable.<sup>169</sup> Certainly intention and knowledge should be included. Those who acquire Child Pornography intentionally while having knowledge of its contents should be culpable.<sup>170</sup>

Possession of Child Pornography is not a new crime. A review of the cases outlined above illustrates one of the many challenges posed by the advance of technology particularly how existing laws are applicable to new situations. As it stands now, there is an inconsistency in case law regarding what constitutes possession of Child Pornography, and a determination of guilt in such a matter could very well turn on whether or not the defendant had an understanding of the technical aspects of computer processes.<sup>171</sup>

### III. DELETED IMAGES AND LEGITIMATE REASON DEFENSE

Diane Deft frequently views Child Pornography on her computer. She deletes every image that she views.<sup>172</sup> Police learn of Diane's proclivity to view child porn and obtain a search

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<sup>163</sup> *United States v. Kuchinski*, 469 F.3d 853, 862 (9th Cir. 2006)

<sup>164</sup> *United States v. Kuchinski*, 469 F.3d 853, 862 (9th Cir. 2006)

<sup>165</sup> *United States v. Kuchinski*, 469 F.3d 853, 862 (9th Cir. 2006)

<sup>166</sup> *United States v. Kuchinski*, 469 F.3d 853, 862 (9th Cir. 2006)

<sup>167</sup> Marin G, 'Possession Of Child Pornography: Should You Be Convicted When The Computer Cache Does The Saving For You?', 23

<sup>168</sup> Gillespie A, *Child Pornography: law and policy*, Routledge-Cavendish; 1 edition (2012), 352

<sup>169</sup> Gillespie A, *Child Pornography: law and policy*, 352

<sup>170</sup> Gillespie A, *Child Pornography: law and policy*, 352

<sup>171</sup> Grantham P.M, "But Your Honor, I Didn't Possess Those Pictures; My Computer Did.", 23

<sup>172</sup> Computer possession problem,



warrant for her computer. Evidence of child porn is found upon forensic retrieval.<sup>173</sup> Can she be successfully prosecuted?

A key problem for investigations is that a person knowingly in possession of Child Pornography (in the traditional sense) can possibly delete them from his hard disc before the police arrive.<sup>174</sup> Can an offense of “possession” then still be charged?<sup>175</sup> This is an interesting dilemma because modern forensics can by the help of technology retrieve deleted images, to a greater or lesser extent, even where an “ordinary” non expert user could not himself still gain access.<sup>176</sup> Whether or not the retrieved images are in “possession” is a matter of great contention.

The best way to tackle this mountain is by analysing case law. European jurisprudence has attempted to tackle this.

*“The Court of Appeal in the case of Porter, the defendant’s home was raided and two computers seized later found to contain 3,575 still images and 40 movie files of Child Pornography. However 875 of the images had been placed in the “Recycle Bin” and then it had been emptied; nonetheless officers were able to retrieve these images using special forensic software. The other 2700 images had been deleted beyond ordinary retrieval but thumbnail images of them could still be viewed using a program “ACDSee” the defendant had on his computer plus special forensics provided by their US Federal government. At first instance the judge held Porter possessed all the files regardless of whether they were in a “deleted” state or not. The main issue was whether he had ever had knowledge of being in possession of illegal images. However on appeal, the court held that possession in the context of photographs referred to a defendant’s “control or custody” of the images. If images had been deleted, then possession would depend on whether he had the specialist knowledge and software to be able to retrieve them; that is, it was a question of fact whether he had actual control over them. This is apparently a subjective test, not a question of what knowledge or facilities the reasonable man (or the reasonable*

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[http://www1.law.umkc.edu/suni/CrimLaw/computer\\_possession\\_problem.htm](http://www1.law.umkc.edu/suni/CrimLaw/computer_possession_problem.htm) on January 19 2016

<sup>173</sup> Gillespie A, *Child Pornography: law and policy*, 352

<sup>174</sup> Edwards L, ‘Pornography, Censorship and the Internet’, 18

<sup>175</sup> Edwards L, ‘Pornography, Censorship and the Internet’, 18

<sup>176</sup> Edwards L, ‘Pornography, Censorship and the Internet’, 19

*pornographer?) would have. In this particular case, Porter's appeal was successful.*"<sup>177</sup>

In the context of Kenya the issue of deleted images would pose a great challenge to legislators as would the problem of caching discussed above. This therefore leaves such a novel and growing matter to ambiguity ultimately giving the courts a tremendously difficult task.

In some countries such as the United Kingdom, the law allows legitimate reason as a defence for some crimes such as the possession of Child Pornography.<sup>178</sup> One reason given is research. The issue that arises here is whether Kenyan legislation can sufficiently deal with such a defence. What would be validly considered as legitimate reason? The legislation in Kenya fails to address this area.

#### **IV. CARTOON AND COMPUTER GENERATED PORNOGRAPHY**

According to the Sexual Offences Act Kenya, it is a criminal offense to manufacture or distribute any images that promote children sexual abuse.<sup>179</sup> This is inspired by claims that pedophiles are circumventing the law by using computer technology to manipulate real photos or videos of abuse into drawings or cartoons.<sup>180</sup> Moreover, there is a rising popularity of Japanese manga and anime type cartoons and films which often depict extreme sex and violence, and perhaps crucially, also often involve young women of indeterminate age.<sup>181</sup>

While nobody will disagree that they should be banned entirely, the justification for criminalising the possession of drawn or computer-generated images that involve no real children is not so clear.<sup>182</sup> The law covers still and moving images and can include cartoons, drawings, and manga-style images.<sup>183</sup> These images are easier to find on the internet than actual child abuse images involving real children, largely due to the fact that virtual

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<sup>177</sup> Edwards L, 'Pornography, Censorship and the Internet', 19

<sup>178</sup> Casey E, Digital Evidence and Computer Crime: Forensic science, computers and the Internet, Academic Press (2011), 2<sup>nd</sup> Edition, 336

<sup>179</sup> Section 12(a), Sexual Offences Act CAP 62A

<sup>180</sup> Edwards L, 'Pornography, Censorship and the Internet', 19

<sup>181</sup> Edwards L, 'Pornography, Censorship and the Internet', 19

<sup>182</sup> 'When a drawing or cartoon image can land you in jail', 27 October 2014,

<http://theconversation.com/when-a-drawing-or-cartoon-image-can-land-you-in-jail-33418> on 06 December 2015

<sup>183</sup> 'When a drawing or cartoon image can land you in jail', 27 October 2014,

<http://theconversation.com/when-a-drawing-or-cartoon-image-can-land-you-in-jail-33418> on 06 December 2015



pornography is not illegal in all countries.<sup>184</sup> For example, the existence of Japanese websites featuring fantasy child sexual abuse has been a concern in countries where it is illegal.<sup>185</sup>

In either case, Kenyan law already allows many such materials to be deemed criminal images of child abuse.<sup>186</sup> Proponents of this will argue that “virtual” pornography actually feeds a criminal need for Child Pornography which may lead on to actual abuse, even if no actual children are harmed in the making of the materials.<sup>187</sup> They state that the circulation of such materials implies a general societal acceptability of such images.<sup>188</sup>

The question that arises is that if these laws do truly set out to create a new domain of content illegal to possess, does it reach beyond images into the largely untouched world of text?<sup>189</sup> If manga are criminalised today, will ultraviolent but artistically well-regarded graphic novels such as Frank Miller’s Sin City be next?<sup>190</sup> How does this come into play vis a vis freedom of expression?

*“In a recent admissibility decision which has received scant attention, the European Court considered for the first time the vexed question of the criminalisation of Child Pornography and its compatibility with freedom of expression. The issue before the Court was whether the conviction of an artist for including Child Pornography in an art exhibition violated the right to freedom of expression under Article 10 of the European Convention. The applicant in Karttunen v Finland was an artist who had included hundred of photographs of minors engaged in sexual acts in an exhibition entitled the “Virgin-Whore Church”, which was displayed at a gallery in Helsinki. The applicant had downloaded the images freely from the Internet, and the purpose of the exhibition was to encourage discussion on the ease of access to Child Pornography and its wide-spread existence. In ruling, The Court accepted that the criminalisation of Child Pornography was based on the interests of protecting children from sexual abuse, their privacy rights, and also moral considerations. The*

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<sup>184</sup> ‘When a drawing or cartoon image can land you in jail’, 27 October 2014, <http://theconversation.com/when-a-drawing-or-cartoon-image-can-land-you-in-jail-33418> on 06 December 2015

<sup>185</sup> ‘When a drawing or cartoon image can land you in jail’, 27 October 2014, <http://theconversation.com/when-a-drawing-or-cartoon-image-can-land-you-in-jail-33418> on 06 December 2015

<sup>186</sup> Section 12(a), Sexual Offences Act CAP 62A

<sup>187</sup> Edwards L, ‘Pornography, Censorship and the Internet’,24

<sup>188</sup> Edwards L, ‘Pornography, Censorship and the Internet’,24

<sup>189</sup> Edwards L, ‘Pornography, Censorship and the Internet’,24

<sup>190</sup> Edwards L, ‘Pornography, Censorship and the Internet’,25



*Court noted that the Finnish courts had acknowledged the applicant's good intentions by not imposing any sanctions. However, the Court noted that the possession and public display of Child Pornography was still subject to criminal liability.*"<sup>191</sup>

One of the main justifications given for criminalising the possession of these "prohibited images" is that they could be used for grooming children and could fuel child abuse by reinforcing potential abusers' inappropriate feelings towards children.<sup>192</sup> The problem with respect to this law governing cartoon Child Pornography is that it will in most cases be a victimless crime – the images are not of a real child suffering abuse.<sup>193</sup> Instead the law focuses on the morality and character of the image – that which depicts a child, albeit an imaginary one, in an inappropriate context.<sup>194</sup> The difficult question is whether this offers sufficient justification to make possessing such an image a serious criminal offence when the possessor has no intent to harm a real child.<sup>195</sup> Production and distribution is a serious matter that raises other more serious concerns.<sup>196</sup>

The primary issue at hand is whether Kenyan legislation is equipped enough to manage this novel problem of cartoon Internet Child Pornography. The very fact that is a victimless crime is a grey area. Moreover, where do we draw the line between perpetration of a crime and freedom of expression?

## V. CLOUD COMPUTING

What we refer to as the internet in the present day and age sprouted from isolated government use, and flourished into personal use and in time became the outstanding network we rely on today.

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<sup>191</sup> *Karttunen v. Finland: Child Pornography and Freedom of Expression*, 25

<http://strasbourgobservers.com/2011/10/10/child-pornography-and-freedom-of-expression/n> on 06 December 2015

<sup>192</sup> 'When a drawing or cartoon image can land you in jail', 27 October 2014,

<http://theconversation.com/when-a-drawing-or-cartoon-image-can-land-you-in-jail-33418> on 06 December 2015

<sup>193</sup> 'When a drawing or cartoon image can land you in jail', 27 October 2014,

<http://theconversation.com/when-a-drawing-or-cartoon-image-can-land-you-in-jail-33418> on 06 December 2015

<sup>194</sup> 'When a drawing or cartoon image can land you in jail', 27 October 2014,

<http://theconversation.com/when-a-drawing-or-cartoon-image-can-land-you-in-jail-33418> on 06 December 2015

<sup>195</sup> 'When a drawing or cartoon image can land you in jail', 27 October 2014,

<http://theconversation.com/when-a-drawing-or-cartoon-image-can-land-you-in-jail-33418> on 06 December 2015

<sup>196</sup> 'When a drawing or cartoon image can land you in jail', 27 October 2014,

<http://theconversation.com/when-a-drawing-or-cartoon-image-can-land-you-in-jail-33418> on 06 December 2015

With time, online discussions and file sharing became the norm. There was the emergence of “Usenet” in the late 1970s whose primary purpose was exchange of text based messages through attachments. This amazing discovery allowed users to encode files and distribute them to subscribers by means of Usenet newsgroups.<sup>197</sup>

By the 1990s, email and the World Wide Web paved the way for a decentralized file sharing system which allowed users to directly connect to each others’ files rather than the past method which required them to go via a central index site.<sup>198</sup>

Today, novel variations of file-sharing networks, such as Limewire and Bit Torrent, continue to allow no-cost, decentralized, peer-to-peer file sharing.<sup>199</sup> Downloaded files are placed in the user’s “shared” folder, which allows others in the network to access his files.<sup>200</sup> Such a development radically simplified access to Child Pornography.

By the new millennium, Child Pornography over the Internet was a 2.5 billion dollar-a-year industry, consisting of over 4.2 million pornographic websites and approximately 372 million pornographic pages.<sup>201</sup>

The latest development in this arena is Cloud Computing. Files are simply stored in the internet within a shared pool of computer resources.<sup>202</sup> They are accessible from any computer worldwide. This invention is so intriguing because it created a situation where a user does not have to install any application on their device or computer; all processing and storage is maintained by the cloud server.<sup>203</sup> This has brought about cloud servers such as “dropbox” which can be accessed on any device at any given time. A file can be shared simply by sending a link to another users dropbox account.<sup>204</sup> Thus, similar to peer-to-peer

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<sup>197</sup> Rogers A, ‘From Peer-To-Peer Networks To Cloud Computing: How Technology Is Redefining Child Pornography’,18

<sup>198</sup> Rogers A, ‘From Peer-To-Peer Networks To Cloud Computing: How Technology Is Redefining Child Pornography’,20

<sup>199</sup> Rogers A, ‘From Peer-To-Peer Networks To Cloud Computing: How Technology Is Redefining Child Pornography’,20

<sup>200</sup> Rogers A, ‘From Peer-To-Peer Networks To Cloud Computing: How Technology Is Redefining Child Pornography’,22

<sup>201</sup> Rogers A, ‘From Peer-To-Peer Networks To Cloud Computing: How Technology Is Redefining Child Pornography’,

<sup>202</sup> Rogers A, ‘From Peer-To-Peer Networks To Cloud Computing: How Technology Is Redefining Child Pornography’

<sup>203</sup> Rogers A, ‘From Peer-To-Peer Networks To Cloud Computing: How Technology Is Redefining Child Pornography’

<sup>204</sup> Rogers A, ‘From Peer-To-Peer Networks To Cloud Computing: How Technology Is Redefining Child Pornography’

networks, once a person allows access to his files, others may do so at any time.<sup>205</sup> The major difference between this technology and peer-to-peer networks is that private cloud services requires that a person designate who may have shared access.<sup>206</sup>

Inevitably, pornographic images swapped can now also be encrypted, so that even if intercepted they would be non-identifiable as such.<sup>207</sup> It is well known that there are multiple anonymising P2P systems such as Freenet and Tor, which were originally designed to allow users to preserve their freedom of expression in the face of state censorship.<sup>208</sup> There are now regularly used by paedophile rings to pass round their wares.<sup>209</sup>

The cloud is just the latest battleground between law enforcement and child pornographers.<sup>210</sup> The ability of Child Pornographers to use cloud computing for their wares has already been recognized.<sup>211</sup> While some cloud providers are employing filtering techniques to suppress access to illegal images, there is a growing concern the cloud will provide deeper cover for pornographers.<sup>212</sup>

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<sup>205</sup> Rogers A, 'From Peer-To-Peer Networks To Cloud Computing: How Technology Is Redefining Child Pornography'

<sup>206</sup> Rogers A, 'From Peer-To-Peer Networks To Cloud Computing: How Technology Is Redefining Child Pornography'

<sup>207</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>208</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>209</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>210</sup> Rogers A, 'From Peer-To-Peer Networks To Cloud Computing: How Technology Is Redefining Child Pornography'

<sup>211</sup> Rogers A, 'From Peer-To-Peer Networks To Cloud Computing: How Technology Is Redefining Child Pornography'

<sup>212</sup> Rogers A, 'From Peer-To-Peer Networks To Cloud Computing: How Technology Is Redefining Child Pornography'



## CHAPTER 4: GOVERNANCE OF CHILD PORNOGRAPHY: LIMITS OF LEGISLATION

Making an observation of Kenya, The Committee on the Rights of a child stated that while recognizing certain efforts to take preventive action, there is a rising number of children internally trafficked and engaged in prostitution as part of sex tourism, particularly in the coastal regions of Kenya.<sup>213</sup> The Committee raised concern that preventative measures, including those to address Child Pornography, remain insufficient.<sup>214</sup> Moreover, despite the legislative provision in the Children's Act for the protection of children against sale, trafficking and abduction, effective protection remains weak and rarely results in investigations and sanctions.<sup>215</sup>

How pornography should be regulated is one of the most controversial topics to have arisen in relation to the Internet in recent years.<sup>216</sup> When tackling the issue on how to legislate Internet Child Pornography, there are several problems that arise.<sup>217</sup> Enforcement is a core issue facing national pornography laws due to the fact that Internet pornography is a global phenomenon.<sup>218</sup> Pornography is as likely to be accessed by a Kenyan citizen sitting at a terminal in Nairobi from a server or Web site physically located in Tanzania, or South Africa, or the United Kingdom, as from one within Kenyan criminal jurisdiction.<sup>219</sup> The question here remains whether Kenyan legislation creates a channel such that it is legally possible for Kenyan national authorities to prosecute and punish the recipients of Child Pornography, even if the material itself is hosted on a foreign server.<sup>220</sup> Moreover, will Kenyan legislation provide for the punishment of parties who store illicit material on foreign located servers, or

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<sup>213</sup> *Convention on the Rights of the Child, Committee On The Rights Of The Child, Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention, Concluding Observations: Kenya, 44<sup>th</sup> session*

<sup>214</sup> *Convention the Rights of the Child, Committee on the Rights of the Child, Consideration Of Reports Submitted By States Parties Under Article 44 Of the Convention, Concluding Observations: Kenya, 44<sup>th</sup> session*

<sup>215</sup> *Convention on the Rights of the Child, Committee On The Rights Of The Child, Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention*

<sup>216</sup> Akdeniz Y, 'Governance of Pornography and Child Pornography on the Global Internet: A Multi-Layered Approach,' in Edwards L and Waelder C, *Law and the Internet: Regulating Cyberspace*, Hart Publishing (1997), 223-241

<sup>217</sup> *Convention on the Rights of the Child, Committee On The Rights Of The Child, Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention*

<sup>218</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>219</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>220</sup> Edwards L, 'Pornography, Censorship and the Internet'

supply it by uploading it to such servers, so long as they themselves are personally located within the jurisdiction?<sup>221</sup>

The structure of the Internet makes control of Child Pornography very difficult.<sup>222</sup> The Internet is a decentralized system with no single controlling agency or storage facility. Because it is a network of networks, even if one pathway is blocked, many alternative pathways can be taken to reach the same destination.<sup>223</sup> Similarly, if one website or newsgroup is closed down, there are many others that can instantaneously take its place.<sup>224</sup> The decentralized nature of the Internet, and resultant difficulties in restricting the distribution of Child Pornography, is exemplified by P2P networks involving direct connections among computers without the need for a central server. It has been argued that the Internet is the ultimate democratic entity and is essentially ungovernable.<sup>225</sup>

The Internet is an international communication tool that crosses jurisdictional boundaries.<sup>226</sup> Parallel operations run from different jurisdictions may unknowingly target the same organization or offender. Equally problematic is the issue of who is responsible for investigating Child Pornography on the Internet when there is no clue as to where the images originate. There is a potential for pornography crimes to go un-investigated because they do not fall within a particular law enforcement jurisdiction.<sup>227</sup>

There is legal ambiguity about whether ISPs should be liable for the material they carry (as are television stations) or merely regarded as the conduits for that material (similar to the mail service).<sup>228</sup> The end result is that ISPs' legal obligations with respect to Internet Child

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<sup>221</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>222</sup> 'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>223</sup> 'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>224</sup> 'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>225</sup> 'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>226</sup> 'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>227</sup> 'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>228</sup> 'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015



Pornography are often unclear, and, for the most part, the emphasis has been on self-regulation.<sup>229</sup>

To the extent that there have been attempts to regulate the Internet, control efforts are hampered by cross-jurisdictional differences in laws and levels of permissiveness regarding Child Pornography. For example, in the United States a child is defined as someone under 18; in Australia the age is 16.<sup>230</sup> Moreover, countries vary in their commitment to enforce laws and act against offenders, either for cultural reasons or because of corruption.<sup>231</sup>

As the typology of Internet offending behavior suggests, offenders vary in the degree to which they employ elaborate security measures to avoid detection.<sup>232</sup> There is a core of veteran offenders, some of whom have been active in pedophile newsgroups for more than 20 years, who possess high levels of technological expertise.<sup>233</sup> Pedophile bulletin boards often contain technical advice from old hands to newcomers. It has been argued that many Internet sting operations succeed only in catching inexperienced, low-level offenders.<sup>234</sup>

The expertise of offenders is enhanced by the rapid advances in Internet technology. In addition to P2P networks, recent developments include remailers (servers that strip the sender's identity from e-mail) and file encryption (a method of hiding or scrambling data). A technological race has developed between Internet pornographers and law enforcement agencies.<sup>235</sup>

The sheer amount of traffic in Child Pornography makes the task of tracking down every person who visits a Child Pornography site impossible.<sup>236</sup> Many offenders realize that realistically their chances of being caught are quite remote. Similarly, while perhaps

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<sup>229</sup>'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>230</sup>'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>231</sup>'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>232</sup>'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>233</sup>'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>234</sup>'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>235</sup>'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>236</sup>'Effects of Child Pornography,' Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015



worthwhile activities, catching peripheral offenders or disrupting individual networks may have little overall impact on the scale of the problem.<sup>237</sup>

This brings the question of whether legislation is sufficient in governance of Child Pornography.

Kenya has drafted the Cybercrime and Computer Related Crimes Bill to assist with dealing with novel problems that have emerged due to use of the internet.<sup>238</sup> Whilst the title of section 15 suggests that the provision deals with Child Pornography, in reality, it criminalises pornography.<sup>239</sup> In particular, the main test used throughout section 15 is ‘obscenity’, which is defined by reference to ‘lavisicious’ material or material that appeals to the ‘prurient interest’ or tends to ‘deprave’ or ‘corrupt’ the persons who have access to it. This obscenity law seems to be based on eminently subjective definitions and rely on the ‘gut-feeling’ instincts of the government of the day.<sup>240</sup> A better alternative would be to adopt a commonly agreed definition of offences related Child Pornography laid down by Article 9 of Cybercrime Convention.<sup>241</sup> In the alternative, the definition of Child Pornography in Article 1 of the African Union Convention on Cyber Security and Personal Data Protection may be used.<sup>242</sup>

The *Problem of copies* as highlighted in Chapter 3 is one that is very much with us and simply cannot be ignored. In the past, Child Pornography was limited in circulation by the limitations of hard copy.<sup>243</sup> By contrast, electronic pornography can be indefinitely copied at marginal cost; the quality of the image does not degrade on multiple copying and material is childishly easy to circulate, both within states and across national boundaries.<sup>244</sup> Kenyan legislation does not describe what electronic copies would entail. As the law is set, only copies in the traditional sense are deemed illegal. The law on possession does not envision situations of *caching, deleted images* and more so the implication of illegalising *obscene cartoon images* on freedom of speech. Material is hard for law enforcement authorities to

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<sup>237</sup> ‘Effects of Child Pornography,’ Center for problem-oriented policing, 2015 POP conference, [http://www.popcenter.org/problems/child\\_pornography/2](http://www.popcenter.org/problems/child_pornography/2) on 27th November 2015

<sup>238</sup> The Cybercrime And Computer Related Crimes Bill, 2014

<sup>239</sup> Kenya: Cybercrime and Computer Related Crimes Bill: legal analysis, Article 19, Free Word Centre, 60 Farringdon Rd, London EC1R 3GA, [www.article19.org](http://www.article19.org)

<sup>240</sup> Kenya: Cybercrime and Computer Related Crimes Bill: legal analysis

<sup>241</sup> Article 9, Cybercrime Convention

<sup>242</sup> Article 1, African Union Convention on Cyber Security and Personal Data Protection

<sup>243</sup> Edwards L, ‘Pornography, Censorship and the Internet’

<sup>244</sup> Edwards L, ‘Pornography, Censorship and the Internet’

detect because of the infinite size of cyberspace and the availability of *encryption*.<sup>245</sup> Even if Internet pornography is located, “seizure” is not a major restricting expense as it is with stocks of (for example) glossy hardcore magazines; it is easy to “restock” with electronic pornography, or to copy the material from one site or one country to another.<sup>246</sup>

## INTERMEDIARY LIABILITY

As one might expect, the legal situation as regards the Internet is far from clear and settled. The global, decentralized and borderless nature of the Internet creates a potentially infinite and unbreakable communications complex which cannot be readily bounded by one national government or even several or many acting in concert.<sup>247</sup> The decentralized nature of the Internet moreover means that there is no unique solution for effective regulation at a national level.<sup>248</sup> In the words of Hirst and Thompson, ‘nation-states have become the local authorities of the global system’ in fragmented postmodern states; this is certainly true for the control and policing of Internet Child Pornography.<sup>249</sup> Criminal law is traditionally associated with nation-states and policing is a core activity of nation states. However, this legitimate activity is unsettled within a borderless medium such as the Internet. The policing of Internet Child Pornography is possible at a national level only when the perpetrators are within the jurisdiction of the nation-state, or when extra-territorial policing activity and co-operation is possible.<sup>250</sup>

One reason for the lack of an effective solution may be that scholars and experts are focused almost entirely on cybercriminals and the countries that support their crimes.<sup>251</sup> They seem to be largely ignoring the critical role played by intermediaries, which include both Internet Service Providers (ISPs) and hosts, in facilitating Child Pornography and cybercrime as a whole.<sup>252</sup> One symptom of the fact that no one is focusing on the role of intermediaries in cybercrime is that these entities operate in a virtual regulatory no-man’s land.<sup>253</sup> The Internet itself is highly decentralized as mentioned above. Its open, virtually lawless architecture was

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<sup>245</sup> Edwards L, ‘Pornography, Censorship and the Internet’

<sup>246</sup> Edwards L, ‘Pornography, Censorship and the Internet’

<sup>247</sup> Akdeniz Y, *Internet Child Pornography and the law*, chapter 1, pg 2

<sup>248</sup> Akdeniz Y, *Internet Child Pornography and the law*

<sup>249</sup> Akdeniz Y, *Internet Child Pornography and the law*

<sup>250</sup> Akdeniz Y, *Internet Child Pornography and the law*

<sup>251</sup> Peterson J, Segal L, Eonas A, ‘*Global Cyber Intermediary Liability: A Legal & Cultural Strategy*’ Pace Law Review (2014), Volume 34

<sup>252</sup> Peterson J, Segal L, Eonas A, ‘*Global Cyber Intermediary Liability: A Legal & Cultural Strategy*’

<sup>253</sup> Peterson J, Segal L, Eonas A, ‘*Global Cyber Intermediary Liability: A Legal & Cultural Strategy*’



originally designed in a small community that had a high degree of trust.<sup>254</sup> The point was to keep the Internet as free from regulation as possible in order to foster an unfettered exchange of information.<sup>255</sup> At the time, cybercrime was unlikely to be considered a major problem.<sup>256</sup> To the extent that cybercrime was considered a major problem, the assumption was that the marketplace would clear it up through self regulation.<sup>257</sup>

Most International instruments let alone national instruments do not talk about ISP liability.<sup>258</sup> Intermediaries face few repercussions for the activity on their servers and networks, and therefore have little incentive to monitor criminal traffic.<sup>259</sup> The burning question, therefore, is whether regulatory policies should impose indirect liability on intermediaries for activities in which knowledge is difficult to prove.<sup>260</sup> To date, intermediaries such as ISPs have avoided liability despite the fact that they are in a favorable position to monitor and control cybercrime.<sup>261</sup> In fact, ISPs wield an almost regulatory function online and thereby operate in an environment of control without liability.<sup>262</sup>

The most effective means of legislating child-sexual-exploitation cases is to adopt a multijurisdictional and multidisciplinary approach.<sup>263</sup> By enabling the law-enforcement, child-welfare, and service-provider communities to combine expertise, manpower, and other institutional resources on these complex cases, investigations can be more thorough, prosecutions more numerous, and services more complete. Successful work in the area of child sexual exploitation requires a formidable array of resources, information, and expertise that can be realized only by tapping the capacity of numerous agencies.<sup>264</sup>

One way of ensuring this is by allowing regulation by ISPs. It is not possible to access the Internet without the services of an ISP, and thus the role of ISPs in content regulation of the Internet is crucial.<sup>265</sup> As a result they are obvious targets for enforcement authorities.<sup>266</sup> ISPs

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<sup>254</sup> Peterson J, Segal L, Eonas A, 'Global Cyber Intermediary Liability: A Legal & Cultural Strategy'

<sup>255</sup> Peterson J, Segal L, Eonas A, 'Global Cyber Intermediary Liability: A Legal & Cultural Strategy'

<sup>256</sup> Peterson J, Segal L, Eonas A, 'Global Cyber Intermediary Liability: A Legal & Cultural Strategy'

<sup>257</sup> Peterson J, Segal L, Eonas A, 'Global Cyber Intermediary Liability: A Legal & Cultural Strategy'

<sup>258</sup> Peterson J, Segal L, Eonas A, 'Global Cyber Intermediary Liability: A Legal & Cultural Strategy'

<sup>259</sup> Peterson J, Segal L, Eonas A, 'Global Cyber Intermediary Liability: A Legal & Cultural Strategy'

<sup>260</sup> Peterson J, Segal L, Eonas A, 'Global Cyber Intermediary Liability: A Legal & Cultural Strategy'

<sup>261</sup> Peterson J, Segal L, Eonas A, 'Global Cyber Intermediary Liability: A Legal & Cultural Strategy'

<sup>262</sup> Peterson J, Segal L, Eonas A, 'Global Cyber Intermediary Liability: A Legal & Cultural Strategy'

<sup>263</sup> Klain E, JD, Heather J, MS, Hicks M.A, MPA, Child Pornography: *The Criminal-Justice-System Response*, American Bar Association Center on Children and the Law for the National Center for Missing & Exploited Children, March 2001

<sup>264</sup> Klain E, JD, Heather J, MS, Hicks M.A, MPA, Child Pornography: *The Criminal-Justice-System Response*

<sup>265</sup> Akdeniz Y, 'Governance of Pornography and Child Pornography on the Global Internet: A Multi-Layered Approach,'

<sup>266</sup> Akdeniz Y, 'Governance of Pornography and Child Pornography on the Global Internet: A Multi-Layered Approach,'



have recently been charged with criminal offences of providing Child Pornography in both Germany and France.<sup>267</sup>

Asserting indirect liability over ISPs is appropriate both because of the better position of ISPs as detectors of nefarious activities and because ISPs are better able to internalise negative externalities.<sup>268</sup> Indirect liability also becomes more attractive when the liable party has an increased ability to influence or prevent “bad” behaviour.<sup>269</sup>

The United Kingdom has adopted the means of self-regulation. ISPs have been encouraged to produce codes of practice to control access to illegal and unsuitable material.<sup>270</sup>

It should not however be forgotten that the prime responsibility for content lies with authors and primary content providers.<sup>271</sup> There is a real need for the legal position of the ISPs to be clarified, so that they need not, as at present, steer a path between accusations of censorship by users, and exposure to liability for the content they carry.<sup>272</sup>

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<sup>267</sup> Akdeniz Y, ‘Gorvenance of Pornography and Child Pornography on the Global Internet: A Multi-Layered Approach,’

<sup>268</sup> Peterson J, Segal L, Eonas A, ‘Global Cyber Intermediary Liability: A Legal & Cultural Strategy’

<sup>269</sup> Peterson J, Segal L, Eonas A, ‘Global Cyber Intermediary Liability: A Legal & Cultural Strategy’

<sup>270</sup> Akdeniz Y, ‘Gorvenance of Pornography and Child Pornography on the Global Internet: A Multi-Layered Approach,’

<sup>271</sup> Akdeniz Y, ‘Gorvenance of Pornography and Child Pornography on the Global Internet: A Multi-Layered Approach,’

<sup>272</sup> Akdeniz Y, ‘Gorvenance of Pornography and Child Pornography on the Global Internet: A Multi-Layered Approach,’

## CHAPTER 5: TOWARDS BETTER GOVERNANCE: LESSONS FROM OTHER NATIONS

This Chapter seeks to give recommendations as to the way forward in accurately legislating Internet Child Pornography in Kenya. The researcher will consider the governance models adopted by the United Kingdom as well as the United States. The researcher does not insist on adoption of the models as a whole, but as a ‘big brother’ approach to our young and budding Nation.

Legislation on its own as highlighted in chapter 4 will fight a losing battle in the war against Child Pornography. Alternative ammunition must be sought. In such a crucial cause, no weapon should be left to chance. Indeed, if Kenya is to make any significant progress towards a cybercrime free society more effort needs to be put in force to fight specific cybercrimes such as Child Pornography. The Cybercrimes Bill while attempting to do so needs thorough amending to accommodate the novel problems highlighted in Chapter 3. Moreover, we need to accept the fact that while legislation is important it simply is not enough. It is a healthy prerequisite but it would be oblivious of us to assume that a better legislation can curb Child Pornography in totality.

It is based on this background that this paper will seek to make a comparative analysis of the mode of governance of Child Pornography by the United Kingdom and the United States.

### I. GOVERNANCE OF INTERNET CHILD PORNOGRAPHY IN THE UNITED KINGDOM

As a general principle of UK law, state jurisdiction in criminal matters is territorial.<sup>273</sup> Each State’s laws on pornography apply within their own territory and affect the state’s citizens.<sup>274</sup> Most States already have in place rules extensively prohibiting the distribution, sale, import and use of Child Pornography.<sup>275</sup> In the UK, there is already a considerable amount of legal regulation of obscene material both from before and after the internet.<sup>276</sup>

*“The U.K Obscene Publications Act, provides that if a viewer is likely to be depraved and corrupted by the material, then the material meets the standards for obscenity.”<sup>277</sup>*

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<sup>273</sup> Edwards L, ‘Pornography, Censorship and the Internet’

<sup>274</sup> Edwards L, ‘Pornography, Censorship and the Internet’

<sup>275</sup> Edwards L, ‘Pornography, Censorship and the Internet’

<sup>276</sup> Edwards L, ‘Pornography, Censorship and the Internet’

<sup>277</sup> Edick D, ‘Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis’, *Boston College International and Comparative Law Review*, (1998) Volume 21

*The United Kingdom has stricter rules for Child Pornography than for other forms of pornography. The Protection of Children's Act of 1978 is similar to the Obscene Publications Act, except that the material must only meet a standard of indecency rather than obscenity. By the U.K. standards, a photo that is not obscene may still be indecent. Furthermore, a photo that may not even be considered indecent when depicting an adult may be indecent if a child is involved. The United Kingdom classifies material as pornography according to the individual who views the material. August 1996, Scotland Yard mounted a massive monitoring operation in which it sent letters to Internet companies specifying that certain newsgroups that contained offensive articles, information, and pictures be removed from the worldwide system. The United Kingdom has also inaugurated a system of self-regulation where an independent body called the Internet Watch Foundation was made responsible for evaluating material circulated on the Internet and handling complaints about illegal practices.*"<sup>278</sup>

The IWF's main role was originally to provide a free hotline channel via which the public could report by phone, email or fax material they encountered on the internet which fell within IWF remit.<sup>279</sup> Through this channel, the UK has put in place without public debate, new laws or a system of public accountability, a universal non-transparent scheme of online censorship which is in theory capable of blocking any particular piece of internet content whether illegal or not.<sup>280</sup>

A major disadvantage that may occur from such a filtering system is that illustrated by the Chinese Government. Google, yahoo and other search engines allow the Chinese Government to dictate what search results they return to Chinese citizens and which excluded.<sup>281</sup> Such an occurrence may be a big hindrance to free speech and innovation.

As promotion of self regulation, Service providers will be required to prohibit illicit messages and restrict users' ability to communicate anonymously.<sup>282</sup> In addition, the British Parliament considered a proposal that would subject the Internet to existing defamation law, which

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<sup>278</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>279</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>280</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>281</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>282</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'



would apply to the Internet the same advertising standards regarding obscenity that are now applied to television.<sup>283</sup>

The European Union (EU), of which Great Britain is a Member State, has also taken actions regarding Internet regulation.<sup>284</sup> In November 1996, the Telecommunications Council of the EU stated that Member States should promote self-regulation and rating systems to control illegal and harmful material on the Internet.<sup>285</sup>

Though not perfected, the system of self regulation and more specifically IWF has successfully reduced the amount of Child Pornography hosted in the UK to almost zero.<sup>286</sup> The biggest challenge they face is that even if sites are closed down, they hop servers and jurisdictions and change URL to stay open.<sup>287</sup> Such longevity is an international challenge.<sup>288</sup> Regardless, the United Kingdom seems to be notably taking steps in the right direction.

## II. GOVERNANCE OF INTERNET CHILD PORNOGRAPHY IN THE UNITED STATES

In the USA, the history of attempted state control of Internet content took a rather different path than in the UK and Europe.<sup>289</sup> In the United States, the battle has historically raged around the grander ambition of protecting children from all “bad content” online, rather than the limited goal of merely criminalising Child Pornography.<sup>290</sup>

*“The First Amendment of the U.S. Constitution guarantees citizens a right to free speech. In 1957, the U.S. Supreme Court held that obscenity is not protected by the First Amendment in Roth v. United States. Although obscene material is not protected by the First Amendment, the Court has held that people may possess obscene material in the privacy of their own homes. Though the Court permits possession of obscene materials in the home, the Court has held that the government can prohibit the*

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<sup>283</sup> Edick D, ‘Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis’

<sup>284</sup> Edick D, ‘Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis’

<sup>285</sup> Edick D, ‘Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis’

<sup>286</sup> Edwards L, ‘Pornography, Censorship and the Internet’

<sup>287</sup> Edwards L, ‘Pornography, Censorship and the Internet’

<sup>288</sup> Edwards L, ‘Pornography, Censorship and the Internet’

<sup>289</sup> Edwards L, ‘Pornography, Censorship and the Internet’

<sup>290</sup> Edwards L, ‘Pornography, Censorship and the Internet’

*transportation, distribution, and receipt of obscene materials. In February, 1996, the U.S. Congress passed the Communications Decency Act (CDA), specifically targeting obscenity and Child Pornography on the Internet. The CDA made it a crime to use a telecommunications device to create, or solicit any communication which is obscene, lewd, lascivious, filthy, or indecent with the intent to annoy, abuse, threaten, or harass. The CDA also made it a crime to make any obscene or indecent communication knowing the recipient is under eighteen years old, no matter who initiated the communication. The CDA offered statutory defences to on-line service providers and others who took action to limit access to obscene or indecent materials. If a person took good-faith, reasonable, and appropriate actions to prevent or restrict access by minors, or restricted such access by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number, that person would not incur any liability under the CDA in the event a prohibited communication to a minor occurred.*<sup>291</sup>

The Act has been under contention from the moment it was passed. It was heavily attacked on the basis that it was over-broad, since it is generally impossible without overt technical measures such as age-verification, to know if a child “might” be reading a Web site or other public communication.<sup>292</sup> The restriction that would be caused by this Act on sites would not be justifiable given the impact of the free speech right of adults.<sup>293</sup> The CDA was ultimately overturned.<sup>294</sup>

In the United States, there have been several efforts aimed at controlling access to content on the Internet.<sup>295</sup> One such method is through introduction of software packages which are available for installation to restrict children's access to pornographic sites.<sup>296</sup> There is no educational purpose for which public school students must access material harmful to minors or obscenity.<sup>297</sup> Therefore, it is entirely appropriate that such material be blocked out on

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<sup>291</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>292</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>293</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>294</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>295</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>296</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>297</sup> Roberts C, 'Internet Filtering and Blocking Technology: The Most Effective Methods Of Protecting Children From Pornography,' COPA COMMISSION



Internet-accessible computers in public schools.<sup>298</sup> A recent study of Utah public schools found that out of 54 million Web access attempts, filters mistakenly denied access 64 times – an accuracy rate of 99.9994 percent.<sup>299</sup>

Another method implemented by some communities is the use of parental control features included on some software.<sup>300</sup> Many adult sites register themselves with the blocking software companies.<sup>301</sup> In addition, most of the software includes a list of target words that trigger the blocking function.<sup>302</sup> A problem with this type of software is that its reliance on general terms to block explicit material can carry unintended consequences.<sup>303</sup> For example, software designed to block sexually explicit categories of material may use words such as "sex" or "breast" as target words, which trigger the blocking function.<sup>304</sup> A consequence of such a program would be that medical and educational information on "breast" cancer would be blocked.<sup>305</sup>

*“Eighty-five percent of public libraries currently have policies similar to the acceptable-use policy employed by the Los Angeles Public Library, yet these libraries continue to report extensive problems with patrons accessing pornography. Indeed, a recent report on 613 libraries nationwide found 503 incidents involving obscenity and Child Pornography being accessed through local public libraries – of these, 245 involved children – despite a wide majority having acceptable use policies in place. Whether accessed from the home, a library, or a school, sexually explicit material has a deleterious effect on children. Legislation requiring the placement of filtering or blocking technology on computers, to prevent access to illegal pornography by adults and material harmful to minors by children, protects children, allows schools and*

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<sup>298</sup> Roberts C, 'Internet Filtering and Blocking Technology: The Most Effective Methods Of Protecting Children From Pornography,'

<sup>299</sup> Roberts C, 'Internet Filtering and Blocking Technology: The Most Effective Methods Of Protecting Children From Pornography,'

<sup>300</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>301</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>302</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>303</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>304</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>305</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'



*libraries to comply with U.S. Supreme Court precedent and federal and state laws while allowing local officials the necessary discretion to determine which products best suit their communities.*"<sup>306</sup>

Finally, adult sites themselves have begun to block out objectionable material and limit sites to adult subscribers.<sup>307</sup>

Thus, historically, obscenity law in the United States has balanced the constitutional right to free speech against the protection of societal mores.<sup>308</sup> Efforts to balance these competing interests have resulted in laws which are more protective of sexually explicit material that is viewed in the privacy of one's home, by adults, featuring adult subjects.<sup>309</sup> Once material leaves the confines of the home and/or becomes more accessible to children, it is protected to a lesser degree.<sup>310</sup> Finally, material featuring children as the subject matter is not protected at all, in dealing with the Internet.<sup>311</sup> The United States has explored various methods of content regulation, including self-regulation, application of existing laws of obscenity to the Internet, and the adoption of the CDA which unsuccessfully attempted to encompass indecency in the category of material subject to government control.<sup>312</sup>

### **III. RECOMMENDATIONS AND CONCLUSION**

It is undoubtedly difficult to adopt a regime to regulate Internet Content.<sup>313</sup> The internet creates novel problems with no parallel in traditional media.<sup>314</sup> The circumstances include difficulty in applying existing law in a new and challenging environment.<sup>315</sup> It is so easy for

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<sup>306</sup> Roberts C, 'Internet Filtering and Blocking Technology: The Most Effective Methods Of Protecting Children From Pornography,'

<sup>307</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>308</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>309</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>310</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>311</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>312</sup> Edick D, 'Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis'

<sup>313</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>314</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>315</sup> Edwards L, 'Pornography, Censorship and the Internet'

children to access adult related content. Moreover, it is so cheap to access or publish internet criminal pornographic content.<sup>316</sup>

The following strategies have been used or suggested to reduce the problem of Child Pornography on the Internet.<sup>317</sup>

#### a. SELF REGULATION

ISPs have a central role to play in combating Internet Child Pornography.<sup>318</sup> The more responsibility ISPs take in tackling the availability of Child Pornography images on the Internet, the more resources police can devote to addressing the production side of the problem.<sup>319</sup>

A key consideration that Kenya should make is whether it would be productive to initiate a national filtering scheme such as the IWF initiated by the United Kingdom. Several factors must be put into consideration while considering filtering:<sup>320</sup>

- A lot of consciousness must be present in defining the purpose of the filter in order to avoid over blocking. This will create a definite scope of words to be blocked.<sup>321</sup>
- Who judges what content is to be banned and classifies the content accordingly. The content should be censored by non-elected, and independent authorities.<sup>322</sup>
- The system ought to be effective in order to achieve its purpose. Web filtering can be easily avoided by those who really want to.<sup>323</sup>
- Creating such a system in such a manner that it will achieve all its obligations will cost billions. A nation should have the necessary resources to initiate this system successfully

#### b. LEGISLATIVE REGULATION

Greater legislation will compel the computer industry to play a greater role in controlling Internet Child Pornography.<sup>324</sup> Part of making tighter legislation entails providing a wider scope for the definition of “possession” to include caching and deleted images where there is

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<sup>316</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>317</sup> Wortley R and Smallbone S, '*Child Pornography on the Internet,*'

<sup>318</sup> Wortley R and Smallbone S, '*Child Pornography on the Internet,*'

<sup>319</sup> Wortley R and Smallbone S, '*Child Pornography on the Internet,*'

<sup>320</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>321</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>322</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>323</sup> Edwards L, 'Pornography, Censorship and the Internet'

<sup>324</sup> Wortley R and Smallbone S, '*Child Pornography on the Internet,*'

*Mens Rea*. Moreover, some form of liability should be placed on ISPs by law.<sup>325</sup> This would push them to monitor content that is trafficked on their servers.<sup>326</sup>

Encryption of pornographic images is shaping to be the biggest technological problem facing law enforcement agencies.<sup>327</sup> Key escrowed encryption would require anyone selling encryption software to supply a trusted third party with a key to the code.<sup>328</sup>

Ultimately, one less avenue of Child Sexual Abuse is what is needed in Kenya. It would be so unfortunate for the flood to come while we still are yet to build the Ark. Undoubtedly, Children are like wet cement, whatever falls on them leaves an impression.<sup>329</sup>

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<sup>325</sup> Wortley R and Smallbone S, *'Child Pornography on the Internet,'*

<sup>326</sup> Wortley R and Smallbone S, *'Child Pornography on the Internet,'*

<sup>327</sup> Wortley R and Smallbone S, *'Child Pornography on the Internet,'*

<sup>328</sup> Wortley R and Smallbone S, *'Child Pornography on the Internet,'*

<sup>329</sup> Haim Ginott, quote on children

[https://www.google.com/search?q=quote+about+the+greatness+of+children&source=lnms&tbn=isch&sa=X&ved=0ahUKEwjXitOqmbnKAhUHnnlKHb9eDuQQ\\_AUIBygB&biw=1138&bih=548#imgrc=aabI5zW6TgD2-M%3A](https://www.google.com/search?q=quote+about+the+greatness+of+children&source=lnms&tbn=isch&sa=X&ved=0ahUKEwjXitOqmbnKAhUHnnlKHb9eDuQQ_AUIBygB&biw=1138&bih=548#imgrc=aabI5zW6TgD2-M%3A)

on 18 January 2016



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