

Possession and Dissemination of Child Pornography - Defenses

I have been inundated recently by inquiries related to child pornography issues. In our computer age where information, images and videos can be rapidly and easily accessed, this has become a growing area of concern. I handle a great number of cases involving these issues. The charges can be devastating to families and certainly to career aspirations for those convicted. As a result, an aggressive defense is necessary.

What happens?

Most cases start with a search warrant and a seizure of equipment which may include computers, hard drives, flash drives, discs, TIVO systems, DVD players, MP3 players, IPODs and anything that can be used to store, view or play images or videos. Search warrants can be acquired when a person reports finding child pornography on a computer. The reporting person may be a family friend, a computer technician that worked on the computer or anyone who has direct or remote access to the system. In some cases, law enforcement personnel use downloaded peer to peer programs to search networked computers for files that include illegal contraband. Finally, police may find accounts and IP addresses when websites posting or promoting contraband images are shut down. Many of these sites, some which are hosted in foreign countries, charge users for access and retain records of users and/or their computer IP addresses.

What do we do?

First, and this is critical, **NO ONE** should make statements to police or outside persons or parties. That means no discussion with family or friends regarding the facts of the case. Nothing that is said is likely to be used by law enforcement for anything other than seeking inculpatory evidence to support criminal charges. Also remember, that law enforcement officers have no obligation to provide the truth when investigating offenses. They may make false statements or promises designed to acquire incriminating evidence or statements from those questioned. Expect officers to make statements such as:

- “If you have nothing to hide, why won’t you speak to us.”
- “We just want to get your side of the story.”
- “If you don’t talk to us, we will have to make a decision and, with what we have, it likely means charges.”

Do not be baited by such statements. Under such pressure situations, person interviewed often are confused. They may make statements speculating about what “*might have*” occurred. Those speculative statements are often taken as statements of fact and used later as part of the criminal prosecution. As a result, it is best to think of each word stated as a piece of evidence that can be turned or twisted to support criminal charged. Accordingly, the less that is said, the better. If police investigators wish to speak with you, it is usually wise to politely decline.

Second, you should hire counsel immediately. To a great degree, you will be in a waiting game for some time while computer forensics run program scans on the electronic equipment seized. Investigations

may last many months to over a year. In the interim, it is important to start interviewing potential computer experts who will have specific knowledge related to the programs used or the caching systems of the various internet browsers. I will explain this a bit more below when I address potential defenses.

Third, do not expect to get your computer equipment back in the short term. It will be quite some time before that occurs. As a result, if a computer is needed, you may wish to replace the equipment with appropriate safeguards to prevent any similar problems.

What about the Charges?

Possession of child pornography is a very serious offense. It should not be taken lightly. It can result in federal charges or state charges depending on the particular facts. It is a felony under Minnesota Statutes Sec. 617.247 and is punishable by up to five years and a fine of not more than \$5,000 for a first offense. Dissemination of child pornography is an even more serious offense. A person who disseminates pornographic work to an adult or a minor, knowing or with reason to know its content and character, is guilty of a felony and may be sentenced to imprisonment for not more than seven years and a fine of not more than \$10,000 for a first offense and for not more than 15 years and a fine of not more than \$20,000 for a second or subsequent offense. Moreover, a person convicted must provide a DNA sample and register as a sexual predatory offender under the law. That is true even if the charge is ultimately reduced to something else. Probationary conditions after a conviction often restrict the person's ability to travel, their computer usage, and contact with minors. In some instances, persons convicted of child pornography offenses must agree to submit to polygraph examinations and/or undergo sexual offender treatment. In other words, the stakes are very high.

What are Some Defenses?

Though defense to child pornography charges vary depending on the particular facts of the case, certain fact patterns and defenses are more common. Ultimately, your defense should be planned only after a complete review of the evidence and circumstances in your case.

First, it should be pointed out that possession of pornography is not a crime. Only possession of child pornography would be criminal. It requires that the actor had an intent. That means the person charged must be proven to have the intent to possess the image(s) and that the person has reason to know of its true content and character.

Second, there are many ways a person can acquire images on a computer which does not mean that they had the requisite intent or knowledge to possess the image. Computers may have many users. That means determining which user may have accessed, downloaded or disseminated contraband child pornography images may be a significant defense issue. Even a one time user of a computer may contaminate its hard drive or cache memory with contraband. That is particularly true for computer systems that share an internet connection such as wireless networks at home.

Additionally, files may also be downloaded blindly without knowing specifically about their content. For example, images may be downloaded by clicking on a link without first reviewing the content of the image being downloaded. This may occur with links found in Newsgroups or other internet settings. Images can also be downloaded in bulk where each image is not reviewed before the download. Two simple examples may be when a person downloads multiple images associated with a Zip file or by highlighting a series of links for download from file sharing programs such as Limewire, MP3 Rocket or Kazaa.

Third, several states have ruled that a person cannot be convicted of "possessing" child pornography based on merely viewing pornographic images a home computer. Pennsylvania, Virginia, Washington and Wisconsin have had similar rulings on the issue. When an image is viewed on a computer, that image is "cached" by the web browser. That means it may exist on the computer without the person ever making an attempt to download the image. Though the person may have been aware of what they were viewing, they may have been unaware that they were automatically downloaded and saved to his computer, and therefore, didn't "knowingly possess" the pornography as state law requires. Where a statute, such the one existing in Minnesota, lacks specific statutory language prohibiting the mere viewing of pornographic images or evidence that the defendant knowingly downloaded or saved pornographic images to his hard drive or knew that the web browser cached the images, it can be argued that the person charged cannot be criminally liable for viewing images on his computer screen.

Fourth, charges of dissemination of child pornography require that the person has the intent to distribute the images to others. Often, such charges are brought against individuals using file sharing programs. The programs are enticing, offering free access to music, documents, movies and images. They are also free to download from any number of internet sites and essentially network any computers on the internet that download the same or similar programs. When these programs are placed on a computer, they include certain defaults. One of those defaults is to allow others with similar programs on remote computers to view and access data contained in a file designated for sharing on your computer. This is called a peer to peer system. Without knowing how the program defaults work, a person may easily disseminate contraband images without the requisite intent to do so.

Finally, search warrants that are used to seize computers and other equipment with electronic storage capacity may be flawed and unsupported by requisite probable cause. When probable cause is lacking for a warrant, any evidence taken as a result of that unconstitutional seizure may be suppressed and cannot be used at trial.

Certainly, charges of child pornography can be very frightening. However, acting promptly can be important to a strong defense.

For a consultation call 612.240.8005.