Too far down the Yellow Brick Road – Cyber-hysteria and Virtual Porn

Maureen Johnson
Senior Lecturer in Law, University of Hertfordshire, School of Law,
7 Hatfield Road, St Albans, Hertfordshire, AL1 3RR
Tel: 01707 286268
Email: M.C.1.Johnson@herts.ac.uk

Kevin M Rogers
Senior Lecturer in Law, University of Hertfordshire, School of Law,
7 Hatfield Road, St Albans, Hertfordshire, AL1 3RR
Member, Law Society's Electronic Law Committee
Tel: 01707 286212
Email: K.Rogers@herts.ac.uk

Abstract. 'Cyberporn' is one of the great moral panics of our age. Indeed, the development of Web 2.0 and the rapid increase of user generated content have opened the floodgates to the number of pornographic websites available. Everybody is familiar, and most are in agreement with the argument against indecent images of children.[1] Few would argue –none successfully – for the law to go easier on those who produce and circulate such images, but an increasingly complicated legal landscape is in danger of stretching the limits of legislation to include what are essentially drawings of children found online or in virtual communities and criminalise those who produce, possess or view them. This paper will consider the necessary response of the United Kingdom's legislature to these problems.

1. A new medium for an age-old problem

Although the Internet has facilitated accessibility for a wide range of topics, communication methods and information, the clear disadvantage is the ease by which illegal or illicit material may be transported. Pornography is such as an example. George and Scerri suggest one of the key problems within online pornography is that it is "*…readily available through such sites to anyone, anytime and anywhere, without the requirement of age or identity verification.*"[2] Not only is pornography readily accessible due to the medium of communication, but also the number of sites are rapidly increasing. According to the *Internet Filter Review*, in 2006 there were approximately 4.2m websites containing pornographic material[3](within this 4.2m approximately 100,000 sites contained indecent material of children) – up from estimates of 1.6m in 2004.[4]

Indecent material of children found on websites is much more problematic, particularly with quantifying the amount. The Internet Watch Foundation, formed in 1996, is a self-regulatory body, which operates the only recognised 'hotline' in the United Kingdom for people to report websites containing illegal content. In their 2007 Annual and Charity Report they stated that determining the scale and scope of the problem is the *"…subject of much speculation"*.[5] However, the authors of the Report point to some 2,755 websites in the English language, which contain material depicting child sexual abuse. Furthermore, Tanya Byron in her wide ranging report examining the risks children face on the Internet stated her belief that there had been a *"…significant increase"* in the number of sites containing child abuse images.[6] It is noted however, that these are merely tentative suggestions and in reality the number of such sites could be significantly higher as, in the words of Eneman:

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[1] 'Child pornography' or equivalent terms will not be used to describe such images in this paper. The reason for this is clearly explained in Eneman, M *The new face of child pornography* (2006) Chapter 3 in *Human Rights in the Digital Age* edited by Klang, M & Murray, A, published by Routledge Cavendish. Eneman argues that: *"The term 'child pornography, which is commonly used to describe the violation of the rights of the child, is unfortunate…as it reduces the gravity of what the material portrays…[and]….is also misleading as it invites comparisons with pornography."* (page 28).

[2] George, C & Scerri, J *Web 2.0 and User-Generated Content: legal challenges in the new frontier* (2007) Journal of Information, Law and Technology, volume 2, paragraph 4.5.

[3] Internet Filter Review *Internet Pornography Statistics* (2006). Available at: http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html. (30th June 2008).

[4] Keen, A *the Cult of the Amateur* (2007) Nicholas Brealey Publishing, page 155.

[5] Internet Watch Foundation *Annual and Charity Report 2007*, page 6. Available at: http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html [30th June 2008)

[6] Byron, T *Safer Children in a Digital World* March 2008, at page 51. Available at: http://www.dfes.gov.uk/byronreview/pdfs/Final%20Report%20Bookmarked.pdf (20th June 2008).

> "Today, paedophiles can download child pornography, often at no cost, in large quantities and in the privacy of their own homes. This represents a reduced risk to the individual when acquiring material, allows for the size of collections to grow, and creates a constant demand for novel and more varied material. Meeting this demand or new material inevitably means that more children are involved in the production of child pornography."[7]

However, the specific remit of this paper is to consider the relative legitimacy of virtual images depicting children. 'Real life' indecent pictures of children are, in the majority of cases, held to be illegal (exceptions provided by the Act include *inter alia* for the prevention, detection or prosecution of a crime or if the image was taken within marriage or a civil partnership). Although, the extent to which this extends to virtual imagery is less clear.

On 22nd June 2007 responses to the Home Office Consultation Paper on the Possession of Non-Photographic Visual Depictions of Child Sexual Abuse[8] (hereinafter the 'Consultation Paper') closed. This Consultation Paper was introduced as it was recognised that there was a potential gap within the law, which meant that virtual indecent images of children may not have been covered by the existing legislation. The paper sought views on three prospective ways of dealing with the 'problem' of disturbing sexual images that are created without using actual children – described in the paper as "*Cartoons, drawings, computer generated images (CGIs) and other non-photographic representations.*"[9] The consultation paper proposed to either:

- Extend the current position in the PCA 1978[10] (as amended);
- Enact a new offence of possession of this sort of image;
- Do nothing.

Under section 1 of the PCA just possession of an indecent image of a child is sufficient to have committed an offence and the criminalisation of the possession means that the images in question can be seized and – one assumes – destroyed. This, it is argued, will take photographs 'out of circulation'. The Consultation Paper expresses the hope that the criminalisation of CGI's and cartoons will also enable such material to be removed from their erstwhile owners. Although this may prove to be a faint hope - given the speed and ease of reproduction of images over the Internet and the unlikelihood of there not being another copy of that image in another – virtual – place. It goes on to say that cartoons, drawings or CGIs fall outside current legislation and there is:

> "…already an indication that website featuring animated images depicting child sexual abuse are on the increase and often hosted abroad, beyond our jurisdiction. As technology advances a gap in the law is starting to emerge."[11]

In the Consultation Paper, the Home Office states:

> "We are aware of a case where the police were unable to prosecute because the suspect was only found in possession of drawings and cartoons: no illegal photographs or pseudo-photographs were discovered."[12]

With respect to the authors, this would seem to be a good thing. If there was no crime committed, then a prosecution would be absurd. It further points to a person avoiding criminality by choosing to act in a way which is within the law, rather than without it. This is the way the criminal law should act, and is designed to act. Rather than bemoaning the lack of a prosecution, should the potential prosecutors be lauding such behaviour? The person concerned has contributed to no individual (certainly) or societal (arguably) harm, when (s) he could so easily have acted otherwise. J. S. Mill is famous for his principle that the only reason to criminalise behaviour is to prevent harm to others.[13] Without that, a widening of the law in this area becomes a very moot point indeed - a

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[7] *Supra* n.1, page 36.
[8] Available at: http://www.justice.gov.uk/publications/non-photographic-depictions.htm (30th June 2008). The consultation period ran from 2nd April 2007 to 22nd June 2007.
[9] Ibid. Page 1.
[10] Protection of Children Act 1978.
[11] *Supra* n.8, page 4.
[12] Ibid.
[13] See for instance: Mill, J. S. *The Contest in America* Harper's New Monthly Magazine (April 1862), Volume 24, Issue 143, pages 683-684. Harper & Bros., New York.

point which it is hoped will be explored in this paper. Is it a credible use of child protection legislation to stretch the law to encompass either 'still' (cartoon) images of 'child abuse' which are indecent, or the on-line 'abuse' of a 'virtual child' in a virtual environment?

2. Virtual Illegality?

The reason for the question, and presumably , for the Consultation Paper itself is in the increasingly complicated legal challenges and questions which sooner or later will have to be addressed. For instance, the Linden Lab creation *Second Life* recently became 'home' to an 'eight year old avatar' who sells sex to 'adult' avatars within the game. Sasami Wishbringer is not a child, as a person has to be over eighteen (and possess a credit card) to play the game, but the avatar is a virtual representation of a child like form.[14] In their article Lastowka and Hunter[15] discuss the problem of using the word 'virtual' in any such context as practically meaningless, in that it has come to be something simulated or created by computer. Arguably such a creation cannot be abused or an abuser. Such is the alarm over virtual child abuse however, that in Holland, a Dutch psychologist[16] has called the Second Life: *"by definition, a school for paedophiles"*, and the prosecutor[17] has made it clear that she intends to bring test cases against those found to have 'abused' the child representations on-line. Virtual child pornography is against the law both in Holland and in Germany, where possession is punishable by up to three years in jail.

Following the publication of the Summary of the Responses to the Consultation Paper and Next Steps,[18] there was the inclusion of a proposed offence in the Criminal Justice and Immigration Act 2008 (CJI). Section 69 (3) states:

> "References to a photograph also include—
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> (a) a tracing or other image, whether made by electronic or other means (of whatever nature)—
>
> (i) which is not itself a photograph or pseudo-photograph, but
> (ii) which is derived from the whole or part of a photograph or pseudo-photograph (or a combination of either or both); and
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> (b) data stored on a computer disc or by other electronic means which is capable of conversion into an image within paragraph (a); and subsection (8) applies in relation to such an image as it applies in relation to a pseudo-photograph."

Section 69 then appears to extend the reach of the Protection of Children Act 1978, the first proposal discussed in the Consultation Paper. In the UK, the Protection of Children Act 1978 s1 (1) makes it an offence to:

> "…take or permit to be taken any indecent photograph of a child or to distribute or show such a photograph or to have it in possession with intention to distribute or show it; or…to distribute or show such indecent photographs…"

Initially, under the PCA 1978 a photograph has to be indecent. The legal test for indecency is an objective one laid down in the case of *Kosmos Publications v DPP*[19] where it was held that *"…the quality of indecency is to be determined by looking at the article alleged to be indecent and nothing else."* This was confirmed in the case of *R v O'Carroll (Thomas Victor)*[20] where O'Carroll sought leave to appeal against a conviction for possessing indecent photographs of children by contending that the concept of 'indecent' material was too vague to allow a citizen to judge what the law was in order to remain inside it. O'Carroll had photographs of naked young children engaged in normal, outdoor activity, leave to appeal was denied and **Kosmos** was approved. It must be noted however that the Court of Appeal did appear to accept the lack of certainty inherent in the concept of indecency in the case of *R v Smethurst*,[21] but it did confirm that neither the circumstances, nor the motives of the photographer or maker of

[14] See, for example, McNeil, J *Virtual Child Porn: The 'Second Life' for Pervs* AFT Doublethink Online. Available at: http://americasfuture.org/doublethink/2007/04/virtual-child-porn-the-second-life-for-pervs/ (30th June 2008).
[15] Lastowska, F G & Hunter, D *Virtual Crimes* (2004), volume 49, issue 1 New York Law School Law Review 293.
[16] Jos Buschman of the Van Mesdag clinic in Groningen.
[17] Kitty Nooij – in charge of the sex offenders portfolio. For full story see: Libbenga, J *Dutch demand ban of virtual child porn in Second Life* (21st February 2007). The Register. Available at: http://www.theregister.co.uk/2007/02/21/dutch_demand_ban_on_virtual_child_porn/ (7th July 2008).
[18] Published by the Ministry of Justice – IBSN 978-1-84726-573-9. Also available at www.justice.gov.uk
[19] [1975] Crim L R 345.
[20] [2003] EWCA Crim 2338.
[21] (2001) The Times 13 April.

the photograph were relevant in deciding whether or not it was indecent.[22] This would seem to suggest that whatever was going on in the mind of the 'abuser' when preying on the impression of a child is irrelevant and the legal standard will be the image itself. Fantasy role play games on one level are very sophisticated interactive environments, but on a technical level, are they are so graphically advanced that the actions of the avatars could be called indecent as opposed to tasteless or a little weird? Or is the mere spectre of paedophilia now enough to frighten the horses?

In the USA the relevant test is one of obscenity and this is judged by reference to the standards of the local community[23] based on a three stage test:

- Would 'the average person applying contemporary community standards' find that the work, taken as a whole, appeals to the prurient interest,
- Does it 'depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable state law',
- And does 'the work, taken as a whole, lack serious literary, artistic, political or scientific value'.

It must be noted however, that while this appears a stringent test, the Supreme Court went further still in the case of *New York v Ferber* [24] and held that pornography showing (actual) minors can be proscribed whether or not the images are obscene under the definitions set forth in Miller. The court in Miller justified this decision in the grounds that such material and its distribution 'was "intrinsically related" to the sexual abuse of children'. Although it was established in **Miller** that obscene material is not protected by the First Amendment, the Supreme Court has struck down as unconstitutional[25] laws which have attempted to curtail such expressions as being a breach of the First Amendment when drafted broadly to include such words as '***appears to be*** a minor' or "***conveys the impression****… of a minor engaging in a sexually explicit act"*[26] Under this reasoning, it would appear that a wholly simulated 'child' no matter how it is manipulated, is without the protection of the US law, and it's 'abuser' protected – or not criminalised – under legislation.

An image of a 'virtual' child then has two hurdles to overcome to be illegal under the PCA 1978. It has to be classified as 'indecent' and then it has to be classified as a photograph or a pseudo photograph. With the advent of computer painting and photo packages, and a real concern that some images may not fall into the 'photograph' definition.[27] Section 84 of the Criminal Justice and Public Order Act 1994 widened section 1 PCA to apply to 'pseudo photographs'.[28] These are defined by Lloyd as:

> "…what appears to be an indecent image of a child, which is made up of a collage of images, modified by the use of computer painting packages, none of the elements of which is indecent in itself."[29]

The introduction of pseudo photographs into the legislation courted a degree of controversy due to an offence being comment by merely possessing such a photograph, even though there may be no direct harm to children in their creation. Nair suggests:

> "The only reasoning for a possession offence was the indirect harm argument. It was argued that the possession of child porn might encourage paedophiles, and there is a possibility of this acting as a prelude before actually harming a child. There was also the possibility of desensitisation and lowering inhibitions in a child in the 'grooming' process. However, there is no conclusive evident to establish any of these claims…"[30]

Section 7(7) of the PCA 1978 provides that an offence will occur under section 1(1)[31] if:

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[22] For a general discussion on these broader issues, please see: O'Doherty, S *Indecent Photographs* (2003) Justice of the Peace, volume 167, page 44.
[23] Miller v California (1973) 413 U.S. 15.
[24] New York v Ferber 458 U.S. 747 (1982).
[25] Ashcroft v Free Speech Coalition 2002 U.S. Lexis 2789.
[26] Child Pornography Prevention Act 1996 18 U.S.C.Section 2256.
[27] Now Section 7(4)b PCA1978 – data stored on a computer disk or by other electronic means which is capable of conversion into a photograph.
[28] See section 7(7) PCA 1978.
[29] Lloyd, I *Information Technology Law* Oxford University Press, 5th Edition (2008), age 254.
[30] Nair, A *'Caveat Viewer!': The rational of the possession offence* International Review of Law, Computers and Technology (2008), volume 22, number 1-2, pages 157-164, at page 160.
[31] It is an offence to take or permit to be taken any indecent photograph of a child or to distribute or show such a photograph or to have it in possession with an intention to distribute or show it.

> "…the impression created by the pseudo photograph is that the person shown is a child, the pseudo photograph shall be treated for all the purposes of this act as showing a child and so shall a pseudo photograph where the predominant image conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult."

Section 7 also states: ""Pseudo photograph" means an image, whether made by computer graphics or otherwise howsoever, which appears to be a photograph." It would appear then, that the CGI's mentioned in the Consultation Paper are already clearly covered in legislation of reasonably long standing. What the proposed law seems to do is attempt to widen the prohibition on such images to pictures which are a 'tracing' of such photographs or pseudo photographs – or, more opaquely, an 'other image' which is derived from a photograph or pseudo photograph. The basis of the offence is still clearly based in an indecent image which emanates from a harm inflicted upon a real child, or a lifelike representation of a child created through computer graphics.

The Consultation Paper expresses concern that 'real' images of child abuse will be manipulated in order to be converted into a 'fantasy style' image which may appear to be cartoon-like. Where these fantasy images can be decoded back to their original photograph format there is clearly no problem with forfeiture and prosecution. The Consultation Paper highlights the inappropriateness of the difference in legal approach where such decoding is not an option. However, if it cannot be proven that the image is a derivative of a photograph or a pseudo photograph then it appears that a prosecution (and therefore confiscation) is not going to be available even under the CJI 2008. If the proof exists, then the image is already covered under the PCA 1978 as amended by the CJA 1994.

It is not clear whether such fantasy style images will be covered under the concept of 'tracing' or of 'other image'. The concept of a 'tracing' may be problematic. It would tend to suggest that a person taking a piece of tracing paper and drawing over an indecent image – even if being left only with a crude outline of the image – is committing a criminal offence, whereas a person creating a much more 'realistic' image solely as the product of his imagination is not.

Given the retained link in the new legislation to a (pseudo) photographic image the next relevant question must be whether or not an avatar is a pseudo photograph? Such an image may fulfil the second criteria for a pseudo photograph – that of being a 'person'. In the South African case of *De Reuck v Director of Public Prosecutions (2004)*[32] the Applicant, a film producer, brought a challenge which focussed on the language of section 1 of the Films and Publications Act 1996 which defined child pornography as "Including any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years…".

As regards definition of 'person' in this context the Constitutional Court held:

> 'Counsels were rightly in agreement that this includes real and imaginary persons…. An effective interpretation of the act requires that 'person' includes at least the imaginary persons that appear in such pseudo photographs…. The term 'person in s1 is accordingly intended to include imaginary persons…."[33]

It may be then, that the impression of a child, as a person is established , but the image still has to 'appear to be a photograph' before the avatar is 'protected' under the act – or rather it's abuser and anyone else watching – is criminalised.

In the context of a fantasy role play game like Second Life, there would be no danger of actually believing that it was a real child, and however the images move, there is also no doubt that the 'adult' avatar is not 'abusing' the 'child' avatar, just as a player is in no doubt when he 'kills' another character in a cops and robbers shoot out, the bad guy is not really dead and will be able to rejoin the game if he or she so wishes.

Therefore, the problem may still be, as it was before the new Act, the requirement of a 'photograph'. This appears to be why the Consultation Paper was initially circulated. The Criminal Justice and Immigration Act 2008 appears to have presented a very much weaker prohibition and one that is still linked to an image 'which appears to be a photograph.'[34] Much may depend on the definition of the wording 'derived from' in section 69(3) ii of the Act. A virtual environment such as Second Life may be created using 'traditional' 3D modelling techniques based on the imagination of the modeller, in which case there would be no derivation from a photograph. If however a computer graphic designer works from a photograph or uses a moving film of a person in order to create his avatar images then arguably he is 'deriving' the image from a photograph and any manipulation of the image to the prurient interest will fall within section 69 of the 2008 Act. This is a hair thin distinction, and one, some may argue, that judges and juries may not be prepared to make. Likewise, an (indecent) free hand sketch of a child based on a (non-indecent) photograph in a clothing catalogue will fall within the definition of derivation, but,

[32] De Reuck v Director of Public Prosecutions (Withwatersrand Local Division) and Others [2004] 4 LRC 72.
[33] Ibid. Paragraph 23.
[34] Section 7(7) Protection of Children Act 1978.

bizarrely, there would be no liability if the indecent sketch was based on a (fully clothed) living child sitting in front of me.

The new Act may have extended the criminalisation for possession of explicit images of children, which seemed to be the aim of the Consultation Paper, but not to the extent wanted by some of the respondents to the Paper. In all, the Consultation Paper received 87 responses, with the majority of respondents preferring the option which sought to introduce a free-standing offence of possessing non-photographic visual depiction/representation of child sexual abuse. It could be argued the CJI Act is justified in this firm retention of the link between actual abuse and criminalisation of image and the refusal to extend the law to the 'cartoons and drawings' suggested in the Consultation Paper. Is there an argument for holding onto the legality of indecent cartoon images which are not derived from actual abuse with the hope or expectation that access to them will result in a reduction of the number of images of actual abuse available online? The consultation paper states:

> 'We are not aware of any specific research carried out to ascertain whether there is a direct link between possession of these (cartoon) images and an increased risk of sexual offending against children.'[35]

3. Societal and Individual Harm

3.1 Criminalisation of image

Indecent photographs of children are already in a legally privileged position as they are illegal in themselves. A photograph or short film of a person being subjected to grievous bodily harm or even the sexual assault or rape of an adult may be deeply shocking for those who must see it in court, but it will be used only evidentially, in order to convict the perpetrators. There is no law *per se* that prohibits its production or possession.[36] The idea that an indecent photograph of a child must be illegal because it is the record of an illegal act therefore does not equate with how other crimes are treated within the legal system.

The Consultation Paper gives two principle reasons for concern over such images and why it may be seeking to criminalise them. First of all, the images may be used to 'groom' children to take part in sexual acts, and secondly because the images may be used to 'normalise' a potential offenders behaviour. The claim usually made about the imperative for preventing all – even totally fictitious – pictures of child abuse from the public or private arena is one of undermining the normative protection of the young in society. A child must not be objectified and sexualised as this is a harm in itself. A corresponding harm – one that is put forward by the Consultation Paper – is that a person may use such pictures to seduce a child. However, as highlighted by Levy[37] it is unlikely that this will be the only weapon in the abusers armoury. A person intent on the seduction or abuse of a child is far more likely to bribe with alcohol, drugs or treats, or to use threats or force than to show indecent pictures in isolation, and as a result, the complete removal of such images from society would be unlikely to prevent abuse from happening. Indeed, Gillespie writing in 2006 highlights the extreme uncertainty that currently exists about whether viewing indecent images of children will naturally lead to seek to 'groom' a child. He suggests:

> "The use of pornography as part of the grooming cycle is a matter of some debate…Eminent psychologists, however, do now appear to believe that it can be used to facilitate sexual abuse."[38]

Indeed, Eneman points to research carried out in 2003 by the University of New Hampshire, which suggested that two-thirds of perpetrators arrested for Internet sex crimes also had in their possession pictures, films and photos depicting indecent images of children.[39] Although, as noted, research in this area is currently thin on the ground.

Similarly, it is claimed, and again highlighted in the Consultation Paper, a potential abuser may use virtual images to reinforce his or her own behaviours as acceptable, especially when shared with the like minded. Here, there is a risk of confusing the dangers. Whether virtual indecent pictures are a 'harm' either to individuals or to society at large is one question. The self-affirming normalisation of non-typical groups and communities on the World Wide Web is quite another, and one that has been subject to scrutiny and debate. The ability of previously

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[35] *Supra* n.8, page 6.
[36] Unless obscene under the Obscene Publications Act 1959
[37] Levy, N *Virtual Child Pornography: The eroticisation of inequality – Ethics and Information* (2002) Technology 4: 319 – 323.
[38] Gillespie, A. A. *Indecent images, grooming and the law* Criminal Law Review (May 2006), pages 412-421, at page 413.
[39] *Supra* n.1, page 36.

isolated – and therefore to some extent constrained – individuals to contact each other anonymously and over long distances is one of the principle joys - and terrors – of the internet idea, but how these groups behave is NOT the same debate as to whether or not virtual cyber children should be 'protected' from virtual cyber adults, or indeed if a picture of a virtual child engaging in (virtual) sexual activity is – or should be – protected under UK national legislation

Another argument is that ***every*** child is harmed by indecent images of children. Children are objectified and sexualised by such images at a time of life when they should be completely free of such pressures from those around them. Again, two problems are being confused. An individual who will seek out indecent images of children, on the Internet or otherwise, has ***already*** objectified and sexualised the young person in the pictures he is expecting to see. If he had not, he would not be looking for the images in the first place. He may be looking to have his thoughts confirmed, and may be successful in this if he finds images of actual children in indecent poses. They may not be confirmed however, by pictures of virtual children in quite the same way, indeed, they may suggest to him that real children ***do not*** act in the way he imagines, so the cartoons are necessary to satisfy his prurient interest.

This assertion however is still possibly open to the criticism of being too narrow in its definition of 'harm'. Society at every level, it could be claimed, is damaged by the availability of the images described. This may be an instinctive feeling, but it is not one that is easy to quantify and is even less susceptible to prove. Faced with real images of abused children or cartoons of the same, while the latter may be unpalatable to many, it would still be wholly more acceptable than the former.

Some of the respondents to the Consultation Paper considered this level of 'societal harm' to be too high a price to pay in respect of this kind of image even if links to actual offending is unproven and essentially unprovable. Some respondents offered that paedophiles used indecent images of children in masturbatory fantasy and in order to become sexually aroused.[40] This is clearly unacceptable in the case of images of real abuse, but can the same moral justification be raised in respect of a cartoon or CGI? A person who is aroused by thoughts of rape (an illegal and damaging act) is allowed to access images or scenes of 'pretend' rape with no question of the law being broken, unless the OPA 1959 has been infringed, which, given the problematic definition of 'tendency to deprave and corrupt' in section 1 of the Act is increasingly unlikely. The situation here only differs because a 'victim' in an image of adult rape is clearly capable of consenting to the image being made. In an offence focussing on cartoon or 'virtual' children, there is no direct victim, and the question of what purpose the image may be put to, resting as it does on an individual's own proclivities may not appear to be sufficient to criminalise a novel class of imaginative fantasy.

3.2 In favour of virtual legality

It might be necessary to take as a starting point the hypothesis that indecent images of children are never going to be something that are inaccessible to those that want them, if they are prepared to go to certain lengths, particularly in the internet age and without a hitherto unheard of level of cooperation on an international level.[41] To an extent then, what must be envisaged is a kind of limitation exercise where society and the law must do – indeed is morally obliged to do - what it can to prevent children being physically and psychologically harmed by the recorded acts. While efforts must not stop to prevent the abuse of real children and the distribution of actual photographs, it may mean the best decision will be to leave virtual indecent images in a non- criminal context as a 'lesser evil' on the balance of harms basis. Faced with the choice of handing over to an interested party a photograph made at the expense of a living individual or an artistic cartoon creation which was to all intents and purposes the same, it would only be the truly perverse who chose to hand over the former, especially if one were illegal to possess and one were not.

Most individuals are risk averse, and know of the risk they take in possessing indecent images of this nature. Especially in a situation where the user of the images is one of the growing band of the 'merely curious', some would undoubtedly choose the 'virtual' over the actual, the result being a lessening of the demand for the abuse of real children. This would be supported by a utilitarian view of the law as one which should deliver the greatest good to the greatest number of people. Must the law then uphold the individual's right to whatever that individual considers to be a 'good' irrespective of the views of society at large? Patently not, but here the discussion is not so much about the delivery of a 'good' as the lessening of a 'harm'. Heroin is illegal to possess in the UK, but thousands of doses of synthetic heroin[42] are given out daily from pharmacies all over the country with the aims of undermining the trade, promoting the safety of the user and the gradual rehabilitation of the user –

[40] Consultation on the Possession of Non-Photographic Visual Depictions of Child Sexual Abuse – Summary of responses and next steps – point 11 – Ministry of Justice.
[41] Shytov, A *Indecency on the Internet and International Law* International Journal of Law and Information Technology (2005) 13 (260)
[42] Methadone

the second being arguably the most successful. To suggest that the programme of supply should be withdrawn because it appears to condone a lifestyle and choices of which society disapproves would not only be met with outrage by many professionals and user groups, it would, in the end, be counter-productive to society as those previously supported in their addiction turn to crime and illegal supply to provide their (previously trouble-free) next fix.

The claim that an individual's right to freedom of expression[43] is (or will be) infringed by any legislation which criminalises CGIs is less easy to defend. The right is not an absolute one and is subject to a number of restrictions, principally – for the purposes discussed here – for the protection of morality.[44] A restriction of this right must be 'by law' and 'necessary in a democratic society'[45] The latter may mean that any statute would have to meet the criteria in *R v Shayler* [46] namely that the restriction must be based on relevant and sufficient reasons, must aim to meet a pressing social need which must be met in a proportionate way. The default position in proportionality is freedom of expression, with the restricting authority having to justify the need for the restriction and bearing the burden of proof for the restrictions' proportionality. This reasoning must be subject to the scrutiny of a court, so legal challenge to any proposed legislation is possible, although whether an English court would follow the American line or the much stricter stand which European states appear to be taking is a question that can only be guessed at.

3.3 Against virtual legality

A counter argument is that with computer imagery now so sophisticated there would be confusion between actual photographs and entirely pixelated ones and court cases would be made longer and more expensive as prosecutors struggled to prove images were of actual children. This clearly would not apply in the Second Life scenario, as the cartoon like nature of the images is all too apparent, but could in any case be easily dealt with by imposing the burden upon the owners or purveyors of virtual images to prove that their pictures were not of actual children. Where there was doubt, those unable to do this would be subject to the child protection laws as they stand. The presumption of innocence is preserved as the prosecution still has to prove possession and the indecency of the images as it would in a case of actual photographs.

There has also been concern expressed in the response to the Consultation Paper that the Cartoons or CGI's be made illegal on the basis of the 'Spiral of Abuse' model[47] which supposes that 'low level' offending, looking at simulated images or taking a 'soft' illegal drug, will lead to a progression to more extremes of behaviour. Again this is as difficult to prove as to disprove, but it could not be assumed that every individual (or even a large proportion of them) who ever saw an unpleasant or sexually troubling image of a young person – intentionally or not – would then go on to seek out other such images of a 'harder' nature, just as not every person who enjoys alcohol or tobacco or cannabis will go on to use heroin or amphetamines. Some respondents to the Consultation Paper express their unease that 'virtual' images are increasingly being found alongside real pictures of abuse and the law is powerless to act against them. It is to be imagined in this circumstance, the real images are sufficient for a prosecution of the individual and the inclusion of an imaginary image within the collection should not be of too much concern.

The trade in elephant ivory is banned on the grounds of conservation and a growing awareness of public sensibilities of the moral attitudes to such a trade. It would seem ludicrous – on the strength of such a ban – to make fake ivory illegal on the grounds that it may sharpen an individual's taste for the real thing. This is not intended to be a trite comparison. The production of a synthetic product inevitably lessens demand for the real thing, and the fact that the thing at risk is a child's physical and psychological wellbeing makes this more and not less relevant. There appears to be no evidence that indecent pictures or CGI's of virtual 'children' leads to the abuse of or harm to the real thing. The fact that these images are being found more frequently on hard drives should be – while not a cause for rejoicing – at least acknowledged that every CGI or cartoon is a living child not harmed, whilst the purposes (whatever they may be) of the owner are served.

The very idea of the sexual abuse of children is a taboo in almost all areas of the world - although the definition of who is a 'child' varies quite widely – and the simple progression of this revulsion from the act itself to a visual representation of the act is appealing. But the law must sometimes fear to tread. A gut reaction to something we –even as a society – find unpleasant, or even repulsive, should not necessarily be enough to justify its illegality under statute. This is clearly the case. How much more compelling then is the idea that the law is not justified in criminalising something which only looks like the unpleasant act or image.

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[43] Article 10, European Convention on Human Rights.
[44] Article 10(2), European Convention on Human Rights.
[45] Ibid.
[46] R v Shayler [2002] UKHL 11.
[47] Developed by Joe Sullivan MA (Crim) BA (Hons) CQSW Dip Psych.

A more concrete foundation on which to build the illegality of indecent photographs is the use of them as currency to enable the 'purchase' of more or as a way to buy acceptance into groups of abusers or users of such images, again with the purpose of obtaining ever greater collections of materials. Whilst it is likely that those who go on to accumulate hundreds of thousands of such images are driven be something other than (but in conjunction with) paedophilia, it is also likely that the majority of individuals who have broken the law by looking at images of actual child abuse, are not abusers and do not themselves know the people producing the pictures of abuse. These 'end consumers' are typically the 'merely curious' in today's parlance, and a group that it may be particularly easy to satisfy without images of actual abuse taking place.

4. Sentencing

The Consultation Paper proposed a maximum three years imprisonment (for possession) for the new offence, as opposed to the 5 years currently available under section 84 CJPOA 1994.[48] This would suggest recognition of the 'virtual' image as being a lesser offence already. However, the retained linkage with a (pseudo)photograph has left the section 69 CJI offence subject to the maximum punishment as under section 84 CJPOA 1994. The classification of indecent image would also appear to be meant to follow the established scale in *R v Oliver,*[49] which provided five levels of indecency to assist with sentencing**.** [50]

A look at the sentencing actually handed down under the PCA 1978 may be instructive. In *Bowden (Jonathan***)**[51] a 12 month conditional discharge was substituted for a custodial sentence on appeal as the defendant had not distributed the material and not been involved in any corruption of the child. However, the defendant had stored images on his computer and printed them out, which the judge considered was sufficient 'to make' a photograph as this act had brought the pictures into existence. This case, and others like it[52], concern images of actual, living children, capable – one assumes – of being harmed by the procedure of the manufacture of their indecent image. The situation in which the Consultation Paper envisaged the new law operating would have been completely devoid of children, and devoid of individual harm. Given this, the sentence which may have been handed down for a 'virtual' child image was likely – on the same scale – to be derisory and could only operate to bring the law into disrepute, quite against the 'tougher image' wanted by the proposers of the new offence.

5. Conclusion

Many of the organisations who responded to the Consultation Paper were supportive of the creation of a new offence which criminalised what were indecent cartoons or drawings of children and will doubtless be unhappy with the section 69 CJI Act, but the lack of harm and possibly the lack of proportionality in the laws response when balanced against Article 10 of the European Convention on Human Rights could be problematic. The broader international landscape is of essential consideration when analysing the Internet in terms of legislation, which is why some commentators, for example Nair, point towards the need for a global community standard and argues that "*…regulation of content will be ultimately based on internationally recognised principles."*[53]However, it seems that this ideal is still a long way off as cultures, traditions and viewpoints contrast and any international standard is only likely to be introduced at the lowest common denominator. This problem was exemplified in the creation of the Council of Europe's Convention on Cybercrime, which only made reference to the offence of producing or distributing child pornography using a computer system. Although, many participants wanted wider offences included, the Explanatory Report offered the following reason for the lack of further offences:

> "The committee drafting the Convention discussed the possibility of including other content-related offences, such as the distribution of racist propaganda through computer systems. However, the committee was not in a position to reach consensus on the criminalisation of such conduct. While there was significant support in favour of including this as a criminal offence,

[48] Criminal Justice and Public Order Act 1994
[49] [2002] EWCA Crim 2766.
[50] The five levels identified by the court in order of seriousness were (1) images depicting erotic posing with no sexual activity; (2) sexual activity between children, or solo masturbation by a child; (3) non penetrative sexual activity between adults and children; (4) penetrative sexual activity between children and adults, and (5) sadism or bestiality.
[51] [2001] 1 QB 88.
[52] See for instance: R v MS (2000) Cr. App, R(S) 388 where the defendant had been downloading material from the Internet for a year and a conditional discharge was (on appeal) substituted for the original sentence of four months' imprisonment. This case can be contrasted with R v Makeham (2001) 2 Cr. App. R(S) 198, where the defendant downloaded a total of 61 indecent photographs on three different occasions and the court was of the view that sentence of six months' imprisonment was appropriate.
[53] Nair, A *Internet Content Regulation: Is a Global Community Standard a Fallacy or the Only Way Out?* International Review of Law, Computers and Technology (2007), volume 21, number 1, pages 15-25, at page 23.

> some delegations expressed strong concern about including such a provision on freedom of expression grounds."[54]

In conclusion, it should be noted that either the drafters of the new Act have shied away from the criminalisation of the possession of wholly imaginary indecent images of children, other than the ones that 'appear to be a photograph' and are already illegal under the PCA 1978, or that the concept of 'derivation' is going to leave the courts with an enormous, and possible unjustified intrusion into the private lives of ordinary citizens. The Consultation Paper itself states:

> "If this option (amending the PCA 1978) were to be accepted, we expect the number of prosecutions to be low, as the police are unlikely to find such images unless investigating more serious offences."[55]

It is submitted that unless or until judges find themselves able and willing to interpret the terms 'tracing' and 'other image' in a novel way, the job of the police and CPS has not been made easier by the passing of section 69 CJI Act 2008. Whether the English criminal law is prepared to extend its statutory reach into murky moral waters remains to be seen.

[54] Council of Europe *Explanatory Report on the Convention on Cybercrime* (2001). Available at: http://conventions.coe.int/Treaty/EN/Reports/Html/185.htm (6th July 2008).
[55] *Supra* n.8, page 16.