

# CASE REPORT

## COURT OF APPEAL CLARIFIES THE LAW ON DOWNLOADING PORNOGRAPHY FROM THE WEB

*Dr. Yaman Akdeniz, University of Leeds*

In the recent years the law courts had to deal with a considerable number of cases involving child pornography received or downloaded through the Internet.<sup>1</sup> Moreover, there has been a considerable number of appeals involving not only sentencing issues but also the interpretation provided to the making offences under section 1(1) of the Protection of Children Act 1978 (the 1978 Act) since the decision of the Court of Appeal in *R v Bowden*.<sup>2</sup> The Court of Appeal has now had an opportunity to explain the law. Yaman Akdeniz reports.

### 1. INTRODUCTION

In the appeal cases involving **R v Graham Wainwright Smith and Mike Jayson** (CA, [2002] EWCA Crim 685, (No.2001/00251/Y1), 7 March 2002), the appellants were convicted of the offence of making an indecent photograph or pseudo-photograph of a child contrary to section 1(1) of the 1978 Act. In the case of Smith, the image in question was received as an attachment to an email message. In the case of Jayson, the images were downloaded by the appellant from the Internet. In each case, the image in question was saved in the temporary Internet cache as a result of the automatic function of the computer.

So far as Smith's case is concerned, he was convicted of one count of making indecent pseudo-photographs of a child and was sentenced to two years' probation in December 2000, at Lewes Crown Court, before His Honour Judge Kemp and a jury.

The police found an email with attachments in Smith's computer which showed images of a naked girl called Eva, apparently taken by her mother, an internationally renowned photographer. According to the appeal decision the attachments had been sent to the appellant on 26 July 1998 by someone calling herself "Yvonne Nystrom", whose email address is "smallthings@hotmail.com". An important fact of the case was that the images were not sent unsolicited to Smith, but according to the case report, Smith asked this person to send him the Eva images. The images in question had not been deleted and remained as an attachment to an email in the Smith's mailbox. The defence on behalf of Smith suggested that:

"upon the proper construction of section 1(1)(a) of the Act the appellant had not 'made' a pseudo-photograph within the meaning of that provision by simply opening an attachment to an email and looking at the images, without doing more."

However, the Crown submitted that the appellant had effectively solicited the photographs by email, had shown an interest in receiving them and in opening them, and in failing to delete them, he had "made" the photographs in question.

Following the interpretation of this issue in the cases of **Bowden**,<sup>3</sup> and **Adkins v DPP**,<sup>4</sup> the trial judge ruled that Smith

"has sought to 'make' photographs, in effect by proliferating them rather than taking the option, which was otherwise available to him, which was to delete them altogether."

The defence, however, argued that "section 1(1)(a) of the Act should be construed as narrowly as is reasonably possible, and it should not be construed so as to apply to a case such as the present." The defence's argument was that Smith's actions should be distinguished "from that of a conscious and deliberate downloading of an image from the Internet."

### 2. THE SMITH APPEAL

The Court of Appeal agreed that "a person is not guilty of an offence of 'making' or 'being in possession' of an indecent pseudo-photograph contained in an email attachment if, before he opens the attachment, he is unaware that it contains or is likely to contain an indecent image." This would mean that liability should not arise if the indecent photographs are received unsolicited. Such a defence would have been available under section 160(2)(c) of the Criminal Justice Act 1988 if Smith was charged with a possession offence. Obviously, the courts and the prosecutors would also look into the behaviour and actions of an accused following the unsolicited receipt of such images via email. It is very much doubted that liability would arise if the images and the message in question is immediately deleted upon the realization of its nature. However, it may be a completely different scenario if the images are looked at and the message moved into a folder named hypothetically as "my naughty folder". At that point the unsolicited nature of the message in question may not be so relevant for the purposes of a prosecution under section 1(1) of the 1978 Act.

However, it should be noted that when charged with a section 1(1)(a) offence of making an indecent photograph or a pseudo-photograph, no defence along the lines of section 160(2)(c) of the Criminal Justice Act 1988 is open to a defendant. "that the photograph [or pseudo-photograph] was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time." The defences which are available under section 1(4) of the

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## **Table of Contents Example Of A Law Report**

1. Understanding the eBook Example Of A Law Report
  - The Rise of Digital Reading Example Of A Law Report
  - Advantages of eBooks Over Traditional Books
2. Identifying Example Of A Law Report
  - Exploring Different Genres
  - Considering Fiction vs. Non-Fiction
  - Determining Your Reading Goals
3. Choosing the Right eBook Platform
  - Popular eBook Platforms
  - Features to Look for in an Example Of A Law Report
  - User-Friendly Interface
4. Exploring eBook Recommendations from Example Of A Law Report
  - Personalized Recommendations
  - Example Of A Law Report User Reviews and Ratings
  - Example Of A Law Report and Bestseller Lists
5. Accessing Example Of A Law Report Free and Paid eBooks
  - Example Of A Law Report Public Domain eBooks

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- Example Of A Law Report Budget-Friendly Options
- 6. Navigating Example Of A Law Report eBook Formats
  - ePub, PDF, MOBI, and More
  - Example Of A Law Report Compatibility with Devices
  - Example Of A Law Report Enhanced eBook Features
- 7. Enhancing Your Reading Experience
  - Adjustable Fonts and Text Sizes of Example Of A Law Report
  - Highlighting and Note-Taking Example Of A Law Report
  - Interactive Elements Example Of A Law Report
- 8. Staying Engaged with Example Of A Law Report
  - Joining Online Reading Communities
  - Participating in Virtual Book Clubs
  - Following Authors and Publishers Example Of A Law Report
- 9. Balancing eBooks and Physical Books Example Of A Law Report
  - Benefits of a Digital Library
  - Creating a Diverse Reading Collection Example Of A Law Report
- 10. Overcoming Reading Challenges
  - Dealing with Digital Eye Strain
  - Minimizing Distractions
  - Managing Screen Time
- 11. Cultivating a Reading Routine Example Of A Law Report
  - Setting Reading Goals Example Of A Law Report
  - Carving Out Dedicated Reading Time
- 12. Sourcing Reliable Information of Example Of A Law Report
  - Fact-Checking eBook Content of Example Of A Law Report
  - Distinguishing Credible Sources
- 13. Promoting Lifelong Learning
  - Utilizing eBooks for Skill Development
  - Exploring Educational eBooks

## 14. Embracing eBook Trends

- Integration of Multimedia Elements
- Interactive and Gamified eBooks

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