1. Introduction

This paper explains the regulation in the United Kingdom of pornography, in particular child pornography, and of hate speech on the Internet. This is of course a rapidly changing area of law; indeed, the law has changed in the course of the last few days, as a new law was finally enacted on Thursday, November 12, proscribing the possession of cartoons and other non-photographic visual depictions of child pornography.\(^1\) The legislation and its interpretation by the courts is quite complex, but I will endeavour to bring out its main principles clearly and without going into too much detail.

I should begin with one or two introductory points. First, there has not been in the United Kingdom, as there has been in the United States, any significant constitutional or human rights challenge to the validity of laws regulating speech on the Internet. The United Kingdom incorporated the European Convention on Human Rights and Fundamental Freedoms (ECHR) into its law by the Human Rights Act 1998 (HRA). As a result legislation must be interpreted and applied so as to give effect to Convention rights, including the right to freedom of expression (ECHR, art 10) and the right to respect for private and family life (ECHR, art 8).\(^2\) If it is impossible to interpret legislation in a way which makes it compatible with the Convention, a court

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\(^1\) Coroners and Justice Bill 2009, clause 49: see section 4 of this paper.

\(^2\) HRA s 3.
may consider whether to declare it incompatible with the Convention, but it cannot invalidate a statute, as the courts in other jurisdictions such as Germany may do. So far there has been no major challenge in the courts to legislation restricting free speech on the Net, though doubts have been raised whether recent legislation banning ‘extreme pornography’ is compliant with the ECHR (see further section 3 of this paper.)

The second introductory point is that there is no doubt that the obscenity legislation, which was enacted to make criminal the sale and distribution of pornographic books and magazines, applies to the Net as fully as it does to other means of communication: broadcasting, cinema films, and videos. Any doubt there may have been was resolved by legislation: publication of obscene material includes electronic transmission. The courts have held that there is publication both when images are uploaded and again when they are downloaded. Further, it rejected the argument that a prosecution could only be brought in the state where the major steps in relation to publication had been taken, that is where the pornographic material had been uploaded. A prosecution may, therefore, be brought in England under the UK Obscene Publications legislation in respect of pornographic material put on a website in the United States, but downloaded in London.

The third introductory point is perhaps the most important; the criminal law provides only part of the answer to the problem of child pornography and hate speech on the Net. The other part is provided by the system of self or voluntary regulation conducted by the Internet Watch Foundation (IWF) which in effect operates an effective, though sometimes controversial system

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3 Ibid, s 4.
4 Criminal Justice and Public Order Act 1994, Sch 9, para 3 amending to Obscene Publications Act 1959, s 1(3).
5 R v Waddon, 6th April 2000, unreported.
of censorship of what the IWF refers to as child abuse content. I will discuss this in section 5 of the paper, but I should emphasize from the start of this talk that the role of the IWF is far from supplementary.

2. Child pornography legislation

This section of the paper outlines the main features of child pornography legislation and some of the court rulings interpreting its quite complex provisions. The most important legislation in the area of child pornography – indecent images of young children under 18\(^7\) – is the Protection of Children Act 1978 which makes it an offence to take or distribute indecent photographs, or to possess them for distribution. Under later legislation, it became an offence merely to possess such images, whether possession is with a view to their later distribution or not. These provisions were amended to cover the making and possession of indecent pseudo-photographs,\(^8\) defined as images made by computer graphics or otherwise which appear to be photos – an example of legislation specifically intended to deal with dangers specific to Internet communications, rather than applying general legal rules to electronic communications. These amendments were intended to prevent the use of indecent pseudo-photographs by paedophiles in attracting or ‘grooming’ children for sexual purposes, not as with the rules about actual photos to stop the sexual abuse of young children in their production.. The legislation has never defined the term ‘indecent’ – that is a matter for the court, or for the jury, to decide on all the facts and in the circumstances of the case.\(^9\) (I will explain later that the new rules being introduced now for cartoons and other non-photographic depictions of child sexual abuse define the material covered much more narrowly and precisely.)

\(^7\) Initially the law only applied to photographs of children under 16, but the age limit was raised to 18 to bring UK law into conformity with European principles: Sexual Offence Act 2003, s 45 (2).
\(^8\) Criminal Justice and Public Order Act 1994, s 84
These provisions have been considered by the courts on a number of occasions. First, the Court of Appeal as long ago as 1997 held that the term ‘indecent photograph or copy of a photograph ‘ in the 1978 legislation covered a visual image stored electronically on disc and that to download such an image on a computer screen was to distribute child pornography, an offence under the legislation. More recently, the Court of Appeal has held that to download or print out an indecent photograph or pseudo-photograph amounts to the offence of ‘making’ an indecent image for the purpose of the child pornography legislation. It did not accept the argument that the legislation was concerned only to stop the production of new images; in the Court’s view it was also concerned to prevent their spread or proliferation. It is, therefore, an offence to download images which originated from outside the UK. The court in Bowden also rejected the argument that the rules might conflict with the right to privacy guaranteed by Article 8 of the ECHR. It is a criminal offence for anyone to download child pornography, including pseudo-photographs, for his own use.

These offences are not however strict liability or absolute offences. So it has been decided that one does not commit the offence of ‘possessing’ indecent photographs, when these are stored on the computer’s ‘cache’, a temporary information store created automatically by Internet browser programmes when accessing a website. The prosecution must show that the defendant knew that this would be the consequence of browsing indecent child pornography images. It has also been held that a defendant is not guilty of ‘possessing’ deleted indecent images, unless he has the necessary specialist

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11 R v Bowden [2000] 2 All ER 418.
12 Atkins v DPP [2000] 2 All ER 425, Divisional Court of Queen’s Bench.
skills and software to retrieve them. Another issue is whether academic researchers, say, people researching the use and abuse of child pornography have a defence when they access, download or print out these images. The legislation provides a defence, if the accused proves that he has a legitimate reason for distributing, showing, or possessing these images. In the court’s view this is a matter of fact for the jury, or magistrate; it would be for it to decide whether the defendant was ‘a genuine researcher with no alternative but to have this sort of unpleasant material in his possession.’ Courts should not too easily conclude that there is a good defence.

The Protection of Children Act 1978 covered indecent photographs and pseudo-photographs; it did not proscribe the possession of every form of child pornography, so very recent legislation has been enacted to extend the range of prohibited material depicting child sexual abuse. But before I deal with that, I will briefly discuss another extension of the criminal law to penalise the possession of ‘extreme pornographic material’ featuring not children, but adults.

3. Extreme pornography

The proposal to extend the criminal law was made by the government in 2006, following the rape and murder of a young woman, Jane Longhurst; her killer had apparently only a few hours before the crime been surfing the Net for sites depicting necrophilia and other explicit and extreme images. The Home Office paper pointed out that there are hundreds of internet sites providing a wide range of material featuring the torture of mostly female

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15 Atkins (note 12), 432-433.
victims, as well as graphic depictions of necrophilia and sexual activity involving animals. It argued that there was no place for such material in society, but the obscene publications legislation did not cover it, as the simple possession of obscene material is not an offence. The challenge was posed almost entirely by material coming over the Internet from sites abroad, though the proposals and subsequent legislation apply to off-line publications as well as online.

Though some critics argued that to penalise simple possession of extreme pornography would infringe both the Convention rights to freedom of expression and to privacy, Parliament enacted the government’s proposals last year in the Criminal Justice and Immigration Act 2008. It is an offence to possess an extreme pornographic image. Both these terms are defined very carefully. An image is ‘pornographic’ if it is of a kind such that it must reasonably be assumed to have been produced only or primarily for sexual arousal; it is an ‘extreme image’ if it is grossly offensive or disgusting and if it portrays explicitly and realistically a number of acts, for example, an act threatening someone’s life, as in a ‘snuff’ movie, an act which results or is likely to result in serious injury, necrophilia or bestiality. There are a few defences. One is that a person has a legitimate reason for being in possession of the image, for example, a police officer or researcher. Further, it is a defence for the accused person to show that he participated in any of the acts concerned and that they did not involve the infliction of any non-consensual harm, so that it is not a crime for participants to possess images of lawful sado-masochistic sexual practices in which they had been involved.

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17 Criminal Justice and Immigration Act 2008, s. 63.
18 Ibid, ss 65 and 66.
4. The new offence of non-photographic depictions of child pornography

As explained in a Home Office Consultation Paper, legislation has not covered cartoons, drawings and animated and other computer generated images depicting the sexual abuse of children. The Protection of Children Act only penalises the making or possession of photographs or pseudo-photographs defined as images made by computer graphics or otherwise, which appears to be a photograph. There was therefore a gap in the law. In the government’s view it was right to fill that gap; there is evidence that paedophiles possess this sort of material to attract young children, while a number of other countries (for example, Norway, Canada, the USA and Australia) all have legislation covering non-photographic images. But it would be wrong to penalise the possession of indecent non-photographic images, as that would be too low a threshold for the application of the criminal law in this context.

The legislation introduced by the government last year and enacted by Parliament last week follows the approach taken in the criminalization of ‘extreme pornography’. It will be an offence to possess a ‘prohibited image’, defined as one which is both pornographic and falls within the category of strictly defined images. The image must also be grossly offensive or disgusting. The category of prohibited images covers those which focus on a child’s genitals or anal region and those which portray a number of acts, for example, sexual acts with or in the presence of a child. There are to be a number of defences, similar to those in the Protection of Children legislation, for those engaged in genuine research, medical work, or in control of the Internet, such as staff of the IWF and internet service providers.


20 Corones and Justice Bill 2009, clause 60.
5. Hate speech on the Net
There has never been any doubt that the incitement to racial hatred offence applies to publication of material intended or likely to incite such hatred on the Net. (The elements of the offence are set out in the Public Order Act 1986 and have been extended, with some modifications, to penalise incitement to religious hatred and the expression of homophobia with similar intentions.)
In July this year, two men were the first to be convicted of inciting racial hatred through a foreign, US, website. They put on a US website antisemitic images and cartoons. After an initial trial last year they fled to the United States and attempted to claim political asylum, but that was refused. On their return to the UK, they were retried and convicted. One was sentenced to four years and 10 months in prison, the other two years and four months. Apparently, the pair had thought that they would be safe if they put the material on an American website, given the strong protection of extremist hate speech in the US.

6. The Internet Watch Foundation (IWF)
The IWF was set up in 1996 by Internet service providers to avert the threat of prosecution for the offence of distributing child pornography. ISPs could in theory be prosecuted for the offences under the Protection of Children Act and other obscenity or indecency legislation, as well as for incitement to racial hatred, though there might be problems in showing that they had distributed the matter with the required mental element. But no prosecutions have been brought against them. Originally composed entirely of industry representatives, the IWF has operated an informal system of dealing with complaints by requiring ISPs to take down immediately material hosted anywhere in the world which depicts child sexual abuse, and criminally

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21 The majority of the Board are now drawn from outside the industry.
obscene and incitement to hatred content hosted on UK websites, in newsgroups and on mobile and other online services. It does not cover emails. This hotline procedure continues to operate. In 2006 the IWF processed over 31,000 reports, the vast majority of them relating to servers in the US and Russia. Apparently, less than 1% relate to sites on UK domains.

Up to 2002 the IWF’s role was solely to recommend to ISPs to take down offending material, which ISPs always complied with in order to protect themselves from liability. But from 2004 the IWF has operated a ‘blocklist’ procedure under which it requires service providers to block sites on a list which is updated twice a day, when these sites have been found to host child sex abuse material. Initially some ISPs refused to co-operate with this system of informal censorship, but the government two years ago threatened to introduce legislation to require them to comply with IWF requirements. The database comprises about 800-1200 URLs at any one time, access to which is effectively blocked. Website owners have a right of appeal within the IWF itself, but it is unclear whether they would have any further remedy in the courts.

This system attracted attention and much adverse comment in December last year when the IWF blocked a Wikipedia article on the Scorpions album, Virgin Killer. The article was illustrated with a picture of the album cover, depicting a virtually naked pre-pubescent girl; the IWF considered it indecent. As a result ISPs were unable to access Wikipedia and users could not edit entries on the site – though the album was displayed on Amazon and in record stores! Following widespread protest, IWF reversed its decision four days later. The episode brings out nicely a range of objections to the IWF. It provides a system of informal censorship or prior restraint on the exercise of freedom of speech on the Internet, without any clear procedures or right of formal
independent appeal. The Foundation’s role is to control illegal child sex abuse depictions, but its decision in the Wikipedia case suggests it may exceed its powers. ISPs do not notify the public that access to sites has been blocked by the IWF; notices imply that they are unavailable for technical reasons. In principle the system is hard to defend. It would, I think, be better to put it on a legal basis. The grounds on which access to sites could be blocked should be set out clearly in legislation and there should be a formal right of appeal, with the IWF liable to judicial review in the courts.

7. Conclusions
The dangers of the ready availability of child pornography are clear. The Internet has radically increased the scale of the problem. Following the investigations conducted nationally by the UK police in 2003, in co-operation with the US FBI – Operation Ore – there have been over 1,670 prosecutions for child pornography offence, with the vast majority ending in convictions. There has been a drastic increase in convictions in the last few years. A year ago, the government with the support of a number of important communications industries – for example, Google, BT, and Microsoft – set up the UK Council for Child Safety; its remit is to deliver a strategy to ensure greater safety for the use by children of the Internet, to promote more responsible advertising, and stop the use of the Net for bullying and violent games. The trend is towards greater regulations and control; the government has even contemplated the possibility of subjecting the Internet to a legal regime similar to the one by which broadcasting has been regulated since its inception. I think that most unlikely. The general media regulator, OFCOM, is opposed to this development. But further regulation in the areas of pornography, child bullying, and terrorism remains a distinct possibility.