

Staff Issue Paper

Minnesota's Definitions Related to Child Pornography

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This paper discusses potential issues related to how Minnesota's Statutes define child pornography. These definitions were enacted in 1999, and can be found in [Minn. Stat. § 617.246](#), subd. 1(d)–(f).

Current Definitions

Minnesota has three key definitions related to child pornography: “Sexual conduct,” “sexual performance,” and “pornographic work.” Although the language below is adapted from the statutory language, the definitions are presented in outline form to assist the reader in comprehension:

- ❖ **“Sexual conduct”** means any of the following:
 - An act of sexual intercourse
 - Normal or perverted
 - Including genital-genital, anal-genital, or oral-genital intercourse
 - Whether between human beings or between a human being and an animal
 - Sadoomasochistic abuse, meaning
 - Flagellation, torture, or similar demeaning acts
 - Inflicted by or upon a person who is nude or clad in undergarments or in a revealing costume
 - Or the condition of being fettered, bound or otherwise physically restrained
 - On the part of one so clothed [nude or clad in undergarments or in a revealing costume]
 - Masturbation
 - Lewd exhibitions of the genitals; or
 - Physical contact with
 - The clothed or unclothed pubic areas or buttocks of a human male or female, or
 - The breasts of the female,
 - Whether
 - Alone or between members of the same or opposite sex or
 - Between humans and animals
 - In an act of apparent sexual stimulation or gratification.

- ❖ **“Sexual performance”** means
 - Any play, dance or other exhibition
 - Presented before an audience or for purposes of visual or mechanical reproduction
 - That uses a minor
 - To depict actual or simulated **sexual conduct**.

- ❖ **“Pornographic work”** means:
 - An original or reproduction of
 - A picture, film, photograph, negative, slide, videotape, videodisc, or drawing of
 - A **sexual performance** involving a minor; or
 - Any visual depiction
 - Including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means
 - That:
 - Uses a minor to depict actual or simulated **sexual conduct**;
 - Has been created, adapted, or modified to appear that an identifiable minor is engaging in **sexual conduct**; or
 - Is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in **sexual conduct**.

Judicial Interpretation

Problems with “convey[ing] the impression”

With respect to the last definition listed above—the one defining child pornography to include an image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that” it depicts a minor engaging in sexual conduct—the U.S. Supreme Court scrutinized a very similar¹ definition in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 257–258 (2002).

¹ The federal and state definitions have been called “substantively identical,” *State v. Dodd*, No. C1-03-320, 2003 WL 22889408 at *1 (Minn. Ct. App. Dec. 9, 2003) (unpublished), *review denied* (Minn. Feb. 25, 2004). Although most of the language of the two definitions is verbatim identical, Minnesota’s definition is arguably even broader than the unconstitutionally overbroad provision scrutinized in *Ashcroft*. Although the federal definition in question required the presence of a sexually explicit image, it is sufficient, in Minnesota, if a promoter merely conveys the impression that the image contains a depiction of sexual conduct. *Cf.* 18 U.S.C. § 2256(8)(D) (2002) (“‘child pornography’ means any visual depiction ... *of sexually explicit conduct*, where ... such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct” (emphasis added)) *with* Minn. Stat. § 617.246, subd. 1(f)(2)(iii) (2019) (“‘Pornographic work’ means ... any visual depiction ... that ... is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct.”).

The Court held that the “conveys the impression” provision was overbroad, encompassing a substantial amount of speech protected by the First Amendment, and therefore unconstitutional. Although appellate courts have not directly addressed the constitutionality of Minnesota’s “conveys the impression” provision, at least three Minnesota district courts have severed, on constitutional grounds, this provision from the remaining definitions of “pornographic work.”^{2, 3}

Requirement of a real child

Ashcroft also struck down as unconstitutionally overbroad a federal provision not found in Minnesota’s statute, one prohibiting a visual depiction that “appears to be” of a minor engaging in sexually explicit conduct. In light of this holding, the Court of Appeals, in 2003, scrutinized Minnesota’s three other⁴ definitions of child pornography—

- A visual depiction (including a drawing) of a sexual performance involving a minor;
- A visual depiction (including a drawing or computer-generated image) that uses a minor to depict actual or simulated sexual conduct; and
- A visual depiction (including a drawing or computer-generated image) that has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct.⁵

The Court of Appeals distinguished each of these definitions from the federal “appears to be” provision, reading each definition as requiring the involvement of a real child. With respect to the second definition, for example, the court said, “While the depiction may be computer-generated and the sexual conduct may be simulated, the minor may be neither computer-generated nor simulated but must be, as defined by Minn. Stat. § 617.246, subd. 1(b), a ‘person under the age of 18.’” *State v. Fingal*, 666 N.W.2d 420, 424–425 (Minn. Ct. App. 2003), *review denied* (Minn. Oct. 21, 2003).⁶

² The following appellate opinions acknowledge the respective district court’s severance of Minn. Stat. § 617.246, subd. 1(f)(2)(iii), from the definition of “pornographic work” in light of *Ashcroft*: *State v. Fingal*, 666 N.W.2d 420, 422 (Minn. Ct. App. 2003), *review denied* (Minn. Oct. 21, 2003); *State v. Dodd*, No. C1 03 320, 2003 WL 22889408 at *1 (Minn. Ct. App. Dec. 9, 2003) (unpublished), *review denied* (Minn. Feb. 25, 2004); *State v. Cannady*, 727 N.W.2d 403 n.2 (Minn. 2007).

³ On the other hand, the current edition of the Minnesota Jury Instruction Guides – Criminal (CRIMJIG), authored by the Minnesota District Judges Association, still includes an option to instruct the jury on the “conveys the impression” provision within the definition of “pornographic work.” CRIMJIG 12.78, 12.105, & 12.107 (2018).

⁴ *I.e.*, the three definitions that were not found to be unconstitutional by the district court. See footnote 2.

⁵ *I.e.*, “morphing.” Discussing the similar federal provision, *Ashcroft*, 535 U.S. at 242, said: “18 U.S.C. § 2256(8)(C) prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *New York v. Ferber*, 458 U.S. 747 (1982). Respondents do not challenge this provision, and we do not consider it.”

⁶ Concurring in the judgment, Judge Minge expressed special concern about including “drawings” in the definition. Judge Minge opined that the statute must be read as covering only drawings of actual, identifiable

Potential Issues Regarding Definitions

Are the definitions overbroad?

As discussed above, Minnesota law classifies a visual depiction as child pornography if its promoter “conveys the impression” that it shows a minor engaging in sexual conduct. This provision appears to be open to at least as many⁷ constitutional challenges as the similar federal provision that the U.S. Supreme Court struck down in 2002 as unconstitutionally overbroad.

Staff suggestion: **Consider recommending that the Legislature revise the definition of child pornography to comply with the Constitution** by repealing the entire “conveys the impression” clause (Minn. Stat. § 617.246, subd. 1(f)(2)(iii)) and, in consultation with its legal staff, reviewing the remaining elements of the definition for constitutionality.

Are the definitions not broad enough?

Recall the legislative [testimony](#) of Megan McKinnon, the mother of one of the victims of Brandon Mark Bjercknes, the middle school assistant principal whose child pornography case was ultimately prosecuted [federally](#):

Because of the definition of child pornography, as defined in Minnesota, many of the pictures the principal is in possession of did not constitute child pornography. Let me make sure I am clear here: A man in a position of authority at a middle school has nude pictures on his computer of the very children he sees and mentors every day, and only a few are legally considered child pornography.⁸

This testimony appears to question whether the scope of Minnesota’s child pornography definition is sufficiently broad. Staff makes three observations:

First, it is not obvious that Minnesota’s definition of child pornography is particularly narrow when compared to the current federal definition. A textual comparison of the statutes reveals the following obvious differences:⁹

minors, and as requiring that the accused know or have strong reason to know that the drawings were of actual, identifiable minors. Because he construed the majority’s opinion as requiring such a reading, Judge Minge viewed the constitutional problem with “drawings” to have been avoided. *Id.* at 426–27.

⁷ As discussed in footnote 1, Minnesota’s definition, unlike the former federal definition, does not require that actual or simulated sexual conduct be depicted, as long such an impression is conveyed. Minnesota’s definition is also broader than the federal definition in that a “drawing” qualifies as a visual depiction; *see* footnote 6.

⁸ Unofficial transcript of the testimony of Megan McKinnon before the Minn. House Public Safety and Security Policy and Finance Committee, April 11, 2018.

⁹ Comparisons are made between 18 U.S.C. § 2256 (2019) and Minn. Stat. § 617.246, subd. 1 (2019). This is not an exhaustive list. Among this list’s omissions: Minnesota defines “sodomasochistic abuse” while the corresponding federal term (“sadistic or masochistic abuse”) is undefined; and the federal statute, unlike Minnesota,

- In Minnesota, sexual conduct includes “lewd exhibitions of the genitals.” The federal statute is similar but includes “graphic or simulated lascivious exhibition of the genitals *or pubic area*” (emphasis added).
- In response to *Ashcroft*, Congress replaced the federal definition’s unconstitutional “appears to be” provision with an “indistinguishable from” provision.¹⁰ This provision is absent from Minnesota statutes.
- In Minnesota, sexual conduct includes physical contact with clothed or unclothed pubic areas, buttocks, or female breasts, in an act of apparent sexual stimulation or gratification. This definition is absent from the federal statute (although other acts included within the federal definitions, such as sexual intercourse or masturbation, may apply to some or many of these situations).

Is Minnesota’s definition of child pornography narrow by comparison to the federal definition? Not necessarily. It is possible that some images of an exposed pubic area, or some images that do not show an actual child but are indistinguishable from images that do, could constitute child pornography under federal, but not state, law. On the other hand, it is possible that other images, such as those depicting physical contact with clothed or unclothed female breasts, could constitute child pornography under state, but not federal, law.

Second, without knowing more about the content of the photos in the *Bjerknes* case, it is observed that some sexual images of children—known as “child erotica”—are considered legal under either federal or state criminal law. The glossary of the U.S. Sentencing Commission’s 2012 report on child pornography contains the following definition of “child erotica”:

Child erotica is a general term describing legal images or stories that are about children and of a sexual nature. Images may be overtly sexual and show children in inappropriate clothing or positions or it may only be use of the image that is inappropriate. For example, some pedophiles use catalog images of children in bathing suit advertisements for child erotica purposes.¹¹

Third, it is possible that Minnesota should—and, perhaps, constitutionally could—expand the definition of child pornography to encompass child erotica in limited circumstances, such as a person in a position of authority over a child possessing nude pictures of that child.

enumerates “oral-anal” among the various bodily combinations constituting sexual intercourse. Additionally, there are differences in how the statutes approach actual vs. simulated conduct, but it is not obvious what practical impact these differences would have.

¹⁰ 18 U.S.C. § 2256(8)(B) (2019) (“‘child pornography’ means any visual depiction ... of sexually explicit conduct, where ... such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct ...”); *see also* 18 U.S.C. § 2256(2)(B) & (11) (defining related terms, including “indistinguishable”).

¹¹ U.S. Sentencing Commission, *Federal Child Pornography Offenses* (Dec. 2012), p. A-2 (retrieved Sept. 19, 2019, at <https://go.usa.gov/xVkpPf>).

Staff suggestion: Consider recommending that the Legislature look at broadening the definition of child pornography by studying, in consultation with legal staff, circumstances in which a sexual image of a child is not included within the definition of “pornographic work” but could and should be, including—

- An image that does not show an actual child but is indistinguishable from an image that does (as in the federal definition),
- An image that depicts the lewd exhibition of a child’s pubic area (as in the federal definition), or
- A nude image of a child when possessed with sexual intent by a person in a position of authority over that child (as reported to be in the *Bjerknes* case)

—and making appropriate modifications to that definition.

Should the definitions be updated, or separated from older definitions?

Minnesota’s current child pornography definitions were established in 1999.¹² While the definitions evidently borrowed language from the 1999 federal child pornography definitions,¹³ they also largely incorporated definitions of Minnesota’s preexisting offense of Use of Minors in Sexual Performance, which was enacted in 1977 and revised in 1983.¹⁴ Some Commission members might question whether some of the terminology is technologically relevant (*e.g.*, “videodisc” and “slide”) or in keeping with current sensibilities (*e.g.*, “normal or perverted” sexual intercourse); others might question whether it remains appropriate or necessary to use combined definitions for these different offenses.

Staff suggestion: Consider taking no action. The obsolete language is harmless and may be addressed by the Legislature if it acts on the preceding recommendations; the remaining issue will be adequately addressed in the staff suggestions pertaining to child pornography production.

¹² [1999 Minn. Laws ch. 217](#).

¹³ 18 U.S.C. § 2256 (1999).

¹⁴ [1977 Minn. Laws ch. 371](#); [1983 Minn. Laws. ch. 204](#), § 11.