Downloading, Burning and Producing

Courtesy of Susan Brenner's blog site

http://cyb3rcrim3.blogspot.com/2010/10/downloading-burning-and-producing.html

This post is about a case in which the Michigan Supreme Court was required to decide whether downloading and burning images to a CD constituted (i) making or producing child pornography or (ii) merely possessing child pornography.

The case is *People v. Hill,* 486 Mich. 658, 786 N.W.2d 601 (Michigan Supreme Court 2010), and this is all I know about the facts that led to Brian Hill's being charged:

> [Hill] was charged with five counts of `arrang[ing] for, produc[ing], mak[ing], or financ[ing]' child sexually abusive material, in violation of [Michigan Compiled Laws § 750.145c(2)], after a search of his two laptop computers and approximately 50 CD-Rs found in his bedroom. After being bound over for trial, [Hill] moved to quash the information with regard to these charges, arguing that the burning or saving of images or data to a CD-R does not rise to the level of producing or making child sexually abusive material. He further argued that the transfer of images from the Internet to his computer's hard drive and then to the CD-Rs constituted nothing more than the storage of data. Thus, he contended that he should only be charged with knowingly possess[ing]' child sexually abusive material under [Michigan Compiled Laws § 750.145c(4)] because he had not originated the prohibited images.

People v. Hill, supra.

Michigan Compiled Laws § 750.145c(2) makes it a felony for someone to persuade, induce, entice, coerce, cause or knowingly allow "a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or . . . arrange[] for, produce[], make[], or finance[]. . . any child sexually abusive activity or child sexually abusive material". Michigan Compiled Laws § 750.145c(4) provides as follows: "A person who knowingly possesses any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both. . . ." And Michigan Compiled Laws § 750.145c(m) defines "child sexually abusive material" as

> any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable

> medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording.

Finally, Michigan Compiled Laws § 750.145c(b) defines a "child" as "a person who is less than 18 years of age".

As noted above Hill was charged with 5 counts of violating § 750.145c(2) by "`arrang[ing] for, produc[ing], mak[ing], or financ[ing]'" child sexually abusive material, Hill moved to quash the charges against him on the premise that his conduct constituted possessing such material, not making or producing it. *People v. Hill, supra.* The trial judge denied his motion to quash the charges, explaining that

> the only question, one of apparent first impression, is whether the act of downloading the image from the internet and `burning' (recording) the image to a CD constitutes the `making' or `production' of such materials.
> The dictionary . . . contains several definitions of the word `make.' Among them are:
> `To cause to exist, occur, or appear; create; to fit, intend, or destine by, or as if by creating; to bring into being by forming, shaping, or altering material; to put together from components.'
> Applying this definition here, the `bottom line' is that, after the requisite, mechanical, and technical functions, some things exist (CD-Rs with these images on them) that did not exist prior to that act.

People v. Hill, supra. Hill appealed the denial of the motion to quash the charges to the Michigan Court of Appeals, which upheld the trial judge's ruling:

> Regardless of whether [Hill's] actions are viewed as copying the original photographs and videos, or copying electronic or computer visual images of the downloaded photographs and videos, the fact remains that copies and reproductions were made. Defendant's argument that use of the CD-Rs was just a mechanism by which to store possessed child pornography ignores the reality that the storing of the images was accomplished through the copying or duplication of already existing images that continued to exist after the images were burned onto the CD-Rs. The language of the statute is clear and unambiguous. The decision by the Legislature to specifically include reproductions or copies in defining `child sexually abusive material,' which term is then incorporated into § 750.145c(2), leaves no room for a contrary judicial construction.

People v. Hill, 269 Mich. App. 505, 715 N.W.2d 301 (Michigan Court of Appeals 2006)). The Michigan Supreme Court declined to hear Hill's appeal, he went to trial and was found guilty on all 5 counts. *People v. Hill, supra.* Hill appealed his conviction to the Court of Appeals, which affirmed the conviction and declined to reconsider its earlier decision on the producing versus possession issue. *People v. Hill, supra.* This time, the Michigan Supreme Court agreed to hear the case, and wound up reversing the Court of Appeals' decision and vacating Hill's convictions. *People v. Hill, supra*.

The Supreme Court began its analysis if the issue by noting that § 750.145c(2) creates a "graduated scheme" of offenses and punishments: producing child pornography (20 years); distributing it (7 years); and possessing it (4 years). *People v. Hill, supra.* The court then parsed the terms used in defining each component of this scheme:

> Those who arrange for child sexually abusive material are involved at the front end of the process by identifying and coordinating the participants, equipment, and locations. . . . [T]he arranger has undertaken actions that lead to the actual production of the child sexually abusive material. Those who finance child sexually abusive material provide funding that leads to the same result. . . . `Produce' refers to the conduct of those persons but for whom the production (the material) would not exist in the first place, i.e., those who have transformed an idea into a reality. Without those who have arranged for, financed, or produced, there would be no child sexually abusive material at all.

> This leaves . . . `makes.' Given the related definitions . . . of `arranges,' `produces,' and `finances,' we believe `makes' should be interpreted in a similar manner as meaning "`to cause to exist or happen'. . . . That is, `makes' should be interpreted in the common fashion as referring to someone who is primarily involved in the creation or origination of the child sexually abusive material.

People v. Hill, supra. The Supreme Court explained that given how these terms are to be interpreted, it

> is simply untenable to conclude that downloading an existing image from the Internet and burning it to a CD-R for personal use constitutes producing or making child sexually abusive material under § 750.145c(2). While such conduct certainly constitutes proof of knowing possession of such material, it does not constitute sufficient proof of the making or producing of that material.

People v. Hill, supra. The Supreme Court justices noted that they believed their

> conclusion is reinforced by consideration of the manner in which most persons . . . think about other types of Internet downloading. It is common for computer users to legally, and sometimes illegally, download songs, movies, television shows, music videos, and books from the Internet. When such materials are . . . burned to a CD-R or . . . some other storage device, . . . few would be inclined to characterize that conduct as the making or producing of that song, movie, television show, music video, or book. Such a characterization would, to say the least, be strained and incompatible with the `common and approved usage of the language. . . .'

People v. Hill, supra (quoting Michigan Compiled Laws § 8.3a). Section 8.3a of the Michigan statutes gives courts guidance as to how statutory language is to be interpreted, i.e., in a manner consistent with the "common and approved use" of particular terms.

As this news story explains, the trial judge vacated Hill's original convictions and sentences, the prosecutor amended the charges to 5 counts of possessing child pornography and 5 counts of using a computer to commit those crimes and Hill pled no contest to those charges. And as this story explains, a couple of weeks ago the trial judge sentenced Hill to "time served," i.e., the "more than three years" he'd served in prison on the original charges, plus 15 months of probation. The judge also required that he either complete a program of sex offender therapy "or at least earnestly seek full-time employment."