

## Child Pornography Related Crimes

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*this session*

- overview / selected elements of specific crimes
- some problems of proof
  - possession vs. viewing
  - defining sexually explicit conduct
  - proving real child

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Federal crimes:

mirror types of individual activity involving CP

- Production
- Sending/Distributing
- Receipt
- Possession
- Viewing: Knowingly accessing with intent to view
- Pandering [already discussed]



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possession: Where is the CP ?

- Offender's computer
  - accessed and downloaded images
  - user log files
  - Internet connection logs
  - browser history and cache files
  - email and chat logs
- Hand-held devices
  - digital cameras
  - PDAs
  - mobile phones

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**More locations of Evidence**

- Servers
  - ISP authentication user logs
  - FTP and Web server access logs
  - Email server user logs
  - LAN server logs, image collections
- Online activity
  - IP addresses of chat room contributors
  - digital evidence of involvement in CP activity

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**approaches to possession of CP**

see Note, 60 Fla. L. Rev. 1205 (2008)

- **dominion and control:**
  - what did def actually DO with image?
  - typical analogy: constructive possession in drug cases
- **seek and obtain:**
  - what did def do to FIND image?
- **Knowledge:**
  - what facts support finding that Def was AWARE of image?



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**Downloaded Image on computer**

- when image downloaded to computer's hard drive, user controls it's destiny
- may zoom in or out on image, enlarge it, print it, etc.

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clearly intentional acts – no conceptual problems as to "possession"

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Cache Memory

Just because it isn't downloaded...

- to speed up repeat viewing of previously visited website, computers **automatically** make copy of data from visited websites in form of "temporary Internet files" and store data in "cache"
- automatic -- no user prompt needed
- images can be reviewed and manipulated even when only in cache files

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typical claim

did not know images automatically downloaded to computer

Possession ?

Possession requires awareness [knowledge] that one has the object -- can one avoid that element because user ignorant about computers?

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Knowing Possession in Temporary Internet Cache

U.S. v. Romm, 455 F.3d 990 (9th Cir. 2006)

Def. admitted viewing CP online, viewing images in his temp internet files and then deleting them

held:

"In the electronic context, a person can receive and possess child pornography without downloading it, if he or she seeks it out and exercises dominion and control over it".

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Possession where no evidence of downloading

possession = exert control over

includes ability to

- detain images on monitor as long as he liked
- enlarge, copy, print, send to others
- delete from temporary files

U.S. v. Tucker, 150 F. Supp. 2d 1263 (D. Utah 2001), *aff'd*, 305 F.3d 1193 (10th Cir. 2002)

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another view of possession

possession = reaching out to images

- how shown:
  - search terms used to find files
  - images in cache
- not necessary to show aware of storage function of cache

Commonwealth v. Simone,  
2003 WL 22994245 (Va. Cir. Ct. 2003)

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Deletion

U.S. v. Bass, 411 F.3d 1198 (10th Cir. 2005)

found Def "knowingly" possessed CP files through evidence that he used deletion function on computer to remove files from cache

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**new challenges: rooms in virtual world**



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**"viewing"**

- Feds :

**"knowingly accesses with intent to view ...."**  
18 U.S. C. sec. 2252A(5)(A)

- States: most have not followed

Note, 30 Western N. England L. Rev. 817 (2008)

- Wisconsin: mere viewing = possession

State v. Mercer, 782 N.W.2d 125 (Wis. App. 2010)

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**distribution?**

Undercover agent receives this email:

- Hey, check out this link, [www.NCJRL.org](http://www.NCJRL.org), it has really great child porn !!!

OR

- Hey, check out this link, [www.olemiss.edu/depts/ncjrl/FourthAmendment/fai\\_judicial.html](http://www.olemiss.edu/depts/ncjrl/FourthAmendment/fai_judicial.html), it has really great child porn !!!

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U.S. v. Navrestad,  
66 M.J. 262 (U.S. Armed Forces 2008)

- sending hyperlink NOT distribution
- must be data "capable of conversion into a visual image" 18 U.S.C. 2256(5)
- hyperlink: electronic address or way to display a website -- does not move a file or document from one location to another
- contrast: sending file by email attachment *is* distribution

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"Child Pornography"

- visual depiction (photo, film, video, digital)
  - of **sexually explicit conduct**
  - **using minor** (under 18) engaging in the conduct  
*or*
  - digital or computer-generated image that is, or is indistinguishable from, a minor  
*or*
  - created or modified to appear that identifiable minor is engaging in act
- 18 U.S.C. § 2252A CP Prevention Act

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some problems of proof

- Is image sexually explicit?
- Does image depict real child?

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"Sexually explicit conduct"

■ Sex acts

■ Actual or simulated

- sexual intercourse (genital-genital, oral-genital, anal-genital, or oral-anal, between persons of same or opposite sex)
- bestiality
- masturbation
- sadistic or masochistic abuse

or

■ "Lascivious exhibition" of genitals or pubic area

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"Lascivious Exhibition"

■ Nudity not required

U.S. v. Knox, 32 F.3d 733 (3rd Cir. 1994)

■ Six factors + others appropriate to case

U.S. v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986)

U.S. v. Hill, 459 F.3d 966 (9th Cir. 2006)

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"Lascivious Exhibition"

■ Test: Six non-exclusive factors: *Dost*

- Focal point -- genitals or pubic area?
- Setting sexually suggestive?
- Child in unnatural pose or inappropriate clothing?
- Child fully or partially clothed, or nude?
- Suggest coyness or willingness to engage in sexual activity?
- Intended to elicit sexual response in viewer?

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is it a real child?

- jury question -- don't need expert

U.S. v. Vig, 167 F.3d 443 (8<sup>th</sup> Cir. 1999)

- available evidence includes --- PIC itself

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Justice Stewart

"I know it when I see it."



Jacobellis v. Ohio, 378 U.S. 184 (1964)

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additional evidence on whether real child

Child Victim Identification Project



Mission

- Identify unknown child victims featured in child pornography images
- Assist in prosecutions of child pornography cases

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**Known image data bases**



NCMEC identifies images by comparing with known series

- provides name of person (detective) able to testify *is* real child
- Problems:
  - often only one, or few, competent witnesses who can so testify
  - those witnesses deluged with subpoenas
  - many are outside U.S. and not subject to subpoena

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**More evidence . . . .**

- What does suspect call pics?
  - title of image
  - labels on disk: "perv" file
  - manner in which image advertised
  - emails / statements by defendant
- website memberships "Lolitagurls.com"
- volume of images  
more pics, more expertise to create, alter lighting, background, proportions to maintain consistency
- meta data within image

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**Magazine images**

can prove image is real child by showing published prior to computer image alteration/creation technology became commercially available

**U.S. v. Guagliardo,**  
278 F.3d 868 (9<sup>th</sup> Cir. 2002)

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more evidence . . . .

- **choice of pictures**

is same child clothed? waste of time to create?

- **Evidence of trading**

- **Expert testimony:**

- **Medical expert / pediatrician's opinion**

e.g., body fat, proportions, movements of child that age

- **Digital Imaging Expert**

- **Photographic Expert**

- **Expert re: economics of technology**

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good case on proving "real" child

**U.S. v. Marchand, 308 F. Supp. 498 (D. N.J. 2004)**

analyzes some typical factors:

- **magazine images**

- **expert who had studied the images re -physical development of child**

- **law enforcement testimony re -- had met the child**

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