evolution of digital Child Pornography regulation

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presentation overview

- background
- four basic forms of criminal activity involving CP
  - pandering
  - real CP
  - virtual CP
  - morphing CP
- case law on probable cause to get warrant
Impact of Internet, Technology

- Access to vast quantities of images
- Images instantly available
- Creation of new images facilitated, plus conversion and circulation of earlier magazine and film images
- Collectors seemingly anonymous
- Communication and image sharing among users facilitated
- **Exacerbation of victimization**
  - images circulate indefinitely
  - re-victimized each time images viewed
internet child pornography collectors

no typical profile ----

- Store images on computer media
- Collect as many images as they can
- Tend to organize collections
- Keep collection for long time
internet child pornography collectors

Cyber tips as of 9/20/06
some statistics

- 62% of commercial child abuse sites are in US
- 10,656 URLs with child abuse content
- “images of child sexual abuse today are more disturbing, more graphic, and more sadistic than ever before....”

USDOJ Project Safe Childhood Guide
## Published Search and Seizure Appellate Court Decisions

<table>
<thead>
<tr>
<th>Year</th>
<th>State</th>
<th>Federal</th>
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<tbody>
<tr>
<td>2007</td>
<td>9 (5)</td>
<td>14 (9)</td>
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<td>2006</td>
<td>17 (9)</td>
<td>14 (8)</td>
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<td>20 (15)</td>
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<td>2004</td>
<td>14 (11)</td>
<td>6 (4)</td>
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<tr>
<td>2003</td>
<td>7 (6)</td>
<td>6 (6)</td>
</tr>
<tr>
<td>2002</td>
<td>9 (7)</td>
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<tr>
<td>2001</td>
<td>6 (4)</td>
<td>7 (4)</td>
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<tr>
<td>Pre-2001</td>
<td>16 (8)</td>
<td>26 (14)</td>
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<tr>
<td>Total</td>
<td>91 (58)</td>
<td>100 (66)</td>
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- **Green** - Total cases
- **Yellow** - Child Porn

*Excludes F. Supp. & military*
regulation of CP -- some background

- "Pornography" is protected speech

- "Obscenity" not protected

  *Miller v. California, 413 U.S. 15 (1973)*

  - Average person, applying contemporary community standards, finds work as whole appeals to prurient interest

  - Work depicts or describes in patently offensive way sexual conduct specifically defined by applicable state law

  - Work, as a whole, lacks serious literary, artistic, political, or scientific value
child pornography is distinct category of prohibited speech


banned distribution / manufacture

* does not have to meet obscenity test

rationale

* safeguarding well-being of child
* permanent record of abuse
* close distribution network to combat abuse
* advertising / selling:
  economic motive is integral part of abuse
* de minimis value of CP
permissible to ban mere possession of CP

* permanent record of abuse

* encourages possessors to destroy images
  
  {dry up market}

* reduces use of images for “grooming”
“Child Pornography”

1. **using minor** *(under 18)* engaging in the conduct

   or

2. **digital or computer-generated image** that **is,** **or** is indistinguishable from, a **minor**

   or

3. **created or modified** to appear that **identifiable minor is engaging in act**

   18 U.S.C. § 2252A CP Prevention Act
“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
“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. Hill*, 459 F.3d 966 (9th Cir. 2006)
“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?
permissible to ban possession of “real” CP

*Osborne v. Ohio*, 495 U.S. 103 (1990)

is it a real child?
is it a real child?

- **jury question** -- don’t need expert

  *e.g.*, U.S. v. Vig, 167 F.3d 443 (8th Cir. 1999)

- available evidence includes ---
  - PIC itself
  - Known image databases
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

- **Magazine images**
  - (pre-date morphing technology)

- **meta data** within image
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
"Virtual" child pornography


- rejected "appear to be minor"

- new statute: digital/computer image that is or is indistinguishable from a minor
Ashcroft v. Free Speech Coalition

the statute "prohibits speech that records no crime and creates no victims by its production"

* rejected dry up the market theory
  {whet appetite for real CP not enough}

* protect real kids from sexual abuse

overbreadth
  * included young adults
  * included artistic works
“Indistinguishable”

Ordinary person would conclude depiction is of actual minor engaged in sexually explicit conduct

inapplicable to
drawings,
cartoons,
sculptures,
paintings

affirmative defense for most crimes: image is adult or not “actual minor”
computer
video
games
popular science:

top 10 hurdles to making video games

1. processing power

"like re-creating the sistine chapel with a couple of crayons"

processing power doubles every 18 months
2. Water

3. human faces
5. artificial intelligence

6. light and shadows
6. Fire

7. Material Physics

8. realistic movement

9. True to life simulation
10. Motion capture

dirty dancing
state of technology

Problems creating image of person:

- Correct form, proportions of body
- Facial expressions
- Color, texture of skin
- Interaction of light with above

Digital imaging experts:

Current technology does not allow creation of computer generated images indistinguishable from real.
#3. created or modified to appear that identifiable minor is engaging in act
Ashcroft v. Free Speech Coalition

decided to address constitutionality of

but noted:

morphed images "implicate the interests of real children and are in that sense closer to Ferber"
http://www.planit3d.com/source/tutorial_files/poser7/2/p7controls1.html
commercially available programs

http://www.greenbriarstudio.com/3D/C4Dmorphs.htm
bill and hillary

george and tony blair
paris hilton morphed with emperor from star wars
Angelina Jollie and Jennifer Lopez
listed as best morph on site

#1

www.MorphThing.com
Crimes

- Production
- Sending/Distributing
- Receipt
- Possession
  - Viewing, “Browsing”, or “Reaching out” to images to view them on Internet?
- Pandering
“possession”?

- Images viewed online are automatically saved to temporary Internet files / cache
- Images can be reviewed and manipulated even when only in cache files
- Images deleted after viewing are still recoverable

When does a user “exercise dominion and control” over the images?
virtual worlds


**create own virtual space**
- chat and interact with your friends in rooms you create

**express yourself**
- customize your avatar and stream personal videos and photos

**add your room to your site**
- Invite your friends to chat and decorate
virtual worlds

AVATAR - Graphical representation of you.
(note) - It's probably not a realistic depiction.
conversations

NOTE: Be advised that we frequently ERP in guild chat and often engage in even potentially offensive kinks such as (Extreme) Ageplay, Bestiality, Child Birth, [something censored by the WoW forums], Watersports, or any other kink those playing may wish to explore.
virtual Porn
rooms in virtual world
"knowingly ... advertises, promotes, presents, distributes or solicits ... any material or purported material in a manner that reflects the belief, or is intended to cause another to believe, that the material or purported material is, or contains" CP

**does not violate 1st Amendment [overbreadth claim]:**

- does not include criminalize substantial amount of protected expressive activity because CP categorically excluded from 1st protection

- govt can ban *both* fraudulent offers and offers to provide illegal products

**does not violate Due Process: [impermissibly vague claim]**

- provides fair notice to person of average intelligence of what is prohibited
Williams dissent (Souter + Ginsburg)

majority undermined *Free Speech Coalition* which distinguished between fake CP and real

cannot prosecute persons for trafficking in material that does not depict real children

TH: cannot prosecute for pandering such material
location of 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
**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
probable cause statements: child pornography cases

Search warrant must establish:

1. Is image sexually explicit?
   
   Give as much detail as possible and/or attach image

2. Does image depict real child?
   
   Affiant's statement that image appears to be that of real child is sufficient

E.g., U.S. v. Love, 516 F.3d 580 (7th Cir. 2008)
   (estimated age of person depicted)
Do you have probable cause to believe "mere" member has CP on his computer?

considerations:

- does site have both legal / illegal materials? -- if so, less likely probable cause exists

- what if site has only illegal materials?
  - some courts: mere membership = probable cause
  - other courts: not enough -

*See U.S. v. Shields*, 458 F.3d 269 (3rd Cir. 2006) (collecting cases)
additional info beyond membership

- put in statement of PC additional info that substantiates suspect's sexual interest in children or child porn, such as:
  - site focus is clearly CP
  - evidence of actual downloading of child porn
  - automatic transmission as part of site's services
  - use of suggestive screen names / email addresses
    - (ex) Littlebuttsue; Littlelitgirly
  - prior convictions for sex offenses involving children or child porn
more PC evidence ....

- possession of child erotica

U.S. v. Hansel, 524 F.3d 841 (8th Cir. 2008)
Affidavit that person has CP and characteristics of collector include keeping for long periods of time.

- **Almost** universally held to overcome staleness claims.

  E.g., **U.S. v. Morales-Aldahondo**, 525 F.3d 115 (5th Cir. 2008) (3 years since last download)

  **U.S. v. Perrine**, 518 F.3d 1196 (10th Cir. 2008) (111 days after chat room/images displayed on web cam)

Justice Stewart

“I know it when I see it.”

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