

Friday, December 1, 2006

**More on child pornography defense.**

This follows up on my November 27 blog entry on child pornography defense, with more ideas about defending such cases: - On November 30, I updated my original November 27 blog entry with further information about 18 USCS § 3509(m), which became law the middle of this year, which provides that "In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title [18 USCS § 2256]) shall remain in the care, custody, and control of either the Government or the court." - Earlier this year, an Oklahoma federal judge mandated that in order for a child pornography charge to proceed against a defendant who allegedly accessed websites containing child pornography, the prosecutor would need to submit a proposed approach for the defense to have access to those websites without exposure to prosecution. U.S. v. Shreck, 2006 U.S. Dist. LEXIS 59724 (N.D. Okla. Feb. 8, 2006). Thanks to Lawofcriminaldefense for covering this case. - In August 2006, 445 F. Supp. 2d 152 (D. Mass. 2006), and November 2006, federal trial Judge Nancy Gertner (D. Mass.) placed substantial limits on the presentation of expert testimony about whether actual children appeared in alleged child pornography images -- and limitations on presenting the images themselves -- by requiring the prosecution to show that the images are of real people in the first place. The case is U.S. v. Frabizio, Crim. No. 03-10283 (D. Mass.). For child pornography prosecutions, the prosecution must prove that an image depicts actual children to sustain a conviction. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); U.S. v. Hilton, 386 F.3d 13, 18 (1st Cir. 2004). Judge Gertner's August 2006 order does an excellent job of showing how the technology now exists to make virtual images look staggeringly like real people: "A significant body of literature also indicates that digitally manufactured images may be confused with real photographs. Faculty in the Department of Computer Science at Dartmouth College, for example, have noted 'photorealistic images can be created that are nearly impossible to differentiate from photographic images.' S. Lyu and H. Farid, 'How Realistic is Photorealistic?' 53(2) IEEE Transactions on Signal Processing (2005) (available at <http://www.cs.dartmouth.edu/farid/publications>). n6 Other articles suggest that such virtual image creation can be achieved using current technology and that even 'experts cannot know whether a digital image is real or virtual.' Timothy J. Perla, Attempting to End the Cycle of Virtual Pornography Prohibitions, 83 B.U. L. Rev. 1209, 1216 (2003). See also, A.C. Popescu and H. Farid, 'Exposing Digital Forgeries by Detecting Traces of Re-Sampling,' 53(2) IEEE Transactions on Signal Processing (2005) (available at <http://www.cs.dartmouth.edu/farid/publications>) ("[D]igital images can be easily manipulated and altered. Digital forgeries, often leaving no visual clues of having been tampered with, can be indistinguishable from authentic photographs"); Caught On Camera, NEW SCIENTIST, Sept. 6, 2003 at 5 ('Warnings about the potential for faking digital images are not new. But the proliferation of cheap digital cameras and computers, together with programs for altering photos and editing video footage, is turning that potential into reality. Where once a specialist was needed to alter analogue images, even beginners can now create digital fakes good enough to fool discerning experts.'). But see Susan S. Kreston, Defeating the Virtual Defense in Child Pornography Prosecutions, 4 J. High Tech. L. 49, 62 (2004) ('Creating realistic images of people . . . continues to be very difficult, with the difference between a real picture and one created by a computer, even using today's best technology, being discernable to the human eye.'). Frabizio, 445 F. Supp. 2d at 157-58. The August 2006 Frabizio opinion includes the following three URL's showing excellent examples of manipulated images that look strikingly like real people: "<http://forums.cgsociety.org/showthread.php?t=141461>; (depicting a nude woman in the fetal position); <http://forums.cgsociety.org/showthread.php?t=361465> (showing a remarkable likeness of actress Jennifer Garner); see also <http://forums.cgsociety.org/showthread.php?t=160012>." Frabizio, 445 F. Supp. 2d at 158. Will prosecutors ever be able to meet their burden to show that alleged child pornography is not manipulated imagery? The August 2006 Frabizio opinion answers: "Whether the images in this case are real or virtual cannot be determined based on mere observation, however, even by a photographic expert. More specialized, computer-based knowledge is required to exclude the possibility that the pictures are wholly virtual." Frabizio, 445 F. Supp. 2d at 170. Thanks to Ohio lawyer Dean Boland for blogging on this case. - On November 27, 2006, the Ninth Circuit provided clarification of the meaning of "possession" of child pornography on one's computer: "Where a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images." U.S. v. Kuchinski, No. 05-30607 (9th Cir. 2006). Jon Katz.

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