

Recent Case Report

U.S. v. Gourde

(9th Cir. en banc 2006) __ F.3d __

ISSUE

Did officers have probable cause to search the defendant's computer for child pornography based on his membership in a website that mainly provided downloads of such images?

FACTS

FBI agents became aware of a website called "Lolitagurls.com" which sold internet access to "over one thousand pictures of girls 12-17."¹ Visitors to the site were shown photos of the genital areas of three prepubescent girls, and were informed that if they wanted to view and download these and other photos they had to join, which meant paying \$19.95 per month. Payment was made by credit card through a company called Lancelot Security. An agent joined and confirmed that the website provided images of "naked prepubescent females with a caption that described them as twelve to seventeen-year old girls."

Consequently, agents obtained a warrant to search the owner's home and his computer. Stored in the computer, they found "over 100 images of child pornography." Agents then subpoenaed the records of Lancelot Security and learned that one of the active members was Micah Gourde of Washington who had joined two months earlier.

Five months later, an agent obtained a warrant to search Gourde's residence and computer for child pornography. The affidavit alleged that Gourde was a collector of child pornography based mainly on his membership in a subscription-only website that featured child pornography and advertised having hundreds of images of girls 12-17 years old "engaged in sexually explicit conduct." Furthermore, the affidavit explained that, according to the FBI's Behavioral Analysis Unit, most collectors of child pornography "rarely, if ever" dispose of their collections. And even if Gourde had "deleted" some files, they were not actually erased "but were kept in the computer's 'slack space' until randomly overwritten."

During execution of the warrant, agents found over 100 images of child pornography and erotica on Gourde's home computer. When Gourde's motion to suppress the images was denied, he pled guilty to possession of child pornography.

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¹ **NOTE:** The website contained this disclaimer: "This site is in full compliance with United States Code, Title 18 Part I Chapter 110 Section 2256" [which criminalizes the possession, receipt and transmission of child pornography]. But because it was apparent that the site did not comply, the court noted that this disclaimer "is mere window dressing that absolves the owner or users of nothing."

DISCUSSION

Gourde contended that the warrant was invalid because the affidavit failed to demonstrate that he had actually downloaded or possessed child pornography. Although there was no direct evidence on these points, the court ruled the circumstantial evidence satisfied the test for probable cause because, when considered as a whole and in light of common sense, it demonstrated a “fair probability” that illegal child pornography would be found on Gourde’s computer.² The circumstances cited by the court included the following:

- (1) It was apparent that Lolitagurls.com “was a child pornography site whose primary content was in the form of images.” Although the affiant neglected to explain how these images met the legal definition of child pornography, this was not fatal to the warrant because the affidavit included the owner’s admission to the agents that he sold “illegal images.”
- (2) As a paying member of the website for over two months, Gourde “had access and wanted access to these illegal images.”
- (3) Gourde could not have become a member accidentally by, for example, clicking the wrong button. Nor did he merely browse the website, taking advantage of the “free tour.” Instead, he “paid to obtain unlimited access to images of child pornography knowingly and willingly, and not involuntarily, unwittingly, or even passively.” As the court pointed out, to become a paid member is a “giant leap.”
- (4) It is reasonable to infer that “someone who paid for access for two months to a website that actually purveyed child pornography probably had viewed or downloaded such images onto his computer.”
- (5) Even though the FBI had closed down the website five months earlier, there was a fair probability—actually a “near certainty”—that illegal images would be stored in Gourde’s computer because, according to the Behavioral Analysis Unit, collectors “have difficulty obtaining images of child pornography” and are therefore “inclined to download and keep such images for a long period of time, and they ‘rarely, if ever, dispose of their sexually explicit materials.’”

Consequently, the court concluded that “the reasonable inference that Gourde had received or downloaded images easily meets the ‘fair probability’ test” and, therefore, “the search warrant was supported by probable cause.”³ POV

² See *Illinois v. Gates* (1983) 462 U.S. 213, 231, 238; *Illinois v. Rodriguez* (1990) 497 U.S. 177, 184; *People v. Kraft* (2000) 23 Cal.4th 978, 1040-1.

³ **NOTE:** Gourde also argued that probable cause did not exist because the agents could have determined for sure that he had downloaded images by examining the owner’s computer. The court responded that while this would certainly have been relevant, it did not negate probable cause.