

On July 16, 2003, at one of these visits, Mr. Sanderson, in the course of inspecting Defendant's computer, found child pornography on the computer in a file downloaded from the internet and maintained in a "my favorites" folder.

The government's next witness was James Janco of Comcast, a provider of computer services through cable networks. Mr. Janco manages the Comcast Network Abuse Department and testified that Comcast provided internet service to Defendant from 2002 through October 14, 2003 at Defendant's home at 954 Cornwallis Drive. The government presented this testimony in an effort to prove the Defendant received the images of child pornography found on his computer through interstate commerce. The statute under which Defendant is prosecuted requires that the child pornography which the Defendant is accused of receiving, "has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer. . . ."¹

Mr. Janco testified that when a computer user attempts to access the internet, the connection to the internet would originate from the consumer's computer, go through the cable modem, both of which are located in the customer's home, and the request would be sent to what Comcast calls a "Regional Data Center" which is a termination point for all connections of its subscribers in a general area. The Comcast Regional Data Center for Defendant is located in Pennsylvania:

It takes the customer's request along with many other requests in that geographical area and it triages it to a number of different switches within that regional data center. In essence it's a transfer

¹Although there does not appear to be any dispute that the Defendant "possessed" the material, and this would itself subject him to conviction regardless of the dates of receipt, the government acknowledged that the indictment charges that the Defendant "knowingly received" the material and thus the government was obliged to prove that the material traveled in interstate commerce, and also the date of receipt. See N.T. at 52-53.

point, it's taking the request from the end user and ultimately sending it out to the internet.

Q. And when you say sending it out to the internet, what does that entail?

A. It entails receiving – sending within the regional data center the request from the, when we call universal broadband router, which is where the subscriber's modem would actually terminate, it would send it to another router, again we're still within the regional data center, ultimately it would, what we would call, hop to a core router, again within a regional data center and from that point, the request would be sent to the internet backbone, which is a series of leased, commercial and private lines.

Q. And are those entirely within the state of Pennsylvania?

A. No, they are not.

(N.T. at 37)

Mr. Janco testified that Comcast would send the message to the “requesting server, whatever the internet site is that the user was trying to access . . . it isn't a direct telephone line, but rather based on what we call, shortest path first. . . .” (N.T. at 38). Mr. Janco testified that the message could be routed through other states and then come back to Pennsylvania. Mr. Janco testified that when a consumer logs on to an internet site, the message could be routed anywhere the server is physically located. However, the Comcast records would not show for a particular date what route a message sent on Defendant's computer would have taken. On cross examination, Mr. Janco testified that he could not tell, as to the websites Defendant accessed during the time period of the indictment, where the servers for those websites were located or whether Defendant used any lines in accessing websites that went outside the state of Pennsylvania. (N.T. at 42-43).

Mr. Janco also testified that the use of the internet would not necessarily involve interstate traffic; although Comcast could possibly monitor the source and receipt of specific internet messages if it deployed intercept boxes on targets, such as in compliance with FISA orders. In the normal course of its business, Comcast does not monitor traffic and thus cannot tell whether specific traffic, in connection with a specific user's assessing a specific website, occurred in Pennsylvania or not. See N.T. at 54-55.

The government next called Donald Justin Price, an FBI agent with training in computer forensics who testified that a computer user who had certain web addresses, such as child pornography, in his "my favorites" folder, would have to have taken affirmative action to place them there. The witness also examined the hard drives of the three computers seized from the Defendant. From his examination, Agent Price testified that he could determine the times and dates of the computer downloads by Defendant relevant to Count II of the indictment.

There was also a stipulation between the parties that as to Count II, the material was received within the dates charges and within the statute of limitations. Thus, the statute of limitations argument of the Defendant only applies to Count I.

There were certain other stipulations between the parties, including that the images both charged in Counts I and II are images of child pornography and that the approximate number of images listed in each computer in Counts I and II are correct, and that Defendant was in knowing receipt of these materials. (N.T. at 49-50).

Following the government's evidence, the Defendant moved for a directed verdict and rested. (N.T. at 57-58). The parties thereafter submitted post-trial briefs and the matter is now ready for a decision.

The government contends that the facts proven are sufficient to show that the offenses were committed within the statute of limitations as to Count I. The Defendant disputes that the offense alleged in Count I was proven as committed within the statute of limitations. The Defendant also asserts that the government did not prove the interstate commerce nexus as to both Counts.

As to the statute of limitations issue, the Court finds that the government did not prove beyond a reasonable doubt that the offense charged in Count I of the indictment was committed within the period of the statute of limitations. There is no evidence as to when the material was received, and no evidence from which the Court can make an inference. Thus, the Court will grant the Motion for Judgment of Acquittal as to Count I. As to Count II, there is no dispute that the evidence is sufficient to show that the offense was committed within the statute of limitations.

With regard to interstate commerce, the parties and the Court have not found any Third Circuit case on point. The leading cases on this issue appear to be U.S. v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997) and U.S. v. Runyan, 290 F. 3d 223, 249 (5th Cir. 2002), citing other decisions and holding that transmission of photographs by means of the internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce for purposes of 18 U.S.C. § 2251, as to which the interstate commerce requirement is identical to the statute under which the present indictment is brought. See U.S. v. Kimler, 335 F.3d 1132 (10th Cir. 2001) (dictum).

Numerous courts have held that the modern phenomenon of the internet is thoroughly connected to and part of interstate commerce. See, for example, American Book Sellers

Foundation v. Dean, 342 F.3d 96 (2nd Cir. 2003), interpreting the “dormant commerce clause” (which protects against state regulations that erect barriers against interstate trade) and finding that internet usage is thoroughly part of interstate commerce. See, Note, The Dormant Commerce Clause and the Internet, 17 Harvard J. L. and Tech, 296 (2003).

The Court holds that the evidence which the government presented, that the images on the Defendant’s computers were received through the use of the internet, is sufficient to carry its burden of proof as to interstate commerce, and that it is not necessary to prove that the specific images were received from a source outside of Pennsylvania.

The Defendant asserts that the Supreme Court’s decisions in U.S. v. Lopez, 514 U.S. 549 (1995), U.S. v. Morrison, 529 U.S. 598 (2000) and Jones v. U.S., 529 U.S. 848 (2000) control, and that the federal jurisdictional requirement, that forbidden images must have been proven to have been transported in interstate commerce, must be interpreted to require the government to prove the passage of child pornography across state lines. Without such proof, Defendant argues only the states may criminalize the receipt of pornography within state lines. However, even after Lopez, the Third Circuit held in U.S. v. Rodia, 194 F.3d 465 (3d Cir. 1999), cert. denied 529 U.S. 1131 (2000) that the statute under which Defendant is being prosecuted was a constitutional exercise of Congress’ commerce clause power. This Court is bound by the holding in Rodia and therefore rejects Defendant’s reliance on Lopez and its progeny.²

²Cf. U.S. v. Maxwell, 386 F.3d 1042 (11th Cir. 2004) suggesting that Morrison requires reexamination of the holding in Rodia.

