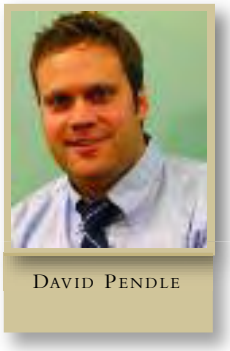
# *New York v. Kent:* Using Temporary Internet Files to Prove Possession of Child Pornography[1]

By David Pendle

**In a case of first impression** in New York, the Second Department of the Appellate Division held that temporary Internet files that show a defendant intentionally viewed child pornography on the Internet could support convictions for possession and promotion of child pornography, even though the images were not downloaded or otherwise manipulated by the defendant.[2] The case appears to be representative of a trend in a growing number of state courts, which are accepting evidence automatically stored in temporary Internet files as sufficient to support possession charges, so long as there is some indication that the images were not inadvertently accessed.

Temporary Internet files, or cache files, essentially represent an Internet browser's Web history. When an Internet browser accesses a Web site, any images, text, and even sounds produced by the site will be automatically stored in the cache on the user's hard drive. If the user later returns to the Web site, the browser will display the cached file rather than again retrieve it from the Internet, which is a slower process.



David Pendle

Using computer forensic software, a forensic examiner can retrieve images stored in the cache. Even where a cached image is "deleted" by the user, it may remain on the user's hard drive and be retrievable by a forensic examiner. Deleted images are merely moved from a hard drive's "allocated space" to "unallocated space." The computer makes files stored in unallocated space available to be overwritten by new files, but newly saved files are not necessarily saved in the same space on the hard drive as the old. Until this occurs, a forensic examiner may retrieve the "deleted" files.

*David Pendle is a staff attorney with the National Center for the Prosecution of Child Abuse, a program of the National District Attorneys Association.*

Recovered cache files only represent what the user actually saw on the computer screen. When viewed in isolation, the files do not indicate whether the user intentionally accessed the host Web site or how long the images were displayed on the computer screen.

In *New York v. Kent*, the defendant, after a nonjury trial, was convicted of two counts of promoting a sexual performance by a child and 134 counts of possessing a sexual performance by a child.[3] Under New York Penal Law § 263.15, a person is guilty of promotion when, "knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than seventeen years of age."The definition of "promote" includes to "procure,"[4] or simply "to get possession of: obtain, acquire."[5] Under New York Penal Law § 263.16, a person is guilty of possession when, "knowing the character and content thereof, he knowingly has in his possession or control any performance which includes sexual conduct by a child less than sixteen years of age." For both statutes, the definition of "performance" encompasses any "motion picture" or "photograph," which includes any "digital computer image."[6, 7]

Two of the defendant's 136 total convictions—one for promotion and the other for possession—were based on a single Web page found only in the cache and not otherwise saved by the user.[8] This Web page, titled "School Backyard," depicted children engaging in sexual intercourse with adults.[9] The cache revealed that within minutes of accessing "School Backyard," the defendant's Web browser also accessed three other Web pages, one labeled "Pedoland" and two with images of a young girl with her hands' bound.[10] In addition, the forensic examiner testified that the cache contained eleven other Web sites that, based on their titles, clearly described child pornography.[11]

*The court cited other state and federal decisions that addressed the evidentiary significance of files stored in the cache.*

Conversely, the pornography that served as the basis for the other 134 counts involved images and videos that were deliberately downloaded and saved to the defendant's hard drive.[12]

The defendant argued that the Internet cache evidence used to support two of his convictions was legally insufficient to establish that he promoted or possessed child pornography. He claimed that procurement, which is required for the promotion charge, is not satisfied "when a Web page is automatically saved in the cache without his knowledge or intentional act of downloading or saving it."[13] Similarly, he argued that he "did not knowingly possess the images in the cache because the temporary Internet files are automatically created and the People failed to prove that he had knowledge of this function on his computer."[14]

The court cited other state and federal decisions that addressed the evidentiary significance of files stored in the cache.

The court noted that the Tenth Circuit requires direct or circumstantial evidence that a user has actual knowledge that files are automatically stored in the cache, unless the images were explicitly downloaded or saved by the user.[15] The Ninth Circuit requires the same, which can be satisfied by evidence that the user saved or deleted cached files.[16] Courts in Alaska and Georgia have held that cache files are only evidence of prior viewing, which does not satisfy their possession statutes without some

additional evidence of dominion or control.[17]

The *Kent* court, however, found that other state courts have recently been less restrictive, upholding convictions based on evidence contained in the cache where there is merely a pattern of Internet browsing.[18] These courts reasoned that an inference arises that a defendant has sufficient control over an image of child pornography when he repeatedly visits similar Web sites. The required control is satisfied by intentionally accessing the material, even if the defendant does not download, copy, print, or otherwise alter the images.[19] Under this reasoning, whether the defendant is aware that his images are stored in the cache is irrelevant, as the images are evidence not of current possession, but prior possession: "'criminal liability arises not from the cached images themselves, but rather from the images that the user originally searched for, selected, and placed on his computer screen.'"[20]

*The Kent court continued the trend of affirming convictions premised on evidence of child pornography contained in cache files so long as the prosecution can show that the defendant accessed the material intentionally.*

The court in *Kent* noted that the "underlying premise" in the holdings of other courts is that a defendant could not be found guilty of possessing, receiving, controlling, or procuring child pornography "merely upon evidence that files have been automatically stored in the cache. More is required."[21]

The "more," however, need not include evidence that the defendant was aware that the viewed files were automatically stored in the cache. The *Kent* court held that whether the defendant understood that his browser automatically stored the images is irrelevant.[22] Instead, evidence of prior possession, which the cache files represent, can be used to support a conviction.[23]

The "more" that the *Kent* court was referring to was some proof that the original possession was intentional, and not merely accidental. The court considered that (1) the defendant's cache files revealed that he had visited 11 child pornography Web sites; (2) four of the websites were visited within minutes of each other; (3) the defendant had deliberately saved other images of child pornography onto his computer (which constituted the basis for separate counts of possession); (4) the defendant had deleted some images, indicating a consciousness of guilt, and (5) the defendant indicated in a message that he was in possession of some child pornography and may need to "wipe" the disks.[24]

All of the above, the court found, demonstrated a pattern—a pattern of purposeful and knowing access to child pornography on the Internet.[25] The court held that this pattern was sufficient to prove that the defendant did not inadvertently or unknowingly access the child pornography Web sites found in the cache files.[26] As a result, the court upheld the defendant's convictions for both possessing and promoting child pornography for the counts based on the cache files.[27]

With its decision, the *Kent* court continued the trend of affirming convictions premised on evidence of child pornography contained in cache files so long as the prosecution can show that the defendant accessed the material intentionally. The Michigan Supreme Court, reaching a similar conclusion, recently acknowledged the reality that "[t]he internet has become the child pornographer's medium of choice. It strains credibility to think that the Legislature intended [through its possession of child pornography statute] to preclude the prosecution of individuals who intentionally access and purposely

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view depictions of child sexually abusive material on the Internet." [28] Arriving at the same conclusion, the Supreme Court of Pennsylvania noted that to find otherwise "would allow the purpose of this anti-child pornography legislation to be circumvented and the child pornography market to grow."[29]

*Prosecutors and investigators should explore their cases to determine whether cache files containing child pornography are representative of a defendant's intentional viewing of such material on the Internet.*

Indeed, some legislatures, recognizing the above, have explicitly closed the cache file loophole.[30]

Prosecutors and investigators should explore their cases to determine whether cache files containing child pornography are representative of a defendant's intentional viewing of such material on the Internet. The requisite intent can be inferred from a myriad of methods, including demonstrating that the defendant: (1) had an obvious pattern of Web browsing, (2) saved bookmarks for the unlawful Web sites, (3) entered pedophiliac Internet search terms, (4) paid for access to the sites, (5) was required to follow clearly illicit links to access the material, (6) had other Internet-based child pornography saved on the computer, (7) attempted to delete any cache files, or (8) provided any form of admission. If the intent can be found, charges are likely warranted.

1 *New York v. Kent*, 2009-07764, 2010 N.Y. App. Div. LEXIS 7405 (A.D.2d. Oct. 12, 2010).

2 *Kent*, 2010 N.Y. App. Div. LEXIS 7405.

3 *Id.* at *1.

4 New York Penal Law § 263.00[5].

5 *Kent*, 2010 N.Y. App. Div. LEXIS 7405 at *5.

6 New York Penal Law § 263.00[4]; *New York v. Fraser*, 96 N.Y.2d 318, 327 (2001), *cert denied*, 533 U.S. 951 (2001).

7 There are two distinctions between the statutes, both of which are not relevant for the purposes of this article: (1) the possession charge does not require proof that the defendant was the individual who initially procured the material, and (2) the promotion charge extends to victims who are up to 17, while the possession charge only applies to victims who are up to 16. *Kent*, 2010 N.Y. App. Div. LEXIS 7405 at *5.

8 *Kent*, 2010 N.Y. App. Div. LEXIS 7405 at *3-*4.

9 *Id.* at *3.

10 *Id.* at *3-*4.

11 *Id.* at *3. For example, one such site was labeled "The Best Lolita CP Sites," with "CP" standing for "child pornography." *Id.*

12 *Id.* at *3-*4.

13 *Id.* at *6.

14 *Id.*

15 *United States v. Bass*, 411 F.3d 1198, 1202 (10th Cir. 2005), cert denied, 546 U.S. 1125 (2006); *United State v. Tucker*, 305 F.3d 1193, 1204 (10th Cir. 2002), *cert denied*, 537 U.S. 1223 (2003).

16 *United States v. Romm*, 455 F.3d 990, 1000-01 (9th Cir. 2006), *cert denied*, 549 U.S. 1150 (2007).

17 *Worden v. Alaska*, 213 P.3d 144 (Alaska 2009); *Barton v. Georgia*, 286 Ga. App. 49, 648 S.E. 2d 660 (Georgia 2007).

18 *Wisconsin v. Mercer*, 324 Wis. 2d 506, 526-529, 782 N.W.2d 125 (2010); *Illinois v. Josephitis*, 394 Ill. App. 3d 293, 306, 914 N.E.2d 607 (2009); *Gant v. Texas*, 278 S.W.3d 836, 839 (Texas 2009); *State v. Jensen*, 217 Ariz. 345, 351-352, 173 P3d 1046 (2008).

19 *Pennsylvania v. Diodoro*, 601 Pa. 6, 18, 970 A2d 1100 (2009), *cert denied*, 130 S. Ct. 200 (2009); *Wisconsin v. Mercer*, 324 Wis. 2d 506, 526 (2010); *Tecklenburg v. Appellate Division*, 169 Cal. App. 4tth 1402, 87 Cal. Rptr. 3d 460 (2009); *Ward v. Alabama*, 994 So.2d 293, 301-02 (Alabama 2007).

20 *Ohio v. Hurst*, 181 Ohio App. 3d 454, 470 (2009), quoting Ty E. Howard, *Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files*, 18 BerkeleyTech LJ 1227, 1257 (2004).

21 *Kent*, 2010 N.Y. App. Div. LEXIS 7405 at *6.

22 *Id.* at *7.

23 *Id.*

24 *Id.*

25 *Id.* at *7-*8.

26 *Id.*

27 *Id.* at *8.

28 *Michigan v. Flick*. 2010 Mich. LEXIS 1630, *30 (2010) (holding that evidence of child pornography contained in temporary internet files coupled with the defendants' admissions that they had intentionally accessed the material was sufficient to establish constructive possession).

29 *Pennsylvania v. Diodoro*, 601 Pa. 6, 18, 970 A.2d 1100 (2009) (holding that intentionally seeking out child pornography and purposefully making it appear on the computer screen constitutes knowing control, regardless of how long the image is on the screen or whether the defendant downloads, copies, or prints the image).

30 The Virginia General Assembly amended its definition of "sexually explicit visual material" in 2007 to include any images "stored in a computer's temporary Internet cache when three or more images or streaming videos are present." Va. Code Ann. § 18.2-374.1:1 (2007). Also, after lower appellate courts held that cache files containing child pornography did not constitute "possession," the Pennsylvania General Assembly amended its possession of child pornography statute to include "intentional viewing." 18 Pa. Code § 6312 (2009); see also *Pennsylvania v. Diodoro*, 601 Pa. 6, 24-25, 970 A.2d 1100 (2009).

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