

Damages for possession of child pornography: legal possibilities and practical obstacles

C.E. Dettmeijer-Vermeulen & Linda van Krimpen



Corinne Dettmeijer-Vermeulen

Watching child pornography is not a victimless offence. The knowledge that child pornography in which they figure is circulating forever on the Internet can cause the victim great psychological harm. It is therefore correct that perpetrators of this offence¹ should be liable for the damage that possession of child pornography causes the victims. However, the nature of the offence raises a number of legal and practical issues which are discussed in this article.

Introduction

Judges impose an order to pay compensation on almost one in three persons convicted of a paedosexual offence.² The order is usually imposed on offenders who have been convicted of a hands-on³ sex offence.⁴ However, even hands-off offences, including possession of child pornography, can cause victimisation and damage.

Child pornography can be produced in various ways: its production is often preceded by sexual abuse of a child, but on occasion adolescents voluntarily produce images of themselves (sexting) or images are manipulated in a manner that makes them pornographic (virtual child

¹ This article concerns individuals who possess child pornography and those who provide access to child pornography pursuant to Article 240b of the Dutch Criminal Code (DCC), further referred to as 'possessors'.

² National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, *On solid ground. Tackling sexual violence against children*. The Hague: National Rapporteur 2014, pp. 219-220.

³ For the distinction between *hands-on* and *hands-off* sexual violence, see National Rapporteur on Trafficking in Human Beings, *First Report on Child Pornography*. The Hague: BNRM 2011, pp. 41-44.

⁴ National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, *On solid ground. Tackling sexual violence against children*. The Hague: National Rapporteur 2014, p. 220.



Linda van Krimpen

pornography). When the person in possession of the images knows the victim (because he is also the person who produced the image, for example) and abused the child for the purpose of producing it, awarding compensation is straightforward.⁵ The situation is different if the person in possession of the image does not know the child who is depicted and the child⁶ is (initially) unaware that the image of the abuse is in the suspect's possession. With the technology that is available for downloading and saving large quantities of child pornography, the person in possession of the pornography will generally not know the identity of the victims who are portrayed. A further complicating factor is the fact that the victims who are depicted can also come from a different country than the person in possession of the images.

1. Legal framework

As already mentioned, the production of a pornographic image of a child is often preceded by sexual abuse of the child. In the first place, the child depicted is the victim of hands-on sexual violence, often committed by the person who has produced the pornographic image. The filming of the sexual abuse adds a second dimension to the nature of the child's victimisation⁷ in the form of the consequences the child suffers from figuring as an object of the pornographic material.⁸

⁵ See, for example, Amsterdam Court of Appeal 26 April 2013, ECLI:NL:GHAMS:2013:BZ8885; Utrecht District Court 24 February 2012, ECLI:NL:RBUTR:2012:BV6879; Zwolle-Lelystad District Court 16 September 2010, ECLI:NL:RBZLY:2010:BR4213.

⁶ This can also be a person who was a minor at the time of the production of the image, but has since reached adulthood.

⁷ National Rapporteur on Trafficking in Human Beings, *First Report on Child Pornography*. The Hague: BNRM 2011, p. 70.

⁸ National Rapporteur on Trafficking in Human Beings, *First Report on Child Pornography*. The Hague: BNRM 2011, p. 70.

INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES

A German study⁹ has shown that professionals presume that the discovery of the existence of material showing the sexual abuse will always cause additional psychological stress for the victim.¹⁰ For many victims, the realisation of the permanent nature of the material in which they are depicted creates feelings of a total loss of control, powerlessness, helplessness, shame and fear.¹¹

1.1 Possession of child pornography and victimization

From a psychological perspective, therefore, the child portrayed can be a victim of the fact that the image depicting the sexual abuse is in the possession of a third party. It can also be assumed that the child is a victim from a legal perspective.

Pursuant to Article 51a(1) of the Dutch Code of Criminal Procedure (DCCP), a victim is 'the person who has suffered damage as a direct result of a criminal act'. As explained earlier, victims of child pornography can continue to suffer the (psychological) consequences of knowing that the images of the abuse can be seen by others for a long time. This psychological impact is the direct result of the crime that is punishable under Article 240b of the Dutch Criminal Code (DCC). In the so-called Amstelveen vice case, in which two suspects were tried for offences including possession of child pornography, it was found that the mere possession of child pornography can also cause victimization. In that case, which can be linked to the Robert M. case, some children had joined the proceedings as injured parties. The Amsterdam District Court ruled in an interim judgment:

"The court is further of the opinion that there can be victimization of a very young child not only due to abuse of the child, but also due to the possession of pornographic images or films in which the child is depicted."¹²

1.2 Possession of child pornography and compensation

A child can therefore be a victim solely of the possession of child pornography. The question then is whether the victim who is depicted also qualifies for compensation for damage suffered as a result of featuring in child pornography. Article 51f(1) DCCP provides that a person who has suffered damage as a direct result of a criminal

act can join the criminal proceedings to pursue a claim for compensation as an injured party. 'There is direct damage if a person is affected in an interest that is protected by the provision of criminal law that has been breached.'¹³ The interest protected by Article 240b DCC is 'the prevention of [...] sexual abuse of children and their exploitation.'¹⁴

That there can also be direct damage in the case of possession of child pornography is apparent from the aforementioned judgment of the Amsterdam District Court, which found as follows in its interim judgment:

"At this stage the question is whether the possession of child pornography can cause direct damage for the child who is depicted in that material. The court answers that question in the affirmative. Feelings of guilt and shame can be a direct consequence of the knowledge that a person is in possession of child pornography in which the individual concerned is depicted."¹⁵

In the final judgment, which followed a month later, the court ruled that by possessing and viewing the pornographic image of one of the victims, the suspect had seriously violated that child's fundamental right to privacy.¹⁶ As a result of that violation of Article 8 of the European Convention on Human Rights,¹⁷ the court ordered payment of €2,000 euro as an advance on the compensation for the child's immaterial damage.

The question of liability for damage arising from possession of child pornography also played a role in the case of Robert M., whose partner, Richard van O., was convicted on appeal, among other things, of co-perpetration of the offence of possession of child pornography. The Court of Appeal in Amsterdam ruled:

"In the cases in which it is found that it has been legally and convincingly proved that Van O. was guilty of co-perpetration of the crime under Article 240b DCC, he shall be ordered to pay €500 per child, since he has been convicted solely of possession of child pornography and not also of its production or distribution."¹⁸

¹³ C.P.M. Cleiren, J.H. Crijns & M.J.M. Verpalen, *Tekst & Commentaar Strafvordering*, Deventer: Kluwer 2013, art. 51f DCC, note 2.

¹⁴ C.P.M. Cleiren & M.J.M. Verpalen, *Tekst & Commentaar Strafrecht*, Deventer: Kluwer 2012, art. 240b DCC, note 4.

¹⁵ Amsterdam District Court, 21 June 2012, ECLI:NL:RBAMS:2012:BW9108.

¹⁶ Amsterdam District Court, 23 July 2012, ECLI:NL:RBAMS:2012:BX2325.

¹⁷ In this context, it referred to a judgement of the European Court of Human Rights on 15 January 2009, 1234/05 (*Reklos and Davourlis/Greece*), in which the unsolicited photographing of a new-born baby by the hospital's photographer in a private ward of the hospital was found to be a violation of Article 8 of the European Convention on Human Rights.

¹⁸ Amsterdam Court of Appeal, 26 April 2013, ECLI:NL:GHAMS:2012:BZ8895.

⁹ J. von Weiler, A. Haardt-Becker & S. Schulte. 'Care and treatment of child victims of child pornographic exploitation (CPE) in Germany'. *Journal of Sexual Aggression* 2010, 16(2), pp. 211-222.

¹⁰ National Rapporteur on Trafficking in Human Beings, *First Report on Child Pornography*. The Hague: BNRM 2011, p. 71.

¹¹ J. von Weiler, A. Haardt-Becker & S. Schulte. 'Care and treatment of child victims of child pornographic exploitation (CPE) in Germany'. *Journal of Sexual Aggression* 2010, 16(2), p. 211-222.

¹² Amsterdam District Court, 21 June 2012, ECLI:NL:RBAMS:2012:BW9108.

INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES

As far as is known, the above judgments are the only (published) judgments in which victims unknown to the perpetrator have joined a case as injured parties solely with respect to possession of child pornography. There have been no known cases involving possession in which a claim for compensation has been rejected by the court.

Accordingly, it is possible for a victim to recover damages from the possessor of the pornographic image on the grounds of Article 51f(1) DCCP. However, although there do not seem to be any legal obstacles, in practice the situation is more complicated. Some of the practical obstacles are discussed in the following section.

2. The complex practice

The two judgments discussed earlier concerned victims who were unknown to the perpetrator, but it was clear that the victims who were depicted could be linked to a hands-on case in which the perpetrator of the hands-on offences knew the possessor. What also made the cases more straightforward in practical terms was that both the possessors and the victims were from the Netherlands. However, in most cases the situation is not that simple. Child pornography is by its nature a transnational phenomenon. Once they have been produced and posted on the Internet, images are easily circulated around the world and can be viewed indefinitely by thousands of perpetrators in dozens of different countries. Depending on the legal framework in the country where the possessor is tried, victims depicted in those images can also claim damages from the possessors in those countries.

In this section, three issues relating to obstacles to claiming compensation are discussed: the formulation of the indictment; informing and notifying victims; and the allocation of damages among possessors. The latter subject will be explained in part on the basis of a recent judgment by the American Supreme Court.

2.1 Formulation of charges

With the rise of high-speed Internet and the increase in the storage capacity of data carriers, possession of child pornography now often involves far more than single images or short films, but embraces thousands and even millions of pornographic files. A practical consequence of this is that charges are not brought for each individual image. However, that in turn has implications for the possibilities for the victims who are depicted to recover damages.

In a recent judgment,¹⁹ the Dutch Supreme Court formulated principles for the assessment of criminal cases in which a suspect is charged with possession of a large quantity of child pornography. Regarding the method of drafting the indictment in this type of case, the Supreme Court found as follows:

¹⁹ Supreme Court, 26 June 2014, ECLI:NL:HR:2014:1497.

"[...] the foregoing means that the author of the indictment should preferably confine himself to describing a small number of images, if possible not more than five, without including any mention of or reference in the indictment to a possibly larger quantity of which those images are part."²⁰

The large-scale nature of the offence can then be taken into account in the sentencing:

"In that context, one option is the so-called addition of offences *ad informandum* if the applicable conditions are met."²¹

What are the consequences of this method of formulating the indictment for victims whose images are not included in the indictment? On the grounds of Article 361(2)(b) DCCP, the claim by an aggrieved party is also admissible when it relates to offences appended to the writ for the information of the court (*ad informandum gevoegde feiten*), provided the similar offence included in the indictment is declared proven and the offences appended *ad informandum* are admitted by the suspect. However, it does then have to be certain that the relevant image was part of the suspect's collection. The Supreme Court noted in its judgment that adding cases *ad informandum* constitutes recognition of the large-scale nature of an offence, thus avoiding the need for a discussion of the specific images or the precise quantity of child pornography involved.²² This can lead to problems if it is uncertain whether the victim who is claiming compensation is depicted in any of the images in the suspect's collection. In that case, a possible solution might be to include a list of file names in the case file, from which a link can be made with a victim who has joined the case as an aggrieved party. However, another problem is that if the suspect denies the offences appended *ad informandum*, the victim will be left empty-handed anyway.

Accordingly, a decision by the public prosecutor's to bring charges only for a number of the images in a larger collection can have a major impact on the chances of the depicted victims receiving compensation, since it is impractical to bring charges for all of the images and the victim is left with nothing if the suspect denies possession of files that have been added *ad informandum*.

2.2 Informing and notifying victims

Pursuant to the Board of Procurators General's Instructions on Care of Victims²³, victims of sex offences must be informed of the possibility of claiming compensation. However, this is not yet standard practice when the image of a previously

²⁰ Supreme Court, 26 June 2014, ECLI:NL:HR:2014:1497, consideration 3.7

²¹ Supreme Court, 26 June 2014, ECLI:NL:HR:2014:1497, considerations 3.8.1 and 3.8.2.

²² Supreme Court, 26 June 2014, ECLI:NL:HR:2014:1497, consideration 3.8.2.

²³ *Government Gazette*, 2010, 20476.

INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES

identified victim is found in a later case involving possession of child pornography. Victims of child pornography are therefore not automatically notified. They will generally not even know that images of themselves have emerged in a case involving possession or, if they do, in which case they have been discovered.

One country where it is normal practice to notify victims is the United States. The US government is obliged to notify all identified victims whose images are discovered in criminal cases.²⁴ The victims can then decide to claim damages. Given the cross-border nature of the offence, this duty of notification cannot be confined to victims within the national borders of the United States. The practical effect of this is still unclear. However, the parents of some of the victims in the Amsterdam vice case have claimed compensation from possessors in the United States since their lawyers were notified by the American government.²⁵

Victims who are unaware that their images have been found in a case are also unable to join the case as an aggrieved party, even though as victims they are entitled to compensation for the damage they have suffered. It therefore seems that a logical first step would be to establish a system for notifying identified victims of child pornography in the Netherlands. However, victims (and the parents of young victims) should only be notified if they wish to be. Victims should be informed of the option of claiming compensation from (future) possessors when they are first identified by the police. The victims could then be explicitly asked whether they wish to be notified if an image of the abuse emerges in a later child pornography case. The victims should also be allowed to reverse their decision that they do or do not wish to be notified.

It is important that the necessary infrastructure is in place for victims who have said that they do wish to be notified. Although records are kept of whether the victims of images saved in the national child pornography database have been identified, that information is not linked to the personal details of the identified victims. There are also a number of aspects relating to privacy involved here. It would therefore be useful to start by studying the practice in countries like the United States, where such a notification system has been used for some time.

²⁴ National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, *On solid ground. Tackling sexual violence against children*. The Hague: National Rapporteur 2014, p. 221.

²⁵ 'Good chance of success for claims after child porn', De Telegraaf, 24 April 2014. Partly because of its unprecedented scale, from the outset the investigation in the Amsterdam vice case had an international character.

Another aspect that will have to be considered is how the Public Prosecution Service (PPS) can notify victims in other countries: how will the PPS discover their contact details and how will it know whether they wish to be notified? These and other questions are inherent to the complexity and transnational nature of child pornography and are best addressed at international level.

In order to award compensation, the victim's identity has to be known. In addition to a claim as an aggrieved party, an order to pay compensation and compensation as a special condition of sentencing, in the case of unidentified victims it is also possible to impose the special condition referred to in Article 14c(2)(4) DCCP, in which case the perpetrator is obliged to deposit a sum of money with the Criminal Injuries Compensation Fund. At present, the Fund only pays compensation to victims of hands-on sex offences, since hands-off sex offences, including possession of child pornography, are not regarded as violent crimes.²⁶ Victims of possession of child pornography are therefore unable to make any claim for compensation from it. This policy perhaps needs to be reviewed, since hands-off sex offences, including possession of child pornography, also fall under the broad definition of sexual violence and, as previously explained, can also have traumatic psychological consequences for victims.²⁷ Another option available under Article 14c(2)(4) DCCP is that the perpetrator would deposit the sum of money with an institution (that would still have to be established) created to represent the interests of – in this case – victims of child pornography.²⁸

2.3 Allocation of damages

A single image of a single victim can be viewed by thousands of people, now and in the future. In theory, a victim can claim compensation from everyone who possesses that image, if the perpetrator is convicted and legal system in that country allows it. At the time of the prosecution of a possessor, it is not known whether and, if so, how many other persons will be prosecuted for possession of the same image. How does the court decide the share of the damages that the relevant possessor is liable for?

²⁶ Information provided in a telephone call by the Criminal Injuries Compensation Fund, 7 July 2014.

²⁷ See National Rapporteur on Trafficking Human Beings, *First Report on Child Pornography*. The Hague: BNRM 2011 and National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, *On solid ground. Tackling sexual violence against children*. The Hague: National Rapporteur 2014

²⁸ 'The presumption in the Explanatory Memorandum is that the court will establish a relationship between the offence and the institution in favour of which the sum of money must be paid'. See C.P.M. Cleiren & M.J.M. Verpalen, *Tekst & Commentaar Strafrecht*, Deventer: Kluwer 2012, art. 14c, note. 7.

INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES

In the Robert M. case, Robert M. and his partner Richard van O. were found jointly and severally liable for the damages relating to the possession²⁹ of the child pornography. The joint and several liability applied solely for the possession, which is understandable in this case since the images were on their jointly owned computer and the cases were heard simultaneously. The court of appeal awarded the claims in full and fixed the share of the claims relating to possession at €500 for immaterial damage. Does that decision mean that the child's damages have been fixed once and for all? And what does that in turn signify, on the assumption of joint and several liability, for other persons who are found in possession of the same images as Robert M. and Richard van O. now or in the future? Or is it the case that the larger the number of possessors of the images, the greater the (immaterial) damage becomes? In that context, is distributing images more harmful to the victim than possessing them? These and many other questions are difficult to answer and will also have to be addressed and resolved in Dutch case law.

Quite apart from the allocation of damages among possessors, with only two rulings in the Netherlands it is also not yet possible to discern a pattern in the amount of damages awarded. Richard van O. had to pay his victims €500 each; the suspect in the Amstelveen vice case had to pay €2,000 as an advance on immaterial damages. By comparison, in a recent case (which is discussed in the next section) the American Supreme Court estimated the victim's total damages, material and immaterial, at \$3.4 million; because of the trauma she had suffered the victim was unable to complete her studies or find a job and she was unable to put the abuse behind her because the images continued to circulate on the Internet.

2.4 Paroline v. United States³⁰

The case of Paroline v. United States centred on 'Amy Unknown', who was sexually abused by her uncle when she was eight years old. The uncle produced and distributed pornographic material depicting the abuse. The series of pornographic images of Amy proved very popular in the following years; images of her were found on many computers, including the suspect Paroline's, on whose computer two images were found by the police nine years after the abuse had occurred.

The court of appeal in New Orleans ruled that Paroline was jointly and severally liable for the entire amount of damages and ordered him to pay the \$3.4 million for possession of the two images.³¹ The Paroline case ultimately reached the American Supreme Court, which was asked to rule on the causal link between viewing a number of images and the total damages. In view of her expertise, the Dutch National Rapporteur was asked by Amy's lawyer to give her opinion on this question by means of an *amicus curiae* brief.³²

The Supreme Court ruled, in line with the National Rapporteur's *amicus curiae* brief, that there was a causal connection between the damage and the possession of the images. The reaction was typified by the words of one of the nine judges, Justice Sotomayor, in response to Paroline's defence that there was no causal connection between his possession of the two images and the damage to Amy:

"Are you trying to tell me that when one person views these images he is liable for damages, and that when a thousand persons view these images nobody is liable? You've got to be kidding me!"

Contrary to what the National Rapporteur had advocated, however, the Supreme Court ruled that the suspect was only liable for his relative share of the damages, thereby rejecting joint and several liability for the total amount of the damages.³³ In reaching this decision, the Supreme Court discussed at length the doctrine of proximate cause, which embraces the causal relationship between an offence (possession of child pornography) and damage:

"The unlawful conduct of everyone who reproduces, distributes, or possesses images of the victim's abuse – including Paroline – plays a part in sustaining and aggravating this tragedy. [...] Thus, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in her images but where it is impossible to trace a particular amount of those losses to the individual defendant utilizing a more traditional causal inquiry, a court should order restitution in an amount that comports with the defendant's relative role in the causal process underlying the victim's general losses."

²⁹ Robert M. was also liable for the damage caused by the production and distribution of the child pornography. He and Richard van O. were not found to be jointly and severally liable for this element of the damages, since the latter was convicted solely of possession.

³⁰ Paroline v. United States et al., 23 April 2014, No. 12-8561.

³¹ In re Amy Unknown, 636 F. 3d 190, 201 (2011), United States Court of Appeals for the Fifth Circuit.

³² See for a complete description of the case and the accompanying documents: www.nationalrapporteur.nl/actueel/nieuws/2013/20131127-rapporteurlevert-bijdrage-aan-zaak-supremecourt.aspx?cp=63&cs=59417.

³³ In a dissenting opinion, one of the nine judges explained why she did in fact agree with the Court of Appeal in New Orleans, which had found that joint and several liability did apply for the full amount.

INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES

Because the Supreme Court found that allocating the entire amount of damages to a person who possessed two images was not proportionate, Amy will have to repeatedly join cases involving possession of the images as an aggrieved party in order to secure compensation of part of the total damages. In view of the undesirability of this situation for the victim, a bill to address it was recently submitted in the US Congress³⁴.

The judgment of the American Supreme Court, and the possible legal amendment ensuing from it, are also of interest to the Netherlands, not only for the question of how to deal with the issue of causality, but also because of the possible consequences for Dutch victims whose images are found in the possession of American citizens.

3 Conclusions

Victims of child pornography can suffer damage from the knowledge that images of their abuse are being viewed by others. They are therefore entitled to compensation for the damage caused by the possession of those images. In practice, however, scarcely any use is made of this possibility to claim damages from possessors in the Dutch courts. A first step would be to inform victims of their right and to notify them of the discovery of their images if they wish to be so informed and notified. There are a number of obstacles to the practical implementation of claims for compensation, mainly due to the complexity of the offence and its transnational character. It would be useful if further consideration were given to these aspects at international level, so that ways can be found of enabling victims to secure compensation for the damage caused to them by the possession of images of their abuse while making the fewest possible demands on them.

This article was first published in Dutch in 'Tijdschrift Praktijkwijzer Strafrecht', TPWS 2014/26.

C.E. Dettmeijer-Vermeulen* LL.M is the Netherlands' National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children.

L. van Krimpen LL.M is a researcher with the Office of the National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children.

³⁴ See www.huffingtonpost.com/james-r-marsh/congress-proposes-to-fix-_b_5619206.html?utm_content=buffer4d9a5&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer. The National Rapporteur set out her views for the Congressional Staff earlier this year.