

**“A Victim’s Perspective---One Attorney’s Experience  
Representing Victims of Child Pornography”**

**Presented by: Carol L. Hepburn, J.D.**

Carol L. Hepburn, P.S.

2722 Eastlake Avenue East, Suite 200

Seattle, WA 98102

Phone (206) 957-7272

Email: [carol@hepburnlaw.net](mailto:carol@hepburnlaw.net)

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*I am living with the horrible knowledge that someone somewhere is watching the most terrifying moments of my life and taking grotesque pleasure in them. I am a victim of the worst kind of exploitation: child porn. Unlike other forms of exploitation, this one is never ending. Everyday people are sharing videos of me as a little girl being raped in the most sadistic ways. They don't know me, but they have seen every part of me. They are being entertained by my shame and pain.*

*Vicky, 2009*

Representing victims of child pornography is challenging, but compelling, work. The injuries involved are unique. The clients are in great need of assistance on many levels. A private attorney can make a substantial difference in getting resources for a victim - financial, providing personal affirmation, and in repairing self esteem.

### **Background**

The term "child pornography" is, in reality, a misnomer. The term leaves open the possibility that there was some voluntariness in the behavior exhibited, that the pictures may be only titillating, "glamour" or modeling photos of overdressed little girls, the product of a creative digital effort with morphed animation, or adults posing as children. In truth, these are crime scene photos that depict graphic child sex abuse. There is nothing voluntary or glamorous about them. These are products of real crimes, and their possession, receipt, and distribution are separate, and very real, crimes with real victims.

Images may depict a child in lascivious poses, child on child sex acts, child masturbation, adult on child sexual penetration, or even bestiality. These crime photos depict rape and sodomy, bondage and torture of teens, tweens, school age children, toddlers and infants. The largest number of convictions appears to be for downloading or trading such images. A large volume are

obtained by offenders through peer to peer software which searches the web anonymously for images based upon search terms commonly used by pedophiles seeking these images. These include terms such as "pthc" for pre-teen hardcore, "lolita," short-hand descriptions of sex acts coupled with the age of the child depicted, or the name of the series of images sought.

"Series" are collections of images, all of the same child. Online pedophiles collect these like one would collect sports trading cards. Images may be stills, or videos. The videos are most often very short--less than a minute, or a few minutes in length. Sometimes a possessor will put together a compilation of stills or videos into a single file in order to aggregate the images and lengthen the viewing time. Series names are used as one method for a collector to organize his or her collection of images.

The nature of the crimes related to child sex abuse images is voyeuristic. It is as if the viewer sits in a darkened theatre and watches the crime taking place on the stage. What is important to remember in this context is that the voyeur shares responsibility with the producer of the image. The production would not occur but for the audience. In Vicky's case the producer of her images took orders from his fellow pedophiles for the type of "drama" they wished to see. He then scripted it out ahead of time and dressed her up to fit the part. If she did not play it well, he made her do it over and over again until she "got it right."

Child sex abuse images are used by some to groom other children for abuse. It has been reported by victims that they were shown images of other children prior to their own abuse, ostensibly in order to "normalize" the behavior. For some, a significant part of their injury is the guilt and fear that their images may be used by a pedophile to groom and abuse another child.

These images are used by some parents to advertise online for prostitution of their own children. The predators who respond will then sometimes produce more images while sexually abusing the children again. In some cases undercover agents successfully lure predators to their arrest using this ploy.

In addition to the spread of the images through peer to peer software, they may be posted on private, members-only bulletin boards, passed through IM chats, sold on commercial websites, or passed via direct email.

### **Symptomology in the Adult Survivor of CP**

Unlike most other crime victims, those who are the subjects Child pornography images suffer a crime that is current ongoing and will continue indefinitely. They are powerless to do anything about it. Law-enforcement is largely powerless to stop the crime. More than other types of cases, the shame

and humiliation that accompanies being the subject of distributed child sex abuse images puts multiple overlays on communication with the potential client and makes connecting with him or her a potentially delicate task. Because this is a current, on-going crime, the victim is vulnerable to continual potentially re-traumatization.

Child exploitation crimes have additional dynamics to them beyond the trauma that is suffered by any child sex abuse victim. Posttraumatic stress disorder, insomnia, anxiety, dissociative disorder, eating disorder, somatoform disorder, non-delusional paranoia, and depression are all diagnoses that you may see with this type of victim. Non-delusional paranoia was one diagnosis I had not come across in my practice before. These victims have good reason to be presently concerned and hypervigilant about being sought out by people with bad intentions.

A recent online survey conducted by the National Center for Victims of Crime in conjunction with the Crimes Against Children Research Center at the University of New Hampshire and the National Children's Alliance. This project, funded by the office for victims of crime of the US Department of Justice was undertaken in order to provide guidance and meeting the needs of a client population which has been underserved. Early findings of the survey were shared recently at the NCVV conference. The final report and recommendations are not yet out.

Although a small sample, the findings give insight, and certainly mirror my experience with my own smaller sample of four clients. The survey included 133 participants, approximately one third male and two thirds female. The majority were white and more than half over the age of 35. Seventy-two percent (72%) were age 9 or younger when first photographed and 93% had suffered hands-on abuse

The initial crime had been reported to police and only 23% of the respondents cases. Only 11% reported convictions. The majority, thus, had had no opportunity for victim compensation, nor for an order of restitution. Only 6% had retained a civil attorney for purposes of making a claim for damages.

Because many of these respondents were older, their initial crime had happened at a time when the Internet was less well-developed. Approximately one third said they had no knowledge about whether their images had been distributed on the Internet and half said their images had not been passed on to others. So for many, concerns about images of their abuse were not of great importance.

However, for the one third of respondents who said that the existence of images of their abuse was the most disturbing part of the crime they endured, significant emotional distress continued 10 and more years after the crime.

Their difficulties included anxiety about the existence of the images, feelings of powerlessness over distribution or retrieval of the images, fear of who might see the images, and disgust at the prospect of their images being used for sexual pleasure.

And even greater number of respondents reported behaviors of avoiding being photographed or videotaped by friends or family, being fearful of recognition, and concerned that others would view them as a willing participant in their own sexual abuse.

Among my own clients, and as I understand from other attorneys representing victims of child pornography, fear of recognition can be overwhelming and disabling. One of my clients is agoraphobic. She won't leave the house without her boyfriend or another trusted friend. Her feelings are rational. She knows that any number of strangers are looking at her images every day for their own, deviant, purposes. She had an incident which brought home this reality when was chatting online with a stranger. She and the other young woman had web cams on so that they could see each other. The other woman sent her a link without explaining what it was. My client opened the link and was horrified to see pictures of herself in being abused by her father as a child. She shocked that this stranger new one of her darkest secrets. But perhaps worse, She had never seen the pictures herself and has largely repressed the memories of the actual abuse. Seeing those graphic images brought all the memories flooding back to her. Her family reports that she was crying hysterically and totally dysfunctional for two to three days.

Another young client is currently working in a restaurant. A male customer told her that she looked familiar and then asked her a number of questions people commonly do to place another person they feel is familiar looking. She immediately worried that he was a child pornography consumer who recognized her. She became distraught and was unable to finish her shift. She was still rattled in talking about it several weeks later.

Yet another client very similarly experienced panic attacks working in retail. She is an attractive young woman, and if a man should happen to glance at her a moment longer than what she felt appropriate, her mind would start racing and she would be in a full-blown panic attack with physiologic reactions.

This client was also stalked by an offender who searched for her online for five years by his own admission. He finally found her via My Space and friends of hers. When he found her he sent her emails saying that he wanted to make pornography with her; he chastised her and called her names for reporting her father who abused her. He was convicted of stalking and transporting child pornography. He was given five years and twenty years to run consecutively as well as ordered to pay restitution. He has made no restitution payment to date.

Other victims report being constantly on the lookout for cameras or computers in any venue they may visit. They may have panic attacks when in a group of unknown people for even a relatively short period of time. This problem made it impossible for one of my clients to attend college in the normal manner. She tried at three different schools and has finally decided on an online college.

Unfortunately, some victims have had their legal names connected with the name given to them in the online world. One client has had this happen. If a search of her name is made of the web, among the hits that are listed are long blogs with dialogues about whether she enjoyed the abuse, what she is doing now, whether she is more or less attractive now than she was as a child, the propriety of her reporting her father's abuse, as well as comments extolling the entertainment virtues of the videos of her abuse. It is disgusting, and to her, horrifying. Worse yet, this is the material that a prospective employer, university, or casual acquaintance might find about her should they "Google" her name.

### **How Can an Attorney Help?: Seeking available remedies and resources.**

#### **A. Restitution in the criminal prosecutions of child porn crimes.**

##### *Paroline v. United States*, US Supreme Court

*Paroline* is the first case in which a crime victim has had independent standing as a full party rather than relying on the government to state her position.

Decided April 23, 2014, *Paroline* was the product of five years of legal advocacy by a team which brought cases all over the country under the federal restitution statute, 18 USC §2259, and worked them up through multiple circuit courts of appeal. This case was the first in which the US Supreme Court reviewed this statute. Unfortunately, the opinion gives little guidance to those who must work with it daily. Rather, many attorneys feel it muddles the statute even further.

#### What the majority court said:

- Every defendant must pay something;
- No one defendant should pay the full amount of losses;
- No joint and several liability;
- The district court should weigh the facts in each case;
- A "Goldilocks" approach
  - o Not severe
  - o Not token, trivial, or nominal

- Reasonable and circumscribed
- Relative to causal role of the defendant
- Discretion, not mathematical formula
- Nonexclusive list
- “Fudge factor”

What the dissent said:

- Unworkable statute that should be fixed by Congress
- The majority approach will have the victim litigating for years for a piecemeal reward based on arbitrary numbers

Sotomayor’s Dissent said:

- Congress mandated payment of the full amount with joint and several liability
- Defendants should not be allowed a “safety in numbers” shield
- Majority approach of apportionment fraught with uncertainty
- Congress should fix this statute with consideration of a concept of aggregate causation and mandatory minimums

## **B. Civil lawsuits for injuries caused by the circulation of child porn**

Masha’s Law, 18 USC §2255, provides a civil action for a person who is a victim of a violation of federal child pornography laws, with a deemed minimum damage of \$150,000 plus attorneys fees and costs o suit.

In pursuing a civil remedy it is most important to shield the victim from the civil discovery process which can simply inflict more harm. The deemed minimum level of damages provides a mechanism for this.

One significant reported appellate case under Masha’s law affirmed liability against a forensic who morphed stock photos of a child on to pictures of adult porn to demonstrate in the course of court testimony in a child porn case that it was very easy to create “fake” child porn. The court held that the expert could be liable to the child even though no sexual abuse had ever taken place. The child was still subject to an invasion of privacy and humiliation. *Doe v. Boland*.

## **C. In Oregon -- Compensatory Fine.**

Oregon has a statute that provides for a fine to be paid to victims in addition to restitution. In 1981, the Oregon Legislature enacted a provision allowing the court to designate as compensatory any portion of a fine imposed

as a penalty for commission of a crime resulting in certain types of injury. ORS 137.101(1). Compensatory fines may be additional to any restitution imposed. ORS 137.101(2).

Compensatory fines are one type of financial obligation that may be included in the sentence imposed upon a convicted person. ORS 137.293. Of the four categories of monetary obligations established, compensatory fines are established as Category 1 and given top priority in the application of payments made by a defendant. ORS 137.295.

## **2. Process**

### **A. Assuming the burden of receiving notices and interacting with the court system.**

Jurisdiction of the crime may be federal or state. For federal criminal cases, victims benefit from a uniform and automated notification system. There is no similar system for state cases of which I'm aware. (Although I understand that the State of Florida has such a system, I've not yet been the recipient of any of their notices.) The comments that follow are, therefore, limited to federal cases.

With the client's permission, notices from the US Department of Justice (DOJ) Victim Notification System (VNS) can be sent to the attorney.

The DOJ, on its website, describes the VNS as a joint effort between the FBI, Postal Inspection Service, US Attorney's Offices, and the Federal Bureau of Prisons for those victims who choose to participate to keep them informed of the status of cases which involve them. Once a victim is identified in a particular case, the VNS provides automated notices to victims of the fact of investigation, charging, pending hearings, trial and sentencing. After conviction, a victim is also informed of the status of inmates within the Bureau of Prisons and projected release dates.

A victim might receive six or more notices for a single case. Sometimes it is less if the victims are identified only late in the life of the case. In either circumstance, the notices, while serving a laudable purpose, also remind a victim that there are more and more people viewing their abuse images, and this reactivates the trauma and feelings of violation.

A meaningful benefit of legal representation can be accomplished at the outset by transferring the collection of notices to the attorney's office. If the client is the subject of a "popular" series, this may mean ten to thirty notices a

day coming in. One may opt to receive the notices via email. I have found though that there is not an exact duplication of the email and "snail mail" notices, and there is often one received in one manner that is not received in the other. We opted to receive notices both ways for a time but it was overwhelming even to my office. For the email notices we have set up a separate Gmail account which is only used for this purpose and now receive all notices for all clients in this manner.

## **B. Documenting the harms and losses**

The nature of the harm is in large part a violation of privacy. These victims are sometimes stalked by pedophiles. The documentation of losses should include nothing that would add to any revelation of the victim's identity or location.

### **1. Victim Impact Statement (VIS).**

- i. The victim's own words. The VIS must be genuine.

Consider how articulate and how in touch the victim is with their feelings. Even with an intelligent and articulate person, drawing out the feelings and experiences to put into words is a difficult and very painful process. It may be a good idea to have the client work with a counselor or psychologist to bring out the feelings and to explore the breadth of the impact this has had on them. This is not a document for an attorney to craft. One would never want the authenticity of the information and emotions questioned in any way. At the same time it is important for the attorney to assure that all feelings pertinent to the distribution and consumption of images are among the things expressed in the statement.

- ii. Provide the VIS to the Child Exploitation and Obscenity Section of the Department of Justice (CEOS.) Once a victim's images are identified in any particular federal prosecution, CEOS sends out the most current VIS on file to the US Attorney's office or the local district attorney prosecuting the case. This is now done via automated process with an online application accessible from a DOJ network.

Neither CEOS nor the FBI give any direction or assistance to a victim or counsel on the content of a VIS, as they believe this would "taint" the process and content.

CEOS states that they track the restitution requests that are submitted. As of the writing of these materials I was informed that CEOS is aware of only four victims nationwide who routinely submit requests for restitution. I personally am aware of one additional victim, making a total of five nationwide.

CEOS has advised my office that when submitting a new VIS they would appreciate knowing whether the victim is from an already identified series, whether they desire to be notified of any new prosecutions involving their images, whether they have any preference as to which jurisdictions may use their statements, i.e., state and local only, federal only, or all jurisdictions.

Family members may also have valuable information for the court and, if so, would want to draft and submit a VIS.

Victim Impact Statements should be updated periodically so that the court knows the current views and experience of the victim.

## **2. Documenting expenses eligible for restitution.**

Federal cases (per 18 U.S.C. § 2259): The court is mandated to order the defendant to pay “the full amount of the victim’s losses.” The “full amount” is defined as including

Medical, psychiatric, or psychological care;

Physical and occupational therapy or rehabilitation;

Necessary transportation, temporary housing, and child care expenses;

Lost income;

Attorneys' fees, as well as other costs incurred; and,

Any other losses suffered by the victim as a proximate result of the offense.

State restitution statutes will vary, but likely have provisions in a general restitution statute similar to §2259. Some will not allow future lost wages; some will not allow attorneys fees. One must look closely at the particular state statute and developing caselaw.

## **3. Forensic evaluations.**

i. Psychiatric/Psychological assessment. The report on the assessment of a victim could potentially be submitted to every US District Court across the nation. It may be quoted in published opinions in multiple cases. It is impossible to overstate how important the quality and integrity of the report must be. Attorneys should always strive to present the best expert testimony; this is one circumstance in which that consideration must be paramount.

As with many cases, the process of evaluation can be re-traumatizing. In these cases, it is important to remember that the victim may likely suspect that every man they meet or see may be a downloader of their images of abuse. Finding an evaluator with the experience and depth of understanding to negotiate this minefield is essential.

The list of symptomology related to the spread of the images is long and varied: insomnia from fear of going to sleep and losing control, nightmares and/or night terrors, shame and embarrassment, reactivation of trauma-related reminders by many more daily or frequent occurrences, distrust particularly of men and/or authority figures, depression, anxiety, anger, academic or occupational dysfunction, relationship dysfunction, dissociation, substance abuse, and/or promiscuity. Consider the need for an assessment of the need for medication, such as for remediating chronic insomnia, or assisting with depression or anxiety.

This client's condition may be more refractory to treatment than a victim who has suffered a time-limited sexual abuse. The continued existence of the pictures and their use by downloaders for personal pleasure and potential grooming of other children for abuse keeps the client's past abuse alive and active for them. Such victims face the potential of a lifetime of victimization given the indefinite distribution and re-distribution of their images.

Future anticipated expenses may be claimed. *United States v. Danser*, 270 F.3d 451, 455 (7<sup>th</sup> Cir. 2001).

ii. Medical assessment (physical manifestations of emotional distress). Remember that physical problems may be the somatic manifestations of the anxiety suffered by these victims. The attorney should obtain primary care, specialist care, counseling records, school and employment records. The victim will likely have one or a number of physical manifestations of the emotional stress they have endured. Gastrointestinal problems, migraine headaches, dermatological conditions, sleep disturbance and other medical conditions may be tied to the anxiety and other mental health consequences of the proliferation of abuse images online. One should consider whether an assessment by a physician of any such physical conditions is appropriate.

iii. Medication, transportation, and/or childcare expenses should not be forgotten. Expenses such as these, which are incident to receiving treatment, are appropriate to include in restitution requests.

iv. Vocational assessment. Building on the psychological evaluation, and considering any medical limitations that may be documented, a vocational evaluation may identify important accommodations needed for education or the work place. The victim may suffer from anxiety or panic

attacks such that they are not able to attend regular college or vocational classes. Your client may be able to only take a limited number of classes at a time. They may not be able to work while in school or in a setting which involves meeting the public. Such circumstances will require extra time to complete a post-secondary education, and limit job opportunities.

A teenager may not be able to attend public school, or may not be able to do so on the same schedule as another child without the same burden. Private school or outside tutoring may be necessary, all with the attendant cost.

In either circumstance, educational and vocational counseling may be necessary to help the client choose a path that will not unnecessarily activate the underlying emotional trauma. Your client may have only very limited occupational options, if any.

v. Lost past and future wages and/or income capacity. With the need for extra time in schooling and the avoidance of certain occupations, the client will have substantial wage loss. Be sure to have your psychologist consider the probability of possible breaks in employment due to the encounter of intolerably stressful work circumstances, emotional decompensation, or emotionally mediated illness.

#### **4. Material on the Web.**

Some victims have their legal name associated with the series name of their images. If this is the case, there may be websites online which reference their legal name and the fact that they are the subject of circulated sex abuse images. This is very, very devastating. Printing such pages, then redacting the legal name, and including these pages in the restitution package portrays clearly the burden that the victim carries in attempting to interact in society.

#### **5. Current literature from the social science, medical, psychology, or victimology journals.**

Because the injuries suffered by these victims are only now being documented and discussed, there may be judges who are not familiar with the unique and far-reaching aspects. Bolster your submission with independent authority. Consider:

Gelber, Alexandra, Asst. Dep. Chief, CEOS USDOJ, "Response to a Reluctant Rebellion" found at <http://www.usdoj.gov/criminal/ceos/ReluctantRebellionResponse.pdf>

Jenkins, P. (2001) Beyond Tolerance: Child Pornography On The Internet. New York, N.Y.: New York University Press;

Klain, E., Davies, H. Hicks, M.A., (March, 2001) Child Pornography: The Criminal Justice Response, Publication of the American Bar Association and the National Center for Missing and Exploited Children;

Ost, Suzanne, CHILD PORNOGRAPHY AND SEXUAL GROOMING, (Cambridge University Press (2009).

### **C. Challenges Faced by Victims in Obtaining Restitution**

State cases—Lack of Notice. There is no uniform notice system for victims in state systems. We have received variable responses when contacting law enforcement or prosecutors in different jurisdictions asking for notice. Until a clearinghouse is set up for notice for victims from states, victims will have to rely on creating an ad hoc network of personal contacts.

Restitution is not uniformly ordered. Recent statistics compiled by the United States Sentencing Commission demonstrated the following:

In 74% of child pornography cases in federal courts in 2013 no fine and no restitution was ordered--1423 of 1922 cases.

Only 286 child pornography offenders where order to pay any restitution in 2013---15%.

Defendants found financial able to pay a fine were not always ordered to pay restitution—190 such cases.

The median payment ordered of the 437 ordered to pay a fine or restitution was \$3,000.

The right to confer and to be treated with fairness is not always honored.

The federal CVRA provides generally for restitution for victims of crime—“full and timely restitution as provided in law.” (18 USC §3771(a)(6)) (copy in Appendix.) Additionally, within the rights accorded victims by the CVRA are the reasonable right to confer with the attorney for the Government (§3771(a)(5)) and also the right "to be treated with fairness." (§3771(a)(8).)

Two victims, Amy and Vicky, have argued in court that the Government has abandoned on appeal the rights of child pornography victims to restitution on multiple occasions. Further, they have argued, this was done without notice, let alone the courtesy of conferring. The Government has also failed to advise what, if any, amount of restitution it would support in one particular case, and in another failed to substantiate the basis for the arithmetic formula put forth. Attorneys for the victims have argued that this violates both the right to confer

and the right to be treated with fairness. A motion in this regard was presented to the 4th Circuit in *US v. Burgess* (No. 09-4584). (Copy in appendix.) The court denied the motion.

The victim's rights to confer and to be treated with fairness should be asserted repeatedly until these gain full recognition. No crime victim can fully protect his or her rights without proper notice of every action in the proceeding. The VNS system is designed to issue notice to a victim of each and every hearing that is set. How much more important to a victim is the fact that the Government has abandoned its prior position supporting restitution?

### **Conclusion**

Thankfully, many more victims are coming forward to request restitution. As more attention is given these efforts by the media, and the plight of these victims, becomes more widely recognized, there is a greater chance that the stigma will dissipate. As more find their voices, they will need assistance and representation.