IP 07-0052-CR 1 H/F USA v Jang
Judge David F. Hamilton Signed on 12/27/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,	)	
	)	
Plaintiff,	)	NO. 1:07-cr-00052-DFH-KPF-1
	)	
SANG JANG,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 1:07-CR-52-DFH-KPF
	)	
SANG JANG,	)	
	)	
Defendant.	)	

ENTRY ON DEFENDANT'S MOTION TO DISMISS

The United States has charged defendant Sang Jang with producing child pornography that was later transported across a state line, a violation of 18 U.S.C. § 2251(a). Jang has moved to dismiss the indictment based on the United States Constitution's venue protections in Article III, Section 2 and in the Sixth Amendment. Jang has also argued that the indictment against him violates the Commerce Clause of the Constitution and is unconstitutionally vague. As explained below, the court denies the motion to dismiss, though without prejudice to reconsideration of the constitutionality of venue in this case at trial. The Commerce Clause and vagueness arguments are not persuasive.

I. *The Indictment*

The indictment alleges that Jang, an Ohio resident, engaged in "sexually explicit activity" in Ohio with "Jane Doe" sometime between September 2002 and March 2003, when she was approximately fourteen years old and was also living in Ohio. See 18 U.S.C. § 2256(2) (defining "sexually explicit conduct" for purposes of federal child exploitation statutes). Jane Doe is the adoptive daughter of David Turner, who has been convicted on numerous child pornography charges involving Jane Doe and others. See *United States v. Turner*, 206 Fed. Appx. 572 (7th Cir. 2006) (affirming convictions and total sentence of 100 years). According to the indictment against Jang, Turner photographed and video-recorded the sexual activity between Jang and Jane Doe in Ohio. Several of the charges against Turner were based on the images Turner had produced of the sexual activity between Jang and Jane Doe in Ohio.[1]

Turner took these images with him from Ohio to Bloomington, Indiana, in March 2003, when he and his family (including Jane Doe) moved back to their original home in Indiana. While searching Turner's home in Bloomington, Indiana, on November 12, 2004, law enforcement officials found numerous images of child pornography, including the recorded images of the sexual activity between Jang and Jane Doe.

[1]Jang argues in his brief that he was aware that Turner was making an image or recording on only one occasion. The indictment is not specific on the point, which cannot be resolved on a motion to dismiss the indictment.

Jang's sexual activity with Jane Doe was discovered by Ohio law enforcement authorities, though there is no indication that they also learned of the photographs and video recording. In December 2002, an Ohio county prosecutor charged Jang with the Ohio felony of engaging in sexual conduct with a minor. In March 2003, Jang pled guilty to the Ohio charge. He was sentenced to six months in custody and an additional six months in a sex offender treatment program.

On May 9, 2007, a grand jury in the Southern District of Indiana indicted Jang in this district for producing child pornography that was then transported in interstate commerce, in violation of 18 U.S.C. § 2251(a) and § 2. The indictment identifies 15 photographic files and one video file on a computer. The indictment alleges that the images were produced in Ohio and that Turner transported the images to Indiana. The indictment is silent about any other connection between Jang and the venue of the Southern District of Indiana.[2]

The operative language of the indictment alleges:

> Between on or about September 2002 through March 2003, in Bloomington, Indiana, within the Southern District of Indiana and elsewhere, including the Southern District of Ohio, SANG JANG, the defendant herein, did employ, use, persuade, entice and coerce a minor to

[2]The indictment also refers to a violation of 18 U.S.C. § 2251(d), but it contains no allegations of any notice or advertisement that would be needed to prove a violation of § 2251(d).

> engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct and such visual depiction was actually transported in interstate commerce, to wit, on the occasion below, SANG JANG employed, used, persuaded, enticed and coerced a minor to engage in sexually explicit conduct as defined in Title 18, United States Code, Section 2256(2), and did aid and abet such conduct, for the purpose of producing [approximately 235 photographic images and one movie image].

II. *Venue*

A. *Knowledge of Actual Interstate Transportation*

Jang argues that the prosecution in the Southern District of Indiana violates the venue provisions in Article III, Section 2 and in the Sixth Amendment of the Constitution. Article III, Section 2 provides: "The Trials of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." The Sixth Amendment provides the accused with the right "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." Rule 18 of the Federal Rules of Criminal Procedure implements these rights by providing that "the government must prosecute an offense in a district where the offense was committed." Congress has not expressly provided for venue under § 2251(a), so venue is to be "determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998), quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946).

Jang argues that he acted only in Ohio and that he did not know of, let alone agree to or intend, Turner's later transportation of the images to Indiana. The United States argues that the crime charged, production of child pornography that was actually transported in interstate commerce, was not complete until the transportation occurred and therefore actually took place in both Ohio and Indiana. See *United States v. Sirois*, 87 F.3d 34, 38-39 (2d Cir. 1996) (holding that violation of § 2251(a) based on actual transportation of child pornography is not complete until image crosses state lines). The United States also argues that it can prove Jang is guilty of the charged offense without having to prove that he knew of, agreed to, or intended the later transportation of the child pornography images across state lines.

Section 2251(a) provides:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

The provision establishes three different ways in which the government may allege and prove a sufficient federal connection to support federal prosecution for

producing child pornography. First, the defendant produces child pornography and either knows or has reason to know that the images will later be transported in interstate or foreign commerce or through the mails. Second, the defendant produces child pornography using materials that have traveled in interstate or foreign commerce. (Any commercially available computer or camera should suffice.) Third, the defendant produces child pornography that is later transported in interstate or foreign commerce or through the mails. The government has charged Jang under only the third theory – that Jang violated § 2251(a) by producing child pornography in Ohio between September 2002 and March 2003 that Turner transported from Ohio to Indiana in March 2003.

Jang's first argument blends venue and the merits. He argues that the government did not properly allege facts supporting a violation of § 2251(a) because it did not allege that he knew or had reason to know that Turner would be taking the images into Indiana. (Jang expects the evidence to show that Turner told both him and Jane Doe in Ohio that Turner had destroyed all the images of them.) Under Jang's interpretation, the explicit requirement of knowledge or reason to know of interstate transportation in the first theory of federal jurisdiction also applies to the third theory based on actual transportation.

The statute's language shows that the third theory does not require the government to prove that the defendant knew or had reason to know of the later

interstate transportation. The statute lists the three theories as alternatives in a series of dependent clauses, each separated by a comma and each beginning with "if." The first clause is the only one that contains any knowledge requirement. If Congress had intended the third theory to require knowledge, it could easily have added the following phrase to the third clause: "or if *such person knows or has reason to know that* such visual depiction has actually been transported in interstate or foreign commerce or mailed." Congress did not include such a knowledge requirement for the second or third theories for federal jurisdiction. There is no requirement under the second theory that the defendant know of the interstate nature of the materials used to produce the pornography, nor is there a requirement under the third theory that the defendant know or have reason to know of the later interstate transportation of the images. See *United States v. Smith*, 459 F.3d 1276, 1289 (11th Cir. 2006) (holding that second theory does not require knowledge and opining that third theory also does not); see also *United States v. Sirois*, 87 F.3d 34, 38-39 (2d Cir. 1996) (stating that § 2251(a) requires proof either that the child pornography has actually crossed state lines or that defendant knew or had reason to know it would cross state lines); *United States v. Robinson*, 137 F.3d 652, 654-55 (1st Cir. 1998) (holding that similar provision in 18 U.S.C. § 2252(a)(4)(B) prohibiting possession of child pornography produced with materials that traveled in interstate commerce does not require knowledge of interstate connection of materials used to produce child pornography).

The legislative history confirms this view of the statutory language. The conference committee report on the key language in section 2251(a) shows that Congress did not intend for the third theory to require knowledge of the later interstate transportation. "The House amendment prohibits the transportation of visual or printed matter actually transported in interstate or foreign commerce or mailed, whether or not the accused knew or had reason to know of such transporting or mailing. The Senate bill does not. The conference substitute accepts the House provision." H.R. Conf. Rep. No. 95-811, at 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 69, 69; accord, H.R. Rep. No. 95-696, at 10, 12 (1977) (explaining that an amendment to § 2251(a) "would enable prosecution if there has been a mailing or transportation without knowledge or intent on the part of the promoter," and providing for punishment of child pornography producer "if such matter has been mailed or transported in interstate or foreign commerce (regardless of whether the person knew or should have known it would be so mailed or transported).").

The Senate committee expressed concern that the broad jurisdictional theories allowed under section § 2251(a) would allow federal prosecutors to charge persons for producing child pornography in "isolated, individual acts." S. Rep. No. 95-438, at 16 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 54. The Senate committee stated that it intended for such acts to be prosecuted at the state or local level, but it gave discretion to federal prosecutors to determine which cases

were "the proper subject of federal concern." *Id.* Here, federal prosecutors have exercised that discretion to charge Jang for producing child pornography in Ohio that later made its way into southern Indiana. Such allegations properly allege a violation of § 2251(a) under the third jurisdictional theory without additional allegations that Jang knew of or had reason to know of the interstate transportation.

B. *Knowledge of Exposure to Venue*

As a matter of substantive law, the government need not prove that Jang knew of the later interstate transportation. Also, Turner's criminal act in producing and then transporting the images was not completed until the transportation, so that venue in the Southern District of Ohio or in the Southern District of Indiana would have been proper, at least for Turner. But the question still remains whether Indiana is a constitutionally permissible venue for prosecuting Jang. The government relies on 18 U.S.C. § 3237(a), which states that venue is proper for a continuing crime in any district where the offense began, progressed, or ended. The government asserts that Jang's alleged offense began in Ohio but was not completed until Turner brought the images into southern Indiana. Thus, the government maintains, venue for the prosecution of Jang is proper in the Southern District of Indiana where the crime was completed. Jang contends that prosecution in Indiana nevertheless violates his constitutional

venue rights without proof that he knew or at least had reason to know that the images would be transported out of Ohio to Indiana.

The Seventh Circuit recently observed in *United States v. Muhammad*, 502 F.3d 646, 651 (7th Cir. 2007), that the Constitution's venue provisions are "far more than a legal technicality" and can raise complex issues of public policy. The venue provisions of the Constitution echo the complaint in the Declaration of Independence that King George III had transported colonists "beyond Seas to be tried for pretended offences." The venue provisions are intended as safeguards to protect the defendant from bias, disadvantage, and inconvenience in adjudication of the charge against him. *Travis v. United States*, 364 U.S. 631, 634 (1961). The Supreme Court has emphasized the importance of venue in criminal cases:

> These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges; and Congress has not been unmindful of them. Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.

United States v. Johnson, 323 U.S. 273, 276 (1944) (finding venue under the Federal Denture Act proper for illegal senders only in the district from which the

dentures were sent and for illegal receivers only in the district in which the dentures were received).

One concern is fairness to the defendant in guarding against hardships "involved when an accused is prosecuted in a remote place." *United States v. Cores*, 356 U.S. 405, 407 (1958); see also *Muhammad*, 502 F.3d at 652 ("'The object . . . is to secure the party accused from being dragged to a trial in some distant state, away from his friends, witnesses, and neighborhood; and thus subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him.'"), quoting Joseph Story, Commentaries on the Constitution § 925 (Carolina Academic Press reprint 1987) (1833). Where the criminal acts do not occur near the accused's home, venue is proper where the accused's criminal conduct occurred. See *Johnston v. United States*, 351 U.S. 215, 220-21 (1956). In such cases, the crime "is held, for venue purposes, to have been committed wherever the wrongdoer roamed." *Travis v. United States*, 364 U.S. at 634 (finding venue proper for the crime of filing false documents only in the district where the statute required the defendant to file the documents).

In *Muhammad*, the Seventh Circuit determined that venue was proper in a district in Wisconsin where the defendant did not commit any substantial acts constituting the crimes for which the government charged him, but where the

defendant directed all his actions toward that district. Muhammad and his cousin, both Wisconsin residents, took a bus from Wisconsin to Arizona. While in Arizona, Muhammad convinced a female friend and her sister to fly to Arizona to meet with someone Muhammad claimed could help the female friend launch a clothing line. Muhammad bought the tickets and told the women he would pay to fly them back to Wisconsin. After the two women arrived in Arizona, Muhammad informed them that his secretary had not booked their return flights and that the group would drive back to Wisconsin in two cars. On the return trip, a police officer stopped the car the two women were driving. Muhammad called his female friend to warn her not to consent to a search of the car. The sister, however, consented. The officer found a rental agreement stating that the sisters were driving the car to Wisconsin. The officer also found three kilograms of cocaine in a suitcase. The officer arrested the two women. Both men traveled back to Wisconsin.

The government charged Muhammad in Wisconsin with attempting to possess cocaine with the intent to distribute it in violation of 21 U.S.C. § 841 and with hindering the communication of information relating to a federal crime in violation of 18 U.S.C. § 1512(b)(3). At trial, Muhammad argued that venue was improper because the only acts he committed in Wisconsin were merely preparatory and could not support an attempt charge in Wisconsin. The district court rejected that argument, concluding that venue in Wisconsin was proper

because the evidence permitted the inference that Muhammad had attempted to possess cocaine with the intent to distribute it in Wisconsin. After discussing the "nature of the crime alleged" and the "location of the act or acts constituting" the crime, the Seventh Circuit affirmed the venue finding.

The *Muhammad* court based its decision on the defendant's intent for his criminal acts to reach Wisconsin:

> Although the defendant's acts occurred in several states, they were aimed at only one state – Wisconsin. The alleged crime was the inchoate one of attempted possession with intent to distribute, and, at the time his plan was thwarted, Mr. Muhammad certainly had moved far beyond mere preparatory acts. Rather, he had constructive possession of the cocaine and had placed in motion a carefully constructed plan that was designed to place those drugs within the Eastern District of Wisconsin. Clearly, Mr. Muhammad intended that the effect of his actions was to be felt in that district.

Id. at 655.

The analysis of the criminal venue issue in *Muhammad* is similar to the analysis that courts undertake in deciding whether a court in one state may exercise specific personal jurisdiction over a non-resident defendant in a civil case. Evidence that a non-resident defendant has acted outside the forum state with the intent or plan to cause harmful effects within the forum state will ordinarily support personal jurisdiction in the forum state. See *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. P'ship*, 34 F.3d 410, 411-12 (7th Cir.

1994), citing *Calder v. Jones*, 465 U.S. 783 (1984) (holding that state in which victim of defendant's defamation lived had jurisdiction over defamation suit). On the other hand, a seller of a defective product is not subject to civil suit in a state where injury occurs if the only connection to the forum is that the buyer transported the product there. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296-97 (1980).

Returning to the criminal context, because Muhammad had planned and intended to possess and to distribute the cocaine in Wisconsin, it was not unfair or unconstitutional to try him there (quite apart from the fact that he was also a Wisconsin resident). Accord, *United States v. Ringer*, 300 F.3d 788, 791-92 (7th Cir. 2002) (holding that venue was proper in Indiana where witness in Kentucky made false statements intended to influence government investigation in Indiana); *United States v. Frederick*, 835 F.2d 1211, 1215 (7th Cir. 1987) (holding that venue in Illinois was proper for defendant who threatened witness in Florida not to testify about certain information in Illinois trial).

In criminal cases like this one, where venue is based not on the defendant's own contacts with the forum but instead on the actions of others, the question of venue can be more difficult. The Seventh Circuit has previously noted but reserved decision on whether venue is proper in a district based on another person's conduct in that district when the defendant had no knowledge that the

other person was acting in that particular district. In *Andrews v. United States*, 817 F.2d 1277 (7th Cir. 1987), a Wisconsin jury convicted Andrews on three counts of using a telephone to facilitate cocaine distribution. Each count was based on a telephone call Andrews received from an informant. Andrews received the calls in Illinois, but the informant made at least one of the calls from Wisconsin. Andrews was charged in Wisconsin with using telephones to facilitate drug distribution. On appeal, he argued that venue was not proper in Wisconsin because his conduct occurred only in Illinois, though at least one charged call was from a person in Wisconsin. The Seventh Circuit held that the charge was a continuing offense "committed both where the call originates and where it is received." *Id.* at 1279.

The *Andrews* court rejected the defendant's argument that this rule could encourage the government to forum-shop, finding that to "the extent that this is a concern in a given case, it is more appropriately handled at the trial level by a transfer to a more reasonable forum . . . ." *Id.* In a footnote, the court noted that the defendant had asserted in his *pro se* reply brief that he did not know that the informant made the telephone calls in Wisconsin. The *Andrews* court reserved judgment on that issue and deemed the argument waived because the defendant had never presented that factual ground to the district court. *Id.* at 1280 n.2.

In a concurring opinion, Judge Cudahy stated that he would go further and would "require the defendant's knowledge of the place where the telephone call originated as a condition of creating venue in that place." *Id.* at 1281. Judge Cudahy found that the language and legislative history of the criminal provision did not require knowledge of the location, but he concluded that knowledge of the location was a condition for venue to be constitutional there. Otherwise, he wrote, it would "violate basic concepts of criminal responsibility and due process to deem a crime committed at places unknown to the defendant, places the very existence of which he may not have had reason even to suspect." *Id.*, citing *United States v. Johnson*, 323 U.S. at 276.

Muhammad and the concurring opinion in *Andrews* suggest that the Constitution's criminal venue requirements include some degree of knowledge of the effect on the forum state or district that would make it foreseeable for a defendant to expect to be, in the phrase drawn from personal jurisdiction in civil cases, "haled into court there." See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985), quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297. In most civil cases (excepting those in which Congress has authorized nationwide service of process), before a non-resident defendant may be compelled to defend even a modest civil case, the plaintiff must be prepared to show that the defendant has sufficient minimum contacts with the forum state to justify the exercise of personal jurisdiction.

In most criminal cases, the required degree of knowledge is easily shown by the defendant's own presence and actions in the forum state, or by actions directed toward the forum state. See *United States v. Cabrales*, 524 U.S. 1, 9 (1998) (collecting cases and explaining that where the crime is an illegal mailing, venue is constitutionally proper both where the mailing was sent and where it was to be delivered); *Armour Packing Co. v. United States*, 209 U.S. 56, 76-77 (1908) (holding that venue was constitutionally permissible in district through which illegal shipment in interstate commerce passed).[3]

In other cases, a defendant may be subject to venue in a district where other persons acted on his behalf or in furtherance of a conspiracy. The common thread of those cases appears to be some degree of knowledge or at least foreseeability of the connection to the forum state or district. The law of venue as applied to conspiracy cases helps to mark the outer limits of venue in criminal

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[3]Variations on this issue may arise where the defendant knows or has reason to know that his actions may cause harm in some other state, but he does not know or have reason to know specifically where. Consider, for example, a person who poisons a food package that he expects will be shipped somewhere, but he does not know to which particular state or district. Or consider a distributor of illegal drugs who sells drugs to another dealer where the seller has reason to know that the buyer will resell in some other state(s) or district(s) but does not know where. Or consider a person who fires a gun close to a state border without aiming or caring in which state the bullet might cause harm. This case does not appear to present such an issue. On the civil side, see generally *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 112-13 (1987) (plurality opinion) (limiting "stream of commerce" theory of personal jurisdiction over non-resident manufacturers in product liability cases and requiring more than manufacturer's mere awareness that product will eventually be sold or used in forum state).

cases. In general, all conspirators may be prosecuted in any district in which one conspirator committed an overt act in furtherance of the conspiracy, whether the other conspirators actually knew or agreed to the specific act in the specific district. The law considers one conspirator an agent of all other conspirators and liable for their acts regardless of his knowledge of any particular act that furthers the conspiracy. Venue for a defendant therefore may be proper in districts where a co-conspirator overtly acted in furtherance of the conspiracy without the defendant's knowledge of the particular act or location. See *Hyde v. United States*, 225 U.S. 347, 356-67 (1912) (holding that conspirators could be tried in District of Columbia based on overt acts of unindicted co-conspirator in that district, so that defendants were deemed "constructively present" in forum district); *United States v. Rommy*, 506 F.3d 108, 123 (2d Cir. 2007) (observing that "the law does not require a defendant to have actual knowledge that an overt act will occur in a particular district to support venue at that location. At most, it asks that the overt act's occurrence in the district of venue have been reasonably foreseeable to a conspirator."); *United States v. Hull*, 419 F.3d 762, 768-69 (8th Cir. 2005) (finding venue proper in district where defendant did not know co-conspirator was distributing drugs because defendant "assumed the risk" and exposed himself to many venues by providing co-conspirator with large shipments of drugs); *United States v. Lester*, 282 F.2d 750, 753 (3d Cir. 1960) ("There was sufficient evidence that Smith had knowledge of the purpose of the conspiracy. It is not necessary [for venue purposes] that he know the scope or all the details of the operation."); see

generally *United States v. Sax*, 39 F.3d 1380, 1391 n.8 (7th Cir. 1994) (observing that venue was proper in Illinois for money laundering count for defendant when only other co-conspirators acted in Illinois); *United States v. Molt*, 772 F.2d 366, 369 (7th Cir. 1985) ("As long as one overt act in furtherance of the conspiracy was committed in a district, venue is proper there.").

In terms of venue, the government's case against Jang appears to try to reach a significant step beyond *Muhammad*, *Andrews*, and the conspiracy cases. In *Muhammad*, the defendant fully intended his actions to reach the district where he was tried, even though he never took any substantial actions in that district. In *Andrews*, the defendant knew that he was participating in an illicit telephone call; he just did not know where the telephone call originated (and he failed to raise that key argument in the district court). Here, Jang asserts that he never intended for the pornography he helped create to travel anywhere and that he thought Turner had destroyed the images.[4]

The government responds that Jang's reliance on Turner to destroy the images was a risk that Jang took and was a "gamble" that "did not pay off." Gov't Br. at 15. The government charged Jang with aiding and abetting Turner, but did

[4]The government must prove the facts supporting venue to the appropriate trier of fact by a preponderance of the evidence. See *United States v. Aldridge*, 484 F.2d 655, 659 (7th Cir. 1973) (finding that the government must "demonstrate venue by a preponderance of the evidence rather than beyond a reasonable doubt").

not charge Jang with conspiracy. Under the government's reasoning then, a defendant could be tried in venues based on the actions of another person who is not charged as the defendant's co-conspirator or agent, for conduct unknown to the defendant. The court has not yet found, and the government has not yet cited, a non-conspiracy criminal case in which venue was found proper over a defendant's objection where the defendant did not know of and could not have foreseen the connection between his actions and the forum state or district.

Under those circumstances, the Constitution's venue provisions may protect Jang from prosecution in Indiana. See generally *United States v. Johnson*, — F.3d —, —, 2007 WL 4357393, at *5-6 (4th Cir. Dec. 14, 2007) (declining to require proof that venue was foreseeable in securities fraud prosecution where the defendant admitted that he personally took the actions that caused a fraudulent securities form to enter the forum district, and describing circuit split on knowledge or foreseeability of venue in fraud offenses); *United States v. Valdez-Santos*, 457 F.3d 1044, 1046-48 (9th Cir. 2006) (finding venue proper for an aider and abetter in a district where the principal acted because the abetter had "knowledge or reasonable cause to believe" that his actions would lead to drug manufacturing in the forum district); *United States v. Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003) (concluding that venue in securities fraud case is proper in a district where an act in furtherance of the crime occurs so long as either the defendant intentionally or knowingly caused the act or it was foreseeable that

such an act would occur; finding venue proper in a district that the defendant did not intend to affect because the defendant was a "savvy investor" and "could reasonably foresee that his trades would likely be executed" in a different district).

At this stage of this case, however, the issue of venue cannot be decided based only on the papers. The indictment neither alleges nor denies Jang's knowledge or reason to know of the later transportation of the images to Indiana. To the extent that the Constitution's venue provisions require some degree of knowledge or foreseeability of, or agreement to, the connection with the forum district where venue is based on the actions of persons other than the defendant on trial, the issue in this case cannot be decided short of a trial on the merits. In addition, the field of child pornography may present some special considerations relevant to venue that have not yet been fully explored in the briefing. The court denies defendant's motion to dismiss for improper venue, but without prejudice to further consideration of the issue at trial.

III. *Vagueness and Interstate Commerce*

Jang also argues that 18 U.S.C. § 2251(a) is void for vagueness because it did not sufficiently alert him that his conduct in Ohio could result in prosecution in Indiana. Jang also alleges that his charged conduct in Ohio did not have a sufficient connection with interstate commerce that could support the exercise of federal jurisdiction over his actions. The facts supporting both of these arguments

are applicable to the issue of venue, but the vagueness and Commerce Clause arguments do not help Jang. Jang presumably was sufficiently aware that his activities with Jane Doe and Turner could lead to criminal prosecution, even if he could not foresee the Indiana connection. See *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (observing that the "void-for vagueness" doctrine focuses on the sufficiency of the notice given for the conduct proscribed and the promulgation of minimum standards for acceptable enforcement). As for the interstate commerce connection, in a case under the third jurisdictional basis under 18 U.S.C. § 2251(a), the Seventh Circuit found in *United States v. Schaffner*, 258 F.3d 675, 679-83 (7th Cir. 2001), that the fact that child pornography had actually crossed state lines was constitutionally sufficient to support federal prosecution.

Conclusion

For the foregoing reasons, defendant Jang's motion to dismiss is hereby DENIED and final judgment on the issue of venue is reserved for factual development and argument at trial.

So ordered.

Date: December 27, 2007

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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