

FILED

NOV 23 2004

United States District Court
NORTHERN DISTRICT OF CALIFORNIA

ROBERT W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

In the Matter of the Search of
(Name, address or brief description of person, property or premises to be searched)

America Online
22000 AOL Way
Dulles, VA 20166

APPLICATION AND AFFIDAVIT
FOR SEARCH WARRANT

CASE NUMBER:
4-04-0203 WDB

I MICHAEL ALLAN being duly sworn depose and say:

I am a(n) SPECIAL AGENT, Immigration and Customs Enforcement and have reason to believe
Official Title

that on the person of or on the property or premises known as (name, description and/or location)

America Online
22000 AOL Way
Dulles, VA 20166

in the _____ District of _____ Virginia

there is now concealed a certain person or property, namely (describe the person or property to be seized)

See Attachment A

which constitutes Evidence, fruits and instrumentalities

(state one or more bases for search and seizure set forth under Rule 41(c) of the Federal Rules of Criminal Procedure)

of a criminal violation(s) of Title 18, United States Code, Section(s) 2252 and 2252A.

The facts to support a finding of Probable Cause are as follows:

See Attached Affidavit and attachments

Continued on the attached sheet and made a part hereof.

Yes No

Approved
As To Form: [Signature]
AUSA: Fenrick

[Signature]
Signature of Affiant

Sworn to before me, and subscribed in my presence

11-23-04
Date

at Oakland, CA
City and State

WAYNE D. BRAZIL, U.S. Magistrate Judge
Name and Title of Judicial Officer

[Signature]
Signature of Judicial Officer

AFFIDAVIT

I, Michael Allan, being duly sworn, hereby depose and state as follows:

1. I am employed as a Special Agent (SA) with the United States Department of Homeland Security, United States Immigration and Customs Enforcement (ICE), presently assigned to the office of the Special Agent in Charge, San Francisco, California (SAC/SF). Among the responsibilities of ICE is the enforcement of federal criminal statutes involving the sexual exploitation of children under Title 18, United States Code, Section 2251, et seq. My responsibilities with ICE include investigations into the sexual exploitation of children within the Northern District of California. I have been a Special Agent with ICE for approximately one year. I am a graduate of the Federal Law Enforcement Training Center's Criminal Investigator Training Program and Immigration and Customs Enforcement Special Agent Training Program, where I received training in the investigation of crimes related to child pornography. Prior to becoming an ICE Special Agent, I graduated with honors from the University of Connecticut School of Law. In addition, I am a member of the California State Bar.

2. This affidavit is made in support of an application for a search warrant for certain accounts controlled by the Internet and electronic mail service provider known as America Online (hereinafter "AOL"), located at 22000 AOL Way, Dulles, Virginia 20166. The accounts to be searched are the accounts registered to Kenneth KELLEY, which are further described in the following paragraphs and in Attachment A.

3. As set forth herein, there is probable cause to believe that on the computer systems of AOL, there exists contraband, evidence, fruits, and instrumentalities of violations of the following statutes:

a. 18 U.S.C. § 2252(a), which in part makes it a crime for any person to knowingly transport or ship any visual depiction of minors engaged in sexually explicit conduct or to knowingly receive or distribute any visual depiction of minors engaged in sexually explicit conduct that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or to knowingly reproduce any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails.

b. 18 U.S.C. § 2252A(a), which in part makes it a crime for any person to knowingly mail, transport, ship, receive, distribute or reproduce for distribution any child pornography in interstate or foreign commerce by any means, including by computer; or to knowingly distribute, offer, send or provide to a minor any visual depiction, including any photograph, film, video, picture, or computer-generated image, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct that has been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer.

4. The information contained in this affidavit is based on my personal observations and training and information provided by other law enforcement officers and/or agents and AOL personnel. This affidavit is submitted solely for the purpose of making the requisite showing to obtain a search warrant. As such, it does not contain all the information obtained during this investigation.

I. ESTABLISHMENT OF PROBABLE CAUSE:

5. On November 11, 2003, Police in Düsseldorf, Germany executed a search warrant at the residence of German citizen Herbert MUMENTHALER, which resulted in the seizure of his computers. Forensic analysis of those computers revealed twenty-five (25) outgoing emails that contained child pornographic attachments as well as four hundred fifty (450) incoming emails containing child pornographic attachments. Many of those email addresses found on MUMENTHALER'S computers originated in the United States.

6. German authorities forwarded a list of the email addresses from the United States to the ICE attaché Frankfurt, which in turn forwarded the information to the ICE Cyber Crimes Center (C3) in Virginia on June 25, 2004.

7. On June 30, 2004, C3 issued a Customs Summons to America Online (AOL) for subscriber information concerning 108 AOL screen names. On July 23, 2004, AOL returned the information requested.

8. One of the screen names on the list sent to AOL was "GaylDude". Of the emails recovered from MUMENTHALER's computers, the information revealed that "GaylDude" received four emails containing child pornographic attachments.

9. Of the four emails received, the first email was sent by "Krefi" to "GaylDude" on October 26, 2003 at 09:15:17 Pacific Standard Time (PST) and it contained three images. The first image is of a young boy approximately 8-10 years old standing nude. The second image is of a boy approximately 12-14 years old sitting in a chair masturbating. An unknown individual is standing behind the boy touching his chest. The third image is of a boy approximately 10-12 years old sitting down with his legs spread apart touching his genitalia.

10. The second email was sent by "Xpicssix" to "GaylDude" on November 25, 2003 at 15:12:00 (PST) and it contained four images from what appears to be a series of images featuring the same young boy approximately 10-12 years old. In the first image, the boy is seated while masturbating. The second image is a close-up of the boy masturbating focusing solely on the genitalia. The third photo was taken from behind as the boy is bent over while masturbating. The final image is of the boy standing naked touching his genitalia.

11. The third email was sent to "GaylDude" from "Pic ass010532884" on November 25, 2003 at 15:45:55 (PST) and it contained four images. The first image is of a boy approximately 12-14 years old lying naked on a blanket with his legs spread apart exposing his genitalia. The second image is

of a boy approximately 12-14 years old performing fellatio on a boy approximately the same age. The third image is of two boys in their underwear approximately 8-10 years old with their hands on each other's genitalia. The fourth image is of a boy approximately 12-14 years old sitting naked on a chair with an erect penis.

12. The fourth email was sent to "Gay1Dude" from "RIMMER1212" on November 27, 2003 at 20:59:35 (PST) and it contained four images. The first image is of a boy approximately 12-14 years old lying naked on a bed with an erect penis. The second image is of a boy approximately 6-10 years old lying on a bed in his underwear. The outline of his erect penis is visible through his underwear. The third image is of a boy approximately 10-12 years old wearing only underwear. The outline of his erect penis is also visible through his underwear. The final image is of a boy approximately 6-8 years old sitting on a park bench wearing only underwear. The outline of his erect penis is also visible through his underwear.

13. AOL confirmed that the screen name "Gay1Dude" is registered to a Kenneth KELLEY currently residing in San Francisco, California and that the account was created in 1999 and is still active.

14. AOL also provided additional screen names on the account owned by KELLEY: "KKEL924", "Mickeydice", "Rocknwry", "K MICHAEL KELLEY", "SirFreelancalot" and "Coppolazoetrope." A deleted screen name of "HIGH5JIVELIVE" was also provided.

15. AOL also included recent login information for one of KELLEY'S screen names, "K MICHAEL KELLEY." The most recent login for that screen name as of the July 23, 2004 response by AOL was on July 18, 2004 at 22:15:16 Eastern Daylight Time (EDT).

16. On September 29, 2004, your affiant confirmed that the credit card used to pay for the AOL accounts listed above is owned by Kenneth M. KELLEY and has never been reported lost or stolen.

II. BACKGROUND REGARDING COMPUTERS, THE INTERNET, AND E-MAIL

17. The term "computer" as used herein is defined in 18 U.S.C. § 1030(e)(1), and includes an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any storage facility or communications facility directly related to or operating in conjunction with such device.

18. I have had both training and experience in the investigation of computer-related crimes. Based on my training and experience, I know the following:

a. The Internet is a worldwide network of computer systems operated by governmental entities, corporations, and universities. In order to access the Internet, an individual computer user must subscribe to an access provider, which operates a host computer system with direct access to the Internet. The world wide web ("www") is a functionality of the

Internet, which allows users of the Internet to share information;

b. With a computer connected to the Internet, an individual computer user can make electronic contact with millions of computers around the world. This connection can be made by any number of means, including modem, local area network, wireless and numerous other methods; and

c. E-mail is a popular form of transmitting messages and/or files in an electronic environment between computer users. When an individual computer user sends e-mail, it is initiated at the user's computer, transmitted to the subscriber's mail server, then transmitted to its final destination. A server is a computer that is attached to a dedicated network and serves many users. An e-mail server may allow users to post and read messages and to communicate via electronic means.

III. AOL IP SERVICES

19. Based on my training and experience, as well as a telephone conversation with AOL representative Octavian Nephilim, I have learned the following about AOL:

a. AOL is an Internet and e-mail service provider. AOL provides, among other services, e-mail accounts and Internet access to its subscribers.

b. AOL maintains electronic records pertaining to the individuals and companies for which they maintain subscriber accounts. These records include e-mail transaction information and account application information. AOL verifies address information;

c. Subscribers to AOL may access their accounts on servers maintained and/or owned by AOL from any computer connected to the Internet located anywhere in the world;

d. Any e-mail that is sent to an AOL subscriber is stored in the subscriber's "mail box" on AOL's servers until the subscriber opens, deletes, specifies the e-mail to delete after a specific number of days or otherwise accesses the e-mail; the subscriber's mailbox exceeds the storage limits preset by AOL; or the message has resided in the "mail box" for a predetermined number of days;

e. When the subscriber sends an e-mail, it is initiated at the user's computer, transferred via the Internet to AOL's servers, and then transmitted via different nodes to its end destination. AOL users have the option of saving a copy of the e-mail sent;

f. An AOL subscriber can store e-mails and attached files in his or her own "mail box" or on servers maintained and/or owned by AOL;

g. E-mails and attached files stored on an AOL server by a subscriber may not necessarily be located in the subscriber's home computer. The subscriber may store e-mails and/or other attached files on the AOL server for which there is insufficient storage space in the subscriber's computer and/or which he/she does not wish to maintain in the computer in his/her residence. A search of the files in the computer in the subscriber's residence will not necessarily uncover the files that the subscriber has stored on the AOL server;

h. AOL allows members to create a "profile" for the individual's screen name. The profile contains user-input personal biographical information;

i. AOL instant messenger or "AIM" allows members to conduct real-time, private chat with other AOL members. Members may also use AIM to broadcast live video through the user's webcam, or "webcam" to the other member, even if the other member does not have a webcam.

IV. STORED WIRE AND ELECTRONIC COMMUNICATION ACCESS

20. Title 18, United States Code, Chapter 121, Sections 2701 through 2711, is entitled "Stored Wire and Electronic Communications and Transactional Records Access."

a. Title 18, United States Code, Section 2703(a) provides, in part:

A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued under the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

a. Title 18, United States Code, Section 2703(b) provides, in part:

(1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection-

(A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued under the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant...

(2) Paragraph (1) is applicable with respect to any wire or electronic communication that is held or maintained on that service:

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) Solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

b. The government may also obtain records and other information pertaining to a subscriber to or customer of electronic communication service or remote computing service by way of a search warrant. 18 U.S.C. Section 2703(c). No notice to the subscriber or customer is required. 18 U.S.C. Section 2703(c)(2).

c. Title 18, United States Code, Section 2711, provides, in part:

As used in this chapter-

- (1) the terms defined in section 2510 of this title have, respectively, the definitions given such terms in that section; and
- (2) the term "remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system; and
- (3) the term "court of competent jurisdiction" has the meaning assigned by section 3127, and includes any Federal court within that definition, without geographical boundaries.

d. Title 18, United States Code, Section 2510, provides, in part:

- (8) "contents," when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;...
- (14) "electronic communications system" means any wire, radio, electromagnetic, photo optical or photo electronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;...
- (15) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;...

(17) "electronic storage" means-

- (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
- (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

V. SEARCH PROCEDURE

21. In order to ensure that agents search only those computer accounts and/or files described in Attachment A, this affidavit and application for search warrants seek authorization to permit employees of AOL to assist agents in the execution of this warrant. To further ensure that agents executing this warrant search only those computer accounts and/or files described in Attachment A, the following procedures will be implemented:

a. The agent executing this warrant shall serve the warrant upon AOL's offices at the location specified in the warrant;

b. In order to minimize any disruption of computer service to innocent third parties, the agent executing this warrant shall permit AOL, as custodian of the computer files described in Attachment A, to locate the files, copy them onto removable electronic storage media or print them out as paper copies, and deliver the copies to the agent, who need not be present during this process. AOL employees will create an exact duplicate of the computer accounts and files described in

Attachment A (preservation requests pursuant to 18 U.S.C. Section 2703(f) have been made to AOL);

c. AOL employees will provide the exact duplicate in electronic form of the accounts and files described in attachment A and all information stored in those accounts files to law enforcement agents;

d. Law enforcement personnel will thereafter review the information stored in the accounts and files received from AOL employees and then identify and copy the information contained in those accounts and files which are authorized to be further copied by this search warrant; and

e. Law enforcement personnel will then seal the original duplicate of the accounts and files received from AOL employees and will not further review the original duplicate absent an order of the Court.

VI. CONCLUSION

22. Based upon the information cited above, there is probable cause to believe that on the computer systems owned, maintained, and/or operated by AOL, located at 22000 AOL Way, Dulles, Virginia 20166; there exists evidence, fruits, and instrumentalities of violations of Title 18 United States Code, Sections 2252(a) and 2252A(a). By this affidavit and application, I request that the Court issue search warrants directed to AOL allowing agents to seize the e-mail and other information stored on the AOL servers for the computer accounts and files and following the search procedure described in Attachment A.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Michael Allan

Michael Allan
Special Agent, US ICE

Sworn to before me, and subscribed in my presence,

This 23 day of November, 2004

Walter D. Szil
U.S. Magistrate Judge

ATTACHMENT A

ITEMS TO BE SEARCHED AND SEIZED:

- a. (1) All accounts associated or subscribed to with screen names Gay1Dude@aol.com, KKEL924@aol.com, Mickeydice@aol.com, Rocknwry@aol.com, K MICHAEL KELLEY@aol.com, Sirfreelancalot@aol.com, Coppalazoetrope@aol.com and HIGH5JIVELIVE@aol.com; (2) All accounts associated with or subscribed to by Kenneth KELLEY;
- b. All existing printouts from original storage of electronic mail;
- c. All transactional information of all activity of the electronic mail addresses and/or individual accounts, including log files, dates, times, methods of connecting, ports, dial-ups, and/or locations;
- d. All business records and subscriber information, in any form kept, pertaining to the electronic mail addresses and/or individual accounts described above including applications, subscribers' full names, all screen names associated with subscribers and/or accounts, all account names associated with subscribers, method of payment, telephone numbers, addresses, and detailed billing records.
- e. All records indicating the services available to subscribers of the electronic mail addresses and/or individual accounts.

INFORMATION TO BE FURTHER COPIED BY LAW ENFORCEMENT PERSONNEL:

- a. The following email from screen names Gay1Dude@aol.com, KKEL924@aol.com, Mickeydice@aol.com, Rocknwry@aol.com, K MICHAEL KELLEY@aol.com, Sirfreelancalot@aol.com, Coppalazoetrope@aol.com and HIGH5JIVELIVE@aol.com and any other account subscribed to by Kenneth KELLEY;
 - (1) Electronic mail referring to or depicting images of child pornography, sexual activity with minors, or communication with minors for the purpose of inducing the minor into sexual activity, whether saved or deleted, opened or unopened;
 - (2) All homepages or web-sites referring to or depicting images of child pornography, sexual activity with minors, or communication with

minors for the purpose of inducing the minor into sexual activity;

- (3) "Chat" communications sent by or received by the accounts, whether saved or deleted, which refer to child pornography, sexual activity with minors, or communication with minors for the purpose of inducing the minor into sexual activity;
- (4) Any and all AOL "address books" and/or "friends/buddy lists" maintained by the accounts which constitute evidence and/or fruits and instrumentalities of a criminal offense, namely violations of 18 USC 2252(a) and 2252A(a).