

Does anyone know of any cases describing images depicting children nude which are not engaged in or performing sexual activities would qualify as pornography?

The essential facts are that Client desired to become a nudist and found a "documentary" web site called "purenudism.com" which contained images of adults and children living the nudist lifestyle. Some images solely contained children, some contained only adults and some had both children and adults. None of the adults or children were in sexually explicit activities, however they were fully exposed. Many were on a beach and the children did have their legs "spread" exposing their genitalia. But not in sexually suggestive poses, more like snapshots of nude people on a beach.

I would tend to think that folks in rural Texas towns that would comprise a jury would find it "creepy" that an adult man would be looking or downloading photographs of nude children playing. Especially since he has been married for decades. I think they would convict him on the "creepy" factor, notwithstanding that there may be a legitimate documentary or expressive purpose.

Thoughts (Mr. Bennett—do you have any First Amendment suggestions)?

Bart C. Craytor

RE: Images

Bart - Just wondering out loud... how many of those jurors might have Led Zeppelin's album (with it's original cover artwork) "Houses of the Holy" in their album collection?

Jay Freeman

RE: Images

Watch out, Jay! Led, Robert Plant, John Paul Jones, and Jimmy Page were just a bunch of perverted Englishmen! Seriously though, I remember Facebook banned the cover and there was a lot of discussion about art and artistic freedom. That sure could get the jury pool talking.

Tip Hargrove

RE: Images

Along the same lines, [Blind Faith's original album art](#) would be in the same genre as *Houses of the Holy*.

Stan Schwieger

RE: Images

Bart: Anybody got grandkids or children? Nothing more innocent or non-sexual than children in a bathtub. Taking a movie of them is a parent's pastime. Also, nobody ever thought Eric Clapton was a perv. They named their children Layla for generations. Lots to work with here on voir dire. Also, there will be tons of cases out of the early 60's on nudist. I'm on a trip or I would run a search on Westlaw. I'm sure Mowla already has a 15-page brief on point. Good luck.

Pat Metze

RE: Images

[Nirvana's Nevermind cover art](#) has a naked baby in a pool.

Scott Stillson

RE: Images

Bart, read *Bolles v. State*, 512 S.W.3d 456, 464 (Tex. App. Corpus Christi - 2016), which was reversed on other grounds by *State v. Bolles*, No. PD-0791-16, 2017 Tex. Crim. App. LEXIS 1005 (Tex. Crim. App. 2017) (Bolles II). *Bolles I* explained that "...the factor of nudity...[specifically, a view of a young child's] vagina...is not sufficient by itself to enable a rational trier of fact to conclude the image is lewd because [art. 43.26(a)] requires more than nudity to reach that level. *Bolles II* reversed in part, on the basis that Bolles zoomed in on the child's vagina. Read both opinions to get the full understanding of Texas law in this area.

In *Bolles II*, the TCCA adopted the six-part, non-exclusive *Dost* test, which lists the following elements, to determine if material qualifies a child pornography:

- 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
- 2) whether the setting of the visual depiction is sexually suggestive, *i.e.* in a place or pose generally associated with sexual activity;

3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

4) whether the child is fully or partially clothed, or nude;

5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. (citing *United States v. Steen*, 634 F.3d 822, 832 (5th Cir. 2011) (per curiam) (citing *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), and *aff'd*, 813 F.2d 1231 (9th Cir. 1987)). Although the *Dost* factors were not considered "definitional...they are useful for assessing the sufficiency of evidence, and pose questions that are (at least) germane to the issue." *Id.* (citing *United States v. Rivera*, 546 F.3d 245, 250 (2d Cir. 2008)). "Further," added the Court, "the sixth factor is not a separate substantive inquiry regarding the content of the image but is another way of asking whether the other five factors are met." *Id.* (citing *United States v. Franz*, 772 F.3d 134, 157 (3d Cir. 2014)).

Bolles involved a Mapplethorpe photograph of a young girl, named "Rosie," that obviously has not been declared to be child pornography. You can google the image, and see for yourself what the subject of the case was, to get an idea of how the images you have concerns about may be evaluated.

BTW, it is possible for an image of a 17-year-old adult woman to be considered child pornography, so long as part of her areola, or other specific body parts, are exposed. The child pornography statute requires age 18, to escape CP status. I handled a case involving a selfie by a model of that age, wearing see-through lingerie, where part of her areola could be seen. It was ultimately dismissed, but my client, who possessed the image in a cell phone, sweated it out.

This is Texas, after all.

Jorge G. Aristotelidis