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"The Marvels of Modern Technology": Constitutional Rights, Technology, and Statutory Interpretation Collide in *United States v. Chiaradio*

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"THE MARVELS OF MODERN TECHNOLOGY": CONSTITUTIONAL RIGHTS, TECHNOLOGY, AND STATUTORY INTERPRETATION COLLIDE IN *UNITED STATES v. CHIARADIO*

Wilber A. Barillas*

Abstract: On July 11, 2012, in *United States v. Chiaradio*, the U.S. Court of Appeals for the First Circuit held that a defendant possessing child pornography on two networked computers had committed two separate crimes of possession and distribution of child pornography under 18 U.S.C. § 2252(a)(4)(B). The court, however, should have shown restraint in its analysis to avoid creating dangerous precedent. In her concurring opinion, Chief Judge Lynch argued for a narrow holding, emphasizing the statute's ambiguity as applied to more complex, modern scenarios. The First Circuit's decision highlights how courts struggle to apply older statutes to rapidly evolving technology. The legislature is in the best position to strike the ideal balance between the constitutional rights of the accused and protecting the public. A deferential judicial opinion by the First Circuit in *Chiaradio* would have been a powerful message to Congress of the ambiguity of section 2552(a)(4)(B).

Introduction

David Chiaradio was charged in federal district court for two separate counts of possession of child pornography under 18 U.S.C. § 2254(a)(4)(B) after FBI agents discovered child pornography on two computers in his home.[1] The U.S. District Court for the District of Rhode Island found Chiaradio guilty of two separate counts of possession and distribution of child pornography.[2] Chiaradio appealed the district court's decision, arguing that the ruling was a violation of the Double Jeopardy Clause of the Fifth Amendment, which states that a

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[1] 18 U.S.C. § 2252(a)(4)(B) (2006) (stating that individuals can be charged under the statute if they "knowingly possess[] . . . 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction" of child pornography); United States v. Chiaradio, 684 F.3d 265, 272 (1st Cir. 2012).

[2] *Chiaradio,* 684 F.3d at 272.

citizen cannot be punished multiple times for the same crime.[3] The U.S. Court of Appeals for the First Circuit remanded the case, finding that Congress intended for an individual in Chiaradio's position to be charged with a single crime.[4] In her concurring opinion, Chief Judge Lynch expressed concern over the manner in which the majority reached this conclusion.[5] Specifically, Chief Judge Lynch urged a narrow reading of the case because the Congressional intent behind the statute could not be deciphered adequately by looking at the statutory text.[6] Furthermore, Chief Judge Lynch was concerned that setting any sort of precedent beyond the facts of the case could have detrimental consequences.[7] The Chief Judge seemed to be aware of the coming changes in technology and how files will no longer be kept in a single hard drive on a single computer.[8]

Chiaradio's case highlights the dangers of leaving courts to decide how new technology applies to older and unclear statutes.[9] On one hand, a court may take an overzealous approach and possibly violate or imperil the constitutional rights of the accused.[10] On the other hand, a court may misconstrue the severity of the crime and thereby fail to safeguard the public adequately.[11] Striking the ideal balance between the constitutional rights of the accused and protecting the public is a

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[3] *Id.*; *see* U.S. Const. amend. V (stating that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb"); Illinois v. Vitale, 447 U.S. 410, 415 (1980) (stating that the Fifth Amendment "protects against multiple punishments for the same offense").

[4] *See Chiaradio,* 684 F.3d at 276, 284 (stating that "on the facts of this case, the defendant's unlawful possession of a multitude of files on two interlinked computers located in separate rooms within the same dwelling gave rise to only a single count of unlawful possession under section 2252(a)(4)(B)"). The First Circuit stated that remanding the case was the most "salubrious" course of action. *Id.* at 284.

[5] *See id.* at 285 (Lynch, C.J., concurring). Chief Judge Lynch especially did not like the fact that the First Circuit looked to *United States v. Polouizzi* for guidance in deciding the case. *See id.*; United States v. Polouizzi, 564 F.3d 142, 153–57 (2d Cir. 2009) (holding that an individual charged with eleven counts of possessing child pornography for possessing thousands of illegal images across three hard drives in two separate rooms had committed a single crime).

[6] *See Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring).

[7] *See id.*

[8] *See id.*

[9] *See id.*; *see also* Orin S. Kerr, *The Fourth Amendment and New Technologies: The Case for Caution,* 102 Mich. L. Rev. 801, 875–82 (2004) (stating the logistical hurdles faced by the judicial branch when trying to adapt to new technology).

[10] *See Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring); Kerr, *supra* note 9, at 875–82.

[11] *See Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring); Kerr, *supra* note 9, at 875–82.

task that the legislature, rather than the judiciary, is best equipped to handle.[12]

I. The FBI's Investigation and Indictment of Chiaradio

On February 28, 2006, FBI agent Joseph Cecchini went online to search for distributors of child pornography.[13] Agent Cecchini used a special version of the file sharing software LimeWire that had been customized to assist child pornography investigations.[14] This special version of LimeWire allowed FBI agents to determine the precise street address of the individual from whom they were downloading the illegal files.[15] Agent Cecchini downloaded three files from a single source after searching for "pedo collection," and the software pinpointed the files as originating from an address in Westerly, Rhode Island.[16] Agent Cecchini relayed this information to agent Andrew Yesnowski, who was tasked with executing the search warrant.[17]

On August 22, 2006, Agent Yesnowski and a search party executed the search warrant at the Westerly residence.[18] The agent discovered two computers—a laptop and desktop—in separate rooms of the house.[19] Chiaradio, who was home at the time, admitted to the agents that the computers were networked in a way that allowed for the wireless sharing of files.[20] Chiaradio stated that he had never searched for, distributed, or downloaded child pornography.[21] Nevertheless, the agents discovered

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[12] *See* Kerr, *supra* note 9, at 875–82.

[13] United States v. Chiaradio, 684 F.3d 265, 271 (1st Cir. 2012).

[14] *Id.*; *see* Brief for the United States at 8, United States v. Chiaradio, 684 F.3d 265 (1st Cir. 2012) [hereinafter Brief for the U.S.].

[15] *Chiaradio,* 684 F.3d at 271; Brief for the U.S., *supra* note 14, at 8 (stating that the customized FBI software "also displays the geographical location and Internet service provider associated with the IP address").

[16] *Chiaradio,* 684 F.3d at 271. Specifically, the software allows the FBI to obtain the suspect's IP address and Internet service provider and, once armed with that information, it is a simple matter of contacting the provider to obtain the address of the home from which the IP address originated. Brief for the U.S., *supra* note 14, at 8–9.

[17] *Chiaradio,* 684 F.3d at 271.

[18] *Id.*; *see* Brief of Defendant-Appellant David Chiaradio at 4, United States v. Chiaradio, 684 F.3d 265 (1st Cir. 2012) [hereinafter Brief for the Defendant].

[19] *Chiaradio,* 684 F.3d at 271.

[20] *Id.* Chiaradio had apparently set up the file sharing between the computers himself, which indicated to the authorities that Chiaradio was fairly computer literate and consciously sought out a system that allowed easy sharing of images between his laptop and desktop. *See* Brief for the Defendant, *supra* note 18, at 4.

[21] *Chiaradio,* 684 F.3d at 271–72. In fact, Chiaradio denied that he had ever seen the folder that contained the illegal images in question, even though the folder "was con-

seven thousand images and videos of child pornography on the computers.[22] Many of the images overlapped on the two computers, and Chiaradio later admitted to using the laptop as his primary download computer and the desktop as his archive and "sharing" computer, a function facilitated by the wireless network configuration.[23]

On May 20, 2009, a federal grand jury indicted Chiaradio with two counts of possession of child pornography under 18 U.S.C. § 2252 (a)(4)(B) and one count of distribution under 18 U.S.C. § 2252(a)(2).[24] A jury subsequently found Chiaradio guilty of both counts of possession—the first count of possession was for the desktop, and the second count of possession was for the laptop—of child pornography under 18 U.S.C. § 2252(a)(4)(B).[25] The U.S. District Court for the District of Rhode Island did not disturb the jury's decision and sentenced Chiaradio on two separate counts of possession of child pornography.[26] Chiaradio promptly appealed the district court's decision, stating that the district court violated the Double Jeopardy Clause of the Fifth Amendment by convicting him twice for the same crime.[27]

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spicuously present on the laptop computer's start-up screen." Brief for the U.S., *supra* note 14, at 10–11.

[22] *Chiaradio,* 684 F.3d at 272.

[23] *Id.;* Brief for the U.S., *supra* note 14, at 70. According to the FBI agents, Chiaradio's laptop was in the middle of downloading additional illegal images when they entered his home. Brief for the U.S., *supra* note 14, at 10.

[24] *See* 18 U.S.C. § 2252(a)(2), (4) (2006); *Chiaradio,* 684 F.3d at 272. The federal grand jury found Chiaradio guilty of every charge that the government brought against him. *Chiaradio,* 684 F.3d at 272.

[25] *See* 18 U.S.C. § 2252(a)(4)(B); *Chiaradio,* 684 F.3d at 272. Section 2252(a)(4)(B) forbids "knowingly possess[ing] . . . 1 or more books, magazines, periodicals, films, video tapes, or other matter" depicting child pornography. 18 U.S.C. § 2252(a)(4)(B). The government's winning argument with the district court appears to have centered around *United States v. McKelvey,* 203 F.3d 66, 71–72 (1st Cir. 2000), and *United States v. Lacy,* 119 F.3d 742, 748 (9th Cir. 1997), which together state that a computer hard drive is a "matter" for purposes of 18 U.S.C. § 2252(a)(4)(B). *See* Brief for the U.S., *supra* note 14, at 53–56. The fact that Chiaradio possessed two separate "matters" containing child pornography (i.e., two separate hard drives) meant that he could be charged with two separate crimes under 18 U.S.C. § 2252(a)(4)(B). *See id.*

[26] *See Chiaradio,* 684 F.3d at 272.

[27] *See id.*; Brief for the Defendant, *supra* note 18, at 44–46 (arguing that the district court's ruling was inconsistent with a prior circuit court ruling in *United States v. Polouizzi,* and that, in the alternative, two networked hard drives were mere gateways to the single electronic database that was the real "matter" intended by the statute).

II. The First Circuit Considers Legislative Intent and Stare Decisis

The U.S. Court of Appeals for the First Circuit overturned the district court's ruling convicting Chiaradio of two separate counts of possession of child pornography.[28] The First Circuit held that Chiaradio was unconstitutionally charged twice for the same crime.[29] The First Circuit based its decision on two premises.[30] First, the legislative intent behind 18 U.S.C. § 2252(a)(4)(B) indicates that someone in Chiaradio's position should be charged with only one count of possession.[31] Second, Chiaradio's case was similar to *United States v. Polouizzi,* where the Second Circuit held that a defendant who had numerous illegal files across three non-networked hard drives committed a single crime.[32]

The First Circuit looked to the history of 18 U.S.C. § 2252(a)(4)(B) for guidance, but did not find any explicit indication by Congress that section 2252(a)(4)(B) can be used to charge an individual with multiple crimes based on the number of "matters" used to house the illegal images.[33] The court focused on the "one or more" language of the statute because it was different from other statutes that previously had been used to charge a defendant with multiple offenses based on the number of items he possessed.[34] To emphasize this point, the court distinguished 18 U.S.C. § 2252(a)(4)(B)—which deals with the possession and distribution of illegal images involving minors—from 18 U.S.C. § 2252A (a)(5)(B)—which deals with the possession and distribution of child

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[28] United States v. Chiaradio, 684 F.3d 265, 276 (1st Cir. 2012).

[29] *Id.* The First Circuit explicitly stated, "[Chiaradio's] simultaneous convictions and sentences on those counts violated his constitutional right to be free from double jeopardy." *Id.*

[30] *Chiaradio,* 684 F.3d at 273–75.

[31] 18 U.S.C. § 2252(a)(4)(B); *Chiaradio,* 684 F.3d at 273–75.

[32] *See Chiaradio,* 684 F.3d at 275; United States v. Polouizzi, 564 F.3d 142, 147, 157 (2d Cir. 2009).

[33] *See* 18 U.S.C. § 2252(a)(4)(B); *Chiaradio,* 684 F.3d at 273–74. The text of the statute uses the word "matter" as an ambiguous catchall. *See* 18 U.S.C. § 2252(a)(4)(B) (stating "1 or more books, magazines, periodicals, films, video tapes, or other *matter*") (emphasis added); Brief for the U.S., *supra* note 14, at 55 ("The term 'matter' means 'physical media' capable of containing images . . . which includes a computer hard drive."). The Act was passed in 1990 and amended in 1998. *Chiaradio,* 684 F.3d at 274.

[34] *See* 18 U.S.C. § 2252(a)(4)(B); *Chiaradio,* 684 F.3d at 274. The court found it noteworthy that no other section of the statute contains a numerical indicator. *Chiaradio,* 684 F.3d at 274. For example, 18 U.S.C. § 2252(a)(1) through (a)(3) deal with receipt, distribution, and sale offenses, but each clause uses the word "any" as opposed to the phrase "one or more." *See* 18 U.S.C. § 2252(a)(1)–(3); *Chiaradio,* 684 F.3d at 274.

pornography.[35] The First Circuit noted that § 2252A(a)(5)(B) allows for multiple offenses depending on the number of possessions because its language states that an individual can be charged for possessing "any" illegal matter.[36] This is different from the language in section 2252(a)(4)(B), which says that an individual may be charged if he possesses "one or more" illegal matters.[37] The court concluded that if Congress truly wanted to allow multiple prosecutions under section 2252(a)(4)(B), then Congress would have used the same language it used in section 2252A(a)(5)(B).[38]

For guidance, the First Circuit in *Chiaradio* also looked to decisions by sister circuits that had previously interpreted 18 U.S.C. § 2252(a)(4)(B)—*United States v. Kimbrough* and *United States v. Polouizzi*.[39] In *Kimbrough,* the defendant appealed after he received multiple counts of possession under section 2252(a)(4)(B) due to multiple illegal images that he housed in a single computer.[40] The U.S. Court of Appeals for the Fifth Circuit held that the plain language of section 2252(a)(4)(B) indicates that Congress did not intend for the statute to be used to charge multiple offenses based on the number of illegal images.[41] Because its own independent analysis of the statute reached the same conclusion, the First Circuit in *Chiaradio* found *Kimbrough*'s analysis and conclusion particularly persuasive.[42]

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[35] *See* 18 U.S.C. § 2252(a)(4)(B); 18 U.S.C. § 2252A(a)(5)(B); *Chiaradio,* 684 F.3d at 275–76. The First Circuit in *Chiaradio* explicitly stated that section 2252A would have allowed for multiple prosecutions. *Chiaradio,* 684 F.3d at 275.

[36] *See* 18 U.S.C. § 2252(a)(4)(B); *id.* § 2252A(a)(5)(B); *Chiaradio,* 684 F.3d at 275. The First Circuit's analysis of the two statutes was in response to the prosecution's argument that if 18 U.S.C. § 2252A(a)(5)(B) allowed for multiple prosecutions then so should 18 U.S.C. § 2252(A)(4)(B). *See Chiaradio,* 684 F.3d at 275.

[37] *See* 18 U.S.C. § 2252(a)(4)(B); *id.* § 2252A(a)(5)(B); *Chiaradio,* 684 F.3d at 275.

[38] *See* 18 U.S.C. § 2252(a)(4)(B); *id.* § 2252A(a)(5)(B); *Chiaradio,* 684 F.3d at 275–76.

[39] *See* 18 U.S.C. § 2252(a)(4)(B); *Chiaradio,* 684 F.3d at 274–75; *Polouizzi,* 564 F.3d at 155–56; United States v. Kimbrough, 69 F.3d 723, 730 (5th Cir. 1995).

[40] *Kimbrough,* 69 F.3d at 729.

[41] *See* 18 U.S.C. § 2252(a)(4)(B); *Chiaradio,* 684 F.3d at 274; *Kimbrough,* 69 F.3d at 730. It is important to point out that *Kimbrough* was decided before the 1998 amendment to 18 U.S.C. § 2252(a)(4)(B), when the statute stated that anyone caught with "three or more," as opposed to "one or more," illegal matters could be charged under the statute. *See* 18 U.S.C. § 2252(a)(4)(B); *Chiaradio,* 684 F.3d at 274; *Kimbrough,* 69 F.3d at 723.

[42] *See* 18 U.S.C. § 2252(a)(4)(B); *Chiaradio,* 684 F.3d at 274; *Kimbrough,* 69 F.3d at 723. After concluding that *Kimbrough* applied to the case at bar, the First Circuit stated, "[a]ccordingly, we hold that the plain language of section 2252(a)(4)(B) memorializes Congress's intent . . . that one who simultaneously possesses a multitude of forbidden images at a single time and in a single place will have committed only a single offense." *Chiaradio,* 684 F.3d at 274.

Similarly in *Polouizzi,* the defendant was charged with eleven counts of possession under section 2252(a)(4)(B) after he was caught with thousands of illegal images spread across three non-networked hard drives.[43] Because the hard drives were not networked, Polouizzi needed to physically carry the hard drives between the rooms, connect them to the computers, and transfer the files while the hard drives were connected.[44] The U.S. Court of Appeals for the Second Circuit held that the defendant could only be charged with one crime under section 2252(a)(4)(B), reasoning that there was no legislative intent for the statute to be used to prosecute a defendant multiple times based on the amount of illegal images he possessed.[45] The *Chiaradio* court found *Polouizzi* particularly persuasive and noted that the prosecution was unable to distinguish Chiaradio's scenario from Polouizzi's.[46]

In her concurring opinion in *Chiaradio,* Chief Judge Lynch noted that she would have preferred a holding and analysis that was explicitly limited to the scenario in *Chiaradio.*[47] Although Chief Judge Lynch agreed with the majority's decision in the case, she disagreed with the extent of the analysis that the majority engaged in to reach their decision.[48] Chief Judge Lynch argued that although the evidence of legislative intent for 18 U.S.C. § 2252(a)(4)(B) was sparse, it was apparent that Congress did not intend for someone in Chiaradio's position to be charged with multiple crimes based on the number of hard drives he possessed.[49] Because there was enough evidence of legislative intent

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[43] 18 U.S.C. § 2252(a)(4)(B); *Chiaradio,* 684 F.3d at 274; *Polouizzi,* 564 F.3d at 146–48. Interestingly, Polouizzi was charged only with eleven counts of possession even though he in fact had thousands of illegal images and videos. *Polouizzi,* 564 F.3d at 147–48.

[44] *See Polouizzi,* 564 F.3d at 147–48.

[45] 18 U.S.C. § 2252(a)(4)(B); *Polouizzi,* 564 F.3d at 155–57.

[46] *See Chiaradio,* 684 F.3d at 275; *Polouizzi,* 564 F.3d at 155–56. The First Circuit stated that the government "labors to distinguish *Polouizzi* on the ground that, unlike in that case . . . [the government] has consistently argued the significance of dual computers in separate rooms." *Chiaradio,* 684 F.3d at 275.

[47] *Chiaradio,* 684 F.3d. at 285 (Lynch, C.J., concurring). Chief Judge Lynch stated that she wrote separately "to say that in [her] view both the question presented and the analysis needed to resolve this question are narrow," and that she "would postpone engaging in any broader analysis until a future case." *Id.*

[48] *Id.* Chief Judge Lynch preferred a simpler analysis. *Id.* Unlike the majority, she believed that the legislative intent behind 18 U.S.C. § 2252(a)(4)(B) was unclear. *Id.*

[49] 18 U.S.C. § 2252(a)(4)(B); *Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring). The majority noted that the name of the 1998 amending legislation to 18 U.S.C. § 2252 was labeled the "Zero Tolerance for Possession of Child Pornography." *Chiaradio,* 684 F.3d at 274. This fact alone would cast some doubt on legislative intent, and the majority seemed to be aware of this fact, as shown by their statement that they "do not write on a pristine page." *Id.* at 275.

that two hard drives did not constitute two separate offenses, Chief Judge Lynch would have preferred that the majority not look to *Polouizzi* or *Kimbrough* for support.[50] Chief Judge Lynch ended her concurrence by highlighting the difficulty of applying the statute to different technological scenarios, especially where the sentence should be more severe.[51] In particular, she noted how Chiaradio's scenario would be different from a scenario where the defendant used multiple mediums, including more technologically advanced mediums such as cloud storage, to access different illegal files from different sources.[52] Although Chief Judge Lynch never explicitly stated that her opinion was motivated by an awareness of the pitfalls that accompany judicial decisions involving technology and statutory interpretation, it was nevertheless implicit in her reasoning.[53]

III. Judicial Problems with Technology and Legislative Solutions

Chief Judge Lynch's restrained approach in *United States v. Chiaradio* would have been preferable because it highlighted the need for legislative action in this area, and therefore promised greater protection for the constitutional rights of the accused and the safety of the general public.[54] Chief Judge Lynch agreed with the majority that Chiaradio was being charged twice for the same crime in violation of the Fifth Amendment and that the case needed to be remanded.[55] Nevertheless, in her concurring opinion, Chief Judge Lynch advocated a narrower analysis because it is unclear how the statute would apply to other sce-

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[50] *Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring); *Polouizzi,* 564 F.3d at 157; *Kimbrough,* 69 F.3d at 730.

[51] *Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring). It is worth noting that 18 U.S.C. § 2252 does not use the words "hard drive," "network," or "Internet." *See* 18 U.S.C. § 2252.

[52] *Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring) (noting that it was not obvious that Congress intended to bar multiple counts in situations where the defendant used multiple technological mediums to access illegal files at different times and from different sources).

[53] *See id.* (noting that the court has "not received briefing on any legislative history of section 2252(a)(4)(B) which might clarify congressional intent on" the issue of how the statute would apply to mediums other than two networked hard drives). "This appeal presents a montage of issues arising at a crossroads where traditional criminal law principles intersect with the marvels of modern technology." *Id.* at 270 (majority opinion).

[54] *See* United States v. Chiaradio, 684 F.3d 265, 273–76 (1st Cir. 2012); *id.* at 285 (Lynch, C.J., concurring).

[55] *See id.* at 276 (majority opinion); *id.* at 285 (Lynch, C.J., concurring).

narios and because a broad precedent might unduly burden future courts.[56]

The majority's deference to *United States v. Polouizzi* is problematic because of the fundamental difference in technology at issue in the two cases—*Chiaradio* dealt with networked hard drives whereas *Polouizzi* did not.[57] Polouizzi needed to physically connect his external hard drives to his computer in order to access and archive the illegal images, but Chiaradio's networked hard drives effectively functioned as a single unit.[58] Furthermore, unlike Chiaradio, Polouizzi's multiple charges were based not on the number of hard drives, but rather on the number of specific files.[59] Despite these differences, the First Circuit nevertheless looked to *Polouizzi,* thereby linking it to *Chiaradio* and grouping together two technologies with notable differences.[60] The First Circuit compared Chiaradio's scenario to a situation where a defendant had multiple photo albums and swapped illegal pictures between them.[61] That comparison is more applicable to the non-networked external hard drives in *Polouizzi* than Chiaradio's networked hard drives because Chiaradio never had to physically swap anything; instead he could access his illegal files remotely from any device on his home network.[62] If there is no legal distinction between the two technologies, this may mean that possession convictions depend on whether or not all of the files were accessed from a single house, regardless of the number of different mediums used to view explicit images.[63] Furthermore, if the location is the common factor, this may mean that an individual has committed a separate crime of possession whenever he stores illegal files somewhere other than his home.[64] Modern networked hard drives and computers, for example, can be configured so that their files can

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[56] *See id.* at 285 (Lynch, C.J., concurring).

[57] *See id.* (placing extra emphasis on the fact that the case at bar involved networked computers and stating that the majority should not have addressed *Polouizzi*).

[58] *See id.* at 271 (majority opinion); United States v. Polouizzi, 564 F.3d 142, 147 (2d Cir. 2009).

[59] *Polouizzi,* 564 F.3d at 154.

[60] *See Chiaradio,* 684 F.3d at 275 (addressing networked hard drives that functioned as a single unit); *Polouizzi,* 564 F.3d at 147 (dealing with external hard drives that needed to be physically connected). The majority opinion stated that the holding was a narrow one, but it gave *Polouizzi* additional influence by relying on it. *See Chiaradio,* 684 F.3d at 275 (stating that the government "labors to distinguish *Polouizzi*" from the case at bar).

[61] *Chiaradio,* 684 F.3d at 275.

[62] *See id.*; *Polouizzi,* 564 F.3d at 147.

[63] *See Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring).

[64] *See id.*

be accessed from anywhere with an Internet connection.[65] Because of the majority's dubious decision to analogize a case concerning non-networked hard drives to a case involving networked hard drives, future courts will now have to tackle the legal significance of the two technologies and untangle *Chiaradio* from *Polouizzi* in the process.[66]

Evolving technology presents a unique problem for courts because a well-informed ruling involving the application of an older statute to new technology requires a thorough understanding of the new technology.[67] Although courts need to be technologically competent to avoid setting precedent that would unnecessarily harm the rights of the accused, they often lack the resources to attain such competence through research and education.[68] Seemingly aware of this, Chief Judge Lynch highlighted the fact that 18 U.S.C. § 2252(a)(4)(B) is difficult to apply in modern scenarios.[69] Chief Judge Lynch's cautious approach is preferable because it minimizes opportunities to establish bad precedent, and because it focuses on the entity that is best equipped to handle the problem—the legislature.[70] The legislature is in the best position to determine how the law will apply to evolving technology due to its greater fact-finding capabilities relative to the judiciary.[71] Congress's resources and constitutional powers should allow it to become educated in the intricacies of network technology and create laws that will

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[65] *Id.*

[66] *See id.* at 276 (majority opinion) (relying on *Polouizzi* and holding that "the defendant's unlawful possession of a multitude of files on two interlinked computers located in separate rooms within the same dwelling gave rise to only a single count of unlawful possession"). Networked hard drives behave more like the extension of a single entity in which there is no need to physically swap items. *See id.*; *Polouizzi,* 564 F.3d at 147; *see also* Kerr, *supra* note 9, at 875–76 (noting that judges frequently struggle to understand new technologies, "and often must rely on the crutch of questionable metaphors to aid their comprehension").

[67] *See* Kerr, *supra* note 9, at 875 ("The task of generating balanced and nuanced rules requires a comprehensive understanding of technological facts. Legislatures are well-equipped to develop such understandings; courts generally are not.").

[68] *See Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring); Kerr, *supra* note 9, at 875. As Professor Kerr makes clear in *A Case for Caution:* "The information environment of judicial rulemaking is usually poor. Judges decide cases based primarily on a brief factual record, narrowly argued legal briefs, and a short oral argument. They must decide their cases in a timely fashion, and can put only so much effort into any one case." Kerr, *supra* note 9, at 875.

[69] *See* 18 U.S.C. § 2252(a)(4)(B) (2006); *Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring).

[70] *See* Kerr, *supra* note 9, at 875.

[71] *See id.*

adequately protect the constitutional rights of the accused.[72] A final benefit of this cautious judicial approach is that it foregrounds the often overlooked constitutional issues that individuals in Chiaradio's situation face.[73]

Additionally, it is possible that Congress would prefer for someone in Chiaradio's position, harboring thousands of illegal files on two separate networked hard drives, to face a harsher sentence than individuals who do not use technology to such extremes.[74] Chiaradio employed technology that was even more sophisticated than the technology Polouizzi used, which arguably makes him more culpable than Polouizzi.[75] Chief Judge Lynch also alluded to the idea that perhaps Congress wants greater punishment for individuals that employ a wide array of technologies at different times to access child pornography.[76] These are serious public safety concerns that the legislature alone can remedy by using its institutional expertise and constitutional authority.[77]

The *Chiaradio* majority merely had to hold that the drafters of the statute did not intend for Chiaradio to be charged on two separate counts; in going beyond that, the majority perpetuated the belief that the judiciary alone can resolve such nuanced technological and statutory issues.[78] Because the First Circuit failed to even acknowledge that

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[72] *See Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring) (lamenting the lack of additional facts provided because more information would be needed to clarify congressional intent on the issue); Kerr, *supra* note 9, at 875 (stating that "[l]egislative rules tend to be the product of a wide range of inputs, ranging from legislative hearings and poll results to interest group advocacy and backroom compromises").

[73] *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give A Damn About the Rights of the Accused?*, 44 Syracuse L. Rev. 1079, 1096–97 (1993) (stating that "when judges interpret language that bears on criminal procedure, they should acknowledge their singular responsibility to those who are unable to defend themselves through electoral politics").

[74] *See Chiaradio,* 684 F.3d at 274–75; *id.* at 285 (Lynch, C.J., concurring). The amending legislation of 18 U.S.C. § 2252(a)(4)(B) was called the "Zero Tolerance for Possession of Child Pornography," which alone suggests that Congress intended the punishments under the statute to be harsh. *See* 18 U.S.C. § 2252(a)(4)(B); *Chiaradio,* 684 F.3d at 274–75 (majority opinion). This was also referenced throughout Chief Judge Lynch's concurring opinion. *See Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring) ("The question of Congressional intent as to very different factual situations on single vs. multiple crimes strikes me as not being resolved by a plain reading of the statutory text.").

[75] *See Chiaradio,* 684 F.3d at 271 (describing the sophisticated system that Chiaradio used to download and archive illegal images); *Polouizzi,* 564 F.3d at 147.

[76] *See Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring) (noting how perhaps Congress does intend multiple convictions for an individual who uses various technological mediums to access illegal files from different sources).

[77] *See* Kerr, *supra* note 9, at 875.

[78] *See Chiaradio,* 684 F.3d at 275–76 (relying on *Polouizzi* and holding that "the defendant's unlawful possession of a multitude of files on two interlinked computers located in

the tension between dated statutes and new technology requires legislative attention, a comprehensive solution to the problem remains a distant hope.[79] The Fifth Amendment protects all criminals, regardless of the crime, from being convicted twice for the same crime.[80] Nevertheless, individuals like Chiaradio face the prospect of multiple punishments for the same crime if a judge is unsure how section 2252(a)(4)(B) applies to modern technology.[81] It is also unfair to the victims of child pornography to punish an individual who uses broader and more sophisticated technologies than Chiaradio at the same level as Chiaradio.[82] This nuanced issue can be settled only by the considered judgment of the legislature.[83] Chief Judge Lynch understood that Chiaradio's situation was not "resolved by a plain reading of the statutory text," and that the majority would have been wise to follow her approach and explicitly note that this area of the law requires legislative action.[84]

Conclusion

The First Circuit in *United States v. Chiaradio* held that an individual who possesses thousands of illegal child pornography images across two networked hard drives has committed a single crime. Chief Judge Lynch wrote a concurring opinion that emphasized the statute's ambi-

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separate rooms within the same dwelling gave rise to only a single count of unlawful possession"); *id.* at 285 (Lynch, C.J., concurring) (expressing concern over how the court's interpretation of what constitutes "matter" under 18 U.S.C. § 2252(a)(4)(B) might impact future cases, and advocating for as narrow a holding as possible). "While other cases, on different facts, might appropriately give rise to multiple possession charges under section 2252(a)(4)(B), the facts of this case do not support such an outcome." *Id.* at 276 (majority opinion).

[79] *See id.* at 285 (Lynch, C.J., concurring).

[80] *See* U.S. Const. amend. V; Illinois v. Vitale, 447 U.S. 410, 415 (1980) (stating that the Fifth Amendment "protects against multiple punishments for the same offense"); *Chiaradio,* 684 F.3d at 273, 276 (rejecting the government's argument that Chiaradio's "utilization of two computers (the laptop and the desktop) exposed him to prosecution for two separate crimes" and holding that his "simultaneous convictions and sentences . . . violated his constitutional right to be free from double jeopardy).

[81] *See* United States v. McKelvey, 203 F.3d 66, 71–72 (1st Cir. 2000); United States v. Lacy, 119 F.3d 742, 748 (9th Cir. 1997) (holding that hard drives are matters for purposes of section 2252(a)(4)(B)); Kerr, *supra* note 9, at 875. The most troublesome technology will likely be remote storage services, which automatically duplicate files on server farms miles away. *See Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring). In fact, this was one of the technologies mentioned by Chief Judge Lynch as potentially troublesome for the statute. *Id.*

[82] *See Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring).

[83] *See* Kerr, *supra* note 9, at 875.

[84] *See Chiaradio,* 684 F.3d at 285 (Lynch, C.J., concurring); Kerr, *supra* note 9, at 875.

guity as applied to more complex and modern scenarios and called for greater restraint in the analysis so as to avoid creating dangerous precedent. The majority should have shown the same restraint in its analysis and not suggested that 18 U.S.C. § 2252(a)(4)(B) is easily applicable to modern scenarios. Courts often struggle when determining how old statutes apply to new technology, and when the ambiguity of statutory interpretation places the constitutional rights of citizens at risk, courts should not hesitate to conscript the legislature in its search for clarity. This was especially critical for Chiaradio because, as an individual accused of a heinous act, his rights will not be well represented before Congress. A deferential judicial opinion in *Chiaradio* would have been a powerful message to Congress that the ambiguity of section 2252(a)(4)(B) endangers the defendant's constitutional rights. It is also true, however, that Chiaradio *did* engage in a heinous act, and there is a possibility that the statute as applied to modern technology is not as powerful a deterrent as society would prefer. The legislature is best equipped to strike the appropriate balance between these two conflicting concerns, and the First Circuit in *Chiaradio* missed an opportunity to call them to the legislature's attention.