

## Feds may let Playpen child porn suspect go to keep concealing their source code

Cyrus Farivar - 1/9/2017, 7:39 PM : 4-5 minutes : 1/9/2017

A balancing act —

**In 2016, judge ordered DOJ to give up source code targeting a Tor-hidden child porn site.**



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Rather than disclose the source code that the FBI used to target a child porn suspect, federal prosecutors in Tacoma, Washington recently [dropped their appeal](#) in *United States v. Michaud*.

The case is just one of 135 federal prosecutions nationwide involving the Tor-hidden child porn website Playpen. The vast effort to bust Playpen has raised significant questions about the ethics, oversight, capabilities, and limitations of the government's ability to hack criminal suspects.

In *United States v. Michaud*, Jay Michaud of Vancouver, Washington allegedly logged on to Playpen in 2015. But unbeknownst to him at that point, federal investigators were temporarily operating the site for 13 days before shutting it down. As authorities controlled Playpen, the FBI deployed a sneaky piece of software (a "network investigative technique (NIT)," dubbed by

many security experts as malware), which allowed them to reveal Playpen users' true IP addresses. With that information in hand, identifying those suspects became trivial.

Since being apprehended, some of the Playpen defendants immediately took plea deals. Others have challenged the government's NIT and the single out-of-district warrant that authorized its use.

In this case, US District Judge Robert Bryan eventually ordered the government to hand over the NIT's source code. Since [that May 2016 order](#), the government has [classified the source code itself](#), thwarting efforts for criminal discovery in more than 100 Playpen-related cases that remain pending. In June 2016, prosecutors began the appeals process to the 9th US Circuit Court of Appeals, but they ultimately decided to abandon *Michaud* at the higher court.

Despite ending the appeal on December 23, the case is still technically live: prosecutors could ask the judge to reconsider his May 25, 2016 order suppressing the evidence found on Michaud's computer as a result of the NIT. But if the government declines to pursue the case further at the district court level, *Michaud* would become the second Playpen-related case that's been dismissed. Prosecutors did not immediately respond to Ars' request for comment.

Michaud's federal public defender, Colin Fieman, has been dogged in trying to force the government to reveal more information about how the NIT worked.

"We're not out of the woods yet because they can ask for another motion to reconsider," Fieman told Ars. "It may not be a dismissal of the indictment at this point, but it would be odd for them to try to pursue further. But we'll have to wait and see."

Last year, a federal judge in a [related case prosecuted out of Oklahoma](#), *United States v. Arterbury*, also ruled against the prosecution. The government eventually dropped the appeal and then dismissed the indictment at the district court in October 2016. Yet another Playpen case, *United States v. Levin*, where the defense prevailed initially, is currently on appeal at the 1st US Circuit Court of Appeals. [Beau Croghan](#), a man in Iowa, was another alleged user hit by this NIT—his case was just one of three in which a [judge ruled to suppress the evidence](#) due to a defective warrant. Croghan's case is now pending before the 8th US Circuit Court of Appeals.

Beyond *Michaud*, Fieman is representing another Playpen defendant in the same judicial district (the Western District of Washington) before the very same judge. In the second case, the evidence and legal questions are nearly identical. That case, *United States v. Tippens*, is set to go to trial on February 27, 2017 in Tacoma.

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