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March 12, 2007

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comments on Proposed Amendments Relating to Intellectual Property and Pretexting

Dear Judge Hinojosa:

With this letter, we provide the comments of the Federal Public and Community Defenders on the proposed amendments and issues for comment relating to Intellectual Property and Pretexting published January 30, 2007.

I. Intellectual Property, § 2B5.3

A. "Anti-Circumvention Devices"

Congress directed the Commission to review and amend § 2B5.3 "if appropriate" after determining whether the definition of "infringement amount" was adequate to address situations in which the defendant was convicted under 18 U.S.C. §§ 2318 or 2320 and the item in which the defendant trafficked was not an infringing item but "was intended to facilitate infringement, such as an anti-circumvention device."[1] For three

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[1] The directive states:

> (c) SENTENCING GUIDELINES-
> (1) Review and amendment- Not later than 180 days after the date of enactment of this Act, the United States Sentencing Commission, pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this subsection, shall review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under **section 2318 or 2320** of title 18, United States Code. . . .
> (3) RESPONSIBILITIES OF UNITED STATES SENTENCING COMMISSION- In carrying out this subsection, the United States Sentencing

reasons, we believe the directive is too ambiguous (at best) to warrant Commission action without clarification from Congress. First, neither section 2318 nor 2320 imposes criminal liability for trafficking in any device. (Sections 1201 and 1204 of the Copyright Act do impose such liability, *see* 17 U.S.C. §§ 1201, 1204, but the directive does not mention those sections.) Second, no federal statute—not even 17 U.S.C. §§ 1201, 1204—imposes liability (civil or criminal) for trafficking in an *anti-circumvention* device. (Sections 1201, 1204 criminalize trafficking in *circumvention* devices.) Third, trafficking in a circumvention device is not a form of or equivalent to fraud or theft, making any recourse to the table in §2B1.1 inappropriate. Until Congress clarifies its intent, no amendment is warranted.

Failing that, we offer our thoughts on the proposed options. 17 U.S.C. § 1201(b)(1) involves trafficking in devices designed to "circumvent[] protection afforded by a technological measure that effectively protects a right of a copyright holder," with the phrase "circumvent protection afforded by a technological measure" defined in 17 U.S.C. § 1201(b)(2). A "right of a copyright holder," with respect to a work which could be protected by a technological measure (*i.e.*, software, a DVD, recorded music) is the right to exercise one of copyright's exclusive entitlements, such as copying or distribution.[2] 17 U.S.C. § 1201(a)(2) involves trafficking in devices designed to "circumvent[] a technological measure that effectively controls access," with the phrase

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> Commission shall determine whether the definition of 'infringement amount' set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is adequate to address situations **in which the defendant has been convicted of one of the offenses listed in paragraph (1)** and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, **such as an anti-circumvention device**, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as U.S. v. Sung, 87 F.3d 194 (7th Cir. 1996).

Pub. L. No. 109-181 § 1(c) (emphasis supplied).

[2] A copyright owner has "exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." 17 U.S.C. § 106.

"circumvent a technological measure" defined in 17 U.S.C. § 1201(a)(3). As we understand it, "accessing" a copyrighted work means using it as intended (*i.e.*, using software, watching a DVD, listening to music), and does not necessarily involve copying or distributing. Violating either subsection of § 1201, if "willfully and for purposes of commercial advantage or private financial gain," is a crime subject to a statutory maximum of five years for a first offense. *See* 17 U.S.C. § 1204.

Option 1 would make the "infringement amount" for a defendant convicted under 17 U.S.C. § 1201 the "price the user would have paid to access lawfully the copyrighted work" times the number of "accessed works," and would add two levels and require a minimum offense level of 12 if the conviction was under 17 U.S.C. § 1201(b). Option 2 would make the "infringement amount" the retail value of the device times the number of devices for any conviction under 17 U.S.C. § 1201. Option 3 would make the "infringement amount" the greater of the retail value of the device times the number of devices, or the "price a person legitimately using the device to access or make use of a copyrighted work would have paid" times the number of devices for a conviction under 17 U.S.C. § 1201(b).

Options 1 and 3 are both too complex. Under Option 1, the court would have to determine the price a user would have paid to "access lawfully" the copyrighted work.[3] Under Option 2, the court would have to determine the price a person would have paid to "legitimately us[e] the device to access or make use of" the copyrighted work. Option 3 is even more complex and confusing than Option 1 because it would require two calculations in every case, and what is meant by the "price a person legitimately using the device to access or make use of a copyrighted work would have paid" is entirely unclear. Option 1 may well result in sentences that exceed the seriousness of the offense, because not every such conviction will necessarily involve actual copying or distribution. With no case law involving an offense under 17 U.S.C. § 1201(b), a conclusion that every such case deserves a minimum of 12 levels seems unjustified—a single distribution of a circumvention device, such as a software program, hardly seems to call for so high an offense level.

We support Option 2 because it is the simplest of the three options. If the Commission wishes to add punishment for a conviction under § 1201(b) that involved copying or distribution, we suggest that it add a specific offense as follows:

> If the defendant was convicted under 17 U.S.C. § 1201(b) and also copied or distributed the copyrighted work, increase by two levels.

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[3] If the Commission uses Option 1, it should provide some examples of what is meant by "the price the user would have paid to access lawfully the copyrighted work." Based on discussions with staff, in the case of software, this would be the cost of adding another user to a software license.

B. Downward Departure

In response to Issue for Comment #1, there should be a downward departure for cases in which the infringement amount overstates the seriousness of the offense. We proposed such a departure in 2005. There has been an invited upward departure since 2000 but no invited downward departure. There have been zero upward departures and a consistently high rate of downward departures. In 2006, the rate of within-guideline sentences under § 2B5.3 reached an all-time low of 47%, with none above the guideline range, 66 non-government sponsored below-guideline range, and 38 government-sponsored below-guideline range. *See* 2006 Sourcebook, Table 28.

The history, and the fact that this guideline is concerned with rapidly changing technology, counsels in favor of flexibility that goes both ways. This guideline can easily overstate the seriousness of the offense for a variety of reasons, including that (1) the vast majority of infringements do not result in anywhere near a one-to-one displacement of sales, (2) studies show that infringement can actually benefit trademark and copyright holders, consumers and the economy, and (3) victims submit the alleged loss amount directly to the Probation Officer rather than to the prosecutor who would otherwise weed out false, misleading, unsupported, inflated or legally irrelevant amounts. *See* 8/3/05 Letter of Jon M. Sands to Kathleen Grilli at 3-6 at 3-6 (attached). There will be situations under new Application Note 2(A)(vii) where there is insufficient evidence that some number of the labels, stickers, boxes, etc., would ever have been affixed to an infringing item.

We recommend the same language we recommended in 2005 for a downward departure:

> There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

C. Special Skill

In response to Issue for Comment #2, the Commission should delete Application Note 3 based on the information it has received that not every de-encryption or circumvention case involves a "special skill" not possessed by members of the general public that requires substantial education, training or licensing. There is no need to modify the note to re-state what is already stated in § 3B1.3. The new information is reason enough to delete the note. In addition, where there has been actual circumvention, the offense level is a minimum of 12 under (b)(3) or more than that through (b)(1) and (b)(2). If the Commission adopts any of the three options involving trafficking in devices used to circumvent a technological measure, de-encryption or circumvention will receive additional points there as well.

II. Pretexting, § 2H3.1; Proposed Expansion of "Victim," § 2B1.1

We join the Practitioners Advisory Group's comments on the proposed guideline for the new offense at 18 U.S.C. § 1039, fraudulent acquisition or disclosure of confidential telephone records. USSG § 2H3.1 is more appropriate than USSG § 2B1.1 because the harm is non-monetary and it would be impractical for courts to translate an invasion of privacy into pecuniary loss, and because the additional 3 levels in the base offense level when there is no pecuniary loss (9 versus 6) is sufficient punishment for an invasion of privacy.

We also agree that the best way to implement the mandatory consecutive penalties for aggravated forms of the offense is to require a conviction under 18 U.S.C. § 1039(d) or (e) in order for the cross reference in § 2H3.1(c) to apply. In order for the additional punishment to apply, there will have to be a conviction under subsection (d) or (e) of the statute. The guideline should follow the same course. This offense of conviction approach would avoid a Sixth Amendment violation and would be consistent with the approach the Commission has taken with respect to other statutes requiring consecutive additional punishment with no minimum and only a maximum. *See* USSG § 2D1.2, applicable to convictions under 21 U.S.C. §§ 859, 860 and 861. An application note should explain how to attribute a portion of the total sentence determined under 18 U.S.C. § 3553(a) to the conviction under 18 U.S.C. § 1039(d) or (e).

We do not believe any specific offense characteristics should be added. There have been no prosecutions under the new statute. The courts can sentence above or below the guideline range if they find the range to be insufficient or greater than necessary to satisfy the purposes of sentencing.

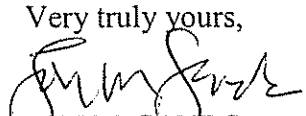
We strongly oppose the proposal by the President's Task Force on Identity Theft to expand the definition of "victim" in USSG § 2B1.1 (or anywhere in the Guidelines) to include a person or entity who sustained no pecuniary harm or bodily injury but "the theft of a means of identification, invasion of privacy, reputational damage, and inconvenience." There is already a specific offense characteristic for identity theft, *see* § 2B1.1(b)(10), and invited upward departure for non-monetary harm. *Id.*, comment. (n.19).

Because the guideline already accounts for these factors, the sole effect of changing the definition of "victim" to include a person or entity who sustained no pecuniary harm or bodily injury but "the theft of a means of identification, invasion of privacy, reputational damage, [or] inconvenience" would be to expand the reach of the Crime Victim's Rights Act, 18 U.S.C. § 3771. Courts would be inundated with assertions of a right to be heard at sentencing by persons and entities claiming perceived damage to their reputations, emotional distress, the inconvenience of a few telephone calls, a headache or loss of a few hours sleep, and then disruptive petitions for mandamus if the court denied the asserted right. Prosecutors would be required to confer with all such persons and entities. Defendants would have to defend against all such persons and entities. The proposed definition would create a practical nightmare in the courts, would

turn a solemn proceeding into a spectacle, and would jeopardize the foundations of our adversary system.

We hope that these comments are useful to the Commission. Please do not hesitate to contact us if you have any questions or concerns, or would like any additional information.

Very truly yours,



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August 3, 2005

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Re: Family Entertainment and Copyright Act of 2005 (Pub. L. 109–9); Intellectual Property Protection and Courts Amendment Act of 2004 (Pub. L. 108–482); CAN SPAM Warning Label Offense (Pub. L. 108-187 section 5(d)(1))

Dear Ms. Grilli:

We write on behalf of the Federal Public and Community Defenders to comment on an appropriate response to the above-referenced intellectual property statutes. As you know, we represent the vast majority of criminal defendants in federal court, and Congress has directed us to submit observations, comments or questions pertinent to the Commission's work whenever we believe it would be useful.[1] We thank you for meeting with us and for this opportunity to follow up with more specific information and analysis.

I. Family Entertainment and Copyright Act of 2005

The FECA adds an offense at 18 U.S.C. § 2319B for unauthorized recording of motion pictures in a motion picture exhibition facility, and an offense at 17 U.S.C. § 506(a)(1)(C) for infringing a copyright of a work being prepared for commercial distribution. The conduct described by each provision was already a crime, and was subject to the same or higher statutory maximums under prior law. Thus, the FECA does not target new conduct for criminal prosecution or harsher penalties.

[1] 28 U.S.C. § 994(o).

The FECA directs the Commission to "review and, if appropriate," amend the guidelines and policy statements applicable to intellectual property offenses,[2] in four ways, each of which we address below.

A. Section 2B5.3 is sufficiently stringent to deter and reflect the nature of intellectual property offenses.

The first directive is a general one to ensure that the intellectual property guideline is "sufficiently stringent" to "deter, and adequately reflect the nature of" such offenses. Based on the history and impact of the NET Act and 2000 amendments, more recent statistical research on the loss attributable to on-line infringement, and Commission statistics on cases sentenced under section 2B5.3, we believe that the current guideline is more than adequate to deter and reflect the nature of intellectual property offenses.

1. History and Impact of the NET Act and 2000 Amendments

Congress enacted the NET Act of 1997 in response to United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994), a case in which an MIT student was charged with wire fraud for running an Internet bulletin board where copyrighted computer games could be uploaded then downloaded at no charge. The district court dismissed the Indictment because, absent a commercial motive, the conduct was not punishable as a crime under the copyright laws or the wire fraud statute.

Congress responded by expanding 17 U.S.C. § 506 to include the reproduction or distribution of copyrighted material accomplished by electronic means – i.e., via the Internet – regardless of whether the conduct is motivated by commercial advantage or private financial gain, and broadened the definition of "financial gain" to include the receipt of copyrighted works. It also directed the Commission to ensure that the guideline range for intellectual property offenses was "sufficiently stringent to deter such a crime," and required that the guideline provide for "consideration of the retail value and quantity" of the infringed item.

After extensive study, the Commission substantially increased the potential guideline range for intellectual property offenses in a variety of ways. It increased the base offense level from 6 to 8; added a 2-level enhancement with a minimum offense level of 12 for manufacture, importation or uploading of infringing items; provided that the 2-level enhancement for use of a special skill under section 3B1.3 would apply if the

[2] See 17 U.S.C. §§ 506 (copyright infringement), 1201 (circumvention of copyright protection systems) and 1202 (misuse of copyright management information), and 18 U.S.C. §§ 2318 (trafficking in counterfeit labels, illicit labels or counterfeit documentation or packaging), 2319 (penalties for copyright infringement), 2319A (unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), 2319B (unauthorized recording of motion pictures in a motion picture exhibition facility), and 2320 (trafficking in counterfeit goods or services).

defendant de-encrypted or circumvented a technological security measure to gain initial access to the infringed item; and encouraged upward departure both for substantial harm to the copyright or trademark owner's reputation, and for commission of the offense in connection with or in furtherance of a national or international organized criminal enterprise. It provided for a 2-level decrease if the offense was not committed for commercial advantage or private financial gain, but excluded from that definition the receipt or expected receipt of anything of value, including other protected works. Thus, the decrease does not apply in most, if not all, cases involving on-line file sharing.

Importantly, the Commission also required that the value of the *infringed* item times the number of infringing items would be used in cases in which the Commission thought it was highly likely that infringing items displaced sales of legitimate items on a one-to-one basis,[3] i.e., where the infringing item is a digital or electronic copy or otherwise appears to be identical or substantially equivalent, or the retail price of the infringing item is at least 75% of the retail price of the infringed item. While the latter may approximate displaced sales, the fact that an infringing item is an electronic or digital copy or otherwise substantially equivalent substantially overstates displaced sales. No matter how perfect the quality of an infringing item, many people simply cannot afford to buy it at its retail price. For example, last month a defendant pled guilty to selling copies of copyright protected software and video games over the Internet. He was paid $192,000 for the infringing items, and the total retail value of the infringed items was $1,154,395.85. That is, he sold the infringing items for 16% of the infringed items' retail value. No one would contend that all or even most of his customers would have paid, or could afford to pay, 84% more. In reality, the majority of those games and software simply would not have been sold. Yet, the defendant's guideline range will be increased based on an infringement amount of over $1 million as well as an uploading enhancement, resulting in a range of 46-57 months.[4] Under the pre-2000 guideline, the range would have been 8-14 months. The 2000 amendments result in a 468% increase from the mid-point of the range.

As noted in the NET Act Policy Development Team Report, economists and even industry representatives agreed that the vast majority of infringements do not result in a one-to-one displacement of sales, the retail value of the infringed (or even the infringing) item overstates loss to the victim because it fails to account for production costs, and although production costs represent payments that would have been made to suppliers of material and labor (assuming the infringement actually displaced a sale), some economists believe that infringement can benefit trademark and copyright holders, consumers and the economy as a whole.[5] See U.S. Sentencing Commission, No

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[3] U.S.S.G. App. C, Amendment 593.

[4] See "Texas man pleads guilty to felony copyright infringement for selling more than $1 million of copyright protected software and video games over the Internet," www.usdoj.gov/criminal/cybercrime/poncedeleonPlea.htm.

[5] Previously, the sentence was increased by the value of the *infringing* item times the number of infringing items. The Commission believed that even that formula would "generally exceed the

Electronic Theft Act Policy Team Development Report at 5, 15, 16, 22-23 (February 1999). Recent studies lend strong support to these concerns. See below.

We also want to alert the Commission to an issue that may further overstate the loss, as well as create unreliability, unpredictability and disparity, in the sentencing of intellectual property cases. With the NET Act, Congress added an unusual provision to these statutes: Victims are permitted to submit *directly* to the Probation Officer "during the preparation of the pre-sentence report" a statement on "the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact."[6] This seems clearly to invite the Probation Officer to use the victim's estimate of loss in calculating the infringement amount. Normally, victims and other witnesses provide evidence to the prosecutor, who sifts through it and passes on to the Probation Officer what is relevant and accurate. Since the prosecutor has an ethical duty of candor to the court, s/he is likely to weed out false, misleading, unsupported, inflated or irrelevant claims of loss. Corporate victims of intellectual property offenses come from a different place. They do not have an ethical duty to the court, may be motivated by concerns such as obtaining restitution or showing investors that intellectual property crime is the cause of falling profits, and are likely to think of "loss" in terms of civil damages. The prosecutor would be obliged to sort out what was actually provable and relevant under the guideline, but we do not believe that most Probation Officers will have sufficient familiarity with the issues to do so, particularly because these cases are so rare. In some districts, sentencing courts hold hearings and resolve disputes about loss with care, but in many districts, the unfortunate fact is that the Pre-Sentence Report is accorded the status of evidence, and evidentiary hearings are rarely if ever held. We raise this not only as a further reason not to increase the guideline range for intellectual property offenses, but as a reason for stronger procedural protections in Chapter 6 and Fed. R. Crim. P. 32.

2. Statistical Research on the Impact of File-Sharing on Sales

A well-respected statistical study of the effect of file sharing on music sales published in March 2004 by researchers at the Harvard Business School and the University of North Carolina at Chapel Hill concluded that "the impact of downloads on sales continues to be small and statistically indistinguishable from zero,"[7] which is inconsistent with industry claims that file sharing explains the decline in music sales

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loss or gain due to the offense," U.S.S.G. § 2B5.3, comment. (backg'd.) (1999), because not every purchase of a counterfeit item represents a displaced sale, and it overestimated lost profits by failing to account for production costs. See U.S. Sentencing Commission, No Electronic Theft Act Policy Team Development Report at 5 (February 1999).

[6] See 18 U.S.C. §§ 2319(e), 2319A(d), 2319B(e), 2320(d).

[7] See Felix Oberholzer and Koleman Strumpf, The Effect of File Sharing on Record Sales: An Empirical Analysis at 24 (March 2004) (hereinafter "Harvard Study"), available at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

between 2000 and 2002.[8] Unlike other studies, which rely on surveys, this study directly observed actual file sharing activities for 17 weeks in the Fall of 2002, and compared it to music sales during the same time period.[9]

The researchers used several models, the most conservative of which showed that it would take 5,000 downloads to reduce sales of an album by one copy.[10] For the top 25% of best-selling albums, downloading was found to have a *positive* effect on sales, while the negative effect on sales of less popular albums was still statistically insignificant.[11] This provides strong support for the concern that section 2B5.3 already overstates the loss by assuming a one-to-one correspondence between infringing items and displaced sales.

The authors pointed out that file sharing may promote new sales by allowing people to sample and discuss music to which they otherwise would not be exposed.[12] In addition to their statistical analysis of actual behavior, they conducted a survey that showed that file sharing led the average user to purchase eight additional albums.[13] Another survey of 2,200 music fans released in 2000 showed that Napster users were 45% more likely to have increased their music spending than non-users.[14]

After the Harvard Study was published, the Recording Industry Association of America reported a 2.8% increase in the number of CDs sold from 2003 to 2004.[15]

The researchers noted that their results were consistent with the fact that sales of movies, video games and software, which are also heavily downloaded, have continued to increase since the advent of file-sharing.[16]

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[8] File sharing of music recordings has been going on since 1999. According to the Recording Industry Association of America (RIAA), CD sales continued to rise during 1999 and 2000, then dropped by 15% between 2000 and 2002. The RIAA claims this is due to file sharing. Id. at 1-2.

[9] Id. at 6, 11.

[10] Id. at 22.

[11] Id. at 23, 25.

[12] Id. at 2.

[13] Id. at 3.

[14] See "Report: File Sharing Boosts Music Sales," E-commerce Times, July 21, 2000, available at http://www.ecommercetimes.com/story/3837.html.

[15] See RIAA 2004 Yearend Statistics (Exhibit A).

[16] Harvard Study at 1, 24.

They suggested (without attempting to definitively identify) several reasons for the decline in music sales from 2000 to 2002: poor economic conditions, a reduction in the number of album releases, growing competition from other sources of entertainment, a reduction in music variety, a consumer backlash against recording industry tactics, and that music sales may have been abnormally high in the 1990s as people replaced records and tapes with CDs.[17]

Finally, the authors suggested that file sharing increases the aggregate social welfare in that it does not reduce the supply of music, and lowers prices overall, which allows more people to buy it.[18]

3. Commission Statistics on Sentencing Under Section 2B5.3

An important factor in evaluating whether the current guideline adequately reflects the nature of intellectual property offenses is how the front-line actors treat these cases. According to Commission statistics, intellectual property cases are few, ranging from a low of 96 in 2000 to a high of 137 in 1998, and 121 in 2003.[19] Since the Commission began keeping track of departures by offender guideline in 1997, there has been only one upward departure in an intellectual property case. That was in 1998, well before the 2000 amendments took effect. The percentage of downward departures has ranged from a low of 22% in 1997, to a high of 41% in 2002 (when sentences under the 2000 amendments were likely to be imposed), then 36% in 2003 (the year of the PROTECT Act).[20] Without knowing the specific departure reasons, it at least appears

[17] Id. at 24.

[18] Id. at 2, 25.

[19] See Table 17 of U.S. Sentencing Commission Sourcebooks of Federal Sentencing Statistics, 1996-2003.

[20] Downward Departures in Cases Sentenced under 2B5.3 1997-2003, based on Sourcebooks of Federal Sentencing Statistics:

	1997	1998	1999	2000	2001	2002	2003
# cases analyzed	115	133	107	87	107	123	112
5K1.1	21	27	25	20	19	38	30
Other govt initiated	N/A	N/A	N/A	N/A	N/A	N/A	2
Non-govt initiated	4	6	0	4	6	13	8
% downward departures	22%	25%	23%	28%	23%	41%	36%

that judges and prosecutors do not regard sentences under current section 2B5.3 as being too low, and in many cases regard them as too high.

No recidivism statistics for intellectual property offenses are publicly available, but one would think that these defendants are relatively easy to deter without excessive sentences. We suspect that most are employed and relatively highly educated. The Commission has identified employment within the year preceding conviction and level of education as factors that indicate reduced recidivism.[21] Those who engage in file sharing on the Internet (with whom Congress and the industry seem most concerned) are not motivated by greed, financial need, or addiction, and therefore are probably more easily deterred. Furthermore, intellectual property prosecutions have a big impact on the relevant population, because they are publicized widely and fast over the Internet.

4. Suggested Basis for Downward Departure

In light of the above, we suggest that the Commission include an encouraged basis for downward departure in the application notes to section 2B5.3:

> Downward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

B. An Enhancement for Pre-Release Infringement is Not Appropriate.

The second directive tells the Commission to determine whether an "enhancement" is appropriate for the "display, performance, reproduction or distribution of a copyrighted work," in any media format, before it has been authorized by the copyright owner. By its terms, this applies to any copyrighted work in any media format. The impetus, however, was the movie industry's representation that "a significant factor" in its "estimated $3.5 billion in annual losses . . . because of hard-goods piracy" stems from the situation where "an offender attends a pre-opening `screening' or a first-weekend theatrical release, and uses sophisticated digital equipment to record the movie," and then sells the recording as DVDs or posts it on the Internet for free downloading.[22]

We do not believe such an enhancement is appropriate. The notion that pre-release DVD sales or Internet postings create losses for the movie industry is highly questionable. The Motion Picture Association of America reports box office sales of $9.5 billion in 2004, a 25% increase over five years ago, and the highest in history.[23] The

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[21] See U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines at 12 (May 2004).

[22] H.R. Rep. No. 109-033.

[23] See Motion Picture Association Worldwide Market Research, U.S. Entertainment Industry: 2004 MPA Market Statistics at 3-4, selected pages attached as Exhibit B, available from www.MPAA.org.

Recording Industry Association of America reports that the number of DVD videos sold increased 66% between 2003 and 2004.[24]

A pre-release enhancement would apply to anything from a defendant using a camcorder to tape a movie and showing it to his family, to making a software package available on the Internet. A one-size-fits-all enhancement would overstate the harm in the first example. It would be excessive in the second example since the defendant would be sentenced for the retail value of all of the software packages downloaded (whether anyone would have bought them or not), as well as an uploading enhancement.

The Commission considered a pre-release enhancement in 2000. The reasons industry gave for such an enhancement were that when the copy is exact, it displaces sales, and when it is inferior, it causes harm to reputation.[25] The 2000 amendments addressed the first concern by increasing the sentence by the value of the infringed item times the number of infringements. If there is increased demand for pre-release works, this will increase the sentence accordingly. The second reason was addressed with an invited upward departure for substantial harm to the copyright or trademark owner's reputation.

C. The Scope of the "Uploading" Enhancement Adequately Addresses Loss from Broad Distribution of Copyrighted Works Over the Internet.

The third directive tells the Commission to determine whether the scope of "uploading" in U.S.S.G. § 2B5.3 adequately addresses loss when people "broadly distribute copyrighted works over the Internet." Defendants who broadly distribute copyrighted works over the Internet receive an increase for that activity in two ways: a 2-level enhancement for uploading, with a minimum offense level of 12, under section 2B5.3(b)(2), and the retail value of all resulting downloads.

In a case where the retail value of an infringed CD is $20, and there was a single upload with no downloads, the uploading enhancement would increase the sentence for a first offender from 0-6 months in Zone A to 10-16 months in Zone C, an increase of 433% in the mid-point of the range, and the difference between probation and approximately one year in prison, in a case in which the copyright owner suffered no loss. If there were 1,000 downloads of the CD, the sentence would increase from 10-16 months to 15-21 months, a 138% increase in the mid-point of the range. In this example, according to the Harvard Study's most conservative model, not even one sale of the CD would have been displaced.

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[24] See RIAA 2004 Yearend Statistics (Exhibit A).

[25] U.S. Sentencing Commission, No Electronic Theft Act Policy Team Development Report at 34 (February 1999).

Two further increases will be available in the more serious cases involving broad distribution over the Internet. In a recent case, eight members of the so-called "warez scene" were indicted for copyright infringement. According to the press release and indictments, "warez" groups are at the "top of the copyright piracy supply chain" and the original sources for most copyrighted works distributed over the Internet. They are highly-organized, international in scope, and some of them specialize in cracking copyright protection systems.[26] These defendants apparently would be eligible for an upward departure for committing copyright infringement in connection with or in furtherance of a national or international organized criminal enterprise, and for an enhancement for use of a special skill for circumventing technological security measures.

In sum, the scope of the uploading enhancement is more than adequate.

D. There is No Need for an Enhancement to Reflect Harm in Cases, If Any, in Which the Number of Infringing Items Cannot Be Determined.

The final directive tells the Commission to determine whether the existing guidelines and policy statements adequately reflect "any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

We do not believe that any change is appropriate. In a case in which the government fails to prove that any download resulted, the defendant already receives an additional four levels through the uploading enhancement. An enhancement explicitly based on a *lack* of evidence is likely to be unconstitutional.

Moreover, a review of recent cases indicates that the scope of the infringement *can* be determined. When copyrighted works are sold over the Internet, buyers have to pay for it, which is easily tracked.[27] Files are shared for free using file transfer protocol ("FTP") or peer-to-peer ("P2P") networks. FTP involves a server with a computer that keeps detailed logs of all traffic on the server. Until recently, all of the file sharing prosecutions involved FTP servers. "Warez" groups not only typically use FTP servers that keep detailed logs of uploads and downloads, but place their "signature mark" on the infringing items they send out into the world. In the case mentioned above, the government removed "more than 100 million dollars worth of illegally-copied copyrighted software, games, movies, and music from illicit distribution channels," and

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[26] See "Justice Department Announces Eight Charged in Internet Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/OpSiteDown8Charge.htm; Indictment of Alexander Von Eremeef (attached as Exhibit C).

[27] See "Texas man pleads guilty to felony copyright infringement for selling more than $1 million of copyright protected software and video games over the Internet," www.usdoj.gov/criminal/cybercrime/poncedeleonPlea.htm.

identified numerous particular uploads and downloads attributable to each defendant.[28] Many P2P networks, including OpenNap and the former Napster, use central servers that (like FTP servers) generate detailed logs of all traffic.[29] The government can also determine the scope of infringement based on the bandwidth used and/or the size of the files shared, by downloading files in a "sting," and by using cooperators.[30]

II. Intellectual Property Protection and Courts Amendment Act of 2004

Despite the lack of evidence of a widespread problem, Congress, in the Intellectual Property Protection and Courts Amendments Act of 2004, has directed the Commission to provide a sentencing enhancement for anyone convicted of a felony offense furthered through knowingly providing, or knowingly causing to be provided, material false contact information to a domain name registration authority.

Notwithstanding this directive, given the dearth of information on the exact nature of this problem, we believe it is best to proceed with caution. Our anecdotal evidence suggests that this conduct occurs mainly, if not entirely, in fraud related offenses. Accordingly, the most appropriate place for this enhancement would be in Guideline §2B1.1. We propose the following:

2B1.1(b)(16) If a felony offense was furthered through knowingly providing or knowingly causing to be provided materially false information to a domain name registrar, domain registry or other domain name registration authority **add 1 offense level**.

Application Notes

(20) Use of a Falsely Registered Domain Name under Subsection (b)(16) -

(A) Definition of Materially False. - For purposes of subsection (b)(16), "materially false" means to knowingly provide registration information in a manner that prevents the effective identification of or contact with the person who registers.

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[28] See "Justice Department Announces Eight Charged in Internet Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/OpSiteDown8Charge.htm; Indictment of Alexander Von Eremeef (attached as Exhibit C).

[29] See Harvard Study at 7-8.

[30] See "First Criminal Defendants Plead Guilty in Peer-to-Peer Copyright Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/trwobridgePlea.htm; Final Guilty Plea in Operation Digital Gridlock, First Federal Peer-to-Peer Copyright and Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/tannerPlea.htm; Government's Memorandum in Aid of Sentencing at 6-7 in United States v. Boel, Cr. No. CR-05-090-01 (attached as Exhibit D).

(B) Non-Applicability of Enhancement.- If the conduct that forms the basis for an enhancement under subsection (b)(16) is the only conduct that forms the basis for an adjustment under Section 3C1.1, do not apply that adjustment under Section 3C1.1.

We believe a one-level enhancement is an appropriate adjustment for this conduct and is consistent with the overall scheme of the Guidelines Manual. To add more than one level would suggest that the conduct in question was as serious as: (1) the possession of a dangerous weapon (including a firearm) during a controlled substance offense (see U.S.S.G. §2D1.1(b)(1)); (2) causing bodily injury during a robbery (see U.S.S.G. §2B3.1(b)(3)(A)); (3) making a threat of death during the course of a robbery (see U.S.S.G. §2B3.1(b)(2)); (4) using a minor to commit a crime (see U.S.S.G. §3B1.4); (5) using body armor to commit a crime (see U.S.S.G. §3B1.5); and, (6) reckless endangerment during flight (see U.S.S.G. §3C1.2), to name just a few examples. A one-level enhancement amply addresses the concerns of Congress.

Further, we propose an application note to define "materially false." This definition tracks the exact language in the Act. We believe that this definition is necessary to limit application of this enhancement to only the conduct Congress intended.

Finally, we believe that it would be impermissible double counting to allow for an increase for Use of a Falsely Registered Domain Name and Obstruction of Justice to apply. The language suggested in the above application note is identical to that of U.S.S.G. §2B1.1, Application Note 8(C), which, similarly, addresses a double counting concern. Specifically, it precludes the addition of an adjustment for Obstruction of Justice where an enhancement for Sophisticated Means per §2B1.1(b)(9) has already been applied.

III. CAN SPAM Act of 2003

Section 5(d)(1) of Pub.L. 108-187 makes it a crime punishable by up to five years imprisonment to transmit a commercial electronic mail that includes "sexually oriented" material without including in the subject heading the marks or notices prescribed by the Federal Trade Commission, or without providing that the message when initially opened includes only those marks or notices, information identifying the message as a commercial advertisement, opt-out provisions, and physical address of the sender, and instructions on how to access the sexually oriented material. "Sexually oriented" has the definition of "sexually explicit" in 18 U.S.C. § 2256.

Our understanding is that the only issue you need to resolve at this point is whether to incorporate this offense into an existing guideline, and if so, which one. We do not think that this offense fits comfortably in any of the existing guidelines in Part G of Chapter 2 because it does not involve a "victim," and does not involve material that is necessarily obscene or child pornography. It is essentially a regulatory offense, and should be treated differently and less seriously than offenses involving victimization and

illegal material. It could be included as an enhancement in the guidelines for other offenses, but Congress has made it a free-standing crime. We suggest that the Commission promulgate a new guideline for it at section 2G4.1.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Very truly yours,

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