Copyright Infringements

Kevin Tate, AFPD, Federal Defenders of Western North Carolina, Inc.

HOW TO ANALYZE AND DEFEND COPYRIGHT INFRINGEMENTS CASES

By Kevin A. Tate
Assistant Federal Defender
Western District of North Carolina

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A Justice Department initiative that targets and prosecutes non-commercial collecting and trading of copyrighted works is being coordinated out of the Justice Department's Computer Crime & Intellectual Property Crimes Section, along with local United States Attorney offices. The investigation targets individuals known as "Warez groups" and involves FBI agents posing as on-line traders and collectors of copyrighted works.

It is anticipated that targets of investigations may request CJA appointed counsel for the purpose of negotiating and signing plea and/or cooperation agreements or for trial. The targets are identified through on-line trading of copyrighted computer software involving an FBI agent or cooperating individual. Their homes are searched and computers, disk and other electronic data are seized. They are not immediately arrested or charged, instead, they are persuaded to cooperate and work covertly for the FBI assisting with gathering intelligence and evidence against others, primarily focusing on the infringement of high-tech computer software applications. These clients, typically, have already confessed and have been cooperating with the FBI for more than 1 year leaving little for the attorney to do in terms of defending the threatened criminal prosecution.

Based on the cases reviewed by this office, most clients will be: from outside the district; will be between the ages of 18 and 30; educated and have little or no criminal history. They will likely be computer savvy and have backgrounds in engineering or computer sciences. Typically,

after their ability to cooperate is exhausted, they will be given an opportunity to plead-pre-indictment- to a felony offense of Copyright Infringement and will be offered a motion for substantial assistance to the government. The typical plea agreement offers a Base Offense Level 8. See USSG 2B5.3 (a). A 2 level adjustment is added for uploading infringed works. See USSG 2B5.3 (b) (2). The loss is typically calculated at between $ 400,000 and $ 1,000,000 increasing the Base Offense Level by 14 points to 24. After deducting acceptance points, the adjusted Base Offense Level is 21. The resulting advisory sentencing range for a defendant with no criminal history is 37-46 months.[1] The hazzard with such an agreement, of course, is that if the Court follows the stipulated guideline at sentencing, your client could go to jail, even after the filing of a 5K.1 motion.

Before signing plea agreements, counsel should evaluate the few limited defenses and specifically scrutinize the loss amount which will normally drive the advisory guidelines into a range with prison exposure.

WHAT IS COPYRIGHT INFRINGEMENT ?

Criminal Copyright Infringement is the willful infringement of a copyright; (a) for purposes of commercial advantage or private financial gain, or (b) by the reproduction or distribution, during any 180 day period of copyrighted works with a total retail value of more than $ 1,000. See 17 U.S.C § 506 (a) (1) & (2). Also known as the NET Act.

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[1]Sentencing data has been reviewed from a number of cases prosecuted in the last couple years around the country, and most cases resulted in pleas and probationary sentences. It is unknown, however, what the terms of those plea agreements were. Some organizers of alleged conspiracies received prison sentences ranging from 6 to 48 months. Counsel looking to make 3553 (a) (6) arguments for probation for their client should contact Assistant Defender Kevin Tate if interested in reviewing the sentencing data.

Criminal penalties are set out by statute. For a first time violation where the infringement involves reproducing or distributing at least 10 copies with a total retail value of more than $ 2,500, criminal penalties include up to 5 years imprisonment for a violation of (a) (1) or up to 3 years for a violation of (a) (2).

DEFENSES TO BE CONSIDERED

Copyright Infringement cases prosecuted under the NET Act are technical and opaque. Defending a infringement case begins with an analysis of the essential elements that the government must prove. To maintain an action the government must prove: (1) a valid copyright exist, (2) it was infringed, (3) the infringement was willful, and (4) either (a) the infringement was for commercial advantage or private financial gain, or (b) the infringed work's value exceeded the statutory thresholds of more than $ 1,000 or $ 2,500.

A. Disproving The Statutory Elements

* **Make sure the work is *actually* registered, if not, the copyright is not valid.**
* **Determine if the seized copyrighted work is more than 5 years old ? If so, can the government prove whether it was downloaded within the last 5 years. If not, move to dismiss, pursuant to 5 year statute of limitations .**
* **Can the government prove your client was the infringing person or was the work acquired from a third party ? The statute disqualifies mere possession of copyrighted work as an offense .**

* **First Sale Doctrine: allows re-distribution of legitimately acquired copyrighted works (does not apply to electronic files).**
* **Fair Use Doctrine: allows limited use and reproduction of copyrighted works for *social benefits* (whatever that means).**
* **Client conduct <u>was not willful</u> because he/she incorrectly believed no infringement occurred applying the First Sale and Fair Use doctrines.**
* **The copyrighted works value is less than the statutory amounts that criminalizes the conduct. Must be at least $ 2,500 for a felony offense and at least $ 1,000 for a misdemeanor. Otherwise no crime at all.**