

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division**

UNITED STATES OF AMERICA)	
)	
v.)	Crim. No. 2:07CR00015
)	
DANIEL DOVE,)	
)	
Defendant.)	

GOVERNMENT’S POSITION WITH RESPECT TO SENTENCING

COMES NOW, the United States of America, through its attorneys, Julia C. Dudley, Acting United States Attorney, Randy Ramseyer, Assistant United States Attorney, and Tyler G. Newby, Trial Attorney, United States Department of Justice, Computer Crime and Intellectual Property Section, in accord with 18 U.S.C. § 3553(a), and the United States Sentencing Commission, *Guidelines Manual*, §2B5.3 (Nov. 2007), files this Position of the United States with Respect to the Sentencing Factors in the case of DANIEL DOVE (2:07cr15).

The government submits that the Presentence Report properly calculates the Defendant’s advisory Sentencing Guidelines range as 51-60 months and respectfully suggests to the Court that a sentence within the advisory Sentencing Guidelines range would be appropriate in this case. Moreover, the government submits that even if the Court were to consider only those works uploaded by the Defendant and subsequently downloaded 45,770 times in calculating the loss amount for purposes of Guidelines § 2B1.1, Defendant’s Guidelines range would still be 51-60 months on each count.

I. BACKGROUND

On July 26, 2008, following a two-and-a-half day trial, a jury convicted the Defendant of both counts of a two count indictment for conspiracy to commit copyright infringement, in violation of Title 18, United States Code, Section 371, and criminal copyright infringement, in violation of Title 17, United States Code, Section 506(a)(1) and Title 18 United States Code, Section 2319(b)(1).

As set forth in the Presentence Report, and as the evidence showed at trial, the Defendant was a high-ranking administrator in an Internet-based piracy group known as “Elite Torrents.” The evidence showed beyond a reasonable doubt that the Defendant willfully entered into an agreement with one or more individuals for the express purpose of unlawfully reproducing and distributing copyrighted materials via the Internet. In addition, the evidence showed beyond a reasonable doubt that Defendant personally copied and distributed more than ten copyrighted works worth thousands of dollars.

II. SENTENCING GUIDELINES CALCULATION

Based on this record, the Presentence Report properly calculated that the Adjusted Offense Level for the defendant’s conduct is 35: Sentencing Guideline § 2B5.3(a) provides for an offense level of 8 for criminal copyright infringement; § 2B5.3(b)(1)(B) provides an additional twenty-two level upward adjustment for an offense with an infringement amount greater than \$20,000,000, but less than \$50,000,000; § 2B5.3(b)(3) provides an additional two-level upward adjustment for an offense involving the uploading of infringed items; and § 3B1.1(b) provides for an additional three-level upward adjustment for Defendant’s role as a manager or supervisor in the criminal conspiracy. The Defendant, therefore, has a Total Offense

Level of 35. The Presentence Report further calculates that the Defendant has a Criminal History Category of III. Because the statutory maximum sentence for each count is 60 months, the advisory Guidelines range for the Defendant is properly calculated as 51-60 months for each count.

Two items discussed within this calculation deserve additional discussion – the amount of loss and Defendant’s managerial role.

A. Loss Amount

Section 2B5.3(b)(1) of the Guidelines advises increasing the total offense level according to the fraud table set forth in §2B1.1 where the infringement amount exceeds \$5,000. As the Application Note 2(A)(i) to §2B5.3 states, the infringement amount should be based in the retail value of the “infringed” item – that is, the legitimate, copyrighted work – where the infringing item is an electronic or digital copy of the original. Since Defendant was involved in a conspiracy to distribute digital copies of movies, software programs and video games over the Internet, the retail value of the *infringed* items should be used in calculating the infringement amount.

1. Option 1: the Probation Officer’s Calculation

Applying the advisory guidelines to the trial record, there are several alternative methods of calculating the loss amount. The method applied by the probation officer, which the Government submits is correct, calculates the loss amount by applying the retail value of a DVD to the number of copies of pirated movies distributed throughout the Elite Torrents group. As shown from the group’s database (GX 40), more than 1,179,305 copies of pirated movies were made by the group’s members. Trial testimony from the Motion Picture Association of

America's representative, Andrew Brogan, established that the retail value of a movie in DVD format was approximately \$19 in 2005. Multiplying that retail value figure by the number of total copies made results in an infringement amount of \$22,406,795.

As large as this figure is, it may even understate the infringement amount. First, the \$19 figure understates the value of the loss caused by the conspiracy, as former Elite Torrents members Scott Harvanek and Grant Stanley testified that many of the movies distributed throughout the Elite Torrents group were not yet available on DVD. Thus, because many of the movies were copied and distributed before there was a market for the legitimate copies, their value they were even more valuable than the cost of a commercially available DVD. Second, for the understandable purpose of simplifying the infringement amount calculation, the probation officer's methodology does not include retail prices for software and video games, which have far more variable prices.

2. Option 2: Using Defendant's Personal Distributions

A second infringement amount calculation methodology is to multiply the total number of movie titles uploaded by Defendant and subsequently downloaded by other Elite Torrents' members by the \$19 per DVD retail value figure. As shown by GX 37, Defendant personally uploaded at least 21 separate movie titles, which were subsequently downloaded 45,770 times by Elite Torrents members. As noted by the PSR, using this methodology results in an infringement amount of \$869,630, which results in a 14 level increase in Defendant's total offense level. As with Option 1, this methodology undervalues the infringement amount, since it does not account for the more variably priced software and video game titles. It also does not account for the hundreds of pirated movies or pirated versions of Microsoft operating system valued at nearly

\$3,000 that were recovered from Dove's residence. Nevertheless, the Government submits that this methodology is also an appropriate calculation of the infringement amount for which Defendant should be held responsible.

3. Option 3: Using the Loss Amounts to Which Other Elite Torrents Members Stipulated When Entering Guilty Pleas

Each of the Elite Torrents members who pleaded guilty, including Grant Stanley, stipulated to an infringement amount of between \$10,000 and \$30,000. That calculation was made by counting the value of the downloads by the particular Defendant who was entering a guilty plea and adding to that the retail value of the uploads of the ten initial targets of the Government's investigation into Elite Torrents. That combined upload value, which did not account for subsequent downloads of those works by other Elite Torrents members, was calculated to be approximately \$16,500.

Using this valuation methodology would be inappropriate for Defendant. First, the stipulated infringement amounts for defendants who pleaded guilty were based on rough approximations following only a preliminary analysis of Elite Torrents' database. Since the Defendant chose to go to trial, additional work was completed to determine the full retail value of the copyrighted material that was distributed within the Elite Torrents group, rather than the quick valuation done for the purposes of the pleas. Furthermore, because Defendant managed the activities of Elite Torrents' Uploaders, who introduced pirated movies into the group for the first time, it is appropriate to hold him responsible for subsequent downloads of those works, while that may not have been the case for other defendants who had less insight into the operations of the entire group.

Accordingly, the Government submits that the lowest infringement amount for which Defendant should be held responsible is \$869,630.

B. Defendant's Managerial Role

Extensive evidence was introduced at trial showing that Dove played a managerial role in overseeing and promoting the mass distribution of pirated movies by Elite Torrents. Chief among that evidence was Dove's own words, captured in logs of chats with co-conspirator, Grant Stanley. As shown in GX 12, Dove boasted on March 7, 2005, "We like run the largest P2P torrent site." In addition, former Elite Torrent Uploaders Scott Harvanek and An Do testified that the Elite Torrents user named "Duffman" – who was confirmed to be Dove – was the manager of all the Uploaders. Both testified that Dove promoted Elite Torrents members with fast Internet connections to be Uploaders, assigned different Uploaders to upload new movies, and demoted Uploaders, like An Do, who were not uploading enough. Records obtained from Elite Torrents' database further confirmed Dove's managerial powers, demonstrating that he frequently promoted, and demoted members over a more than six month period. (GX 36). Accordingly, a three level increase in Defendant's total offense level is warranted under § 3B1.1(b).

In sum, the government believes that the advisory Sentencing Guidelines range for the Defendant is properly calculated as 51-60 months.

III. *POST UNITED STATES V. BOOKER* SENTENCING PRACTICES

A. Applicable Legal Standards

The Supreme Court has declared that "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."

Gall v. United States, 128 S. Ct. 586, 596 (2007). The Sentencing Guidelines, therefore, remain an indispensable resource for assuring appropriate and uniform punishment for federal criminal offenses.

This Court must also consider all of the sentencing considerations set forth in Section 3553(a). Those factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant; (4) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner; (5) the guidelines and policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a).

B. A Sentence Within the Sentencing Guidelines Would Be Reasonable and Appropriate in Light of Recent Supreme Court Rulings

The government's recommendation of a within-guideline sentence is based in part on the fact that such a sentence properly reflects the accumulated wisdom and expertise of the Sentencing Commission, and serves the vital goal of uniformity and fairness in sentencing. While, to be sure, "[i]n accord with 18 U.S.C. § 3553(a), the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence," Kimbrough v. United States, 128 S. Ct. 558, 574 (2007), it remains the case that "the Commission fills an important institutional role: It has the capacity courts lack to 'base its

determinations on empirical data and national experience, guided by a professional staff with appropriate expertise,” *id.* at 574 (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

Thus, the Supreme Court recently stated that “[w]e have accordingly recognized that, in the ordinary case, the Commission’s recommendation of a sentencing range will ‘reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.” Kimbrough, 128 S. Ct. at 574 (quoting Rita v. United States, 127 S. Ct. 2456, 2465 (2007)).

The advisory guidelines are the sole means available for assuring some measure of uniformity in sentencing, fulfilling a key Congressional goal in adopting the Sentencing Reform Act of 1984. Reference to the guidelines, while carefully considering the 3553(a) factors particularly relevant to an individual defendant, is the only available means of preventing the disfavored result of basing sentences on the luck of the draw in judicial assignments. Therefore, the Supreme Court has held that “district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” Gall, 128 S. Ct. at 596 n.6.

Likewise, the Court’s decision in Kimbrough, issued on the same day as Gall, emphasized the district courts’ responsibility to consider the Sentencing Guidelines as a bulwark against disparate sentencing. Responding to an assertion that case-by-case assessment of the propriety of the guidelines may lead to significant disparity in sentencing, the Court emphasized the district courts’ responsibility to avoid that result:

Section 3553(a)(6) directs *district courts* to consider the need to avoid unwarranted disparities — along with other § 3553(a) factors — when imposing sentences. See *Gall*, *ante*

Kimbrough, 128 S. Ct. at 574 (emphasis in original).

For all of these reasons, the advisory guideline range deserves significant respect. To be clear, the government recognizes that the guidelines are entirely advisory, and that a district court has discretion to vary from an advisory range, subject only to deferential appellate review for reasonableness. However, a district court must consider the guideline range, see § 3553(a)(4), and is usually well advised to follow the Sentencing Commission's advice, in order to assure fair, proportionate, and uniform sentencing of criminal offenders.

C. A Sentence within the Guidelines Range Is Appropriate And Reasonable In Light Of the Serious Nature Of Defendant's Criminal Conduct (18 U.S.C. § 3553(a)(1) & (2)(A))

Defendant's conduct is particularly worthy of significant punishment because of its expansive nature. Defendant belonged to a conspiracy that effectively created an online superstore for new movies and popular video games and software programs – only in this store everything was pirated. Moreover, Defendant relished and boasted about his important role in managing Elite Torrents' Uploaders so that the network operated efficiently. A sentence of imprisonment within the Guidelines range is therefore required to “promote respect for the law,” 18 U.S.C. § 3553(a)(2)(A).

D. A Sentence within the Guidelines Range Is Necessary for Both General and Specific Deterrence (18 U.S.C. § 3553(a)(2)(B) & (C))

The Defendant has not shown any remorse for his conduct. Instead, he testified that he had no idea that distributing tens of thousands of copies of pirated movies, video game files and software programs was illegal. This testimony was unconvincing, particularly given that it conflicted with Defendant's own contemporaneous reference to his activity as involving “illegal warez.” This lack of remorse suggests Defendant has not yet come to regret his actions, other than the fact that he was caught. A sentence within the Guidelines range, therefore, will deter

Defendant from committing future crimes of this nature. *See* 18 U.S.C. § 3553(a)(2)(C).

This case also provides a significant opportunity for general deterrence. As the defendant's conduct has shown, the opportunity to commit piracy on a massive scale is significant. The sentence of the Court will be a significant message to others who might, and who currently are, emulating the Defendant's criminal conduct.

E. The Defendant's Sentence Should Be Significantly Longer than Any of the Previously Convicted Defendants (18 U.S.C. § 3553(a)(6))

A number of other co-conspirators from Elite Torrents have been sentenced after pleading guilty. Of the six co-conspirators who have been sentenced, four, including Grant Stanley, who was sentenced by this Court, received sentences of five months incarceration and five months home confinement, followed by a period of two to three years of incarceration. Two other co-conspirators did not receive any prison time: Scott Harvanek was sentenced by the United States District Court for the Northern District of Ohio to five months of home confinement to be followed by three years of supervised release.¹ The Government filed, and the Court granted, a motion for a downward departure pursuant to § 5k1.1 of the Guidelines for Harvanek's substantial assistance to the Government. One other co-conspirator – Mark Repp – received a sentence of straight probation. However, unlike the Defendant, Repp was barely 18-years-old when he committed the offenses.

Unlike the above co-conspirators, Defendant was an important administrator. He, more than any of the co-conspirators listed above, was responsible for making Elite Torrents notorious for the speed with which pirated content was distributed. By exercising tight control over the

group's Uploaders and ensuring that only those with very fast Internet connections served as Uploaders, Defendant was, as he said himself, responsible for running "the largest P2P torrent site." In light of his important role, Defendant's sentence should reflect the higher amount of damage he caused. The Guidelines sentence reflects this appropriately; its use of the § 2B1.1 table reflects a judgment that intellectual property crimes are analogous to theft or fraud, and should be punished equivalently. *See* U.S.S.G. § 2B5.3 (background note).

Second, Defendant is the only member of the group who chose not to accept responsibility for his actions; such decisions should have consequences. If defendants who waive their right to trial were to receive the same sentence as defendants who insist on a trial, then there would be little incentive to plea bargain. The Guidelines' Acceptance of Responsibility provisions adequately take this consideration into account.

Finally, the goal of avoiding "unwarranted sentence disparities" cited in 18 U.S.C. § 3553(a)(6) is advanced by adherence to the Guidelines. Even in the post-Booker era, the "advisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to avoid excessive sentencing disparities." Kimbrough, 128 S.Ct. 558, 573-74 (2007).

¹ An Duc Do, who testified in the Defendant's trial, is scheduled to be sentenced in the U.S. District Court for the Eastern District of Pennsylvania on September 16, 2008.

IV. CONCLUSION

For the reasons set forth above, the United States requests that the Court impose a sentence within the advisory Sentencing Guidelines of 51-60 months of incarceration, plus three years of supervised release on each count.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF, which will then send a notification of such filing (NEF) to the following:

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