

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

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

**GOVERNMENT’S MEMORANDUM REGARDING RESTITUTION**

The UNITED STATES OF AMERICA, by its attorneys, Julia C. Dudley, Acting United States Attorney for the Western District of Virginia, Tyler G. Newby, United States Department of Justice Trial Attorney, Jay V. Prabhu and Randy Ramseyer, Assistant United States Attorneys respectfully submits this memorandum addressing the restitution issues raised by the Court at sentencing and in its September 19, 2008 Order.

**I. RESTITUTION IS AVAILABLE TO COPYRIGHT OWNER VICTIMS**

Because intellectual property crimes are crimes against property, restitution is available to copyright holder victims of criminal copyright infringement under the Mandatory Victims Restitution Act (“MVRA”). *See* 18 U.S.C. § 3663A(c)(1)(A)(ii); *see also* 18 U.S.C. § 3663(a)(1)(A), *e.g.*, *United States v. Manzer*, 69 F.3d 222 (8th Cir. 1995) (upholding restitution award to broadcasters in wire fraud, mail fraud and copyright infringement case involving sale of chips permitting unauthorized decryption of satellite broadcasts). However, to be entitled to restitution, the preponderance of the evidence must show that the copyright holder suffered actual loss as a result of the infringement. *See* 18 U.S.C. §§ 3663(a)(1)(B)(i)(I), 3663A(b)(1)(B); *United States v. Messner*, 107 F.3d 1448, 1455 (10th Cir.1997) (showing of actual loss is a predicate to restitution under the MVRA).

## **II. A PREPONDERANCE OF THE EVIDENCE SUPPORTS RIAA'S CLAIMED LOSSES**

In this matter, two organizations have requested restitution, albeit in differing levels of detail: the Recording Industry Association of America ("RIAA") has identified losses by its member companies in the amount of at least \$47,132.16, and Lionsgate Entertainment, Inc. has identified losses totaling \$880,000. Copyright owners, like Lionsgate and the RIAA's member companies, are entitled to restitution to compensate them for diverted profits caused by the infringement. *See, e.g., United States v. Martin*, 64 Fed. Appx. 129 (10th Cir 2003).

In each of the prior Elite Torrents prosecutions, the United States has recommended waiving restitution, pursuant to 18 U.S.C. § 3663A(c)(3)(B). It has been the government's position that determining complex issues of fact related to the cause or amount the victims' losses in this case would complicate or prolong the sentencing process to a degree that outweigh the need to provide restitution for the following reasons. The scope of the number of victims, and the nonuniformity of their businesses and profit models has made the process of calculating restitution for all victims unduly burdensome. Elite Torrents was an online pirates' bazaar for all manners of copyrighted works, including e-books, video games, music, movies and software programs. Each of those copyrighted works was developed and sold by numerous different victim companies, each of which likely had different profit margins for the various titles they sold.

Unlike those prior cases, however, here the RIAA has provided a detailed accounting of its member companies' estimated diverted sales, which it calculated by multiplying their estimated wholesale prices for music albums (\$7.22) by a sample of the number of infringing copies of 20 albums that were distributed through the Elite Torrents network. According to the

RIAA's October 8, 2008 submission to the Court, the RIAA obtained the estimated wholesale prices from its member companies' records. The data regarding the number of pirated albums that were distributed through the Elite Torrents network came from the Elite Torrents tracker database, which was introduced into evidence at trial.

While there is no direct evidence that each unlawful distribution of an RIAA member company's album through the Elite Torrents network diverted a sale from that company, the circumstantial evidence supporting RIAA's conservative estimate of actual losses is strong. First, as the evidence at trial established, the entire purpose of Elite Torrents was to facilitate the unlawful distribution of digital copies of copyrighted works. Once a user copied a digital version of a sound recording, he had no incentive to purchase that music, either from a legitimate download store, like Apple's iTunes service, or on physical media, like a compact disc. Second, as demonstrated by RIAA's pre-sentencing victim letter and supplemental October 8, 2008 letter, RIAA's estimates of its members' actual losses are very conservative. RIAA's estimate of losses counted only the copies made of 20 of the albums copied and distributed by Elite Torrents members, rather than the 17,000 copies of the 183 albums in the Elite Torrents tracker database. In light of the conservative nature of this estimate, as well as the fact that RIAA appropriately based its estimates of its members' actual loss on the wholesale values of its albums, rather than the retail value, the Government submits that the preponderance of the evidence supports awarding restitution to the RIAA in the amount of \$47,000.

As demonstrated by the evidence from the Elite Torrents tracker database introduced at trial, the majority of the pirated works distributed through the Elite Torrents network were movies. However, for the reasons discussed above, calculating restitution amounts for copyright

owners of the 700 different film titles that were unlawfully copied and distributed would be unduly burdensome. While it is likely that the motion picture company victims, including Lionsgate did, in fact, suffer actual losses as a result of legitimate sales of its films being diverted by the illegal distribution of pirated versions of those films through Elite Torrents, evidence as to each victim's wholesale profit per unit, or even estimates of those profits, is absent.

**III. DEFENDANT'S FINANCIAL RESOURCES DO NOT NECESSITATE A SCHEDULE OF PAYMENT UNDER 18 U.S.C. § 3664(f)(2)**

Should the Court enter an order of restitution less than the full amount requested by Lionsgate, the United States respectfully submits that a payment schedule pursuant to 18 U.S.C. § 3664(f)(2) is not appropriate, in light of the Defendant's financial resources. As set forth in the Pre-Sentence Report, the Defendant has assets of approximately \$762,000, much of which are tied to his business. Defendant identified himself as the sole owner of the business, and is therefore able to withdraw capital from it without concern for affecting other shareholders. See 18 U.S.C. § 3664(f)(2)(a). Since Defendant reported his monthly income from his business as \$7,000, one can presume that his earnings from his business will likely continue at that rate. Finally, while Defendant does have three dependents, his ample income and assets will provide for those financial obligations should the Court award a restitution amount less than the full amount that has been requested by Lionsgate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 9th day of October, 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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