

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FILED IN OPEN COURT

4/16/07

RALPH L. DeLOACH, CLERK

BY J. Stepp
DEPUTY CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.
cm

SAMUEL KOUNEN,

Defendant.

No. 07-20027-01-CM

PLEA AGREEMENT

The United States of America, by and through Assistant United States Attorney, Scott C. Rask, Andrea Sharrin, Senior Counsel, Department of Justice, Criminal Division, Computer Crime and Intellectual Property Section and Sam Kounen^{or}, the defendant, personally and by and through defendant's counsel, David J. Phillips, hereby enter into the following plea agreement pursuant to Rule 11 of the Federal Rules of Criminal Procedure:

1. **Defendant's Guilty Plea.** The defendant agrees to plead guilty to Counts One and Two of the Information charging a violation of Title 18, United States Code, Section 371, that is, conspiracy to commit criminal copyright infringement; Title 18, United States Code, Section 2319 and Title 17, United States Code, Section 506, that is, criminal copyright infringement. By entering into this plea agreement, the defendant admits to knowingly committing this offense, and to being guilty of this offense. The defendant also agrees to the forfeiture contained in the Information. The defendant agrees to plead guilty by April 23, 2007. The defendant understands that the maximum sentence which may be imposed as to each Count of the information to which the defendant has agreed to plead guilty is not more than 5

years of imprisonment, a \$ 250,000 fine, 3 years of supervised release, restitution, forfeiture, and a \$ 100 mandatory special assessment.

2. **Factual Basis for the Guilty Plea.** The parties agree the facts constituting the offense to which the defendant is pleading guilty are as follows:

With respect to Count One, the defendant agrees that if this matter were to proceed to trial the United States could prove beyond a reasonable doubt all of the facts as alleged in the Information as well as the following:

The defendant was a member of Elite Torrents ("ET"), an online piracy organization using a BitTorrent based peer-to-peer network to facilitate infringement by its members. The ET organization placed special importance on reproducing or distributing pirated content either before or immediately following its public release. For example, many motion pictures were transferred over the ET network within days of their theatrical release and, on some occasions, before such release.

While a member of the ET network, the defendant served as an Uploader. As an Uploader, defendant would obtain access to pirated works including movies, software programs, computer games, and music and would upload such works onto the ET network for others to access, reproduce and distribute. Defendant and other conspirators willfully infringed the copyright of a copyrighted work for purposes of commercial advantage and private financial gain, by reproducing and distributing during a 180-day period ten (10) or more copies of one or more copyrighted works, with a total retail value of more than \$2,500. Defendant participated in transferring these works without authorization from the copyright holder and transferred such works knowing it was unlawful to do so.

Specifically, ET used a computer server known as a tracker that maintained a database of each ET members uploads and downloads. Computer logs generated from the tracker would show that for any six month period between September 2004 and May 25, 2005, defendant participated in transferring to and from the ET network thousands of pirated copyrighted works including movies, software programs, computer games and music with a total retail value in excess of \$10,000. Logs from the tracker database would show that from his home in the District of Kansas, defendant personally uploaded onto the ET network the following copyrighted movies, among other things, which were collectively downloaded by other members over 7,200 times:

- a. On December 18, 2004, defendant uploaded, or caused to be uploaded, to the ET network a pirated copy of the copyrighted motion picture "*Shaun of the Dead*";
- b. On December 23, 2004, defendant uploaded, or caused to be uploaded, to the ET network a pirated copy of the copyrighted motion picture "*Harold and Kumar Go To White Castle*";
- c. On December 24, 2004, defendant uploaded, or caused to be uploaded, to the ET network a pirated copy of the copyrighted motion picture "*Finding Neverland*"; and,
- d. On May 1, 2005, defendant uploaded, or caused to be uploaded, to the ET network a pirated copy of the copyrighted motion picture "*The Wedding Date*."

In exchange for making copyrighted works available for others on the ET network to download, the defendant expected to receive and did receive pirated copies of copyrighted works for his own personal use. For example, computer logs generated from the ET tracker would

show that from his home in the District of Kansas and elsewhere, defendant downloaded over 40 pirated copies of copyrighted motion pictures.

With respect to Count Two:

The government would prove beyond a reasonable doubt that on May 1, 2005, in the District of Kansas, the defendant willfully infringed the copyright of a copyrighted work by the distribution of a work being prepared for commercial distribution, by making the motion picture "*The Wedding Date*" available on ET, a computer network accessible to members of the public, when he knew and should have known that the work was intended for commercial distribution.

Specifically, computer transfer logs from the tracker database would show that on May 1, 2005, at approximately 3:10 PM, defendant uploaded the pirated copyrighted movie "*The Wedding Date*" onto the ET network for others to download over two months prior to its commercial distribution on August 16, 2005. By uploading "*The Wedding Date*" onto the ET network defendant made it available to over 133,000 ET members to download. Transfer logs from the tracker database show that over 950 ET members did download a copy of "*The Wedding Date*."

Defendant understands that he will have to swear under oath to the accuracy of this statement, and if he should be called upon to testify about this matter in the future, any intentional material inconsistencies in his testimony may subject him to additional penalties of perjury or false swearing which may be enforced by the United States under this agreement.

3. **Application of the Sentencing Guidelines.** The parties request that the United States Sentencing Guidelines, November 1, 2004 edition (Guidelines or U.S.S.G.) be applied by the Court to calculate the applicable sentence in this case and that a sentence consistent with the

Guidelines be imposed by the Court, in so much as it is consistent with the United States Supreme Court ruling in *United States v. Booker*. The defendant further waives any right to have facts that determine the offense level under the Guidelines alleged in an indictment and found by a jury beyond a reasonable doubt; agrees that facts that determine the offense level will be found by the Court at sentencing by a preponderance of the evidence and agrees that the Court may consider any reliable evidence, including hearsay; and the defendant agrees to waive all constitutional challenges to the validity of the Guidelines. The parties further agree to request a sentence within the guideline range determined to be appropriate by the Court. In other words, the United States will not request a sentence in excess of the high end of the guideline range and the defendant will not request a sentence below the low end of the guideline range. The parties understand this agreement binds the parties only and does not bind the Court.

4. **Relevant Conduct.** The parties have agreed to the application of the Guidelines and therefore both the United States and the defendant understand that the conduct charged in any dismissed counts of the indictment is to be considered as well as all other uncharged related criminal activity as relevant conduct for purposes of calculating the offense level for Counts One and Two, in accordance with United States Sentencing Guidelines (U.S.S.G.) § 1B1.3. The parties further agree that: (i) the defendant's base offense level is 8 pursuant to U.S.S.G. § 2B5.3; (ii) a 4-level specific offense characteristic enhancement should be added to the base offense level pursuant to U.S.S.G. § 2B5.3(b)(1) based on a stipulated loss amount of between \$10,000 and \$30,000; and (iii) a 2-level enhancement should be added to the base offense level pursuant to U.S.S.G. § 2B5.3 (b)(2) for uploading, which results in a total offense level of 14.

5. **Government's Agreements.** In return for the defendant's plea of guilty as set forth herein, the United States Attorney for the District of Kansas agrees to:

- a. Not file any additional charges against the defendant arising out of the facts forming the basis for the present information;
- b. Recommend a sentence at the low end of the applicable guideline range;
- c. Recommend the defendant receive a two level reduction in the applicable offense level under U.S.S.G. § 3E1.1 for acceptance of responsibility if at the time of sentencing the defendant continues to exhibit an acceptance of responsibility. If the Court finds the defendant is eligible for that reduction and the defendant's offense level is 16 or greater, then the United States will move at the time of sentencing for the defendant to receive an additional one level reduction for acceptance of responsibility if at the time of sentencing he continues to exhibit acceptance of responsibility.
- d. Not request an upward departure from the applicable sentencing guideline range if the defendant does not request a downward departure.

If the defendant breaches or violates this plea agreement or otherwise fails to adhere to its terms, then the United States will not be bound by this paragraph and may pursue any additional charges arising from the criminal activity under investigation as well as any perjury, false statement, or obstruction of justice charges which may have occurred. Specifically, the government's obligations provided in this paragraph are contingent upon the defendant continuing to manifest acceptance of responsibility as determined by the United States. If the defendant denies or gives conflicting statements as to his involvement, falsely denies or frivolously contests relevant conduct that the court determines to be true, willfully obstructs or impedes the administration of justice as defined in U.S.S.G. § 3C1.1 (or willfully attempts to do so), or engages in additional criminal conduct, the United States reserves the right to withdraw any and all recommendations in this paragraph without breaching this agreement.

The defendant understands and agrees that if he violates this plea agreement, then all statements he made subsequent to the execution of this plea agreement, any testimony he gave before a grand jury or any tribunal or any leads from such statements or testimony will be admissible against him in any and all criminal proceedings. The defendant waives any rights that might be asserted under the United States Constitution, any statute, Federal Rule of Criminal Procedure 11(f), Federal Rule of Evidence 410, or any other federal rule that pertains to the admissibility of any statements he gave subsequent to entering into this plea agreement.

6. **Sentence to be Determined by the Court.** The defendant understands that the sentence to be imposed will be determined solely by the United States District Judge. The United States cannot and has not made any promise or representation as to what sentence the defendant will receive.

7. **Information Provided by Defendant.** The United States agrees not to use new information the defendant provides about the defendant's own criminal conduct except as specifically authorized by U.S.S.G. § 1B1.8. As such, this information may be revealed to the Court but may not be used against the defendant in determining the defendant's applicable guideline range or departing above his guideline range. Defendant understands and agrees, however, that under U.S.S.G. § 1B1.8, there shall be no such restrictions on the use of the information: (1) previously known to the United States; (2) revealed to the United States by, or discoverable through, an independent source; (3) in a prosecution for perjury or giving a false statement; (4) in the event there is a breach of this agreement; or (5) in determining whether and to what extent a downward departure as a result of a government motion pursuant to Title 18, U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 is warranted.

8. **Forfeiture of Assets.** The defendant admits to and agrees not to contest the criminal forfeiture, and in so doing, he forfeits all right, title, and interest in the property listed herein. He acknowledges that the following personal property was used or intended to be used in any manner or part to commit and to facilitate the commission of the violation involved in Counts One and Two, and is therefore subject to forfeiture to the United States pursuant to Title 17, United States Code, Section 506(b):

a. PERSONAL PROPERTY

- i. Compaq Deskpro Computer;
- ii. Asus Computer;
- iii. Three computer hard drives;
- iv. Approximately 320 CD ROMs and Floppy Disks;
- v. Computer Raid Cabinet; and
- vi. Miscellaneous Documentation.

The defendant knowingly and voluntarily waives his right to a jury trial on the forfeiture of these assets. He knowingly and voluntarily waives all constitutional, legal, and equitable defenses to the forfeiture of these assets identified above, in any proceeding. The defendant acknowledges and agrees that the forfeiture of the personal property described herein shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon the defendant in addition to forfeiture. The defendant agrees to the immediate entry of the preliminary order of forfeiture. He agrees to sign any and all documents necessary to effectuate the forfeiture and transfer of his interest and possession in the property identified herein to the United States, and to execute any documents necessary to transfer title to

the United States before sentencing. The defendant freely, voluntarily, knowingly, and intelligently waives any right to collaterally attack any matter in connection with this prosecution and sentence, including the forfeiture of assets.

9. **Withdrawal of Plea Not Permitted.** The defendant understands that if the court accepts this plea agreement but imposes a sentence with which the defendant does not agree, the defendant will not be permitted to withdraw this plea of guilty.

10. **Payment of Special Assessment.** The defendant understands that a mandatory special assessment of \$100 per count of conviction will be entered against the defendant at the time of sentencing. The defendant agrees to deliver payment to the clerk of the court in the appropriate amount no later than the day of plea. If the defendant fails to make full payment of the special assessment the United States will no longer be bound by the provisions contained in Section 5(b) of this agreement. The burden of establishing an inability to pay the required special assessment lies with the defendant.

11. **Waiver of Appeal and Collateral Attack.** Defendant knowingly and voluntarily waives any right to appeal or collaterally attack any matter in connection with this prosecution, conviction and sentence. The defendant is aware that Title 18, U.S.C. § 3742 affords a defendant the right to appeal the conviction and sentence imposed. By entering into this agreement, the defendant knowingly waives any right to appeal a sentence imposed which is within the guideline range determined appropriate by the court. The defendant also waives any right to challenge a sentence or otherwise attempt to modify or change his sentence or the manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under Title 28, U.S.C. § 2255 [except as limited by United States v. Cockerham, 237

F.3d 1179, 1187 (10th Cir. 2001)], a motion brought under Title 18, U.S.C. § 3582(c)(2) and a motion brought under Fed. Rule of Civ. Pro 60(b). In other words, the defendant waives the right to appeal the sentence imposed in this case except to the extent, if any, the court departs upwards from the applicable sentencing guideline range determined by the court. However, if the United States exercises its right to appeal the sentence imposed as authorized by Title 18, U.S.C. § 3742(b), the defendant is released from this waiver and may appeal the sentence received as authorized by Title 18, U.S.C. § 3742(a).


12. **Waiver of FOIA Request.** The defendant waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case including, without limitation, any records that may be sought under the Freedom of Information Act, Title 5, U.S.C. § 552, or the Privacy Act of 1974, Title 5, U.S.C. § 552a.

13. **Full Disclosure by United States.** The defendant understands the United States will provide to the court and the United States Probation Office all information it deems relevant to determining the appropriate sentence in this case. This may include information concerning the background, character, and conduct of the defendant including the entirety of the defendant's criminal activities. The defendant understands these disclosures are not limited to the count to which the defendant has pled guilty. The United States may respond to comments made or positions taken by the defendant or defendant's counsel and to correct any misstatements or inaccuracies. The United States further reserves its right to make any recommendations it deems appropriate regarding the disposition of this case, subject only to any limitations set forth in this plea agreement. The defendant also has the right to provide information concerning the offense

to the court and the United States Probation Office.

14. Parties to the Agreement. The defendant understands this plea agreement binds only the defendant and the United States Attorney for the District of Kansas, and that it does not bind any other federal, state, or local prosecution authority.

15. No Other Agreements. The defendant has had sufficient time to discuss this case, the evidence, and this agreement with the defendant's attorney and defendant is fully satisfied with the advice and representation provided by defendant's counsel. Further, the defendant acknowledges that he has read the plea agreement, understands it and agrees it is true and accurate and not the result of any threats, duress or coercion. The defendant further understands that this plea agreement supersedes any and all other agreements or negotiations between the parties, and that this agreement embodies each and every term of the agreement between the parties. The defendant acknowledges that the defendant is entering into this agreement and is pleading guilty because the defendant is guilty and is doing so freely and voluntarily.

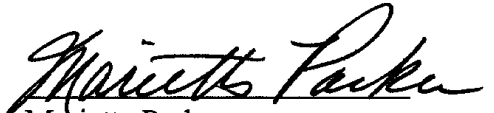


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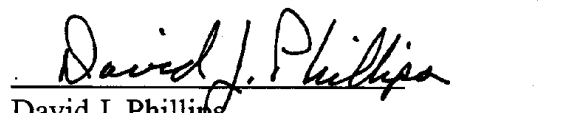
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Date: April 2, 2007


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