Day Two—Intellectual Property/Copyright Infringement

Group Breakout Session Two

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GROUP TWO: INTELLECTUAL PROPERTY/COPYRIGHT INFRINGEMENT

MR. COHEN: My name is Ken Cohen. I'm at the Sentencing Commission, and I was asked to moderate this panel, in part, because I chaired the working group that we had at the Sentencing Commission to work on developing implementation for the No Electronic Theft Act of 1997. Here's Jim Gibson, who also worked on it.

To my far left, we have Monty Price, who's graciously agreed to step in at the last minute. Monty served as a criminal investigator, a vessel commander, computer investigative specialist, and as a group supervisor. And now he is assistant director of the Cyber Crimes Unit at U.S. Customs Service.

Immediately to his right, we have Tom Costabile. He's senior vice president of operations at Sony Disc Manufacturing. He is responsible for planning, directing, and coordinating activities relating to all operations and services of the facility and its current employees.

To my right, we have Peter Nolan. He is assistant general counsel and senior vice president of the Walt Disney Company.

And to my far right, David Goldstone, who I think was introduced earlier this morning. I think he was on a panel. He's currently co-chair of the Justice Department's Electronic Commerce Working Group and is a trial attorney in the Computer Crime and Intellectual Property Section of the Criminal Division of the Department of Justice.

What I thought we would do today is I'd just give you a brief introduction to some of the issues and some of the data that we found when we were working on the criminal copyright and trademark infringement guideline. Then each of the panelists would make a few brief opening remarks. And then I have some prepared questions, and I'm sure you all have questions also. Feel free to chime in with your questions at any time.

The No Electronic Theft Act, among other things, directed the Commission to ensure that the guidelines pertaining to intellectual property offenses are sufficiently stringent to deter those crimes, and it also instructed the Commission to amend the guideline to provide for consideration of the retail value and quantity of the infringed items. Those are the legitimate items which are infringed upon.

The guideline as it existed before the Act—well, actually, before this May—is §2B5.3. That's criminal infringement of copyright or trademark, and that guideline had a base offense level of six, and more particularly, a sentencing enhancement that was based only on a monetary calculation using the retail value of the infringing item. So we clearly did have to do something in response to this Act.

Now, during the course of our work, we discovered a couple of interesting things. Number one, this is obviously a huge problem across the country. When we met with folks from the Business Software Association, they were stating that counterfeit businessware software applications alone were in the neighborhood of $11 billion a year.

Yet in our data, for instance, last year, only 113 cases were sentenced under the copyright and trademark infringement guideline, and that includes all trademark cases also, not just copyright. And, in

fact, when we looked at the cases, we saw that an overwhelming majority of those prosecuted, or at least sentenced under that guideline, were trademark cases and not copyright cases.

And also, there's a tie to yesterday's session. Courtney Semisch probably showed you loss distributions for fraud and theft. We also looked at the loss distribution for copyright and trademark offenses, and the distribution over the loss table was actually eerily similar between copyright and trademark infringement and fraud overall. It doesn't necessarily mean anything, but it was just something to note. That is, when you change one calculation, it may change the relationship between those and that may or may not be a good thing. It was something that we did watch for, however.

More importantly, we noticed that there was a difference between the sentences that copyright and trademark infringers were receiving and fraud offenders overall. Copyright and trademark offenders received some sentence of imprisonment in 56.4 percent of the cases, but in fraud cases overall, offenders received some term of imprisonment in 80 percent of the cases. And in those cases in which offenders did receive terms of imprisonment, copyright and trademark offenders received shorter sentences than fraud sentences overall, six months compared to 12 months.

What the Commission tried to do when they looked at the infringement guideline is that they tried to make it look and operate more like the fraud guideline on the grounds that they are both economic crimes and, therefore, should both be treated similarly. That's something that may be up for debate, and some panelists may want to address whether that was an appropriate decision. But if you looked at the guideline now, it has some enhancements that look a lot like the fraud guideline. The whole report is available on our website.

Then lastly, before I turn it over to our panelists, I'd like to just point out some of the most salient features of the new guideline because it has been completely overhauled.

The first thing you'll notice is that the base offense level was increased by two levels, from Level 6 to Level 8, and the reason the Commission did that was based in large part on the data you saw yesterday about the more than minimal planning enhancement that's in the fraud guideline. You'll recall that Courtney said that in the fraud guideline, more than minimal planning applies in approximately 85 percent of the cases, and we thought when we reviewed the cases that were sentenced under the infringement guideline, that that enhancement, too, would apply in the vast majority of cases if it existed in the infringement guideline. And considering that the Commission was moving away from having more than minimal planning as a separate enhancement, we built it into the base offense level.

The most direct response to the NET Act itself, though, is that we changed how the sentencing enhancement based on that monetary calculation is done. What we tried to do is use the retail value of the infringed item, the legitimate item that's been infringed upon, in those cases in which we thought there would most likely be displaced sales of legitimate items from the sale of counterfeit items, cases in which the goods are substantially identical in terms of quality or very close in price. That's found in subsection (b)(1), but the real guts of it is in Application Note 2 of the guideline.

Then the next thing we did was we added the sentencing enhancement and minimal floor of Level 12 for cases in which the offender manufactured, imported, or uploaded infringing items to an Internet site, thereby making it available to others to download. We did that on the basis that we thought those defendants were more culpable and caused more harm because they actually entered the illegal goods and

counterfeit goods into the stream of commerce, thereby making it available to others also to infringe upon intellectual property rights. We expect from our analysis to show that specific enhancement will apply in almost two-thirds of the cases that we saw sentenced under the guideline.

That kind of capsulizes our work in this area and where we currently are. Why don't we just start left to right for some opening remarks.

MR. PRICE: I have just recently been assigned to our Cybersmuggling Center out here in Fairfax, Virginia. Prior to that, I was a group supervisor and an actual working agent with Customs down in Corpus Christi, Texas. A lot of the cases we worked were narcotics, but we were able to branch into a large amount of child pornography, some weapons cases, and a little bit of fraud.

I am now in charge of our Cybercrimes Unit, which involves anything but child pornography. It seems like the four agents and two intelligence specialists I have working for me, the seven of us have been overwhelmed with the IP issues that have come to light.

My experience again is in investigations, and I'll talk to you from the enforcement side of it, not the victim's side or the prosecution's side. We always had a given quantity that we could deal with when we took it to the U.S. Attorney's Office. If it was a narcotics case, we had a certain poundage of cocaine or marijuana. If we were dealing with child pornography, we had a given number of images, a given number of images transmitted over a computer. We had a real means to show some activity.

What we're finding in the IP arena is, much like you find with child pornographers, they don't always do it for money. If you're not talking textiles but you're talking electronic data, these people are doing it not only to add to their collection, much like child pornographers would, but they do it also for the prestige that they gain.

We're finding in the hacker community that these people will find a source within the industry or buy a release just as soon as it comes out and either strip all the excess package with the software program or do a complete duplicate of it, send it to a foreign country where they've got people that can strip off the encryption or the protection off of the software, then put it right back into the U.S. market.

So where we traditionally found bulk shipments, we're now finding people dealing more with user quantity, people that will go to a site, download Microsoft's Millennium Edition, and use it for personal use at home. So we haven't been able to focus as much on the individual picking up one or two pieces of software. We've looked back over towards hacker groups like "Pirates with Attitude" or "Drink or Die" and looked at their networks. A lot of what they do is on the Internet relay chat with servers that they will set up, and they have 200 or 300 titles at a time on the server.

One of the issues that we've had come up, and again, as prosecutors looked at it, was how you quantify the damage. What exactly have they been doing? It's not like we're able to go in immediately with a search warrant, seize the server, and then take count of the software they've got on the computer. They actually are distributing. We will go onto a queue and try to download some of the software. We wait eight hours for all the other people in front of us in line to download their software before we are able to go on and download the piece that we want.

So what we're finding is, short of getting our hands onto the server where we can start looking at some logs that will document how many people came and what they took, we're actually having to sit there and just count the sheer numbers of people going to the sites and downloading and waiting our turn to get a copy of something so that we've got hard evidence in hand.

Customs itself in fiscal year 1999 seized $98.5 million worth of counterfeit and pirated merchandise. That was over 500 investigations that we conducted. We're finding for fiscal year 2000 that our seizures are going to well exceed that, and a good bit of it is now going from the normal textile and the wearable goods into the digital merchandise.

We're finding, because it is digital merchandise, people all over the world now are involved. We no longer have an international border where somebody clears Customs. If you've got a computer, you basically have a port of entry in your home. So we're looking at people that are able to sign on in Fairfax, Virginia, go to Europe and download a software program and use it here. Our trouble has been with some of the other foreign governments. A lot of times, the activity that the people are conducting over there is not a violation of foreign law. About the only way we've able to get their attention is with their loss of revenue.

Again, with the explosion of the Internet, by the year 2004, we're expecting 500 million Internet users worldwide. E-commerce, which is estimated to be approaching $1 billion a year, is looking at over $7 billion a year by 2004. So what's going to happen is with this explosion in the Internet use, it's a great opportunity for many private businesses and industries out there. But we're finding that the criminals have jumped on the bandwagon, have learned the weaknesses in the system with the anonymous mail handlers, spoofing e-mail addresses. They've learned how to make our life very difficult for us to try to go back and find them to refer a case for prosecution.

Again, it leads into quantifying the damage with the corporations that are being victimized. We've worked very closely with the industry. In doing that, we give them a chance to go forward with their civil prosecution, with cease and desist orders, and generally, after they've tried everything that they can to stop a group of individuals or a specific individual from the pirating acts. Then we look at it for federal prosecution. So we've tried some smart investigating and working with the industry to minimize the cases that we have to bring into the system, hoping that once we have it in the system that we've got a case worthy of federal prosecution and something that's going to meet the guidelines so that we have some idea what kind of penalties we're looking at. Thank you.

MR. COHEN: Thank you. Tom?

MR. COSTABILE: Thank you, Ken. Again, thank you for inviting us today. My role is very much what Monty says. My day job is providing the mechanism or the facilities of legitimate copyrights to our artists and very many companies around the world. On an average day here in the United States, we produce about three million compact discs of varying sizes and shapes. The sizes and shapes are more commonly known to each of us as a 120-millimeter piece of plastic that promises ease of access for all of us.

We do this under some very, very tight guidelines called copyright laws as we are looked and viewed as the repository of a revenue stream for some 700 to 800 individuals in the development of this one piece of property. What the Internet does is allow distribution even wider and more rapidly.

When I look at the RIAA, Recording Industry Association of America's definition, there are four different groups that we look at. I wanted today to just provide some thought, because my role here is more from the distribution side. We always are the first ones named in a lawsuit or the second level of a lawsuit because we provide the physical medium, or at least that portion of it that allows this intellectual property to be shared. So I thought I would provide a few simple definitions.

I am an engineer by training, and I won't use any acronyms. If I do, please stop me. And if you want to know how a CD player works, I could bore you for about seven or eight hours and tell you all the details of that side.

When we think of copyrighted materials, a CD in this instance—whether it's an audio CD or a computer CD—a pirated recording we view as one that is just the intellectual property that gets exploited in some illegal fashion. A counterfeit recording takes all of the parts of the CD: the booklets, the back liners, the paper parts, the instruction manuals—and that also often gets discounted, especially on an entertainment product like a DVD or an audio CD.

There is a huge, huge revenue stream and support mechanism that develops the pictures, the content, the lyrics, the words, and then the multiple uses thereon, where, again, if you look at it in terms of how you measure a crime or how you measure the value of that particular property, that seven- to ten-fold stream that comes off of the CD is often discounted because a picture's a picture, but right straight down to t-shirts and point-of-sale articles at a concert.

The third area is bootleg recordings, and it's the one that I probably spend most of my time with in terms of pirated or counterfeit-type approaches. A bootleg recording is one that is done live. All too often, we'll get a series of masters in. We'll do a short scan on it, even though our purchase orders and our recording documents that you sign up front state that you own the copyrights. We're free from that; we find simple little words on the master that say everyone on this CD is above the age of 18. Right there, we stop and make a phone call to our local FBI agents. We're not the keeper of property, but they are, and you'll find, unfortunately, on an average CD, 1,200 to 1,500 different pornographic pictures. So three little CDs in that particular portion, somebody wants to manufacture 300 or 3,000 or 300,000 copies. With the rules that we put in place, that could be stopped.

The bootleg side of that is also disturbing because the bootleg product comes in from somebody sitting in the front row of a theater with a camera—in my case, hopefully it's a Sony handheld camera—and you can actually see them shaking as they're laughing to the material. That will come back in to be reproduced. So how do you stop that portion?

The fourth area is the new one. It's online piracy, and online piracy we view in two different levels, the counterfeit portion of it and, again, the pirated portion of it. So, the good news is the last year or so the number of counterfeit hard copies that we've seen has gone down. What has gone up, unfortunately, is the number of available pieces. Because as technologists, we've driven the price down, which has now changed the recording medium or the venue for property to be shared.

Take that in digital form, and we were having an informal discussion here about kiddie pornography. I've watched our guys in the studio, in the gaming studio, where we'll put an athlete in there and measure their moments and use that for control issues on a video game. There, once you have that one

image, a graphic artist—even any one of us who's halfway literate with a computer—can put any image we want on that. And it's that level that we're only scratching the surface with today.

The other part that we can talk a little bit about is Napster and Nutella and those portions of it. I have been involved with representing us. Our position and my own personal position is not to shut Napster or Nutella or some of these alternative arrangements down because they parallel very much what the recording industry did in terms of AM and FM radio. We as an industry created FM radio. That's how we sell our product. How do we now ensure that, as a group, intellectual property developers—also known as artists—enjoy their fee for that particular product? And that's the challenge that we see in front of us.

I will guarantee you that as we sit here today, a year from today we will not be operating with the same economic models or the same paradigms of enjoying music as we are today.

So I'll leave it at those few thoughts, and I'm ready to talk a little about those issues.

MR. COHEN: Peter?

MR. NOLAN: I'm Peter Nolan. I'm from the Walt Disney Company. As a result, I won't be talking about kiddie porn this afternoon. I do come from a copyright industry. That industry is America's fastest growing economic asset, representing more than 4.3 percent of the gross domestic product of the country. We make greater value-added contributions to our nation's economy than any other manufacturing sector, and we rank first in foreign sales and exports. The reason I mention that is because we're not talking about a small interest to the country.

A mere decade ago, there were physical barriers to entry in the piracy market. Widespread piracy of sound recordings, for instance, required investment in resources, access to CD manufacturing equipment, and raw materials. It also required distribution systems—planes, trains, automobiles—and retail outlets, and these distribution requirements afforded copyright owners and law enforcement officials some opportunity to detect and stop the piracy.

With the advances in technology, that has changed the playing field with regard to piracy. It has virtually eliminated each of those barriers I've mentioned, and along with them, the related chances to find the pirate and to bring piracy to a halt. Today, someone who wants to make and distribute illegal copies, for instance, like sound recordings, need only have access to a computer and a modem with a telephone line—no manufacturing plants, no shrink wrapping, no distribution systems.

Today's pirates can, with a few clicks of the mouse, distribute perfect copies, digital copies, to millions of people around the world with little or no effort or investment. And, in fact, digital technology and the Internet has made pirating easier, detection harder, and potential harm to copyright owners greater.

Congress has tried to address these challenges by enacting legislation intended to help copyright owners keep pace with the realities of the new technology. Unfortunately, criminal enforcement of copyright laws in the digital arena has not kept pace with Congress. Now, Congress, some people say, is inherently slow, perhaps philosophically and purposefully slow, so that makes the criminal enforcement tardiness even more difficult to understand.

There are any number of explanations as to why, but one clear obstacle—and this is according to the Department of Justice—has been the inadequacy of the sentencing guidelines involving criminal copyright infringements and trademark infringements. In testimony before the House Judiciary Subcommittee on Courts and Intellectual Property just last year, the DOJ attributed the paucity of Internet-related prosecutions at least in part to the fact that the then-current sentencing guideline instructed courts to calculate sentencing based on the retail value of the infringing items and to the fact that the guideline's application made clear that "infringing items" means the items that violate the copyright and trademark laws, not the legitimate items with which they compete.

DOJ explained that the guideline's exclusive focus on the low retail value of infringing goods "led courts to impose lower sentences on defendants who commit intellectual property crimes than those who commit other types of fraud." DOJ continued, stating that the lack of enforcement contributes to the all-too-accurate perception that intellectual property crimes are associated with high profits and low risk, which helps fuel the growth of this crime area.

Congress took an important step toward fixing the problems of criminal violations when it passed the No Electronic Theft Act, or NET Act, in 1997, which was intended to make clear the availability of criminal penalties for certain willful infringements, whether or not the defendant had a direct financial benefit or not. This legislation responded to a 1994 decision in the case of *United States v. LaMacchia,* which held that willful infringements committed without a profit motive were beyond the reach of criminal law. That was despite the fact that more than $1 million in computer programs were downloaded from this individual's website in just six weeks.

The NET Act closed this loophole by modifying the definition of financial gain to include "receipt or expectation of receipt of anything of value, including the receipt of other copyrighted works." The bill also directed the Sentencing Commission to ensure that the applicable guideline range for a defendant convicted of a crime against intellectual property is sufficiently stringent to deter such a crime, including by ensuring that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed, that is, the real product, the genuine product.

Unfortunately, because of vacancies on the Sentencing Commission and for other reasons, amendments to the NET Act directive were not acted upon by the Sentencing Commission for nearly two years. Not a single case was brought under the NET Act for more than a year after its enactment. Still today, the number of prosecutions under the NET Act are numbered on one hand.

Disney, the Motion Picture Association of America, and other copyright industries continue to press hard for adoption of amendments to the sentencing guidelines. Congress listened to our pleas and enacted the Digital Theft Deterrence and Copyright Damages Improvement Act last fall, which, among other things, directed that the Sentencing Commission promulgate within 120 days emergency guideline amendments to comply with the NET Act.

It was interesting to hear a comment earlier today, in this morning's session, that someone was saying that the legislative process somehow corrupts the process that the Sentencing Commission has. I tend to disagree with that earlier statement. Sometimes people don't really have the ear of the Sentencing Commission.

As a result of the bill and the appointment of new commissioners, the Commission published proposed amendments in December of 1999, and after comments, issued emergency amendments which took effect on May 1 of this year. Disney was pleased, together with the Motion Picture Association and the broader copyright industries, to work with the Sentencing Commission in promulgating these amendments, which are significant in a number of respects.

First, the amendments increase the base level offense from a Level 6 to a Level 8, which puts the guidelines in line with the theft and fraud guidelines and reflects the fact that the more than minimal planning enhancement applies to nearly all intellectual property crimes.

Second, the amended guideline directs courts to consider the value of the infringed-upon item in calculating the loss in all cases. This is tremendously important in ensuring that loss calculations accurately reflect the harm incurred by copyright owners.

Third, the amended guidelines provide a two-level upward adjustment for cases involving manufacture, importation, and uploading of infringing items and impose mandatory offense levels of 12 in such cases. This change, which results in a guideline range of ten to 16 months' imprisonment, is important not only to encourage prosecutors to bring Internet-related and other cases, but also, it furthers the intent of the NET Act and the Digital Theft Deterrence bill.

Fourth, the new guidelines also provide a two-level upward adjustment based on use of special skill in cases involving circumvention of technical protection measures. This is circumventing technical measures to protect copyrighted works. This change reflects Congress's enactment of the Digital Millennium Copyright Act, which made illegal the circumvention of technical measures, such as encryption, that are employed by copyright owners to control access to their copyrighted works. This is a key element in protection of copyrighted works for the future. It's the belief of many in the copyright industries that it is not possible through ordinary copyright enforcement measures—especially on the civil side—to stop the Nutellas of the world from growing and thriving unless we have technological protection.

Fifth and lastly, the new guidelines give courts discretion in any case to apply an upward departure in a case where the ordinary calculation would substantially understate the seriousness of the offense. And they include, by way of example, the case where the offense involves substantial harm to the reputation of the copyright or trademark owner. This is particularly relevant in an age where irretrievable harm can be caused to the reputation of a copyright owner on a worldwide scale with a single posting or the click of a mouse.

There are some things that the copyright industries would have liked the Sentencing Commission to also have included in its new guidelines. But you can't have everything, and rather than go through that and be negative about it, we wanted to say that we are pleased with what the Sentencing Commission did this year and its staff, in particular Ken Cohen, who's sitting to my left. They are to be commended for their work and for their willingness to engage industry on this topic. I look forward to a continued dialogue with the Commission on these issues and to working with it on new guidelines for the future. Thank you very much.

MR. COHEN: Thank you. Dave?

MR. GOLDSTONE: Thanks, Ken. I want to talk a little bit generally about intellectual property, having come from a number of panels on general new technology offenses. This breakout, of course, is dedicated to intellectual property.

First of all, I want to pick up on something Peter just mentioned about the extent to which laws can solve the problem of the easy infringement in the digital age by itself. Peter expressed concern on industry's part that law can do it by itself, and I think that that's right. I think law is an important part but not the whole part, and I see at least three pieces. One is law. Second is technology. And the third is societal norms.

Technology—the kind of technology that Peter was talking about—may involve some sort of copy protection schemes, but as we've seen both in the software wars of the 1980s and more recently with the DVD copy protection scheme, those technologies can be cracked. Just as the underlying intellectual property can be distributed with ease, so can the back door that was used to crack the copy protection scheme.

So technology has its hopes, but it also has some limits. Law, of course, also has an important role, but also has its own limits; although I would note that prior to the NET Act, it seemed that there were a wide number of websites that were freely giving away music and software. Since the passage of the NET Act, there have been only a handful of cases, and we just had a third case brought last month of a person who was actually making movies available; he made *The Phantom Menace* Star Wars movie available without commercial gain, and that was downloaded obviously a multitude of times. Nonetheless, while it's true we have only had three cases since the law was passed, it appears now that there are dramatically fewer of these websites out there and that the providers have moved to more discreet means of providing it, like Internet Relay Chat and FTP sites. So law has an important role. Criminal law, as well, has an important role, and it has its own limitations.

The third piece is society, and I think society has an important function, as well, and I'll tell a brief anecdote, if I may. One of my wife's friends was complaining that she had purchased a Kate Spade bag, a fancy handbag, and then she went to Canal Street in New York and found that she could buy an imitation Kate Spade bag for $25. And she said, "I will never buy a real Kate Spade bag again."

I think that's a dramatic example of how the easy availability of counterfeit goods undermines the market for real goods. There are many people in society who would find nothing wrong with purchasing a counterfeit Kate Spade bag. I'm not saying purchasing a Kate Spade bag should be a crime, but it should be recognized as inappropriate, and that's a societal norm.

As we move into an age where not only music, movies, software, but also corporate brands are becoming increasingly valuable—and we see this in the naming of our baseball stadiums and our football stadiums; we see this in merchandising—intellectual property is increasingly valuable; it's just as wrong—maybe not identically wrong, but similarly wrong—to use counterfeit or illicit goods as it is to use counterfeit money. And just as we all recognize how important the soundness of the monetary system is—because money itself has no intrinsic value—handbags may have intrinsic value, but certainly the brand of that needs to be protected.

In addition to what we've been talking about generally—about how the Internet can substantially facilitate the crime and facilitate infringement, how there's such a large market, how it can be done on such

a large scale, how the digital copying is perfect and can be done with ease, and how certain file-sharing technologies such as Napster and Nutella might even facilitate it more—I think one of the most interesting things is that it's a kind of crime in which the victim doesn't necessarily know when it's happened.

If somebody goes to Disney's warehouse and steals 1,000 videos, their inventory control system is going to notice that and presumably some investigation will ensue. However, if somebody makes 1,000 copies of the Disney video after it's left the warehouse, they have no idea that that's taken place. I think that makes it very hard for the victims to defend themselves.

I'll give you an example. In one case I have in Salt Lake City, a person was running a video store where he was actually copying videos. He had many video machines connected together. He got raided by law enforcement. Many of those videos were stored. And while law enforcement was working on putting the case together, he went ahead and opened up another store. He was able to do that because when you buy a video, you now have the ability—unbeknownst to the intellectual property holder—to make a perfect copy, and, of course, all this is exacerbated by the Internet.

Now, at the Department of Justice, we have the Computer Crime and Intellectual Property Section, which was founded a couple years ago. We tried to consolidate some of our intellectual property efforts in an Intellectual Property Initiative. As part of that Initiative, we've been focusing our efforts on seven key districts, the major cities such as New York, San Francisco, Los Angeles, and we've been working with prosecutors and agents in all of these places.

Much new energy has been generated since this new guideline went into effect. The old guidelines said to use the retail value of the infringing item. So there was certainly an argument in certain circuits—especially the Second and the Ninth had a couple cases—that if the infringing item was of an equal quality to the infringed upon item, then we could argue that the retail value of an equal quality good is the same as the retail value of the legitimate good. On the other hand, if you've got a person with a website giving away software for free, it's harder to argue that the retail value of software that's being given away for free is a substantial figure.

So while we had arguments available to us, the new guideline gives us a lot more clarity and gives us a much clearer way to calculate the loss, which is not only important in presenting the case to a court, but it's also important within U.S. Attorney Offices when evaluating a case. Certain loss thresholds within some offices are set by the sentencing guidelines. So some cases might not even be looked at seriously.

I will say that it's not entirely clear in the Internet context what the loss figure is going to end up being for particular cases because I don't have a clear experience as to whether Internet pirates keep track of how many infringing copies were made from their website. I know of a couple cases where they have done that out of a sense of pride. But I also know of other cases where they turned off the feature that kept track of how many copies were made because they didn't want that evidence around. That's obviously a more prudent step to take and that makes it very hard to prove substantial loss if the loss is keyed, as it is, to the number of copies that are made.

Nonetheless, as I mentioned, we are working closely with the seven districts. We are working with the headquarters component of investigative agencies. We're going to have a training this spring just for prosecutors. We're probably going to have about 75 prosecutors down for a week to our training center. And we previously had an intellectual property manual that's available to prosecutors. It tended to be

somewhat academic, which is helpful because the copyright and trademark areas are seen as out of the scope of the day-to-day work of criminal prosecutors.

We're now coming out with a new edition of the manual, which is much more experience based, and it should be out, I'd say, in the next month or so. It's a substantial rewrite of the old manual. We think that—between the training, the manual, and the other support, as well as the more proactive efforts we have been taking to work with industry to try to get referrals of cases when they do know about it; and as I said, there's many cases where they don't know when they're being victimized—these measures will result in actually more cases.

And I will note that the Department of Justice did file an amicus brief in the *Napster* case in the Ninth Circuit arguing that Napster was not immune from the copyright laws on the basis of the Audio Home Recording Act, which provides an exception for personal use. We took the position that neither the statute nor the legislative history suggests that what Napster is engaged in is personal use.

QUESTIONER: I guess the Commission is looking for input. I find this to be a remarkably one-sided presentation—no, not remarkably. Maybe I'm not surprised. But before I was a circuit judge, I was an antitrust defense lawyer in civil cases. That means I represented the business community, but my perspective was competition and free trade. And what we're talking about in this area is protecting statutory monopolists, and I am a firm believer in those monopolies for the limited purposes for which they were created. When Customs gets involved, we're talking about creating what our trading partners would call non-tariff barriers.

To make the proposition that these crimes from a loss or value standpoint are the equivalent of an insurance fraud or some sort of sale of a bogus product from the consumer's standpoint is just ridiculous. Well, the industry is to be commended for their lobbying.

MR. GOLDSTONE: May I respond to that, Ken?

MR. COHEN: Actually, you're picking up on a point that I wanted to start with. One of the reasons why it took us so long to enact the new guidelines—the first reason, of course—was that there was no Commission for 13 months. But the other reason is that we really wrestled long and hard with the issue of how you value the harm caused by any particular intellectual property offense and how you construct a guideline around that. And I see in the audience Professor Kobayashi, one of the folks we actually met with. We met with Professor Kobayashi because it wasn't readily apparent to us that in every case multiplying the quantity of infringing items by the retail value of the legitimate item was the economic harm caused.

QUESTIONER: It's not society's loss. It's not even the competitor's loss. The competitor lost the profits on a percentage of that quantity. And I just want to make one more comment. David says that if we hadn't had this value explosion, the U.S. Attorneys in the country would be just turning their backs on these problems. Well, that's horrible criminal enforcement policy. I mean, if you're talking about hard core criminal copyright infringers, they ought to be prosecuted. And if the U.S. Attorneys around the country have to keep score on a phony value basis, then somebody ought to go to the criminal division and straighten them out.

MR. COHEN: Jim?

MR. GIBSON: I want to agree with that on two points. I'm Jim Gibson. I was at the Commission and worked a little bit on this. I know this is true. I know this isn't made up because we heard from industry executives who told us they were hearing things like this from U.S. attorneys or assistant U.S. attorneys. I'm almost offended by the idea that they would say the guidelines aren't high enough for me to prosecute what my own department is telling everyone is an incredibly serious crime.

If you listen to the sociologists and the professors we had talking to us yesterday morning, the certainty of punishment is much more important in terms of general deterrence than the severity of punishment. So if you actually convict someone and subject them to whatever punishment, possibly inadequate, that already exists on the books, the deterrent effect is essentially going to be accomplished regardless of whether you eventually get a guideline passed that adds, what, a 20-percent bump to the average case. The guidelines operate on the margins. The deterrent effect that actually is sociologically proven is whether you actually convict someone of the crime or not and subject them to whatever severity follows therefrom.

If you have these attorneys out there who have the industry coming to them with cases, which they did, saying, you know, "We have copyright infringement for 'X' amount," and they're saying, "Well, we can't get the bang for our buck so we're not going to bother to prosecute," I think that astonishes me.

I also have a conceptual problem—and Ken has heard me say this eight zillion times—with the idea that the prior guideline assigned a value of zero to infringing products in the kinds of cases we're talking about. The reason that copyright, especially online copyright infringement of software products, is so insidious is because it's an exact copy of the original product. This is not a knock-off Kate Spade bag. This is the same thing as the original.

The prior guideline said the *value*—not the *price* of the product. It said the value of the product, and the value of a bootleg copy of Windows is the same as a legitimate copy, perhaps minus some small discount for support or whatever else you get when you buy the retail product.

So if I were the judge on the bench—and I'd mention I'm a pretty liberal guy, I'm a defense attorney—and the prosecutor said, "Look, we have to assign the value of these infringing products at almost equivalent to the legitimate," I would say, "Yes, it's a no-brainer."

MR. COHEN: In cases using the Internet, for instance, where you get an exact copy, is it a reasonable estimate of economic harm to the intellectual property owner to multiply the number of times that someone downloads that item from that site by the retail value for the legitimate item?

MR. GOLDSTONE: Let me respond to a couple of these points. I think they're very thoughtful and I think they're fair. And I said in my remarks here that I think there is an argument under the old guideline that the retail value could be the value of the good. On the other hand, I have talked to a lot of people at U.S. Attorney Offices. I don't know many assistants who were willing to make that argument in a web-based case, where it was being given away for free. It can be hard to make the argument that it was worth substantially more than zero.

MR. GIBSON: Well, sure. When you steal a brand new Mercedes and it cost $60,000, and you value that for purposes of theft, for instance, you don't get the chop-shop value of the car. You get the

value that you would pay to a dealer for the car. I mean, I'm not saying you're wrong in making this argument, but to me—

MR. GOLDSTONE: Maybe we didn't need a new guideline, but I will tell you that at least now we have a certain amount of clarity and certainty.

Now, as far as the other point that was made over here, I think you're absolutely right that the loss to the consumer isn't the same as in an insurance fraud case. And actually, the consumer isn't a victim at all. My friend who went and bought a Kate Spade bag on Canal Street in New York was not a victim. She was a very happy purchaser. She was thrilled to get a counterfeit Kate Spade bag.

QUESTIONER: But the long-term victim—

MR. GOLDSTONE: But Kate Spade wasn't a party to that transaction, and Kate Spade had its name at stake. If somebody wrote a law review article with your name on it and submitted it, and you disagreed with it, and they got it published in a law journal, a prestigious law journal, on the basis of your reputation, the law review may or may not be upset, but I suspect you would be very upset.

MR. COHEN: There's a gentleman in the back who has his hand up.

QUESTIONER: The Commission understandably spent a lot of time trying to figure out the factual or empirical question: how do you value this loss, either from industry standards or the real dollar amount as a factual level? The problem is that, at a normative level, I think a lot of the consumers would place the value at zero. Or more accurately, they'd say the value of the Microsoft Windows, it is not the $200 I have to pay for it. They'd say in their own mind to justify what they don't see as stealing, "Well, it's only $200 because they have to work into that price the fact I'm going to make a copy anyway. You know, I'm going to make a copy because it's overpriced." I'll make a copy, and especially because it is so easy to do it, the thought is there's no harm there.

And I must say that I think one of the problems I have with increasing the penalties and treating this as if it's like other kinds of more tangible harm is—it may be in a long-term sense, but it's not—that in some ways I worry Congress isn't just reflecting the public. They're way ahead of the public in a way the public doesn't want to go, and what that ultimately does is give prosecutors an awful lot of discretion to pick and choose the cases that they're going to then treat very seriously. Again, I would hope they'll use that discretion as effectively as they can, but in terms of creating certainty of punishment that reflects community values in an effective way, there's necessarily a greater disconnect because we're ratcheting up the penalties because the industry says we need this tough criminal enforcement, whereas the person on the street, he doesn't think—

MR. COHEN: If you download software illegally from a website that retails for $200, to use your example, that you otherwise would have gone to the store and purchased—

QUESTIONER: But people do that. I mean, that's really an unrealistic vision of the market. People download it because it's free. They don't think it's worth to them $200. They wouldn't value it at $200.

MR. COHEN: You're saying there's not a displaced sale.

QUESTIONER: Maybe there is or maybe there isn't. They don't feel like criminals, I guess is what I'm ultimately saying. To some extent, this entire discussion is treating this as a criminal enforcement issue—I'm not sure it's appropriate to brand as criminals a lot of people who do this kind of copying—but to suggest that that's the norm and the paradigm in which we think about these issues, something's missing. Because you're not going down and prosecuting the guy on Canal Street, even though I think technically he's violating these criminal trademark laws, and so—

MR. GOLDSTONE: Well, just to be clear, downloading software isn't a crime.

QUESTIONER: Right. But willfully doing it—

MR. GOLDSTONE: Even willfully doing it, to become a felony, it would have to be $2,500 worth and you have to make—

QUESTIONER: Well, it's still a misdemeanor, though, or—

MR. GOLDSTONE: It's a misdemeanor if it's $1,000 worth. But only on a large scale would it become a crime. But say you're just downloading one copy. The person who has the website that's set up to provide many, many copies, I suspect that you would think is acting in a criminal way.

QUESTIONER: Right, but it sounds like there's a lot of those out there and yet you only have three cases in the last year. I mean—

MR. GOLDSTONE: Well, there's not a lot anymore.

QUESTIONER: We're spending a lot of time talking about what an infringement is worth. It's almost sophistry in a way. And we've heard what other people think the problem is. We've got a good chance, I think, to hear from a couple of people in industry about what do they see the problem is, because at least in the courts, I sense that more of the solution from the industry standpoint has been civil sorts of enforcement rather than criminal. I'm just sort of curious how these representatives would see the balance.

MR. COHEN: And also, how do they decide whether to seek criminal enforcement as opposed to going through civil mechanisms.

MR. NOLAN: Well, I think I'd like to address some of these issues. Whether we go criminally or civilly to a large degree depends upon what the U.S. Attorney in that particular locality says. Despite everybody's talk about how it's improper evaluation by prosecutors, the fact is, they weren't bringing cases.

QUESTIONER: Has Disney actually sought a prosecutor to bring a case?

MR. NOLAN: Oh, yes, and been declined on quite a few cases. In large part, it wasn't necessarily anything other than the offices having limited resources. I think this is, by the way, normal human thinking or management thinking. The U.S. Attorney says, "I have limited resources. I want to go after the person who is causing violence to my fellow citizens in my locality. I'm going to go after them rather than a copyright infringement which has a comparatively low guideline level, and as a result, I'm not going to bring it. I just don't have the manpower to do it or the money." And then we as copyright owners decide to go civilly.

MR. GOLDSTONE: And may not actually be hurting anyone in the district.

MR. NOLAN: That can happen, as well.

MR. COSTABILE: From our standpoint, we joined forces through the RIAA because the number of infringements is generally a small tolerable range. This gentleman suggests here that whether or not it's a local crime, it's been a longstanding policy not to go against an individual unless there's a business that's operating for profit. What we find, even in mid-year numbers, is that there are less than 100,000 pieces that we've been able to take off the street in an illegal fashion.

So when you look at it, it's the intensity. And I guess much to your point, it's the issue of the Internet being a very, very easy way for us. And it changes the medium in which we deal, and that part we don't have very good statistics on except what's out there with Napster and Nutella. Napster—we've seen the number of illegal downloads, and it's been our position that they are illegal downloads because the artist is not enjoying a normal fee for service or fee for their work. It's gone from February with about 1.1 million a month to somewhere in the range of almost six million last month, and that part of it, while it doesn't begin to make a large dent, it does put a dent in the overall sale of that particular product.

MR. COHEN: Question?

QUESTIONER: I'm now a judge. I was a prosecutor. The copyright area is the one area where industry has probably the greatest amount of self-help available. We authorize the marshal to go out with your lawyers and seize all the goods. I think one of the questions has to be: where is the appropriate entry of the criminal process? And I think one of the reasons is, as Mr. Nolan mentioned, the U.S. Attorney.

You come to me, I had more good cases that I could prosecute all the time, and I don't think you're going to find U.S. Attorneys sympathetic to bringing criminal cases against somebody who is not deriving a profit from the activity, you know, the Robin Hood defense. How excited is a jury going to get about somebody who is giving away free on the Internet?

It also is my view that loss isn't the issue because, yes, you can lose as much product from somebody distributing free over the Internet as you can from somebody running a commercial operation to duplicate video tapes. But it seems to me that's the person who the criminal law should be focusing on, the person who is running a commercial operation where he's stealing for profit, like any other thief.

MR. COSTABILE: Speaking just from Sony's standpoint, what we do is we aggregate that with other industries—and in this case music, and we do it from the Columbia Pictures side and go after it as a larger side—because when you find an illegal business that's set up, it's not just Sony products. It's everybody's product.

I learned a long time ago that 80 percent of this business you can learn in two years. If you have hot artists and hot acts and a good marketing team, you'll sell a lot of goods. If you don't, the other 20 percent takes the rest of your life to figure out.

If I could discuss one other issue—your point about the Internet, that's the part I'm not sure I agree with. With the Internet, what we have seen is that it's a very, very swift, easy way with the click of a mouse to get a less-than-high-quality product, but you get a product that you can enjoy. It's your individual

user preference. These are listening attributes that then we find are actually cutting into the overall total sales of a piece of intellectual property that someone or a group of individuals have devoted a substantial amount of their time to and that they're not being compensated for.

Look at the record company. Look at the individual artists. When I hear these arguments, I go back and forth on the point of whether it's a crime to download one piece of music or to share that piece of music one or seven or 800 times. The fact that we don't know that and the fact that the Internet allows that to happen is something that I believe that we have to get our hands on.

QUESTIONER: The whole question is who we make criminal in our society. There may be other remedies that you have, but I think if somebody is doing it and they're doing it for free, you're not going to find a lot of people, absent the extreme circumstance, thinking that they should be severely punished.

I was talking with someone who was saying that, in all these horrendous Internet cases we're talking about, the virus cases, they've ended up with very low sentences in most of those cases because basically when it got before somebody, you were dealing with kids. You were dealing with a situation where they didn't have any profit motive. And I think that operates in the system all the time.

MR. NOLAN: There's also the problem, though, of the hacker, the Mitnicks of the world, who cause people tremendous losses, and although copyright is a limited monopoly, it is a property. It is created with risk takers who invest money and by humans who derive a livelihood and a revenue from those works. And if someone just takes them for their own reason, it hurts them economically, and ultimately, as was said, it could subvert the system long-term.

But I think it is compelling to just look at the perpetrator who's not making any money and say that he ought to get a light or no sentence at all. But on the other hand, if that individual is causing great harm to someone else, I think he ought to be seriously sentenced.

MR. COSTABILE: I'll add one other point to your statement. If you look at the way the typical music product or an entertainment product is marketed, 20 to 25 percent of the total sales in terms of units are usually given away. And that's where I personally see, and as an industry representative see, the value of a Nutella or of a Napster-type arrangement that is controlled. And right now, and I believe I heard this, there isn't a control mechanism. David had said something about turning off the number of hits. What you can do on an active server page is amazing so that there's a blatant, in my opinion here, disregard for copyright law at that point because you know actively what you're trying to do.

When you get behind the surface of it, and you look at it from our standpoint in terms of units that we have to produce to bring out to the public for the intent of exploiting the artist, it becomes a great tool. But we're all afraid of it right now. How do you balance that? That's what I'm asking.

QUESTIONER: Getting back to the guidelines, this particular issue is really about the loss rule and almost ties in with what was said yesterday, but I want to address the judge's point. A lot of these cases aren't consumer fraud. There are other cases of counterfeit goods where you install a faulty knock-off auto part which actually causes some kind of consumer injury.

But in a lot of the cases, such as the bag case, there probably isn't any consumer fraud. And when you go to think about what the trademark harm is, it's lost profits and price erosion, which may or may not

be individualized to this particular case. But it's almost an antitrust type of analysis about what happens when you have these extra units, which is a competitor but not a legal one, putting units on the market.

And the other issue, I think, which you were getting at, is that with software, there's lots of consumer price discrimination. It's given away. Also, over time, the price falls at the retail level. There are promotions, there are specials, there are upgrades. So it is a complex issue.

I think what I viewed the Commission doing was, in the emergency guidelines, coming up with some proxies which would try, at least, to mirror the times when, of course, there would be the consumer fraud aspect of it. Otherwise, it's just theft, and we'd be trying to figure out in a very rough proxy way when it would be that this would be a lost sale or when would this cause a huge intellectual property harm like price erosion or a disincentive to have the product in the first place.

All these things aren't going to be perfect, but at some point, things become too complex if you actually try and implement an antitrust-like damage calculation in every one of these cases. So we have to realize that we're in this imperfect world and is this a proxy which makes some sense.

MR. COHEN: One of the other things that we learned when we were looking at this issue, and I think it's been talked about before, is that the motive and the type of offender really varies. Several offenders may do this for money. They do it for commercial venture, private financial gain, and others do not. They do it, I think, just because they can; so they upload stuff to an Internet site, make it available to others to download for free, illegally, and they do it just because they can.

How should the motive of the offender factor into the sentencing calculations? Particularly when we look at the fact that these violations that we're talking about weren't even criminalized until the NET Act a few years ago, and that Congress still set a separate penalty structure for them that's somewhat lower than for offenses that were committed for profit?

MR. PRICE: Some of what we see with the hacker groups are people who have no monetary interest in any of this, but they take a matter of pride in being the first ones to get the release out onto the Internet. What we try to do is track it back to the source of where the software came from, be it someone in the industry trying to leak it out or just a very quick duplication of purchased software that a hacker gets his hands on.

So what we're looking at is people involved in an overall conspiracy. They may be small people who aren't of any interest to a U.S. Attorney, but what we're trying to do is go further up the food chain, look at something overall that tends to go a bit further.

QUESTIONER: I haven't seen any food chain cases on this. We did have a computer science student at the University of Oregon who had big files and was giving them away, giving away lots of stuff. He was prosecuted and pleaded guilty. His motive did not gain him any money. The worst thing I did to him was take all his computers away. He can't be on computers anymore. This is someone getting his advanced degree in computers, and he said, "Judge, what will I do?" Well, I don't know. I guess the old fashioned way. But I think a lot of times these days, they're really small groups that are able to do this. It doesn't take a lot of people.

MR. COHEN: The new guideline wasn't in effect when that case came down, correct?

QUESTIONER: No. I was told by college student friends of mine in different states who had heard about the case, even though I hadn't.

MR. COHEN: Because one of the concerns that I think we have about the new guidelines is that one could argue that this type of college student is exactly the type of offender who may be very well deterred by probation and by a few cases brought that are well publicized where the defendant receives a term of probation. It may go a long way towards deterring that kind of conduct on campuses nationwide. Yet now we have a guideline where if the offender was uploading infringing material, you are going to now start at Level 12, plus the loss calculation is going to be based on the retail value of the legitimate item because these are identical copies.

So one potential problem is that for exactly the type of offender where probation really may be particularly well suited, it's less likely to happen. I guess my question to the panel members is: am I right in my observations or are these cases where probation is not appropriate?

QUESTIONER: If I could respond about that one case, where probation was the sentence with all these conditions. I believe it was very effective. When I get a call from my son, who is a college student in another state, and he says, "Everyone's talking about your big case," and I'm thinking, "What case is that," because I really—

MR. COHEN: You have so many big cases.

QUESTIONER: Yes. "What area was that in?" "Well, it's all over the campus about the case you had there in Eugene." That wasn't because it was a particularly big case to me, but I think that that probably was a very effective sentence.

QUESTIONER: There's a corollary to your question.

MR. COHEN: Yes, sir.

QUESTIONER: If the guideline does require a substantial prison sentence, is a prosecutor going to bring that case? Here's a case that everybody says the right answer is probation, but now I've got a guideline that says I don't have that option. If I prosecute this kid, he's going to go to jail for 16 months.

MR. COHEN: Or what's really going to happen is that they're going to plea bargain away on the quantity.

QUESTIONER: I've got a lot of thoughts. Let me see if I can get these out in some logical pattern here.

First of all, what we've been seeing in the U.S. market in particular is a maturing process; people have more and more respect for intellectual property. I think a few years back, maybe some of us were a party to being offered something that was software, something that was intellectual property, and it didn't seem too bad to take that and use that for your own limited use. But we see more and more the realization that if I'm going to use a piece of software out there, I ought to buy the license for it. I ought to own the license.

Now, in our company, our lifeblood is our software. That's what we make. That's our whole existence. We spend millions of dollars every year in research to develop new software, to make it current, to make it better. On the enforcement side, I'll have to tell you that in the past year or two, 100 percent of our cases have been addressed civilly. And I think I'm beginning to understand why, more because I'm participating some here in this symposium. And it turns out to be, quite frankly, maybe a little disappointing to me because it seems to me that there's a lot of work we ought to be doing on the enforcement side, federally and locally.

At the same time I say that, we get a tremendous amount of cooperation and have a working relationship with the FBI and Customs, in fact. We do interface a lot with Customs, and we train them in terms of how you identify a legitimate product versus a bogus product. And they do watch for that. They do intercept the bad product and so forth, so we appreciate those efforts.

But our attitude is very simple, and that is that we own that product and nobody has a right to use that product unless they have purchased the license. We don't care if it's one individual making that available to one person or 100 persons over the Internet. The fact is, they don't have a right to do that. We've licensed that software. They can't take that. They can't use that. We lose control of it if, say, one person has put that on the Internet and other people are making copies of that. Where does it end? Where does it go?

Maybe part of our success is that we have a staff that includes four retired FBI agents, so we happen to be very aggressive in this marketplace. We live on the dark side, so to speak. We spend time out there with the hackers and we try to identify who they are. We identify our product being sold out there on the Internet, and we buy that product if we can, and then we sue and we recover. But that's our program to protect our intellectual property.

And I guess I'm a little surprised that some say, "Gee, that doesn't appeal to a jury, or that doesn't appeal because we don't know how much the loss is." Well, the loss is substantial to us as far as we're concerned, and there's no way of putting a fence around that. You don't know where it's going. We have product that was slated for destruction, and it wasn't destroyed, and we found it was in the marketplace. And pretty soon, lots of corporations are using our product. That's loss of revenue to us: can we quantify that exactly? No. In many cases, we do our best, and we do a very convincing job of that in terms of our civil legal suits.

But I guess I'm looking to find out whether there are there more avenues federally and on the criminal side where we could be more effective.

MR. GOLDSTONE: Do you have cases that you presented to the U.S. Attorney's Office that have been declined, or hasn't this been part of your enforcement strategy?

QUESTIONER: Well, it has been. It was for a while. I think we backed away from it for two reasons. Number one, the resources were not there generally, and secondly, the technical skills were not there. Now, that's changed over the last year or so. They've invested a lot more money in the development of those skills and expertise, but it hasn't been there. And you're kind of plowing a lot of new ground all the time. If you're out there with the hacksters, you've got to know their methods and their technologies and you have to be very technically competent. So we gradually got away from that because we weren't successful there. But we are successful here.

MR. GOLDSTONE: There's also an interesting federalism issue here because in other white collar fraud areas, sometimes cases that aren't taken by the U.S. Attorney's Office can be brought by the state or local offices. In the copyright area, Congress, for national uniformity reasons, has preempted any state or local government from enacting a copyright law which has had the incidental and unintended effect of—because the preemption took place in 1976 before stiffer criminal penalties were introduced—preempting criminal enforcement at the state and local level.

MR. COHEN: But wouldn't that make it a higher priority at the Justice Department, then, if state prosecutions are preempted? And yet we see so few.

MR. COSTABILE: I've got an observation about the issue of destruction of product and filtering it back into the marketplace. We find in all cases that we'll use the civil approach to resolving that issue and then jump into an education approach, very much like what we did as an industry with Napster and universities. Napster requires a huge amount of file data storage, and we were able effectively to send out 10,000-plus cease and desist-type letters to different universities. And then with an active campaign, much to my chagrin, the only university that hasn't listened to us is the one nearest and dearest to my heart, the University of Oregon. I can understand their issues because with the amount of usage of that type of data and tracking it becomes a huge, huge cost.

So there's a secondary effect. The only legal mechanism that we have found to be useful for us is to, again, put Sony Corporation against a larger individual, and in the end, how much money do you want to spend? You can either pay the attorneys or you can pay for lost product.

We've got another case with a third party that we're dealing with right now; it has the same type of issue: destruction of product wasn't handled appropriately. We were named in the case because we were the creators of the CD for them. We came to find out that their recycler is the one who committed the crime. So how do you resolve that issue and take it away from this Internet or the approach that it gets blown into a bigger venue than it really is?

QUESTIONER: All these comments highlight that intellectual property crimes are just different than other kinds of crime. This is the only panel, I think, where we have crime victims—essentially Sony and the Disney Company—talking through how they go about dealing with the crimes they suffer and the fact that other crime victims can hire a team of FBI agents to go out and look at the crimes and then also have civil remedies out there to deal with issues. At least for me, that's a whole new paradigm. The Commission's effort—maybe pushed by Congress—to replicate the old paradigm, to make it more like fraud or other kinds of crime, is in some ways a disservice to what's really going on here. What that, in turn, leads to is prosecutors imposing the new paradigm, themselves saying, "We're not going to go after these cases because that's not important to us, or we can't spend the time."

And so I'm concerned about not starting from the base ground of how we should approach these different kinds of crimes in a different kind of way. And so I just wonder if other people agree that maybe we need to not be thinking about how we can tweak the sentencing to help us out a little bit more, but about ways in which to rethink the entire criminal enforcement approach so that maybe we get more certainty. Or maybe we better define what the crimes are so that we integrate the criminal enforcement component so that in this area of different kinds of property offenses we have a different enforcement strategy that can lead to a better end product.

MR. COHEN: Well, I can't speak to the enforcement strategy because I'm not a part of the process, but it seemed logical to us when we were devising a new guideline that—and whether we actually succeeded or not, we could debate forever—to the extent that one could measure economic harm from an intellectual property event, it seemed like that should weigh into the calculation for a copyright trademark infringement case just as much as it should for any other economic crime.

QUESTIONER: But people don't commit other economic crimes as much, and there are people who commit this kind of crime much more readily. And I think that's a function of the fact that society views it differently. And so, just again, take that old paradigm. Well, let's measure the harm and punish for it. Normatively, people make different judgments. There aren't real Robin Hoods out there. At least to my knowledge, there aren't lots of people out there stealing Mercedes and giving them away to other people, but they do that with Microsoft products and so that suggests it's different—people regard it differently. And so to say, "It works the same kind of way so why not use the same model?"—it seems to miss something.

MR. NOLAN: There are people, though, who vandalize public property owned by the federal government. I don't see this as a real different issue than theft of someone else's property and destroying it.

QUESTIONER: As a former prosecutor, this is the same old stuff. The paradigm for punishment is basically harm and culpability. The problem here is you don't have the culpability that you have in the other kinds of crimes because the motivation of the person doing it is different. It's not for pecuniary gain. That's what throws it off.

The analogy here is really the causation analogy that we use to decide what sorts of harm people are going to be held responsible for: those that they intend, those that are reasonably foreseeable, or the "but for" standard. I see no problem with a prosecutor who has limited resources not prosecuting these situations, not because they aren't crimes, but simply because you have limited resources and there's not much punishment.

MR. COHEN: Another comment?

QUESTIONER: When we start trying to put a number on these things, we just ignore the tremendous variation in how these products go out. Until Jerry Garcia poisoned himself, every year, the Grateful Dead came to Eugene, Oregon, for a concert. They encouraged pirating of their stuff, but not their t-shirts. Every year, the week before that concert, there were a couple of lawyers in sharkskin suits from Los Angeles in my court. They would haul these poor young hippies in front of me in the court with their pirated t-shirts. I don't know if the guideline fits that or not.

QUESTIONER: There are culpability cases, and I would guess that the Disney and Sony people are most worried about the intentional competitor doing knock-offs or thefts or gray goods, whatever. There are all different variations. It seems to me those are the ones the industry is most worried about from a criminal enforcement standpoint.

But one problem that we haven't talked about is what is infringement, and I suspect that turns a lot of prosecutions away, the difficult question of whether it is. My own law firm represented ASCAP. Young lawyers went to the Minnesota bars on Saturday night to try to catch unlicensed recordings. Well, the infringement's pretty easy there. But we also represented Target Corporation, the second or third biggest legitimate discount retailer in the country. They thrive on copying, but they thrive on legal copying.

And the distinction between legal and illegal is in the eyes of the competitive beholder, and U.S. Attorneys get caught in the crossfire. So there are just so many layers of complexity here that I think the Commission has a heck of a time, and I hate to see them get in an unrealistic straightjacket.

MR. NOLAN: I will say, though, that I don't think prosecutors focus on cases that do present that kind of issue. Ones that they have taken, at least, in the past, have involved straightforward reproduction and distribution.

MR. COHEN: I can make one comment and then we have to close. We published our amendments for public comment, and we ultimately did promulgate this: we have a downward adjustment for offenses that are not committed for profit or commercial advantage. Industry across the board commented negatively about that provision saying that, in those cases, "Just because you put something up on the Internet site and you didn't intend to profit from it personally, that doesn't necessarily lessen the economic harm that that offense causes." So industry is not entirely consistent on that.

Anyway, thank you for participating in my panel.