

Intellectual Property Amendments: 2006



Policy Development Team Report

May 2006

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The Family Entertainment and Copyright Act of 2005
Pub. L. 109–9,

The Intellectual Property Protection and Court Amendment Act of 2005
Pub. L. 108–842, and

The CAN-SPAM Act of 2003
15 U.S.C. § 7704

I. Introduction

This Report focuses on the Family Entertainment and Copyright Act (the “Act”), the Intellectual Property Protection and Court Amendment Act of 2005 (“IPPCA Act”), and the CAN-SPAM Act, 15 U.S.C. § 7704. The Commission acted upon directives in the Act by amending, pursuant to emergency authority, the intellectual property guideline, USSG §2B5.3, effective October 24, 2005, and recently voted to promulgate that amendment as a permanent amendment. The Commission also promulgated guideline amendments to follow from the IPPCA Act and the CAN-SPAM Act.

II. The Family Entertainment and Copyright Act of 2005

In carrying out the directives of the Act, the Commission must take steps to ensure that the Federal sentencing guidelines and policy statements are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property right crimes. More specifically, Congress instructed the Commission to determine—

- 1) whether to provide a sentencing enhancement for the distribution of pre-release works;
- 2) whether the scope of “uploading” set forth in Application Note 3 of USSG §2B5.3 is adequate to address the loss attributable to people who, without authorization, broadly distribute copyrighted works over the Internet;¹ and
- 3) whether the sentencing guidelines adequately reflect the harm to victims from any copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed.

The Staff Policy Team (the “Team”) was formed in June 2005, to assist Commissioners

¹ The legislative history of the Act contains no information about any perceived deficiency in the uploading definition and industry representatives expressed to the Team their satisfaction with the guideline definition. Representatives of the Department of Justice suggested that Application Note 3 might be read to exclude peer-to-peer transfers and the Team concluded that this was a legitimate concern. Congress and the industry have been struggling with a variety of issues relating to peer-to-peer technology.

in developing and evaluating possible responses to the congressional directives in the Act, among other things. To date, the Team has: i) analyzed the legislative history of the Act; ii) reviewed the history of the copyright and infringement guideline, USSG §2B5.3; iii) conducted an empirical analysis of fiscal year 2003 (FY 03) cases and FY 05 post-*Booker* cases sentenced under USSG §2B5.3; iv) researched relevant state law for guidance; v) researched federal case law for any application issues requiring Commission action in this area; and vi) performed a literature review, including review of the No Electronic Theft Act (hereinafter “NET Act”) Policy Development Team’s Report to the Commission dated January 1999 (hereinafter “NET Act Team Report”). The Team has reviewed testimony before Congress on issues relating to the directives, attended hearings, and performed outreach to interested groups to gather their input on relevant issues, meeting with industry representatives, the Federal Defenders, the Probation Officers Advisory Group (“POAG”), and the Department of Justice, among others.

A. Legislative History

The Act was signed into law on April 27, 2005. The Act penalizes the unauthorized recording of motion pictures in movie theaters and the unauthorized distribution of pre-release copyrighted works. Section 102 of the Act amended Title 18, United States Code, by adding a new offense after section 2319A. The new section, 2319B, criminalizes the use or attempted use of an audiovisual recording device² to transmit or make a copy of a motion picture or other audiovisual work protected under title 17, United States Code, or from the performance of such work at a motion picture exhibition facility.³ The crime is punishable by a term of imprisonment of not more than 3 years, a fine, or both, in the case of a first conviction, or by a term of imprisonment of not more than 6 years, a fine, or both, in the case of a second or subsequent offense. The statute does not reach those who take still pictures of movies, sales people who use a camcorder to record a movie playing for the purposes of demonstrating the capabilities of either the television or the camcorder, or individuals recording movies from their television screen for private viewing later.

Section 103 of the Act added subsection (a)(1)(C) to 17 U.S.C. § 506(a). This subsection creates a criminal offense punishable under 18 U.S.C. § 2319. A violation of this subsection occurs whenever a person willfully distributes a work being prepared for commercial distribution (to wit: pre-release copyrighted work), by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution. The term “work being prepared for commercial distribution” is defined as

² “Audiovisual recording device” is defined as a digital or analog photographic or video camera, or any other technology or device capable of enabling the recording or transmission of a copyrighted motion picture or other audiovisual work, or any part thereof, regardless of whether audiovisual recording is the sole or primary purpose of the device. *See* 18 U.S.C. § 2319B (g)(2).

³ The Act defines “motion picture exhibition facility” at 17 U.S.C. § 101 to mean “a movie theater, screening room, or other venue that is being used primarily for the exhibition of a copyrighted motion picture, if such exhibition is open to the public or is made to an assembled group of viewers outside of a normal circle of a family and its social acquaintances.” *See* Act, section 102.

(A) a computer program, a musical work, a motion picture or other audiovisual work, or a sound recording if, at the time of the unauthorized distribution—

- (i) the copyright owner has a reasonable expectation of commercial distribution; and
- (ii) the copies or phonorecords of the work have not been commercially distributed; or

(B) a motion picture, if, at the time of the unauthorized distribution, the motion picture—

- (i) has been made available for viewing in a motion picture exhibition facility; and
- (ii) has not been made available in copies for sale to the general public in a format intended to permit viewing outside a motion picture exhibition facility.

See Act, section 103. Any person who commits an offense under section 506(a)(1)(C) shall be punished by a term of imprisonment of not more than 3 years, a fine, or both, for a first violation, and to not more than 6 years, a fine, or both in the case of a second and subsequent violation. If the pre-release distribution offense was committed for the purposes of commercial advantage or private financial gain,⁴ the term of imprisonment is increased to not more than five years, a fine, or both. Second or subsequent offenses are punishable, respectively, by terms of imprisonment of not more than 6 or 10 years. *See Act, section 103.*

The House report on the Act specifically notes that the Judiciary Committee felt that although the harm caused by distribution of copyrighted works when legally available has long been established, there is a “larger harm caused by those who distribute copies of works before they are legally available to the consumer.” *See Committee on the Judiciary’s Report*, at p. 4 (hereinafter “Report”). Thus, the Committee wanted to ensure that there was a specific penalty for illegal pre-release activity. The Report notes that the “Commission has previously and successfully updated the guidelines to account for changes in the manner of intellectual property piracy.” *See Report* at p. 5. Congress included the directives to the Commission in the Act because of the “unique harms and aspects related to the infringement of pre-release works” and the existing guideline contains no provisions specifically addressing pre-release works. The Committee opined that the harms caused by “the display, performance, publication, reproduction or distribution of a pre-released work appear to warrant their inclusion as a third reason for upward departure” from the guidelines. *Id.*

The Act also directs the Register of Copyrights to issue regulations to establish procedures for preregistration of a work that is being prepared for commercial distribution and

⁴ Financial gain has the meaning given the term in 17 U.S.C. §101. *See the Act, section 103.*

that has not been published.⁵

B. Guideline History of §2B5.3

Section 2B5.3 was adopted with the initial set of guidelines in 1987 and largely retained its original form until amended, effective May 1, 2000, in response to the NET Act. As in the guidelines for other economic crimes, the drafters of USSG §2B5.3 aimed to achieve a proportionate punishment by setting the offense level according to the seriousness of the crime. The original version of this section largely mirrored the treatment of fraud offenses under USSG §2F1.1. The original version of USSG §2B5.3 provided for a base offense level of 6. In addition, if the value of the infringing item exceeded \$2000, the offense level was adjusted upward by the corresponding number of levels from the loss table in USSG §2F1.1.

“The original Commission was persuaded that pecuniary loss to the primary victim(s) is generally the best basis for assessing the seriousness of all economic and property crimes, including infringement of intellectual property.”⁶ The original guideline for intellectual property offenses called for offense level increases based on the value of the infringing item.

This guideline treats copyright and trademark violations much like fraud. Section 2B5.3 provides for a base offense level of 8 which, like all base offense levels, is designed to reflect a minimal, general harm caused by the offense, and incorporates the more than minimal planning conduct that the Commission determined was present in the majority of offenses sentenced under this guideline. *See* USSG App. C, Amendment 590 (2004).

Before the emergency amendment took effect, §2B5.3 contained four specific offense characteristics. The first related to the monetary value of the items involved in the offense. Section 2B5.3(b)(1) provides that “if the infringement amount (A) exceeded \$2000, but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the number of levels from the loss table in USSG §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.” Application Note 2 contained instructions for the determination of the infringement amount for purposes of subsection (b)(1).

Like the loss enhancement in the theft and fraud guidelines, the monetary calculation in USSG §2B5.3(b)(1) serves as an approximation of the pecuniary harm caused by the offense and is a principal factor in determining the offense level for intellectual property offenses. Before the 2000 amendments to this section, the monetary calculation for all intellectual property crimes was based on the retail value of the infringing item multiplied by the quantity of infringing

⁵ Other provisions of the Act, not relevant to the Commission’s work, include the clarification of the legal status of technologies that allow the editing of certain works by individuals for private home viewing. In addition, the Act contains provisions to reauthorize and reorganize the National Film Preservation Board and to correct a technical error in the Sonny Bono Copyright Term Extension Act of 1998, which inadvertently limited access by libraries and archives to certain categories of works.

⁶ NET Act Report, pp.3-4, citing Jeffrey Parker, *Criminal Sentencing Policy for Organizations: the Unifying Approach of Optimal Penalties*, 26 Am. Crim. L. Rev. 513 (1989).

items. In response to the NET Act directive, the Commission refashioned this enhancement so as to use the retail value of the infringed item, multiplied by the number of infringing items, as a means of approximating the pecuniary harm for cases in which that calculation is believed most likely to provide a reasonable estimate of the resulting harm. The Commission believed that use of that calculation would provide a reasonable approximation for those classes of infringement cases in which it is highly likely that the sale of an infringing item results in a displaced sale of the legitimate, infringed item. *See* NET Act Report at 22. The guideline also requires that the retail value of the infringed item, multiplied by the number of infringing items, may be used in certain other cases for reasons of practicality.⁷

The Commission's review of cases sentenced under the earlier version of USSG §2B5.3 led to a determination that using the above formula likely would overstate substantially the pecuniary harm caused to copyright and trademark owners in some cases currently sentenced under the guideline. For those cases, a one-to-one correlation between the sale of infringing items and the displaced sale of legitimate, infringed items is unlikely because the inferior quality of the infringing item and/or the greatly discounted price at which it is sold suggests that many purchasers of infringing items would not, or could not, have purchased the infringed item in the absence of the availability of the infringing item.⁸ The Commission therefore determined that, for these latter classes of cases (referred to in Application Note 2(B)), the retail value of the infringing item, multiplied by the number of those items, provided a more reasonable approximation of lost revenues to the copyright or trademark owner, and hence, of the pecuniary harm resulting from the offense.

Before the emergency amendment took effect, USSG §2B5.3(b)(2) provided an enhancement of two levels, and a minimum offense level of level 12, if the offense involved the manufacture, importation, or uploading of infringing items. In response to the NET Act directive, the Commission determined that defendants who engage in such conduct are more culpable than other intellectual property offenders because they place infringing items into the stream of commerce, thereby enabling others to infringe the copyright or trademark.

Before the emergency amendment took effect, USSG §2B5.3(b)(3) also provided a two-level downward adjustment (but to a resulting offense level that is not less than offense level 8) if the offense was not committed for commercial advantage or private financial gain. This adjustment reflects the lower statutory penalties for offenses that were not committed for commercial advantage or private financial gain.⁹

⁷ *United States v. Larracuenta*, 952 F.3d 672 (2d Cir. 1992)(retail value of tapes copied by criminal infringement defendant was appropriate value for use to compute the infringement amount where the unauthorized copies were of sufficient quality to permit their distribution through normal retail outlets).

⁸ An example might be the sale of a fake Rolex watch at the price of \$20.00, where a legitimate Rolex watch retails for well over \$2000.00.

⁹ Application Note 1 defines "commercial advantage or private financial gain" as "the receipt, or expectation of receipt, of anything of value, including other protected works." *See also* 17 U.S.C. § 101.

The last specific offense characteristic in this section, before the emergency amendment took effect, provided an enhancement of two levels, and a minimum offense level of level 13, if the offense involved the conscious or reckless risk of serious bodily injury or possession of a dangerous weapon in connection with the offense. When acting pursuant to the directive in the NET Act, the Commission received testimony indicating that the conscious or reckless risk of serious bodily injury may occur in some cases involving counterfeit consumer products.¹⁰ The Commission determined that this kind of aggravating conduct in connection with infringement cases should be treated under the guidelines in the same way it is treated in connection with fraud cases; therefore, this enhancement is consistent with an identical provision in the fraud guideline.

Before the emergency amendment took effect, USSG §2B5.3 contained an application note expressly providing that the adjustment in USSG §3B1.3 (Abuse of Position of Trust or Use of Special Skill) shall apply if the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item. As stated in the background commentary to USSG §3B1.3, persons who use such a special skill to facilitate or commit a crime generally are viewed as more culpable.

Finally, USSG §2B5.3 contained two encouraged upward departure grounds. The first ground exists when the offense involved substantial harm to the reputation of the copyright or trademark owner. *See* USSG §2B5.3, comment. (n.5). The Commission added this departure ground in response to public comment indicating that infringement may cause substantial harm to the reputation of the copyright or trademark owner that is not accounted for in the monetary calculation of the infringement amount. Public comment to the Commission also indicated that some copyright and trademark offenses are committed in connection with, or in furtherance of, the criminal activities of certain organized crime enterprises. Thus, the second encouraged ground for departure exists when the offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international organized criminal enterprise. *See* USSG §2B5.3, comment. (n.5).

C. The Guideline in Practice

USSG §2B5.3 covers a variety of infringement crimes. The harm to the copyright or trademark holder can vary widely depending on the type of item infringed, the method of infringement, and the quality of the infringing item. In order for the Commission to respond to the Act's directives, it is important to consider the types of cases sentenced under the guideline, as well as how the composition of cases may have changed. Additionally, it is important to compare not only the types of cases sentenced under these guidelines, but to determine what impact, if any, the *Booker*¹¹ decision had upon sentences for these types of offenses.

¹⁰ An example would be a case involving counterfeit prescription drugs. *See, e.g.*, Report of the Department of Justice's Task Force on Intellectual Property dated October, 2004 at p. iii.

¹¹ *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005)(excising 3553(b) from statute and declaring that the guidelines, while no longer mandatory, continue to be advisory).

Accordingly, the Team analyzed all cases sentenced under USSG §2B5.3 in fiscal year (FY) 2003 and all cases from the first six months of the post-*Booker* era sentenced in FY 05.

1. Empirical Analysis of FY 03 Cases

The Team's empirical analysis has revealed that 117 cases with complete documentation were sentenced in FY 03 using USSG §2B5.3. Eighty-six (86) of the 117 cases were sentenced under USSG §2B5.3 as amended effective May 1, 2000, pursuant to the NET Act and constitute the universe of cases for the data below.

Nearly three-quarters (73.3%) of the 86 cases involved a single infringing item and the remaining 36.5 percent involve some combination of items. The most common types of infringing items are software (present in 26.7% of the cases), video recordings (primarily DVDs) (25.6%), trademarked goods (*e.g.*, watches, handbags, t-shirts, sunglasses) (20.9%), audio recordings (primarily CDs) (18.6%), and satellite tv access cards (17.4%). Other items such as computer games (9.3%), bootleg live recordings (audio and video) (5.8%), and miscellaneous items (CPUs, nutritional supplements) (6.9%) were much less common.

Nine cases (10.5%) involved items in pre-release status. All of these cases involved pre-release first-run motion pictures, and two of the cases also involved pre-release computer games and software. Ten (11.6%) of the 86 cases involved uploading of infringing items and the court applied §2B5.3(b)(2) in all ten cases.

The Team's review of the 86 relevant cases sentenced under this guideline suggests that courts apply specific offense characteristics when appropriate. The infringement amount enhancement applied in 95 percent of the cases, and the median loss amount for the cases is \$95,910.¹² The Manufacture/Import/Upload enhancement (USSG §2B5.3(b)(2)) was applied in 46.5 percent of the cases. The decrease in the offense level for offenses not committed for financial gain (USSG §2B5.3(b)(3)) applied in 3.5 percent of the cases. Finally, USSG §2B5.3(b)(4)'s increase for risk of injury or weapon enhancement applied in 2.3 percent of the cases.

The Team's empirical analysis also revealed that an increased number of defendants sentenced under this section received a prison term.¹³ Fifty (50) percent received prison terms with a median term of 18 months imposed.¹⁴ The within-range sentences under this section seem to mirror the within-range sentences under the guidelines as a whole. Nearly two-thirds (65.9%)

¹² The median is the midpoint of the values so that half of the cases had loss amounts less than \$95,910 and the other half of the cases had loss amounts greater than that figure.

¹³ This increase is in relation to those sentenced under earlier versions of this guideline section. *See* NET Act Report at p. 7.

¹⁴ In the universe of 117 FY03 cases reviewed by the Team, only 32.3% of the defendants sentenced under the pre-NET Act version of the guideline received prison sentences.

were sentenced within the guideline range, 25.6 percent received USSG §5K1.1 departures and the remaining 8.5 percent received other downward departures, primarily for aberrant behavior.

2. Empirical Analysis of FY 05 cases

The universe of the post-*Booker* (39) cases was remarkably similar to those sentenced in FY 03.¹⁵ The majority of the cases (69.2%) involved a single infringing item. Counterfeit videos (30.8%) and audio recordings (23.1%) were most common; followed by various trademarked items (17.9%). Six cases involved software. Three cases involved satellite tv access cards and three cases involved computer games. Eight cases (20.5%) involved “other” items, including cigarettes, prescription drugs, beanie babies, movie titles, and video game sets loaded with illegal software.

Five cases involved prerelease items. All of these cases involved pre-release first-run motion pictures. Four (4) of the 39 cases involved uploading of infringing items and the court applied §2B5.3(b)(2) in each of those cases.

The Team’s review of the 39 relevant cases sentenced post-*Booker* suggests that courts are continuing to apply specific offense characteristics in most instances when appropriate. The infringement amount enhancement applied in 95 percent of the cases, and the median loss amount for the cases is \$48,251. The Manufacture/Import/Upload enhancement (USSG §2B5.3(b)(2)) was applied in 56.4 percent of the cases.¹⁶ The decrease in the offense level for offenses not committed for financial gain (USSG §2B5.3(b)(3)) applied in 7.7 percent of the cases. Finally, USSG §2B5.3(b)(4)’s increase for risk of injury or weapon enhancement applied in 5.1 percent of the cases.

The Team’s empirical analysis revealed that an even greater percentage of defendants sentenced under USSG §2B5.3 in the post-*Booker* era received a prison term than those sentenced in FY 03.¹⁷ Fifty-nine percent received prison terms with a median term of 15

¹⁵ This universe of cases was reviewed and coded prior to promulgation of the emergency amendment in October and included all post-*Booker* cases received and coded for the first six months after *Booker*. After promulgation of the emergency amendment, the Team did not conduct an in-depth empirical analysis of post-*Booker* cases received by the Commission in the next six months. The Team ascertained that the Commission received an additional 86 cases sentenced under the post-NET Act version of this guideline. Examination of the guideline calculations in these cases revealed that the specific offense characteristics were applied at the same or similar rates to those cases reviewed before the emergency amendment was promulgated. For example, 95 percent of these offenders received some increase under the loss table, and the Manufacture/Import/Upload enhancement applied in 56.8 percent of the cases. The median loss amount was \$50,870 and the median sentence was 16 months. Given that empirical similarities to those cases for which an in-depth review was conducted, the Team determined that no additional analysis was warranted.

¹⁶ Our coding revealed that manufacture/import/upload conduct occurred in three cases in which the specific offense characteristic was not applied.

¹⁷ The data available thus far in the post-*Booker* era may allay the industry’s expressed concerns that the courts would impose lower sentences than required by the guidelines.

months imposed. More than two thirds (69.4%) were sentenced within the guideline range. Of those receiving sentences outside the applicable guideline range, 13.9 percent received USSG §5K1.1 departures and 13.9 percent received other downward departures for various reasons, including family ties, physical condition, loss overstates seriousness, and other general mitigating circumstances. One additional case had both a USSG §5K1.1 and other downward departure.

3. Guideline Application Issues

The Team examined all case law citing USSG §2B5.3 to ascertain whether there are any circuit conflicts or application problems requiring Commission resolution in the area of intellectual property. The Team did not discover any circuit conflicts in this area. The case review did not reveal any significant application issues that the Team determined warranted Commission action.

D. Questions for Commission Resolution

1. Should §2B5.3 be amended to more severely penalize offenses that involve pre-release copyrighted or trademarked articles?

The one common area of concern expressed by Congress, the industry and the Department of Justice is that the copyright or trademark infringement of pre-release items is somehow more egregious than the infringement of a legally available item. Industry representatives report that infringements of pre-release versions of protected material cause economic harm to the property owner that may not be captured by the current structure of the guidelines. Moreover, the impact is felt whether the pre-release infringing item is of identical or inferior quality to the released product. When the copy is exact, it displaces sales. When the copy is inferior, it causes harm to reputation. Either way, the effects are difficult to quantify and vary according to the industry subset involved. According to the entertainment industry, the novelty of the pre-release item is important, a factor that has faded by the time of sentencing. The business software representatives noted that novelty was less of an issue. For their purposes, however, pre-released versions, even if still in beta-testing, are valued at the full retail price of the software yet to be released.

In testimony at a hearing before the Permanent Subcommittee on Investigations of the U.S. Senate's Committee on Governmental Affairs, a representative of the Motion Picture Association of America opined that piracy poses a significant threat to the future of the motion picture industry's economic growth. He explained the threat, noting

[t]he average film costs over \$90 million to make and market. Only one in ten films ever gets this investment returned through theatrical exhibition. Films have to journey through many market venues — premium and basic cable, satellite delivery, home video, network and individual TV stations, international — in

order to try to recoup the private risk capital that brings a movie to life. If a film is kidnapped early in its journey, it's obvious that the worth of that film can be fatally depleted long before it can retrieve its investment. Piracy means fewer people buying DVDs, less revenue, and fewer movies being made.¹⁸

A recent news article in the *New York Times* reports that the motion picture industry estimates that piracy involving bootleg DVDs deprived the industry of more than \$3 billion in sales last year. That figure does not include lost sales from pirated works distributed online, for which industry insiders say they have no reliable estimate but which they assume to be substantial. Given that DVD sales account for approximately two third's of the industry's revenue each year, the impact of lost revenues attributable to piracy is of considerable import.¹⁹

The recording industry also reports that over the past four years, domestic revenues in the music industry have plummeted from \$15 billion to \$11 billion. The industry attributes this drop in revenue to piracy.²⁰ A least one legislator noted that while sales of music compact discs have dropped, sales of blank compact discs have risen dramatically.²¹

Yet other available information regarding industry trends suggests that the intellectual property industry continues to thrive, notwithstanding the dire predictions of losses attributed to piracy. The 2004 Motion Picture Association market statistics show that box office gross revenues have steadily increased over the past twenty years, grossing 9.5 billion dollars in 2004 (a 25% increase over a five year period).²² Although the music industry sales appear to have dropped, at least one economic study suggests that file-sharing has no statistically significant impact on legitimate music purchases. The study enumerates a variety of non-piracy related explanations for the drop in recording sales, including public backlash against recording industry

¹⁸ *Privacy and Piracy: the Paradox of Illegal File Sharing on Peer-to-peer Networks and the Impact of Technology on the Entertainment Industry: S. Hrg. 108-275 before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov'tal Affairs, 108th Cong. 90 (2003)*(statement of Jack Valenti, President And Chief Executive Officer, Motion Picture Association of America).

¹⁹ See Timothy L. O'Brien, *King Kong vs. the Pirates of the Multiplex*, N.Y. Times, Aug. 28, 2005 at BU7.

²⁰ *Privacy and Piracy: the Paradox of Illegal File Sharing on Peer-to-peer Networks and the Impact of Technology on the Entertainment Industry: S. Hrg. 108-275 before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov'tal Affairs, 108th Cong. 15 (2003)* (statement of Mitch Bainwol, Chairman and Chief Executive Officer, Recording Industry Association of America).

²¹ *Privacy and Piracy: the Paradox of Illegal File Sharing on Peer-to-peer Networks and the Impact of Technology on the Entertainment Industry: S. Hrg. 108-275 before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov'tal Affairs, 108th Cong. 72 (2003)* (statement of Sen. Frank R. Lautenberg).

²² See Motion Picture Association Worldwide Market Research, U.S. Entertainment Industry: 2004 MPA Market Statistics at 3-4, available from www.MPAA.org.

tactics.²³ Testimony before the Senate on this issue lends credence to the public backlash theory.²⁴

These conflicting reports highlight the difficulty facing the Commission in deciding whether the guidelines capture the harm associated with distribution of pre-release works and if not, how best to capture that harm. In some instances, it appears that the economic harm associated with the distribution is adequately captured by the existing specific offense characteristic on infringement amount. *See* USSG §2B5.3(b)(1). In approximately one third of the cases involving pre-release motion pictures contained in the FY 03 cases, the pre-release movie was valued at a premium price of \$50.00. This figure was derived from the valuation given by the motion picture industry for a DVD of a pre-release movie.

In other instances, the data is unclear whether the harm associated with the distribution of pre-release items has been captured by computation of the infringement amount. In more than half (55%) of the pre-release FY 03 cases, the parties stipulated to the infringement amount. The Team was not able to ascertain whether the stipulated amount included a premium price for pre-release items. Finally, eleven (11) percent of the cases involved inferior copies of pre-release items so the infringement amount was not based upon a premium price.

In the five post-*Booker* pre-release cases, it is not clear whether a premium price was attributed to any of the pre-release works involved. In all five cases, the parties stipulated to the infringement amount. In two of the five, the infringement amount was based upon the value of \$750.00 per movie title copied and a total of 50 titles. In the remaining three cases, which involved related defendants, the pre-release items were VCR copies of movies and were valued at \$15-20 per movie. The presentence reports indicate that this figure was provided by the motion picture industry. The court then used the figure of \$15.00 per movie to arrive at the infringement amount. It is not clear whether the \$15.00 figure accords any premium to the fact that the movies were not yet publicly available for purchase.

These concerns were similarly expressed to the Commission during its consideration of changes to USSG §2B5.3 following the NET Act. *See* NET Act Report, pp. 32-33. In that Report, the Team suggested that the Commission might consider an enhancement if the offense involved pre-release copyright or trademarked articles. The Team identified as an argument against this proposed enhancement the fact that the reputational damage caused in an offense involving pre-release items is more akin to consequential damages. The Guidelines do not

²³ *See* Felix Oberholzer and Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis* at 24 (March 2004) available at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

²⁴ *Privacy and Piracy: the Paradox of Illegal File Sharing on Peer-to-peer Networks and the Impact of Technology on the Entertainment Industry: S. Hrg. 108-275 before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov'tal Affairs*, 108th Cong. 50-51 (2003) (statement of Lorraine Sullivan).

ordinarily include such damages in the loss calculation.²⁵

At the time the Commission was deliberating on the emergency amendment, the Federal Defenders asserted that the Commission need not add an enhancement for pre-release items at this time, because the current structure of the guideline adequately captures either harm.²⁶ The Federal Defenders reasoned that if there is an increased demand for pre-release works (or as the Department of Justice representatives claim, pre-release works command a higher price), then the sentence will be increased accordingly as the infringement amount increases. *See* USSG §2B5.3(b)(1). If the offense causes substantial harm to the legitimate owner's reputation, then the guidelines provides for an invited upward departure. *See* USSG §2B5.3, comment. (n.5). The Federal Defenders argue that a one-size-fits-all enhancement would overstate the harm in many instances. The Department of Justice also voiced this concern. Yet, the Department of Justice argued that the converse is also true and that a one-size-fits-all enhancement may not adequately capture the harm caused in certain more egregious pre-release cases.

Deciding whether the guideline adequately captures any harm associated with pre-release distribution of protected works is further complicated by the wide variety of protected items covered by USSG §2B5.3. While the motion picture industry undeniably attributes a premium value to pre-release motion pictures, the Team received no information that other subsets of the entertainment industry attribute a similar premium to pre-release works.²⁷ Indeed, some suggest that the pre-release distribution of protected works might operate to create a "buzz" that enhances sales of the legitimate work, rather than displacing those sales. Moreover, the empirical analysis of cases in this area suggests that the infringement of pre-release works arises most often in the context of motion pictures. Accordingly, a one-size-fits-all enhancement may be over-reaching in some instances, while not sufficiently onerous in others.

The emergency amendment added a new specific offense characteristic for pre-release works. The two-level enhancement at §2B5.3(b)(2) was placed before the uploading enhancement with its floor of level 12. The amendment addresses concerns that the distribution of pre-release items causes additional harms not accounted for in the guidelines, but avoids overstating the harm involved in less serious cases. The amendment also included new language in Application Note 2 defining the retail value of a pre-release work as the value of the item upon its initial commercial distribution. Amending the commentary addresses concerns raised by the Team's empirical analysis that defendants in cases involving pre-release items are treated disparately, because of the variety of methods used for determining infringement amount in these

²⁵ Ultimately the Commission decided against adding an enhancement for pre-release protected works. The NET Team staff members recall that the copyright industry had a split of opinion over whether this enhancement should apply to all types of copyright cases.

²⁶ The Team met with representatives from the Federal Defenders to discuss this issue and received public comment from them to this effect. *See* letter from Jon Sands dated August 3, 2005.

²⁷ This lack of information is consistent with the Net Act Team's recollections that the entertainment industry was divided on the need for a sentencing enhancement for distribution of pre-release works.

cases.²⁸

2. Does the scope of “uploading” adequately address the loss attributable to broad distribution of copyrighted works over the Internet?

The legislative history of the Act is devoid of any discussion regarding any perceived inadequacy of the term “uploading” as used in the guidelines. USSG §2B5.3 defines uploading in Application Note 1 to mean “making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item.” Application Note 3 expands upon the definition. “With respect to uploading, subsection (b)(2) applies only to uploading with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item. *For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer.*” See USSG §2B5.3, comment. (n. 3) (emphasis added).

The Team’s empirical analysis of cases sentenced under this guideline did not reveal any problems with the uploading definition. In each case where the Team members identified the occurrence of uploading conduct the sentencing court applied the enhancement. The industry also did not identify any deficiency with the definition employed by the Commission. Indeed, until meeting with the Department of Justice, the Team was at a loss to understand what motivated the inclusion of this directive.

With advances in technology come variations in the methods for committing intellectual property offenses. Traditionally, Internet piracy involved uploading protected works onto an Internet site through the use of a central computer server and making those works available for downloading by members of the public (or specific persons) with access to the Internet. In these cases, the definition in Application Note 1 and explanation in Application Note 3 clearly cover the prohibited conduct.

The Department of Justice suggested, however, that the final sentence of Application Note 3 may present application issues in cases involving peer-to-peer exchanges of protected works. Put simply, peer-to-peer exchanges can be accomplished without resort to a central computer server. Using the appropriate software, users can store protected works on their own personal computers, which can then be downloaded through the Internet onto another person’s personal computer. In essence, the unrelated personal computers are networked together.²⁹ The

²⁸ The Commission considered and rejected other approaches, including adding a third ground for an invited upward departure in cases involving pre-release items, *see* USSG §2B5.3, comment. (n. 5), and assigning a minimum value to pre-release items.

²⁹ A more comprehensive discussion of peer-to-peer computer networks can be found at <http://en.wikipedia.org/wiki/Peer-to-peer>.

exchange of protected works can then occur from one personal computer to another. Because the infringing items are stored on personal computers and not necessarily uploaded onto Internet sites, the Department of Justice believed that the final sentence of Application Note 3 could be read to exclude exchanges of protected works in peer-to-peer cases.

The industry representatives who met with the Team suggested that peer-to-peer cases have traditionally been more difficult to prosecute because of proof deficiencies, thus preventing the cases from ever arriving at the sentencing stage of prosecution. As technology becomes increasingly sophisticated, however, so too do law enforcement efforts to deter and apprehend violators. Thus, in 2004, federal authorities instituted Operation Digital Gridlock, the first federal law enforcement action against a peer-to-peer network.³⁰ Since the arrests in that operation are relatively recent, few of the cases have wound through to the sentencing stage. Thus, the Department of Justice was not able to offer any concrete examples of cases where the current guideline definition of “uploading” did not capture the relevant conduct of the offenders.

Congress’ concern regarding the uploading definition in the guidelines apparently related to whether the definition and application note explaining its application could be interpreted to cover peer-to-peer exchanges of protected works. Upon examining the definition in light of this information and upon further consideration of the mechanics of peer-to-peer exchanges of information, the Team suggested that some revision to the uploading definition might be in order. After hearing the Team’s presentation, the Commission instructed the Team to give further consideration to expanding the definition of uploading to include peer-to-peer exchanges of information. A more expansive definition was crafted and included in the emergency amendment of October 24, 2005.

In order to illustrate why the Team suggested amending the guideline in this fashion, a further explanation of the peer-to-peer (P2P) technology is in order. P2P applications are relatively new technology, adopted, in large part, because these applications are more effective and efficient in locating files than anything offered before by the Internet. P2P applications include two software components. First, a search index, which enables the user to locate a file on another computer using the same P2P application. The second is a transport protocol, that is, the means by which the computers connect together to transfer information.³¹

The advantage of peer-to-peer networks over information networks of other types shows up in their substantial and growing popularity. Because they need no central computer server to mediate the exchange of information or files among users, the high-bandwidth communications capacity for a server may be dispensed with, and the need for costly server storage space is eliminated. Since copies of a

³⁰ See Report of the Department of Justice’s Task Force on Intellectual Property at p. 16.

³¹ *Privacy and Piracy: the Paradox of Illegal File Sharing on Peer-to-peer Networks and the Impact of Technology on the Entertainment Industry*: S. Hrg. 108-275 before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov’tal Affairs, 108th Cong. 115-116 (2003) (statement of Derek S. Broes, Executive Vice President, Brilliant Digital Entertainment & Altnet, Inc.).

file (particularly a popular one) are available on many users' computers, file requests and retrievals may be faster than on other types of networks, and since file exchanges do not travel through a server, communications can take place between any computers that remain connected to the network without risk that a glitch in the server will disable the network in its entirety. Given these benefits in security, cost, and efficiency, peer-to-peer networks are employed to store and distribute electronic files by universities, government agencies, corporations, and libraries, among others.³²

Users connected to the Internet who have a common P2P application (e.g. Kazaa or Morpheus) and have made files on their PC available, become servers to other common P2P application users. Some P2P applications have open protocols, meaning that any file on the PC can be made available and transported to any user of that application.³³ This feature of P2P file transfers distinguishes it from “uploading” as described in the current version of the guideline, because the uploader has to take the affirmative step of making the infringing materials available to others on the Internet. In an open protocol, simply maintaining an infringing item on one’s PC *automatically* makes that material available to other users of the P2P application and the person maintaining the item may not even be aware when others obtain access to the item. Thus, utilizing P2P applications could have the effect of placing more infringing items into the stream of commerce.

As a result of the technological distinctions between uploading and P2P transfers, the Team proposed that USSG §2B5.3 continue to include peer-to-peer file transfer as a separate basis for application of specific offense characteristic in USSG §2B5.3(b)(3). The Team believed that the language the Commission incorporated into the definition of “uploading” in the emergency amendment should be retained.

3. Does the guideline adequately reflect any harm to victims when law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed?

The final directive instructs the Commission to determine whether the existing guidelines and policy statements adequately reflect “any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed.”

The Team’s empirical analysis did not uncover any cases in which the government was unable to determine, for sentencing purposes, how many times copyrighted material had been

³² *MGM Studios v. Grokster*, 125 S.Ct. 2764, 2770 (2005).

³³ *Privacy and Piracy: the Paradox of Illegal File Sharing on Peer-to-peer Networks and the Impact of Technology on the Entertainment Industry*: S. Hrg. 108-275 before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov’tal Affairs, 108th Cong. 115-116 (2003) (statement of Derek S. Broes, Executive Vice President, Brilliant Digital Entertainment & Altnet, Inc.).

reproduced or distributed. The industry representatives also did not seem to think that this problem was one of an inadequacy with the guidelines at time of sentencing, but rather one of inadequacy of proof to obtain a conviction. Once sufficient proof was uncovered to support a conviction, the industry representatives expressed satisfaction with the guidelines' method for capturing the harms associated with the infringement.

At the time the Commission was considering the emergency amendment, the Federal Defenders categorically opposed any changes to the guidelines in response to this directive. They offered three primary arguments in support of this position. First, they noted “[a]n enhancement explicitly based on a *lack* of evidence is likely to be unconstitutional.”³⁴ Second, in cases where the government is unable to show that any downloads occurred, the defendant is still subject to the uploading enhancement and a floor offense level of 12. Third, the Federal Defenders suggested that law enforcement authorities have means to determine how many times copyrighted material has been reproduced or distributed. Those include tracking payments made for copyrighted items, reviewing server logs or logs created by peer-to-peer networks, determining the scope of infringement based on the bandwidth used and/or the size of the files shared, by downloading files in a “sting,” and by using cooperators.

Department of Justice representatives expressed some concerns about how to quantify the infringement amount in cases in which law enforcement authorities are unable to tell the number of infringing items. Historically, in such cases, the government has utilized the defendant's bank records to determine infringement amount. After separating monies that can be attributed to legitimate business activities of the defendant, the balance of the monies in the account are attributed to the trademark and/or copyright infringement.³⁵ The Department of Justice representatives conveyed the belief that this methodology might be called into question by recent court decisions.

The Department of Justice also related that there may be some difficulty in determining infringement amount in cases involving labels which are not affixed to a copyrighted or trademarked item.³⁶ The example used was a case involving Calvin Klein labels, which could be affixed to a pair of underwear as easily as they could be affixed to a suit. In such an instance, where a wide variety of goods could be involved in a variety of price ranges, a determination of the infringement amount is difficult to calculate. Similarly, the Department of Justice suggested that if no value is attached to the label itself, the infringement amount may not reflect the scope

³⁴ Letter from Jon Sands, dated August 3, 2005.

³⁵ See, e.g., *United States v. Foote*, 22005 WL 1566730 (10th Cir. 2005)(the district court's methodology for computing infringement amount, which included bank account transactions in its calculations, did not constitute clear error).

³⁶ The Department of Justice cited to the Seventh Circuit's opinion in *United States v. Sung*, 87 F.3d 194 (7th Cir. 1996). In *Sung*, the court reversed the trial court's decision to hold the defendant responsible for the retail value of 240,000 bottles of imitation hair products because the defendant had filled only 17,600 of such bottles and lacked the supplies to fill any more.

of the offense being committed.³⁷

The Department of Justice suggested that if the guideline were amended to include language that would allow courts to make a reasonable estimate of the infringement amount, this problem could be cured. The Department of Justice submitted that language analogous to the loss estimate language contained in USSG §2B1.1, comment. (n. 3(C)),³⁸ would cure the perceived problem.

The data reviewed by the Team provided no empirical support for the claim that courts have any difficulty arriving at an infringement amount. As noted above, ninety-five (95) percent of the cases in FY 03 and post-*Booker* FY 05 received some increase pursuant to USSG §2B5.3. In many instances, the parties stipulated to the infringement amount. In the remaining five (5) percent of the cases receiving no increase, the government charged the defendant with a misdemeanor copyright violation. In only one case, did the presentence report suggest that the court was not able to determine the number of infringing items. The data also appeared to suggest that the courts are already making reasonable estimates of the infringement amount in cases where the court cannot ascertain the exact number of infringing items.

The Team's work suggested two possible options to respond to this directive. The first was to take no action, concluding that the guideline adequately captures harms to victims in all cases in which the government uncovers sufficient proof to convict and thus arrive at the sentencing stage.³⁹ The second option was to permanently promulgate application note 2(E), thus allowing the sentencing court to make a reasonable estimate of the infringement amount. This application note tracks the "reasonable estimate" construct at USSG §2B1.1, comment. (n. 3(C)). The Commission decided to permanently promulgate application note 2(E), thereby codifying the practice already employed by the courts.

III. DOMAIN NAME AMENDMENT

A. Summary of the Intellectual Property Protection and Court Amendment Act of 2004, Pub L. 108 – 482 and its pertinent Legislative History

The IPPCA Act was signed into law on December 23, 2004. Among other things, the

³⁷ The problem may also arise in connection with counterfeit authentication components that are not found along with the protected work which they purport to authenticate or illicit labels, one of the subjects of the Intellectual Property Protection and Courts Act, Pub. L. 108-482 discussed *infra*.

³⁸ That language states, in pertinent part, "Estimation of Loss.--The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f). The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances,..." §2B1.1, Comment. Note 3(C).

³⁹ The district court need only make a reasonable estimate of the loss, given available information. *United States v. Slater*, 348 F.3d 666, 670 (7th Cir. 2003). POAG reports no application problems in computing infringement amounts and favors no change to the guideline in this area.

IPPCA Act amends the Trademark Act of 1946 to increase criminal and civil penalties for individuals who willfully submit false information to a domain name registration authority in connection with an Internet address used to commit a crime or engage in online copyright or trademark infringement.

Portions of the Act derive from the House bill H.R. 4125, "Federal Courts Improvement Act of 2002," introduced in the 107th Congress on October 1, 2002. The intellectual property protection portions of the bill were first introduced in the House on November 21, 2003 by Rep. Lamar Smith when he introduced the Anti-Counterfeiting Amendments of 2003 (H.R. 3632). The legislation, H.R. 3632, as enacted, combines the Anti-Counterfeiting Amendments Act and the Fraudulent Online Identity Sanctions Act (H.R. 3754, introduced by Rep. Smith and Rep. Berman).

The portion of the IPPCA Act derived from the Fraudulent Online Identity Sanctions bill, H.R. 3754, creates penalties for those who submit materially false information in connection with a domain name to commit a crime or engage in online infringement.⁴⁰ The House Report on the measure found that the difficulty in prosecuting those who assume fraudulent Internet identities has led to the increased use of materially false contact information to infringe copyrights and trademarks. *See* H.R. Rep. No. 108-600, at 4 (2004). Anonymous but legitimate domain names in which the registrar's contact information is substituted for the actual registrants are still available for those entities wishing to remain anonymous for purposes such as freedom of speech. Section 204(a) of the IPPCA Act creates a sentencing enhancement at 18 U.S.C.

§ 3559(f) for those crimes committed with the use of a fraudulent domain name. That section provides

- (1) If a defendant who is convicted of a felony offense (other than offense of which an element is the false registration of a domain name) knowingly falsely registered a domain name and knowingly used that domain name in the course of that offense, the maximum imprisonment otherwise provided by law for that offense shall be doubled or increased by 7 years, whichever is less.
- (2) As used in this section—
 - (A) the term "falsely registers" means registers in a manner that prevents the effective identification of or contact with the person who registers; and
 - (B) the term "domain name" has the meaning given that term is (sic) section 45 of the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and

⁴⁰ *See* IPPCA Act, Section 204.

for other purposes" approved July 5, 1946 (commonly referred to as the "Trademark Act of 1946") (15 U.S.C. §1127).

The term "domain name" means "any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet."⁴¹ Put more simply, this means that "Internet users are able to access desired content on the Web by typing in the correct Uniform Resource Locator ("URL"), or domain name, which functions much like a telephone number, allowing a user who enters the correct address to reach a particular Web site."⁴² "A domain name consists of at least two parts: the top level domain and the second level domain. The top level domain, such as .com, .net, or .org, is preceded by the second level domain, which consists of a combination of letters, numbers, or some symbols. So, for example, in the domain name uscourts.gov, '.gov' is the top level domain name and '.uscourts' is the second level domain name."⁴³

B. The Directive to the Commission in the IPPCA Act

Section 204(b) of the IPPCA Act instructs the Commission to review and amend the sentencing guidelines and policy statements to ensure that the applicable guideline range for a defendant convicted of any felony offense carried out online that may be facilitated through the use of a domain name registered with materially false contact information is sufficiently stringent to deter commission of such acts. In responding to the directive, Congress directed the Sentencing Commission to provide "sentencing enhancements for anyone convicted of any felony offense furthered through knowingly providing or knowingly causing to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the violation."⁴⁴

⁴¹ 15 U.S.C. § 1127.

⁴² *Sallen v. Corinthians Licenciamentos LTDA*, 273 F.3d 14, 18 (1st Cir. 2001).

⁴³ *Id.*

⁴⁴ *See* IPPCA Act, Section 204.

C. Empirical Analysis Performed by the Team

The Team examined FY03 and post-*Booker* FY05 cases involving computer crimes charged under 18 U.S.C. § 1030 in an effort to ascertain whether the use of false domain names occurs with any frequency in those cases and if so, how the courts have addressed the usage of a false domain name. The Team did not locate any false domain names in the 77 FY03 cases or in the 23 FY05 cases reviewed. The Team did not identify the use of a false domain name in any of the copyright or trademark cases examined in connection with the Team's analysis of USSG §2B5.3, even though the legislative history of the IPPCA Act suggests that false domain names are utilized in such cases. Because of time and resource constraints, the Team has not requested a case pull of other types of felony offenses, such as fraud or pornography. Furthermore, because of broad nature of the sentence enhancement in 18 U.S.C. § 3559(f), the Team concluded that such a case pull would prove to be of limited utility to the Commission's response to this directive.

D. Issue requiring Commission Resolution

The directive in the IPPCA Act is relatively straightforward. The Commission is instructed to create a sentencing enhancement for the use of a false domain name that facilitates the commission of *any* felony. Given the broad application intended for this enhancement, the Team determined that the logical response to the directive was to either insert this enhancement into an existing Chapter Three adjustment or create a new adjustment in that Chapter, adding an additional 2 or 3 levels to the applicable offense level. The Department of Justice concurred, given its position that this type of conduct can be found in a wide variety of felony cases. POAG also agreed with this option.

The Federal Defenders offered a different perspective, suggesting a lack of evidence of a widespread problem. Thus, the Federal Defenders urged the Commission to proceed with caution. Their anecdotal evidence suggested that this conduct occurs mainly, if not entirely, in fraud-related offenses. Accordingly, they suggested that the most appropriate place for this enhancement would be in USSG §2B1.1 and would recommend an increase of one offense level. The Federal Defenders' proposed language for the enhancement was included in the letter from Jon Sands dated August 3, 2005. That language is as follows:

2B1.1(b)(16) If a felony offense was furthered through knowingly providing or knowingly causing to be provided materially false information to a domain name registrar, domain registry or other domain name registration authority **add 1 offense level.**

Application Notes

(20) Use of a Falsely Registered Domain Name under Subsection (b)(16) -

(A) Definition of Materially False. - For purposes of subsection (b)(16), “materially false” means to knowingly provide registration information in a manner that prevents the effective identification of or contact with the person who registers.

1. Non-Applicability of Enhancement.- If the conduct that forms the basis for an enhancement under subsection (b)(16) is the only conduct that forms the basis for an adjustment under Section 3C1.1, do not apply that adjustment under Section 3C1.1.

(emphasis in original).

The Federal Defenders asserted that a one-level enhancement is an appropriate adjustment for this conduct and is consistent with the overall scheme of the Guidelines Manual. To add more than one level would suggest that the conduct in question was as serious as: (1) the possession of a dangerous weapon (including a firearm) during a controlled substance offense (*see* USSG §2D1.1(b)(1)); (2) causing bodily injury during a robbery (*see* USSG §2B3.1(b)(3)(A)); (3) making a threat of death during the course of a robbery (*see* USSG §2B3.1(b)(2)); (4) using a minor to commit a crime (*see* USSG §3B1.4); (5) using body armor to commit a crime (*see* §3B1.5); and, (6) reckless endangerment during flight (*see* USSG §3C1.2), to name just a few examples. They submitted that a one-level enhancement amply addresses the concerns of Congress.

The Federal Defenders also proposed an application note to define “materially false,” which tracks the exact language in the Act. They submitted that this definition is necessary to limit application of this enhancement to only the conduct Congress intended. Finally, the Federal Defenders suggested that it would be double counting to allow for an increase for Use of a Falsely Registered a Domain Name and Obstruction of Justice to apply. They suggested that the Commission include language in an application note identical to that of USSG §2B1.1, Comment. Note 8(C), which, similarly, addresses a double counting concern. Specifically, it precludes the addition of an adjustment for Obstruction of Justice where an enhancement for sophisticated means per USSG §2B1.1(b)(9) has already been applied. In other written communications with the Team, the Federal Defenders pointed out that the pornography guidelines already include an enhancement for using a computer. *See* USSG §§2G1.3(b)(3), 2G2.1(b)(6), 2G2.2(b)(6), and 2G3.1(b)(3). Misrepresenting one’s identity is also accounted for in the pornography guidelines. *See* USSG §§2G1.2(b)(2), 2G2.1(b)(6), and 2G3.1(b)(2).

Thus, there were several possible options that the Commission considered in responding to the directive in the IPPCA Act. First, the Commission could incorporate the false domain name use into an existing Chapter Three adjustment, such as USSG §3C1.1 (Obstruction of Justice). Second, the Commission could create a new Chapter Three adjustment for the Use of a False Domain Name. Finally, the Commission could add an enhancement for use of a false domain name, wherever appropriate, throughout the Chapter Two guideline sections.

The Commission decided to address this directive by adding a new adjustment to Chapter Three. The amendment simply provides for a two-level adjustment if the statutory enhancement under 18 U.S.C. §3559(f)(1) applies.⁴⁵ The Commission did not include any application notes addressing possible double counting concerns. Although the conduct encompassed by use of the domain name might trigger other offense level increases, the Commission concluded that the harm that Congress intended to address through this sentence enhancement is different than those harms already addressed in the guidelines. The relative ease of creating an Internet presence, the anonymity the Internet offers, and the difficulty that law enforcement authorities then have in tracking down offenders using false domain names motivated creation of the sentence enhancement in 18 U.S.C. § 3559(f). Conceivably the Federal Defenders' supposition that conduct encompassed by the enhancement might fit within the confines of existing Chapter Two specific offense characteristics or Chapter Three adjustments is correct. After discussing the issue, however, the Team concluded that if the Commission decided that the double counting issue warranted consideration, the concern could be addressed by choosing a lower number for the offense level adjustment (either 1 or 2 levels) in the proposed Chapter Three adjustment. The published version of the proposed amendment included a range of one to four levels for the adjustment. The Commission decided to promulgate the new guideline with only a two-level adjustment.

III. CAN-SPAM AMENDMENT

A. Summary of the CAN-SPAM Act, its pertinent Legislative History and Regulations Implementing the Act

On December 16, 2003, President Bush signed into law the CAN-SPAM Act, which became effective on January 1, 2004. The CAN-SPAM Act is directed against predatory and abusive use of commercial electronic mail ("e-mail"). Section 5 of the Act contains a new criminal statute that seeks to regulate e-mail containing sexually explicit material.⁴⁶ The offense was not the subject of a directive to the Commission but was nonetheless considered by the Commission during the 2004 amendment cycle along with that portion of the CAN-SPAM Act that was the subject of a directive. Although the Commission responded to the directive, it deferred action on whether to incorporate the new offense in the guideline.

The offense is labeled "Requirement to place warning labels on commercial electronic mail containing sexually oriented material." Proscribed by the offense is the sending of any

⁴⁵ The language used in the proposed amendment tracks the language being proposed for a new Chapter Three adjustment intended to replace USSG §2J1.7, while accounting for the provisions of 18 U.S.C. §3147.

⁴⁶ See 15 U.S.C. § 7704.

commercial e-mail message that includes “sexually oriented material”⁴⁷ to a protected computer and either

- 1) failing to include in its subject matter heading the marks or notice required by the Federal Trade Commission, to inform the e-mail recipient of the fact that the e-mail contains sexually oriented material; or
- 2) failing to provide that the part of the e-mail initially viewable by the recipient includes only the prescribed marks or notices (unless the sender has received from the recipient prior affirmative onset to receipt of the message; and the following components
 - a) clear and conspicuous identification that the message is an advertisement or solicitation;
 - b) clear and conspicuous notice to the recipient of an opt-out option (i.e., that the recipient can decline to receive further e-mail messages from the sender; and
 - c) a valid physical postal address of the sender.⁴⁸

The penalty for one who knowingly engages in the prescribed conduct is a fine, a prison sentence up to five years, or both.⁴⁹

Congress gave the FTC a period of 120 days from the effective date of the CAN-SPAM Act in which to promulgate the necessary regulations. The 120-day period did not elapse until the end of the 2004 amendment cycle. The FTC has now promulgated the regulations implementing the CAN-SPAM Act. Those regulations took effect in January 2005.⁵⁰ The regulations require that the term “SEXUALLY-EXPLICIT:” appear as the first 19 characters of the subject line of any commercial e-mail containing sexually oriented material.

⁴⁷ Section 7704(d)(4) defines "sexually oriented material" as “any material that depicts sexually explicit conduct (as that term is defined in section 2256 of Title 18), unless the depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters.” Section 2256 provides that "sexually explicit conduct" means actual or simulated sexual intercourse,...; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person...”

⁴⁸ See 15 U.S.C. § 7704(d)(1).

⁴⁹ See 15 U.S.C. § 7704(d)(5).

⁵⁰ See 16 C.F.R. §§316.1 -316.5.

This section of the CAN-SPAM Act derived from a floor amendment proposed by Senator Enzi on October 22, 2003.⁵¹ The Senator pointed to a recent FTC study that found that 66 percent of spam contains false or misleading claims and another 18 percent contains “pornographic or adult content.” Thus, the Senator proposed the amendment to take “the important step in protecting Internet and e-mail users, especially minors, from receiving sexually explicit, offensive, and unwanted content in their e-mails.”⁵²

B. Issues Requiring Commission Resolution

The Commission decided to defer a decision on whether, and if so, how to incorporate this offense into the guidelines during the 2004 amendment cycle. In large part, this decision was predicated upon the fact that the FTC had not yet issued the requisite lists of marks and notices that must be included in the e-mail. Thus, the Commission concluded that it was unlikely that the new statute would be applied until after May 1, 2004. Additionally, the Commission was concerned about potential First Amendment challenges to this new offense and that cases ruling on the constitutionality of the statute might limit the scope and application of the statute.

Despite promulgation of the requisite mark or notice, the issues concerning guideline implementation of this statute remain unchanged. Representatives of the Department of Justice advised the Team that no cases have yet been prosecuted under this section of the statute. Accordingly, there is still no universe of cases from which the Commission can extrapolate information about the sorts of behavior that will constitute the heartland of cases for this offense.

The options pertinent to the current discussion remain the same as those presented to the Commission in the 2004 amendment cycle. A brief summary of the four options follows:

- 1) Reference the new offense in Appendix A to USSG §2G3.1, the obscenity guideline (the option favored by the Department of Justice);
- 2) Reference the new offense in Appendix A to USSG §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials) (the option favored by the Team and POAG);
- 3) Craft a new guideline (the option favored by the Federal Defenders);
- 4) Wait and see.

The Commission voted to promulgate an amendment which would simply reference violations of 15 U.S.C. § 7704(d) to USSG §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials) and made no substantive changes to that guideline

⁵¹ 149 Cong. Rec. 13012-01, S13035 (daily ed. Oct. 22, 2003)(statement of Sen. Enzi).

⁵² *Id.*

section, other than a change to the title of the section. Given the lack of prosecutions, the Commission lacked any empirical evidence about the type of conduct that might be involved in a violation of this statute. Crafting specific offense characteristics for an offense that is not being prosecuted is contrary to the sound sentencing policy considerations traditionally employed by the Commission.