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ON THE

PROPOSED AMENDMENTS TO GUIDELINE § 2B5.3

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Introduction

I would like to begin by thanking the Commission for the opportunity to appear here today on behalf of the Electronic Frontier Foundation (EFF) to comment on what we believe to be an extremely important issue. First, I should say a brief few words about who we are. The Electronic Frontier Foundation is a national non-profit civil liberties organization working to safeguard rights and promote responsibility in the rapidly developing online world. Since 1990, we have been working to protect free expression, individual privacy, and open access to information in cyberspace, and we continue to represent the public interest in issues that touch upon the fabric of the new information society. We are very pleased to appear before the Commission to provide our perspective on some key proposals in this year's guideline amendments.

The subject of our testimony is Guideline § 2B5.3, the governing provision for criminal infringement of copyright or trademark, and the various proposals to revise it. These proposals break down into two main initiatives. First, there is the Department of Justice (DoJ) -sponsored initiative to amend § 2B5.3 pursuant to legislative changes enacted in the No Electronic Theft Act of 1997. Second, there are the Commission's own revisions proposed as part of its broader rethinking of the theft, fraud, and tax loss tables. The bulk of our comments will be directed toward the DoJ proposal and related issues; I would then like to close with our brief views on the various options pertaining to loss table cross-referencing.

The NET Act and the Sentencing Guidelines

Last year, Congress enacted the No Electronic Theft, or "NET," Act, which for the first time extended criminal penalties to willful copyright infringement undertaken without commercial purpose. Congress refused to extend criminal penalties to the acts of software piracy that it has deemed least serious (i.e., those involving dollar amounts of less than $1,000) and set out broad misdemeanor and felony categories for those acts that it declared *do* rise to the standard of criminality. However, within the broad sweep of these criminal categories persist many different degrees of culpability to which the leniency or severity of punishment need to be calibrated.

For example, the home user who makes an unauthorized copy of legitimately purchased software and the professional software pirate who makes a business out of selling bootleg software at a fraction of its retail value are very different people in very different circumstances. While they both may have technically violated one or more of an author's exclusive rights under federal copyright law, no reasonable person would argue that these disparate transgressions should be treated identically. Certain kinds of software copyright infringement are clearly more deserving of punishment than others. In the statute, Congress provided some minimal guidance—a starting point, if you will—as to how this challenge can be equitably met, but the greater part of this delicate task remains to be done.

EFF's Proposal for a Downward "Noncommercial Infringer" Adjustment

Under the Copyright Act as amended by the NET Act, criminal penalties for copyright infringement may be triggered in one of two ways. The first is contained in § 506(a)(1) and is an expanded version of the old criminal provision covering willful infringement for "purposes of commercial advantage or private financial gain." The NET Act broadened the definition of "financial gain" to include "receipt, or expectation or receipt, of anything of value, including the receipt of other copyrighted works." This effectively brought "bartering" transactions within the reach of this first provision.

The second trigger for criminal punishment is entirely new. Governed by § 506(a)(2) of the Copyright Act, this provision sets a bright-line retail value threshold of $1,000. Any unauthorized copying of software—even the production of a single copy—that exceeds that amount is a criminal act, regardless of the absence of commercial or trade purpose.

These two provisions define three distinguishable types of copyright criminals. First, there is the commercial software pirate, who illegally copies software and sells the resulting bootlegged copies to others at cut-rate prices. He is not only violating the copyright holder's exclusive right of reproduction, but has taken the further step of elevating his violation into a profit-making enterprise.

Second, there is the hobbyist-collector, who is known in the jargon as a "warez trader." A warez trader is one who deals in illicit software over the Internet but does not accept any money in exchange. Instead, he barters one illegal copy for another, with the primary goal of expanding his collection of illegal "wares." This individual has also gone beyond the mere violation of the right of reproduction; he encourages further piracy by organizing and participating in in-kind transactions where the currency is more bootlegged software.

Third, there is the individual who is guilty of noncommercial software copying. While he technically may have violated the exclusive right of reproduction conferred upon the copyright holder by federal law, unlike the previous two, he has taken no additional step beyond that violation. The noncommercial infringer generally does not seek out others engaged in infringement in order to initiate sales or trades on a mass scale. Predictably, this tends to lead to a somewhat lower volume of infringing activity.

There are fundamental differences between the first two acts of infringement and the third. Commercial or trade piracy tends to be a more organized, sophisticated activity involving large underground networks, high levels of activity, and large amounts of illicit data. Noncommercial infringement, on the other hand, takes no more than a single individual making a single unauthorized copy. Commercial or trade piracy involves a second step that magnifies the harm of the first infringement and tends to facilitate or encourage more piracy. The harm from noncommercial infringement tends to be limited to the underlying violation only. All commercial or trade piracy is criminal. Noncommercial infringement straddles the boundary between civil liability and criminal wrong, depending entirely on the price tag of the software copied. Whereas commercial and trade piracy dominate one end of the severity scale, noncommercial infringement sits on the other. Noncommercial infringement under § 506(a)(2) should be treated more leniently than commercial or trade piracy under § 506(a)(1).

Yet, under the current law, an offender who has committed a much less serious offense could potentially receive the same sentence as an offender guilty of a much more serious offense. For instance, consider the individual who copies two high-end applications retailing for $1500 in order to install them on his home computer so that he can bring some of his work home with him. He shares the software with no one else, uses it only in connection with work, and makes no further

copies. Now consider a commercial offender, a software bootlegger who produces a CD containing an illegal copy of one of the newest and most popular games that retails for $50. The bootlegger markets and sells 30 copies of this CD to people all over the world. The $1500 noncommercial infringement and the $1500 commercial piracy could be treated exactly alike.

EFF believes that a new specific offense characteristic in Guideline § 2B5.3 should be adopted to reflect the varying levels of culpability in the offenses that are now reached under the provisions of the NET Act. The effect of this specific offense characteristic would be to grant a one-level decrease in offense level for any infringement not committed for purposes of commercial advantage or private financial gain. Such an adjustment is based on a recognition that the act of distributing illicit software either through sale or trade is proportionally a more serious offense than the simple act of making copies of software worth more than a statutorily fixed amount. Since the existing penalties had been calibrated to punish the more serious crime—that is, infringement "for financial gain"—the new crime of noncommercial copyright infringement should draw a lighter sentence relative to that established baseline. We believe that a one-level decrease would justly reflect these differing levels of culpability for these very different acts, while maintaining adequate deterrent effect pursuant to the statutory directive.

The DoJ's Proposal for a Revised Adjustment Standard

Currently, § 2B5.3 contains a single "specific offense characteristic" provision, which directs an upward adjustment to the offense level based upon the "retail value of the infringing items." The magnitude of that adjustment is determined by reference to the loss table in guideline § 2F1.1, which governs fraud and deceit. Under the present guideline, for example, a software pirate convicted of producing bootleg software worth $6,000 would—by reference to the dollar value in the loss table—be subject to a +2 level increase to the base offense level.

In its directive to the Sentencing Commission, the NET Act instructed that the applicable sentencing guideline should do two things: first, ensure that penalties were sufficiently stringent to deter, and second, take into account the "retail value and quantity" of the infringed upon items. In spite of this, the DoJ argues for the replacement of the "retail value of the infringing item" standard with a "loss to the copyright or trademark [owner]" standard, justifying this change on the grounds that "when copyrighted materials are infringed upon by electronic means, there is no 'infringing item', as would be the case with counterfeited goods." Furthermore, the DoJ proposes language that would specifically permit a court to consider (1) lost profits, (2) value of infringed items, (3) value of infringing items, and (4) injury to the copyright owner's reputation, in addition to any similar harms associated with the four named factors.

We must disagree with the DoJ's analysis. Even in the realm of electronic infringement, the illegitimate reproduction of a protected work results in the production of an illegitimate copy, which is an "infringing item." The DoJ's broad notion of "loss to copyright or trademark owner" is unacceptably vague, incorporating factors not contemplated by the statute and introducing a vagueness that hinders the effectiveness of the guideline itself. We urge the Commission to adopt a

narrower standard that, like the DoJ proposal, looks to the value of the *infringed* item, but unlike the DoJ proposal, confines itself to a clear and unambiguous figure derived from retail value alone.

None of the four factors specified by the DoJ, except for the second, does anything to fulfill the congressional directive. Lost profits, value of infringing items (which, according to the DoJ, do not even exist in the electronic context), and injury to reputation clearly have nothing to do with the retail value of the infringed-upon works, the second prong of the directive. In order to follow from the congressional directive, therefore, they must be attached to the remaining prong—that is, they must do something to deter the underlying crime. But it is far from clear how any of these considerations serve to particularly enhance deterrence.

It is our belief that lost profits, value of infringing items, and injury to reputation are especially unsuitable factors given the nature of the loss table in which they will be used. The loss table in § 2F1.1 is calibrated to match specific upward adjustments with particular dollar amounts unlawfully taken as a result of fraud. Any additional consequential injury (such as reputational harm) that results from a fraudulent act is not factored into the loss table. It therefore makes little sense to include such factors in cases of copyright infringement—which use exactly the same adjustment schedule—as that threatens to distort the careful balance of harm and punishment contained in the loss table.

The DoJ's Proposal for Guidance Pertaining to Upward Departures

We move now from specific offense characteristics to guideline commentary. In recognition of the unique circumstances that often attend incidents of software piracy, the DoJ has proposed language that would provide guidance to courts considering a guideline departure under § 5K. Specifically, the DoJ proposes an Application Note suggesting the consideration of an upward departure in circumstances where "the calculable loss to the victim understates the true harm caused by the offense." The example it gives is where the offender uploads software to a publicly accessible server, where it then is copied an indeterminate number of times by an indeterminate number of people. Since the loss is not "calculable" for reasons of incomplete data and presumably would not be incorporated into the adjustment for specific offense characteristic, the commentary suggests that "an upward departure may be warranted."

EFF believes that the Commission should substitute the language "retail value of the infringing items" for "calculable loss to the victim" and "severity of the offense" for "true harm caused by the offense." We would like to emphasize that this language is not intended to suggest an upward departure option in *every* case where retail value does not square with every possible calculation of severity, but only in cases where the difference is very significant and the consequences of strictly adhering to retail value are plainly inequitable.

We are aware that the insertion of this Application Note reintroduces some of the judicial discretion that we criticized in our earlier discussion of the revised adjustment standard. However, the determinative difference, from our perspective, is that the exercise of judicial discretion here is governed by the departure provisions of § 5K, which was specifically designed to accommodate broad discretion under unique circumstances. What is inappropriately vague for a guideline rule may be

perfectly well suited for departure commentary.

EFF's Proposal for Corresponding Guidance Pertaining to Downward Departures

However, we regard the DoJ's suggestion to insert departure commentary as somewhat unfinished. In addition to an "upward departure" comment, we propose corresponding guidance that would advise the consideration of a *downward departure* under specific circumstances. Just as retail value may understate the severity of the offense in certain situations, it may overstate it in others.

One example would be a situation in which the infringing act clearly did not result in the loss of a sale to the copyright owner, thus reducing the utility of "retail value" as a measure of offense severity. For example, a father might give his old computer to his college-bound daughter with software preloaded on it while he retains the original software diskettes for himself. When he loads that software onto his new computer, he has technically violated the criminal provisions of the Copyright Act. But his daughter might not ever access the preloaded software and certainly would not have purchased it on her own. The software producer did not lose a sale as a result of this transaction, and a downward departure would probably be appropriate.

Another special situation that might justify consideration of a downward departure would be where the retail price for a particular software package is so high that the infringer is boosted into an offense level clearly out of proportion to the underlying offense. An example might be a single illicit reproduction of a high-end software application; that single infringement could lead to more severe penalties than would be levied upon an offender who trafficked in much larger amounts of cheaper software.

In most cases, we anticipate that retail value will be a fair measure of the severity of an

offense. However, because different offenders have different motivations for copyright infringement, we can certainly envision cases in which the retail value of the programs copied bears little on the relative culpability of the offender. In these special situations, we believe that sentencing courts, in their discretion, should be allowed to consider a downward departure. We believe that it is inequitable to specifically provide for departures only in cases where the result would be a harsher sentence. Consequently, we urge the Commission to adopt a second comment, on downward departures, to complement the first, upward departure, comment.

A Brief Comment on the § 2B5.3 Loss Table Revision Options

Finally, EFF would like to comment very briefly on the various amendment options to § 2B5.3 being considered in connection with the proposed revision to the fraud loss table. These options would cross-reference the copyright infringement guideline to either a revised fraud loss table or an alternative monetary table, with various additional options for fine-tuning the schedule of loss adjustments. We have three very brief comments to make.

First, we support a cross-reference to the alternative monetary table rather than to any revised fraud loss table. Referencing the new fraud loss table, which has the "more-than-minimal planning" (MMP) enhancement built-in, would have the effect of indirectly incorporating the MMP enhancement into § 2B5.3 as well. We feel that this would be a mistake. The MMP enhancement was a fraud-specific provision that never was a part of the copyright infringement guideline, and it is not at all clear why such an enhancement would be appropriate now. For this reason, we urge the Commission to reject Options 3, 3A, and 4.

Second, we support a $5,000 threshold sum for any table that is adopted. The next lower

level is $2,000, which falls within the misdemeanor range of the criminal copyright section. We do not believe that any upward adjustment is appropriate at that level of wrongdoing. Furthermore, we feel that the tables with an opening threshold of $2,000 include upward adjustments that are too high for their corresponding dollar values at amounts under $1,200,000. Therefore, we urge the Commission to reject Option 2.

Third and finally, we are opposed to Option 1A's offense-specific +1 adjustment at levels above $2,000 that would have the effect of lowering the table's $5,000 threshold amount to $2,000. Again, $2,000 only represents a misdemeanor under the statute, and we are of the opinion that an upward adjustment—whether a result of a loss table or a specific-offense-characteristic provision—would not be warranted at this level.

We believe that the loss table that is ultimately chosen should appropriately combine relatively small adjustments at the lower dollar values with greater adjustments at the higher dollar values, in order to provide lesser penalties for less serious offenders while retaining a rough consistency with the fraud loss table and its new high-value loss step-up. Consequently, we strongly urge the Commission to adopt Option 1 as the appropriate loss table amendment to § 2B5.3, which would cross-reference the guideline to an unmodified alternative monetary table with a threshold sum of $5,000.

Conclusion

In order to avoid inequities in sentencing, the EFF strongly encourages the Commission to do five things with respect to the criminal copyright infringement guideline:

(1) adopt a one-level downward adjustment in offense level for noncommercial infringements under § 506(a)(2);

(2) adopt a loss table adjustment standard based on a clear and unambiguous measure of retail value;

(3) insert a version of the DoJ's proposed guidance on upward departures, slightly modified for consistency with our other proposals;

(4) include corresponding guidance on downward departures; and

(5) adopt Option 1 of the loss table revisions to Guideline § 2B5.3.

By amending sentencing guideline § 2B5.3 in these five ways, we believe that the Commission will have crafted a sentencing solution to the software copyright infringement problem that is far more effective and fair than the DoJ proposal.

I would like once again to thank the Commission for the opportunity to be here today on behalf of the Electronic Frontier Foundation. I hope that our testimony will prove useful to you. Thank you.