

013-98

CHARLES A. LAWHORN
VICE PRESIDENT, ANTI PIRACY CRIMINAL LITIGATION



March 12, 1998

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Comment

Re: N.E.T. Act, Pub. L. 105-147, Copyright Infringement, Proposed amendments to §2B5.3

Dear Commission:

The Recording Industry Association of America, Inc. (RIAA) members create, manufacture or distribute more than 90 percent of all sound recordings legitimately produced and sold in the United States (see attached list of members). The RIAA supported the enactment of The No Electronic Theft (NET) Act, and welcomes this opportunity to offer supplemental comments about proposed amendments to U.S.S.G. §2B5.3. We are writing to express our hope that the Commission truly endeavors to enhance the deterrent power of intellectual property laws that safeguard the valuable rights of RIAA member companies throughout the United States.

We believe that the directive to ensure deterrence through sufficiently stringent guidelines does not contemplate a status quo approach. Rather, we urge the Commission to recognize that current guidelines for offenses set forth at Title 18 sections 2318, 2319, 2319A and 2320, do not presently deter music piracy crimes in a manner consistent with the fundamental notion that "[o]ur creative community is a bulwark of our national economy." 143 CONG. REC. S12692 (daily ed. Nov. 13, 1997) (statement of Sen. Kyl). The NET Act's legislative history, we believe, clearly expresses an intent to increase criminal penalties for offenses prosecuted under Title 17 U.S.C. section 506(a), Title 18 U.S.C. sections 2318-2320. Rather than submit verbiage that will perpetuate status quo results, we respectfully urge the Commission to propose amendments containing substantive increases to the existing sentencing guidelines involving music piracy crimes.

In our view, any proposal that contemplates amending §2B5.3 without including any changes whatsoever in the base offense level is non-responsive to the congressional directive. We believe that it would be appropriate to change the present §2B5.3 Base Offense Level 6 to Base Offense Level 8. Although this change would not directly affect the sentencing table re: Criminal History Category I defendants (0-6 months for Offense Level 6 or 8), it would serve to enhance prosecutive policies concerning criminal copyright and trademark infringement crimes. Moreover, an examination of comparable sentencing guidelines offers support for proposing a revision of the base

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offense level from 6 to Base Offense Level 8, e.g., §2B6.1 (Altering or Removing Motor Vehicle Identification Numbers) Base Offense Level 8, §2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes) Base Offense Level 9.

In addition to supporting proposals to amend §2B5.3 to Base Offense Level 8, we are writing to express concerns about the proposed §2B5.3(b) [Specific Offense Characteristic] language changes and suggested changes re: loss calculations as proposed in §2B5.3 Application Note #1 and Background. The RIAA fully supports the Department of Justice proposal to amend §2B5.3 Application Notes, insofar as the proposal concerns the creation of a new Application Note #2 relevant to infringements by electronic means. We believe, however, that considerable confusion and detrimental results will occur absent better clarification of loss calculation as proposed in Application Note #1. We urge consideration of an additional Application Note #3 relevant to offenses prosecuted under Title 18 U.S.C. §2319A (live performance/bootleg recordings).

The RIAA's concerns about the proposed amendments are best understood in the context of the differences among various criminal offenses applicable to §2B5.3. We believe that the proposed amendments to the Application Notes should factor into consideration, for example, the extreme differences between copyright infringement prosecutions pursuant to §2319 and live performance "bootleg" prosecutions pursuant to §2319A. To the extent that the proposed amendments contemplate an all-inclusive "reasonable manner" calculation without making any distinction between specific offense characteristics relevant to §§2318-2320, in our view this approach will lead to sentencing results that are 180 degrees opposite from the anticipated goal of establishing guidelines that are sufficiently stringent in application as well as purpose and intent.

We agree with the views expressed in the letter of support for "No Electronic Theft (NET) Act," as submitted by the Department of Justice Office of Legislative Affairs and reprinted in the Congressional Record:

The House-passed bill accomplishes several important goals, including:
....Enhancing the deterrent power of the copyright criminal laws by directing the Sentencing Commission to amend the Sentencing guideline for copyright and trademark infringement to allow courts to impose sentence based on the retail value of the good infringed upon, rather than the often lower value of the infringing good.
143 CONG. REC. S12691 (daily ed. Nov. 13, 1997) (letter dated Nov. 7, 1997, to Sen. Hatch, by Asst. Attorney Gen. Andrew Fots).

The above comments are accurate in our view re: prosecutions related to criminal copyright infringement (§2319) involving counterfeit sound recordings that attempt to duplicate in all respects the legitimate copyrighted item (physical packaging as well as phonorecord contents) and/or pirate compilations of various legitimate copyrighted sound recordings.

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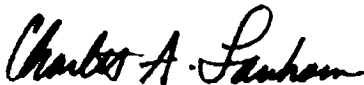
Consistent with the Department of Justice's views as expressed above, we agree that offenses prosecuted pursuant to 17 U.S.C. §506(a)/18 U.S.C. §2319 should be sentenced according to "the retail value of the good infringed upon, rather than the often lower value of the infringing good." Given this viewpoint, as well as the explicit directive to ensure consideration of the retail value of the items with respect to which the crime against intellectual property was committed, it seems entirely inconsistent to propose §2B5.3 amendments that would allow a court to consider "the value of the infringing items" in its calculations relevant to §2F1.1 enhancements. The RIAA respectfully urges the Commission to delete references to "the value of the infringing items" in connection with guideline application notes relevant to offenses set forth at 17 U.S.C. §506(a)/18 U.S.C. §2319.

Although "the retail value of the infringed upon items" is in our view the appropriate benchmark for application of §2F1.1 enhancements relevant to criminal copyright infringement (§2319), prosecutions pursuant to 18 U.S.C. §2319A (live performance/"bootleg" recordings) are not conducive to valuation based on the retail value of the infringed upon items. Bootleg recordings embodying live musical performances (§2319A) are not copies of legitimate copyrighted sound recordings, and therefore the loss to the copyright or trademark owner cannot be calculated with reference to "the value of the infringed upon items." In the absence of any legitimate counterpart to live musical performance/bootleg recordings, we believe that the appropriate measure of loss for purposes of §2F1.1 enhancements related to §2319A violations should be "the retail value of the infringing items."

We believe that the guideline application notes should recognize the distinction between §2319 copyright infringement (calculation of loss based upon "the retail value of the infringed upon items") and §2319A live musical performance/bootleg recordings (calculation of loss based upon "the value of the infringing items"). This distinction can be clarified in the form of an additional application note, e.g., Application Note 3. "In calculating the loss to the victim relevant to violations of 18 U.S.C. §2319A only, the enhancement is based on the retail value of the infringing items."

We appreciate consideration of the above views in connection with the possible submission of amendments to the Congress by May 1, 1998. Please don't hesitate to contact me directly for any reason.

Very truly yours,



Charles A. Lawhorn
Vice President, Anti-Piracy Criminal Litigation
Recording Industry Association of America, Inc.

RIAA MEMBER LABELS as of 12/4/97

ABC Kids	Bantam Doubleday Dell Publishing	Continuum Records
ABKCO Music & Records	Barcos	Coral Records
Aftermath	Barking Pumpkin	Cotillion
Albertine	Basic Records	Coyote/A&M
All American Music Group	Bass Production	Crave
Alliance Quasar Music Group	Bellmark Records	Creation Records
Almo	Benson/Gaither	Crescent Moon
A&M Associated Labels	Big Bad Records	Critique
A&M Records	Big Beat Records	Curb Records
American	Big Cat	Curb/MCA - L.A.
American Recordings	Big Records	Curb/MCA - Nashville
Amuse America	Big Screen Music	Curb/Rising Tide
Angel	Big Tree Records	Curb/Universal
Angel Records, EMI	Black Out	Cypress
Classics/Virgin Classics	Bluebird/Novus	DB Records
A+	Blue Note Records	DCC/Sandstone
Ardent	Blue Thumb	DGC
Ariola	Bon Ami	DHM/Eurodisc
Ariola Dance	Branford Marsalis	DV8
Arista Records, Inc.	Brentwood Children's Group	Daemon
Arista Records Nashville	Broken Records	Dali Records
Arista Austin	Bust It	Dancing Cat
Arista Latin	CGI/Platinum	Dark Horse
Arista Texas	CMC International	Day Spring
Arista Video	CZ	Death Row
Ark 21	Cannan	Decca Nashville
Asia Entertainment, Inc.	Capitol Nashville	Decca Records
Astor Music	Capitol Records	Dedicated Records
Asylum Records	Capricorn	Deep Purple
Atco	Career Records	Def Jam Recordings
The Atlantic Group	Cargo	De-Lite
Atlantic Classics	Catalyst	Detonator
Atlantic Jazz	Celtic Heartbeat	Deutsche Grammophon
Atlantic Jazzlore	Century Media	Deutsche Harmonia Mundi
Atlantic Nashville	Chameleon	Dinosaur Entertainment
Atlas Records	Chaos Recordings	Disa
Avenue/Vertebrae	Charisma	Discos International
Axiom	Cherry Disc	Discovery Records
BIM/BIM SKA	Chess Records	Disques Vogue
BMG Classics	The Children's Group	Domino
BMG Classics Video	Chocolate City	Don Hill
BMG Direct	Chronicles	Dot Records
BMG Distribution	Chrysalis Records	Dragon Street
BMG Entertainment	Chuck Life	DreamWorks Nashville
BMG Interactive/New Technologies	Circumstantial	DreamWorks SKG
BMG Special Products	Click Records	Duck
BMG U.S. Latin	Cocoa Records	ECM
BMG Video	Cold Chillin'	EMI-Capitol Entertainment Properties
BNA Entertainment	Columbia Home Video	EMI-Capitol Music Group North America
B-Rite	The Columbia House Company	EMI Christian Group
Backyard Records	Columbia Records Group	EMI Latin
Bad Boy Entertainment	Command	EMI Music Distribution
Balance Productions	Conifer Classics	

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E Pluribus Unum	Groovetown	LV
Earache	Guardian	LaFace
Eardrum	Guitar Recordings	Legacy Records
Earthbeat	Hall of Fame	Legacy/Columbia
EastWest America	Harmony Records	Legacy/Epic
EastWest Records	Heads Up	Legato
Elektra Entertainment Group	Heartry	Lightyear Entertainment
Elektra/Musician	High Street	Lil' Joe
Elephant	Hightone Records	Lil Man
Energy	Hip-O Records	Limelight Jazz
Epic Associated Labels	Hitsville	Little David
Epic Home Video	Hola Records	Little Dog
Epic Records Group	Hollywood Records	Live Home Video
Epic Soundtrax	Home Sweet Home	Lobster Records
Epic Street	Homeland	Logic Records
Epitaph	Hoppoh/Columbia	London International
Erato	House of Blues	London Records
Esparanza Records	Hughes Brother	Lonely Planet
Essential Classics	Hush Ent.	Loose Groove
Everland	I.R.S. Records	Loot
FFRR	I AM Entertainment	Loud Records
Fantasy	Ichiban	Luaka Bop
Fat Wreck Chords	ie Music	MCA Classics
Fever	Imaginary Road	MCA Nashville/Decca
57 Records	Imago Recording Company	MCA Records
Finnadar	Immediate	MCA Records - L.A.
First Priority Music	Immortal	M&G Records
First Warning	Impact Records	MJJ Records
510 Records	Impulse Records	MTV
Flavor Unit Records	Independent Network Co.	Magnet Records
FonoVisa, Inc.	Infinity Digital	Malaco Records
Fontana	Infrared Music Group (IMG)	Mammoth Records
40 Acres and a Mule	Interscope Records	Manga
4 AD Record	Island Records Group	Manticore
Fox Music Group	JRS Records	Maranatha!
Fox Records	JVC Musical Industries, Inc.	Margaritaville Records
Freeworld Recordings	Jeff Robinson	Marinda Grace
Frontier Records	Jersey Films	Masterworks
Full Moon Records	Jim Henson Records	Masterworks Heritage
Fully Loaded	Jireh	Masterworks Portrait
GRP Recording Company	Jive/Benson/Brentwood	Matador Records
GTS Records	Jive/Cedarhurst	Maverick Recording
Gang of Seven	Jive Records	Max Music
Gasoline Alley	Jive/Reunion	McGhee Records
Gee Street	Jive/Sik Wid It	Mechanic
Geffen/DGC Records	Jive/Silvertone	Medicine
Geffen Goldline	Jive/Verity	Megaforce Entertainment
Giant Records	Karen	Melodiya
Good News	Kelit-Aurora Record Corp.	Mercury Nashville
Gotee	Ketter Entertainment Group	Mercury Records
Gramavision	Kid Rhino	Mesa/Bluemoon
Grateful Dead Records	King Biscuit	Metal Blade Records
Great Performances	King Communications	Mighty Horn
Grindcore	Knitting Factory	Milan

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Milan/Jade Records
 Millenium
 Mirage
 Miramar
 Modern Art
 Modern Records
 Mojo
 Monument
 Moon
 Moon Shine
 Mordam
 Morgan Creek Music Group
 Motown Record Company, L.P.
 Moulin D'Or Recordings
 Music For Little People
 Musical Productions
 Musicmaster
 Mute Records
 Myrrh
 ND Golf
 NFL Films
 N2K Encoded Music
 Narada Records
 Nas
 Nation Records
 Nettwerk
 New Deal
 Next Century Latin
 Nick @ Nite
 Nimbus
 Nitro
 No Face
 Nonesuch
 Nonesuch/Musician
 Noo Trybe
 Noptee
 Nothing
 November
 nu. millenia
 Nuclear Blast
 Nude
 Oasis
 Observed
 Oceana
 Ode 2 Kids
 Odyssey
 Okeh
 Omni
 143 Records
 One Globe Music
 One Little Indian
 Opal
 Organized Noise
 Orpheus

Outburst
 Outpost
 PIMA
 PMP Records
 P.R.O.
 PSI Comun
 Pacific Arts Audio
 Pakaderm
 Pallas
 Palma Music
 Pandisc/Streetbeat
 Papillon
 Parachute
 Patriot Records
 Pavement
 Pendulum Records
 Philips
 Philips Classics
 Platinum Entertainment
 Polydor
 Polydor Atlas
 Polydor Classics and Jazz
 Polydor Nashville
 PolyGram Classics/Jazz
 PolyGram Group Distribution
 PolyGram Holding, Inc.
 PolyGram Latino
 PolyGram Video
 Popular Records
 Premier
 Premium
 Priority Records
 Private Music
 Private Music Video
 Pumpko Inc., Ltd.
 Push Records
 Q Division
 Qwest Records
 RAL Def Jam
 RCA Gold Seal
 RCA Label Group
 RLG/Nashville
 RCA Records Label
 RCA Records Nashville
 RCA Red Seal
 RCA Victor (Greatest Hits
 & Basic 100)
 RCA Victor Living Stereo
 RCA Victrola
 R.E.X. Music
 RFC
 RKD
 RMM
 RSO

RTR Records, Inc.
 Rabbit Ears
 Radioactive
 Random House
 Rap-A-Lot
 Razor Sharp
 Rebound Records
 Red Baron Productions, L.T.D.
 Red Light
 Reebok
 Refuge
 Rejoice
 Relapse
 Relativity Records
 Relix
 Reprise
 Resound
 Restless Records
 Reunion Records
 Revelation
 Revolution
 Rhino Home Video
 Rhino Records
 Rhino Video
 The Right Stuff
 Rising Tide
 Rising Tide Nashville
 Risky Business
 Riva
 River North
 Roadrunner Records
 Robbins Entertainment
 Rodven Records
 Rooart
 Roswell Records
 Rotten
 Rowdy
 Rubenstein Media Lebal
 Ruffhouse
 Ruffhouse Records/Ovum
 Rush Associated Labels
 Ruthless Records
 SBK Records
 SMSP/Signature
 SMV
 S.O.U.L.
 Saja Records
 Savage Records
 Scotti Bros./Street Life Records
 Scratchic Records
 Seed
 Select Records
 Shang
 Shimmy-Disc

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Shrapnel	Tim Kerr	Warner Reprise Video
Silas	Time Bomb	Warner Special Products
Sire Records	Time Warner Audio Books	WarnerVision Entertainment
Sire/Elektra	Tommy Boy Music	Warner Western
Skunk	Total Experience	Way Cool
Sky	Touch and Go	What?
Slamm Dunk	Track Factory	Whitfield
Slash	Trackmasters	Wild Pitch
So So Def	Trauma	Win Time
Soho Square	Tribeca	Windham Hill Group
SOLAR Records/J. Hines	Triloka	Wind-Up Entertainment
Company	Triplex	Wonderland
Sony Broadway	TriStar Music Group	Word
Sony Classical	Tropical Storm	Word Song
Sony Classical Film and Video	21 Records	Word Treasures
Sony Direct	Twism	Work
Sony Discos	Twisted	World Domination Music
Sony 550 Music	ULG	Yab Yum Entertainment
Sony Latin	Uptown Records	ZYX Music Distributors
Sony Masterworks	Uptown/URC	Zero Hour
Sony Music Distribution	Universal Latino	Zomba Jive
Sony Music Entertainment, Inc.	Universal Music Group	Zoo/CZ Records
Sony Music International	Universal Music & Video	Zoo/Out of Control Records
Sony Music Nashville	Distribution	Zoo/Pavement Music
Sony Music Special Products	Universal Records	Zoom Express
Sony Wonder	V2/Gee Street/Flydaddy/Big Cat	
Soundwave	Varese Sarabande Records	
Southern Studios	Vedisco	
Sparrow Records	Vendetta	
Special Markets	Vertigo	
Spinart	Verve	
Stardog	Verve Antilles	
Starsong	Verve Forecast	
Stepson	Vestron	
Stonecreek	Viceroy	
Street Life Records	Victory Music	
Streetbeat	Vinyl Solution	
Stretch Records	Virgin Records, Inc.	
Suave House	Vivarte	
Super K	Vocalion Records	
Swan Song	Volcano Recordings	
TK Records	WEA Inc.	
TRS	WEA Latina	
TVT/Nothing	The Wal	
Tag Records	Walt Disney Records	
Telarc	Wanderlust Interactive	
Telarc Blues	Warner Alliance	
Telarc Jazz	Warner Bros. Records Inc.	
Telarc Jazz Zone	Warner/Curb	
Telarchive	Warner/Elektra/Atlantic	
Teledec	Warner Kids	
Third Stone Records	Warner Music Group	
Thirsty Ear	Warner/Reprise	
Threshold	Warner/Reprise Nashville	