
PUBLIC COMMENT

2000 AMENDMENT CYCLE



United States Sentencing Commission

March 2000

March 10, 2000

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500 South
Washington, DC 20002-8002
Attention: Public Information – Public Comment

Re: N.E.T. Act Directive, Proposed Amendments to § 2B5.3- Supplemental
Comments

Dear Commissioners:

On behalf of U.S. copyright-based industries, the undersigned would like to thank the Commission for the opportunity to file supplemental comments on the proposals to amend the U.S. sentencing guidelines to implement the No Electronic Theft (NET) Act (Pub. L. 105-147) and hereby submit the following comments in response to the Federal Register Notice published on February 11, 2000.

At the outset, the signatories to this letter – the Business Software Alliance (BSA), the Interactive Digital Software Association (IDSA), the Software & Information Industry Association (SIIA), the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA) (“the industries”) – refer the Commission back to the comments we filed previously with the Commission on January 26, 2000 and reaffirm the substantive positions stated in that letter. It is our understanding that the options originally noted for public comment have been superceded by the options contained in a paper dated February 21, 2000 (“February 21st paper”) provided by the Commission staff to us and, therefore, it is with this understanding that we submit the following comments.

We strongly support proposed Option 4 with modifications.

The undersigned industries join in support of Option 4 as proposed by the Commission in the February 21st paper with the following modifications:

- a. Amending Application Note 5(iii) to apply when the offense involves substantial harm to the market of the infringed item;
- b. Removing the word, “usually,” from the Determination of Retail Value in Application Note 2;
- c. Adding a specific offense characteristic increase where the offense involves the conscious or reckless risk of serious bodily injury; and
- d. Eliminating or modifying specific offense characteristic (b)(2).

We believe that Option 4 provides the most balanced, appropriate, effective, and efficient approach in meeting the Congressional directive to implement the NET Act and that our suggested modifications further ensure that the resulting guidelines satisfy the relevant objectives.

We support Option 4 (base offense level 8) and the inclusion of specific offense characteristics (b)(1) and (b)(3) as proposed in Option 4. We believe that each of these factors should be expressed as a specific offense characteristic rather than a potential basis for departure.

a. Option 4 Application Note 5(iii) should be amended to apply when the offense involves substantial harm to the market of the infringed item.

We strongly support an amendment to Option 4 - Application Note 5(iii) clarifying that an upward departure is warranted when the offense involves substantial harm to the market of the infringed item.¹ This Application Note presently provides that an upward departure may be warranted when: "The offense involved substantial harm to the reputation of the copyright or the trademark owner." We believe that the Commission should incorporate the following italicized language into Note 5 (iii):

The offense involved substantial harm to the reputation of the copyright or trademark owner or to the market for the infringed work.

As drafted in the February 21st paper, Note 5 overlooks the related but separate and distinct harm to the intellectual property owner that results from unauthorized reproduction, distribution, performance or display of a copyrighted work prior to the time that the owner is prepared to commercially release that product into the open market. This harm was acknowledged and appropriately addressed in the original draft proposal under Option 3, Application Note 3 ("Pre-Release Infringement").

Without this change, the Application Note addresses only the damage done to the reputation of the copyright or trademark owner and ignores the potential loss of market that results from pre-released infringing items. The availability of infringing product prior to the commercial release of a work can cause significant lost sales and damage to the market. More often than not, the pre-released infringing item is a reproduction of a work in progress that is not ready for market.

For example, there have been instances where an editor's cut² of a motion picture has been pirated and distributed prior to release of the actual motion picture. While such a pre-release might cause damage to the reputation of the copyright owner/motion picture studio, it will most certainly cause damage to the market for the motion picture itself. In effect, such a pre-release

¹ It should be noted that there is no Application Note 5(ii) and therefore this provision appears to be misidentified.

² The editor's cut of a motion picture is one which, unlike the final product, includes the scenes presented as they were filmed rather than the order they are intended to be shown in the final product, scenes that eventually end up on the cutting room floor, film editor's notes, and no musical score.

could prevent attendance at the movie because it has already been seen and/or through bad word of mouth on the street because of the prior viewing.

Therefore, we believe that the Commission should incorporate the suggested italicized language above to Option 4 Application Note 5 (iii).

b. The "Determination of Retail Value" in Option 4 Application Note 2 should be amended by removing the word, "usually."

We strongly object to the inclusion of the word, "usually," in the Determination of Retail Value in Option 4 Application Note 2. We are concerned that insertion of the word "usually" could unintentionally mislead some courts to believe that they can substitute other benchmarks in lieu of the retail price standard, when in fact we believe that the Commission inserted the word "usually" only to enable the courts to use alternative benchmarks when a retail price standard is not available. Consequently, we believe that a clarification or deletion of the word is in order.

If, however, insertion of the word "usually" by the Commission was intended to allow for alternative methodologies for determining the retail value of infringing and infringed items, we would object to inclusion of that word. The effect of including such language runs counter to the Congressional objective and could undermine the notions of uniformity and certainty in the sentencing process by opening every case to an unguided argument over whether it should be the exception to the rule.

c. Option 4 should add a specific offense characteristic increase where the offense involves the conscious or reckless risk of serious bodily injury.

We support an amendment to Option 4 that adds a specific offense characteristic increasing the offense level where the offense involves conscious or reckless risk of serious bodily injury. We believe that this amendment would provide at least an initial means of address the increasing presence of organized crime elements in this area. We suggest amending Option 4 by including the following italicized language as an additional specific offense characteristic:

(b)(4) If the offense involved the conscious or reckless risk of serious bodily injury, increase by [2].

This proposed language is consistent with our support of specific offense characteristic (b)(6) in prior Option 3 in our January 26, 2000 letter. Moreover, we note that Option 2, specific offense characteristic (b)(5), in the February 21st paper contains similar language.

d. Option 4 should be adopted without specific offense characteristic (b)(2).

We object, however, to specific offense characteristic (b)(2) in Option 4. Regarding (b)(2)(A) and (b)(2)(B), we believe that it is unnecessary and potentially counter-productive to include a downward adjustment for offenses committed without a commercial purpose or financial gain or in which the infringing articles are being sold far below the retail price of the infringed item. In the first instance, we note that the harm to the victim is not mitigated by the fact that the

defendant failed to profit from the offense. In the second instance, we believe that defendants should not be rewarded for discounting their wares (and in many cases increasing their sales as a result).

Regarding (b)(2)(C), we believe that the quality or performance of an infringing item is not substantially inferior to the quality or performance of an infringed item where the infringing item is a digital or electronic reproduction. We believe that the language in (b)(2)(C) does not account for the technological identity between digitally or electronically reproduced items and their originals.

While we object to (b)(2)(C) in its current form, we believe that the Commission could make a workable administration of this specific offense characteristic consistent with the NET Act by adding an Application Note 6 to Option 4 with the following italicized language:

6. Determination of the Quality or Performance of an Infringing Item.- For purposes of subsection (b)(2)(C), the quality or performance of an infringing item is not substantially inferior to the quality or performance of the infringed item if the infringing item is a digital or electronic reproduction.

We would also support Option 3 if amended.

While we strongly support Option 4, we believe that Option 3 is also viable with the same changes noted in the preceding section. We believe that newly proposed Option 4 is preferable to Option 3 because it would be easier for the courts and prosecutors to apply and it also appears to have the support of the trademark-based industries. If, however, the Commission, should opt for Option 3 in lieu of Option 4, we would urge the Commission to also adopt the language we proposed above.

We oppose Options 1 and 2.

For the reasons stated in our previous letter, we oppose options 1 and 2. In Option 1, we especially oppose the inclusion of the downward departure in Application Note 5(B). We believe that the inclusion of such language is antithetical to the Commission's objective and contrary to the very essence of federal sentencing guidelines. It would completely undermine the notions of uniformity and certainty in the sentencing process and mark an unprecedented return to the unfettered discretion that existed prior to The Sentencing Reform Act of 1984.

We continue to oppose Option 2 largely because we believe a sentencing system based on the price charged by the defendant vis-à-vis the infringed-upon item would perversely reward the pirate who prices his/her goods the lowest. In addition, we believe that the potential benefits of implementing the Option 2 guidelines are clearly outweighed by the likelihood of a sentencing process that would be unduly complicated by the process of calculating "greatly discounted merchandise."

Request to testify at the March 23rd Hearing

According to the Federal Register Notice of February 11th, we understand that the Commission will hold a hearing on March 23rd to solicit public comment on the proposed amendments to the sentencing guidelines. We, the undersigned organizations, hereby notify the Commission of our intent to testify at this hearing.

Summary

We commend the Commission on the significant effort it has taken to address the concerns of the interested parties. In comparing the various options, we believe that all would be an improvement over existing law. Of these options, we believe Option 4 strikes the best balance between competing interests and best effects the purposes behind the legislative directives underlying these amendments.

Should the Commission have any questions or concerns about the statements made in this letter, we would be pleased to discuss them with the Commission at your convenience. We look forward to testifying at the upcoming hearing.

Thank you once again for the opportunity to voice our views on the proposals to amend the U.S. sentencing guidelines.

Very truly yours,

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