

Intellectual Property Institute

University of Richmond School of Law

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One Columbus Circle NE
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Dear Ms. Grilli:

I write to offer input on the directives Congress has sent to the Sentencing Commission in the Family Entertainment and Copyright Act of 2005.

About the Author

My background makes me particularly interested in—and, I hope, gives me an unusual perspective on—the intersection of sentencing law and intellectual property. From 1996 until 1999, I served as an Attorney-Adviser at the Commission and was a member of the working group that performed the in-depth analysis of the guidelines' treatment of intellectual property offenses in response to the No Electronic Theft ("NET") Act of 1997. I then joined the firm of Williams & Connolly as a criminal defense lawyer, but over time my practice began to include representation of copyright owners, and I became involved in the *Napster* and *Aimster* file-sharing litigation as counsel for several record labels and movie studios.

I left private practice in 2002 for academia. Today I teach intellectual property and computer law at the University of Richmond School of Law and am Director of the school's Intellectual Property Institute. The focus of my research and writing as a law professor has been the intersection of copyright law and digital technology. I remain involved in file-sharing litigation; for example, I authored an *amicus* brief urging the Supreme Court to rule in favor of the copyright owners in this summer's Supreme Court file-sharing case, *MGM Studios v. Grokster*. I have also remained involved in federal sentencing policy as a member of the Commission's Practitioners Advisory Group, but the views offered in this letter are my own.

The Historical Perspective on Intellectual Property Sentencing

The recent congressional directives pertaining to intellectual property should be evaluated in light of the major amendments to the Chapter Two guideline for intellectual property offenses (section 2B5.3) that took place just five years ago. Before promulgating those amendments, the Commission spent a more than two years studying the adequacy of intellectual property sentencing and the effect of online infringement thereon. It held hearings, surveyed hundreds of individual case files, sent representatives to testify before Congress, met with myriad industry representatives, economists, academics, and other interested parties, and drafted an insightful thirty-eight-page report.

The impetus for this comprehensive reexamination of intellectual property sentencing was the NET Act and the case that gave rise to the Act, *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994). David LaMacchia was an MIT student who made computer games and other valuable software available to the public via the Internet without the consent of the copyright owners. LaMacchia avoided conviction for criminal copyright infringement, however, because he received no benefit, financial or otherwise, from his activities, and the criminal copyright statute (17 U.S.C. § 506) then applied only to those who realized commercial advantage or private financial gain from their infringement.

The *LaMacchia* case was a wake-up call for Congress, in that it showed how the Internet could easily and cheaply be used to illegally distribute the countless copyrighted works that exist in digital form. The NET Act was intended to address this new threat, both by amending section 506 to apply to those who made no money from their online infringement (but who traded in works whose retail value exceeded \$1000) and by directing the Commission to examine the severity of the intellectual property guidelines and ensure that they consider the value of the copyrighted items.

After the aforementioned two years of study, the Commission responded to the NET Act's directives by substantially increasing the sentencing exposure for defendants convicted of intellectual property offenses. It increased the Base Offense Level in section 2B5.3 from 6 to 8. It added a 2-level increase in offense level, with a floor of 12, if the offense involved manufacture, importation, or (most significantly) uploading of infringing items, although a 2-level decrease for offenses not committed for financial gain mitigated this effect somewhat. And it added a 2-level increase for risk of serious bodily injury or possession of a dangerous weapon, with a floor of 13.

Most important, the amendment ensured that the value of the *infringed* item—i.e., the copyrighted work—would determine the amount used to increase the offense level under the Loss Table in section 2B1.1 whenever the infringing item was “identical or substantially equivalent to” the infringed item. See § 2B5.3, comment. (n.2(A)(I)). Prior to this amendment, the guideline called for using the value of the *infringing* item. Although the new section 2B5.3 still allowed use of the infringing value in some cases, online copyright infringement was not among them, because digital copies of music, films, software, etc. tend to be near-perfect reproductions of the original. (Indeed, that's why online infringement poses such a danger, as Congress and the Commission both recognized after *LaMacchia*.) And although there was a good argument that the value of the infringing item was the same as the value of the infringed item when the former was a near-perfect copy of the latter, and that the amendment would thus make little difference in the loss amount, the Commission was informed that courts used an infringing value of zero, even for a perfect copy of a copyrighted work, whenever it was given away for free. The change to infringed value therefore made a considerable difference.

The use of the infringed item's value to calculate loss, however, rested on some dubious premises. Foremost among them was the assumption that the illegal provision of a copyrighted work was the equivalent, for purposes of calculating loss under section 2B1.1's table, of the theft of tangible property. In other words, the new section 2B5.3 treated someone who illegally distributed software worth \$40,000 the same as someone who stole \$40,000 in cash from the software company. Yet if the recipients of the free software would never have purchased it at its retail price—a certainty in many, and perhaps most, cases—the true loss was closer to zero than to the software's retail value. And even if an online infringement did truly represent a lost sale, using the retail price would overstate the loss because it would fail to account for the company's costs; it would wrongly assume that the sales revenue represented pure profit. It is presumably for this reason that the original

Commission thought that even the *infringing* amount would “generally exceed the loss or gain due to the offense.” See § 2B5.3, comment. (backg’d) (pre-2000 version).

In their totality, then, the NET Act and the accompanying changes to section 2B5.3 resulted in dramatically (and, arguably, disproportionately) increased punishment for those engaging in online infringement. Someone who distributed \$40,000 worth of music online, free of charge, would have an offense level of 6 under the old guideline (the Base Offense Level, with no loss adjustment for software given away for free). Under the new guideline, the offense level would be 14 (Base Offense Level of 8, plus 6 for the loss, plus 2 for uploading, minus 2 for no commercial motive). For a defendant with no criminal record, that represents a 500% increase in the midpoint sentence—i.e., the difference between a sentencing range of 0 to 6 months (probably probation) and 15 to 21 months (of mandatory imprisonment). A defendant like David LaMacchia, whose indictment averred a loss amount exceeding \$1 million, went from having no criminal liability to facing over five years in jail.¹

In sum, there is no doubt that the 2000 amendments to section 2B5.3 recognized and more than adequately accounted for the newfound threat of online infringement. The guideline’s reference to section 2B1.1’s loss table and the use of the value of the infringed item in calculating the infringement amount ensure that intellectual property sentencing will be sensitive to the potential for large-scale online infringement, even by those lacking a financial motive. Nothing that has occurred in the last five years calls into question the decisions the Commission made on this subject following the NET Act.

Specifics of the Family Entertainment and Copyright Act of 2005

Viewed in the historical context set forth above, the Family Entertainment and Copyright Act of 2005 (“FECA”) is a modest piece of legislation. The NET Act expanded the reach of criminal copyright liability to cover a vast new population of online infringers, a group that, after *LaMacchia*, was understood to threaten the foundations of copyright law. In contrast, FECA simply fills some minor holes in the statutory scheme. For example, the movie bootlegging statute (section 2319B) simply changes the existing statute’s *mens rea* from willfulness to knowledge and eliminates certain motive and volume requirements for a category of conduct that was already illegal. The statutory maximums that accompany this new enactment are actually less severe than their preexisting counterparts. The same can be said of the pre-release statute (section 506(a)(1)©)). Modest legislation such as this calls for a modest response by the Commission.

FECA contains four directives for the Commission. The first directive is the general admonition that frequently accompanies more specific directives, namely that the Commission “take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements . . . are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes.” Given the Commission’s extensive reexamination of intellectual property sentencing just five years ago, the amendments it passed at that time, and the absence of any material change in nature of intellectual property offenses since, this general admonition warrants no new amendments in and of itself.²

¹ This comparison of pre- and post-2000 intellectual property sentencing does not take into account the increase in offense levels occasioned by the 2001 amendments to section 2B1.1’s loss table. If those were factored in, the difference between pre- and post-2000 sentences would be even greater.

² Incidentally, one would be hard-pressed to accept the notion that criminal prosecution has any deterrent effect on online copyright infringement. There are tens of millions of illegal file-sharers in the

The second directive instructs the Commission to consider an enhancement for infringement of pre-release works. Again, the Commission explicitly studied to this concern following the NET Act, *see* U.S. SENTENCING COMMISSION POLICY DEVELOPMENT TEAM REPORT, NO ELECTRONIC THEFT ACT 34-35 (1999) (discussing draft pre-release enhancement), and responded to it in two ways. First, because pre-release works are likely to be more popular, they will naturally result in more instances of infringement and thus a higher loss amount and a correspondingly higher offense level. Second, because pre-release works may not yet be ready for the market (e.g., beta versions of software may still be “buggy”), their premature distribution can harm the copyright owner’s reputation. The Commission accordingly invited an upward departure for “substantial harm” to the victim’s reputation.

The third directive questions whether the definition of “uploading” in section 2B5.3 captures the loss attributable to broad online copyright infringement. Because the specter of widespread uploading of copyrighted works was the impetus for the NET Act and 2000 guideline amendments, it should come as no surprise that the current section 2B5.3 adequately accounts for uploading culpability. The broad definition of uploading already draws an appropriate distinction between those who make copyrighted works available to the whole world via the Internet and those smaller-scale infringers who merely download for personal use. The former obviously pose by far the greater threat, and are punished accordingly, with a proportionately severe enhancement—a 2-level (i.e., 25%) increase in sentence (with a floor of 12 that can effectively make the increase 3 or even 4 levels for certain defendants). Add to that the likelihood that the infringement amount for uploaders is likely to be significantly higher than for downloaders,³ and it becomes clear that uploading is both appropriately defined and punished.

The fourth directive raises the issue of what to do when evidence of the scale of infringement cannot be found. This will often not be an issue. The defendant’s Internet service provider likely maintains logs that will show the total bandwidth consumed, which should give the court some idea of the scale of infringement. Some file-sharing software also logs the user’s uploading and downloading history. And many file-sharers are motivated not by money, but by the bragging rights that come with being a big-time uploader, which means that they will try not to destroy evidence of their infringement, but to create and preserve it. In any event, convictions under the NET Act require proof that the defendant traded in works totaling more than \$1000 in retail value, which means that by the time NET Act cases reach sentencing the prosecution already has some evidence of the scale of infringement.

country, and the Department of Justice brings fewer than a hundred copyright infringement prosecutions each year. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, INTELLECTUAL PROPERTY THEFT, 2002 (2004). Nor has the incidence of intellectual property prosecution increased since passage of the NET Act; an examination of Table 17 in the Commission’s SOURCEBOOK OF FEDERAL SENTENCING STATISTICS from 1998 to today shows that section 2B5.3 has been used as the primary guideline an average of 120.2 times per year in that period, and the most recent statistic is only 121.

³ A new infringement occurs each time an unauthorized copy is made from the uploader’s file. Because such copying is likely to be viewed as an act aided, abetted, induced, or willfully caused by the defendant (or as a harm resulting therefrom), each such copy would be included in the defendant’s relevant conduct and would thus constitute a new “infringing item” to be multiplied by the value of the infringed item, with the result added to the infringement amount. Uploaders are therefore much more likely to see high infringement amounts than mere downloaders.

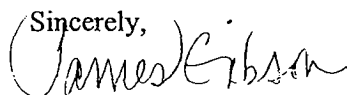
Even when evidence of distribution volume is not available, the mere fact that copyrighted works were uploaded results in the aforementioned 2-level enhancement, with a floor of 12. In other words, *even when the prosecution fails to prove that a single download resulted from the defendant's uploading*, the defendant sees his or her offense level rise from 8 to 12, representing a 300% increase in the midpoint sentence and a shift from probable probation to mandatory jail time for a first-time offender. This adjustment more than adequately addresses the concern about the difficulties the prosecution might face in amassing evidence of the scale of infringement. In short, because section 2B5.3 already significantly increases an uploader's sentence even absent evidence of any harm done, and because this increase was the intended result of the 2000 Commission's attention to the threat of online infringement, no further increase is warranted.

Conclusion

I have no sympathy for copyright infringers. I have written op-eds and *amicus* briefs that lament the popularity of file-sharing and seek to discourage it. I frequently give talks to high-school students regarding ethics in the world of the Internet, and the downsides of file-sharing always feature prominently in those talks. As Director of the Intellectual Property Institute, I have overseen the creation of the National CyberEducation Project, an initiative aimed at promoting improved understanding and discussion on college campuses of the issues, such as file-sharing, that the Internet presents for intellectual property law.

Nevertheless, I see no reason to question the adequacy of the guidelines' current sentences for intellectual property offenses, either online or offline. The Commission's comprehensive assessment in the late 1990s resulted in amendments to section 2B5.3 that more than adequately address the threats that copyright and trademark face in the new millennium.

I would be more than willing to come to Washington to meet with any staff or Commissioners who would like to discuss these issues further. (Indeed, it would be a great pleasure to visit the Commission and catch up with old friends there.) In any event, if I can be of any assistance, please feel free to contact me at 804-287-6398 or jgibson@richmond.edu.

Sincerely,


James Gibson
Director, Intellectual Property Institute
Assistant Professor of Law