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Memorandum In Support of Restitution

To: United States District Court for the Western District of Virginia
Big Stone Gap Division

From: Recording Industry Association of America

Date: October 8, 2008

Re: United States v. Daniel Dove, Case No. 2:07CR00015

I. Is restitution available for the offenses of which the defendant was convicted?

Intellectual property offenses in Title 18 require restitution under the Mandatory Victim Restitution Act of 1996 ("MVRA"). Such crimes constitute offenses against property, and therefore it is *mandatory* for the sentencing court to order the defendant to pay restitution under 18 U.S.C. § 3663A(c)(1)(A)(ii),(B). For example, in United States v. Chay, the court found that trafficking in counterfeit computer programs was a violation of intellectual property rights, and also a crime against property, and therefore ordered mandatory restitution under the MVRA. 281 F.3d 682 (7th Cir. 2002). Further, in United States v. Hanna, trafficking in counterfeit trademarks affixed to phony consumer goods (handbags, wallets, belts, etc.) was considered a violation of intellectual property rights and a crime against property, thereby requiring the court to order restitution. 2003 WL 22705133 (S.D.N.Y. Nov. 17, 2003). And finally, in United States v. Manzer, copyright infringement was considered a violation of intellectual property rights and a crime against property, therefore requiring that restitution be ordered. 69 F.3d 222, 229-30 (8th Cir. 1995).

As the defendant in the instant case was convicted of felony copyright infringement on June 26, 2008, he was convicted of a crime against property that

requires the payment of restitution to the victims under 18 U.S.C. § 3663A(c)(1)(A)(ii). This criminal activity, specifically, the unauthorized distribution of RIAA member company sound recordings to the public on a massive scale, caused pecuniary loss in the form of displaced sales and lost profits, therefore requiring the payment of restitution under the Act.

II. Is the proof of such losses sufficient?

Evidence pointing to the number of albums downloaded without authorization in this case is definite and irrefutable. The FBI provided the RIAA with a listing of full albums discovered on the defendant's server, including detailed information showing the number of times that copies of those albums were transferred to others. (See attached Evidence Chart – MP3 and Number of Times Downloaded). The list includes 183 albums, copies of which were transferred from the defendants server to others a total of 17,281 times. The RIAA has reviewed 20 of the albums at the top of the list and confirmed that its member companies own the same. (See attached Evidence Chart – Unauthorized Downloads of RIAA Member Company Sound Recordings). These 20 sound recordings were transferred without consent, and without payment, a total of 6,528 times. (See evidence charts referenced above, and detailed analysis in RIAA Victim Impact Statement).

The amount of restitution due a victim under the MVRA is the value of diverted profit from the victim plus amount the victim incurred investigating the defendants conduct. United States v. Martin, 64 Fed. Appx. 129 (10th Cir. 2003); United States v. Susel, 429 F.3d. 782, 783 (8th Cir. 2005). When the victim is the distributor of product, diverted profit can be determined by multiplying the average profit per product by the number of infringing products in the defendant's inventory. United States v. Martin, 64 Fed. Appx. 129 (10th Cir. 2003).

The average wholesale price of a digital album on or around the time of the defendant's illicit activity was \$7.22 per unit. Thus, the 6,528 unauthorized transfers of the 20 RIAA member company recordings studied represent lost profits of \$47,132.16. These sound recordings are in fact copyrighted. (See attached copies of copyright registrations). Finally, the RIAA has been granted authority on behalf of its member companies to represent its interests in criminal music piracy matters and to request the restitution owed in this case. (See attached letters of authorization).

III. Is a schedule of payment of restitution appropriate in the case?

The RIAA would ask for payment of restitution in a manner consistent with the provisions of 18 U.S.C. § 3664.