



GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 1

The Nature of the Offense Charged - Count 1

Count One of the indictment charges that from at least October 2004 and continuing until approximately May 2005, in the Western District of Virginia and elsewhere, DANIEL DOVE, also known as “DUFFMAN,” “MCCALISTER,” and “DERKADER,” the defendant herein, conspired and agreed to willfully infringe copyrights with others known and unknown to the government; that is, during a 180-day period, defendant did conspire and agree to willfully reproduce and distribute at least ten infringing copies of one or more copyrighted works, with a total retail value of more than \$2,500, for purposes of private financial gain, in violation of Title 17, United States Code, Section 506(a)(1) and Title 18, United States Code, Section 2319(b)(1).

The indictment also alleges that in furtherance of the conspiracy, and to effect the aims and objectives thereof, the conspirators performed overt acts in the Western District of Virginia and elsewhere.

(Derived from 1A O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions*, Section §31.01 (5th ed. 2000); Indictment; 18 U.S.C. §§ 371; 2319(b)(1); and 17 U.S.C. § 506(a)(1))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 2

Count 1 - The Statute Defining the Offense Charged

Section 371 of Title 18 of the United States Code provides, in part, that:

[i]f two or more persons conspire ... to commit any offense against the United States,  
... and one or more of such persons do any act to effect the object of the conspiracy,...

an offense against the United States has been committed.

(2 O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 31.02 (5th ed. 2000); 18 U.S.C. §371))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 3

Count 1 - The Essential Elements of the Offense Charged  
(Conspiracy)

In order to sustain its burden of proof for the crime of conspiracy to commit any offense against the United States of America, namely:

(1) copyright infringement, in violation of Title 17, United States Code, Section

506(a)(1)(A) and Title 18, United States Code, Section 2319(b)(1);

as charged in Count One of the indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:

- One:* The conspiracy, agreement, or understanding, as described in the indictment, was formed, reached, or entered into by two or more persons;
- Two:* At some time during the existence or life of the conspiracy, agreement, or understanding, the defendant, knew the purpose(s) of the agreement, and, with that knowledge, then deliberately joined the conspiracy, agreement, or understanding; and
- Three:* At some time during the existence or life of the conspiracy, agreement, or understanding, one of its alleged members knowingly performed one of the overt acts charged in the indictment and did so in order to further or advance the purpose of the agreement.

(2 O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 31.03 (5th ed. 2000); *United States v. Tedder*, 801 F.2d 1437, 1446 (4th Cir. 1985))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 4

Conspiracy--Existence of an Agreement

A criminal conspiracy is an agreement or a mutual understanding knowingly made or knowingly entered into by at least two people to violate the law by some joint or common plan or course of action. A conspiracy is, in a very true sense, a partnership in crime.

A conspiracy or agreement to violate the law, like any other kind of agreement or understanding, need not be formal, written, or even expressed directly in every detail.

The government must prove that the defendant knowingly and deliberately arrived at an agreement or understanding that they, and perhaps others, would violate some laws by means of some common plan or course of action as alleged in Count One of the indictment. It is proof of this conscious understanding and deliberate agreement by the alleged members that should be central to your consideration of the charge of conspiracy.

To prove the existence of a conspiracy or an illegal agreement, the government is not required to produce a written contract between the parties or even produce evidence of an express oral agreement spelling out all of the details of the understanding. To prove that a conspiracy existed, moreover, the government is not required to show that all of the people named in the indictment as members of the conspiracy were, in fact, parties to the agreement, or that all of the members of the alleged conspiracy were named or charged, or that all of the people whom the evidence shows were actually members of a conspiracy agreed to all of the means or methods set out in the indictment.

Unless the government proves beyond a reasonable doubt that a conspiracy, as just explained, actually existed, then you must acquit the defendant.

(2 O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 31.04 (5th ed. 2000))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 5

Conspiracy--Membership in an Agreement

Before the jury may find that the defendant, or any other person, became a member of the conspiracy as charged in Count One of the indictment, the evidence in the case must show beyond a reasonable doubt that the defendant knew the purpose or goal of the agreement or understanding and deliberately entered into the agreement intending, in some way, to accomplish the goal or purpose by this common plan or joint action. If the evidence establishes beyond a reasonable doubt that the defendant knowingly and deliberately entered into an agreement to commit the offense as alleged in Count One, the fact that the defendant did not join the agreement at its beginning, or did not know all of the details of the agreement, or did not participate in each act of the agreement, or did not play a major role in accomplishing the unlawful goal is not important to your decision regarding membership in the conspiracy.

Merely associating with others and discussing common goals, mere similarity of conduct between or among such persons, merely being present at the place where a crime takes place or is discussed, or even knowing about criminal conduct does not, of itself, make someone a member of the conspiracy or a conspirator.

(2 O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 31.05 (5th ed. 2000))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 6

Count 1 - Objects of the Conspiracy

As to Count One, I instruct you that:

Count One alleges a conspiracy to commit a separate federal offense against the United States.

The offense alleged as an object in Count One is copyright infringement, that is, to willfully, and for the purpose of private financial gain, infringe the copyrights of copyrighted works, by reproduction and distribution during a 180-day period of ten (10) or more copies of one (1) or more copyrighted works which had a retail value of \$2,500 or more.

(Adapted from 2 O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 31.01 (5th ed. 2000); cf. *United States v. Ugbaja*, 1997WL559982 at \*1 (4th Cir. 1997) (unpublished) (finding no requirement that a district court instruct the jury on the elements of the substantive offenses which are the objects of a charged conspiracy); 17 U.S.C. § 506(a)(1)(A) and 18 U.S.C. § 2319(b)(1))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 7

Acts and Declarations of Co-Conspirators

Evidence has been received in this case regarding co-conspirators of the defendant that have done or said things during the existence or life of the alleged conspiracy in order to further or advance its goal.

Such acts and statements of these other individuals may be considered by you in determining whether or not the government has proven the charge in Count One of the indictment against the defendant.

Since these acts may have been performed and these statements may have been made outside the presence of the defendant and even done or said without the defendant's knowledge, these acts or statements should be examined with particular care by you before considering them against the defendant who did not do the particular act or make the particular statement.



GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 8

"Overt Act"—Defined

In order to sustain its burden of proof under Count One of the indictment, the government must prove beyond a reasonable doubt that one of the members of the alleged conspiracy or agreement knowingly performed at least one overt act and that this overt act was performed during the existence or life of the conspiracy and was done to somehow further the goal of the conspiracy or agreement.

The term "overt act" means some type of outward, objective action performed by one of the parties to or one of the members of the agreement or conspiracy which evidences that agreement.

Although you must unanimously agree that the same overt act was committed, the government is not required to prove more than one of the overt acts charged.

The overt act may, but for the alleged illegal agreement, appear totally innocent and legal.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 9

Success of Conspiracy Immaterial

The government is not required to prove that the parties to or members of the alleged agreement or conspiracy were successful in achieving any or all of the objects of the agreement or conspiracy.

(2 O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 31.08 (5th ed. 2000); *United States v. Tucker*, 376 F.2d 236, 238 (4th Cir. 2004) ("Proof of a conspiracy does not require that the object of the conspiracy was achieved or could have been achieved, only that the parties agreed to achieve it."))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 10

The Nature of the Offense Charged - Count 2

Count 2 of the indictment charges that from November 2004 through April 2005, within the Western District of Virginia and elsewhere, defendant DANIEL DOVE, did knowingly and willfully, and for the purpose of private financial gain, infringe the copyrights of copyrighted works, by reproduction and distribution during a 180-day period of ten or more copies of one or more copyrighted works which had a retail value of \$2,500 or more.

GOVERNMENT’S PROPOSED JURY INSTRUCTION NO. 11

The Statutes Defining the Offense Charged - Count 2

Section 506(a)(1)(A) of Title 17 of the United States Code states, in part, that “[a]ny person who willfully infringes a copyright ... for purposes of commercial advantage or private financial gain,” has committed criminal copyright infringement.

Section 2319(b)(1) of Title 18 of the United States Code explains that law further. It states it is a felony if someone violates Section 506(a)(1) by committing criminal copyright infringement that:

consists of the reproduction or distribution . . . during any 180-day period, of at least 10 copies ... of 1 or more copyrighted works, which have total retail value of more than \$2,500.

(18 U.S.C. § 2319(b)(1); 17 U.S.C. § 506(a)(1))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 12

The Essential Elements of the Offenses Charged

In order to sustain its burden of proof for the crime of copyright infringement as charged in Count 2 of the indictment, the government must prove the following essential elements, beyond a reasonable doubt, for each of the Counts:

- One:* That a copyright exists;
- Two:* That the defendant infringed the copyright for each copyrighted work by reproducing or distributing copies of the work as charged in Count 2;
- Three:* That the defendant reproduced or distributed at least 10 copies, of more than one of these copyrighted works, within a 180 day period;
- Four:* That the defendant did this willfully;
- Five:* That the total retail value of the copyrighted works was more than \$2,500; and
- Six:* That the defendant infringed the copyrights for the purpose of private financial gain.

(1A O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions*, Section §13.03 (5th ed. 2000); 18 U.S.C. § 2319(b)(1); 17 U.S.C. §506(a)(1); *see also United States v. Larracuenta*, 952 F.2d 672, 673 (2d Cir. 1992) (burden of proof requires government to prove copyright and copying); *United States v. Cross*, 816 F.2d 297, 301 (7<sup>th</sup> Cir. 1987) (burden of proof requires copyright, infringement, willful intent, and purpose of commercial advantage or private financial gain); *United States v. Wise*, 550 F.2d 1180, 1188 (9<sup>th</sup> Cir. 1977) (burden of proof for criminal copyright infringement for predecessor copyright statute))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 13

Existence of a Copyright

To sustain its burden of proof for the crime of copyright infringement as alleged in Count 2, the government must prove the existence of at least one copyrighted work. A copyright exists from the moment an original work is put in fixed form for the first time. The owner of the copyright for each work – usually the person or entity that made it – has the exclusive right to reproduce and distribute that work, or to give others permission to do those things.

(17 U.S.C. § 101 (“A work is ‘created’ when it is fixed in a copy or phonorecord for the first time[.]”); 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”); 17 U.S.C. § 106 (listing exclusive rights of copyright holder, including right to reproduce and distribute); *United States v. Vampire Nation*, 451 F.3d 189, 203 (3rd Cir. 2006)(testimony of anti-piracy specialist of Microsoft - belief that company’s copyrights covered all of the software products at issue - sufficient evidence that jury concluded software was copyrighted); *Comm. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (work is “entitled to copyright protection” from moment work has a “fixed, tangible expression”); *Latin Am. Music Co., Inc. v. Archdiocese of San Juan*, 194 F.Supp.2d 30, 37-38 (D.P.R. 2001)(“Copyright protection begins when an author creates a work by fixing it in a tangible medium of expression.”))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 14

Registration of Copyright

The owner of a copyright is entitled to obtain a Certificate of Registration from the United States Copyright Office for that copyrighted work. This certificate shows that the Copyright Office has confirmed that the work is subject to copyright, and that the legal and formal requirements for a copyright have been met.

The Certificate of Registration is *prima facie* evidence that the work is copyrighted. That means the certificate is enough evidence to show there is a valid copyright for the work, unless it is outweighed by some other evidence presented in the case.

The absence of a Certificate of Registration does not mean that a work is not copyrighted.

(17 U.S.C. § 410(a), (c) (significance of registration; “In any judicial proceeding the certificate of a registration . . . shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate”); *United States v. O’Reilly*, 794 F.2d 613, 614 (11<sup>th</sup> Cir. 1986)(government's introduction of copyright registration certificates for allegedly infringed video games sufficiently proved what was copyrighted))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 15

Infringement of a Copyright

Copyright infringement occurs when someone other than the copyright owner copies or distributes the copyrighted work without authorization. The owner of a copyright has the exclusive right to reproduce and/or distribute the copyrighted work or to authorize others to do the same. In Count 2, the government alleges that the defendant infringed copyrights owned by motion picture and computer software companies by reproducing and distributing numerous copies of copyrighted works for profit.

The government does not need to show that the copies allegedly made or distributed by a defendant are identical to the original works in all respects. It is enough to show that the original works and the copies are at least substantially similar.

You are further instructed that the government can prove infringement through direct and circumstantial evidence, sometimes called indirect evidence.

(17 U.S.C. § 106(1) & (3) (itemizing exclusive rights of copyright holder); 18 U.S.C. § 2319(e)(2) (terms “reproduction” and “distribution” refer to the exclusive rights of copyright owner under §106); *see also United States v. O'Reilly*, 794 F.2d 613, 615 (11<sup>th</sup> Cir. 1986) (infringement may be found where the similarity relates to the matter which constitutes a substantial portion of the copyrighted work); *United States v. Cross*, 816 F.2d 297, 303 (7<sup>th</sup> Cir. 1987) (instructing jury that violation of rights of copyright owner amounts to infringement); *United States v. Taxe*, 540 F.2d 961, 966 (9<sup>th</sup> Cir. 1976) (nature of copyright claimed can be infringed by unauthorized duplication of any copyrightable component part))



GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 16“Retail Value” - Defined

To sustain its burden of proof for the crime alleged in Count 2, the government must prove that the “total retail value” of the infringed copyrighted works was more than \$2,500. The term “retail value” refers to prices assigned to goods for sale at the retail level at the time of reproduction or distribution at issue, representing face or stated value, or prices of goods determined by actual transactions between willing buyers and willing sellers at the retail level — whichever is the greatest. In other words, if the jury is presented with credible evidence that the suggested retail price of a legitimate copyrighted work at the time of the alleged crime is greater than the price being paid by purchasers of infringing copies of that copyrighted work, the jury is instructed to use the suggested retail price, because it is the higher value.

To calculate the total retail value, you may add up the value of all of the items identified in a single count of the indictment.

(On retail value: 2B O'Malley, Grenig & Lee, *Federal Jury Practice & Instructions*, § 59.15 (5th ed. 2000)(“value” - defined); 18 U.S.C. § 2319(b)(1) (requiring at least 10 copies “of one or more copyrighted works, which have a total retail value of more than \$2500”); *United States v. Armstead*, F.3d 2008 WL 1947869 (4th Cir. May 6, 2008); H.R. Rep. No. 102-997 (1992), reprinted in 1992 U.S.C.C.A.N. 3569 at 3574-75 (“House Conference Rpt”) (explaining copyright statute amendments, presenting example referring to retail value of infringed items (computer programs), and defining “retail value” as price “at which the work is sold through normal retail channels”; also discussing items that have been infringed “before a retail value has been established,” i.e., before release in a legitimate retail market, like “motion picture prints distributed only for theatrical release”) 138 Cong. Rec. S.17959 (daily ed. Oct. 8, 1992)(statement of bill sponsor Sen. Hatch)(explaining copyright statute amendments: “[T]he term “retail value” means the suggested retail price of the legitimate copyrighted work at the initial time of its release, and not the market price of the pirate copy. . . . [R]etail value should be determined by looking to the value of copyrighted works in the legitimate retail market, not the thieves’ criminal market.”)); *see also* Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, §§ 15.01[B][1](“retail value” refers to infringed item, citing House and Senate legislative history above))

(On aggregation of value within a single count: 18 U.S.C. § 2319(b)(1)(referring to “total” retail value of items infringed); H. Conf. Rep. at 3574 (18 U.S.C. § 2319(b)(1) “intended to permit aggregation of different works . . . to meet the required number of copies and retail value”); *see also Schaffer v. United States*, 362 U.S. 511, 517-18 (1960)(proper to aggregate value of separate items in single count of indictment to reach threshold amount under National Stolen Property Act))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 17

“Willfully” Defined

To act “willfully” means to act with knowledge that one’s conduct is unlawful and with the intent to do something the law forbids, that is to say, with the purpose to disobey or to disregard the law. In determining whether the Defendant acted wilfully, you may consider evidence of the Defendant’s words, acts, or omissions, along with all the other evidence in the case, including direct and circumstantial evidence.

Conduct is not “willful” if due to negligence, inadvertence, or mistake. Moreover, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement.

(17 U.S.C. § 506(a); *United States v. Cross*, 816 F.2d 297, 300-01 (7th Cir. 1987)(approving without comment a jury instruction that an act is willful when it is committed “voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law, and not by mistake, accident or in good faith.”); *United States v. Whetzel*, 589 F.2d 707 (D.C. Cir. 1978), *abrogated on other grounds by Dowling v. United States*, 473 U.S. 207 (1985); *United States v. Heilman*, 614 F.2d 1133 (7th Cir. 1980))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 18

Commercial Advantage or Private Financial Gain

To sustain its burden of proof for the crime alleged in Count 2, the government must prove that the defendant engaged in copyright infringement for the purpose of private financial gain. The government, however, need not prove that a defendant actually received a profit from the infringement. The government need only establish that a defendant acted with the expectation of receiving anything of value, which can include other copyrighted works.

(17 U.S.C. § 101; 17 U.S.C. § 506(a)(1)(A); 18 U.S.C. § 2319(b)(1), (d)(2), (f)(3); *United States v. Steele*, 785 F.2d 743, 749 (9<sup>th</sup> Cir. 1986) (the government must prove that the copyright infringement was for purposes of commercial advantage or private gain); *United States v. Shabazz*, 724 F.2d 1536, 1540 (11<sup>th</sup> Cir. 1984) (not necessary that defendant actually make a profit, but only that defendant engaged in business "to hopefully or possibly make a profit."))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 19

Aiding and Abetting

A person may violate the law even though he or she does not personally do each and every act constituting the offense if that person “aided and abetted” the commission of the offense. Section 2(a) of Title 18 of the United States Code provides:

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Before a defendant may be held responsible for aiding and abetting others in the commission of a crime, the government must prove beyond a reasonable doubt that the defendant knowingly and deliberately associated himself in some way with the crime charged and participated in it with the intent to commit the crime.

In order to be found guilty of aiding and abetting the commission of the crime of criminal copyright infringement charged in Count 2 of the Indictment, the government must prove beyond a reasonable doubt that Defendant Daniel Dove:

- One:* knew that the crime charged was to be committed or was being committed,
- Two:* knowingly did some act for the purpose of aiding the commission of that crime, and
- Three:* acted with the intention of causing the crime charged to be committed.

The government need not prove that the defendant, Daniel Dove, participated at every stage of an illegal venture, only that he participated at some stage accompanied by knowledge of the result and intent to bring about that result.

Before Defendant Daniel Dove may be found guilty as an aider or an abettor to the crime of criminal copyright infringement, the government must also prove, beyond a reasonable doubt,

that some person or persons committed each of the essential elements of the offense charged as detailed for you in Instruction No. [12].

Merely being present at the scene of the crime or merely knowing that a crime is being committed or is about to be committed is not sufficient conduct for the jury to find that a defendant aided and abetted the commission of that crime.

The government must prove that Defendant Daniel Dove knowingly and deliberately associated himself with the crime in some way as a participant – someone who wanted the crime to be committed – not as a mere spectator.

(2 O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions*, § 18.01 (5th ed. 2008); *United States v. Arrington*, 719 F.2d 701, 705 (4th Cir.1983) (“Participation at every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result.”))

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 20

Charts and Summaries

Charts or summaries have been prepared by the government, have been admitted into evidence, and have been shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, or other documents which are also in evidence in the case. You may consider the charts and summaries as you would any other evidence admitted during the trial and give them such weight or importance, if any, as you feel they deserve.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of June, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF, which will then send a notification of such filing (NEF) to the following:

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