

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	CASE. NO 1:07CR195
)	
Plaintiff,)	JUDGE CHRISTOPHER BOYKO
v.)	
)	
SCOTT HARVANEK,)	UNITED STATES OF AMERICA’S
)	SENTENCING MEMORANDUM
Defendant.)	
)	

COMES NOW, the United States of America, by its counsel, William J. Edwards, Acting United States Attorney, Robert W. Kern, Assistant United States Attorney, and Tyler G. Newby, Trial Attorney, Computer Crime and Intellectual Property Section, United States Department of Justice, in accord with the local rules, 18 U.S.C. § 3553(a), and the United States Sentencing Commission, *Guidelines Manual*, §2B5.3 (Nov. 2004), files this Memorandum of the United States with Respect to the Sentencing Factors in the case of SCOTT HARVANEK (1:07CR195).

The government submits that the Plea Agreement, as reflected in Paragraph 61 of the Presentence Investigation Report, properly calculates the Defendant’s advisory Sentencing Guidelines range as 10-16 months. In addition, as noticed in the government’s July 21, 2008 Motion for Downward Departure Pursuant to U.S.S.G. § 5K1.1, the government has moved for a

three-level downward departure in recognition of Defendant's substantial assistance in the government's investigation and successful prosecution of a high-ranking co-conspirator. The government respectfully suggests that a sentence within the range of 4 to 10 months would be appropriate in light of the sentencing considerations set forth in 18 U.S.C. § 3553(a).

I. BACKGROUND

The Presentence Investigation Report and the stipulated factual basis section of the parties' plea agreement correctly summarizes the background of Defendant's participation in a criminal conspiracy to commit copyright infringement using the Internet. From September 2004 to May 25, 2005, Defendant was a member of Elite Torrents ("ET"), an online piracy organization which used BitTorrent peer-to-peer technology to copy and distribute pirated versions of copyrighted movies, video games, and software among members. Elite Torrents was a highly hierarchical organization. Within that hierarchy, Defendant served as one of several "Uploaders", who were responsible for initially distributing newly acquired pirated content to other members of the group. Defendant would receive newly pirated movies from Elite Torrents' "Uploader Administrator" which he would then upload to other Elite Torrents members using a very fast Internet connection.

During the course of the Government's investigation, it acquired the computer database that tracked all of Elite Torrents' members' uploads and downloads, as well as other data. At the time the Defendant pleaded guilty, a preliminary analysis of these database records showed for any six month period between September 2004 and May 25, 2005, Defendant participated in distributing and copying pirated copyrighted movies, software programs, computer games and music with a total retail value in excess of \$10,000, but less than \$30,000. While there was no

evidence that Defendant sold any of the content he downloaded, Defendant acknowledged that he participated in the group so that he could acquire free copies of movies, software and video games.

II. APPLICABLE LEGAL STANDARDS

Any sentencing determination should begin with the calculation of a defendant's total offense level under the Sentencing Guidelines. Although the Supreme Court has declared the Guidelines to be advisory, it has also stated that "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." Gall v. United States, 128 S. Ct. 586, 596 (2007). The Sixth Circuit adheres to this view, holding that sentencing determinations should begin with a calculation of the appropriate Guidelines range. The Guidelines then serve as an element to be considered along with the other sentencing factors enumerated in 18 U.S.C. § 3553(a). See United States v. Collington, 461 F.3d 805, 807 (6th Cir. 2006).

The Sentencing Guidelines, therefore, remain an indispensable resource for assuring appropriate and uniform punishment for federal criminal offenses. While, to be sure, "[i]n accord with 18 U.S.C. § 3553(a), the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence," Kimbrough v. United States, 128 S. Ct. 558, 574 (2007), it remains the case that "the Commission fills an important institutional role: It has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise,'" Id. at 574 (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

In addition to the Guidelines, this Court must also consider all of the sentencing considerations set forth in Section 3553(a). Those factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant; (4) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner; (5) the guidelines and policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a).

III. SENTENCING GUIDELINES CALCULATION

In the Plea Agreement, the parties reached stipulations of fact that resulted in an Adjusted Offense Level of 12: Sentencing Guideline § 2B5.3(a) provides for an offense level of 8 for criminal copyright infringement; § 2B5.3(b)(1)(B) and § 2B1.1 provide a four-level upward adjustment for an offense with an infringement amount greater than \$10,000, but less than \$30,000; § 2B5.3(b)(3) provides an additional two-level upward adjustment for an offense involving the uploading of infringed items; and § 3E1.1 provides for a two-level downward adjustment for acceptance of responsibility. The Presentence Report further calculates that the Defendant has a Criminal History Category of I. Accordingly, before considering the Government's § 5k1.1 motion, Defendant advisory Guidelines range should be 10-16 months.

The Government disagrees with the Presentence Investigation Report on one important factor – the valuation of loss attributable to Defendant. As set forth in paragraphs 15-18 of the PSR, the Probation Officer recommends that Defendant be held accountable for a loss each time a different Elite Torrents member downloaded one of the movies Defendant originally uploaded. For example, the PSR explains that because the tracker database showed 3,200 Elite Torrents members downloaded the pirated movie *The Jacket*, which Defendant initially uploaded, the loss from those 3,200 downloads should be attributable to Defendant. Using a retail value of \$20 for a legitimate DVD, the PSR thus calculates a loss of \$64,000 attributable to Defendant for that movie. Using that loss calculation method for each movie Defendant uploaded, the Probation Officer recommends a total loss amount approximately 20 times higher than that contemplated by the government at the time Defendant entered his guilty plea.

The government submits that the Probation Officer's calculation of loss does not correctly consider Defendant's role in the conspiracy or the state of the government's investigation at the time of plea negotiations. At that time, the government's estimated loss amount included: (1) the total combined value of all pirated works originally uploaded to the ET network by the U.S. targets identified by the government as Uploaders and Administrators in the group; and (2) the total value of Defendant's own downloads. The number of pirated works uploaded was limited to the pirated works uploaded by the domestic targets of the government's investigation for whom the government had seized evidence. Although the government had copies of the Elite Torrents database at the time of plea negotiations, the government had not yet conducted a detailed analysis of that electronic evidence to determine the accuracy of all of its records.

In addition, at the time of plea negotiations, the government accounted for Defendant's role in the Elite Torrents organization. While Uploaders were certainly important to the purpose of the conspiracy, they did not have any managerial oversight or control over the activities of other members or the group, as a whole, or even other Uploaders. That type of control and responsibility was reserved for administrators, who could admit, promote and ban members and otherwise affect their privileges within the group. It is the government's position that the higher ranking administrators are the ones who should be held responsible for all of the downloads and uploads of pirated content within the group.

The particular dollar value of each item was determined as follows: For computer games, movies and music the government used an average retail value which is \$40 (games); \$20 (movies) and \$.79 (sound recordings). The software value, which varies substantially in price, was determined by the amount the product retails for online (either by using the copyright holder's web site (e.g. McAfee's web site for its products) or from commonly used web sites including but not limited to Amazon.com). Following the method described above, total value of infringing items uploaded by the nine targeted co-conspirators involved in the Elite Torrents organization is approximately \$16,500. In addition, Defendant downloaded pirated works with a total value of \$5,047. Accordingly, the government estimated that Defendant was responsible for copying or participating in a conspiracy to distribute pirated works with retail values totaling approximately \$21,550.

Thus, the government submits that, considering the status of the government's investigation at the time of plea negotiation, it is appropriate to value the loss attributable to Defendant conservatively at a range between \$10,000 and \$30,000.

IV. DEFENDANT'S SUBSTANTIAL ASSISTANCE

Defendant cooperated extensively in the Government's investigation and successful prosecution of a top administrator in the Elite Torrents organization in the Western District of Virginia in *United States v. Daniel Dove*. Defendant testified truthfully both before the grand jury and at a three-day trial in June 2008, after which, the jury returned a guilty verdict on all counts. Defendant's testimony at trial was important in explaining how the Elite Torrents group operated and Dove's roles as the manager of all Uploaders in the group.

Prior to testifying, Defendant assisted the government by identifying documents and e-mail communications showing Dove's payment and operation of a high-speed computer resold by Defendant's company. Those records provided both physical address information and Internet Protocol addresses that corroborated other evidence confirming Dove's identity. These records, and other information provided by Defendant, also corroborated evidence that Dove used the server he leased in furtherance of his administrative role in the group.

On all occasions, Defendant was cooperative when assisting the government. Defendant twice traveled from his home in Tucson, Arizona to southwestern Virginia for grand jury and trial. Defendant made himself available to meet with the government, and was always professional in his dealings with the government. All of the information provided by the Defendant on multiple occasions, including during his consensual interview when a search was executed at his home, two separate proffers, grand jury testimony and trial testimony, was corroborated by other witnesses and records gathered by law enforcement.

In light of the above, the Government moves this court pursuant to Guidelines § 5K1.1 for a downward departure of three levels to a total offense level of 9.

V. CONCLUSION

For the reasons set forth above, the United States requests that the Court impose a sentence within the advisory Sentencing Guidelines of 4-10 months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2008, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

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