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# THE NO ELECTRONIC THEFT ACT: THE MUSIC INDUSTRY'S NEW INSTRUMENT IN THE FIGHT AGAINST INTERNET PIRACY

Karen J. Bernstein\*

## I. INTRODUCTION\*\*

Jeffrey Gerard Levy probably did not know he was breaking the law when he allegedly uploaded over 1,000 pirated MP3 files on the University of Oregon website.<sup>1</sup> Indeed, he must have been quite sur-

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\*\* Since this article was written, President Clinton signed H.R. 3456, Pub. L. No. 106-160 on December 17, 1999, which ordered the Sentencing Commission to propose emergency guidelines under the NET Act. *See* Pub. L. No. 106-160 (Dec. 17, 1999). Accordingly, the Commission proposed several options, including a “decrease for offenses that are NOT COMMITTED FOR THE PURPOSE OF COMMERCIAL OR PRIVATE FINANCIAL GAIN.” *See Copyrights: Sentencing Guidelines are Proposed for ‘No Electronic Theft Act’ Offenses*, BNA PATENT, TRADEMARK & COPYRIGHT LAW DAILY, Jan. 14, 2000, available in WESTLAW 1/14/2000 PTD d2 (emphasis added).

The efficacy of the Sentencing Commission’s proposal is not yet known, but if this particular option is accepted, it would essentially decriminalize non-profit Internet piracy. This change in the Sentencing Guidelines would be in direct contravention of the NET Act’s legislative purpose to circumvent the unfortunate results in the *LaMacchia* decision. (*See infra* for a discussion of *LaMacchia*). Until the Sentencing Commission issues emergency guidelines under the NET Act, however, the suggestions in this article are still valid.

<sup>1</sup> *See* Jennifer Sullivan, *MP3 Pirate Gets Probation*, wired.com (Nov. 24,

prised to discover that he had become the first person ever prosecuted under the No Electronic Theft Act (NET Act), which makes it a crime to upload electronically more than ten digital copies of phonorecords regardless of profit motive.<sup>2</sup> Mr. Levy could have been sentenced to a maximum of three years in prison and fined \$250,000, but he signed a plea agreement and was sentenced to two years probation.<sup>3</sup>

Why did it take federal prosecutors almost two years after the NET Act's passage to gain a conviction that failed to result in a prison sentence? At least the government, recognizing that Internet piracy is an important area of criminal law, has demonstrated an unprecedented use of an Internet-related criminal copyright statute directed at first-time offenders. In addition to government action, the music industry<sup>4</sup> can foster these new developments by funding more prosecution training programs, lobbying the new United States Sentencing Commission (Commission) to raise the minimum sentence under the NET Act, and educating the public about Internet piracy.

This Note argues that money is not enough to deter Internet pirates who do not derive private financial benefit or commercial gain (the so-called "non-profit" Internet pirate). Accordingly, the only way to fend off the non-profit Internet pirate is by increasing prison sentences for Internet pirates through the NET Act. Moreover, the music industry can continue its efforts to educate the public about Internet piracy through electronic media and by funding special projects.

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1999) <<http://www.wired.com/news/politics/0,1283,32276,00.html?tw-wn199991126>> [hereinafter "Sullivan article"].

<sup>2</sup> See Letter of Plea Agreement from Sean B. Hoar, *Assistant United States Attorney for the District of Oregon*, to Shaun S. McCrea (*Mr. Levy's attorney*) and Jeffrey Gerard Levy, *Defendant* (May 27, 1999) (on file with the Clerk's Office in the *United States District Court for the District of Oregon*). See also Sullivan article, *supra* note 1.

<sup>3</sup> *Intellectual Property Rights, House International Relations Subcommittee on International Economic Policy and Trade*, 105<sup>th</sup> Cong. (Oct. 13, 1999) (statement of Jeremy Salesin, General Counsel and Director of Business Affairs for LucasArts Entertainment Company LLC), available in 1999 WL 27595602 [hereinafter "Salesin testimony"].

<sup>4</sup> For convenience, the author refers to the "music industry" as an amalgam of recording artists, authors, publishers, record labels, distributors, music associations, and the like.

This Note consists of five parts. Part I analyzes public misperceptions of Internet piracy. Part II provides an historical overview of criminal copyright law, as well as a brief legislative history of the NET Act. Part III discusses the Sentencing Guidelines under the NET Act, as well as Congress' directive to the Sentencing Commission to provide "sufficiently stringent" guidelines. This section also presents a Team Report written by the Sentencing Commission Development Policy Team, which recommended enhancements and increases to the base offense level under the NET Act. Part IV assesses efforts that government, educators, and the music industry have made to educate the public and enforce laws against Internet piracy. Part V concludes the Note by suggesting ways for the music industry to take a more proactive role in deterring would-be Internet pirates.

## II. BACKGROUND

Unknown to most people, Internet piracy has an enormous impact on "the incentive to create new and interesting properties and technologies."<sup>5</sup> It also places a significant financial strain on the music business. One music executive estimated that "piracy costs the American music industry nearly a million dollars a day . . . and well over \$2 billion a year worldwide."<sup>6</sup> Indeed, people like Jeffrey Levy fit the typical description of a not-for-profit Internet pirate, "the consummate 'hacker' or 'warez' aficionado, who copies and distributes computer software simply for self-aggrandizement—the reputation, the thrill, the 'fun' of having the latest programs or the biggest 'library' of 'warez' titles."<sup>7</sup>

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<sup>5</sup> See Salesin testimony, *supra* note 3.

<sup>6</sup> *No Electronic Theft Act: Hearings on H. 2265 Before the Subcommittee on Courts and Intellectual Property, House Committee on the Judiciary* (Sept. 11, 1997) (Statement of Cary H. Sherman, Sen. Exec. V.P. & Gen'l. Counsel, Recording Industry Association of America), available in 1997 WL 566007.

<sup>7</sup> *No Electronic Theft Act: Hearings on H. 2265 Before the Subcommittee on Courts and Intellectual Property, House Committee on the Judiciary*, 104<sup>th</sup> Cong. (Sept. 11, 1997) (statement of Sandra A. Sellers, V.P. for Intellectual Property Education and Enforcement, Software Publishers Association), available in 1997 WL 566030. Warez is "software that has been stripped of its copy-protection and made available on the Internet for downloading." See *Warez Chatters Busted: Piracy*, wired.com (visited Nov. 28, 1999).

### III. HISTORICAL OVERVIEW OF CRIMINAL COPYRIGHT LAWS AND THE DEVELOPMENT OF THE NET ACT

#### A. *Criminal Copyright Laws*

The 1897 Copyright Act was the first criminal copyright statute. It distinguished criminal copyright infringement as one “for purposes of commercial gain” for dramatic and musical compositions.<sup>8</sup> The 1897 Act also defined the mens rea of criminal copyright infringement as “willful” or “for profit,” a standard which remained in place until the 1976 Copyright Act.<sup>9</sup> Sound recordings were not made part of the Copyright Act until 1971.<sup>10</sup> Additionally, Congress increased the penalties for pirating in 1974.<sup>11</sup>

The 1976 Copyright Act loosened the mens rea requirement for criminal copyright infringement by defining infringement as “willfully and for purposes of commercial advantage or private financial gain”<sup>12</sup> However, criminal copyright infringement was still considered a misdemeanor offense, except in the case of repeat offenders who could face up to two years in prison and a fine of \$50,000.<sup>13</sup> Only in 1980 did Congress amend the 1976 Copyright Act to include computer programs.<sup>14</sup>

In 1982, prompted by ardent lobbyists from the motion picture industry,<sup>15</sup> Congress elevated certain types of criminal copyright infringement to a felony for first-time offenses, and the penalties were

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<<http://www.wired.com/news/mp3/0,1285,32616,00.html>>.

<sup>8</sup> Act of Jan. 6, 1897, ch. 4, 29 Stat. 481-482 (1897).

<sup>9</sup> *Id.*; see also 1976 Copyright Act, 17 U.S.C. §101, *et seq.* (1976).

<sup>10</sup> See Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

<sup>11</sup> See H.R. Rep. No. 93-1581 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6849.

<sup>12</sup> 17 U.S.C. § 506(a) (1976).

<sup>13</sup> See *id.*

<sup>14</sup> See Computer Software Copyright Act of 1980, Pub. L. No. 96-517, 94 Stat. 3028 (codified as amended at 17 U.S.C. §117).

<sup>15</sup> See Mary Jane Saunders, *Criminal Copyright Infringement and the Copyright Felony Act*, 71 DENV. U. L. REV. 671, 675 (1994).

transferred to a new statute, 18 U.S.C., Section 2319.<sup>16</sup> The mens rea element requiring proof of "commercial advantage and private financial gain" remained unchanged.<sup>17</sup> Congress also increased the maximum penalty for infringing reproduction and distribution of sound recordings and motion pictures from \$10,000 to \$250,000, but it retained the maximum 2-year prison sentence if the infringer reproduced or distributed more than one hundred but less than one thousand sound recordings or copies over a six-month period of time.<sup>18</sup> Interestingly, the Senate Report, which was a predecessor to the 1982 Act, indicated that "prosecutors are reluctant to prosecute, and courts impose sentences which are not commensurate with the crime involved."<sup>19</sup> Accordingly, the Senate Report surmised that since "a first offense is only a misdemeanor," U.S. Attorneys prefer to prosecute felonies instead.<sup>20</sup>

The Sentencing Reform Act of 1984<sup>21</sup> retained the maximum fines for intellectual property crimes at up to \$250,000, but it lowered the requirement of the number of infringing copies to "one or more sound recordings" or "more than seven but less than sixty-five copies in one or more motion pictures."<sup>22</sup> It raised the maximum prison sentence to five years if at least one thousand sound recordings or motion pictures were infringed.<sup>23</sup> The Act also reigned in judicial discretion by establishing sentencing guideline ranges.<sup>24</sup>

In 1992, Congress passed the Copyright Felony Act,<sup>25</sup> which amended the penalties for criminal copyright infringement, so that

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<sup>16</sup> See Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 (codified at 18 U.S.C. § 2319).

<sup>17</sup> 17 U.S.C. § 506(a) (1982).

<sup>18</sup> See *id.*

<sup>19</sup> S. Rep. No. 97-274, at 6 (1982), reprinted in 1982 U.S.C.C.A.N. 127, 132.

<sup>20</sup> *Id.*

<sup>21</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3571).

<sup>22</sup> See *id.*

<sup>23</sup> See 18 U.S.C. § 2319(b)(1), incorporated by reference in 17 U.S.C. § 506(a), as amended by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

<sup>24</sup> See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

<sup>25</sup> Copyright Felony Act, Pub. L. No. 102-561, 106 Stat. 4233 (1992).

they applied equally to sound recordings, audiovisual works, and computer software.<sup>26</sup> The 1992 Amendment increased the maximum prison sentence to five years if the reproduction or distribution during a six-month period was of at least 10 copies of sound recordings of one or more copyright works with a retail value of more than \$2,500.<sup>27</sup> For second offenses, the maximum prison sentence was increased to 10 years.<sup>28</sup> Congress also explicitly provided for an "innocent infringer" exception.<sup>29</sup>

#### B. *United States v. LaMacchia: The Net Act is Born*

*United States v. LaMacchia*<sup>30</sup> involved a Massachusetts Institute of Technology student who accessed the MIT website and encouraged users (with a password) to upload Excel 5.0, WordPerfect 6.0, and computer games like Sim City 2000 for free download.<sup>31</sup> The infringement "result[ed] in an estimated loss of revenue to the copyright holders of over one million dollars over a six-week period."<sup>32</sup> The defendant was charged under the federal wire fraud statute.<sup>33</sup>

The *LaMacchia* case centered around the wire fraud statute's definition of "physical taking of the goods," a definition interpreted by an earlier case, *Dowling v. United States*.<sup>34</sup> *Dowling* involved a defendant whose conviction was reversed by the Supreme Court for "conspiracy to transport stolen goods in interstate commerce."<sup>35</sup> Specifically,

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<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See* H.R. REP. NO. 102-997, at 6 (1992). Congress noted that the six-month period was retained from the former statute, because "it excludes from felony prosecution children making copies for friends as well as other incidental copying of copyrighted works having a relatively low retail value." *Id.*

<sup>30</sup> 871 F. Supp. 535 (D. Mass. 1994).

<sup>31</sup> *Id.* at 536.

<sup>32</sup> *See* 141 CONG. REC. S1145-05, S11453 (daily ed. Aug. 4, 1995) (statement of Sen. Leahy).

<sup>33</sup> *See* 871 F. Supp. At 535-36; *see also* 18 U.S.C. § 1343 (West Supp. 1999).

<sup>34</sup> *See* 473 U.S. 207 (1985).

<sup>35</sup> *Id.* at 208.

Dowling mailed bootleg<sup>36</sup> Elvis Presley recordings from Los Angeles to Baltimore in contravention of federal interstate commerce laws.<sup>37</sup> However, the *Dowling* court held that the bootleg records were not stolen property, because the defendant did not “assume physical control over the copyright.”<sup>38</sup> Based on this rationale, the *LaMacchia* Court granted the defendant’s motion to dismiss.<sup>39</sup>

Significantly, however, in dicta, the District Court remarked that the government failed to prove its case under the federal wire fraud statute, and it should have prosecuted Mr. LaMacchia under “Section 506 of the Act, and other incidental statutes that explicitly refer to copyright and copyrighted works.”<sup>40</sup> Furthermore, the *LaMacchia* court concluded that “[c]riminal as well as civil penalties should probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer.”<sup>41</sup> Finally, the court prophetically announced: “One can envision ways that the copyright law could be modified to permit such prosecution. But ‘[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment.’”<sup>42</sup>

### C. Congressional Testimony on the NET Act’s Passage

Consequently, the *LaMacchia* decision prompted action by the President’s Council on the National Information Infrastructure Task Force (“IITF”),<sup>43</sup> which presented to both houses of Congress a pre-

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<sup>36</sup> “A ‘bootleg’ phonorecord is one which contains an unauthorized copy of a commercially unreleased performance.” *Id.* at 211, n.2.

<sup>37</sup> *See id.* at 209-10, n.1.

<sup>38</sup> *Id.* at 217. Dowling was acquitted, because his actions did not involve a physical taking of records, cassettes, or CDs. *See id.* at 207. Instead, he recorded live music on records and sold them. *See id.* Interestingly, the Wire Fraud statute, for which Dowling was prosecuted and acquitted, has since merged with the Fraud Guideline. Compare U.S.S.G. § 2B5.4 (deleted 1993) with U.S.S.G. § 2F1.1.

<sup>39</sup> 871 F. Supp. at 545.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (emphasis added).

<sup>42</sup> *Id.* (quoting *Dowling*, 473 U.S. at 214).

<sup>43</sup> “The IITF was established by President Clinton to articulate and implement the Administration’s vision for the NII and to develop comprehensive telecommunications and information policies and programs that will promote the devel-



liminary draft (the "Green Paper") by its Working Group on Intellectual Property Rights in July 1994.<sup>44</sup> This served as the progenitor for the Criminal Copyright Improvement Act of 1995 (the "1995 Improvement Act") introduced by Senators Leahy and Feingold.<sup>45</sup> A Final Report (the "White Paper") issued in September 1995 and set the framework for the Senate version of the NET Act.<sup>46</sup> This was known as the Criminal Copyright Improvement Act of 1997 (the "1997 Improvement Act").<sup>47</sup>

The difference between the 1995 and 1997 Improvement Acts was that the 1995 version did not "contain a numerical threshold or requisite time period during which the infringement must occur."<sup>48</sup> The 1997 version required "at least 10 or more copies of the infringed work be made . . . ."<sup>49</sup> Subsequently, the House debated its version, House Bill 2265,<sup>50</sup> which was co-sponsored by Reps. Frank, Goodlatte, Cannon, and Coble. The proposed legislation redefined the willfulness aspect of prior criminal copyright statutes as "the acquisition of 'anything of value, including the receipt of other copyrighted

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opment of the NII and best meet the country's needs." See *Intellectual Property And The National Information Infrastructure: The Report Of The Working Group On Intellectual Property Rights: Executive Summary* (visited Jan. 9, 2000) <<http://www.uspto.gov/web/offices/come/doc/ipnii/execsum.html>> [hereinafter "The Report of the Working Group"]. "The National Information Infrastructure or 'NII' is a fancy name for what is popularly known as the 'information highway.'" 141 CONG. REC. S14,547-05, S14,550 (daily ed. Sept. 28, 1995) (statement of Sen. Hatch).

<sup>44</sup> See IITF COMMITTEE REPORT, Nov. 10, 1994 (visited Jan. 9, 2000) <[http://www.iitf.nist.gov/documents/activity/1112\\_iitf\\_report.html](http://www.iitf.nist.gov/documents/activity/1112_iitf_report.html)>. "The Working Group on Intellectual Property Rights was established within the IITF to examine the intellectual property implications of the NII and make recommendations on any appropriate changes to U.S. Intellectual Property law and policy." See *The Report of the Working Group*, *supra* note 43.

<sup>45</sup> See 141 CONG. REC. S11,451-05, S11,452 (daily ed. Aug. 4, 1995).

<sup>46</sup> See 143 CONG. REC. S7768-01, S7772 (daily ed. July 21, 1997) (statement of Sen. Leahy).

<sup>47</sup> See 143 CONG. REC. S7768-01, S7772 (daily ed. July 21, 1997).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See H.R. 2265, 105<sup>th</sup> Cong. (1997).

works.”<sup>51</sup> Congressman Coble emphasized that the amendment eliminated the Government’s burden of proving the “defendant’s state of mind”; thus, it is not “required to prove that the defendant was familiar with the criminal copyright statute or violated it intentionally.”<sup>52</sup> Passed by the House on November 4, 1997, H.R. 2265 “built upon, and closely resembled, Senate Bill 1044” (the “Senate version”); however, the Senate version of the NET Act had a slightly higher monetary threshold for felony convictions.<sup>53</sup>

On December 16, 1997, a compromise bill, the No Electronic Theft Act (NET Act), was submitted by the Subcommittee on the Courts and Intellectual Property,<sup>54</sup> and President Clinton signed it into law.<sup>55</sup> Accordingly, Congress amended 17 U.S.C. Section 506 and 18 U.S.C. Section 2319 to specifically address digital transmission and to sanction infringers who do not personally gain from copying software, audio, or video.<sup>56</sup> Most importantly, Congress enacted the NET Act (1) to “eliminat[e] the government’s burden to prove” “‘commercial motive’ in criminal prosecutions,”<sup>57</sup> and (2) to “criminalize LaMachchia-like behavior; that is, ‘computerized’ misappropriation in which the infringer does not realize a direct financial benefit but whose actions nonetheless substantially damage the market for copyrighted

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<sup>51</sup> See 143 CONG. REC. H9883-01, H9884, (daily ed. Nov. 4, 1997) (statement of Rep. Coble), available in 1997 WL 683378.

<sup>52</sup> *Id.*

<sup>53</sup> See 143 CONG. REC. S7768-01, S7773 (daily ed. July 21, 1997) (statement of Sen. Leahy). The Senate Version required 10 or more copies with a total retail value of \$5,000 or more. See *id.* The House Version required 10 or more copies, but deemed the total retail value of \$2,500 or more. See H.R. 2265. The Senate Version was higher, because it was to “insure[] that merely casual or careless conduct resulting in distribution of only a few infringing copies would not be subject to criminal prosecution.” See 141 CONG. REC. S11451-05, S11453 (daily ed. Aug. 4, 1995) (statement of Sen. Leahy).

<sup>54</sup> See No Electronic Theft NET Act, Pub. L. No. 105-147, 111 Stat. 2678-80 (1997) (codified as amended at 17 U.S.C. § 506, 18 U.S.C. § 2319, 28 U.S.C. § 994).

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See Ting Ting Wu, *The New Criminal Copyright Sanctions: A Toothless Tiger?*, 39 IDEA 527, 531 (1999).

works.”<sup>58</sup>

The willfulness requirement has continued to remain in a slightly watered-down version.<sup>59</sup> Several definitions have been proffered during Senate debate. For instance, Senator Hatch defined willfulness as “the intent to violate a known legal duty”<sup>60</sup> while Senator Leahy proclaimed willfulness as “consist[ing] of evidence of more than [*sic*] the mere intentional reproduction . . . of copyrighted works.”<sup>61</sup> As a result, some contend that the NET Act has not cured the problem of prosecuting criminal copyright infringement, even though it alleviated the level of proof regarding commercial motive, “because proof of willfulness is a statutory impediment to the prosecution of copyright infringement.”<sup>62</sup>

#### IV. DISCUSSION

##### A. Congress' Directive to the Sentencing Commission

When it passed the NET Act, Congress explicitly directed the sentencing commission to (1) “ensure that the applicable guideline range for a defendant convicted of a crime against intellectual property . . . [be] *sufficiently stringent* to deter such a crime . . .” and (2) to “provide for consideration of the retail value and quantity of the items” to be calculated for loss.<sup>63</sup>

Amending the Sentencing Guidelines (“Guidelines”) is solely within the province of the Commission.<sup>64</sup> The Commission, however,

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<sup>58</sup> H.R. REP. No. 105-339, at 19 (1997), available in 1997 WL 664424.

<sup>59</sup> See Wu, *supra* note 57.

<sup>60</sup> See 143 CONG. REC. S12689-01 (daily ed. Nov. 13, 1997) (statement of Sen. Hatch). Senator Hatch cited several cases as authority: *United States v. Bishop*, 412 U.S. 346 (1973), *United States v. Cheek*, 498 U.S. 192 (1991), and *Ratzlaf v. United States*, 510 U.S. 135 (1994).

<sup>61</sup> See 143 CONG. REC. S12689-01, S12691 (daily ed. Nov. 13, 1997) (quoting Letter from Andrew Fois, Assistant Attorney General, *Department of Justice*, to Sen. Orrin Hatch, Chairman, Committee on the Judiciary, *United States Senate* (Nov. 7, 1997).

<sup>62</sup> See Wu, *supra* note 57, at 531.

<sup>63</sup> See Pub. L. 105-147, § 2(g), 111 Stat. 2678 (1997) (codified as amended at 28 U.S.C. § 994 (1997)) (emphasis added).

<sup>64</sup> See 28 U.S.C. § 991 (West. Supp. 1999).

has been “without any voting members since October 1998.”<sup>65</sup> A temporary Commission was appointed in the interim, and it recently issued its Development Policy Team Report (“Team Report”) to Congress, which recommended reformulating calculation of loss under the NET Act.<sup>66</sup> The Report also called for several adjustments to the Guidelines under the NET Act, but Congress cannot promulgate these changes until a permanent Commission is officially in place. In the meantime, however, Congress adopted the Report’s recommendations regarding calculation of loss, and it passed the Copyright Damages Improvement Act of 1999,<sup>67</sup> which increased the available statutory damages by fifty percent.<sup>68</sup> However, assessing damages remains difficult since “no simple formula exists for accurately calculating the harm caused by the range of different types of intellectual property offenses . . . .”<sup>69</sup>

### B. *The Sentencing Guideline Table*

Currently, courts consult the Sentencing Guideline Table (the “Table”) to determine a defendant’s term of imprisonment.<sup>70</sup> The Table consists of forty-three offense severity levels that “form[ ] the vertical axis of the Sentencing Table.”<sup>71</sup> There are six criminal history catego-

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<sup>65</sup> *No Electronic Theft Act: Hearings on Internet Piracy Before the Subcommittee on the Courts and Intellectual Property, House Committee on the Judiciary, 106<sup>th</sup> Cong.* (May 12, 1999) (statement of Timothy McGrath, Interim Staff Director of the United States Sentencing Commission), available in 1999 WL 300789 [hereinafter “McGrath testimony”].

<sup>66</sup> See U.S. SENTENCING COMM’N: NO ELECTRONIC THEFT ACT POLICY DEVELOPMENT TEAM REPORT 1 (visited Sept. 15, 1999) <<http://www.ussc.gov/pdf/netbrf99.pdf>> [hereinafter “Team Report”].

<sup>67</sup> See 17 U.S.C. § 504(c) (West, Supp. 1999). Specifically, the amendment raised the minimum statutory damages from \$500 to \$750 and the maximum statutory damages from \$20,000 to \$30,000. In addition, it raised the statutory damages for willful infringements from \$100,000 to \$150,000. See *id.*

<sup>68</sup> See *id.*

<sup>69</sup> See McGrath testimony, *supra* note 65.

<sup>70</sup> See *U.S. Sentencing Comm’n., An Overview Of The United States Sentencing Commission* (visited Oct. 25, 1999) <<http://www.ussc.gov/overview.htm>>.

<sup>71</sup> See *U.S. Sentencing Guidelines Manual* [hereinafter “U.S.S.G.”], Ch. 5, Pt. A., Appl. Note 1 (1998).

ries that span the Table's horizontal axis.<sup>72</sup> The Base Offense Level ("BOL") and the criminal history category intersect at a cell, which determines the minimum and maximum "Guideline Range in months of imprisonment."<sup>73</sup> Of course, any enhancement increases the BOL along the vertical axis. For example, the BOL under the NET Act is six.<sup>74</sup> If the defendant is a first-time offender (criminal history category of one), then he or she faces a minimum of probation (zero months) and a maximum of six months imprisonment.<sup>75</sup> Factors such as the calculation of loss and whether the offense involved minimal planning will increase the BOL.<sup>76</sup>

### C. *The Policy Development Team Report's Recommendations for Adjustment of the Sentencing Guidelines Under the NET Act*

#### 1. 2-Level Enhancement

The Report likened an Internet pirate to a person held criminally liable for trafficking in counterfeit sound recording labels,<sup>77</sup> and it suggested a 2-level enhancement if the "offense involved the use of a computer to unlawfully distribute infringing articles."<sup>78</sup> This holds the uploader, not the downloader, solely responsible for the infringement because "the uploader . . . increas[es] the exposure to harm by enabling others to violate intellectual property rights."<sup>79</sup>

#### 2. Increase the BOL

The Report also recommended increasing the BOL from six to

<sup>72</sup> *See id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See* U.S.S.G., *supra* note 71, at Ch. 5, Pt. A.

<sup>75</sup> *Id.*

<sup>76</sup> *See id.*

<sup>77</sup> *See* Team Report, *supra* note 66, at 30. *See also* 18 U.S.C. § 2318 (West Supp. 1999) (Trafficking in Counterfeit Labels for Phonorecords, Copies of Computer Programs or Computer Program Documentation or Packaging, and Copies of Motions Pictures or Other Audio Visual Works, and Trafficking in Counterfeit Computer Program Documentation or Packaging).

<sup>78</sup> *See* Team Report, *supra* note 66, at 32.

<sup>79</sup> *Id.*

eight, using the Fraud Guideline.<sup>80</sup> Moreover, “the majority of fraud offenses sentenced under Section 2F1.1 receive a two-level enhancement for more than minimal planning (MMP) under Section 2F1.1(b)(2), resulting in an offense level of 8 . . . .”<sup>81</sup> Hence, if the BOL is eight, even the slightest enhancement could mean actual jail time. For example, if the court determines that the retail value of the infringed goods is \$5,000, then there would be a 2-level increase in the BOL (a level ten), which carries a minimum of six months and a maximum of one-year imprisonment.<sup>82</sup>

## V. EFFORTS TO ENFORCE COPYRIGHT LAW ON-LINE

Certainly, the music industry can deter criminal copyright infringement through “technological safeguards” such as “scrambling, encryption, watermarking, [and] use of secure passwords. But content providers are quick to argue that any technological security measures can eventually be ‘hacked’ and that, therefore, new legal protections for copyrighted works in the network environment are also required.”<sup>83</sup> Below are some methods already used by government, educators, and the music industry to combat and deter Internet piracy.

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<sup>80</sup> The Guidelines under the NET Act (“Section 2B5.3”) were “adopted with the initial set of guidelines in 1987 . . . and, thus, largely mirror the treatment of fraud offenses under § 2F1.1 [the Fraud Guideline].” See Team Report, *supra* note 66, at 3, 4. Section 2B5.3 encompasses a variety of intellectual property-type crimes. See, e.g., 18 U.S.C. § 2318 (West Supp. 1999) (Trafficking in Counterfeit Labels for Phonorecords, Copies of Computer Programs or Computer Program Documentation or Packaging, and Copies of Motions Pictures or Other Audio Visual Works, and Trafficking in Counterfeit Computer Program Documentation or Packaging). Section 2B5.3 refers the user to the Fraud Guideline “if the retail value of the infringing items exceeded \$2,000.” See U.S.S.G. § 2B5.3(b)(1) (West. Supp. 1999). Then, the user analyzes the Fraud Guideline table to determine how much to increase the BOL. See *id.*; see also U.S.S.G. § 2F1.1(b)(1)(A)-(S) (West Supp. 1999). For example, if the judge determines the value of the infringing goods was more than \$20,000, then he would add four levels to the BOL. See U.S.S.G. § 2F1.1(b)(1)(E).

<sup>81</sup> See Team Report, *supra* note 66, at 30.

<sup>82</sup> See U.S.S.G. § 2F1.1(b)(1)(C) (West. Supp. 1999); see also U.S.S.G., Ch. 5, Pt. A (West. Supp. 1999).

<sup>83</sup> See Joyce, COPYRIGHT LAW 48 (4<sup>th</sup> ed. 1998).

### A. *Government*

Unfortunately, the U.S. Attorney's Office has failed to update its Intellectual Property Crimes Manual since the NET Act was passed.<sup>84</sup> How can the federal government expect to successfully convict Internet pirates when its own publications are outdated? Shaun McCrea, Jeffrey Levy's attorney, speculated that one of the reasons the Assistant U.S. Attorney gave her client the option of accepting a plea rather than waiting six months for the FBI to analyze Mr. Levy's computer was because the government did not want to pool the resources to fully calculate the loss.<sup>85</sup> Indeed, Assistant U.S. Attorney Sean Hoar speculated that if the FBI had analyzed Mr. Levy's computer, the amount of loss could have been over \$70,000, which would have increased his BOL to twelve: A minimum of ten months to a maximum of sixteen months in prison.<sup>86</sup> Government resources need to be updated and devoted to combating this growing problem.

Some governmental action has been taken. In the summer of 1999, the Department of Justice, the Federal Bureau of Investigation, and the U.S. Customs service announced the Intellectual Property Rights Initiative (the "Initiative")—a joint initiative to combat Intellectual Property crime.<sup>87</sup> One of the Initiative's key goals is to "increase specialized training courses for detecting intellectual property crime" in conjunction with the National Cybercrime Training Pro-

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<sup>84</sup> See United States Department of Justice: *Federal Prosecution of Violations of Intellectual Property Rights* (visited Oct. 12, 1999) <[http://www.usdoj.gov/criminal/cybercrime/Intell\\_prop\\_rts/Sect\\_III.htm](http://www.usdoj.gov/criminal/cybercrime/Intell_prop_rts/Sect_III.htm)>. The United States Attorney's Office, Computer Crimes and Intellectual Property Section, informed the author that they are in the process of updating the Intellectual Property Crimes Manual. Telephone interview with Michael Greene's Office, Assistant United States Attorney, Computer Crimes and Intellectual Property Section (Nov. 4, 1999).

<sup>85</sup> Telephone interview with Shaun McCrea, Attorney for Mr. Levy in Eugene, Oregon (Nov. 2, 1999).

<sup>86</sup> See Sullivan article, *supra*, note 1. See also USSG § 2F1.1(b)(1)(G); USSG, Ch. 5, Pt. A.

<sup>87</sup> See *Department of Justice: Justice Department, FBI and Customs Service to Combat Intellectual Property Crime* (visited Sept. 9, 1999) <<http://www.usdoj.gov/criminal/cybercrime/ipinitia.htm>> [hereinafter "DOJ Press Release"].

gram, a privately-run organization that trains law enforcement “whose duties include the investigation and prosecution of high-technology crimes and the seizure of electronic evidence . . . .”<sup>88</sup> Equally important, the Initiative plans to “seek referrals from industry through a streamlined system, and [c]ontinuing support for increased criminal penalties for infringement through efforts directed at amending the Sentencing Guidelines.”<sup>89</sup>

### B. *Educators*

Colleges and universities can spot student pirating activity through a program called “Kinnetics Network Manager,” which monitors Internet traffic patterns, failure modes, and predicted future values, so a system administrator, such as a college computer administrator, will be able to identify spikes in internet traffic on the school webpage.<sup>90</sup>

### C. *The Music Industry*

In an attempt to protect their copyrights, record companies have joined forces through the Secure Digital Music Initiative (“SDMI”), an agreement to obtain watermarking encryption technology and hinder pirating through portable digital music devices such as CD burners and MP3 players.<sup>91</sup> Additionally, the Anti-Piracy Council of the Recording Industry Association of America’s (RIAA) Soundbyting Campaign has been modestly successful in shutting down computer-hosted Web pages at various colleges around the country.<sup>92</sup> The RIAA campaign aims to “arm college/university administrators and

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<sup>88</sup> See *National White Collar Crime Center: Computer Crime Section: Basic Data Recovery and Analysis* (visited Dec. 7, 1999) <<http://www.cybercrime.org/course.htm>>.

<sup>89</sup> See DOJ Press Release, *supra* note 87.

<sup>90</sup> Loran Website (visited Nov. 15, 1999) <<http://www.loran.com/products>>.

<sup>91</sup> See David Nimmer, *Puzzles of the Digital Millenium Copyright Act*, 46 J.U.S.A. COPYRIGHT SOC’Y 401, 457 (1999) (footnote omitted). “Encryption encodes a work so that it cannot be read without the proper key.” See also Marshall Leaffer, *Protecting Author’s Rights In A Digital Age*, 27 U. TOL. L. REV. 1, 10 (1995).

<sup>92</sup> See Kristen Phillipkoski, *The Student Jukebox Sting*, wired.com (visited Nov. 28, 1999) <<http://www.wired.com/news/culture/0,1284,32444,00.html>>.



staff with the tools to easily educate students about the application of copyright law as it pertains to music on the Internet.”<sup>93</sup> However, the “[RIAA] does not have access to the network neighborhoods common to college communities,” because of firewalls.<sup>94</sup>

## VI. IDEAS FOR THE FUTURE

The music industry must take even more extensive proactive measures to combat Internet piracy. Here are some suggestions for furthering this goal:

Lobby the new Commission to adopt the Interim Commission’s Report for increasing the BOL under the NET Act.

Forge partnerships with software associations, such as the Business Software Alliance, to fund special federal prosecution teams to monitor Internet pirate activity.

Launch a televised public service announcement campaign featuring popular recording artists to publicize that using a computer to “steal[ ] intellectual property is as bad as stealing a car or any other tangible property . . . .”<sup>95</sup>

Post notices on the outside of music product to alert consumers that it is against the law to upload more than ten copies of sound recordings.

## VII. CONCLUSION

It is imperative to provide tougher maximum sentences, because “pirates, particularly small-scale ones, are effectively judgment proof, [so] the threat of imprisonment often provides the only effective deterrent.”<sup>96</sup> Increasing the BOL under the NET Act is but one way to al-

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<sup>93</sup> See RIAA.com (visited Nov. 28, 1999) <<http://www.soundbyting.com/html>>.

<sup>94</sup> See Dave Hartman, *Justice Department May End Free Music*, U-WIRE, Nov. 2, 1999, available in 1999 WL 18822114. A firewall “implements an access control policy,” which can prevent outside Internet traffic from a networked Website. See also Marcus J. Ranum & Matt Curtin, *Internet Firewalls Frequently Asked Questions* (last modified May 26, 1998) <<http://www.clark.net/pub/mjr/pubs/fwfaq/>>.

<sup>95</sup> See Salesin testimony, *supra* note 3.

<sup>96</sup> *Id.*

low “prosecutors [to] have at their disposal more effective investigative tools,”<sup>97</sup> and, as a result, to bring more effective prosecutions. Some would argue that the music industry should be in the business of promoting music, not stiff prison sentences. However, the industry has an obligation to prevent copyright infringement through informing the public about the consequences of Internet piracy. Otherwise, criminal copyright infringers like Jeffrey Gerard Levy will continue to hurt consumers and the music industry.

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<sup>97</sup>*Id.*

