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   UNITED STATES OF AMERICA
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                      UNITED STATES DISTRICT COURT
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                 FOR THE CENTRAL DISTRICT OF CALIFORNIA
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   UNITED STATES OF AMERICA,
                                       CR No. 08-1222-PLA
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                   Plaintiff,
                                       GOVERNMENT'S POSITION RE
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                                       PRESENTENCE REPORT AND
                                       SENTENCING FOR DEFENDANT;
                   v.
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                                       MOTION PURSUANT U.S.S.G.
   KEVIN COGILL,
                                        § 5K1.1; DECLARATIONS OF
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        aka, "Skwerl,"
                                       JENSEN PENALOSA; L. CARLOS
                                       LINARES, JR.; CRAIG H.
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                   Defendant.
                                       MISSAKIAN
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        Plaintiff United States of America ("plaintiff" or "the
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   government") hereby respectfully submits it position regarding
   sentencing of defendant Kevin Cogill ("defendant").
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The government's position regarding sentencing is based on the final Guideline Presentence Report and Recommendation ("PSR") submitted herein, the pleadings and papers on file with the Court, and any argument of counsel at the hearing of this matter that the Court may request. Dated: March 10, 2009 Respectfully submitted, THOMAS P. O'BRIEN United States Attorney CHRISTINE C. EWELL Assistant United States Attorney Chief, Criminal Division CRAIG H. MISSAKIAN Assistant United States Attorney Attorneys for Plaintiff UNITED STATES OF AMERICA 

Introduction

The United States Probation Department's (the "USPO" or "Probation") recommended sentence of probation fails to account for key factors set forth in 18 U.S.C. § 3553(a) ("Section 3553(a)"). In particular, the recommendation does not reflect -or discuss -- the gravity of the offense and will do nothing to deter other would-be leakers in this rapidly expanding threat to the music industry. To the contrary, far from attempting to analyze the nature of the offense, the PSR appears more concerned with the circumstances surrounding defendant's arrest -mentioning not once but twice that agents arrested defendant "at gun point" -- a factor not identified anywhere in Section 3553(a), the United States Sentencing Guidelines ("guidelines" or "USSG") or in any case that the government has found. Nevertheless, one cannot deny Congress has recognized that leaking pre-release works over the Internet constitutes a serious and growing commercial threat demanding more of a punishment than a slap on the wrist. As such, in the government's view a short custodial sentence is appropriate and satisfies Section 3553(a).

# Government's Position Re Sentencing

#### A. Response to the PSR

While the government does not object to any of the relevant factual conclusions in the PSR set out at paragraphs 7-13, it does disagree with the PSR's ultimate conclusions and the inferences it draws from those facts. The specific points are discussed below.

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### B. <u>Government's Position re Sentencing</u>

The parties' plea agreement resolves most of the relevant sentencing issues, with the parties agreeing to a total offense level of 10 under USSG § 2B5.3. The parties, however, could not agree and left open for argument the "infringement amount" under subsection (b)(1). As discussed below, the government believes that a conservative infringement amount is \$371,622. Court accepts the government's argument, then defendant's total offense level increases to 21, with a sentencing range of 37-46 months for a person falling in Criminal History Category II. After reducing the defendant's total offense level by 4 under USSG § 5K1.1, the resulting total offense level and sentencing range fall to 17 and 27 to 33 months. Obviously, the Guideline's calculation is somewhat academic since the Guideline's range far exceeds the statutory maximum of one year. Nevertheless, the gravity of the offense -- as reflected in the calculated sentencing range -- should likewise be reflected in the sentence imposed by the Court.

## 1. The Infringement Amount

In calculating the total offense level, section 2B5.3(b)(1) provides that "[i]f the infringement amount . . . exceeded \$5,000, increase by the number of levels from the table in § 2B1.1 . . . corresponding to that amount." In calculating the infringement amount, the guidelines provide that the Court should use the "retail value of the infringed item, multiplied by the number of infringing items." This formula applies to offenses,

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like the present, involving "the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution." "In a case involving such an offense, the 'retail value of the infringed item' is the value of that item upon its initial commercial distribution." In this case, one reasonable measure of the retail value of each individual song is the cost to download that song from iTunes, or \$.99 per item.

The number of infringing items in this case -- i.e., the number of distinct "streams" and downloads of each of the 9 leaked songs -- cannot be determined exactly. The guidelines, however, do not require exactitude. Rather, subsection 2(E) of the Commentary makes clear that "[i]n a case which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records." Here, enough information exists to enable the Court to make a reasonable estimate of how many individual streams and downloads occurred for each of the 9 songs as a result of defendant's conduct.

Determining the total number of infringing items involves calculating two separate components. The first component is the total number of streams from defendant's web site, since each distinct stream of one of the leaked songs would constitute an infringing item. See U.S.S.G. § 2B3.1, Application Notes ("'Infringing item' means the item that violates the copyright or trademark laws."). The second component is the number of downloads from third-party sites that obtained copies of the songs as a result of defendant's streaming them. Combining these two totals yields the total number of infringing items. See generally Metro-Goldwyn-Mayer Studios, Inc. v.

With respect to the streams from defendant's site, for the time period 1:00 p.m. PST to 3:00 p.m. PST -- the approximate period during which the songs were available on antiquiet.com -- the songs were streamed a total of 1,123 times. The breakdown goes as follows:

Song Title	No. of Streams	Unique IP Addresses
Chinese Democracy	163	118
Better	187	144
IRS	126	85
Madagascar	111	78
Blues	86	62
There Was A Time	86	58
Riad And The Bedouins	137	98
Prostitute	120	83
If The World	107	75
Total Streams	1123	

(Declaration of Jensen Penalosa ("Penalosa Decl."), at ¶ 2).

With respect to the number of downloads from the third-party sites that obtained the songs as a result of defendant's violation, a conservative estimate is over 300,000 downloads. This number is based on a sample of 30 out of 1,310 unauthorized web sites that offered the leaked songs to the public between June 19, 2008 and November 21, 2008. Of the 1,310 web sites identified as having unauthorized copies of the music that defendant streamed, 30 of those contained information showing the

Grokster, Ltd., 454 F.Supp.2d 966 (C.D.Cal. 2006).

number of downloads from their sites. (See Declaration of L. Carlos Linares, Jr. ("Linares Decl."), at  $\P$  2).

Focusing solely on the 30 sites for which we have download information, there were a total of 16,976 downloads of "Chinese Democracy." It is most likely that this number represents the number of downloads of the group of 9 leaked songs, for a total of 152,784 downloads of individual songs (16,976 x 9). It is, however, not possible to say at this time whether the figure represents the group of 9 songs or individual songs. Giving the defendant the benefit of the doubt, the government will assume that the 16,976 figure represents downloads of individual songs.

In addition to the above number, the Court should also add an additional number for the number of downloads from the remaining 1,200-plus web sites that offered the songs for download. The average number of downloads from the 30 sites for which actual data exists is 565. Again, giving the defendant the benefit of the doubt, the Court could reduce that number by one half and estimate that each other site accounted for 280 individual downloads, or a total of 358,400 (1,310-30 x 280), during the relevant period.

By taking the total number of downloads of 375,376 (16,976 + 358,400) and multiplying that number by \$.99 per song downloaded, the infringement about becomes \$371,622. (Linares Decl.,  $\P$  2). Under Section 2B1.1, that would translate into an additional 12-level increase in defendant's total offense level, or a level 21, for a sentencing range of 37 to 46 months. Taking an additional

4 levels off under Section 5K1.1, reduces that range to 27 to 33 months.

2. <u>Section 3553(a) Factors</u>. The factors identified in Section 3553(a) militate in favor of a sentence that is more than probation. First, a probationary sentence does not reflect the seriousness of the offense. The PSR goes to unusual lengths to downplay the gravity of this crime while at the same time failing to analyze the nature of the harm. The PSR does so first by referring to the offense as a mere "error in judgment" and then by concluding that "it is clear that this offense is not a typical copyright piracy case in which the defendant's motivation was to profit from the distribution of a copyrighted work."

The PSR is correct that this is not a typical copyright infringement case; in reality, it is **more** serious than the typical case. Making a pre-release work available to the worldwide public over the Internet where it can copied without limit is arguably one of the more insidious forms of copyright infringement. That is because once released it is virtually impossible to prevent unlimited dissemination of the work. As the international music trade group IFPI explained in 2007:

Pre-release leaks are one of the most damaging forms of internet piracy that is currently eroding legitimate sales of music across the world. Recorded music sales fell by more than a third internationally in the last six years, and independent studies show that a major factor in this decline has been internet users accessing peer-to-peer networks to steal music online. Pre-release piracy is particularly damaging to sales as it leads to early mixes and unfinished versions of artists' recordings circulating on the internet months ahead of the release.

See Article, "British and Dutch police raids shut down world's largest pre-release pirate music site," IFPI (Oct. 23, 2007), online at,

http://www.ifpi.org/content/section\_news/20071023.html. The PSR, however, does not discuss this significant and growing problem.

The PSR also minimizes the seriousness of the conduct in two other ways, first by noting that defendant only streamed the music and, second, by noting that he did so for only a short time. Both points, even if true, demonstrate a misunderstanding of the nature and circumstances of the offense. Whether the music was streamed -- as opposed to being made available for download -- is irrelevant. So-called "stream rippers" -- software add-ons that enable users to copy the streamed content -- are commonplace. As such, for all practical purposes, defendant made these songs available for copying. And, in fact, that is exactly what happened. We know that users made copies because those copies ended up on third party web sites where they were then downloaded by the thousands.

Similarly, the fact that the streamed content was available on defendant's site for only a short time is also irrelevant since on the Internet seconds are sometimes all it takes. The reason for that is obvious. The power to copy and disseminate material over the Internet is free, easy, and virtually impossible to control. And, again, that is exactly what occurred here. Notwithstanding the fact that defendant's site crashed soon after he posted the songs, that was long enough for copies

of the songs to be made and uploaded to numerous other sites where they were downloaded by the thousands.

Beyond the financial loss resulting from such an offense, the PSR also fails to consider the potential damage caused to the creative process by such conduct. Needless to say, artists like the band Guns N' Roses put their blood, sweat, toil and tears into the creative process. And this country has seen fit to protect their rights — and in so doing foster and encourage the creative process by which all society benefits. Minimizing the importance of those protections by characterizing the present conduct as merely a lapse in judgment, ignores this important goal. In short, this is a far more serious offense than the PSR suggests.

Nor would a probationary sentence promote respect for the law or afford adequate deterrence to criminal conduct, two equally important considerations under Section 3553(a). One of the primary motives behind sentencing decisions is general deterrence — <u>i.e.</u>, the value in sending a strong message that makes other would-be criminals think twice about committing the same crime. <u>See United States v. Barker</u>, 771 F.2d 1362 (9th Cir. 1985) ("desire to 'send a message' through sentencing [not] inappropriate" and "[i]ndeed, perhaps paramount among purposes of punishment is the desire to deter similar misconduct by others"). Deterrence takes on even greater importance in cases like the present where stopping the crime before it happens is key; since trying to un-ring the bell is virtually impossible. A

probationary sentence, by comparison, sends exactly the wrong message by suggesting to other would be offenders that a slap on the wrist is all that awaits.

The government does not dispute that the remaining Section 3553(a) factors -- such as specific deterrence -- militate in defendant's favor. Moreover, as discussed below, the government does not deny that defendant has cooperated fully and deserves consideration for doing so. Rather, the government maintains that a subjective view about the gravity of the offense does not alone justify a departure from the guidelines under Section 3553(a).

#### C. Motion Under § 5K1.1

The government recommends that defendant receive an additional 4-level reduction in his total offense level under U.S.S.G. § 5K1.1 for substantial assistance. Defendant's substantial assistance consisted of attending proffer sessions with government investigators where he provided substantial information about the crime in which he was involved, including information about new potential targets. In the government's view, the information defendant provided amounts to substantial assistance within the meaning of § 5K1.1. The government views the information that defendant provided as complete, truthful, and reliable. The information provided and the offer of additional further assistance was also timely, coming at a point early enough in the investigation to be useful to the government. Based on the nature of defendant's cooperation, the government

believes that a 4-level reduction is appropriate.

## Government's Position Re Sentencing

With a 4-level reduction in defendant's quidelines calculation pursuant to § 5K1.1, his adjusted offense level would become 17 with a corresponding sentencing range of 27 to 33 months. Since this range exceeds the statutory maximum of one year, the government believes a 6-month sentence satisfies the dictates of the relevant provisions of 18 U.S.C. § 3553(a).

Restitution is also mandatory in the case. The RIAA estimates that defendant's conduct resulted in a loss of approximately \$2 million. (See Declaration of Craiq H. Missakian, Ex. A (attaching RIAA Victim Impact Statement)). RIAA would also be willing to accept, in lieu of this amount, the lesser sum of \$30,000 in restitution if defendant was willing to participate in a public service announcement designed to educate the public that music piracy is illegal.

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Dated: March 10, 2009

Respectfully submitted,

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