

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA)
)
 v.) CRIMINAL NO. 2:15cr95
)
 ROCKY P. OUPRASITH)
)

COMBINED SENTENCING MEMORANDUM OF THE UNITED STATES OF AMERICA AND MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION FOR DEPARTURE

The United States of America, by and through its undersigned counsel, Randy C. Stoker, Assistant United States Attorney for the Eastern District of Virginia, and John H. Zacharia, Special Assistant United States Attorney and Assistant Deputy Chief for Litigation, U.S. Department of Justice, Criminal Division, Computer Crime and Intellectual Property Section, hereby states that it has no objection to the presentence report (“PSR”) and that the probation officer correctly calculated a range of imprisonment of 70-87 months under the United States Sentencing Guidelines. In addition, the United States does not dispute any of the facts or factors material to sentencing in the presentence report. The United States also respectfully reserves the right to call the lead case agent in the federal investigation and Mr. Carlos Linares, Vice President of Anti-Piracy Legal Affairs for the Recording Industry Association of America (“RIAA”) if needed to respond to any objections by Defendant Ouprasith.

I. The Court Should Reject Defendant’s Requests for an Additional Downward Departure or a Variance Sentence.

The applicable advisory guideline range, to which neither party objects, is 70-87 months (reduced to the statutory maximum sentence of 60 months). As the Court well knows, this range is only the “starting point and initial benchmark” in the sentencing analysis. *Gall v. United*

States, 552 U.S. 38, 49-50 (2007). After ensuring that the advisory range is properly calculated, the Court must consider whether a sentence within that range serves the factors and purposes set forth in 18 U.S.C. § 3553(a). *United States v. Moreland*, 437 F.3d 424, 432 (4th Cir. 2006). If not, then the Court must determine whether grounds for a departure exist under the Guidelines or pertinent case law and apply them, as appropriate. *Id.*; *United States v. Tucker*, 473 F.3d 556, 560-61 (4th Cir. 2007) (consider departure grounds before imposing variance). As the Court knows, the United States has already moved for a downward departure for the reasons set forth in its November 10, 2015 motion.

Next, if it still deems a sentence within the resulting range to be inadequate, the Court may further vary from the guidelines until it reaches a sentence which best serves the statutory sentencing factors and purposes. *Moreland*, 437 F.3d at 432. Finally, the Court must state its reasons for imposing such a sentence, taking care to explain the reasons for any departure or variance. *Id.*; *see also* 18 U.S.C. § 3553(c)(2).

Defendant seeks a downward departure due to his age, stature, and his erroneous contention that the method used to calculate the infringement amount is based on a formula that results in an estimated amount that substantially exceeds the actual harm to the copyright holder. These factors, whether assessed individually or collectively, support neither a further downward departure nor a variance.

Section 5H1.1 of the guidelines provides that “age . . . may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, *are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines . . . [and] may be a reason to depart downward in a case in which a defendant is elderly and infirm*” U.S.S.G. § 5H1.1, p.s. (emphasis

added). Defendant is neither elderly nor infirm. He is 23 years young, is in basically sound physical health and able to work. Such facts, whether weighed in isolation or in concert, fail to support a downward departure or variance because they are neither unusual nor distinguish this case from those that typically come before this Court, nor from any other defendant of the same age.

Defendant also asserts that he should receive a downward departure because he would be “extremely vulnerable to abuse in prison.” Defendant’s Nov. 5, 2015 Position Paper with Respect to Sentencing Factors (“Defendant’s Memorandum” or “Def. Mem.”) at 6. He points to his slight physical stature, naiveté, lack of street smarts, and the nature of the offense to support his claim. *Id.* The Fourth Circuit has recognized “extreme vulnerability” as a ground for departure, but has held that “this ground for departure should be construed very narrowly.” *United States v. Maddox*, 48 F.3d 791 (4th Cir. 1995). In *Maddox*, the court held that being “meek, cautious, and easily led” did not warrant a finding of vulnerability. *See id.* at 798; *see also United States v. DeBeir*, 186 F.3d 561 (4th Cir. 1999) (holding that a sex offender whose expert at sentencing testified to his psychological fragility did not qualify for a vulnerability-based departure). The *Maddox* court was also unpersuaded that the 5-foot 10-inch, 155-pound defendant qualified as being slight in appearance. *See id.* at 798 n.10.

Defendant cites similar characteristics possessed by the defendant in *United States v. Parish*, 308 F.3d 1025 (9th Cir. 2002), which is a possession of child pornography case, in support of his argument. Rather than articulating a rule by which physical stature, demeanor, and naiveté could be assessed, the Ninth Circuit merely deferred to the district court, which had the opportunity to observe the defendant. While it ultimately found no clear error, the Ninth Circuit noted that it was unclear why the court considered the defendant’s 5’11”, 190-pound

stature as a factor for susceptibility and that Parish's naiveté was a factual determination better made by a district court judge rather than by an appellate court. *United States v. Parish*, 308 F.3d at 1031.

Here, Defendant's overall profile resembles that of the defendants in *Maddox and DeBeir*, but his circumstances are even less severe. Whereas the defendant in *Maddox* could claim to be of borderline intelligence suffering from dependent personality disorder and the defendant in *DeBeir* was guilty of a crime with a heavy negative stigma, Defendant Ouprasith cannot claim any of those characteristics. He is an intelligent young man in sound mental health who was engaged in an economic and computer-based crime. He is not unlike any number of white collar defendants who have appeared before this Court.

Defendant also seeks a departure because he alleges that the calculated losses overstate the seriousness of the offense. Def. Mem. at 9. The Court should reject this argument because the PSR's infringement amount calculation represents the most conservative measurement possible of the seriousness of Defendant's offense. Defendant claims that the PSR's infringement amount calculation, while properly calculated under the Sentencing Guidelines, nonetheless overstates the seriousness of the offense because it overstates the "loss" caused by defendant's offense. Defendant's "loss caused" argument is misplaced and unavailing for at least four independent reasons.

First, as a threshold matter, Defendant's argument that the "loss" calculation overstates the "loss" caused by Defendant's offense is not relevant to the calculation of a sentence in a criminal copyright case. In copyright crime cases, the relevant measure for calculating a sentence under the Guidelines – as the PSR properly notes – is the "infringement amount," not the "loss amount." U.S.S.G. § 2B5.3(b)(1). Although Defendant's reflexive reliance on his

boilerplate “overstates the loss” argument appears to stem from the fact that § 2B5.3 refers back to the “loss” table set forth in § 2B1.1, *see* Def. Mem. at 9, this cross reference does not convert a criminal copyright case governed by § 2B5.3 into a criminal fraud or other case governed by § 2B1.1. Indeed, it is axiomatic that when the Guidelines refer to a table elsewhere in the Guidelines, no other part of that Guideline (including any defenses set forth in the commentary) may be relied upon by either party. U.S.S.G. § 1B1.5(b)(2) (“An instruction to use a particular subsection or table from another offense guideline refers only to the particular subsection or table referenced, and not to the entire offense guideline.”).

Likewise, Defendant’s apparent “loss caused” argument appears to confuse three different concepts and calculations – “infringement amount,” restitution, and proceeds subject to forfeiture – and merely references them in simply concluding that “[t]he method used to calculate the infringement amount is based on a formula that results in an estimated amount that substantially exceeds the actual harm to the copyright holder” because the infringement amount exceeds the restitution amount or the proceeds subject to forfeiture. Def. Mem. at 9.¹ Although Defendant’s “loss caused” may be relevant to determining a restitution claim based on pecuniary harm pursuant to 18 U.S.C. § 3663A(c)(1), it is unsurprising that Defendant finds no support in any statute or case that his “overstates the loss” theory relates to determining a sentence under § 2B5.3.

¹ Defendant appears to confuse how restitution and illegal proceeds are calculated. Specifically, Defendant states that “the Government is only requesting [sic] restitution order for \$50,851.05 ‘which represents the proceeds of the charged offense.’” Def. Mem. at 9 (citing PSR ¶ 4). In fact, as set forth more fully *infra*, restitution represents the pecuniary harm to the victim, not the proceeds of the charged offense, and the PSR correctly states that the victim is seeking \$45,288.62 in restitution. *See* PSR ¶¶ 9, 62. Likewise, the PSR also correctly sets forth Defendant’s proceeds of the charged offense at \$50,851.05. PSR ¶ 4.

Second, and in any event, cases involving the digital reproduction and distribution of copyrighted works, like the one at bar, are precisely the types of cases where there is the greatest likelihood of pecuniary harm to victim copyright owners. Contrary to Defendant's claim that the infringement amount overstates the harm to the copyright owners, the Sentencing Commission concluded that cases involving the distribution of infringing digital copies, like the case at bar, are examples of cases where "it is highly likely" that the infringing item will result in "a displaced sale of the legitimate, infringed item." U.S. Sentencing Guidelines Manual App. C, Amendment 590 (2000) (noting that the Sentencing Commission reached this conclusion based on a review of cases over a two-year period), Amendment 593 (2000) (same). As a result, the PSR properly used the retail value of the infringed item, multiplied by the number of infringing items, to calculate the infringement amount because the Sentencing Commission concluded that this is the best means of approximating the pecuniary harm caused by the offense. *Id.*; see § 2B5.3, cmt. 2(A)(i)(II). This result matches Congress' concern with the greater likelihood of pecuniary harm caused by infringing digital copies. H.R. Rep. No. 105-339, at 4.²

² In 1997, Congress passed legislation directing the Commission to amend the Guidelines to "ensure that the applicable guideline range for a defendant convicted of a crime against intellectual property" would be "sufficiently stringent to deter such a crime and to adequately reflect" consideration of "the retail value and quantity of the items with respect to which the crime against intellectual property was committed." No Electronic Theft (NET) Act of 1997, Pub. L. No. 105-147, § 2(g), 111 Stat. 2678 (Dec. 16, 1997). When Congress enacted the NET Act, Congress was specifically concerned about the harm that unauthorized digital and electronic reproductions of copyrighted works, "especially computer software, compact discs, and movies," H.R. Rep. No. 105-339, at 4, caused to copyright owners because of the inherent high quality of the content in infringing digital copies. *Id.* ("the development of new technology will create additional incentive for copyright thieves to steal protected works. The advent of digital video discs, for example, will enable individuals to store far more material on conventional discs and, at the same time, produce perfect secondhand copies."). In response to Congress' statutory directive, the Sentencing Commission amended § 2B5.3 to create a new Application Note that separated certain classes of infringement cases in which the Commission wanted to require courts to use the *infringed item's* retail value (App. Note 2A), rather than the *infringing item's* retail value (App. Note 2B), to calculate the infringement amount. U.S.S.G. Appx. C,

Third, the seriousness of Defendant’s conduct as the creator and operator of RockDizMusic.com and the affiliate website RockDizFile.Com is compounded by the fact that he was not only involved in the distribution of digital copies of copyrighted works, but most prominently the distribution of even more valuable digital copies of pre-release copyrighted works – *i.e.*, works being prepared for commercial distribution – that is particularly harmful to copyright owners. *See* SOF at 7 (Defendant admits that his offense involved the reproduction and distribution of pre-release works). In 2005, Congress highlighted the need to address the greater harm caused in cases where, as here, defendants distribute copies of pre-release copyrighted works over the Internet by eliminating the monetary and numeric thresholds for prosecuting such crimes. *See* Family Entertainment and Copyright Act of 2005 (FECA), Pub. L. No. 109-9 § 103, 119 Stat 218, 220-21 (Apr. 27, 2005) (codified at 17 U.S.C. § 506(a)(1)(C)) (adding felony offense to address the online infringement of pre-release works). Congress enacted this provision to target two phenomena that are at the heart of this case and that Congress deemed particularly harmful to copyright-holders, especially in combination – “pre-release” piracy and Internet piracy (especially peer-to-peer file-sharing). *See, e.g.*, Remarks on Introduction of Bill in Senate, 151 Cong. Rec. S494 (daily ed. Jan. 25, 2005) (statement of Sen. Hatch); Judiciary Committee Report, H.R. Rep. No. 109-33(I), at 4, *reprinted in* 2005 U.S.C.C.A.N. 220, 223. And, as the United States already noted, the RIAA determined that RockDizFile.com was the second largest online file sharing site of infringing copies of copyrighted music in the United States in 2013.

Fourth, and most importantly, the PSR’s infringement amount calculation represents the most conservative measurement possible of the seriousness of Defendant’s offense. The

Amendment 590 (2000) (“This amendment is in response to section 2(g) of the No Electronic Theft (NET) Act of 1997”), Amendment 593 (2000) (same).

undisputed infringement amount of \$6,057,164 is limited to the acts of infringement related to infringing copies of copyrighted music that Defendant himself uploaded to his website.

However, as the RIAA noted in its Victim Impact Statement, “this represents a mere fraction of the infringing activity facilitated by the defendant.” Exhibit 1 at 2. Indeed, the United States made no effort to include in the infringement amount infringing copies of copyrighted music uploaded to Defendant’s website by others, nor for the unauthorized distribution and downloading of copies of such music by users visiting Defendant’s website. According to the RIAA, “Rockdizfile.com averaged 4.45 million visits a month from users seeking free music during its last 12 months of operation.” *Id.* Moreover, the RIAA estimates that the value of the recordings illegally downloaded from Defendant’s website during this same 12-month period was more than \$10,000,000 per month. *Id.* Rather than seeking to enhance the infringement amount in ways noted above, the United States calculated it in a generous and conservative manner that, if anything, tends to understate the seriousness of the offense and the actual harm caused by Defendant’s copyright piracy.

II. United States Position Regarding the Sentencing Factors Set Forth in 18 U.S.C. § 3553(a).

With respect to the sentencing factors contained in 18 U.S.C. § 3553(a), the United States notes the following. *First*, the nature and circumstances of Defendant’s offense are serious, as he created and operated the music website RockDizMusic.com – which, according to the RIAA, was the second largest online file sharing site specializing in the reproduction and distribution of infringing copies of copyrighted music in the United States in 2013. Aug. 21, 2015 Ouprasith Statement of Facts (hereinafter “SOF”) (Doc. #10) at 4. From in or about May 2011 through October 15, 2014, Defendant operated RockDizMusic.com as a site where Internet users could find and download infringing digital copies of popular, copyrighted songs and albums for free

and without permission from the owners of these copyrighted works. *Id.* at 1. Not only did Defendant seek out and find digital copies of copyrighted songs and albums online, he also encouraged and solicited others, referred to as “affiliates” or as registered or premium account users, to seek and to upload digital copies of copyrighted songs and albums to another website that Defendant operated called RockDizFile.com. *Id.* Defendant utilized these two websites to host hyperlinks to content being offered for streaming or download on RockDizMusic.com. *Id.* After operating these websites for some time, Defendant conducted business through the entity, RPO Productions, LLC, which he incorporated in North Carolina on October 9, 2013. *Id.*

Defendant willfully and illegally reproduced and distributed infringing copies of popular, copyrighted songs and albums in the following manner. First, Defendant sought out and found digital copies of copyrighted songs and albums online. *Id.* Second, Defendant encouraged and solicited others, referred to as “affiliates” or as registered or premium account users, to seek and to upload digital copies of copyrighted songs and albums to RockDizFile.com. *Id.* at 1-2. To encourage such activity, Defendant agreed to pay these affiliates based upon the number of times copies of the affiliates’ songs and albums were downloaded from his website. *Id.* at 2. Third, Defendant processed the content that he personally obtained and/or received from others by readying the digital files for use on his websites by using certain naming conventions, by sorting the content by artist and genre, and by identifying the publisher of such content as RockDizMusic.com. *Id.* Fourth, after processing the content files, Defendant made them available for reproduction and download via hyperlinks which he posted on RockDizMusic.com. *Id.* Fifth, once website users clicked on these hyperlinks, Defendant designed his website and servers to reproduce and distribute infringing copies of the copyrighted songs and albums to such

users' computers, all without permission from copyright owners holding the exclusive rights to reproduce and distribute the songs and albums in question. *Id.*

To operate these websites, Defendant rented and used computer servers in the United States and abroad. *Id.* Defendant hosted the website RockDizMusic.com on servers originally located in France and later in Canada. *Id.* One of Defendant's linking websites, at RockDizFile.com, operated from a computer server in Illinois furnished by the webhosting provider, GigeNET. *Id.* at 2-3. A second linking website used by Defendant, at SfShare.se, was hosted from a computer server in Russia. *Id.* at 3. Finally, Defendant utilized cyber lockers, or online data hosting services in the Netherlands and France, to host infringing copies of copyrighted music content which were ultimately reproduced and downloaded to users' computers. *Id.*

Moreover, Defendant actively sought to profit from the operation of these websites. *Id.* To generate revenues to pay for the activities and rentals described above, Defendant did several things. First, he sold premium subscriptions to users, at a cost of up to \$90.00 per year, which offered access to faster download speeds and other premium features on his websites. *Id.* Second, he entered into agreements with at least nine online advertising firms, which paid Defendant for placing advertisements for major retailers and service providers on his websites. *Id.* Third, Defendant sought to increase traffic to his websites and thereby generate increased advertising revenue, by actively promoting RockDizMusic on various social networking websites and, as described above, by identifying music content reproduced and distributed to others as having originated from RockDizMusic.com. *Id.*

These efforts resulted in substantial traffic and visits to Defendant's websites and his receipt of considerable revenue. For example, in statistics compiled by Defendant for

RockDizMusic for the month of January 2014 alone, he reported 1,652,253 site visits, 937,116 unique site visitors, and 7,498,998 page views. *Id.* In Skype chat messages recovered from a laptop seized from Defendant's house pursuant to a search warrant, Defendant stated that he "made 80k last year [and] payout [sic] 60k." *Id.*

Not surprisingly, Defendant's activity attracted the attention of copyright holders, their representatives, and law enforcement. During 2013, for example, numerous copyright holders and their representatives (including the RIAA and the International Federation of the Phonographic Industry (IFPI)), directly and indirectly³ sent emails to Defendant complaining that RockDizFile.com contained links to infringing copies of copyrighted songs and albums owned by others. SOF at 4. These emails, sent pursuant to the notice and takedown procedures specified in the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, typically notified Defendant that his website/server hosted unauthorized copies of sound recordings for download and requested that he immediately remove the infringing files from his system and/or disable access to such files. *Id.* Defendant received hundreds of such emails during 2013 and 2014. *Id.*

Remarkably, Defendant continued to engage in his infringing activity knowing full well that they were illegal. And in response to the DMCA takedown notices, he either ignored the emails sent directly to him and/or notified the website hosting provider GigeNET and/or the complaining copyright holders and representatives that he had removed the files in question. *Id.* In fact, as the repeated, complaining emails and further investigation by Homeland Security Investigation ("HSI") later revealed, Defendant sometimes pretended to comply with the provisions of the DMCA by temporarily removing links to the infringing content (for example, on RockDizFile.com), but soon thereafter posted new and different links to the very same

³ Many complainants sent email complaints to GigeNET.com, the website hosting provider for RockDizFile.com, which forwarded the complaints to its customer, Defendant.

infringing files. *Id.* In other words, Defendant never took down the infringing files pursuant to the DMCA takedown notices. Instead, he simply created a new hyperlink to the same illegal content. *Id.* at 5.

The PSR correctly notes that it is undisputed that the infringement amount for which Defendant is directly responsible is over \$6 million – a reflection of the seriousness of the scope of Defendant’s crime. PSR ¶ 15. Further demonstrating the serious impact that Defendant’s conduct had on the victim copyright owners, the RIAA conducted its own analysis of the network’s traffic and music offerings and determined that the value of RIAA member company recordings illegally downloaded from RockDizFile.com in the year leading up to October 15, 2014 “may be conservatively estimated at more than \$10,000,000 a month.” RIAA Victim Impact Statement (attached hereto as Exhibit 1) at 2.

Second, regarding Defendant’s history and characteristics, to his credit, he comes before the Court with no prior criminal convictions, and with an apparent history of supporting his family. The significance of the absence of any criminal history, however, is diminished by his role as the creator and operator of RockDizMusic.com and by the breadth, nature, and the length of the willful, criminal misconduct that brings Defendant before the Court. It is further diminished by his continued operation of RickDizMusic.com and RockDizFile.com, even after learning that his conduct was illegal. As the foregoing discussion demonstrated, rather than use the DMCA notices that he received as a reason to reconsider his operation of RockDizMusic.com and RockDizFile.com and to stop committing his copyright crimes, Defendant continued his illegal conduct in defiance of the law until investigators executed search warrants overseas and in the United States, including warrants on his residence on October 15, 2014.

Third, the nature of Defendant's illegal conduct calls for a sentence that promotes in him a greater respect for the law and the property rights of others, that deters others from engaging in similar illegal conduct, and that provides for a just punishment.

Fourth, regarding the kinds of sentences available and the sentencing range, the United States notes the following. As the presentence report correctly calculated, Defendant reached an adjusted offense level of 30 for his conviction on count one of the Indictment, and a final offense level of 27 after a three-level reduction for acceptance of responsibility. This results in an advisory guideline range of 70-87 months (reduced to the statutory maximum sentence of 60 months), well within zone D of the guidelines and far outside of other zones which permit alternative sentences involving something other than straight incarceration.

III. The Court Should Order Restitution for Investigative Costs Pursuant to 18 U.S.C. § 3663A(C)(4).

Intellectual property offenses in Title 18 of the United States Code require restitution under the Mandatory Victim Restitution Act of 1996 ("MVRA") set forth in part in 18 U.S.C. § 3663A ("Mandatory restitution to victims of certain crimes"). Under the MVRA, restitution is mandatory following any "offense against property under [Title 18] . . . including any offense committed by fraud or deceit . . . in which an identifiable victim or victims suffered a pecuniary loss." 18 U.S.C. § 3663A(c)(1)(A)(ii), (B). For offenses committed on or after October 13, 2008, the Prioritizing Resources and Organization for Intellectual Property Act of 2008 ("PRO IP Act") made this explicit, creating a new section, 18 U.S.C. § 2323, dealing specifically with forfeiture, destruction and restitution for intellectual property offenses.

The enactment of 18 U.S.C. § 2323 codified a longstanding body of case law authorizing restitution for intellectual property offenses. Intellectual property crimes are offenses against property in two senses: some defraud unwitting customers into paying money for infringing

products, and all involve intellectual property, which is property as much as any tangible property. Intellectual property offenses are “offense[s] against property” for purposes of § 3663A. *See, e.g., United States v. Hicks*, 46 F.3d 1128, 1195 WL 20791, at *3 (4th Cir. Jan. 20, 1995) (table) (upholding restitution award in satellite decryption and copyright case). These cases support the proposition that restitution is mandatory in all Title 18 intellectual property offenses.

The companies that own the music and sound recording copyrights that Defendant infringed are victims entitled to restitution pursuant to the MVRA and the PRO IP Act.

This Court may consider two types of restitution under the MVRA: (1) restitution for the victims’ displaced sales caused by the Defendants’ misconduct and (2) restitution for investigative costs. Here, the victims, through their representative the RIAA, seek only the latter category of restitution.⁴ With respect to investigative costs, the MVRA authorizes restitution for victims’ “expenses incurred during participation in the investigation or prosecution of the offense

⁴ With respect to the first category of restitution, and as already noted, the Sentencing Commission stated that in classes of cases where, as here, the infringing items are digital or electronic reproductions of copyrighted works, “it is highly likely that the sale of an infringing item results in a displaced sale of the legitimate, infringed item” and that using the retail value of the infringed item, multiplied by the number of infringing items, is “a means of approximating the pecuniary harm.” U.S.S.G. Appendix C, amend. 590, amend. 593 (2000). Clearly, the victim copyright owners suffered some displaced sales that resulted in some amount of pecuniary harm above zero as a result of Defendant’s infringing conduct. The inherent difficulty in proving an exact amount of actual economic loss caused by an infringer is a problem common to both civil and criminal copyright infringement cases. Federal copyright law has long authorized copyright owners bringing successful civil infringement actions to elect an award of “statutory damages” in lieu of having to prove actual loss, with such statutory damages to be determined within broad statutory limits pursuant to 17 U.S.C. § 504. *See Lowery’s Reports, Inc. v. Legg Mason, Inc. et al.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004) (“[s]tatutory damages exist in part because of the difficulties in proving – and providing compensation for – actual harm in copyright infringements”) (citing *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 231 (1952) (statutory damages are intended to allow the “owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits”)).

or attendance at proceedings related to the offense.” 18 U.S.C. § 3663A(b)(4). These provisions have been interpreted to cover not only the victim’s expenses in helping the government, but also the costs of the victim’s own investigation of the offense. *See United States v. Brown*, 150 Fed. Appx. 575 (8th Cir. 2005) (per curiam) (awarding restitution to victim company for staff investigation costs into reconstructing and correcting financial records related to defendant’s embezzlement); *United States v. Beaird*, 145 Fed. Appx. 853 (5th Cir. 2005) (per curiam) (affirming \$200,000 award of restitution for attorney’s fees and litigation expenses that amounted to “consequential” damages associated with assisting the FBI’s investigation); *United States v. Gordon*, 393 F.3d 1044, 1049-50, 1056-57 (9th Cir. 2004) (affirming \$1,038,477 in restitution for costs of company’s investigation costs that were the “‘direct and foreseeable result’ of the defendant’s wrongful conduct”); *see also United States v. Susel*, 429 F.3d 782, 784 (8th Cir. 2005) (per curiam) (affirming award of software company’s administrative and transportation expenses during participation in the investigation and prosecution of the offense in criminal copyright case). As the Ninth Circuit held in *Gordon*, “investigation costs – including attorneys’ fees – incurred by private parties as a ‘direct and foreseeable result’ of the defendant’s wrongful conduct ‘may be recoverable.’” 393 F.3d at 1057. With respect to Defendant in this case, the RIAA has submitted a victim impact statement requesting \$45,288.62 in restitution for their investigative costs related to the Defendant convicted in this case.

Accordingly, the United States respectfully submits that the Court has the authority to consider the RIAA’s submission of investigative costs incurred “during participation in the investigation . . . of the offense” for restitution pursuant to 18 U.S.C. § 3663A(b)(4).



United States District Court
Eastern District of Virginia
United States Probation Office
Attention: Jeffrey A. Noll
827 Diligence Drive, Suite 210
Newport News, VA 23606

October 1, 2015

**Re: Victim Impact Statement in the case of United States v. Rocky Ouprasith
Docket No. 2:15CR00095-001**

To Whom It May Concern:

The Recording Industry Association of America (RIAA) respectfully requests that restitution be awarded in the above-captioned case in the amount of \$45,288.62 to reimburse the recording industry for losses sustained as a result of the defendant's criminal activity. Federal law authorizes courts to order restitution when defendants are convicted of criminal infringement of a copyright. 18 U.S.C. § 3663. This includes defendants entering plea agreements.

The RIAA is the trade association that represents the United States recording industry. The RIAA's member companies create, manufacture and distribute approximately 85% of all legitimate sound recordings produced and sold in the United States. A primary function of the RIAA is to investigate the illegal production and distribution of sound recordings, and to assist law enforcement agencies – including prosecutors' offices – in seeking justice when the decision is made to pursue criminal remedies. The RIAA has been granted specific authority by its members to represent their interests in criminal music piracy matters in federal, state and local courts. When restitution is ordered, the RIAA receives the payments on behalf of its members pursuant to their authorization.

A. Facts of the Case

The seizure of Megaupload in January of 2012 sent shock waves through the illegal file sharing community. Several cyberlocker operators responded by taking significant steps to ensure their services would no longer be used as vehicles of mass copyright infringement. Others recognized this business model was no longer viable and completely closed shop. Unfortunately, some cyberlocker operators elected to ignore the threat of criminal prosecution altogether, viewing these developments as an opportunity to capitalize on the ongoing demand for free music online in a less competitive environment. Rocky Ouprasith, the owner and operator of the Rockdizfile music file sharing network, selected this path and took aggressive steps to fill his cyberlocker with the popular music necessary to drive high volumes of user traffic to his websites for purposes of generating online advertising revenue.

The defendant specialized in pre-release music piracy and personally uploaded unreleased tracks and full albums to his RockDizFile.com cyberlocker and posted the corresponding download links on his RockDizMusic.com website to enable the public to locate, access, and download unauthorized copies for free. He encouraging participation in the scheme by paying uploaders of commercial music based on the number of times their files were downloaded from his cyberlocker. Rockdizfile.com averaged 4.45 million visits a month from users seeking free music during its last 12 months of operation. Ouprasith has admitted that the market value of his illegally pirated recordings during a 6 month period from October 2013 to April 2014 was between \$2,500,000 and \$7,000,000. However, this represents a mere fraction of the infringing activity facilitated by the defendant. An analysis of the network's traffic and music offerings suggests the value of RIAA member company recordings illegally downloaded from Rockdizfile.com in the year preceding its takedown by Homeland Security Investigations in October 2014 may be conservatively estimated at more than \$10,000,000 a month.

B. Components of the Requested Restitution

Restitution for economic harm to the victims of crime is authorized by the Mandatory Restitution Act of 1996. Lost sales are an appropriate measure of restitution in criminal cases involving the misappropriation of intellectual property. *See U.S. v. Milstein*, 481 F.3d 132 (2007); 2007 U.S. App. LEXIS 7034. Unauthorized music downloading displaces legitimate sales and is the main reason that music piracy costs the United States recording industry more than \$5.33 billion per year. (See, Stephen E. Siwek, "The True Cost of Sound Recording Piracy to the U.S. Economy", Institute for Policy Innovation, Policy Report 188, August 2007). Studies have conservatively estimated that unauthorized downloading reduces sales of legitimate music by 10 to 20 percent. (See, Raphael Rob & Joel Waldfogel, "Piracy On The High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students", *Journal of Law & Econ.*, April 2006). As Ouprasith has admitted that the value of the music he pirated is no less than \$2,500,000 during the dates at issue, the lost sales sustained by the U.S. recorded music industry for this activity alone may be estimated at no less than \$250,000.

RIAA Victim Impact Statement - U.S. v. Rocky Ouprasith, Docket No. 2:15CR00095-001

Additionally, the recording industry is entitled to reimbursement in the amount of \$45,288.62 for expenses incurred in its participation in the investigation and prosecution of the offense. Thus, the sum requested as restitution in this victim impact statement represents RIAA's costs on this case only, and is offered as a compromise should the defendant choose to forego formal restitution proceedings. Documentation detailing these expenses will be forwarded to your attention upon request.

C. Restitution is an Important Deterrent to Prevent Further Victimization

The illegal duplication and distribution of sound recordings is not a victimless crime. Music piracy deprives musicians, record companies, producers, songwriters, publishers, and legitimate retailers of the profits to which they are entitled, causing the loss of jobs and diminishing the opportunities available to aspiring artists. Local, state and federal governments suffer due to lost revenue from income and sales taxes. Moreover, consumers are victimized when they purchase goods of inferior quality to genuine sound recordings.

Please contact me at (202) 857-9643 or at clinares@riaa.com if I may be of any assistance. If asked by your office, we will readily provide in-court testimony in support of our request for restitution. Thank you for your attention in this important matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "L. Carlos Linares, Jr.", with a stylized flourish at the end.

L. Carlos Linares, Jr., Esq.
Vice President, Anti-Piracy Legal Affairs