

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

	:	Cr. No. 08-217 (RWR)
UNITED STATES OF AMERICA	:	
	:	Sentencing Hearing: October 28, 2008
	:	
v.	:	
	:	
MICHAEL DWAYNE LOGAN,	:	
	:	
Defendant.	:	
	:	

**GOVERNMENT’S MEMORANDUM IN AID OF SENTENCING**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, submits the following Memorandum in Aid of Sentencing in the above-captioned case. For the reasons set forth herein, the Government respectfully requests that the Court impose a sentence in accordance with the voluntary U.S. Sentencing Guidelines and the terms of the plea agreement in this case.

**I. BACKGROUND**

**A. Procedural History**

On August 11, 2008, Defendant Logan entered a guilty plea, pursuant to the terms of a written plea agreement, to a two-count Information that charged Unauthorized Recording of Motion Pictures in a Motion Picture Exhibition Facility, in violation of Title 18, United States Code, Section 2319B.

**B. Facts**

On May 11, 2007, Defendant Logan unlawfully recorded the motion picture *28 Weeks Later*, using a camcorder inside the Regal Gallery Place Stadium 14, located at 701 7<sup>th</sup> Street, NW, Washington, D.C. It was the day of the film's theatrical release, but in a matter of hours pirated copies of the Defendant's recording were being sold on the streets of New York City. Such a copy was obtained by investigators working for the Motion Picture Association of America ("MPAA"). Subsequent forensic analysis, discussed infra., linked the recording to Defendant Logan, based on internal characteristics of the illegally recorded copy and established it as having been recorded at the Regal Gallery Place Stadium 14.

On November 24, 2007, Defendant Logan returned to the Regal Gallery Place Stadium 14 for a showing of the motion picture *Enchanted*, which also had its theatrical release that day. Under surveillance, the Defendant was observed in the first seat of the last row of the theater directly at the top of the stairs – a seat that provided an unobstructed view of the screen. He was further observed accepting a video camera from a female companion, preparing the camera to record the movie, and attempting to hide the camera under a coat when other patrons walked by him. Law Enforcement Officers of the Metropolitan Police Department were dispatched to the theater. The Police observed the Defendant actively recording *Enchanted* as the camera rested on the armrest of his theater seat. Defendant Logan was arrested in the theater. His camcorder, a JVC Everio Model GZHD7U, High Definition Camera, was seized by law enforcement. It was later determined that on the hard drive of the camera there was approximately 50 minutes of the motion picture *Enchanted*.

Disney Enterprises, Inc. (“Disney”) holds the copyright for the motion picture *Enchanted*. Disney never grants permission for individuals to record Disney motion pictures in a theater using video cameras. Disney did not grant the Defendant Logan permission to record any of its motion pictures, including *Enchanted*. 20<sup>th</sup> Century Fox holds the copyright for the motion picture *28 Weeks Later*. 20<sup>th</sup> Century Fox never grants permission for individuals to record 20<sup>th</sup> Century Fox motion pictures in a theater using video cameras. 20<sup>th</sup> Century Fox did not grant the defendant permission to record any of its motion pictures, including *28 Weeks Later*.

During the plea proceeding colloquy, and in the Statement of Offense filed in this case and signed by Defendant Logan, he has acknowledged unlawfully using a camcorder in a Motion Picture Facility to record *Enchanted* and *28 Weeks later* for commercial purposes.

The two illegal camcorder motion picture recordings made by Defendant Logan in this case were not isolated incidents. MPAA, which represents the victim studios in this case commissioned a forensic analysis by Deluxe Content Protection Services (“Deluxe”) of numerous pirated first run motion pictures acquired by MPAA. Forensic analysis revealed a pattern of activity establishing a connection between the pirated movies and Defendant Logan’s recording of *Enchanted*. Common audio and visual characteristics included one or more of the following traits: Defendant Logan’s voice on the recording, Defendant Logan using a cell phone while recording the movie, the voice of one particular woman, a unique DVD menu structure, the use of a baseball cap to make the recording less obvious to others in the theater, the visible presence of air hole ringlets from the baseball cap on the illegal recordings, and the recording angle. The analysis also included information obtained from a unique watermark placed on all motion pictures before commercial distribution. This watermark permits investigators to specifically identify the origin of a pirated movie in terms of the

theater authorized to display the motion picture and also the time period for which display is authorized at the theater.

MPAA has linked Defendant Logan to an astounding number of pirated motion pictures. According to John G. Malcolm, Executive Vice President and Director of Worldwide Anti-Piracy, Motion Picture Association, Deluxe determined that from approximately January 12, 2006 through January 18, 2008, Michael Logan was responsible for the camcording and premature release of over 100 movies in a region that included North Carolina, South Carolina, Pennsylvania, Virginia, and the District of Columbia (See, letter from John G. Malcolm to the Honorable Richard W. Roberts, dated October 8, 2008, at p.1).

The far-reaching scope of Defendant Logan's activity is summarized in the January 29, 2008, report prepared for MPAA by Deluxe:

A new cammer is somewhat unusual, as at any given time we observe less than ten cammers in all of North America. Because of this, it was with great interest that Deluxe identified the first camcordered feature originating from the Baltimore area in January 2006. In the 12 months that followed we discovered dozens of titles pirated from theaters in the Baltimore and Washington area. In 2007, we observed certain characteristics in both the video and audio streams of pirated content that led up to believe this cammer was videotaping movies at theaters farther and farther away from the Baltimore area. Our preliminary analysis led us to suspect that the same individual had cammed titles across North Carolina, South Carolina, Pennsylvania, Maryland, and Virginia in addition to the District of Columbia. Deluxe was asked to perform a review of pirated film content known to have originated from these areas and determine if we could find any common characteristics to the person we referred to as the "DC Cammer."

For criminal purposes, the Government limited its case to those illegal copies of theatrical motion pictures in which there were three or more internal characteristics indicating that Defendant Logan was the person who camcordered the film. The Deluxe analysis reveals 23 such motion pictures. Based on their forensic analysis, MPAA believes that Defendant Logan "is directly or

indirectly responsible for as much as 8% of all pirated movies on the Internet and that Logan's pirated material can be found on 7% of all the illegal DVD's in the world" (See, letter from John G. Malcolm to the Honorable Richard W. Roberts, dated October 8, 2008, at p.2).<sup>1</sup> This claim appears corroborated, at least in part, by Defendant Logan's history of arrests and convictions for related offenses, discussed below.

## II. SENTENCING CALCULATION

### A. Statutory Maximum

Defendant pleaded guilty to two counts of Unauthorized Recording of Motion Pictures in a Motion Picture Exhibition Facility, in violation of Title 18, United States Code, Section 2319B. As to each count, the statute provides for a maximum penalty of three years imprisonment, a fine of \$ 250,000.00 or a fine of twice the pecuniary gain or loss pursuant to 18 U.S.C. § 3571(d), an order of forfeiture and destruction for all unauthorized copies of motion pictures and any audiovisual recording device or other equipment used in connection with the offense, a \$100 special assessment, a 3-year term of supervised release, an order of restitution, and an obligation to pay any applicable interest or penalties on fines or restitution not timely made.

### B. Sentencing Guideline Calculation

The parties agree that the Guideline calculations in the Presentence Report ("PSR") correctly reflect the Defendant's total offense level of 15 (See, PSR ¶ 36). Pursuant to the plea agreement, the Government agreed not to oppose a 2-level reduction for acceptance of responsibility and a 1-level

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<sup>1</sup>"Indirect responsibility" for pirated movies on the Internet would include the situation where individuals to whom Defendant Logan sold or otherwise distributed pirated motion pictures uploaded copies of those movies to the Internet.

reduction for timely notification of his intent to plead guilty (See, PRS ¶ 35). The PSR also correctly lists Defendant's criminal history as Category II (See, PSR ¶ 48). Therefore, the guideline range for Defendant is correctly calculated in the PSR as 21 to 27 months (See, PSR ¶ 117). The Government also agreed not to oppose a Defense request for voluntary self-surrender for any sentence that is imposed.

**1. Restitution**

The plea agreement indicates that the maximum sentence that the Court can impose includes an order of restitution. The plea agreement, however, does not include a specific restitution provision. Restitution is mandatory for any offense against property under Title 18 offenses (See, 18 U.S.C. §3663A). However, 18 U.S.C. § 3663A does not apply if the Court finds from facts on the record, that determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process (18 U.S.C. § 3663A(c)(3)(B); U.S.S.G. §5E1.19b(2)). In this case, the actual loss to the motion picture industry, while presumed to be substantial, is not been documented and cannot readily be ascertained.

**2. Prior Criminal History**

Defendant Logan has a history of arrests and convictions for intellectual property crimes. His record includes a 2001 conviction for Criminal Simulation and Trademark Counterfeiting in Bergen County, New Jersey, a 2002 conviction for Counterfeit Trademark and Selling Without a License, in Baltimore, Maryland, and a 2007 conviction for Recording, Sell, etc. in Baltimore, Maryland (See, PSR ¶ 42-43 and 45). As of the date of the presentence report investigation,

Defendant Logan is also pending trial in Moorestown Township, New Jersey, for Pirating Recordings.

**3. Calculation of the Loss Amount**

When a first run motion picture is showing in the theater the rights holder does not make copies of that motion picture available to the public through any legitimate purchase avenue other than buying a ticket to watch the movie in a theater. Pursuant to the plea agreement, the parties agreed that the loss amount here is the “infringement amount.” That is, the cost to Regal Theater for the rights to display the films *Enchanted* and *28 Weeks Later* from Disney and 20<sup>th</sup> Century Fox studios, respectively. The cost to the theater is a minimum of 50 percent of gross revenue (ticket sales). Gross revenue for *Enchanted* at Regal Theater, Washington, D.C., was \$51,930. Gross revenue for *28 Weeks Later* at the same theater was \$45,334. Total revenue for the two films (\$97,264.) divided in half (50 percent) equals the price the theater paid the studios for the two films (\$48,632.) (See, U.S.S.G. §2B5.3, Application Note 2(A), indicating that the infringement amount is the retail value of the infringed item).

**III. GOVERNMENT’S POSITION ON SENTENCING**

**A. Defendant Logan Deserves a Significant Sentence Under the Guidelines**

The parties have stipulated, and the Probation Office has found, that Defendant Logan has a guideline level of 15 under the United States Sentencing Guidelines. That level, which includes adjustments for the commercial nature of the Defendant’s offenses, calls for a sentence of 21 to 27 months of incarceration, given Defendant Logan’s criminal history.

**B. Defendant Logan Deserves a Significant Sentence Under Section 3553**

Title 18, United States Code, Section 3553 provides that in determining the particular sentence to be imposed, the Court must consider the nature and circumstances of the offense, the history and characteristics of the defendant, and the need for the sentence imposed: to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553).

**IV. FACTORS TO BE CONSIDERED IN IMPOSING SENTENCE**

The Government respectfully submits that the factors enumerated in 18 U.S.C. § 3553 independently support a sentence within the guidelines' range.

**1. The Nature and Circumstances of the Offense**

**a. Defendant Logan illegally camcorderd motion pictures as a livelihood**

Defendant Logan candidly told the probation officer his earnings came primarily from his involvement in illegal behavior and he earned a "decent" amount of money (See, Presentence Report, ¶ 100). Making money through illegal behavior was clearly what motivated Defendant Logan's actions in this case. He was caught red-handed unlawfully recording a first-run Hollywood motion picture on its release date. Had Defendant Logan not been caught, copies of his recording of *Enchanted* undoubtedly would have made their way to street vendors and Internet sites that facilitate the piracy of motion pictures. That is precisely what happened with Defendant Logan's illegal recording of the motion picture *28 Weeks Later*, which he recorded in November 2007, in Washington, D.C. Copies of Defendant's illegal copy ended up for sale in New York City almost



immediately after the movie's theatrical release. The evidence also indicates that Defendant Logan has engaged in illegal camcording of motion pictures many times in the past. His illegal activity was so significant that MPAA focused significant investigative resources on him and ultimately identified him as a major contributor to the problem of motion picture piracy.

**b. Motion picture piracy is not a victimless crime**

Intellectual property offenses are parasitic crimes that feed off the creative talents, hard work, and venture capital risks of others. Such crime costs the motion picture industry and its business partners billion of dollars annually. According to MPAA:

The worldwide motion picture industry, including foreign and domestic producers, distributors, theaters, video store and pay-per-view operators lost \$18.2 billion in 2005 as a result of piracy - over \$7 billion of which is attributed to Internet piracy and more than \$11 billion attributed to hard goods piracy including bootlegging and illegal copying.

It is estimated that 90% to 95% of this piracy begins as a camcord copy taken from a local theater by camcorders such as Michael Logan (Letter from John G. Malcolm to the Honorable Richard W. Roberts, dated October 8, 2008, at p.1).

The U.S. Congress has recognized the degree of harm camcording causes the movie industry. In passing 18 U.S.C. § 2319B, Congress observed that the "misuse of camcorders is a significant factor in the estimated \$3.5 billion in annual losses the movie industry suffers because of hard-goods piracy" (See, H.R. Rep. 109-33(I), at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 220, 221). It is reasonable to infer that some of these losses are passed along to the public, which pays for crimes like those committed by Defendant Logan through increased ticket prices and other entertainment costs. Furthermore, Congress enacted this statute expressly to combat the threat to motion picture

copyrights posed by those who engage in this criminal activity (Id.). As Congress described the problem:

Typically, an offender attends a pre-opening “screening” or first-weekend theatrical release and uses sophisticated digital equipment to record the movie. A camcorderd version is then sold to a local production factory and sold on the street for a few dollars per copy. . . . Causing greater financial harm, these camcorderd versions are posted to the Internet through certain peer-to-peer networks and made available for millions of users to download (Id.).

By his own account, Defendant Logan has been primarily dependent upon his illegal earning from the sales of camcorderd motion pictures to support himself and his family. The defendant’s bank account records for the period April 2007 to January 2008, reflect 99 cash deposits totaling \$59,318.80. The deposits range in amount from \$5.00 to \$4,303.00. Since Defendant Logan had no other source of income, the obvious implication is that someone was paying him for providing copies of the camcorderd motion pictures he recorded or he was directly making money by reproducing and selling illegal copies of the motion pictures he camcorderd.

Motion picture studios are publically traded corporations that are owned by shareholders. The crime of camcording causes the studios to lose money and results in less profits for the shareholders. In addition, this type of crime harms everyone whose livelihood is linked to the motion picture industry, and is therefore, impacted by reduced profits. This includes the individuals directly involved with making the motion picture, such as the writers, producers, production companies, and actors, and the companies intertwined with the film industry including those who are distributors, advertisers, and third-party vendors. From the catering companies on the studio lots to the popcorn vendors that supply the theaters, there is a economic domino effect in a case such as this one.

**c. Illegal Camcording of Motion Pictures derails the motion picture studios' business model for movie distribution**

Not all movies that are produced actually result in profits for the motion picture industry. To maximize profits, the industry business model utilizes the sequential release of a particular film through various brick and mortar, Television, and Internet distribution networks. When a motion picture is released in the theater it is not available for legitimate purchase from any source for a finite time period. Following theatrical release, a motion picture is distributed over time through various outlets including cable television Pay-Per-View, video rental outlets, and sales of legitimate DVD copies of the motion pictures. When a motion picture is illegally camcorded and sold the entire business model is disrupted.

According to MPAA, within hours of camcording, illegal copies of the movie flood the Internet and/or are converted into pirated optical disks that are sold for handsome profits on city streets throughout the world (MPAA Victim Impact Statement at p.1). All of the markets in which the movie is sold legitimately are negatively impacted. It is obvious that the most significant damage is caused when a film is camcorded in a theater and sold on the streets, because the movie industry's business model is disrupted at the starting point. A legitimate sale, be it a ticket for a movie or a purchase of a DVD in a store, cannot compete with pirated copies sold for pennies on the dollar.

**2. The History and Characteristics of the Defendant**

Defendant Logan is 31 years-old and he grew up in New York. According to the PSR, Defendant Logan was raised by a loving and supportive grandmother, with whom he still has a strong relationship. The Defendant has the love of an extremely supportive wife and children.

Defendant Logan has no drug or alcohol problems. Nor does he suffer from any medical or psychological problems that would render him unable to maintain legitimate employment.

Perhaps the most notable aspect of the Defendant's background is his criminal history. His criminal record includes three convictions for trademark counterfeiting or piracy related offenses, five other arrests for similar offenses that did not result in convictions, and a pending criminal charge for Pirating Recordings in Moorestown Township, New Jersey (See, Presentence Report, ¶¶ 42, 43, 45, 52, 54-58). Moreover, the facts of some of these cases further corroborate Defendant Logan's extensive involvement in the illegal business of pirating motion pictures.

For example, on September 13, 2002, Defendant Logan was arrested in Baltimore, Maryland, for selling pirated CDs and DVDs from his car. During his arrest, police officers recovered from his vehicle several pirated copies of the motion picture *Barbershop*. That motion picture had its theatrical release the same day as the Defendant's arrest, yet he possessed several illegal copies of it which clearly was intending to sell (See, IMDb: The Internet Movie Database, available at <http://www.imdb.com/title/tt0303714> - listing the United States release date for *Barbershop* as September 13, 2002). In Defendant Logan's pending case in New Jersey, he was arrested at a highway rest area and found to be in possession of several pirated movies. Likewise, when he was arrested in New Jersey, Defendant Logan had apparently just recorded two motion pictures – *Catch A Fire* and *Saw II* – during their theatrical releases. DVD packaging material and ticket stubs from those films were found in his vehicle. Police officers also recovered from Defendant Logan's vehicle a laptop computer, a spool of 18 blank DVDs, a DVD burner, and other apparent tools of the piracy trade.

This criminal history demonstrates that for many years Defendant Logan has been in the business of stealing the intellectual property of others. Despite numerous arrests and convictions, each time he has made the conscious decision to return to his criminal livelihood. Indeed, just one month after being arrested in New Jersey for Pirating Recordings, Defendant Logan was undeterred in sneaking a camcorder into the Regal Gallery Place Stadium 14 in Washington, D.C., setting up shop in the back of the theater, and pursuing his illicit business of pirating motion pictures for commercial purposes. In doing so, Defendant Logan has shown that being arrested, having a criminal record, and being required to pay fines, serve probationary sentences, and perform community service has had no measurable deterrent affect on him.

**3. The Need for the Sentence to Reflect the Seriousness of the Offense, Promote Respect for the Law, and Provide Just Punishment for the offense**

A sentence within the guidelines range would reflect the seriousness of Defendant Logan's conduct, promote respect for the law, and provide just punishment for his actions.

**4. The Need for the Sentence to Afford Adequate Deterrence**

A sentence within the guidelines range would serve as an important deterrent not only to Defendant Logan but also to individuals currently involved in camcording or involved in the manufacture and distribution of pirated motion pictures. It will also serve to deter those who would consider committing such crimes. Defendant Logan has had several opportunities to change his illegal behavior, but has failed to do. At this stage, a sentence that includes a period of incarceration is appropriate as a deterrent.

**5. The Need to Protect the Public from Further Crimes of the Defendant**

This case does not involve a violent crime. Therefore, the traditional notions of public protection are not implicated. However, intellectual property crimes are an assault on the economic health and continued viability of the victim corporations. The corporate victim supports a network of employees and puts money into our economy through sales, its business and distribution partners, and income, sales, and other taxes. As such, the corporate victim deserves protection from continued victimization. A guideline sentence would incapacitate the Defendant from committing additional Intellectual Property offenses, and therefore, serve to protect the public.

**6. The Need to Provide the Defendant Educational or Vocational Training**

The defendant has had legitimate employment in his past. He would likely benefit from obtaining his General Equivalency Diploma and possibly from receiving vocational training.

**III. CONCLUSION**

The Government respectfully requests that the Court sentence Defendant Logan in accordance with the plea agreement, the U.S. Sentencing Guidelines, and the factors articulated in 18 U.S.C. § 3553(a). It is important that he be punished for his conduct. It is equally important that others similarly situated who might be tempted to engage in this type of conduct be deterred. In accordance with the provisions of 18 U.S.C. § 2319B(b), the Government further respectfully requests that the Court order the forfeiture and destruction of the property listed in Attachment No. 1, which includes “unauthorized copies of motion pictures or other audio visual works protected

under Title 17 and audiovisual recording devices or other equipment used in connection with the offense,”<sup>2</sup> (See 18 U.S.C. § 2319B(b)). In accordance with the terms of the plea agreement, the Government also requests that for the duration of any sentence imposed by the Court, to include a period of supervision, the sentence include a provision that Defendant Logan be ordered not to enter any movie theater in the United States.

Respectfully submitted,

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<sup>2</sup>The items listed were seized pursuant to a duly authorized search warrant executed at Mr. Logan’s Maryland residence.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Government's Memorandum in Aid of Sentencing was served on counsel for Defendant, B. Eugene Fulghum, 2001 Lincoln Drive West, Suite A, Marlton, NJ 08053 and Keith David Sklar, 1901 N. Olden Avenue, Suite 22, Ewing, NJ 08618, this 20th, day of October, 2008, via the U.S. Mail.

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