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Internet Law Update

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NO REQUIREMENT OF JURY INSTRUCTIONS OF FAIR USE FOR PIRATES WITH ATTITUDES'
CRACKING SOFTWARE AND MAKING IT AVAILABLE ON THE INTERNET

Pirates with Attitude ("PWA") is a group organized and dedicated to making copyrighted software available over the Internet. Each member of PWA was required to perform a service. "Suppliers" provided access to copyrighted programs. "Crackers" downloaded the software and removed the internal copyright protection. "Packagers" took the program from "crackers" and tested the software for functionality. "Couriers" then uploaded the cracked program onto Internet sites maintained by PWA where it was available for downloading by PWA members.

One website operated by PWA was known as "sentinel." In January of 2000, the FBI seized computer hardware from the closet of a university professor that was hosting the sentinel site. The university was unaware of the existence of sentinel, or of the computer in the closet.

A jury convicted Christian Morley, a member of PWA and one of its "packagers," of conspiracy to commit copyright infringement. (*1) Morley appeals the conviction on the basis that the district court's denial of a jury instruction on fair use was improper. Jason Slater, another member of PWA and a "cracker," entered a guilty plea to the indictment for conspiracy to commit copyright infringement. Slater appeals the valuation of loss used for the Sentencing Guidelines. *United States of America v. Jason Slater and Christian Morley*, 2003 U.S.App. LEXIS 22860 (7th Cir. 2003).

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Fair Use

The 7th Circuit found no fault with the denial of a jury instruction for fair use. The fair use exception limits the exclusive rights of copyright holders by providing that certain use of a work is "fair." Purposes that fall within "fair use" are criticism, comment, news reporting, teaching, scholarship, or research.

Morley contends that the jury should have received an instruction on fair use. First, Morley argues that the sentinel site was noncommercial because members did not pay to download software. Second, he argues that the site was "educational" because defendants could use the software to learn something. The 7th Circuit first observes that Morley's arguments "barely pass the straight-face test." (*7) While members did not "pay" in traditional currency, each member was required to contribute services, which the court deemed was a barter form of payment. Also, the argument that members would learn from using the software and that the site was hosted at a university was considered a tortuous attempt to shoehorn the infringing activities into the educational exception. As evidenced by the facts, the university was unaware that the site was housed on its campus or that it was kept in the closet of one of its professors.

Valuation of Loss

The 7th Circuit was equally not persuaded by Slater's arguments concerning the use of the 1998 Sentencing Guidelines. Under the 1998 Guidelines, the sentence is enhanced if the retail value of the loss exceeds \$2,000. Under the Sentencing Guidelines, the value of loss is measured by the retail value of the infringing items. "The total value of the infringing items can be calculated by multiplying the number of infringing items by their average retail value." (*9-10) Slater argued that since the members paid nothing for the software the value of the software was zero. Since there was no evidence of the value of pirated copies of software, the 7th Circuit upheld the district court's use of the retail value as



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an acceptable choice because the infringing item was the virtual equivalent of the infringed item. (*12)