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10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13 UNITED STATES OF AMERICA,)	Case No.:CR 08-01222 PLA
)	
14 Plaintiff,)	DEFENDANT’S POSITION RE
)	SENTENCING
15 vs.)	
)	
16 KEVIN COGILL,)	Hearing Date: March 17, 2009
)	Hearing Time: 10:00 a.m.
17 Defendant.)	Courtroom: Spring Street “G”
)	Hon. Paul L. Abrams

19
20 **I. INTRODUCTION**

21 The Court should adopt the recommendation of the Presentence Report and
22 Recommendation (“PSR”) and impose a sentence of one-year probation under the
23 terms and conditions set forth in the PSR, waive all fines, and order no restitution in
24 this case as the government has not provided any “victim” information from which
25 restitution could be determined and because under the facts of this case, a determination
26 of actual loss to any purported victim is not reasonably quantifiable.

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II. Factual Background

1. Procedural Posture

On or about June 18, 2008, defendant received unauthorized copies of songs purporting to be nine musical tracks from the album “Chinese Democracy” performed by the rock band Guns N’ Roses. A valid United States Copyright existed on each of the nine songs of the “Chinese Democracy” album, which on June 18, 2008, had not yet been released but was being prepared for commercial release by Guns N’ Roses and Universal Music Group’s Interscope-Geffen-A&M records (the record label).

Within minutes of receiving the unauthorized tracks, Mr. Cogill uploaded the tracks to his Internet website Antiquiet.com. The tracks were not made available for downloading but only for listening in real time by a streaming player. At the time, Mr. Cogill was aware that the musical tracks were protected under United States copyright laws, and he was aware that he did not have authorization to upload the songs over the Internet and that to do so was illegal.

Mr. Cogill cooperated with federal law enforcement officers throughout their investigation. He provided them with his computers both at home and work. He met with or spoke to the agents several times. Finally, the agents wanted to speak with Mr. Cogill about the case again at which time Mr. Cogill told them he was in the process of retaining counsel. He informed the agents that as soon as he had hired his lawyer, he would be happy to continue cooperating in the investigation.

The following morning, Mr. Cogill was arrested at gun point by five FBI agents. He was initially charged in a felony complaint.

On October 16, 2008, Mr. Cogill entered a cooperation plea agreement. The government agreed to file misdemeanor charge only in exchange for Mr. Cogill’s assistance in identifying the source of the leaked tracks. On December 15, 2008, the Court accepted his change of plea.

1 Pursuant to the terms of Mr. Cogill’s plea agreement, he provided timely and
2 complete information relating to how he acquired the tracks from the Chinese
3 Democracy album.

4
5 2. History Of The Copyrighted Work

6 Mr. Cogill created his website Antiquiet.com as a musical commentary and
7 review website, or “blog”. The term “blog” is a contraction of the term "Web log" and
8 is a website usually maintained by an individual with regular entries of commentary,
9 descriptions of events, or other material such as graphics or video. Many blogs provide
10 commentary or news on a particular subject. The ability for readers to leave comments
11 in an interactive format is an important part of many blogs.¹

12 Mr. Cogill created and maintains Antiquiet.com as a music journalism blog. Mr.
13 Cogill and others review music, conduct interviews with artists and discuss a variety of
14 aspects of music and entertainment industry news. The creation of Antiquiet.com is the
15 result of his passion for music. He is a particularly dedicated fan of the band Guns N’
16 Roses.

17 The album “Chinese Democracy” began its creation with a former variation of
18 the band Guns N’ Roses. The former band began writing and recording tracks for the
19 album in 1994. However, as a result of in-fighting among band members, three of the
20 four members left the band in 1996 leaving lead singer Axl Rose to recreate the band
21 anew without the album or most of its tracks having been completed.² Rose was the
22 only original band member to continue working on the album while the Guns N’ Roses

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24 ¹ Wikipedia, *Blog*, accessed February 10, 2009, <http://en.wikipedia.org/wiki/Blog>.

25 ² Wikipedia, *The History of Chinese Democracy*, accessed February 10, 2009, [http://](http://en.wikipedia.org/wiki/History_of_Chinese_Democracy)
26 en.wikipedia.org/wiki/History_of_Chinese_Democracy. Guns N’ Roses has
27 traditionally had four primary band members with three other associated members who
28 play with the band regularly, but who are not usually counted as the core artists. *See id.*

1 band underwent additional artist changes, three different studio affiliations, and four
2 band managers.³

3 Work on the album was sporadic. Rose and the Guns N' Roses band of the
4 moment continued to lay new tracks, record different tracks, mix different tracks, to the
5 point where it is estimated that Rose had a personal library of "potential" Chinese
6 Democracy songs numbering over 1,000 tracks or variations and mixes of tracks.⁴ By
7 2005 it was estimated that various labels having involvement with the album had sunk
8 over \$13 million into its creation--a record amount of investment for any album of its
9 type.⁵

10 In 1999, Rose invited the music magazine Rolling Stone to preview some of the
11 tracks for the album. The magazine published an article indicating that there might be a
12 release date in 2000. But the album still did not appear.⁶

13 Several other feints at a release of Chinese democracy took place over the next
14 few years. Finally, in 2004, Geffen Records (one of the record label divisions of
15 Universal Music Group, or "UMG") shut down all funding for the album.⁷ The label
16 wrote to Rose informing him that because the band had exceeded all budgeted and

17 ³ Leeds, Jeff. *The Most Expensive Album Never Made*, March 6, 2005, The New York
18 Times, <http://www.nytimes.com/2005/03/06/arts/music/06leed.html?> Rose is, in effect,
19 Guns N' Roses, and is the copyright holder for the band's music. It is unclear what
20 rights or interest UMG, or any of the former Guns N' Roses band members have in the
21 copyright of Chinese Democracy. The government has not produced any such
22 information in discovery in this case.

21 ⁴ *Id.*

22 ⁵ *Id.*

23 ⁶ *Id.*

24 ⁷ Universal Music Group controls over twenty different record labels for music
25 recording and publishing in the United States. One of these labels is the tri-able of
26 Interscope-Geffen-A&M Records. UMG estimates that it controls nearly 98% of the
27 recording industry in the United States. Universal Music Group. *Company Overview*,
28 accessed February 16, 2009, <http://new.umusic.com/overview.aspx>.

1 approved recording costs for the album and that the label considered it Rose's
2 obligation to fund and complete the album. The label had effectively shut down the
3 band even going so far as to lock up the band's instruments and recording equipment.⁸
4 the label released a "greatest-hits" compilation, over Rose's objection, in an attempt to
5 recoup some of its investment in Chinese Democracy.⁹

6 Throughout 2004 and 2005 rumors of the album's release continued. But as of
7 2005, Interscope Records had officially removed the album from its production
8 schedule.¹⁰ Throughout 2006, Rose himself had stated that Chinese Democracy would
9 be released that year. By December 2006, with no album released, in an open letter to
10 his fans posted on the Guns N' Roses website, Rose stated that the band had to cancel
11 its last four shows of its North American Tour in order to complete the album blaming
12 the band's former manager for the delay in the album's release. He announced a
13 tentative release date of March 2007.¹¹ In February 2007, the band's road manager
14 announced that the album was complete and was in its post-production "mixing
15 process".¹²

16 The album was not released until November 23, 2008.

17 According to industry insiders, the label had entered an exclusive retail sales
18 contract with Best Buy in which the retailer paid for 1.3 million copies of the album up
19 front. Although the album's United States sales in the first week of release were
20 approximately 261,000 copies, as of February 6, 2009, the total U.S. Sales of the album

21 ⁸ *Id.*

22 ⁹ *Id.*

23 ¹⁰ *Id.*

24 ¹¹ Rose, Axl. *An Open Letter from Axl Rose*, December 14, 2006, <http://www.GunsNRoses.com>

25 ¹² James, Del. *Chinese Democracy Update*, February 22, 2007, <http://web.gunsnroses.com/news/article.jsp?>

1 had only reached 537,000. But the label had already been paid for the 1.3 million
2 copies through its contract with Best Buy.¹³

3 Industry executives have blamed the album's poor sales on Rose himself for
4 failing to promote the album through videos, tours and interviews. Other insiders have
5 attributed it to Best Buy, arguing that the retailer did little to promote its exclusive
6 rights to sell the album.¹⁴ Rose has pointed the finger at Interscope Records and its
7 CEO, Jimmy Iovine, for not putting enough support behind the album's production and
8 marketing. In an interview with the music news magazine *Billboard*, Rose expressed
9 his opinion that Interscope and UMG had not approached the album seriously and did
10 nothing to promote the album prior to its release.¹⁵

11 Notably absent from any public discussion of the possible reasons for the
12 album's poor showing is any mention of the numerous leaks of the Chinese Democracy
13 tracks either by Mr. Cogill or any of the other leaks throughout the years.¹⁶ To the
14 contrary, in the same *Billboard* interview, Axl Rose expressed that he did not believe
15 that the album's sales were harmed at all by Mr. Cogill's actions.¹⁷

16 And it is unlikely that Axl Rose, Interscope, or UMG could prove with any
17 certainty the cause of the lackluster sales of the album. Numerous tracks on the final
18 album had been leaked throughout the years. Industry insider and journalist Mick Wall
(author of numerous books on Guns N' Roses including *W.A.R. The Unauthorized*

19 ¹³ Cohen, Johnathan *The Billboard Q&A: Axl Rose*, February 6, 2009, [http://](http://www.billboard.com/bbcom/feature/the-billboard-q-a-axl-rose-103939032.story)
20 www.billboard.com/bbcom/feature/the-billboard-q-a-axl-rose-103939032.story.

21 ¹⁴ Cohen, Johnathan *The Billboard Q&A: Axl Rose*, February 6, 2009, [http://](http://www.billboard.com/bbcom/feature/the-billboard-q-a-axl-rose-103939032.story)
22 www.billboard.com/bbcom/feature/the-billboard-q-a-axl-rose-103939032.story

23 ¹⁵ *Id.*

24 ¹⁶ At present, the entire album is available for free on-line streaming and, with the
25 appropriate software, burning to CD, at the social network site Imeem.com. [http://](http://www.imeem.com/gunsnroses/music/ZDPzX2B2/guns_n_roses_chinese_democracy/)
www.imeem.com/gunsnroses/music/ZDPzX2B2/guns_n_roses_chinese_democracy/.

26 ¹⁷ Cohen, Johnathan *The Billboard Q&A: Axl Rose*, February 6, 2009, [http://](http://www.billboard.com/bbcom/feature/the-billboard-q-a-axl-rose-103939032.story)
27 www.billboard.com/bbcom/feature/the-billboard-q-a-axl-rose-103939032.story

1 *Biography of William Axl Rose*) stated that in 2006-2007 time frame he obtained nine of
2 the 14 tracks appearing on the released version of *Chinese Democracy*--long before Mr.
3 Cogill uploaded any of the tracks to Antiquiet.com.¹⁸ And apparently people associated
4 with the album have also freely distributed or played various tracks from the album at
5 various times.¹⁹

6 Moreover, recording industry veterans have acknowledged that there is no loss
7 suffered from pre-release leaks of music. In fact, many insiders acknowledge that pre-
8 release leaks help promote an album by creating interest and discussion among fans and
9 critics and, therefore, actually boost sales.²⁰ This idea finds support when examining
10 sales figures for albums that had significant pre-release leaks. For example, in 2007,
11 three of the top six debut sales weeks included three major releases that had been
12 leaked. One of these albums, Lil Wayne's "Tha Carter III", reached one million albums
13 sold in the first week even though Universal Music Group estimates that one million
14 people downloaded the album illegally prior to its release.²¹

15 The industry has also taken advantage of pre-release leaks for market research.
16 By monitoring traffic on peer-to-peer networks to gauge unauthorized leaks, the label is
17 able to develop information to help in product promotion. Specifically, the monitoring

18 ¹⁸ Van Buskirk, Eliot. *Full Interview: Mick Wall on Axl Rose*, November 25, 2008,
19 Wired.com, <http://blog.wired.com/music/2008/11/mick-wall-takes.html>.

20 ¹⁹ Versions of the album had been circulating since 2001. In his interview with
21 Wired.com, Mr. Wall described a "record company executive" who held private
22 listening sessions for journalists in London in 2007 playing finished tracks of the
23 version of the album he received while working on the project in 2001. *Id.* As early as
24 September 2003, a New York radio DJ Eddie Trunk played one of the tracks from
25 *Chinese Democracy* that had been brought to the radio station by Mets baseball player
26 Mike Piazza, who had apparently received the CD in the mail from an unknown source.
27 D'Angelo, Joe, *New GN'R Tune Leaked By ... Mets Cather Mike Piazza?! February 9,*
28 2003, MTV, http://www.mtv.com/news/articles/1477813/20030902/runs_n_roses.jhtml.

²⁰ Crosley, Hillary, *Music Industry Insiders Find Upside in Album Leaks*, July 11, 2008,
Reuters, <http://www.reuters.com/article/musicNews/idUSN1126044820080712?>

²¹ *Id.*

1 permits the label to identify age, gender, and location of those downloading the tracks,
2 as well as identify which songs are the most popular.²²

3 4 3. The Infringement Activity

5 Mr. Cogill received the tracks via the Internet through a “chat” feature. The
6 tracks were unexpected and unsolicited by Mr. Cogill. In fact, Mr. Cogill did not even
7 know what it was he was receiving until he started to listen to the tracks. When Mr.
8 Cogill realized what he had received, as a music journalist he believed it was necessary
9 to share the tracks. He also saw this as an opportunity to promote the Antiquiet.com
10 website as a music industry news blog and make a name for himself.

11 It took approximately 20 minutes to prepare the website in order to upload the
12 tracks and prepare the streaming software. The tracks were not made available for
13 downloading. Mr. Cogill intentionally limited the format for accessing the files so that
14 the tracks would be available through Antiquiet.com for visitors to listen to the tracks in
15 real-time. However, with the appropriate software, it is possible to “rip” the files from
16 Antiquiet’s server for downloading.²³ But, other than tracking the number of “hits” or
17 site visits, Mr. Cogill had no way of tracking how many site visitors were actually
18 listening to the tracks. Nor did he have any means of knowing who might be using
19 software to rip the files for downloading.

20 Within 20 minutes of uploading the tracks, the Antiquiet site crashed and visitors
21 could no longer access the website or the tracks. Before Mr. Cogill could correct the
22 problem, he received a call from a Guns N’ Roses representative instructing him to take
23 the songs down. He informed them that the site had crashed and that he would not post

24 ²² *Id.*

25 ²³ Some of this software that permits the user to “rip” files from streaming media is
26 restricted to downloading the files as they play. In other words, the capturing software
27 must “record” the streaming media as it is played in real time. Other software can rip
28 the files faster than they are streamed. There is no way to track whether software is
ripping streaming files or whether the files are being ripped in real time or not. It is
also impossible to determine whether or not files are being ripped at all.

1 the songs again. Approximately one hour later, Mr. Cogill received a cease and desist
2 letter emailed from Axl Rose's attorney. Mr. Cogill never posted the songs again.

3 In total, the tracks Mr. Cogill had received were available for streaming for
4 approximately 20 minutes. Of the "hits" or visits to the site, there is no way to
5 determine how many visitors listened to the tracks, how many tracks were played,
6 whether anyone ripped the files from the streaming player, and if so, how many tracks
7 were in fact downloaded.²⁴

8 On its release date, Chinese Democracy had a retail list price at Best Buy of
9 \$13.99 with an actual price of \$11.99 for the compact disc. However, it was also being
10 sold as an LP on vinyl for \$19.99. The compact disc is currently selling at Best Buy for
11 \$9.99.²⁵

12 III. DISCUSSION

13 A. OBJECTIONS TO PRESENTENCE REPORT AND 14 RECOMMENDATION

15 Mr. Cogill has no objections to the factual statements and findings of the
16 Presentence Report and Recommendation ("PSR"). The only additional information
17 Mr. Cogill submits is that recently, following the disclosure of the PSR, he was laid off
18 by his employer. He is currently unemployed but trying to do contract project work.
19 Although the information provided by his employer was that he was laid off for "no
20 cause", he was the only person at the company to be laid off and there was some
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22 _____
23 ²⁴ The full running time for the album is over 71 minutes.

24 ²⁵ [http://www.bestbuy.com/site/olspage.jsp?skuId=9111016&st=chinese](http://www.bestbuy.com/site/olspage.jsp?skuId=9111016&st=chinese+democracy&lp=1&type=product&cp=1&id=1925065)
25 [+democracy&lp=1&type=product&cp=1&id=1925065](http://www.bestbuy.com/site/olspage.jsp?skuId=9111016&st=chinese+democracy&lp=1&type=product&cp=1&id=1925065) Although Best Buy was to
26 have the exclusive retail sales for the album, it has been available through Apple, Inc.'s
27 iTunes for purchase on-line--the entire album (for \$9.99), or for each individual track at
28 \$0.99 per song. All different sources of the album (Best Buy CD, Best Buy vinyl, or
iTunes) all had the same 14 tracks per album.

1 indication that his employer's decision was motivated in part because of Mr. Cogill's
2 conviction in this case.

3 Mr. Cogill has no objection to the Advisory Guideline calculation as set forth in
4 the PSR nor the recommended sentence set forth therein.

5 **A. SENTENCING FACTORS**

6
7 1. Section 3553(a) And The Advisory Guidelines

8 Mr. Cogill stands by the stipulations in his plea agreement that the proper
9 advisory Guideline calculation results in a total adjusted offense level of 10. Mr. Cogill
10 agrees with the PSR's calculation of his criminal history placing him in Category II.

11 However, Mr. Cogill agrees with the analysis set forth in the PSR as an accurate
12 reflection of the Section 3553(a) factors justifying a probationary sentence.

13 2. Infringement Amount

14 Under the Advisory Guidelines, a specific offense characteristic to include in
15 determining the appropriate offense level is the infringement amount. If that amount is
16 greater than \$2,000.00 but no more than \$5,000.00, the offense level is to be increased
17 by 1. (USSG §2B5.3(b)(1)). If the infringement amount exceeds \$5,000.00, the loss
18 amount of §2B1.1 is to be used to increase the offense level. *Id.*

19 In determining an infringement amount, the Advisory Guidelines suggest
20 considering the retail value of either the infringing item or the item infringed.

21 Use of Retail Value of Infringed Item. --The infringement amount is the
22 retail value of the infringed item, multiplied by the number of
23 infringing items, in a case involving any of the following:

24 (i) The infringing item (I) is, or appears to a reasonably
25 informed purchaser to be, identical or substantially equivalent to the
26 infringed item; or (II) is a digital or electronic reproduction of the
27 infringed item.

1 USSG §2B5.3, application note 2(A)(i).

2 As this case involves a digital or electronic reproduction of the infringed item--
3 the nine tracks of the album uploaded to the Antiquiet.com website--the Advisory
4 Guidelines indicate that the retail value of these nine tracks is the basis for establishing
5 the infringement amount.

6 Retail Value Defined.--For purposes of this Application Note, the
7 “retail value” of an infringed item or an infringing item is the retail
8 price of that item in the market in which it is sold.

9 USSG §2B5.3, application note 2(C).

10 Here, the market in which the nine tracks were sold is the United States. That
11 market, however, is limited by two factors--that one retailer alone had exclusive rights
12 to sell the complete album (Best Buy) and that the on-line music seller iTunes offered
13 the tracks individually as well as as an entire album. However, the retail price for these
14 items differed distinctly between these two retail sellers of the tracks. Taking the Best
15 Buy release price of \$11.99 for the entire album of 14 tracks, each track, if divided
16 equally by the retail price for the album, would be \$0.856 per track. However, if the
17 price were based on the Best Buy “list” price of \$13.99, not the actual price at which
18 Best Buy sold the new release, then the price per track would increase to \$0.999 per
19 track. However, this only accounts for the price of the CD, not the vinyl LP. At the
20 vinyl LP release price of \$19.99, the per track price increases to \$1.427.

21 This does not account for the iTunes price nor the Best Buy current retail price.
22 The iTunes per album price is, as is the Best Buy current price, \$9.99. That would
23 reduce the price per track to \$0.713. Yet, the per track price on iTunes remains at
24 \$0.99. But interestingly, the per track price is for the unprotected Digital Rights
25 Management (“DRM”) free tracks. In other words, the iTunes per track price of \$0.99
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1 is for tracks that do not have any of the technological protections restricting the
2 copying, downloading and sharing or distributing of these tracks.²⁶

3 Consequently, it cannot be reasonably determined what the true “retail value” of
4 the nine tracks is. With the wide discrepancy among the initial retailers of the music,
5 the Court can only reach a conclusion of the retail value of these nine tracks by
6 speculation. And while the Court may make a reasonable estimate of the infringement
7 amount, it cannot engage in supposition.

8 Even if the government could establish that the retail value of each track was
9 \$0.99, for example, there is no reasonable way to determine the number of
10 infringements. Mr. Cogill posted the nine tracks one time. He made the tracks
11 available for listening only--by means of a streaming audio player. He did not enable
12 anyone to download or rip the files. In fact, he took steps to prevent that. Any third
13 party who may have used other software to rip the files for downloading the tracks
14 cannot be reasonably or justifiably counted as an infringing act against Mr. Cogill.

15 Moreover, there is no way to determine how many downloads were made.
16 Although the number of visitors to the Antiquiet.com site can be tracked, the number of
17 visitors does not equate to the number of downloads. In fact, there is no way to
18 determine with any reasonable certainty how many of the visitors actually played the
19 tracks through the streaming audio player. Moreover, there is no way to identify the
20 number of visitors who actually ripped the files or which files they downloaded. To
21 claim that the number of infringements is equal to the number of visitors is purely
22 speculation that each visitor to the site had the proper software to rip the files and in
23 fact did so. Such supposition is not the proper basis for this Court to make a reasonable

24 ²⁶ DRM encoding protects against the number of copies that can be made from a
25 particular digital file containing the music. Apple’s iTunes included DRM encoding on
26 all iTunes music until recently. The Chinese Democracy album and its individual
27 tracks are currently available without the DRM encoding, thereby eliminating the
28 restrictions on copying and sharing of a single track of music. See Apple, Inc., *What’s
New in iTunes 8*, accessed February 16, 2009, <http://www.apple.com/itunes/whatsnew>.

1 estimate of the infringement amount even if this Court can conclude what the retail
2 price of the tracks in fact was.

3
4 **I. CONCLUSION**

5 As fully set forth above, the Court should adopt the recommendation of the
6 Probation Office as set for in the PSR and sentence Mr. Cogill according to that
7 recommendation.

8 Respectfully submitted,

9
10 Dated: March 1, 2009

11 
12 David J.P. Kaloyanides
13 Attorney for Defendant
14 Kevin Cogill