Inactive Distribution: How the Federal Sentencing Guidelines for Distribution of Child Pornography Fail to Effectively Account for Peer-to-Peer Networks

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TABLE OF CONTENTS

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I. INTRODUCTION

Generally, society has a collective disgust for those who threaten the health and safety of children.[1] Particularly, child pornography—and those who collect, view, and distribute it—turns the stomachs of most Americans.[2] It is difficult to set aside this sentiment and view the laws relating to these individuals in an unbiased fashion. Harsh sentences for possession, distribution, and other child pornography crimes rarely cause outrage because the idea of retribution against these offenders is so attractive.[3] However, it is necessary to take one step back from the grotesqueness of child pornography and the desire for harsh punishments. When the Federal Sentencing Guidelines (Guidelines) for distribution of child pornography are analyzed objectively, it becomes apparent that the current Guidelines are ineffective in accomplishing their goals and irrational in their application. Particularly, the current Guidelines are poorly fit for cases involving Internet distribution of child pornography using peer-to-peer networks and have therefore caused confusion and disagreement among the federal circuit courts.

Computers and the Internet have tremendously affected the landscape of child pornography.[4] Computers offer "anonymity, affordability, and accessibility," which make them ideal for distributing child pornography.[5] Child

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[1] *See* U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 1 (2010), *available at* www.justice.gov/psc/docs/natstrategyreport.pdf.

[2] One judge describes society's view of these offenders by stating: "Possessors of child pornography are modern-day untouchables." United States v. Cruikshank, 667 F. Supp. 2d 697, 703 (S.D. W. Va. 2009); *see also* J.J. Prescott, *Child Pornography and Community Notification: How an Attempt to Reduce Crime Can Achieve the Opposite*, 24 FED. SENT'G REP. 93, 94 (2011) ("Sex offenders are sometimes considered evil and oftentimes considered dangerous, but they are uniformly perceived as 'creepy,' 'weird,' and 'gross,' unknowable and unpredictable.").

[3] *Cruikshank*, 667 F. Supp. 2d at 703 ("[B]ecause we cannot imagine that we personally know anyone so perverted, we are not bothered by the idea that these men are cast out to serve long periods in prison.").

[4] Spearlt, *Child Pornography Sentencing and Demographic Data: Reforming Through Research*, 24 FED. SENT'G REP. 102, 102 (2011) ("As the Internet grew, so did its use for pornography; from 1996 to 2002, online images of sexual exploitation of children increased

pornography is, therefore, found in mass quantities on the Internet.[6]

Peer-to-peer networks, a relatively recent technological development that began with Napster,[7] are now frequently used to trade and acquire child pornography.[8] Some commonly known peer-to-peer networks are LimeWire, Bittorrent, Shareaza, and Kazaa.[9] While there are many legitimate uses for peer-to-peer networks,[10] the programs' characteristics also make them ideal for distributing child pornography, and this distribution is categorically different

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by almost 2,000%, making child pornography the most significant cybercrime against children confronting the FBI.").

[5] Nicola M. Döring, *The Internet's Impact on Sexuality: A Critical Review of 15 Years of Research*, 25 COMPUTERS HUM. BEHAV. 1089, 1092 (2009). Additionally, "[t]he digital format of Internet pornography makes it easy for users to search for specific images, archive them in great volume on their home computers, and digitally modify them. The digital format of online pornography also allows users to conveniently produce and distribute their own sexually explicit content." *Id.*

[6] *See* U.S. DEP'T OF JUSTICE, *supra* note 1, at 11. There is no way to determine exactly how much child pornography is available, but there are reports that child pornography is growing "exponentially," and "it is evident that technological advances have contributed significantly to the overall increase in the child pornography threat." *Id.* One indicator is that reports sent to the National Center for Missing & Exploited Children by electronic service providers "increased by 69% between 2005 and 2009," and 432% more movies and files were submitted to NCMEC to identify children. *Id.*

[7] *See* Geoffrey Fox, *Peer-to-Peer Networks*, COMPUTING SCI. & ENGINEERING, May/June 2001, at 75. Napster has since been absorbed in a merger. Steven Musil, *RIP Napster—Again*, CNET (Dec. 1, 2011, 10:47 PM), http://news.cnet.com/8301-1023_3-57335330-93/rip-napster-again/.

[8] *See Overview and History: Online Child Pornography/Child Sexual Exploitation Investigations*, FBI, http://www.fbi.gov/stats-services/publications/innocent-images-1/innocent-images-national-initiative (last visited July 15, 2012) (noting that the Innocent Images National Initiative has expanded its investigations to peer-to-peer file sharing programs).

[9] Sandip Dedhia, *Top 20 Best Peer to Peer (P2P) File Sharing Programs and Applications*, BLOGSDNA (Sept. 14, 2008), http://www.blogsdna.com/923/top-20-best-peer-2-peer-p2p-file-sharing-programs-applications-software.htm; *Peer-to-Peer (P2P) File Sharing Websites Description/Review*, SITERAPTURE, http://www.siterapture.com/category main.asp?CategoryID=93 (last visited July 15, 2012).

[10] FED. TRADE COMM'N, PEER-TO-PEER FILE-SHARING TECHNOLOGY: CONSUMER PROTECTION AND COMPETITION ISSUES 5 (2005), *available at* http://www.ftc.gov/reports/p2p05/050623p2prpt.pdf (explaining the commercial uses of peer-to-peer networks, such as "the licensed distribution of games, movies, music, and software"); *see also Windows Peer-to-Peer Networking*, MICROSOFT TECHNET, http://technet.microsoft.com/en-us/network/bb545868 (last visited July 31, 2012) (describing uses for peer-to-peer networks such as allowing sharing of files and programs within a "HomeGroup," facilitating business transactions, instant messaging, and running an office). On the other hand, besides child pornography, there are also other illegitimate uses of peer-to-peer networks. *Digital Evidence Analysis: Peer-to-Peer Analysis*, NAT'L INST. JUST., (Nov. 5, 2010), http://nij.gov/nij/topics/forensics/evidence/digital/analysis/peer-to-peer.htm (listing other illegitimate uses for peer-to-peer networks such as identity theft, copyright infringement, and credit card fraud).

than child pornography distribution of the past.[11] The amount of offenders accessing child pornography using peer-to-peer networks continues to increase.[12]

One of the pertinent characteristics that makes peer-to-peer networks ideal for child pornography offenders is the lack of a centralized server.[13] In other words, the peer-to-peer program acts simply as the medium for file distribution.[14] The program does not monitor the content or have ownership rights to the files shared; the files are owned by the individual on whose computer they are stored.[15] A peer-to-peer program allows users to download files from the computers of other users.[16] Unlike other means of acquiring files over the Internet, such as in a chat room or using e-mail, when files are obtained using a peer-to-peer network, no personalized contact is required between the provider and receiver.[17] To download files, users simply search for a term and choose from available files.[18] There are certain search terms known to those in

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[11] Michael C. Seto & R. Karl Hanson, *Introduction to Special Issue on Internet-Facilitated Sexual Offending*, 23 SEXUAL ABUSE: J. RES. & TREATMENT 3, 3 (2011) (acknowledging the view that the online child pornography offender is different than the offline offender, and often the online offender "would never have committed their crimes without internet facilitation"); Chad M.S. Steel, *Child Pornography in Peer-to-Peer Networks*, 33 CHILD ABUSE & NEGLECT 560, 561 (2009) (explaining that technological advances relating to the Internet, specifically the advent of peer-to-peer networks, means child pornography distribution is "[n]o longer the purview of mail-based providers and the back rooms of adult bookstores").

[12] Janis Wolak et al., *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 SEXUAL ABUSE: J. RES. & TREATMENT 22, 37 (2011).

[13] Wai Gen Yee & Linh Thai Nguyen, *A View of the Data on P2P File-Sharing Systems*, 60 J. AM. SOC'Y FOR INFO. SCI. & TECH. 2132, 2132 (2009).

[14] *See, e.g.*, United States v. Carani, 492 F.3d 867, 869 (7th Cir. 2007); *Beginner's Guide*, BITTORRENT, http://www.bittorrent.com/help/guides/beginners-guide (last visited July 15, 2012). This is similar to the way Internet Explorer or other web browsers work. BITTORRENT, *supra*.

[15] BITTORRENT, *supra* note 14 ("BitTorrent is purely a content distribution method, just like a web browser, and similarly, does not incorporate any technology to monitor or restrict your activity.").

[16] Darren Gelber, *Cybercrimes: File-Sharing Programs Violating Copyright and Child Pornography Distribution Laws*, 255 N.J. LAW. MAG., Dec. 2008, at 59, 59.

[17] *See* Detlef Schoder et al., *Core Concepts in Peer-to-Peer Networking*, *in* PEER-TO-PEER COMPUTING: THE EVOLUTION OF A DISRUPTIVE TECHNOLOGY 1, 6 (Ramesh Subramanian & Brian D. Goodman eds., 2005), *available at* http://www.econbiz.de/archiv1/2008/42151_concepts_peer-to-peer_networking.pdf (explaining that the sharing of resources on a peer-to-peer network "frequently takes place between peers that do not know each other").

[18] Josh Moulin, *What Every Prosecutor Should Know About Peer-to-Peer Investigations*, 5 CHILD SEXUAL EXPLOITATION PROGRAM UPDATE (Nat'l Dist. Attorneys Ass'n, Alexandria, Va.), no. 1, 2010, *available at* http://www.ndaa.org/pdf/UpdateGreen_v5.pdf.

the field that indicate a file is child pornography.[19] Because peer-to-peer users can speedily download files from other users and the peer-to-peer network does not monitor the content of the files being shared, peer-to-peer networks offer an attractive way to acquire and share child pornography.[20]

In addition to acquiring files by downloading, files on a user's own computer can be uploaded and acquired by other users.[21] Files may be available to be downloaded by other users even when the originator's computer is turned off.[22] Users have at least some control over their upload settings, but how much depends on the program.[23] Generally, the default settings of a peer-to-peer program allow file sharing, and the user is made aware of this default setting.[24] Peer-to-peer programs encourage users to allow uploading because then there are more files available to other users.[25] To encourage uploading, peer-to-peer programs often provide incentives, such as faster downloading capabilities, to users who share files.[26]

Distribution of child pornography using peer-to-peer networks has exploded because of these characteristics that make it appealing to offenders, which has led to many arrests and convictions for this conduct.[27] Consequently, district court judges are faced with fitting this conduct into the current distribution

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[19] Steel, *supra* note 11, at 561 ("There are a series of keywords that are 'terms of art' for those involved in trading child porn."); *see also* U.S. DEP'T OF JUSTICE, *supra* note 1, at 13 (finding that the "number and names of child pornography files change every minute").

[20] NAT'L INST. JUST., *supra* note 10 (describing how child pornography offenders take advantage of the "speedier transmission and direct communication" of peer-to-peer networks).

[21] *See* FED. TRADE COMM'N, *supra* note 10, at 3.

[22] Gelber, *supra* note 16, at 59.

[23] United States v. Handy, No. 6:08-cr-180-Orl-31DAB, 2009 WL 151103, at *2 (M.D. Fla. Jan. 21, 2009); *P2P File-Sharing: Evaluate the Risks*, FED. TRADE COMMISSION, www.security.arizona.edu/files/p2p%20risks.pdf (last visited July 31, 2012).

[24] Moulin, *supra* note 18. *See generally Peer-to-Peer File-Sharing Software Developer Settles FTC Charges*, FED. TRADE COMMISSION (Oct. 11, 2011), http://www.ftc.gov/opa/2011/10/frostwire.shtm.

[25] JOHN F. BUFORD ET AL., P2P NETWORKING AND APPLICATIONS 333 (David Clark ed., 2009) (explaining that peer-to-peer programs seek to eliminate "free riders" who only want access to the resources of others, without sharing their own, a phenomenon described as "resource theft"); *see also* Yee & Nguyen, *supra* note 13, at 2137.

[26] Paul Gil, *How Torrents Work*, ABOUT.COM: INTERNET FOR BEGINNERS, http://netforbeginners.about.com/od/peersharing/a/torrenthandbook_2.htm (last visited July 31, 2012) (explaining that users who share files are rewarded with faster downloading speeds and users who "leech" files are punished with slower speeds); *see also* United States v. Carani, 492 F.3d 867, 869 (7th Cir. 2007).

[27] *See* Paul Elias, *Child Porn Prosecutions Soaring*, SEATTLE TIMES, Feb. 5, 2011, http://seattletimes.com/html/nationworld/2014139341_apuschildpornprosecutions.html; FBI, *supra* note 8; Page Pate, *Child Pornography Arrests Skyrocket as Penalties Grow Harsher*, PATE LAW FIRM (Feb. 17, 2011), http://www.georgia-criminal-lawyers.com/2011/02/child_pornography_arrests_skyr/ (explaining that peer-to-peer programs "tend to be the catalyst for most child pornography investigations" and predicting the number of investigations will continue to grow as the use of these programs increases).

enhancements of the Guidelines.[28] Courts are in disagreement about which distribution enhancements should apply to peer-to-peer distribution.[29] Therefore, different enhancements are being applied to different offenders who have engaged in the same conduct.[30] Not only does this cause confusion, but it may also lead to as many as twelve years being added to one offender's sentence and not to another's.[31] When an additional twelve years in prison are at stake, confusion, misapplication, and inconsistent sentences are unacceptable.

This Note explains the confusion that arises when applying the Guidelines for the distribution of child pornography to activity on a peer-to-peer network and concludes that separate sentencing enhancements should be developed for active and inactive distribution of child pornography. Part II provides background on the child pornography Guidelines generally and the distribution Guidelines specifically. Parts III and IV explain the confusion in the circuit courts about which distribution enhancement should apply when a defendant makes child pornography available on a peer-to-peer network and determine that peer-to-peer distribution cannot be effectively classified under the current Guidelines. Then, Part V demonstrates the extreme sentence disparities that can arise from the inconsistent application of the distribution enhancements and further concludes that reform of the distribution Guidelines for peer-to-peer network activity is necessary. Finally, Part VI of this Note recommends a revised, two-part distribution enhancement that separates "active distribution" from "inactive distribution."

II. BACKGROUND ON THE FEDERAL SENTENCING GUIDELINES

To understand the inadequacy of the Guidelines for distribution of child pornography as applied to peer-to-peer network activity, it is first necessary to understand the framework of the Guidelines. Section A describes the child pornography Guidelines and the universal criticism of them. Section B focuses on the Guideline enhancements that are specifically targeted to distribution of child pornography to describe the current system into which judges are attempting to fit distribution over a peer-to-peer network.

A. *The Child Pornography Sentencing Guidelines Generally*

The Guidelines are developed by the United States Sentencing Commission (Commission), which was created by Congress in the Sentencing Reform Act (SRA) in 1984.[32] The Commission is required to review and revise the

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[28] *See* Kimbrough v. United States, 552 U.S. 85, 90–91 (2007) (noting that the Guideline range must be considered when determining a reasonable sentence).

[29] *See infra* Part IV.B.

[30] *See infra* Part IV.B.

[31] *See infra* Part V.C.

[32] U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 1 (2009), *available at* http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/

Guidelines in consideration of new comments and data.[33] But, the Commission does not have the ultimate authority over the Guidelines—Congress retains final approval of amendments and can issue directives to the Commission.[34]

By passing the SRA, Congress hoped to "establish a rational sentencing system to provide for certainty, uniformity, and proportionality in criminal sentencing."[35] Thus, the Guidelines should create clarity and decrease the disparities in sentences among similarly situated offenders.[36] The Guidelines should additionally promote fairness, judicial flexibility, and be based upon current knowledge of human behavior.[37] Also, Guidelines should "take into account the purpose of sentencing: just punishment, rehabilitation, deterrence, and incapacitation."[38] Thus, the analysis of the child pornography distribution Guidelines must be in the context of these goals.

The Guidelines created by the Commission are unconstitutional unless they are considered simply advisory, and appellate courts must review district court departures from the Guidelines only for unreasonableness.[39] The Supreme Court announced this standard in 2005 when deciding *United States v. Booker*; this new standard markedly changed the application of the Guidelines.[40] The Court's holding in *Booker* has allowed district court judges, if they choose, to exercise more discretion when sentencing.[41] Now, the sentence recommended by the Guidelines must be determined and is the starting point in every sentencing, but judges can then adjust the level as they deem appropriate after analyzing other factors.[42] However, judges' discretion is still subject to any mandatory minimum and maximum sentences established by Congress.[43] As a

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20091030_History_Child_Pornography_Guidelines.pdf.

[33] U.S. SENTENCING COMM'N, 2010 ANNUAL REPORT ch. 2, at 7 (2010).

[34] *Id.*

[35] U.S. SENTENCING COMM'N, *supra* note 32, at 2.

[36] U.S. SENTENCING COMM'N, *supra* note 33, ch.1, at 1.

[37] *Id.*

[38] *Id.*

[39] United States v. Booker, 543 U.S. 220, 264–65 (2005).

[40] *Id.* at 264–68. Justice Stevens, writing for the Court, recognized that "[w]e do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system." *Id.* at 265. However, the Court held that interpreting the Guidelines as mandatory was unconstitutional. *Id.* Therefore, the Court found it necessary to excise the mandatory provisions and decrease appellate review, believing this still achieved Congress's general goals underlying the Guidelines. *Id.* at 264.

[41] *See* Marcia Coyle, *DOJ Wants Sentences Examined: Prosecutors See Disparity in Fraud, Child Pornography Punishments*, NAT'L L.J. (July 19, 2010).

[42] Gall v. United States, 552 U.S. 38, 49–50 (2007); *Booker*, 543 U.S. at 264; United States v. Pauley, 511 F.3d 468, 472–74 (4th Cir. 2007).

[43] *See* Lauren Garrison, *Child Porn Cases Trigger New Debate: Judges Lack Discretion with Mandatory Sentencing*, NEW HAVEN REG., Aug. 15, 2010, http://nhregister.com/articles/2010/08/15/news/doc4c6764e864853770116397.prt.

result of *Booker*, sentences within the Guideline range have continually decreased for all offenses.[44]

Congress first began legislating against child pornography in 1977, and after its enactment, the Commission examined current sentencing practices and issued the first set of child pornography guidelines in 1987.[45] Since these original Guidelines, there have been many reports, amendments, and changes.[46]

The child pornography Guidelines provide federal judges a recommendation of the appropriate amount of months for an offender's sentence given the characteristics of the offender and the offense.[47] Like other Guidelines, the child pornography Guidelines first set out a base level for the offense, which will generally be twenty-two for a peer-to-peer distributor.[48] Eventually, an offender's final recommended Guideline level will translate into a recommended number of months for their prison sentence. After determining the base level, the judge looks through a series of enhancements and reductions in the Guidelines and determines whether they are applicable; if they are, the base level is adjusted up or down according to the number of levels provided.[49] Once the base level has been adjusted for appropriate enhancements and reductions, the court has determined the offender's final recommended sentence level.

Once the court has calculated the offender's sentencing level, it must look to the Sentencing Table to determine the recommended length in months for the offender's sentence.[50] The Sentencing Table has two axes—a vertical axis for

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[44] *Compare* U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2010) (reporting 55% of sentences were within Guideline range), *with* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2006) (finding 61.7% of sentences were within the Guideline range).

[45] U.S. SENTENCING COMM'N, *supra* note 32, at 8–10.

[46] *Id.* at 2 ("Prompted by congressional action, and on its own initiative, the Commission has reviewed and substantially revised the child pornography guidelines nine times.").

[47] *Pauley*, 511 F.3d at 471.

[48] Section 2G2.2 is the Sentencing Guideline applicable to distribution of child pornography. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2011). The title of this section is: "Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor." *Id.* Eighteen is the base level "if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7)." *Id.* § 2G2.2(a)(1) (2011) (Section 1466A involves "[o]bscene visual representations of the sexual abuse of children." 18 U.S.C. § 1466A (2006). Section 2252 concerns "[c]ertain activities relating to material involving the sexual exploitation of minors." *Id.* § 2522.). For all other trafficking or distributing offenses, the base level is twenty-two. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(a)(2) (2011).

[49] 24 C.J.S. *Criminal Law* § 2024 (2006).

[50] U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, Sentencing Table (2011).

the computed offense level and a horizontal axis for past criminal history.[51] The court will insert the computed offense level and appropriate criminal history level of the offender into the table, and this provides the recommended amount of months for the offender's sentence.[52] Ideally, the monthly range proscribed by the Guidelines will fall within the mandatory minimum and maximum sentence for the offense as proscribed by Congress—for distribution of child pornography, the minimum sentence set by Congress is five years and the maximum sentence is twenty years.[53] If the recommended sentence is outside the mandatory range, the mandatory maximum or minimum trumps the Guideline recommendation, thus controlling a judge's discretion to some extent.[54]

The recommended monthly sentence given by the Guidelines is now just one factor a judge considers while imposing a sentence.[55] In addition to the Guideline range, a sentencing court must also consider the other factors listed in 18 U.S.C. § 3553(a).[56] After considering the Guidelines and other factors, a judge "shall impose a sentence sufficient, but not greater than necessary" to accomplish the goals of sentencing.[57]

The Guidelines for child pornography have been the subject of significant criticism from all sides.[58] Frequent criticisms focus on the harshness of the child

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[51] *Id.* Therefore, two offenders with the same final offense level could have different sentence recommendations from the Table because of their criminal history. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, Sentencing Table, nn.1 & 3 (2011).

[52] U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, Sentencing Table (2011); *see also Pauley*, 511 F.3d at 471–72.

[53] 18 U.S.C. § 2252(a)(2), (b)(1) (2006). Congress established this minimum and maximum in 2003 when passing the PROTECT Act. U.S. SENTENCING COMM'N, *supra* note 32, at 38.

[54] U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(a)–(b) (2011); *see also* United States v. Dorvee, 616 F.3d 174, 181 (2d Cir. 2010) (finding error with the district court's use of the recommended Guideline range as the benchmark instead of the statutory maximum); Garrison, *supra* note 43.

[55] 18 U.S.C. § 3553(a)(4) (2006).

[56] The other factors are "the nature and circumstances of the offense and the history and characteristics of the defendant"; "the need for the sentence imposed" to further the penological justifications of retribution, deterrence, incapacitation and rehabilitation; "the kinds of sentences available"; "any pertinent policy statement" that has been released; "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and "the need to provide restitution to any victims of the offense." *Id.* §§ 3553(a)(1)–(3) & (a)(5)–(7).

[57] *Id.* § 3553(a).

[58] Jelani Jefferson Exum, *What's Happening with Child Pornography Sentencing?*, 24 FED. SENT'G REP. 85, 85 (2011). Judges have been particularly critical of the child pornography Guidelines. *See* Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 FED. SENT'G REP. 108, 109 (citing U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, at 13 (June 2010), *available at* http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf (explaining judicial dissatisfaction with the child pornography Guidelines)).

pornography Guidelines and the discrepancy in their application.[59] Also, because Congress has been particularly active in mandating changes to the child pornography Guidelines, the Guidelines have been criticized for not being empirically based, as is required.[60] When the Guidelines are not based on legitimate findings, courts can give them less deference.[61] Because of these criticisms, district court judges have used their post-*Booker* discretion to sentence outside the Guidelines for child pornography offenses more than for any other offense.[62]

The Commission has recognized the intense criticism, as well as the discrepancies in the sentences imposed, and has placed changes to the child pornography Guidelines on its priority list.[63] When considering changes to the child pornography Guidelines, a better understanding of the current confusion regarding peer-to-peer distribution is incredibly important.[64] The inconsistent

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[59] Spearlt, *supra* note 4, at 102 ("Disapproving federal judges cite § 2G2.2 as derivative of politics, diverging from the Commission's typical empirical approach, producing unjust sentences, being seriously flawed, and not being due the same degree of deference as other Guidelines." (footnotes omitted)). There has also been criticism about the mandatory minimums for child pornography crimes. *See* Garrison, *supra* note 43.

[60] United States v. Grober, 595 F. Supp. 2d 382, 390–95 (D.N.J. 2008); Spearlt, *supra* note 4, at 102 ("Consistent congressional directives have practically prevented the U.S. Sentencing Commission from doing its job as reviewer and reviser of the Federal Sentencing Guidelines. Rather than performing its task in consultation with commentary, data, judges and other authorities in criminal justice, the Commission has been regulated to merely adapting upward rachets to the Guidelines." (footnote omitted)).

[61] Kimbrough v. United States, 552 U.S. 85, 108–10 (2007); *see also* United States v. Cruikshank, 667 F. Supp. 2d 697, 701–03 (S.D. W. Va. 2009); *Grober*, 595 F. Supp. 2d at 384 (finding based on testimony about the Guideline and the history of the enhancements that "U.S.S.G. § 2G2.2, fails to provide a just and reasoned sentencing range given the facts of this case and the background of the defendant").

[62] Carissa Byrne Hessick, *Post*-Booker *Leniency in Child Pornography Sentencing*, 24 FED. SENT'G REP. 87, 87 (2011) ("Perhaps troubled by this seeming lack of proportionality [in the Guidelines], a number of district courts have used their post-*Booker* discretion to impose below-Guideline sentences on those who possess child pornography. Indeed, in 2010, more than 40 percent of below-Guideline sentences that were not sponsored by the government were imposed in child pornography cases. That is the highest rate for any offense type in the federal system." (footnote omitted) (citing U.S. SENTENCING COMM'N, *supra* note 33, ch. 5, at 34)). The rate of departure from the Guidelines has reached 62% for child pornography sentences. Stabenow, *supra* note 58, at 109. To compare, the downward variance rate is 3.8% for drug possession cases. *Id.*

[63] U.S. SENTENCING COMM'N, NOTICE OF FINAL PRIORITIES 4 (2011), *available at* http://www.ussc.gov/Legal/Federal_Register_Notices/20110915_FR_Final_Priorities.pdf.

[64] In 2008, Congress passed the Providing Resources, Officers, and Technology to Eradicate Cyber Threats to Our Children Act of 2008 (the "PROTECT Act"), which called for a national strategy to protect children and mandated the production of reports on the prevalence of child pornography on the Internet, including peer-to-peer usage, to develop the strategy. Providing Resources, Officers, and Technology to Eradicate Cyber Threats to Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229, 4229–53 (codified at 42 U.S.C. § 17611 (Supp. V 2011)).

application of the distribution enhancements to peer-to-peer network activity must be remedied for the Guidelines to provide uniformity and similar sentences for similarly situated offenders.[65] Section B now provides the current structure of the Guidelines for distribution.

B. *The Guidelines for Distribution of Child Pornography*

The initial child pornography Guidelines did address distribution; however, the Guidelines have been amended and complicated since that time to arrive at today's version. The two current distribution enhancements most relevant to this Note are U.S.S.G. §§ 2G2.2(b)(3)(B) and 2G2.2(b)(3)(F).

The first child pornography Guidelines, promulgated in 1987, increased the base offense level of thirteen at the time by a number of levels corresponding to the retail value of the material, starting at five levels.[66] In 2000, according to congressional directives, the Commission changed the distribution Guidelines to provide a varying level of enhancement, from two levels to seven levels, depending upon the nature of the distribution.[67] Also at the request of Congress, the Commission later clarified that distribution could include distribution not for pecuniary gain.[68]

Today, the distribution Guidelines still provide an enhancement from two levels to seven, depending upon the type of distribution. The enhancement level that is added is incredibly important because the amount of months of an offender's recommended sentence can increase greatly when even one level is added.[69] Section 2G2.2(b)(3) of the Guidelines currently lists six types of distribution in subsections (A) through (F). If the offense falls into multiple categories of § 2G2.2(b)(3), the greatest should be applied.[70] Now, the two of these enhancements that are most relevant to this Note will be examined.

Section 2G2.2(b)(3)(B) (Five-Level Thing of Value Enhancement) applies a five-level enhancement if the offense involved "[d]istribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain."[71] The commentary provides: "'Distribution for the receipt, or expectation of receipt of a thing of value, but not for pecuniary gain' means any *transaction*, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of *valuable consideration*."[72]

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[65] For the goals of the Guidelines, see *supra* notes 35–38 and accompanying text.

[66] U.S. SENTENCING COMM'N, *supra* note 32, at 11.

[67] *Id.* at 35.

[68] *Id.* at 40.

[69] U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, Sentencing Table (2011). For example, a level of twenty-nine in the lowest criminal history category has a recommended sentence of 87–108 months, but a level of thirty in the lowest criminal history category has a recommended sentence of 97–121 months. *Id.*

[70] U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(3) (2011).

[71] *Id.* § 2G2.2(b)(3)(B).

[72] *Id.* § 2G2.2 cmt. n.1 (emphasis added).

This Note will demonstrate that attempting to apply "transaction" and "valuable consideration" to distribution over a peer-to-peer network has led to confusion and inconsistent application of the enhancement.

The other important enhancement for this Note is § 2G2.2(b)(3)(F) (Two-Level Other Distribution Enhancement). This section provides a two-level enhancement for an offense involving "[d]istribution other than distribution described in subdivisions (A) through (E)."[73] Therefore, the Two-Level Other Distribution Enhancement functions as a catch-all for distribution that does not fit into one of the specific categories of distribution with a higher enhancement. The two-level increase is the lowest of the distribution enhancements of § 2G2.2(b)(3).[74]

This Note will explain how different courts have applied these two enhancements to the same peer-to-peer distribution—therefore, the same conduct results in a two-level increase for some offenders and a five-level increase for other offenders. This creates a large discrepancy in the amount of months of their recommend sentences. This inconsistency throughout the circuit courts and the unpredictability it causes is precisely what the SRA, the Commission, and the Guidelines are designed to combat.[75]

III. INTERPRETATIONS OF WHETHER PEER-TO-PEER CONDUCT IS SUBJECT TO THE FIVE-LEVEL THING OF VALUE ENHANCEMENT

When an offender is being sentenced for distribution of child pornography that occurred over a peer-to-peer network, the court must determine which distribution enhancement should apply. Some prosecutors will argue that the Five-Level Thing of Value Enhancement should be applied because it is the highest enhancement that could address peer-to-peer distribution, and the court must apply the highest enhancement in § 2G2.2(b)(3).[76] To determine whether activity on a peer-to-peer network warrants the Five-Level Thing of Value Enhancement, courts must decide whether the activity constitutes a "transaction" conducted for, or for the expectation of, a thing of value, meaning "valuable consideration."[77]

Two main theories have been offered for why peer-to-peer distribution is a "transaction" conducted with the expectation of receiving a "thing of value." Section A discusses the first theory—that peer-to-peer users share child pornography with the expectation that they will receive more child pornography. Section B describes the second theory—that peer-to-peer users share child pornography with the expectation of receiving faster downloading

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[73] *Id.* § 2G2.2(b)(3)(F).

[74] *Id.* § 2G2.2(b)(3).

[75] For the goals of the Guidelines, see *supra* notes 35–38.

[76] U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(3) (2011); *see also* Justin Fitzsimmons, *Peer-to-Peer File Sharing Networks and Child Pornography: Possession or Dissemination? Charging Decisions and Other Issues*, 45 PROSECUTOR 38, 39 (2011).

[77] U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 cmt. n.1 (2011).

capabilities on the peer-to-peer network. This Note argues neither of these are an effective way to classify peer-to-peer distribution.

A. *The Debate About Other Peer-to-Peer Network Child Pornography as a Thing of Value*

In non-peer-to-peer contexts, it is undisputed that child pornography can be a "thing of value," but circuit courts disagree about whether the typical offender using a peer-to-peer network distributes child pornography with the expectation of receiving more child pornography. A comment to the Guidelines maintains that child pornography can be a "thing of value," such as in a situation where an offender barters child pornography in return for other child pornography; therefore, in that case the Five-Level Thing of Value Enhancement should apply.[78] When it comes to peer-to-peer networks, however, the courts are split on whether there must be a specific agreement between users that causes an offender to expect child pornography in return, or whether simply giving other users the opportunity to access child pornography and also downloading child pornography from the program constitutes a transaction for a thing of value. This split has led to only some circuits applying the Five-Level Thing of Value Enhancement when a user on a peer-to-peer network provides child pornography for other users to download.

The first view taken by some courts is that the Five-Level Thing of Value Enhancement can apply if the peer-to-peer user makes child pornography files available for upload and expects more child pornography in return.[79] Therefore, for these courts, applying the thing of value enhancement is not dependent upon finding evidence of a specific agreement between peer-to-peer users to trade child pornography.[80] The court that has most actively supported this position is the Eighth Circuit, and the Sixth, Tenth, and Second Circuits have indicated their support of this position as well.[81]

The Sixth, Eighth, and Tenth Circuits have made clear that the Five-Level Thing of Value Enhancement should not *automatically* apply when an offender makes files available on a peer-to-peer network, but should be determined on a

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[78] *Id.*

[79] *See, e.g.*, United States v. Burman, 666 F.3d 1113, 1118 (8th Cir. 2012); United States v. Hardin, 437 F. App'x 469, 474 (6th Cir. 2011); United States v. Geiner, 498 F.3d 1104, 1109–10 (10th Cir. 2007); United States v. McVey, 476 F. Supp. 2d 560, 562–63 (E.D. Va. 2007).

[80] *Geiner*, 498 F.3d at 1109–10; United States v. Maneri, 353 F.3d 165, 169–70 (2d Cir. 2003).

[81] For Eighth Circuit examples, see *Burman*, 666 F.3d at 1118; *United States v. Stults*, 575 F.3d 834, 849 (8th Cir. 2009); and *United States v. Griffin*, 482 F.3d 1008, 1013 (8th Cir. 2007). For a Tenth Circuit example, see *Geiner*, 498 F.3d at 1109–10. For a Sixth Circuit example, see *Hardin*, 437 F. App'x at 474. For a Second Circuit example, see *Maneri*, 353 F.3d at 169–70 (indicating generally that no specific agreement is necessary for the Five-Level Thing of Value Enhancement, but in the case the "thing of value" at issue was a sexual encounter).

case-by-case basis.[82] No direct evidence of an expectation to receive child pornography is required; circumstantial evidence that the offender was a sophisticated computer user can be sufficient.[83]

The second view taken by other courts is that the Five-Level Thing of Value Enhancement should not apply to the typical peer-to-peer user because the nature of a peer-to-peer program is such that users do not expect files only in return for sharing. Recently, the Eleventh Circuit in both *United States v. Spriggs* and *United States v. Vadnais* held that a defendant who offered files on a peer-to-peer network for others to download did not conduct a "transaction" for "valuable consideration" when the offered "valuable consideration" or "thing of value" was other child pornography.[84] Therefore, applying the Five-Level Thing of Value Enhancement on this reasoning was inappropriate.[85] The court accepted that the defendants "distributed," even though there was no evidence of another user actually downloading the files.[86] But, the court held that while child pornography can be a "thing of value," the defendant's "hope that a peer would reciprocate his generosity does not amount to a transaction conducted for 'valuable consideration.'"[87] The court's main concern was that there was no agreement between the defendant and another user that included a return promise for additional pornographic files.[88] The Eleventh Circuit, therefore, requires evidence of a specific agreement between two peer-to-peer users for the Five-Level Thing of Value Enhancement when the proffered thing of value is other child pornography.

By finding a specific agreement necessary for the Five-Level Thing of Value Enhancement, the Eleventh Circuit in *Spriggs* explicitly rejected the Eighth Circuit's position.[89] The Eleventh Circuit disagreed with the Eighth

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[82] *Hardin*, 437 F. App'x at 474; *Stults*, 575 F.3d at 848–49; *Geiner*, 498 F.3d at 1111.

[83] *Stults*, 575 F.3d at 849. In *Stults*, for example, the circumstantial evidence that the court used to establish Stults's computer proficiency was as follows: he had two or three computer towers and a large database; he had saved a large amount of data from other LimeWire users on CDs; he had many images on his computer; and he had a substantial amount of data on his machine. *Id.* For another example of circumstantial evidence a court found sufficient, see *Hardin*, 437 F. App'x at 474 (noting evidence of appellant's "extensive use of LimeWire").

[84] United States v. Spriggs, 666 F.3d 1284, 1288 (11th Cir. 2012); *see also* United States v. Vadnais, 667 F.3d 1206, 1210 (11th Cir. 2012).

[85] *Spriggs*, 666 F.3d at 1288; *Vadnais*, 667 F.3d at 1210.

[86] *Spriggs*, 666 F.3d at 1288.

[87] *Id.*

[88] *Id.* ("Without evidence that Spriggs and another user conditioned their decisions to share their illicit image collections on a return promise to share files, we cannot conclude there was a transaction under which Spriggs expected to receive more pornography.").

[89] *Id.* (finding that the Eleventh Circuit has a different view of file sharing than the Eighth and "disagree[ing] with the approach taken by the Eighth Circuit"); *see also* Douglas A. Berman, *Creating Circuit Split, Eleventh Circuit Rejects File-Sharing Basis for Significant Child Porn Guideline Enhancement*, SENT'G L. & POL'Y (Jan. 10, 2012), http://sentencing.typepad.com/sentencing_law_and_policy/2012/week2/index.html (noting

Circuit's application of the Five-Level Thing of Value Enhancement in similar cases by reasoning that file-sharing programs do not exist to facilitate trading, but to provide free information, regardless of whether the other user shares files.[90] In other words, as the court explained in *Vadnais*, a user of a file-sharing program, particularly a sophisticated user, would never expect to receive other child pornography in return for providing pornography for download by others because this is contrary to the way a peer-to-peer network works.[91] The same files would be available to the user whether or not the user shared files with others.[92]

The circuit courts, particularly the Eighth and Eleventh Circuits, disagree about whether a specific agreement is needed to apply the Five-Level Thing of Value Enhancement when the "valuable consideration" is other child pornography. This split will lead to some offenders being subject to a five-level enhancement, while other offenders who committed the same conduct will not be, thus leading to inconsistency in their recommended sentences.

B. *Exploring the Possibility of Faster Downloading Speeds on a Peer-to-Peer Network as a Thing of Value*

The second argument presented in peer-to-peer distribution cases dealing with the Five-Level Thing of Value Enhancement is that the valuable consideration can be faster downloading capabilities on the peer-to-peer network. This argument is based on the fact that many peer-to-peer file sharing programs reward users for sharing files with faster downloading speeds.[93]

The Tenth Circuit is one court that has held faster downloading speeds are a thing of value.[94] The court reasoned: "[a] 'thing of value' need not have objective value, but may be something of value to the defendant."[95] Therefore, based on the defendant's admission that he shared his child pornography in anticipation of faster downloading speeds, the court found that the Five-Level Thing of Value Enhancement should apply.[96]

The Eleventh Circuit has discussed the application of the Five-Level Thing of Value Enhancement for faster downloading speeds but never specifically applied it. In *Spriggs*, the court rejected that the enhancement should apply

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the Eleventh Circuit's explicit disagreement with the Eighth Circuit that created a circuit split).

[90] *Spriggs*, 666 F.3d at 1288 ("Because the transaction contemplated in the Guidelines is one that is conducted for 'valuable consideration,' the mere use of a program that enables free access to files does not, by itself, establish a transaction that will support the five-level enhancement.").

[91] *Vadnais*, 667 F.3d at 1210.

[92] *Id.*

[93] *See supra* note 26.

[94] United States v. Geiner, 498 F.3d 1104, 1111–12 (10th Cir. 2007).

[95] *Id.* at 1111.

[96] *Id.* at 1112.

based on an alleged transaction with software developers that provided the offender faster downloading capabilities in return for sharing files.[97] However, the court did not focus on whether faster capabilities were a thing of value, but based its decision on factual deficiencies that the peer-to-peer program used in the case was the type of program that offered faster downloading speeds for sharing.[98] In *Vadnais*, the court commented approvingly on the Tenth Circuit's position that faster downloading speeds could be a thing of value, but did not apply the enhancement because there was no evidence that the offender expected faster downloading speeds.[99] The Eleventh Circuit found it important when evaluating the Five-Level Thing of Value Enhancement when other child pornography was offered as valuable consideration that receiving the thing of value be the actual reason the defendant distributed the child pornography.[100] Consequently, the court may require that the government establish obtaining faster speeds was the reason for sharing files before applying the Five-Level Thing of Value Enhancement based on faster downloading speeds. Because file-sharing programs are set to automatically allow uploads, it would be hard to prove, absent an admission, that this was the reason for sharing.

Courts have been trying to fit peer-to-peer network activity into the existing distribution Guidelines. However, the existing Guidelines are not easily applied to the new technology. This has caused a split between the circuits when faced with the question of whether sharing files on a peer-to-peer network is distribution for a thing of value when the thing of value offered is other child pornography. Also, some courts have applied the Five-Level Thing of Value Enhancement when faster downloading speeds are offered as valuable consideration, but this would also be problematic if a specific agreement is necessary for the application of the enhancement. Thus, peer-to-peer distribution does not fit well into existing Five-Level Thing of Value Enhancement.

IV. PEER-TO-PEER CONDUCT AS OTHER DISTRIBUTION AND ATTEMPTING TO DISTINGUISH WHEN PEER-TO-PEER ACTIVITY CALLS FOR THE TWO-LEVEL ENHANCEMENT, AS OPPOSED TO THE FIVE-LEVEL ENHANCEMENT

A. *The Two-Level Other Distribution Enhancement*

As shown above, whether and when the use of a peer-to-peer network justifies the Five-Level Thing of Value Enhancement is unclear. However,

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[97] United States v. Spriggs, 666 F.3d 1284, 1288–89 (11th Cir. 2012).

[98] *Id.* The detective who testified in the case for the government noted that some peer-to-peer programs provide users with faster downloading speeds for sharing files, but provided no evidence that the program Spriggs was using acted that way. *Id.*

[99] United States v. Vadnais, 667 F.3d 1206, 1210 (11th Cir. 2012).

[100] *Spriggs*, 666 F.3d at 1288 (finding that there would have needed to be "evidence that [the defendant] and another user conditioned their decisions to share their illicit image collections on a return promise to share files").

courts agree that a user of a peer-to-peer network who knowingly offers child pornography for others to download is subject to the Two-Level Other Distribution Enhancement.

The Two-Level Other Distribution Enhancement has been applied in cases where the defendant created a shared folder and knowingly allowed other users to acquire the child pornography that was on the defendant's computer.[101] The circuits agree on the appropriateness of the Two-Level Other Distribution Enhancement in that situation.[102] The courts have reasoned that the "passive nature" of the program is "irrelevant" to whether a distribution enhancement is appropriate.[103] Frequently, the passive nature of peer-to-peer distribution has been compared to a self-service gas station, which offers and distributes gas even though the station may be unmanned.[104] The courts are not concerned with whether the files were actually downloaded, just that they were available for download.[105]

The requisite state of mind of the defendant for the application of the Two-Level Other Distribution Enhancement is, however, not clear. The Eighth Circuit, for example, uses a "concrete evidence of ignorance" standard when defendants claim they did not know the files were being uploaded.[106]

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[101] United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009).

[102] *See, e.g.*, United States v. Petersen, 426 F. App'x 852, 853 (11th Cir. 2011); United States v. Estey, 595 F.3d 836, 843–44 (8th Cir. 2010); United States v. Carani, 492 F.3d 867, 876 (7th Cir. 2007).

[103] *Carani*, 492 F.3d at 876.

[104] United States v. Shaffer, 472 F.3d 1219, 1223–24 (10th Cir. 2007) ("We have little difficulty in concluding that Mr. Shaffer distributed child pornography in the sense of having 'delivered,' 'transferred,' 'dispersed,' or 'dispensed' it to others. He may not have actively pushed pornography on Kazaa users, but he freely allowed them access to his computerized stash of images and videos and openly invited them to take, or download, those items. It is something akin to the owner of a self-serve gas station. The owner may not be present at the station, and there may be no attendant present at all. And neither the owner not his or her agents may ever pump gas. But the owner has a roadside sign letting all passersby know that, if they choose, they can stop and fill their cars for themselves, paying at the pump by credit card. Just because the operation is self-serve, or in Mr. Shaffer's parlance, passive, we do not doubt for a moment that the gas station owner is in the business of 'distributing,' 'delivering,' 'transferring,' or 'dispersing' gasoline; the *raison d'etre* of owning a gas station is to do just that. So, too, a reasonable jury could find that Mr. Shaffer welcomed people to his computer and was quite happy to let them take child pornography from it."); *see also Carani*, 492 F.3d at 876.

[105] *See* United States v. Durham, 618 F.3d 921, 928 (8th Cir. 2010) (noting that the standard is whether the defendant made child pornography *available* for upload, not whether another user actually downloaded it).

[106] United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010) ("[T]he purpose of a file sharing program is to share, in other words, to distribute. Absent concrete *evidence* of ignorance—evidence that is needed because ignorance is counterintuitive—a fact-finder may reasonably infer that the defendant knowingly employed a file sharing program for its intended purpose."). Under this approach, the government retains the burden of proof for the distribution enhancements. *Id.* at 452 n.2. This burden can be met with circumstantial evidence of the defendant's computer skills, and then the defendant must provide concrete

Accordingly, the court analyzes whether the defendant was a sophisticated computer user and applies the enhancement if there is no concrete evidence of the defendant's ignorance that the files were being uploaded.[107]

The Eighth Circuit, therefore, provides one approach to the intent question, but the argument can be made that mens rea should be irrelevant to the Two-Level Other Distribution Enhancement. The Sixth Circuit was recently asked by the government to uphold a Two-Level Other Distribution Enhancement on the ground that this enhancement "has no intent, knowledge, or any other mens rea requirement."[108] The government reasoned that other subsections of § 2G2.2(b)(3) specifically include a mens rea requirement; therefore, because the Two-Level Other Distribution Enhancement has no such requirement, the Commission did not intend the defendant's state of mind to be an element of the enhancement.[109] The Sixth Circuit upheld the enhancement in that case without directly responding to the government's argument that the Two-Level Other Distribution Enhancement contains no mens rea requirement.[110] The court found on the facts of the case that there was at least arguably enough evidence that the defendant was aware of the file sharing and would meet the standard used by the Eighth Circuit.[111] Therefore, the court did not need to address the government's argument that the two-level enhancement should be automatic, regardless of the defendant's state of mind.[112]

The argument that the Two-Level Other Distribution enhancement does not contain a mens rea requirement does find support in the language of the Guidelines. This automatic approach would decrease the confusion that arises

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evidence of ignorance for the enhancement not to apply. *Id.* at 452. For an example of what was found to be concrete evidence of ignorance, see *Durham*, 618 F.3d at 931–32. In that case, Durham's brother testified as a witness that Durham had not been the person who downloaded LimeWire and Durham had limited knowledge of the program's capabilities. *Id.* at 932. On the other hand, the government's witness was a forensic examiner who had found no evidence of child pornography in the defendant's shared folder. *Id.* at 923. The circuit court agreed with the government's concessions that the examiner was not a strong witness and that the government should have called the police officer who had investigated Durham pre-arrest and seen files with names suggesting child pornography available to download from Durham. *Id.* at 932.

[107] United States v. Dolehide, 663 F.3d 343, 347–48 (8th Cir. 2011) (explaining that without concrete evidence of ignorance, it is appropriate to assume a defendant used a peer-to-peer program for its intended purpose—file sharing).

[108] United States v. Bolton, 669 F.3d 780, 781 (6th Cir. 2012).

[109] *Id.* The Five-Level Thing of Value Enhancement, for example, requires the defendant to expect a thing of value. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(3)(B) (2011). Another example is the enhancement that targets distribution to a minor "that was *intended* to persuade, induce, entire, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct." *Id.* § 2G2.2(b)(3)(E) (emphasis added) (mandating a seven-level enhancement).

[110] *Bolton*, 669 F.3d at 783.

[111] *Id.*

[112] *Id.*

when trying to establish the intent of a defendant to participate in a passive activity.

The intent necessary for the Two-Level Other Distribution enhancement and whether it should automatically apply is still open to debate. It is troubling that the standard is uncertain when the application of the enhancement may mean an increased prison sentence for an offender. However, what is even more troubling about the Two-Level Other Distribution enhancement is the lack of clarity for when it should be applied as opposed to applying the Five-Level Thing of Value Enhancement.

B. *The Circuits That Apply the Two-Level Enhancement and the Five-Level Enhancement Have Failed to Distinguish when Each Should Be Applied*

Those courts that do apply the Five-Level Thing of Value Enhancement when the valuable consideration is child pornography also apply the Two-Level Other Distribution Enhancement. The Sixth and Eighth Circuits have upheld a Two-Level Other Distribution Enhancement in cases with markedly similar facts to cases in which they have upheld the Five-Level Thing of Value Enhancement.[113] Therefore, the confusion about what behavior justifies each enhancement is even more perplexing when the results of the cases are compared side by side.

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[113] In *United States v. Bolton*, 669 F.3d 780, 782–83 (6th Cir. 2012), the Sixth Circuit upheld a Two-Level Other Distribution enhancement for a defendant who used LimeShare to distribute child pornography. The court noted that Bolton understood the file-sharing program because he removed a file-sharing program from his girlfriend's computer and replaced it with a different one. *Id.* at 783. Also, his girlfriend testified he knew the program shared files. *Id.* Compare that case to *United States v. Hardin*, 437 F. App'x 469, 471 (6th Cir. 2011), in which the Sixth Circuit upheld a Five-Level Thing of Value Enhancement for an offender who had distributed using LimeWire. The court noted that Hardin did not disable the sharing feature, downloaded many videos and pictures, and, therefore, his "sophisticated and extensive use of LimeWire" was sufficient to add the enhancement. *Id.* at 474. In both *Bolton* and *Hardin* the Sixth Circuit discussed the defendant's use of a file-sharing program and apparent awareness that the program shared files. There was no principled reason that *Hardin* and *Bolton* received different enhancements that could greatly impact the length of their sentences. The Eighth Circuit has also upheld both enhancements despite the similarities in the facts of the cases and the inconsistency in the recommended sentences results. *Compare* United States v. Dodd, 598 F.3d 449, 451–52 (8th Cir. 2010) (finding that because the defendant downloaded pornography on the Internet, stored the images on his hard drive, and offered no concrete evidence that he did not know he was sharing the files, the Two-Level Other Distribution Enhancement was appropriate), *with* United States v. Dolehide, 663 F.3d 343, 347–48 (8th Cir. 2011) (holding the Five-Level Thing of Value Enhancement was appropriate because of Dolehide's "familiarity with computers" and his use of a file-sharing network).

United States v. Estey is a perfect example of the inconsistent results under the Eighth Circuit approach and the confusion with the current Guidelines.[114] Using *United States v. Griffin*, a Five-Level Thing of Value Enhancement case, as precedent, the district court imposed a Two-Level Other Distribution Enhancement on Estey.[115] Estey was a sophisticated computer user who even admitted to placing files in his shared folder to increase his own downloading speeds.[116] Yet, the district court, on these facts, applied a two-level enhancement as opposed to a five-level. The Eighth Circuit upheld the enhancement even when Estey tried to distinguish his case from *Griffin* because of the different enhancement levels in the cases.[117] The court responded that the "distinction merely suggests that Estey's use of the filing sharing program could have amounted to distribution under either of these subparts [(B) or (F)] of U.S.S.G. § 2G2.2(b)(3)."[118]

The Guidelines specifically state that the greatest of the applicable subparts of § 2G2.2(b)(3) should apply.[119] Therefore, it is incredibly unsettling that a court could so easily conclude that either enhancement could apply to the same conduct, thereby deciding, but only for that particular case, that the lower of the two enhancements is fine. The calculation of the recommended sentence from the Guideline is not where district judges should exercise their own discretion—discretion comes later.[120] But, the confusion that the Guidelines have caused with respect to peer-to-peer networks is giving judges precisely that opportunity and leading to inconsistent results.

V. PUTTING THE PEER-TO-PEER ENHANCEMENT CONFUSION INTO CONTEXT: HOW LEVELS TRANSLATE INTO YEARS IN PRISON

Up until this point, this Note has talked about the inconsistency and confusion with the Guideline enhancements for peer-to-peer activity in terms of

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[114] United States v. Estey, 595 F.3d 836, 843 (8th Cir. 2010). For another example of the Eighth Circuit affirming a two-level enhancement for a peer-to-peer user when there was no concrete evidence of ignorance that the defendant did not understand he was sharing the files, see *Dodd*, 598 F.3d at 451–52.

[115] *Estey*, 595 F.3d at 843.

[116] *Id.* at 844.

[117] *Id.* at 843.

[118] *Id.* In another case, the defendant argued against the five-level enhancement because he said the government did not provide evidence that he expected a thing of value in return for his available child pornography. United States v. Dolehide, 663 F.3d 343, 348 (8th Cir. 2011). However, the court said "[t]his standard is met by virtue of the fact of sharing (uploading) and receiving (downloading) shared images via the file sharing network." *Id.* *Dolehide*, like *Estey*, is evidence that the Eighth Circuit fails to distinguish between the Five-Level Thing of Value Enhancement and the Two-Level Other Distribution Enhancement.

[119] U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(3) (2011).

[120] *See* Gall v. United States, 552 U.S. 38, 46 (2007) (explaining that judges must calculate the recommended Guideline sentence and then should "give serious consideration to the extent of any departure").

levels—namely, one offender may be subject to a five-level enhancement and another a two-level enhancement for the exact same conduct—and this makes it easy to forget what these levels mean. This Part of the Note puts the Five-Level Thing of Value Enhancement and the Two-Level Other Distribution Enhancement into context to demonstrate the real-world effect that these enhancements can have on an offender's sentence. Section A explores how the distribution enhancement, depending on how the offender approaches it, may have the effect of eliminating the possibility of certain reductions that may have otherwise been applicable. Section B demonstrates that peer-to-peer conduct is, by its nature, also subject to many other enhancements in addition to the distribution enhancement. Finally, section C translates levels into years by using an example of an offender given a two-level enhancement and comparing it to an offender given a five-level enhancement. This comparison demonstrates the real effect—a potential difference of up to twelve years—that applying one enhancement over the other may have.

A. *Missing Out on an Acceptance of Responsibility Reduction*

The distribution enhancements not only can add unjustified levels, and consequently months, to the offender's sentence, but the confusion surrounding the enhancements may cost the offender a reduction for acceptance of responsibility as well. The acceptance of responsibility reduction in the Guidelines provides for a decrease by two levels if the defendant "clearly demonstrates acceptance of responsibility for his offense."[121]

David Gunderson's case provides an example of not only levels being added for distribution, but also levels being prevented from being subtracted. Mr. Gunderson admitted to possessing and downloading child pornography; however, he argued against the distribution enhancement because his computer automatically traded the files.[122] The court rejected this argument, finding that "the fact that his computer traded files automatically is irrelevant: Gunderson is the person who programmed his computer to trade files in this manner."[123] Because Gunderson's objection challenged that he "distribut[ed] at any conceivable level," the court determined that he had gone further than just challenging the meaning of "distribution" but was denying that he had shared files at all.[124] Therefore, in addition to the distribution enhancement, Gunderson was not entitled to a reduction for acceptance of responsibility.[125] In the end, then, his conduct added seven levels to the base level—five for the enhancement and two that were not subtracted for acceptance of responsibility.

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[121] U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2011).
[122] United States v. Gunderson, 345 F.3d 471, 472 (7th Cir. 2003).
[123] *Id.* at 473.
[124] *Id.* at 473–74.
[125] *Id.*

Gunderson is just one example of how the distribution enhancements can affect the recommended level of the offender in additional ways. Besides a situation like Mr. Gunderson's, that involved the missed opportunity for a reduction, the conduct of a peer-to-peer offender will also undoubtedly be subject to many other enhancements because certain enhancements go hand-in-hand with peer-to-peer activity. Section B explains further those additional enhancements.

B. *Other Enhancements Will Always Be Added to the Distribution Enhancement for a Peer-to Peer User*

As commentators have recognized, particularly when a peer-to-peer network is involved, an offender can easily amass multiple enhancements very quickly.[126] The nature of peer-to-peer activity lends itself to many other enhancements being applied for the conduct.

For example, if an offender uses a computer to distribute child pornography, an additional two-level enhancement is added.[127] This enhancement is the by-product of a previous time when distribution using a computer was deemed worse than non-computer distribution because of the fear that computer use helped facilitate the transportation and abuse of minors.[128] Now, child pornography has become largely an Internet crime and this reasoning for enhancing the defendant's level if the distribution used a computer fails.[129] Currently, the prevailing view is that a computer user is actually less likely to harm a child and commit a contact offense.[130] This is particularly true when the computer use is passively on a peer-to-peer network, as opposed to actively joining groups and communicating with others interested in child pornography. [131]

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[126] *See* Spearlt, *supra* note 4, at 105 ("Also, some have called to reform the various upward adjustments, because, as Professor Jelani Jefferson Exum has noted, technology makes it 'easier to amass more sentencing enhancements without necessarily being a more harmful offender.'").

[127] "If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels." U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(6) (2011).

[128] Stabenow, *supra* note 58, at 122.

[129] U.S. SENTENCING COMM'N, *supra* note 32, at 30 n.148 ("While computer use at promulgation of the 'use of computer' specific offense characteristic was small (approximately 28% of federal child pornography offenders in 1995 used a computer), such use has continued to rise and the use of a computer occurred in 96.5 percent of these cases in fiscal year 2008 and 84.5 percent of these cases in fiscal year 2007.").

[130] Stabenow, *supra* note 58, at 122.

[131] *See* Spearlt, *supra* note 4, at 104 ("[A]ccording to research on child abuse images and online sexual exploitation of children, Internet crimes involving adults and juveniles fit a model of statutory rape—adult offenders who meet, develop relationships with and openly

All child pornography on a peer-to-peer network obviously uses a computer.[132] However, courts have rejected the argument that applying both the computer enhancement and distribution enhancement is double counting for the same conduct.[133] Until the Guidelines directly address peer-to-peer distribution, all offenders who make files available on a peer-to-peer network will be subject to a two or five-level distribution enhancement for the conduct *and* a two-level enhancement because a computer was used.

Enhancements for additional images are also much more likely when the offender has distributed using a peer-to-peer network because of the ease of obtaining multiple files very quickly with a peer-to-peer program.[134] However, the evidence that a peer-to-peer user with more files is more dangerous or likely to commit a contact offense is lacking.[135] Some even suggest that the correlation should be in the opposite direction—that an offender with fewer images might actually be more morally culpable and dangerous.[136] However, the current Guidelines will often cause the typical peer-to-peer offender to be subject to a distribution enhancement as well as a number of images enhancement because peer-to-peer network use, due to the ease of acquiring files, normally involves more images than conduct off-line.

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seduce underage teenagers—than a model of forcible sexual assault or pedophilic child molesting." (internal quotation marks omitted)).

[132] Stabenow, *supra* note 58, at 122 (demonstrating the redundancy of the computer enhancement and quoting one judge who said "enhancing for the use of the computer is a little like penalizing speeding, but then adding an extra penalty if a car is involved").

[133] United States v. Carter, 292 F. App'x 16, 18–19 (11th Cir. 2008) (rejecting that applying both the Two-Level Other Distribution Enhancement and the use of a computer enhancement was double counting because the enhancements were meant to address different harms); United States v. Bastian, 650 F. Supp. 2d 849, 864 (N.D. Iowa 2009), *aff'd*, 603 F.3d 460 (8th Cir. 2010).

[134] U.S. DEP'T OF JUSTICE, *supra* note 1, at 11 (describing how the "speed of downloading and uploading, and advances in file sharing technologies make it very easy to quickly transfer or receive large volumes of child sex abuse images" and how new home computer technology makes keeping large libraries of images possible); *see also* Stabenow, *supra* note 58, at 124 (noting that it takes only "marginally more effort to collect 10,000 images than it does to collect ten" when using new technologies). The additional images enhancements provide an increase by two levels for 10–150 images, three levels for 150–300 images, four levels for 300–600 images and five levels for 600 or more images. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(7) (2011).

[135] *See, e.g.*, United States v. Robinson, 669 F.3d 767, 778 (6th Cir. 2012) (expressing doubt that in the computer age "the number of pictures alone captures the gravity of the crime"); Jesse P. Basbaum, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281, 1300–01 (2010).

[136] Stabenow, *supra* note 58, at 125. Troy Stabenow's argument is based on his prosecution experiences that demonstrate defendants with fewer images are sophisticated users who have planned their activities carefully and disposed of images. *Id.* "In other words, although forensic analysis may establish the number of images present on a hard drive, that data is unreliable in assessing actual consumption patterns and tends to mislead courts about the nature of offenders." *Id.*

Two additional enhancements are also more likely to apply to the offender using a peer-to-peer network: the enhancement for sadistic or masochistic conduct, and the enhancement for conduct involving a minor under twelve.[137] These enhancements are more likely for a peer-to-peer user because of the mass amount of files acquired.[138] In a case involving a peer-to-peer user who downloads hundreds of files, there is a high probability that the user may acquire at least one file that fits into each of these categories.[139] When a peer-to-peer program is used, files cannot be previewed beforehand, and it is possible the offender never intended or even realized what was acquired.[140] So, like the computer and number of images enhancements, the peer-to-peer user will likely be subject, in addition to the distribution enhancement, to enhancements for the age of the minor in the pictures and for sadistic images.

The Sentencing Commission strategically structured the child pornography Guidelines so the amount of months corresponding to the base level is less than the minimum sentence set by Congress because the Commission anticipated enhancements would apply in almost every case.[141] However, while "[e]nhancements to the base offense level are meant to increase a sentence for conduct more aggravated than the typical type of offense," multiple enhancements are relevant to the typical child pornography distribution offense, "making this guideline an anomaly."[142] Not only are enhancements being applied to the "typical" case, in almost every case these enhancements are doing more than just tipping the sentence over the mandatory minimum, they are

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[137] These enhancements are contained in U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(4) and (b)(2), respectively. Section 2G2.2(b)(4) dictates a four-level enhancement "[i]f the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence." U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(4) (2011). Section 2G2.2(b)(2) provides a two-level enhancement "[i]f the material involved a prepubescent minor or a minor who had not attained the age of 12 years." U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(2) (2011).

[138] *Stabenow*, *supra* note 58, at 124 ("[P]eople who download child pornography accumulate all sorts of images with little effort.").

[139] *See id.*

[140] *Id.* (noting that using new technology, a person can acquire child pornography images that he or she has "never even seen or attempted to view" and that this is drastically different than in the past when offenders had to specifically send away for specific images they wanted to purchase).

[141] Congress established this minimum and maximum in 2003 when passing the PROTECT Act. U.S. SENTENCING COMM'N, *supra* note 32, at 38. After, the Commission had to determine how to adjust the base level offenses to account for the higher mandatory minimum sentence. *Id.* at 44. The Commission decided to set the base level for the offense below the mandatory minimum and trust that the specific offense characteristics and other adjustments would cause the level to reach the mandatory minimum. *Id.* at 46. The Commission chose this approach after noticing "a majority of offenders sentenced under § 2G2.2 were subject to specific offense characteristics that increased their offense level." *Id.* If the mandatory minimum is not reached, however, § 5G1.1(b) would apply and the mandatory minimum would trump the recommended Guideline level. *Id.* at 45.

[142] United States v. Robinson, 669 F.3d 767, 778 (6th Cir. 2012).

actually sending the sentences close to or even over the mandatory maximum.[143] The harsh sentences that result from enhancements being piled on top of one another are especially outrageous for a peer-to-peer user, yet, at the same time, very likely for a peer-to-peer user. The next section demonstrates the harshness by converting the levels into years of an offender's sentence.

C. *The Harshness of Recommended Sentences and the Large Disparity in the Recommended Sentence when a Five-Level Enhancement Is Applied Compared to a Two-Level Enhancement*

The distribution enhancements, when translated from level to years, have major effects on a person's life. Therefore, the enhancements are too important to be unclear and it is unacceptable to not know whether a two or five-level enhancement will apply. When adding months or years to someone's prison system, we must have a legitimate system for doing so.

To put the enhancements and levels into context, suppose a hypothetical offender who distributes child pornography uses a peer-to-peer network. Therefore, begin with a base level of twenty-two.[144] Then, add five levels pursuant to the Five-Level Thing of Value Enhancement for a total of twenty-seven. With no criminal history, this provides a sentence of 70–87 months. Obviously, because this is a peer-to-peer case, the offender used a computer, adding two levels and bringing the level to twenty-nine, or 87–108 months when there is no criminal history. If the offender had over 600 images, five more levels are added, for a level of thirty-four, or 151–188 months. Four more levels are added if even one of the images portrayed masochistic conduct, which means a level of thirty-eight, or 235–293 months when there is no criminal history. Finally, if any of the material portrayed a minor under twelve, two more levels are added bringing the level to forty. For someone in the lowest category of criminal history, a level of forty means 292–365 months. Or, in other words, *between 24.3 years and 30.42 years*. This means that the standard peer-to-peer user who is a first time offender with no child contact and no actual bargaining with another person can easily receive the statutory maximum sentence of twenty years.

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[143] Mark Hansen, *A Reluctant Rebellion*, A.B.A. J. MAG., June 1, 2009, http://www.abajournal.com/magazine/article/a_reluctant_rebellion/ ("The result is a sentencing scheme in which the typical offender 'charts' at a guideline range that automatically exceeds the statutory maximum, even when there is a full acceptance of responsibility, complete cooperation with law enforcement officials, little or no threat of physical harm to any children and no criminal history."); *see also* United States v. Grober, 595 F. Supp. 2d 382, 394 (D.N.J. 2008) (noting that the Guidelines recommend that almost every offender be "incarcerated near the twenty-year statutory maximum").

[144] Distribution will have a base level of twenty-two, which has also been criticized. *See* Stabenow, *supra* note 58, at 112 (noting how changing the charge from receipt to distribution increases the base level from eighteen to twenty-two, "instantly up[ping] the ante for the defense").

Not only is the severity of this sentencing concerning, it is alarming what the difference is when the calculation is done using the Two-Level Other Distribution Enhancement. For an offender with the exact same enhancements, base level, and criminal history—but with the Two-Level Other Distribution Enhancement as opposed to the Five-Level Thing of Value Enhancement—the final sentence level is a thirty-seven. A level of thirty-seven corresponds to 210–262 months for an offender in the lowest category of criminal history. In terms of years, the sentence for this offender is *between 17.5 years and 21.83 years*. Like the calculation with the Five-Level Thing of Value Enhancement, this is a very severe sentence especially when considered in relation to other crimes.[145]

Even setting aside this general severity, undisputedly 17.5–21.83 years is significantly different than 24.3–30.42 years. This is what is at stake—potentially 12.92 years of someone's life (if the highest of the five-level recommendations is applied and the lowest of the two-level). If courts inconsistently switch between the two enhancements and some circuits continue to apply the Five-Level Thing of Value Enhancement in situations where other courts do not, someone's liberty may be compromised for many years. Peer-to-peer networks do not clearly fit into one distribution enhancement, therefore, the Guidelines' purposes of consistency and fair sentences are not being reached and the Guidelines must be reformed to specifically address peer-to-peer conduct.

VI. FIXING THE PROBLEM: AN ENHANCEMENT SPECIFICALLY ADDRESSING "INACTIVE DISTRIBUTION" USING A PEER-TO-PEER NETWORK

This Note has demonstrated that the current child pornography distribution enhancements in the Federal Sentencing Guidelines are not well suited to address new technologies, particularly peer-to-peer networks. New technologies coupled with the increase in discretion of district judges when applying the Guidelines post-*Booker* have created confusion for all parties, including prosecutors, defense attorneys, and judges.[146] Courts are in disagreement about

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[145] Hansen, *supra* note 143 (explaining that there can be a lower sentencing level for killing someone than for downloading child pornography and how the penalties for child pornography are often more severe than for contact offenses); Spearlt, *supra* note 4, at 103 ("As one report calculates, the typical defendant convicted of distributing child pornography can suffer a fate 194% harsher than a 50-year-old man who crosses state boundaries and repeatedly engages in sex with a 12-year-old girl."); Stabenow, *supra* note 58, at 109–10.

[146] For information on prosecutors' confusion and reactions, see generally Fitzsimmons, *supra* note 76. For information on defense attorney confusion, see Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2010 from Marjorie A. Meyers, Fed. Pub. Defender to Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 6–16 (Aug. 26, 2011), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20110826/Defender-Priorites-Comments_2011-2012.pdf. For examples of judges' confusion and reactions, see generally Hansen, *supra* note 143.

what activities merit the Five-Level Thing of Value Enhancement and the Two-Level Other Distribution Enhancement. This lack of clarity has caused inconsistent application, which is directly contrary to the Guidelines' goals of consistent sentences and just punishments.[147] To decrease the confusion, inconsistent sentences, and unjust punishments, this Note recommends an enhancement that specifically targets the inactive distribution that occurs over a peer-to-peer network.

Peer-to-peer distribution—and the offenders who participate in it—is fundamentally different than other distribution of child pornography because of its inactive nature and thus requires a new enhancement.[148] A sentence must reflect the seriousness of the offense.[149] Therefore, to account for the innate difference of peer-to-peer distribution, a reformed distribution Sentencing Guideline must be two pronged. One subsection should directly address "active distribution" and a separate subsection should target "inactive distribution." In its current form, § 2G2.2(b) lays out the specific offense characteristics.[150] This Note proposes that (b)(1) state: "If the offense involved the defendant *actively distributing* child pornography, increase by (*X* amount of levels)—." Then, (b)(2) should provide: "If the offense involved the defendant *inactively distributing* child pornography, increase by (*X* amount of levels)—." As explained in more detail below, the level for active distribution would be higher than the level for inactive distribution.

An enhancement directed specifically at inactive distribution would be directly applicable to users on a peer-to-peer network who simply provide child pornography files that others can download. The enhancement should not be titled "peer-to-peer distribution," however. The critical difference between the offender who shares child pornography files over a peer-to-peer network and the more traditional offender is the inactive nature of the former's crime. Therefore, rather than title the enhancement "peer-to-peer distribution," the enhancement should be titled "inactive distribution" to address this actual distinction. At this time, no other methods of inactive distribution come to mind, but that is not to say this enhancement should be limited in the future to only peer-to-peer activity. Naming the new enhancements "active" and

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[147] *See* U.S. SENTENCING COMM'N, *supra* note 32, at 1 n.2.

[148] Peer-to-peer users are even different than other offenders who use the Internet to acquire child pornography. *See* U.S. DEP'T OF JUSTICE, *supra* note 1, at 9 ("Rather than simply downloading or uploading images of child pornography to and from the Internet, offenders also use current technologies to talk about their sexual interest in children, to trade comments about the abuse depicted in particular images—even as images are shared in real-time—to validate each other's behavior, to share experiences, and share images of themselves abusing children as they do so.").

[149] 18 U.S.C. § 3553(a)(2)(A) (2006).

[150] U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b) (2011).

"inactive distribution" will increase their ability to adapt to new distribution mediums in the future.[151]

Besides the timelessness that supports a comprehensive inactive distribution enhancement, the active/inactive classification will allow for distinctions to be made even among peer-to-peer users. Not all peer-to-peer distribution is inactive.[152] For example, police could find evidence that an offender explicitly and actively told another person to download files that the offender had made available on a peer-to-peer network. In that type of situation, the government should be able to argue that the distribution, even though it occurred over a peer-to-peer network, was active.

Having different enhancements for active distribution and inactive distribution will also allow the Commission to structure appropriate sub-enhancements that address the characteristics and severity of each type of distribution.[153] While there may be some sub-enhancements that would be relevant to both categories, certain sub-enhancements will be relevant to active or inactive and not to the other. For example, an increased enhancement for use of a computer under inactive distribution will always be redundant because off-line distribution is not easily defined as passive.[154] Therefore, this is an inappropriate sub-enhancement for inactive distribution. A number of images enhancement should also be different under active and inactive distribution, because distributing 600 images is very different when each individual image is actively distributed.[155]

To be effective, the active distribution and inactive distribution enhancements should take into account the specific characteristics of the offense and the offender and be targeted to achieve the goals of sentencing with respect to that type of conduct—the offense level for each offense should reflect

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[151] Because of the speed of technology, it is important that the Guidelines in this area are adaptable to these changes. *See* Jeremy Prichard et al., *Internet Subcultures and Pathways to the Use of Child Pornography*, 27 COMPUTER L. & SECURITY REV. 585, 589 (2011) (noting that "with each new means of communications that has been developed using the Internet a new method of sharing or selling child pornography has emerged").

[152] See United States v. Gunderson, 345 F.3d 471, 473 (7th Cir. 2003), for an example where the offender specifically set up his peer-to-peer system to allow others to download child pornography images from him only after they had uploaded images to his hard drive. This would be a different situation than the entirely inactive peer-to-peer user.

[153] In the example provided, under both (1) and (2), there could be lettered subsections that are appropriate to the characteristics of the offense and whether the person actively or inactively distributed.

[154] If another type of inactive distribution is classified, use of a computer may not be a redundant enhancement in every case. However, because no other types have been identified currently, a sub-enhancement for use of a computer at this point is most likely unnecessary. While this Note only focuses on "inactive distribution," because of changing technologies, use of a computer may be a redundant enhancement for "active distribution" as well. *See* Stabenow, *supra* note 58, at 122–23.

[155] For the language of the current number-of-images enhancement, see *supra* note 134.

the seriousness of the offense.[156] For a court to be required to give them weight, the Guidelines must be based on actual experiences and scientific data.[157] Therefore, the levels for the new active and inactive distribution enhancements must be based on research and experience and any sub-enhancements levels must be also. Because of the intense amount of scientific research and analysis the Commission must conduct for an enhancement level to be credible, this Note is hesitant to provide actual levels for the proposed active and inactive distribution enhancements. Instead, this Note outlines the important aspects of the new inactive distribution enhancement and the characteristics of inactive offenders that make them distinctive and must be considered when determining the appropriate enhancement level.

The first important issue to address relating to the new inactive distribution enhancement is the amount of knowledge required for the enhancement to apply to an offender who makes files available on a peer-to-peer network. The inactive distribution enhancement should automatically apply if an offender makes files available for upload on a peer-to-peer network. Spending time trying to decipher the sophistication of the computer user, the intent to distribute, and searching for concrete evidence of ignorance[158] ignores the fact that today users of peer-to-peer networks understand how the programs operate.[159] A person who provides other peer-to-peer users access to child pornography should be assumed to be knowledgeable of that distribution.[160]

Assuming that a peer-to-peer user has knowledge that another person can download the user's files is not only a reflection of the common reality, but also coincides with the actual harm of distribution over a peer-to-peer network. The harm that is created by peer-to-peer sharing is the continued expansion and availability of child pornography.[161] It is this expansion and availability that

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[156] 24 C.J.S. *Criminal Law* § 2024 (2006).

[157] Stabenow, *supra* note 58, at 108 ("In order to merit deference and compliance, any changes to § 2G2.2 would need to reflect relevant and validated scientific data yet also account for common practical experiences.").

[158] *See supra* note 106 and accompanying text.

[159] As one district court judge said, "I think that there was a time, perhaps, of several years ago when I could say that . . . just simply having a peer-to-peer file sharing program on your computer didn't mean that you were intending to distribute, but I think that time has passed. I really do." United States v. Bolton, 669 F.3d 780, 782 (6th Cir. 2012). He continued on to say that people know if they are using a peer-to-peer program that they are sharing files unless they "go through all the steps" to make themselves secure. *Id.*

[160] The level of computer sophistication that is required to download child pornography on the Internet should be enough to presume peer-to-peer users have a certain level of computer knowledge and are aware that by keeping files in shared folders and not turning on privacy settings, they are making child pornography available for others. *See* Döring, *supra* note 5, at 1091 (2009) ("Online child pornography is extremely difficult to find for unsophisticated users, as it is illegal in most developed countries.").

[161] U.S. DEP'T OF JUSTICE, *supra* note 1, at 9, 11 (noting that "technological advances have contributed significantly to the overall increase in the child pornography threat" and also that "knowing that all copies of child pornography images can never be retrieved

should be punished and this occurs regardless of how knowledgeable the user was of the distribution.

Besides increasing the availability of child pornography, another harm posed by distribution is the possibility that the offender has committed a contact offense in the past or will commit one in the future.[162] The Guideline levels must reflect that certain characteristics of an inactive offender using a peer-to-peer network indicate that the inactive offender is less likely to commit a contact offense.[163] The Department of Justice (DOJ) has established factors that demonstrate an individual's commitment to child pornography and indicate that an offender poses a high risk of committing a contact offense.[164] A first characteristic is that a distributor is "participat[ing] in online child pornography communities."[165] A community can reinforce and normalize an interest in child pornography.[166] Because inactive peer-to-peer distribution does not link the distributor and person receiving the files together, the issue of community is not relevant to inactive distribution.

Another factor that DOJ has determined makes an offender more likely to commit a contact offense is that the offender uses "more than one technology to collect or trade child pornography."[167] Presumably using more than one type of technology indicates a higher commitment to child pornography and makes the offender more likely to actually harm a child. Inactive distribution over a peer-to-peer network will always involve only one medium; if more than one technology is being used for distribution, the offender would be in the active distribution category at this time because no other form of inactive distribution has been established.

The use of "sophisticated technologies or practices to avoid detection" is yet another indicator that the offender may be more likely to commit a contact

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compounds the victimization" of the child, according to the victims, researchers, and medical professionals); *see also* Döring *supra* note 5, at 1093.

[162] U.S. DEP'T OF JUSTICE, *supra* note 1, at 19 (noting that "[a] number of studies indicate a strong correlation between child pornography offenses and contact sex offenses against children"). The validity of this correlation has been questioned, however. *See* Prichard et al., *supra* note 151, at 586; Spearlt, *supra* note 4, at 104.

[163] This sentiment has been recognized by the Department of Justice. *See* U.S. DEP'T OF JUSTICE, *supra* note 1, at 28 ("[A]n offender using pure P2P [peer-to-peer] technology may signal less of a risk than an offender using a technology that combines P2P file sharing with the ability to interact with like-minded offenders. This is because pure P2P technology only requires a blind search of the network for images and videos using a search term; it does not require much personal investment or any personal contact to acquire images."). But, the Department of Justice report still maintains that "these observations are not universal and those who trade on basic peer-to-peer can pose the same risk to a child as an offender using an encrypted message board to trade images." *Id.*

[164] U.S. DEP'T OF JUSTICE, *supra* note 1, at 27–28.

[165] *Id.* at 27.

[166] Prescott, *supra* note 2, at 97; *id.* at 20.

[167] U.S. DEP'T OF JUSTICE, *supra* note 1, at 27.

offense.[168] Again, this characteristic is not relevant to the inactive distributor. By the nature of the offense, inactive offenders are not going to great lengths to avoid detection because they are distributing to others passively.

A final characteristic that DOJ has identified as making an offender more likely to commit a contact offense is that "[t]he offender communicates with other offenders in online communities about his sexual interest in children."[169] This is similar to the first characteristic about participating in communities generally. The inactive offender will never be actively distributing and communicating "sexual interest in children" with others. If the offender were, the offender would be an active offender.

These particular characteristics that DOJ determined make an offender more likely to commit a contact offense are not relevant to the inactive offender. Therefore, the Commission should consider that the inactive offender is, because of the characteristics of the offender's actions, less likely to commit a contact offense and must set the enhancement level for inactive distribution lower than that for active distribution. While there are a few other characteristics listed by DOJ that could apply to the inactive offender, the harm of these can be addressed by sub-enhancements to the inactive distribution base level; they do not apply to inactive offenders as a group as the characteristics just discussed do.[170]

Besides the characteristics listed by DOJ that prove an inactive offender is less likely to commit a contact offense, other personal characteristics of inactive offenders also justify the lower enhancement level. Internet offenders are generally less likely to re-offend than offline offenders.[171] Furthermore, the online offenders who were most likely to re-offend were those with a history of past contact offenses,[172] who would be punished more harshly by the Guidelines anyway. In addition to lower recidivism rates, peer-to-peer offenders are more responsive to community treatment.[173] The Commission should recognize that for the typical peer-to-peer offender, the embarrassment and guilt associated with a conviction for child pornography, combined with a less severe

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[168] *Id.*

[169] *Id.* at 28.

[170] These characteristics are: whether the "offender has a prior history of sex offenses"; how long the offender has been involved in the trade of child pornography; whether the offender demonstrates a particular interest in images of "extreme sexual conduct or very young victims"; and how much care the offender has taken in "building, maintaining and categorizing his collection of child pornography." U.S. DEP'T OF JUSTICE, *supra* note 1, at 27.

[171] Michael C. Seto et al., *Contact Sexual Offending by Men with Online Sexual Offenses*, 23 SEXUAL ABUSE: J. RES. & TREATMENT 124, 136–37 (2011) (explaining that generally there are "substantially lower" recidivism rates for the typical online offender than the typical offline offender); *see also* Stabenow, *supra* note 58, at 119.

[172] Seto et al., *supra* note 171, at 136–37; Stabenow, *supra* note 58, at 120.

[173] Stabenow, *supra* note 58, at 119.

prison sentence, creates a sentence that appropriately serves the goals of punishment.[174]

The Sentencing Commission must study the use of peer-to-peer networks to determine what the appropriate initial enhancement levels are for active and inactive distribution, as well as any necessary sub-enhancements. This Note proposes that there needs to be separate enhancements for active and inactive distribution. The inactive distribution enhancement should apply regardless of the intent of the offender. Because of the limited scientific research available, it is impossible to accurately provide the exact number of levels and conclude how much higher the enhancement for active distribution should be than that for inactive distribution. The Commission must consider, in setting that level, that inactive peer-to-peer offenders are less likely to commit contact offenses and less in need of severe punishment.

VII. CONCLUSION

As most people agree, the child pornography Guidelines are in need of revision. The current Guidelines cause inconsistent sentences, confusion amongst the circuits, and are not accomplishing the goals of the Guidelines. These revisions must take into account the new technology of peer-to-peer networks. By adding an enhancement that directly addresses this new technology and the inactive nature of the distribution, the Guidelines will be able to effectively address child pornography offenders as they function today.

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[174] *See* Elias, *supra* note 27 (quoting the mother of a young man convicted on child pornography charges discussing how her son "will have to carry the stigma of an ex-con and a registered sex offender for the rest of his life" and his seven-year sentence was a "waste of a young person's life and his human potential as a whole, functioning, taxpaying citizen").