

FEDERAL CHILD PORNOGRAPHY OFFENSES



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The Eighth, Tenth, and Eleventh Circuits have taken inconsistent positions concerning the related issue of whether a defendant's knowing use of a P2P file-sharing program by itself qualifies for the 5-level enhancement under §2G2.2(b)(3)(B) as distribution "for the receipt, or expectation of receipt, of a thing of value" (other than for "pecuniary gain") or, instead, only qualifies for the 2-level enhancement under §2G2.2(b)(3)(F) for simple distribution.⁸⁵ The Tenth Circuit has held (and no other circuit has disagreed) that, if a defendant knowingly "opts in" to a P2P file-sharing program in order to gain access to more files or receive faster downloads than he would if he had not "opted in" to the file-sharing feature of the program, such a defendant warrants the 5-level enhancement.⁸⁶

The second recurring issue is what qualifies as "sadistic or masochistic conduct or other depictions of violence" within the meaning of §§2G2.1(b)(4) and 2G2.2(b)(4) — a phrase not specifically defined within the guidelines. Courts have applied this phrase to a variety of conduct. In addition to sexual bondage of minors and use of weapons in a sexual context,⁸⁷ certain sexual acts themselves are deemed "inherently" sadistic by most courts. The 11 federal circuit courts to have addressed the issue to date have held that an image or video that portrays the vaginal or anal penetration of a prepubescent minor by an adult male or with an object for sexual purposes is sufficient evidence by itself for the enhancement. Most such courts have reasoned that such sexual penetration is "*per se*" sadistic or violent and that a court does not need expert medical testimony to support its conclusion that the enhancement applies in such a case.⁸⁸

⁸⁵ Compare *United States v. Griffin*, 482 F.3d 1008, 1013 (8th Cir. 2007) ("Griffin admitted that he downloaded child pornography files from Kazaa, knew that Kazaa was a [P2P] file-sharing network, and knew that, by using Kazaa, other Kazaa users could download files from him. By introducing these admissions into evidence, the government met its burden of establishing that Griffin expected to receive a thing of value — child pornography — when he used the file-sharing network to distribute and access child pornography files."), with *Geiner*, 498 F.3d at 1111 ("We agree that Mr. Geiner did not expect to access images and other files in exchange for allowing other network users to access his files. Although other courts have held that, by sharing files on a file-sharing network, a defendant necessarily expects to receive a 'thing of value' (*i.e.*, access to other users' files), [citing *Griffin*, *supra*], we do not think the language of U.S.S.G. §2G2.2(b)(3)(B) permits such a broad interpretation."); *United States v. Vadnais*, 667 F.3d 1206, 1209–10 (11th Cir. 2012) (*same*); *but cf.* *United States v. Ultsch*, 578 F.3d 827 (8th Cir. 2009) ("Whether a defendant qualifies for the five-level enhancement must be decided on a case-by-case basis, with the government bearing the burden of proving that the defendant expected to receive a thing of value [*e.g.*, another participant's files] when he used the file-sharing software.").

⁸⁶ *Geiner*, 498 F.3d at 1111.

⁸⁷ See, *e.g.*, *United States v. Hoey*, 508 F.3d 687, 692 n.3 (1st Cir. 2007).

⁸⁸ See *United States v. Groenendal*, 557 F.3d 419, 425–26 (6th Cir. 2009) ("[T]he First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have found that images involving penetrative sex between a prepubescent child and an adult male are *per se* sadistic. . . . "[W]e hold today that penetration of a prepubescent child by an adult male constitutes inherently sadistic conduct that justifies the application of [USSG] § 2G2.2(b)(4).") (emphasis in original); *Hoey*, 508 F.3d at 691 ("We agree with the many circuits which have found that images depicting the sexual penetration of young and prepubescent children by adult males represent conduct sufficiently likely to involve pain such as to support a finding that it is inherently 'sadistic' or similarly 'violent' under the terms of section 2G2.2(b)(4).") (citing decisions of the Second, Fifth, Eighth, Tenth, and Eleventh Circuits) (citations omitted); *United States v. Bellflower*, 390 F.3d 560, 562 (8th Cir. 2004) (holding that "images involving the sexual penetration of a minor girl by an adult male and images of an adult male performing anal sex on a minor girl or boy are *per se* sadistic or violent within the meaning of U.S.S.G. § 2G2.2(b)(4)") (emphasis in original); accord *United States v. Maurer*, 639 F.3d 72, 78–81 & n.5 (3d Cir. 2011); *United States v. Holt*, 510 F.3d 1007, 1011 (9th Cir. 2007); *United States v. Myers*, 355 F.3d 1040, 1043–44 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1143–44 (10th Cir. 2003); *United States v. Osborn*, 35 F. App'x 61, 62 (4th Cir. 2002); *cf.*

level enhancement for use of a computer, §2G2.2(b)(6), applies in virtually every case and, thus, fails to differentiate among offenders with respect to their involvement in communities.⁶⁴

A new guideline provision specifically dealing with offenders' community involvement, as distinct from their distribution conduct, could better differentiate among offenders' culpability based on their degree of such community involvement.⁶⁵ In addition, the guideline could be amended to better distinguish between more and less culpable distribution conduct while remaining "technology-neutral" (and, thus, remain relevant in view of inevitable future changes in technologies). The enhancement in §2G2.2(b)(3) was created before the widespread use of P2P file-sharing programs and other types of emerging technologies by non-production offenders.⁶⁶ Therefore, a revised guideline should better differentiate among offenders based both on their degree of community involvement and the nature of their distribution conduct.⁶⁷

c. Offenders' Known Histories of Sexually Dangerous Behavior

Non-production offenders' histories of criminal sexually dangerous behavior (CSDB) result in increased penalty ranges for some offenders. Some offenders receive the guideline's "pattern of activity" enhancement under §2G2.2(b)(5) and/or the statutory enhancement for having a predicate conviction for a sex offense under 18 U.S.C. §§ 2252(b) or 2252A(b). In addition, depending on the operation of the guidelines' criminal history rules,⁶⁸ offenders with

⁶⁴ *See id.* at 139.

⁶⁵ By focusing on "community" involvement, the Commission is not intending to suggest that mere association with others who generally advocate child sexual exploitation is a basis by itself for criminal punishment. Rather, a convicted child pornography offender's involvement with other child pornography offenders in actual or virtual "communities" — whereby child sexual exploitation generally and child pornography specifically are validated through the community members' words and actions — is sufficiently related to the offenses of possession, receipt, or distribution of child pornography such that the First Amendment would not bar consideration of that association as an aggravating factor at sentencing. *See United States v. Simkanin*, 420 F.3d 397, 417 n.22 (5th Cir. 2005) (approving of a prior unpublished decision affirming a district court's upward departure based on a child pornography defendant's membership in the North American Man Boy Love Association; stating that such a departure did not violate the First Amendment); *see also Dawson v. Delaware*, 503 U.S. 159, 165 (2002) (holding that "the Constitution does not erect a per se barrier to the admission of [a defendant's] beliefs or associations at sentencing simply because those beliefs and associations are protected by the First Amendment").

⁶⁶ The distribution enhancement was in the original version of the guideline (promulgated in 1987). The last time the Commission amended the distribution enhancement was to clarify that "distribution includes advertising and posting [child pornography] on a website for public viewing . . ." USSG App. C, amend. 664 (Nov. 1, 2004). This clarification in the definition of "distribution" did not specifically concern P2P file-sharing programs.

⁶⁷ *See Prepared Statement of Prof. Bryan N. Levine, Ph.D., Professor of Computer Science, University of Massachusetts, to the Commission, at 1 (Feb. 15, 2012) (contending that offenders' involvement in child pornography communities and use of sophisticated computer technologies "are important aspects of this crime and its offenders that are not taken into account by the current guidelines"); see also Joint Prepared Statement of James Fottrell, Steve Debrotta, and Francey Hakes, U.S. Department of Justice, to the Commission, at 17 (Feb. 15, 2012) ("The Commission should . . . consider adding new specific offense characteristics [to the guideline] to better differentiate among offenders, such as by accounting for offenders who communicate with one another and in so doing, facilitate and encourage the sexual abuse of children and the production of more child pornography, as well as for offenders who create and administer the forums where such communication is taking place.")*

⁶⁸ *See USSG §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).*