

Appendix L

Cases: Distribution for pecuniary gain enhancement USSG §2G2.2

In United States v. Lorge, 166 F.3d 516 (2nd Cir.), *cert. denied*, 119 S. Ct. 1372 (1999), the Second Circuit held that the definition of "distribution" in §2G2.2(b)(2) is not limited by Application Note 1 thereof to acts for pecuniary gain, and trading pornographic pictures without pecuniary gain qualifies for the enhancement. The defendant exchanged images of illegal sex acts involving children with other adults over the Internet; he also offered to "trade" videos depicting child pornography for photographs of the same.

The district court enhanced the defendant's sentence five levels pursuant to §2G2.2(b)(2) following the recommendation by the probation officer who noted in the presentence report "the defendant was to send fifty pictures, which the agents advise have no value, to an undercover agent in exchange for a video which has a value of \$50." *Id.*, 166 F.3d at 518. The defendant contended that application note 1 limits the term "distribution" to acts taken for "pecuniary gain." The appellate court affirmed the five-level increase, noting that §1B1.1 provides that the term "includes" is not exhaustive, and that §2G2.2 application note 1 should not be read as to avoid an overly narrow reading of distribution that excludes acts ancillary to sales, such as transportation. The appellate court added that the ordinary meaning of distribution involves an act or series of acts without regard to the actor's motive.

In United States v. Hibbler, 159 F.3d 233 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1278 (1999), the Sixth Circuit held that the distribution enhancement in §2G2.2(b)(2) is not limited to instances involving distribution for pecuniary gain. Therefore, the trading of images depicting child pornography for pictures of like kind warranted an increase under §2G2.2(b)(2) for distribution of child pornography. The defendant had traded child pornography pictures over the Internet. The appellate court following the reasoning of the Fifth Circuit in United States v. Canada, 110 F.3d 260, 263 (5th Cir. 1997) (the plain meaning of the word "includes" unambiguously indicates that the intended definition of distribution for §2G2.2(b)(2) is meant to be inclusive, of pecuniary gain purposes, but not exclusive of all other purposes), enhanced the defendant's sentence 5-levels pursuant to §2G2.2(b)(2). The Sixth Circuit added that in cases similar to the one at hand, where no actual "sale" takes place and the value of the materials distributed is not easily ascertainable, the minimum five-level enhancement is appropriate.

In United States v. Canada, 110 F.3d 260 (5th Cir.), *cert. denied*, 118 S. Ct. 195 (1997), the Fifth Circuit held that the definition of distribution as used in §2G2.2(b)(2) is not limited to transactions for pecuniary gain. The defendant was convicted under 18 U.S.C. §§ 2252(a)(2), 2252(a)(4)(B), and 2423(b) for attempting to solicit a thirteen-year-old male minor to have sex with the defendant. The defendant had sent the boy a visual depiction of minors engaging in sexually explicit conduct. The district court enhanced the defendant's

sentence five-levels, pursuant to §2G2.2(b)(2) for distribution. The defendant argued that distribution under §2G2.2(b)(2) requires a purpose to exact a pecuniary gain which was not present here. The appellate court rejected the defendant's argument, holding that the intended definition of distribution for the sake of the guideline is meant to be inclusive of pecuniary gain purposes, but not exclusive of all other purposes. Furthermore, §1B1.1 provides that the term "includes" is not exhaustive. The appellate court upheld the district court's determination that the defendant's distribution was accompanied by an additional element, an attempt to entice a minor to have sex with him.

In United States v. Black, 116 F.3d 198 (7th Cir.), *cert. denied*, 118 S. Ct. 341 (1997), the Seventh Circuit, in a 2-1 decision, held that in order for a defendant to qualify for a distribution enhancement under §2G2.2(b)(2), the defendant must receive some benefit or transaction for pecuniary gain. The defendant received and distributed child pornography over the Internet. The government appealed the district court's refusal to enhance the defendant's sentence under §2G2.2(b)(2). The appellate court rejected the government's argument that the enhancement should apply to some forms of distribution that are not for pecuniary gain. The appellate court, holding that §2G2.2(b)(2) implies a transaction for pecuniary gain is needed for the enhancement to apply, noted that this was a case where the distribution was not for any kind of gain, and thus, §2G2.2(b)(2) should not apply. The court did state, however, that pecuniary gain was a broad concept itself, and it does not exclude the possibility of swaps, barter, in-kind transactions, or other valuable consideration.