US Sentencing Guidelines and Computer Crime

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In 1986, the US Congress adopted a system of sentencing guidelines which was designed to eliminate inconsistencies in sentencing across the country for violations of the same statute.The sentencing guidelines establish a formula which federal judges must use to calculate a range of sentence for any given offense. The formula takes into account the severity of the offense, the skill and planning required to commit it, the defendant's prior history, whether the defendant admitted or contested his guilt, and other aggravating and mitigating factors which courts have traditionally used in setting sentence. The guidelines, however, assign a formulaic value to each of these factors, which then leads to a calculation of the required sentence.Courts are allowed to depart from the guidelines under only limited conditions.

The US sentencing guidelines have resulted in considerable debate and are a factor in a high percentage of criminal appeals. Most people agree that they have tended to standardize sentences, but there is disagreement about whether that result has been beneficial to the administration of justice.

Early this year, Congress enacted legislation requiring the US Sentencing Commission to propose amendments to the sentencing guidelines that would result in tougher sentences for certain types of fraud, including telemarketing fraud and theft of identity.

In addition, in the last six months, three federal courts have announced decisions on sentencing guideline issues in criminal cases involving computer fraud. In the first, *US v. Guffey*, 97 F. Supp. 2d 842 (E.D. Tenn., May 18, 2000), a 20 year old man "used his mother's newly acquired home personal computer, color printer and scanner to copy a twenty dollar bill," made 10-12 copies of the bill and tried to pass them as legal currency. He was charged and pled guilty to making and passing counterfeit notes. The issue for the court was whether the defendant's sentence should be increased under a portion of the sentencing guidelines that applies to persons who "manufacture the currency" but does not apply to "persons who merely photocopy notes or otherwise produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny." The court held that the intention of the sentencing guidelines was to increase the level of a defendant's sentence if the counterfeit currency he produced was good enough to pass in commerce and thereby pose a threat to the US economy, and that the exception as written in the sentencing guidelines in 1989 had become out of date with developing technology.
"The use of, and access to, highly technical, sophisticated equipment capable of producing quality counterfeit no longer requires specialized training. Today's personal computers and the concurrent accessories have turned once difficult time-consuming tasks into quick easy projects for even the least technology-savvy individuals," the court wrote. Accordingly, the defendant was sentenced as a skilled manufacturer, not a simple copier, in accordance with what he did, not how he did it.

The second case involved a similar set of facts, but a different section of the sentencing guidelines and a different result. In *US v. Codman*, 223 F.3d 320

(Aug. 2, 2000), the Sixth Circuit Court of Appeals was faced with an appeal from a sentence after plea to one count of counterfeiting. Here, too, the defendant had used a personal computer and off-the-shelf software to make counterfeit currency, and here, too, the trial court increased the sentence under the guidelines, but relying on a different section of the sentencing guidelines that increases the penalty if the defendant "used a special skill, in a manner that significantly facilitated the commission of the offense." The guidelines define such a "special skill" as "a skill not possessed by a member of the general public and usually requiring substantial education, training or licensing." Although the trial court thought that the ability to make counterfeit notes with a personal computer showed a "skill not possessed by the general public," the appellate court did not and reduced the sentence.

The lesson of Guffey and Codman is that, while it may take no special skill to counterfeit US currency, it does to determine what a defendant's sentence is likely to be for the crime under the sentencing guidelines.

In the third case, *US v. Middleton*, (2000 U.S. App. LEXIS 29-31, 9th Cir., Nov. 16, 2000), the issue was whether, for a violation of the Computer Fraud and Abuse Act, a defendant who gained unauthorized access to a US computer system could receive an increased sentence based on the fair value of the time spent by company employees to repair the damage he caused. The Ninth Circuit held that he could. In this case, a disgruntled former employee hacked into his former employer's computer system, changed passwords and deleted whole databases. The company brought in staff for all of one weekend to rebuild the system, and although the defendant argued that the actual cost to the company of using salaried employees to repair the damage was slight, the trial court disagreed, valued the damage the defendant caused by the market value of the time expended and increased the defendant's sentence based on the calculation of the fair value of staff time.

The Ninth Circuit found the decision consistent with the sentencing guidelines, saying, "There is no basis to believe that Congress intended the element of 'damage' to depend on a victim's choice whether to use hourly employees, outside contractors or salaried employees to repair the same level of harm to a protected computer." Middleton teaches that the defendant bears the risk at sentencing of the costs that his criminal acts impose on his victim.

All three of these cases involved US citizens charged in US courts for crimes committed entirely within the territorial United States. But the US sentencing guidelines apply to any crime prosecuted in a US court, whether the act occurs within or outside the US And these most recent cases, taken together with Congress' direction to stiffen the sentencing guidelines for certain types of economic crimes, show that a person charged with a US crime takes his chances with the sentence he is likely to receive if convicted.