DOCKET NO.
12-1620-cr

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

-v-

NEIL FARNEY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

REPLY BRIEF ON APPEAL FOR DEFENDANT-APPELLANT NEIL FARNEY

Copies to:

RICHARD HARTUNIAN
United States Attorney
BRENDA K. SANNES
Assistant U.S. Attorney
PO Box 7198
100 South Clinton Street
Syracuse, New York 13261-7198
(315) 448-0672

Respectfully submitted:

LISA A. PEEBLES
Federal Public Defender
JAMES P. EGAN, *on brief*
Research & Writing Attorney
4 Clinton Square, 3rd Floor
Syracuse, New York 13202
(315) 701-0080

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

GUIDELINE PROVISIONS

ARGUMENT

Neil Farney objects to and disagrees with many contentions presented in the government's responsive brief. This reply is limited solely to those warranting a response. Contentions left unaddressed are sufficiently met with the facts and arguments presented in his opening brief.

I. THE DISTRIBUTION PROVISIONS OF U.S.S.G. §2G2.2 REQUIRE PROOF THAT A DEFENDANT KNEW IMAGES HE DOWNLOADED WOULD BE MADE AUTOMATICALLY AVAILABLE TO OTHER INDIVIDUALS.

Farney argued on appeal that the district court erred in applying the distribution provisions of U.S.S.G. §2G2.2 after finding he knowingly made images of child pornography available to other individuals. In particular, he argued that his ignorance that the peer-to-peer network would automatically make images of child pornography he downloaded available to other users of the same program required applying the two-level reduction of U.S.S.G. §2G2.2(b)(1) and precluded application of the two-level distribution increase of U.S.S.G. §2G2.2(b)(3)(F). Although in the district court the government accepted that each provision required proof of a defendant's knowledge as to the file-sharing feature of each program, it now changes its tune and trumpets the contrary argument placed in its lap by the Tenth Circuit's recent decision

in *United States v. Ray*, __F.3d__, 2012 WL 5395164 (Nov. 6, 2012).[1] For that reason, this Court should decline to consider the government's assertion that the distribution provisions do not contain a *mens rea* requirement. Even if reaching the merits, however, this novel argument should be rejected for several reasons.

Prior to addressing the government's new-found reliance on the Tenth Circuit's analysis, it is first important to define the precise issue injected into this appeal by the government. Farney used two peer-to-peer networks to locate and download files containing still images and videos depicting minors engaged in sexual explicit conduct onto his two computers. There is no indication that prior to doing so Farney had ever viewed or possessed child pornography. Whatever may be said of the general purpose of the peer-to-peer network, then, Farney's purpose in using the programs was to obtain child pornography, not to distribute it to other individuals. When Farney downloaded child pornography files through each program, the files were placed in a folder entitled "Saved Folder" on the computers' hard drives, which could only be accessed by users of each respective computer. By default,[2] each

[1] Notwithstanding the government's attempt to parse the particular holdings of the various Courts of Appeals to have addressed the issue, it is strained to acknowledge that every other circuit court has relied on direct or indirect evidence of a defendant's knowledge of the peer-to-peer network's file sharing function in upholding a distribution enhancement.

[2] The government concedes that both peer-to-peer networks had default settings to make each downloaded file automatically available. Brief of Appellee at 7.

program also automatically placed each downloaded file into a separate folder entitled "Shared Folder" on the computers' hard drives, which, again by default, could be accessed by any user of the respective programs when Farney's computers were on. There was no evidence that Farney actually distributed a child pornography image to another individual or intended to do so. Nevertheless, Farney concedes that knowingly placing child pornography files in the shared folder constitutes distribution under U.S.S.G. §2G2.2. The question in the district court and initially presented on appeal was whether the government produced sufficient evidence to contravene his asserted ignorance of the fact that the peer-to-peer network automatically made images he downloaded available to other users by placing them in the shared folder. The government now asks this Court to consider a preliminary question: whether Farney may be found to have distributed child pornography even if his ignorance is accepted.

As the government has noted, the Tenth Circuit recently held that the distribution provisions of U.S.S.G. §2G2.2 apply when the government concedes that a defendant, who receives child pornography images through a peer-to-peer network, is unaware of the program's sharing feature. The *Ray* Court arrived at this conclusion in two steps. First, the court observed the absence of an express *mens rea* requirement in the language of the general distribution definition in application note

1 of U.S.S.G. §2G2.2. *Ray*, 2012 WL 5395164 at *4. Second, the Court cited its own circuit precedent declining to read a *mens rea* requirement into sentencing guidelines. *Id*. at *5. The *Ray* Court then satisfied itself with this interpretation by observing that the scienter requirement included in the definition of "distribution to a minor" was absent from the general definition of "distribution," remarking that the Sentencing Commission knew how to add a *mens rea* requirement when it wanted one. *Id*.

Several analytical failings undermine the *Ray* Court's conclusion. The Tenth Circuit first erred in holding that the guideline definition of "distribution" fails to incorporate a *mens rea* requirement. While it is true that the general distribution definition does not contain an express *mens rea* requirement, the *Ray* Court failed to find that, or even consider whether, one is implicit in the Commission's definition. Beyond that, the Tenth Circuit erred in relying on precedent from this Court for the proposition that a *mens rea* requirement may never be read into a guideline provision. Finally, the *Ray* Court's analysis fails on its own terms. The only act that Farney committed – receiving child pornography through a peer-to-peer network – is not an act related to the transfer of child pornography as defined by the Sentencing Commission. Moreover, the network's default setting of automatically depositing downloaded child pornography files into the shared folder was not an act committed or willfully caused by Farney and is therefore not relevant conduct.

A. The General Distribution Definition in U.S.S.G. §2G2.2 Contains an Implicit *Mens Rea* Requirement.

In assessing whether the distribution definition contains a *mens rea* requirement, the *Ray* Court erred in looking solely at the express language used by the Commission. Upon closer and more considered inspection, the following considerations compel the conclusion that the Commission intended the distribution enhancements to be applied only when evidence supported a defendant's knowing and intentional conduct related to the distribution of child pornography: (1) a survey of the history and development of the distribution enhancement; (2) a comparison between the general distribution enhancements and the three specific ones; (3) an examination of the qualifying conduct constituting general distribution; and (4) a review of the context in which the distribution enhancement is placed.

1. The history and development of the distribution enhancements indicate the Commission's intention to require proof of a defendant's *mens rea*.

A *mens rea* requirement has always been implicit in the distribution definition. The first Guidelines Manual included a single definition, "'Distribution,' as used in this guideline, includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute." U.S.S.G. §2G2.2, application note 1 (1987). Though this definition did not include an express

mens rea requirement, one was certainly implicit. Under this definition, distribution only enhanced a sentence when done so for pecuniary gain. As one cannot ignorantly or unknowingly distribute something for pecuniary gain, it necessarily follows that distribution as first defined implicitly included only knowing acts done for a particular purpose or with a specific intent.

The first significant amendment to this definition came in 2000, when the Sentencing Commission acted pursuant to congressional directives to "clarify that the term 'distribution of pornography' applies to the distribution of pornography *for both monetary remuneration and a non-pecuniary interest.*"[3] U.S.S.G. App'x C, amend. 592 (2000) (emphasis added). As noted by the Sentencing Commission, the amendment "(1) modifies the definition of 'distribution' to mean any act, including production, transportation, and possession with intent to distribute, related to the transfer of the material, regardless of whether it was for pecuniary gain; and (2) provides for varying levels of enhancement *depending upon the purpose* and audience of the distribution." *Id*. (emphasis added). According to the Sentencing Commission, "[t]hese varying levels are intended to respond to increased congressional concerns,

[3] In 1996, the Sentencing Commission made a slight revision to the definition, but kept the requirement of pecuniary gain: "'Distribution' includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute." U.S.S.G., App'x C, amend. 537 (1997).

as indicated in the legislative history of the Act, that pedophiles, including those who use the Internet, are using child pornographic and obscene material to desensitize children to sexual activity, to convince children that sexual activity involving children is normal, and to entice children to engage in sexual activity." *Id*. In addition to amending the definition of "distribution," Amendment 592 also provided for additional definitions of distribution when related to different audiences or for different purposes, including (1) distribution for pecuniary gain, (2) distribution for the receipt, or expectation of receipt, of a thing of value, and (3) distribution to a minor.

Despite these modifications to the distribution provisions, the Sentencing Commission retained the implicit *mens rea* requirement. Although making clear the distribution enhancements applied when done "for both monetary remuneration and a non-pecuniary interest," the Commission continued to base the enhancement on proof that a defendant distributed *for* a particular purpose or with a particular interest, thus preserving the pre-existing *mens rea* requirement implicit in the original definition. In fact, the Commission's insertion of varying levels of distribution enhancements to correspond to the defendant's purpose and intended audience further supports this conclusion. There was no concern that defendants were unwittingly disseminating child pornography.

In 2004, the Sentencing Commission made substantial amendments to the child pornography guidelines in response to the PROTECT Act. As relevant here, the amendment consolidated the guidelines for receipt, possession, and distribution of child pornography into the single guideline, U.S.S.G. §2G2.2. Possession of child pornography offense were assigned an offense level of 18 and all other covered offenses were assigned a level of 22. At the same time, however, the Commission provided for a two-level reduction when the defendant's conduct was limited to receipt or solicitation and the defendant did not intend to distribute child pornography. U.S.S.G. §2G2.2(b)(1). Importantly, the Commission noted that this amendment meant that "individuals convicted of receipt of child pornography *with no intent to traffic or distribute* the material essentially will have an adjusted offense level of level 20, as opposed to an offense level of level 22, for receipt *with intent to traffic*, prior to application of any other specific offense characteristics." U.S.S.G., App'x C, amend. 664 (2004) (emphasis added). Put somewhat differently, "the Commission determined that a two-level reduction from the base offense level of level 22 is warranted, if the defendant establishes that there was *no intent to distribute the material*." *Id.* (emphasis added).[4] Amendment 664 also added language to the

[4] In addition to demonstrating the implicit inclusion of a *mens rea* requirement in the two-level distribution enhancement of U.S.S.G. §2G2.2(b)(3)(F), this language also demonstrates the Commission's intention to apply the two-level reduction of §2G2.2(b)(1) when the defendant

definition of distribution, "mak[ing] clear that distribution includes advertising and posting material involving the sexual exploitation of a minor on a website for public viewing but does not include soliciting such material." *Id*. Reading this addition together with the two-level reduction provision in cases where a defendant does not intend to distribute child pornography means that solicitation and "simple receipt" do not constitute distribution. For if it were otherwise, then the two-level reduction provided for in U.S.S.G. §2G2.2(b)(1) would always be erased by the two-level increase in U.S.S.G. §2G2.2(b)(3)(F). Furthermore, if the contrary interpretation were adopted, then the general distribution enhancement of U.S.S.G. § 2G2.2(b)(3)(F) would apply in every child pornography case other than mere solicitation, because receipt, whether knowing or unknowing, always precedes possession. And though the Commission added language to the distribution definition, it again declined to remove the implicit *mens rea* requirement remaining from the original definition. Because the Sentencing Commission has always understood the distribution enhancement to be predicated on proof of a defendant's knowing conduct, this Court should hold that the general distribution definition contains an implicit *mens rea* requirement.

---

was convicted of receipt and did not intend to distribute child pornography, thus supporting a two-level reduction in Farney's case.

2. Comparing the four distribution definitions of U.S.S.G. §2G2.2 reveals the Commission's intent to limit application of the distribution enhancements to instances where a defendant acted knowingly.

Reading the general "distribution" definition within the context of the several other definitions of distribution further supports a *mens rea* requirement. The guidelines currently define four types of distribution: (1) general distribution; (2) distribution for pecuniary gain; (3) distribution for a thing of value; and (4) distribution to a minor. U.S.S.G. §2G2.2, application note 1. A *mens rea* requirement is only expressly provided within two of the four definitions. Within the general definition of distribution, possession with intent to distribute is offered as an example of an act related to the transfer of child pornography. Additionally, "distribution to a minor" is defined as the "knowing distribution to an individual who is a minor at the time of the offense." *Id*. Neither "distribution for pecuniary gain" nor "distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" includes an express *mens rea* requirement.

It appears, then, that the Commission only inserted a *mens rea* requirement where one was needed to refine an act or to clarify the scope of its application, and omitted an express *mens rea* requirement where common sense rendered one implicit. According to this logic, possession by itself would never be understood to be an act

related to the transfer of child pornography. That is why the Commission made clear that only possession with intent to distribute qualified. Likewise, inclusion of the term knowing in the definition of "distribution to a minor" makes clear that the enhancement only applies when the defendant knows that the recipient is a "minor," which assumes that the defendant's distributive act was done knowingly, for it would be absurd to find that a defendant unwittingly distributed an image of child pornography to an individual he knew was a minor. Additionally, as noted above, enhancing the unwitting distribution for profit or ignorant distribution for a thing of value would be absurd. Therefore, there was no need for the Commission to include an express *mens rea* requirement in either of these definitions. Because the definition of "distribution for pecuniary gain" is predicated on the general definition of "distribution," omitting the *mens rea* requirement from the general distribution definition would require omitting it from the definition of distribution for pecuniary gain. Therefore, this Court should find that the context in which the Commission defined "distribution" requires an implicit *mens rea* requirement.

3. The Commission's listed examples of acts related to the transfer of child pornography indicate a *mens rea* requirement.

While it is true that the definition of distribution does not contain an express *mens rea* requirement, the types of acts provided within the definition obviate the

need for its inclusion. Distribution is defined as "any act . . . related to the transfer of material involving the sexual exploitation of a minor." The Sentencing Commission provided the following examples of such acts: "possession with intent to distribute, production, transmission, advertisement, . . . transportation . . . [and] posting material involving the sexual exploitation of a minor on a website for public viewing . . . ." The only example containing a *mens rea* requirement is "possession with intent to distribute." In that instance, the express *mens rea* requirement attaches to the purpose of the possession, not to the possession itself. Because it is impossible to unknowingly possess with intent to distribute, drafting the definition to provide for the "knowing possession with intent to distribute" was unnecessary. The same can be said of the other listed acts. It would be passing strange if a *mens rea* requirement applied to the most passive acts listed in the definition but did not also apply to the most active ones.

The very examples listed in the general distribution definition also imply a scienter requirement. Take for example the inclusion of production as an act related to the transfer of child pornography. Though not expressly attaching a *mens rea* requirement to the production of child pornography, surely the Commission intended one. For if it were otherwise, the unwitting production of child pornography would trigger application of a distribution enhancement. But it is absurd to speak of an

unwitting production of child pornography. Just as it is absurd to speak of an unwitting advertisement for and transmission and posting of child pornography. The commission of these act can only occur with the defendant's knowledge. Otherwise, they are not the acts of a defendant.

Reference to the inclusion of production as an example of distribution in U.S.S.G. §2G2.1 further solidifies this point. The production of child pornography as proscribed by 18 U.S.C. § 2251(a)-(c), (d) is governed by U.S.S.G. §2G2.1. If even mere knowing production of child pornography were an act sufficient to trigger application of the distribution enhancement, then a defendant's offense level for committing a violation of 18 U.S.C. § 2251(a)-(c), (d) would always be increased by two levels, and the guideline would be drafted to clearly indicate that fact. That the mere knowing production does not raise the offense level of every defendant convicted under 18 U.S.C. § 2251(a)-(c), (d) is clear evidence that the Commission intended for the production of child pornography to constitute an act sufficient to trigger the distribution enhancement of Sections 2G2.1 and 2G2.2 only when the defendant in addition to knowingly producing child pornography also intended to, or did in fact, distribute the produced image. Because the *Ray* Court's conclusion would lead to absurd applications of the distribution enhancements, this Court should decline to adopt its analysis.

4. Analyzing the context in which the distribution definition appears further compels a *mens rea* requirement.

The term "distribution" does not merely define a defendant's additional conduct in some possession and receipt cases. Instead, the term is used in the very guideline that applies to defendants who are convicted of violating statutes criminalizing the distribution of child pornography, in violation of 18 U.S.C. §§ 2252, 2252A, which indisputably require proof of a defendant's knowledge. Defining the term "distribution" in the guidelines was necessitated by the absence of a definition in the criminal code and the need to incorporate other prohibited conduct closely related to distribution. For example, in addition to prohibiting the distribution of child pornography, Congress proscribed the knowing transportation (18 U.S.C. §§ 2252(a)(1), 2252A(a)(1)), the knowing shipment (18 U.S.C. § 2252(a)(1)), the knowing reproduction for distribution (18 U.S.C. §§ 2252(a)(2), 2252A(a)(3)), the knowing selling or possession with intent to sell (18 U.S.C. §§ 2252(a)(3), 2252A(a)(4)), the knowing mailing (18 U.S.C. § 2252A(a)(1)), and the knowing advertising, promotion, presentation, or solicitation (18 U.S.C. § 2252A(a)(3)(B)) of child pornography. Additionally, 18 U.S.C. § 2252A(a)(6) punishes any person who knowingly distributes, offers, sends, or provides to a minor any child pornography. Finally, 18 U.S.C. § 2252A(a)(7) criminalizes the knowing production of child

pornography with the intent to distribute.

In contrast to the mere possession of child pornography, each of these acts triggers application of a five-year mandatory minimum sentence. With the exception of solicitation in 18 U.S.C. § 2252A(a)(3)(B), which is expressly excluded in application note 1, all of these prohibited acts are governed by U.S.S.G. §2G2.2, and it is beyond doubt that each act, which contains a *mens rea* requirement, falls within the definition of distribution. The only example listed in the general guideline definition of distribution that is not criminalized in the provisions of Section 2252 and 2252A triggering the five-year mandatory minimum sentence is the possession with intent to distribute child pornography.[5] Every other act falls within the distribution related offenses of 18 U.S.C. §§ 2252 and 2252A, each of which contains a *mens rea* requirement. Thus, the guideline definition is only broader than the criminal statutes over which it governs in the case of possession with intent to distribute. And in that sense, the Commission only needed to add a *mens rea* requirement to that offense to distinguish it from otherwise criminal conduct not governed by the distribution related provisions of Sections 2252 and 2252A.

[5] Even possession with intent to distribute would fall within the zero to ten year statutory imprisonment range. Possession with intent to sell, however, would trigger application of a five-year mandatory minimum sentence. *See* 18 U.S.C. § 2252(a)(3), (b)(1).

Therefore, this Court should find that the Commission intended to require proof of a defendant's *mens rea.*

Finally, even if this Court can merely guess as to whether a *mens rea* requirement is implicit in the distribution enhancements, the rule of lenity requires resolving ambiguity in favor of the defendant's interpretation. *See Barber v. Thomas*, 130 S.Ct. 2499, 2508 (2010) (quoting *Muscarello v. United States*, 524 U.S. 125, 139 (1998)).

B. The *Ray* Court's Reliance on Precedent From this Court to Prohibit Reading a *Mens Rea* Requirement Into the Distribution Guideline is Misplaced.

The Tenth Circuit's decision in *Ray* is guided by complete failure to consider whether a *mens rea* requirement was implicit in the distribution enhancements. Without ever considering whether the Sentencing Commission intended to limit application of the distribution enhancement where a defendant committed a knowing act, it was enough for the *Ray* Court that the guideline lacked an express *mens rea* requirement. That absence, in combination with the Tenth Circuit's apparent refusal to apply a common sense interpretation of a guideline to determine whether a *mens rea* requirement is implicit, was sufficient for the *Ray* Court to conclude that a defendant may be said to have distributed child pornography even when he was completely ignorant of the act that made distribution possible.

In attempting to support this conclusion, the *Ray* Court relies on this Court's decision in *United States v. Thomas*, 628 F.3d 64 (2d Cir. 2010). That reliance is misplaced. This Court has never adopted the Tenth Circuit's broadly stated interpretive prohibition. Instead, this Court has merely declined to extend the general due process rule against strict liability in criminal statutes to read *mens rea* requirements into sentencing guidelines. *See United States v. Griffiths*, 41 F.3d 844 (2d Cir. 1994). Unlike the Tenth Circuit, as suggested though not squarely addressed in *Ray*, this Court has never strictly prohibited reading a *mens rea* requirement into a sentencing guideline when one was implicit and intended by the Sentencing Commission.

At most, this Court in *Thomas* confirmed that the stolen firearm enhancement of U.S.S.G. §2K2.1(b)(4) does not require proof that a defendant knew the firearm was stolen. That holding was amply supported by commentary to the guidelines making it clear beyond question that the enhancement "applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number." U.S.S.G. §2K2.1, application note 8(B). Needless to say, no similar provision is present in U.S.S.G. §2G2.2. Had the Sentencing Commission intended to apply the distribution enhancements of U.S.S.G. §2G2.2 in the absence of a *mens rea* requirement, it clearly knew how make such an

intention clear. Its decision not to do so, in combination with the foregoing reasons outlined in Part A, *supra*, make plain that the Sentencing Commission intended the distribution enhancements of U.S.S.G. §2G2.2 to be applied only where the defendant knowingly committed a qualifying act. Therefore, this Court should decline to follow the Tenth Circuit's analysis and, instead, hold that the distribution provisions of U.S.S.G. §2G2.2 require proof that a defendant knew that child pornography would automatically be made available to other users of the peer-to-peer network.

C. Farney Did Not Commit An Act Related to the Transfer of Child Pornography.

Even if this Court agrees with the Tenth Circuit's conclusion that no *mens rea* is required in the context of this case, the *Ray* Court's conclusion fails on its own terms. Although never expressly stated, the *Ray* Court appears to have found that the defendant's use of a peer-to-peer network to view and download images of child pornography whether he knew or was ignorant that the program would deposit those files in a shared folder for others to obtain was an act related to the transfer of child pornography. Pursuant to this formulation, the act that triggers application of the enhancement is the defendant's receipt of child pornography using a peer-to-peer network. However, as noted above, the Commission made clear that receipt is an act distinct from distribution. *See* U.S.S.G. §2G2.2(b)(1). Mere receipt, irrespective of

the manner in which it is accomplished, is never sufficient to constitute distribution. If it were otherwise, then the two-level reduction provided for in U.S.S.G. §2G2.2(b)(1) would always be erased by the two-level increase in U.S.S.G. §2G2.2(b)(3)(F).

As here, the only act in *Ray* that conceivable fits within the definition of distribution was the "program['s] . . . deposit [of] downloaded child-pornography files into a shared folder accessible to other users—e.g., rendering files only a mouse-click away." *Ray*, 2012 WL 5395164 at *4 (quoting *United States v. Ramos*, 695 F.3d 1035, 1040-41 (10th Cir. 2012)). But the act of depositing downloaded child pornography files into the shared folder is not an act committed by Farney; it is an act performed by the peer-to-peer network program. Although acts not performed by a defendant may be considered as relevant conduct for purposes of enhancing a sentence, the guidelines restrict consideration of those acts to ones willfully caused by the defendant. In a different context, this Court has held that "willfully caused" implies a *mens rea* requirement, namely a specific intent to cause the particular result. *United States v. Reed*, 49 F.3d 895, 900 (2d Cir. 1995) (interpreting the "willfully caused" language in U.S.S.G. §3C1.1). Even if the "willfully caused" provision of U.S.S.G. §1B1.3 is read to require some *mens rea* requirement less than specific intent, a defendant could not have willfully caused the

network to automatically place the files in the shared folder unless he was, at the very least, aware that the network had that default setting. Because Farney was unaware that the peer-to-peer network would automatically make downloaded images available to other users of the network, he did not commit an act related to the transfer of child pornography. Therefore, this Court should decline to adopt the reasoning of the *Ray* Court in all respects and find that the district court erred in applying the distribution provisions.

II. THE EVIDENCE PRESENTED IN THE DISTRICT COURT FAILED TO INDICATE THAT FARNEY WAS AWARE OF THE DEFAULT FILE-SHARING FEATURE OF EACH RESPECTIVE PEER-TO-PEER NETWORK.

On appeal, Farney argued that the government failed to produce sufficient evidence to demonstrate that he knew the peer-to-peer network would automatically place files he downloaded in a shared folder. In response, the government points to (1) several facts surrounding Farney's computer usage, (2) the asserted fact that the general purpose of each network was to share files, and (3) language used during the networks' installation processes. Brief of Appellee at 21-23. Each of these facts fails to demonstrate Farney's specific knowledge of the networks' file-sharing functions.

Nothing about Farney's computer usage can be used to infer his specific knowledge about the operation of the networks' shared folders. Knowledge of a

program's internal operation is not gleaned by the number of times a user downloads a program or the number of computers he uses. Even if it was, Farney only downloaded each respective peer-to-peer network once. Furthermore, the use of a common search term does not demonstrate a user's knowledge about how files are retrieved and, more importantly, what a computer program does with a file after it is obtained, even when done over a two-year period. If it did, then knowledge of the proprietary algorithm could be imputed to every user of the search engine Google. Use of an external hard drive to store files overloading an internal hard drive is also not a factor demonstrating knowledge of a specific feature of a computer program. It merely demonstrates a user's understanding that space on an internal hard drive is not limitless. Try as the government might to cast Farney as a sophisticated computer user, the fact remains that not one of these factors has any bearing on the specific program feature at issue in this case. And to call a person "sophisticated" who brings his computer containing child pornography to the retail store Staples to address an apparent virus without doing anything to conceal the illicit files does violence to the label. By this logic, who is not a sophisticated computer user?

Consideration of these surrounding circumstances, however, ignores a more troubling argument. As did both the district court below and the Eighth Circuit in *United States v. Dodd*, 598 F.3d 449 (2010), the government places overriding weight

on the claimed general purpose of the peer-to-peer network. According to this argument, the purpose of the programs is the share files, where according to the government, sharing requires distribution. Pointing to the asserted general purpose of the programs glosses over the particular facts of this case. As noted above, the record indicates that Farney accessed and downloaded his first child pornography by using a peer-to-peer network. If Farney did not have a file of child pornography, how was it his purpose to distribute it? Furthermore, nothing in either program requires a user to distribute or make files available for distribution before he can obtain or continue to obtain files. A user can "share" by only receiving files and never making a single file available to others, and he can do so for as long as he wishes. Mere use of a "file-sharing" network does not demonstrate knowledge of the default shared folder settings. And if it did, then its use would trigger application of the distribution enhancement in every case involving a peer-to-peer network.

Even more troubling is the government's reliance on the language displayed during the installation process. According to the government, a user is informed that each program enables file-sharing by default. Brief of Appellee 21-22. This argument overlooks the most critical fact in this case. While a user is informed that files placed in the shared folder will be available for sharing, she is not informed that the network will automatically place downloaded files into the shared folder. A. 92

("Select the file types that you wish to share with LimeWire. (This does not automatically share all files with these types. Only files in your Shared Folders will be shared.)"). A user is reasonably led to believe that only files she places in the shared folder will be made available to others; she is never told that the program will automatically deposit downloaded files into the shared folder. According to the installation windows, the "Saved Folder" is distinct and unconnected to the "Shared Folder." Therefore, this Court should find the district court erred in holding that the government produced sufficient evidence to demonstrate Farney's knowledge concerning the fact that files he downloaded would be made automatically available to other users.

CONCLUSION

For the above reasons, and as set forth in his opening brief, this Court should vacate the district court's judgment and remand for resentencing.

DATED: December 3, 2012

Respectfully submitted,

/s/
Lisa A. Peebles
Federal Public Defender
James P. Egan, *on brief*
Research & Writing Attorney
4 Clinton Square, 3rd Floor
Syracuse, New York 13202
(315) 701-0080

CERTIFICATE OF COMPLIANCE

Pursuant to 2ND CIR. R. 32 (a)(7), undersigned counsel certifies that this brief complies with the type-volume limitations, typeface requirements and type style requirements of Fed. R. App. P. 32 (a)(7).

1. This brief contains 5,231words within the type volume limitation of Fed. R. App. P. 32 (a)(7)(B) exclusive of the portions exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in proportionally spaced typeface using Corel WordPerfect 12.0 software in Times New Roman, 14 point font in text and Times New Roman 12 point font in footnotes.

3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32 (a)(7), may result in the Court striking this brief and imposing sanctions against the person using the brief.

/s/
LISA A. PEEBLES
Federal Public Defender

CERTIFICATE OF SERVICE

I, Valarie Bruni, certify that today, December 3, 2012, one copy of the Appellant's Reply Brief, was served upon Mr. Richard Hartunian, United States Attorney, through Brenda K. Sannes, Assistant United States Attorney, 100 South Clinton Street, Syracuse, New York 13261, by hand delivery.

/s/
Valarie Bruni