
UNITED STATES
SENTENCING COMMISSION

SUPPLEMENT TO THE
1998 GUIDELINES MANUAL



May 1, 2000

This supplement incorporates the emergency guideline amendment to §2B5.3 (Criminal Infringement of Copyright or Trademark), effective May 1, 2000. This document, used in conjunction with the 1998 Guidelines Manual (rust cover), constitutes the operative Manual effective May 1, 2000.

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AMENDED GUIDELINE

§2B5.3. Criminal Infringement of Copyright or Trademark

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
 - (1) If the infringement amount exceeded \$2,000, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount.
 - (2) If the offense involved the manufacture, importation, or uploading of infringing items, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
 - (3) If the offense was not committed for commercial advantage or private financial gain, decrease by **2** levels, but not less than level **8**.
 - (4) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **13**, increase to level **13**.

Commentary

Statutory Provisions: 17 U.S.C. § 506(a); 18 U.S.C. §§ 2318-2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Commercial advantage or private financial gain" means the receipt, or expectation of receipt, of anything of value, including other protected works.

"Infringed item" means the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.

"Infringing item" means the item that violates the copyright or trademark laws.

"Uploading" means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item.

2. Determination of Infringement Amount.—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).

(A) Use of Retail Value of Infringed Item.—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following:

- (i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is

a digital or electronic reproduction of the infringed item.

- (ii) *The retail price of the infringing item is not less than 75% of the retail price of the infringed item.*
 - (iii) *The retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding.*
 - (iv) *The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511. (In a case involving such an offense, the "retail value of the infringed item" is the price the user of the transmission would have paid to lawfully receive that transmission, and the "infringed item" is the satellite transmission rather than the intercepting device.)*
 - (v) *The retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.*
- (B) *Use of Retail Value of Infringing Item.—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. § 2319A.*
- (C) *Retail Value Defined.—For purposes of this Application Note, the "retail value" of an infringed item or an infringing item is the retail price of that item in the market in which it is sold.*
- (D) *Determination of Infringement Amount in Cases Involving a Variety of Infringing Items.—In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B) of this Application Note. For example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (i.e., the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (i.e., the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).*
3. *Manufacturing, Importing, and Uploading Enhancement.—With respect to uploading, subsection (b)(2) applies only to uploading with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item. For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer.*
4. *Application of §3B1.3.—If the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply.*
5. *Upward Departure Considerations.—If the offense level determined under this guideline substantially understates the seriousness of the offense, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure may be warranted:*

- (A) *The offense involved substantial harm to the reputation of the copyright or trademark owner.*
- (B) *The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.*

Background: This guideline treats copyright and trademark violations much like theft and fraud. Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guidelines, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act by using the retail value of the infringed item, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1993 (see Appendix C, amendments 481 and 482); May 1, 2000 (see Appendix C, amendment 590).

SUPPLEMENT TO THE 1998 SUPPLEMENT TO APPENDIX C

This supplement to the 1998 supplement to Appendix C presents the emergency amendment to §2B5.3 (Criminal Infringement of Copyright or Trademark), effective May 1, 2000.

The format under which the amendments are presented in Appendix C, including the 1998 supplement and this supplement, is designed to facilitate a comparison between previously existing and amended provisions, in the event it becomes necessary to reference the former guideline, policy statement, or commentary language. For amendments to the guidelines, policy statements, and official commentary effective November 1, 1998, and earlier, see the main volume of Appendix C and the 1998 supplement.

AMENDMENT

590. Chapter Two, Part B, Subpart 5 is amended by striking §2B5.3 in its entirety as follows:

"§2B5.3. Criminal Infringement of Copyright or Trademark

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

(1) If the retail value of the infringing items exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

Commentary

Statutory Provisions: 17 U.S.C. § 506(a); 18 U.S.C. §§ 2318-2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. 'Infringing items' means the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon).

Background: This guideline treats copyright and trademark violations much like fraud. Note that the enhancement is based on the value of the infringing items, which will generally exceed the loss or gain due to the offense.

The Electronic Communications Act of 1986 prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline."

A replacement guideline with accompanying commentary is inserted as §2B5.3 (Criminal Infringement of Copyright or Trademark).

This amendment is in response to section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105-147 ("the Act"). The Act directs the Commission to ensure that the applicable guideline range for intellectual property offenses (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code) is "sufficiently stringent to deter such a crime." It also more specifically requires that the guidelines "provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed."

The amendment responds to the directives, first, by making changes to the monetary calculation found in the copyright and trademark infringement guideline, §2B5.3. In addition, the amendment makes a number of other modifications to the infringement guideline, including the addition of several mitigating and aggravating factors, as further means of providing just and proportionate punishment while also seeking to achieve sufficient deterrence.

The monetary calculation in §2B5.3(b)(1), similar to the loss enhancement in the theft and fraud guidelines, serves as an approximation of the pecuniary harm caused by the offense and is a principal factor in determining the offense level for intellectual property offenses. Prior to this amendment, the monetary calculation for all intellectual property crimes was based on the retail value of the infringing item multiplied by the quantity of infringing items. In response to the directive, the Commission refashioned this enhancement so as to use the retail value of the infringed item, multiplied by the number of infringing items, as a means of approximating the pecuniary harm for cases in which that calculation is believed most likely to provide a reasonable estimate of the resulting harm. Use of that calculation is believed to provide a reasonable approximation for those classes of infringement cases in which it is highly likely that the sale of an infringing item results in a displaced sale of the legitimate, infringed item. The amendment also requires that the retail value of the infringed item, multiplied by the number of infringing items, be used in certain other cases for reasons of practicality.

However, based upon a review of cases sentenced under the former §2B5.3 over two years, the Commission further determined that using the above formula likely would overstate substantially the pecuniary harm caused to copyright and trademark owners in some cases currently sentenced under the guideline. For those cases, a one-to-one correlation between the sale of infringing items and the displaced sale of legitimate, infringed items is unlikely because the inferior quality of the infringing item and/or the greatly discounted price at which it is sold suggests that many purchasers of infringing items would not, or could not, have purchased the infringed item in the absence of the availability of the infringing item. The Commission therefore determined that, for these latter classes of cases (referred to in Application Note 2(B)), the retail value of the infringing item, multiplied by the number of those items, provides a more reasonable approximation of lost revenues to the copyright or trademark owner, and hence, of the pecuniary harm resulting from the offense.

This amendment also increases the base offense level from level 6 to level 8. The two-level increase in the base offense level brings the infringement guideline more in line with offense levels that would pertain under the fraud guideline, §2F1.1, assuming applicability under that guideline of the two-level enhancement for more than minimal planning. Based on a review of cases sentenced under the infringement guideline, if a more than minimal planning enhancement did exist in that guideline, it would apply in the vast majority of such cases because they involve this kind of aggravating conduct. Rather than provide a separate enhancement within the revised guideline for "more than minimal planning" conduct, the Commission determined that the infringement guideline should incorporate this type of conduct into the base offense level.

This amendment also provides an enhancement of two levels, and a minimum offense level of level 12, if the offense involved the manufacture, importation, or uploading of infringing items. The Commission determined that defendants who engage in such conduct are more culpable than other intellectual property offenders because they place infringing items into the stream of commerce, thereby enabling others to infringe the copyright or trademark. A review of cases sentenced under the guideline indicated applicability of this enhancement to approximately two-thirds of the cases.

This amendment also provides a two-level downward adjustment (but not less than offense level 8) if the offense was not committed for commercial advantage or private financial gain. This adjustment reflects the fact that the Act establishes lower statutory penalties for offenses that were not committed for commercial advantage or private financial gain.

This amendment also provides an enhancement of two levels, and a minimum offense level of level 13, if the offense involved the conscious or reckless risk of serious bodily injury or possession of a dangerous weapon in connection with the offense. Testimony received by the Commission indicated that the conscious or reckless risk of serious bodily injury may occur in some cases involving

counterfeit consumer products. The Commission determined that this kind of aggravating conduct in connection with infringement cases should be treated under the guidelines in the same way it is treated in connection with fraud cases; therefore, this enhancement is consistent with an identical provision in the fraud guideline.

The amendment also contains an application note expressly providing that the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply if the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item. As stated in the background commentary to §3B1.3, persons who use such a special skill to facilitate or commit a crime generally are viewed as more culpable.

Finally, this amendment contains two encouraged upward departure provisions. The Commission received public comment that indicated that infringement may cause substantial harm to the reputation of the copyright or trademark owner that is not accounted for in the monetary calculation. Public comment also indicated that some copyright and trademark offenses are committed in connection with, or in furtherance of, the criminal activities of certain organized crime enterprises. The amendment invites the court to consider an appropriate upward departure if either of these aggravating circumstances are present.

The effective date of this amendment is May 1, 2000.