UNITED STATES
SENTENCING COMMISSION
SUPPLEMENT TO THE 1998 GUIDELINES MANUAL
May 1, 2000

§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) isa 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.

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