

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice of a temporary, emergency amendment to sentencing guidelines, policy statements, and commentary.

SUMMARY: Pursuant to section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109–181, the Commission hereby gives notice of a temporary, emergency amendment to the sentencing guidelines, policy statements, and commentary. This notice sets forth the temporary, emergency amendment and the reason for amendment.

DATE: The Commission has specified an effective date of September 12, 2006, for the emergency amendment.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer,
Telephone: (202) 502-4590.

SUPPLEMENTARY INFORMATION: The Commission must promulgate a temporary, emergency amendment to implement the directive in section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109–181, by September 12, 2006. The statutory deadline for the promulgation of the temporary, emergency amendment, in conjunction with the Commission’s public meeting schedule (the promulgation of such amendments must occur in a public meeting), made it impracticable to publish a proposed temporary, emergency amendment in the Federal Register in order to provide an opportunity for public comment, and to publish the promulgated amendment not less than 30 days before the effective date. The Commission therefore had good cause not to publish a proposed amendment before the specified effective date and not to publish the promulgated amendment 30 days or more before such date. See 5 U.S.C. § 553(b), (d)(3).

The temporary, emergency amendment set forth in this notice also may be accessed through the Commission’s website at www.ussc.gov.

AUTHORITY: 28 U.S.C. § 994(a), (o), (p), (x); section 1(c) of Pub. L. 109–181.

Ricardo H. Hinojosa,

Chair

Amendment: The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 2(A) by adding at the end the following:

"(vii) A case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the 'infringed item' is the identifiable, genuine good or service."

Reason for Amendment: This amendment implements the emergency directive in section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109–181. The directive, which requires the Commission to promulgate an amendment under emergency amendment authority by September 12, 2006, instructs the Commission to "review, and if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 2318 or 2320 of title 18, United States Code . . ." The directive further provides that the Commission shall:

determine whether the definition of "infringement amount" set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is

adequate to address situations in which the defendant has been convicted of one of the offenses [under section 2318 or 2320 of title 18, United States Code,] and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, such as an anti-circumvention device, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as *U.S. v. Sung*, 87 F.3d 194 (7th Cir. 1996).

The emergency amendment adds subdivision (vii) to Application Note 2(A) of §2B5.3 (Criminal Infringement of Copyright or Trademark) to provide that the infringement amount is based on the retail value of the infringed item in a case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service.