

# PRIMER



## INTELLECTUAL PROPERTY; §2B5.3 (CRIMINAL INFRINGEMENT OF COPYRIGHT OR TRADEMARK)

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*Prepared by the Office of General Counsel, U.S. Sentencing Commission*

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## I. INTRODUCTION

This primer provides a general overview of the sentencing guidelines, pertinent statutes, issues, and case law regarding the application of the intellectual property guideline. It is not intended to be comprehensive, definitive, and it is not a substitute for independent research. The selected case law focuses on published circuit cases, and generally includes only one authority from a given circuit even if the same court has addressed a particular issue more than once.

## II. INTELLECTUAL PROPERTY STATUTES

### A. THE STATUTORY SCHEME

The most commonly used intellectual property statutes include the following:

#### 1. 17 U.S.C. § 506 – Criminal Infringement

Section 506 is the federal criminal copyright infringement statute. Section 506(a)(1)(A)–(C), discussed below, sets out the offense of criminal infringement. The penalties for violations of section 506 are found at 18 U.S.C. § 2319. Section 2319 provides for tiered penalties, up to a maximum of ten years in prison, a fine, or both, based on the specific provision of section 506 violated and various other factors, such as the number of copyrighted works distributed or whether the offense is the offender’s second or subsequent copyright infringement offense. While fines are not explicitly defined in section 506, the court may impose a fine pursuant to the general provision of title 18, U.S. Code, at section 3571. Since a violation of section 506 is a felony, the maximum fine is \$250,000.<sup>1</sup>

Section 506(a)(1)(A) prohibits the willful infringement of a copyright where the infringement was committed “for purposes of commercial advantage or private financial gain.” For a violation of section 506(a)(1)(A), the offender—

- (1) shall be imprisoned not more than five years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution, including by electronic means, during any 180-day period, of at least ten copies or phonorecords, of one or more copyrighted works, which have a total retail value of more than \$2,500;

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<sup>1</sup> 18 U.S.C. § 3571(b)(3).

- (2) shall be imprisoned not more than ten years, or fined in the amount set forth in this title, or both, if the offense is a felony and is a second or subsequent offense under subsection (a); and
- (3) shall be imprisoned not more than one year, or fined in the amount set forth in this title, or both, in any other case.<sup>2</sup>

Section 506(a)(1)(B) prohibits the willful infringement of a copyright where the infringement was committed “by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000.” For a violation of section 506(a)(1)(B), the offender—

- (1) shall be imprisoned not more than three years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution of ten or more copies or phonorecords of one or more copyrighted works, which have a total retail value of \$2,500 or more;
- (2) shall be imprisoned not more than six years, or fined in the amount set forth in this title, or both, if the offense is a felony and is a second or subsequent offense under subsection (a); and
- (3) shall be imprisoned not more than one year, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution of one or more copies or phonorecords of one or more copyrighted works, which have a total retail value of more than \$1,000.<sup>3</sup>

Section 506(a)(1)(C) prohibits the willful infringement of a copyright where the infringement was committed “by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.”<sup>4</sup>

For the purposes of section 506, the term “work being prepared for commercial distribution” is defined in two ways. First, as—

- (A) a computer program, a musical work, a motion picture or other audiovisual work, or a sound recording, if, at the time of unauthorized distribution—

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<sup>2</sup> 18 U.S.C. § 2319(b).

<sup>3</sup> *Id.* § 2319(c).

<sup>4</sup> 17 U.S.C. § 506(a)(1)(C).

- (i) the copyright owner has a reasonable expectation of commercial distribution; and
- (ii) the copies or phonorecords of the work have not been commercially distributed.

And, second, as—

(B) a motion picture, if, at the time of unauthorized distribution, the motion picture—

- (i) has been made available for viewing in a motion picture exhibition facility; and
- (ii) has not been made available in copies for sale to the general public in the United States in a format intended to permit viewing outside a motion picture exhibition facility.<sup>5</sup>

For a violation of section 506(a)(1)(C), the offender—

- (1) shall be imprisoned not more than three years, fined under this title, or both;
- (2) shall be imprisoned not more than five years, fined under this title, or both, if the offense was committed for purposes of commercial advantage or private financial gain;
- (3) shall be imprisoned not more than six years, fined under this title, or both, if the offense is a felony and is a second or subsequent offense under subsection (a); and
- (4) shall be imprisoned not more than ten years, fined under this title, or both, if the offense is a felony and is a second or subsequent offense under paragraph (2).<sup>6</sup>

In addition to the conduct discussed above, section 506 prohibits the publication of a fraudulent copyright notice, the fraudulent removal of a legitimate copyright notice, and the false representation of a material fact in the application for copyright registration.<sup>7</sup> Each of these three offenses is punishable by a fine of not more than \$2,500.

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<sup>5</sup> *Id.* § 506(a)(3).

<sup>6</sup> 18 U.S.C. § 2319(d).

<sup>7</sup> 17 U.S.C. §§ 506(c)–(e).

**2. 17 U.S.C. § 1201 – Circumvention of Copyright Protection Systems**

Section 1201 prohibits the circumvention of a technological measure that controls access to a work protected under title 17, U.S. Code. The penalties for section 1201 are at 17 U.S.C. § 1204. Violations are punishable by a term of imprisonment of 1) not more than five years for the first offense, or 2) not more than ten years for any subsequent offense.

**3. 18 U.S.C. § 2318 – Trafficking in Counterfeit Labels, Illicit Labels, or Counterfeit Documentation or Packaging**

Section 2318 prohibits trafficking in counterfeit or illicit labels, or counterfeit documentation or packaging. Violations are punishable by a term of imprisonment for not more than five years.

**4. 18 U.S.C. § 2319A – Unauthorized Fixation of and Trafficking in Sound Recordings and Music Videos of Live Musical Performances**

Section 2319A prohibits recording and trafficking of live musical performances. Violations are punishable by a term of imprisonment of 1) not more than five years for the first offense, or 2) not more than ten years for any subsequent offense.

**5. 18 U.S.C. § 2319B – Unauthorized Recording of Motion Pictures in a Motion Picture Exhibition Facility**

Section 2319B prohibits the unauthorized recording of motion pictures in movie theaters. Violations are punishable by a term of imprisonment of 1) not more than three years for the first offense, or 2) not more than six years for any subsequent offense.

**6. 18 U.S.C. § 2320 – Trafficking in Counterfeit Goods or Services**

Section 2320 prohibits trafficking in counterfeit goods or services. To convict an individual under section 2320, the government must prove that he or she: (1) trafficked or attempted to traffic in goods or services; (2) did so intentionally; (3) used a counterfeit mark on or in connection with such goods and services; and (4) knew the mark was counterfeit.<sup>8</sup>

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<sup>8</sup> See *United States v. Giles*, 213 F.3d 1247, 1249 (10th Cir. 2000). See also *United States v. Yi*, 460 F.3d 623 (5th Cir. 2006) (identifying elements of 18 U.S.C. § 2320); *United States v. Sultan*, 115 F.3d 321, 325 (5th Cir. 1997); *United States v. Beuschel*, 662 F. App'x 818, 824–25 (11th Cir. 2016) (finding that circumstantial evidence is sufficient for a reasonable jury to infer that a defendant knew a drug to be counterfeit).

Courts have held that the offense of trafficking in counterfeit goods is complete when one “intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods and services. . . .”<sup>9</sup> “[E]ven if [the defendant] never sold a single infringing [item], he remains accountable for the full amount, as he admits he caused infringing items to be produced with the intent to sell them.”<sup>10</sup> Further, section 2320 “requires not only that the genuine [trade]mark be federally registered, but also that the mark be in actual use at the time of the defendant’s use of that mark.”<sup>11</sup>

A first-time violation is punishable by: 1) a term of imprisonment of not more than ten years, a fine of not more than \$2,000,000, or both, if the offender is an individual, or 2) a fine of not more than \$5,000,000, where the offender is a person other than an individual.<sup>12</sup> In the case of subsequent convictions, violations are punishable by: 1) a term of imprisonment of not more than 20 years, a fine of not more than \$5,000,000, or both, where the offender is an individual, or 2) a fine of not more than \$15,000,000, where the offense is committed by other than an individual.<sup>13</sup>

If the offense involved knowingly or recklessly causing or attempting to cause serious bodily injury, the violation is punishable by: 1) a term of imprisonment of not more than 20 years, a fine of not more than \$5,000,000, or both, where the offender is an individual, or 2) a fine of not more than \$15,000,000, where the offense is committed by other than an individual.<sup>14</sup>

If the offense involved knowingly or recklessly causing or attempting to cause death, the violation is punishable by: 1) imprisonment of any term of years or for life, a fine of not more than \$5,000,000, or both, where the offender is an individual, or 2) a fine of not more than \$15,000,000, where the offense is committed by other than an individual.<sup>15</sup>

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<sup>9</sup> See *United States v. Beydoun*, 469 F.3d 102, 105 (5th Cir. 2006) (quoting 18 U.S.C. § 2320(a)).

<sup>10</sup> *Id.*

<sup>11</sup> See *United States v. Foote*, 413 F.3d 1240, 1248 (10th Cir. 2005); *United States v. Guerra*, 293 F.3d 1279, 1287 (11th Cir. 2002) (irrelevant that defendant did not know whether a trademark is registered in the United States or another country). See also 18 U.S.C. § 2320(f)(1)(A)(ii).

<sup>12</sup> 18 U.S.C. § 2320(b)(1)(A).

<sup>13</sup> *Id.* § 2320(b)(1)(B).

<sup>14</sup> *Id.* § 2320(b)(2)(A).

<sup>15</sup> *Id.* § 2320(b)(2)(B).

If the offense involved counterfeit military goods or services and counterfeit drugs, the violation is punishable by: 1) a term of imprisonment of not more than 20 years, a fine of not more than \$5,000,000, or both, where the offender is an individual, or 2) a fine of not more than \$15,000,000, where the offense is committed by other than an individual.<sup>16</sup> In the case of subsequent convictions, violations are punishable by: 1) a term of imprisonment of not more than 30 years, a fine of not more than \$15,000,000, or both, where the offense is committed by an individual, or 2) a fine of not more than \$30,000,000, where the offense is committed by other than an individual.<sup>17</sup>

**7. 18 U.S.C. § 2511 – Interception and Disclosure of Wire, Oral, or Electronic Communications Prohibited**

Section 2511 prohibits the interception and disclosure of wire, oral, or electronic communications. Violations are punishable by a term of imprisonment of not more than five years.

**III. INTELLECTUAL PROPERTY GUIDELINE**

**A. §2B5.3 (CRIMINAL INFRINGEMENT OF COPYRIGHT OR TRADEMARK)**

Section 2B5.3 serves as the primary sentencing guideline for intellectual property offenses and mirrors the Commission’s general approach to most economic crime guidelines in that it uses the pecuniary harm caused by the offense as a proxy for measuring a defendant’s culpability. Section 2B5.3 was adopted with the initial set of guidelines in 1987 and largely retained its original form until amended, effective May 1, 2000, in response to the No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 (“the NET Act”). Since then, the Commission has amended §2B5.3 several additional times in response to the enactment of new laws by Congress.

**B. §2B5.3 SECTION BY SECTION**

**1. §2B5.3(a) – Base Offense Level**

Section 2B5.3 provides for a base offense level of 8 which, like all base offense levels, is designed to reflect a minimal, general harm caused by the offense, and incorporates the more than minimal planning conduct that the Commission determined was present in the majority of offenses sentenced under this guideline.<sup>18</sup>

<sup>16</sup> *Id.* § 2320(b)(3)(A).

<sup>17</sup> *Id.* § 2320(b)(3)(B).

<sup>18</sup> *See* USSG App. C, amend. 593 (effective Nov. 1, 2000).

## 2. §2B5.3(b)(1) – Infringement Amount

Guideline penalties in intellectual property cases are driven in large part by the infringement amount.<sup>19</sup> If the infringement amount is \$2,500 or less, there is no offense level increase. If the infringement amount exceeds \$2,500, but does not exceed \$6,500, this enhancement provides for a 1-level increase.<sup>20</sup> In a case where the infringement amount exceeds \$6,500, the base offense level is increased by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.<sup>21</sup>

The infringement amount is the “retail value” of the “infringed item” or “infringing item,” multiplied by the number of infringing items, depending on the nature of the case.<sup>22</sup> An infringed item is the copyrighted or trademarked item, while an infringing item is the item that violates the copyright or trademark laws.<sup>23</sup> The retail value of an infringed item or an infringing item is the retail price of that item in the market place in which it is sold.<sup>24</sup> Application Note 2 provides guidance on how to determine the infringement amount.

In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.<sup>25</sup> As such, courts have used varying methods and considerations in determining the infringement amount.<sup>26</sup>

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<sup>19</sup> See USSG §2B5.3(b)(1); §2B5.3, comment. (backg’d.).

<sup>20</sup> See USSG §2B5.3(b)(1)(A).

<sup>21</sup> See USSG §2B5.3(b)(1)(B). See also *United States v. Cho*, 136 F.3d 982 (5th Cir. 1998) (§2B5.3(b)(1)(B) references only the table in §2B1.1; it does not incorporate any other §2B1.1 provision or commentary).

<sup>22</sup> See USSG §2B5.3, comment. (n.2(A)).

<sup>23</sup> See USSG §2B5.3, comment. (n.1).

<sup>24</sup> See USSG §2B5.3, comment. (n.2(C)).

<sup>25</sup> See USSG §2B5.3, comment. (n.2(E)). See, e.g., *United States v. Foote*, 413 F.3d 1240, 1251 (10th Cir. 2005) (quotation omitted) (observing “[d]istrict courts have considerable leeway in assessing the retail value of the infringing items, and need only make a reasonable estimate of the loss, given the available information.”).

<sup>26</sup> *United States v. Sweeney*, 611 F.3d 459 (8th Cir. 2010) (affirming district court’s use of financial records to make a reasonable estimate of the infringement amount for cable television descramblers); *United States v. Brereton*, 196 F. App’x 688 (10th Cir. 2006) (affirming district court’s use of television viewer habits to estimate infringement amount in a pirated television access card case); *United States v. Lozano*, 490 F.3d 1317 (11th Cir. 2007) (affirming the district court’s use of the retail value of the trademarked and counterfeit goods applicable to the United States market because the defendants sold some counterfeit goods in Miami, instead of the retail values applicable to South America, where defendants sold the majority of the counterfeit goods). *But see*, *United States v. Yi*, 460 F.3d 623, 637 (5th Cir. 2006) (remanding because of the lack of record evidence of pecuniary harm to the victim companies); *United States v. Villanueva*, 175 F. App’x 147 (9th Cir.

**a. Determination of the Infringement Amount**

**(i) Retail Value of the Infringed Item**

One of the methods used to determine the infringement amount is the retail value of the infringed item multiplied by the number of infringing items. As explained at §2B5.3, comment. (n.2(A)), this method is used when the case involves any of the following factors:

(i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item;<sup>27</sup> or (II) is a digital or electronic reproduction of the infringed item.<sup>28</sup>

(ii) The retail price of the infringing item is not less than 75 percent 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.

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2006) (remanding because the district court did not state whether it relied on the value of the infringed items or the infringing items); *United States v. Bao*, 189 F.3d 860 (9th Cir. 1999) (vacating and remanding for resentencing because the district court used a wrong value when calculating the infringement amount).

<sup>27</sup> See, e.g., *United States v. Larracuenta*, 952 F.2d 672 (2d Cir. 1992) (affirming the district court's use of the retail value of the infringed item because the "bootleg" videotapes were of sufficient quality to permit their distribution through normal retail outlets); *United States v. Hucks*, 557 F. App'x 183 (3d Cir. 2014) (affirming use of value of infringed item in a counterfeit drug case as the counterfeit pills were identical or substantially identical to the genuine article); *United States v. Shi Chang Huang*, 491 F. App'x 382 (4th Cir. 2012) (affirming use of value of infringed item as infringing items identical or substantially identical to genuine article); *United States v. Alim*, 256 F. App'x 236 (11th Cir. 2007) (affirming use of value of infringed item as the infringing items were substantially similar to the genuine article); *United States v. Beuschel*, 662 F. App'x 818, 830–31 (11th Cir. 2016) (affirming use of "wholesale acquisition cost" (i.e., value of the infringed item) of genuine Viagra pills to calculate infringement amount for counterfeit Viagra pills); *United States v. Lundgren*, 729 F. App'x 873 (11th Cir. 2018) (finding that the district court reasonably concluded that the proper value of the infringed item was \$25 per disc, the lowest amount Microsoft charged buyers in the relevant market, because the discs were, or appeared to a reasonably informed purchaser to be, substantially equivalent to legitimate discs containing Microsoft software). But see *Bao*, 189 F.3d at 867 (finding that the district court erred in using the retail value of the complete software package to sentence a defendant convicted of producing illegal copies of the software's manual when the manual itself was sold individually and had a separate retail value); *United States v. Trang Doan Hoang*, 536 F. App'x 583 (6th Cir. 2013) (vacating and remanding sentence because district court erred using value of infringed item because the counterfeit handbags and wallets were of insufficient quality for a reasonable informed purchaser to believe them to be identical or substantially identical to the infringed items); *United States v. Guerra*, 293 F.3d 1279, 1292 (11th Cir. 2002) (finding the "district court erred by relying in part on the value of *genuine* cigars where there is sufficient evidence of the value of the counterfeit items and no findings as to the quality of the counterfeit goods.").

<sup>28</sup> See, e.g., *United States v. Slater*, 348 F.3d 666 (7th Cir. 2003) (affirming use of retail price of software where defendants provided unauthorized copies over the Internet for zero cost).

(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.<sup>29</sup>

(vi) The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the “retail value of the infringed item” is the value of that item upon its initial commercial distribution.

(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.

(viii) A case under 17 U.S.C. §§ 1201 and 1204 in which the defendant used a circumvention device. In such an offense, the “retail value of the infringed item” is the price the user would have paid to access lawfully the copyrighted work, and the “infringed item” is the accessed work.<sup>30</sup>

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<sup>29</sup> See, e.g., *United States v. Kim*, 963 F.2d 65 (5th Cir. 1992) (affirming use of value of infringed item because evidence presented by the government and in the presentence report had sufficient indicia of reliability to make reasonable estimate of infringement amount); *United States v. Yu Chunchai*, 476 F. App'x 119 (9th Cir. 2012) (affirming use of the value of the infringed item because determining the value of the infringing items would have been too difficult to determine without unduly prolonging the sentencing proceeding); *but see United States v. Yi*, 460 F.3d 623, 637–38 (5th Cir. 2006) (remanding for further findings where the district court decided the retail value of the infringing item, not the retail value of the infringed item, more accurately represented the pecuniary harm suffered by the victim companies).

<sup>30</sup> See USSG §2B5.3, comment. (n.2(C)). Alternatively, if the defendant violated 17 U.S.C. §§ 1201 and 1204 by conduct that did not include use of a circumvention device, Application Note 2(B) would apply by default. Thus, as it does in any case not otherwise covered by Application Note 2(A), the infringement amount would be determined by reference to the value of the infringing item, which in these cases would be the circumvention device. See USSG §2B5.3, comment. (n.2(B)); USSG App. C, amend. 704 (effective Nov. 1, 2007).

### (ii) Retail Value of the Infringing Item

If the case does not involve any of the factors listed at Application Note 2(A), the infringement amount is calculated using the retail value of the infringing item.<sup>31</sup>

### (iii) Number of Infringing Items

In some cases, a variety of infringing items may be involved. In such cases, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B) of §2B5.3, comment. (n.2).<sup>32</sup>

In a case where “the court cannot determine the number of infringing items, [it] need only make a reasonable estimate of the infringement amount using any relevant information.”<sup>33</sup> For example, courts have used a wide-range of evidence to estimate the infringement amount, such as the quantity of the individual components needed to complete a finished product and whether the defendant had the intent or ability to manufacture a quantity of an infringing goods.<sup>34</sup> However, such evidence must have sufficient indicia to show that the defendant intended or had the means to complete the infringing goods.<sup>35</sup>

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<sup>31</sup> See USSG §2B5.3, comment. (n.2(B)).

<sup>32</sup> See USSG §2B5.3, comment. (n.2(D)).

<sup>33</sup> See USSG §2B5.3, comment. (n.2(E)). See, e.g., *Kim*, 963 F.2d at 69 (affirming use of value of infringed item because evidence presented by the government and in the presentence report had sufficient indicia of reliability to make reasonable estimate of infringement amount); *Yu Chunchai*, 476 F. App'x at 121 (affirming use of the value of the infringed item because determining the value of the infringing items would have been too difficult to determine without unduly prolonging the sentencing proceeding).

<sup>34</sup> See, e.g., *United States v. Beydoun*, 469 F.3d 102, 106 (5th Cir. 2006) (finding a reasonable likelihood that the entire order of one million booklets of counterfeit cigarette paper would be produced, but for the government's intervention, was sufficient to use the number in calculating the sentence); *United States v. Shengyang Zhou*, 717 F.3d 1139 (10th Cir. 2013) (affirming district court's inclusion of 10,000 bottles of counterfeit diet pills that were never delivered because the completed counterfeit packaging was virtually indistinguishable from the authentic items); *United States v. Beuschel*, 662 F. App'x 818, 830 (11th Cir. 2016) (affirming use of expired Viagra pills to calculate infringement amount).

<sup>35</sup> See, e.g., *United States v. Sung*, 87 F.3d 194, 196 (7th Cir. 1996) (remanding because the district court failed to determine with “reasonable certainty” that the defendant intended to manufacture 240,000 bottles of counterfeit hair spray based on the number of shipping cartons he purchased when he had actually purchased and filled only 17,600 bottles).

**3. §2B5.3(b)(2) – A Work Being Prepared for Commercial Distribution**

Section 2B5.3(b)(2) provides for a 2-level increase “[i]f the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution.”<sup>36</sup> A work being prepared for commercial distribution is defined in Application Note 1 as having the same meaning given that term in 17 U.S.C. § 506(a)(3).<sup>37</sup>

In 2005, the Commission amended Application Note 2 to explain that in cases involving pre-release works, the infringement amount should be determined by using the retail value of the infringed item, rather than any premium price attributed to the infringing item because of its pre-release status.<sup>38</sup> The enhancement addresses concerns that the distribution of an item before it is legally available to the consumer is more serious conduct than distribution of other infringing items, and involves a harm that was not otherwise addressed by the then-existing current guideline.<sup>39</sup>

**4. §2B5.3(b)(3) – (A) Manufacture, Importation, or Uploading of Infringing Items; or (B) Convictions under 17 U.S.C. §§ 1201 and 1204 for Trafficking in Circumvention Devices**

Section 2B5.3(b)(3) provides for a 2-level increase with a minimum offense level of 12 if (A) the offense involved the manufacture, importation, or “uploading” of infringing items;<sup>40</sup> or (B) the defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in “circumvention devices.”<sup>41</sup> Uploading is defined as making an infringing item

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<sup>36</sup> See USSG §2B5.3(b)(2).

<sup>37</sup> See USSG §2B5.3, comment. (n.1).

<sup>38</sup> See USSG App. C, amend. 675 (effective Oct. 24, 2005); §2B5.3, comment. (n.2(A)(vi)).

<sup>39</sup> See, e.g., *United States v. Ndhlovu*, 510 F. App’x 842, 849 (11th Cir. 2013) (affirming application of 2-level enhancement pursuant to §2B5.3(b)(2) because the offense involved the reproduction of a pre-release work).

<sup>40</sup> See, e.g., *United States v. Beltran*, 503 F.3d 1 (1st Cir. 2007) (affirming application of 2-level enhancement for manufacturing where defendants made unauthorized copies of movies on DVDs and VHS tapes); *United States v. Sweeney*, 611 F.3d 459, 475–76 (8th Cir. 2010) (affirming application of 2-level enhancement for manufacturing cable television descramblers); *United States v. Brereton*, 196 F. App’x 688, 693 (10th Cir. 2006) (affirming application of 2-level enhancement for manufacturing where defendant reprogrammed existing television access cards).

<sup>41</sup> See USSG §2B5.3(b)(3). See, e.g., *United States v. Mason*, 38 F. App’x 458, 459 (9th Cir. 2002) (reprogramming access cards to illegally gain access to scrambled satellite television signals fits the meaning of manufacture of an infringing item); *Brereton*, 196 F. App’x at 693 (affirming that the defendant “manufactured an infringing item when he illegally reprogrammed access cards to permit unauthorized interception of [satellite television] programming.”).

available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item as an openly shared file.<sup>42</sup> Uploading does not include merely downloading or installing an infringing item on a hard drive on a defendant's personal computer unless the infringing item is an openly shared file.<sup>43</sup>

Circumvention devices are defined as devices used to perform the activity described in 17 U.S.C. §§ 1201(a)(3)(A) and 1201(b)(2)(A).<sup>44</sup> Section 1201(a)(3)(A) explains that

to “circumvent a technological measure” means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.

Section 1201(b)(2)(A) explains that

to “circumvent protection afforded by a technological measure” means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure.

The purpose of the enhancement in §2B5.3(b)(3) is to provide greater punishment for defendants who put infringing items into the stream of commerce in a manner that enables others to infringe the copyright or trademark. The Commission determined that trafficking in circumvention devices similarly enables others to infringe a copyright and warrants greater punishment.<sup>45</sup>

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<sup>42</sup> See USSG §2B5.3, comment. (n.1); USSG App. C, amend. 675 (effective Oct. 24, 2005). Amendment 675 built on the then-existing definition of “uploading” to include making an infringing item available on the Internet by storing an infringing item in an openly shared file.

<sup>43</sup> See USSG App. C, amend. 675 (effective Oct. 24, 2005). Amendment 675 also clarified that uploading does not include merely downloading or installing infringing items on a hard drive of the defendant's computer unless the infringing item is in an openly shared file.

<sup>44</sup> See USSG §2B5.3, comment. (n.1).

<sup>45</sup> See USSG App. C, amend. 704 (effective Nov. 1, 2007).

**5. §2B5.3(b)(4) – Offense Not Committed for Commercial Advantage or Private Financial Gain**

Section 2B5.3(b)(4) provides for a 2-level reduction with a minimum offense level of 8 if the offense was not committed for “commercial advantage or private financial gain.”<sup>46</sup> Commercial advantage or private financial gain is defined to mean the receipt, or expectation of receipt, of anything of value, including other protected works.<sup>47</sup>

**6. §2B5.3(b)(5) – Counterfeit Drugs**

Section 2B5.3(b)(5) provides for a 2-level increase if the offense involved a counterfeit drug.<sup>48</sup> A counterfeit drug is defined as having the same meaning given that term in 18 U.S.C. § 2320(f)(6).<sup>49</sup> Section 2320(a)(4) prohibits trafficking in a drug while knowingly using a counterfeit mark on or in connection with such drugs, and section 2320(f)(6) defines the term “drug” by reference to section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 321), which at subsection (g)(1) states:

The term “drug” means (A) articles recognized in the official United States Pharmacopœia, official Homœopathic Pharmacopœia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clause (A), (B), or (C).<sup>50</sup>

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<sup>46</sup> See USSG §2B5.3(b)(4).

<sup>47</sup> See USSG §2B5.3, comment. (n.1).

<sup>48</sup> See USSG §2B5.3(b)(5). See, e.g., United States v. Beuschel, 662 F. App’x 818, 824–25 (11th Cir. 2016) (affirming (b)(5) enhancement for trafficking counterfeit Viagra pills); United States v. Hollis, 666 F. App’x 798 (11th Cir. 2016) (affirming (b)(5) enhancement for trafficking counterfeit Viagra and Cialis pills).

<sup>49</sup> See USSG §2B5.3, comment. (n.1).

<sup>50</sup> Section 321(g)(2) also provides a definition of the term “counterfeit drug,” which states:

a drug which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, or device, or any likeness thereof, of a drug manufacturer, processor, packer, or distributor other than the person or persons who in fact manufactured, processed, packed, or distributed such drug and which thereby falsely purports or is represented to be the product of, or to have been packed or distributed by, such other drug manufacturer, processor, packer, or distributor.

The 2-level increase at §2B5.3(b)(5) reflects the Commission’s determination that offenses involving counterfeit drugs involve a threat to public safety and undermine the public’s confidence in the drug supply chain.<sup>51</sup> Furthermore, unlike many other goods covered by the infringement guideline, offenses involving counterfeit drugs circumvent a regulatory scheme established to protect the health and safety of the public.<sup>52</sup>

**7. §2B5.3(b)(6) – (A) Risk of Death or Serious Bodily Injury; or (B) Possession of a Dangerous Weapon**

Section 2B5.3(b)(6) provides for an enhancement of 2 levels with a minimum offense level of 14 if the offense involved (A) the conscious or reckless risk of death or serious bodily injury<sup>53</sup> or (B) the offense involved the possession of a dangerous weapon (including a firearm) in connection with the offense.

**8. §2B5.3(b)(7) – Counterfeit Military Goods or Services**

Section 2B5.3(b)(7) provides for an enhancement of 2 levels with a minimum offense level of 14 if the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause (A) the disclosure of classified information; (B) impairment of combat operations; or (C) other significant harm to (i) a combat operation, (ii) a member of the Armed Forces, or (iii) national security.<sup>54</sup> Counterfeit military good or service is defined at §2B5.3, comment. (n.1), to have the meaning given that term in 18 U.S.C. § 2320(f)(4), which states:

the term “counterfeit military good or service” means a good or service that uses a counterfeit mark on or in connection with such good or service and that—

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<sup>51</sup> See USSG App. C, amend. 773 (effective Nov. 1, 2013).

<sup>52</sup> In an amendment promulgated on April 12, 2018, the Commission amended §2B5.3(b)(5) to replace the term “counterfeit drug” with “drug that uses a counterfeit mark on or in connection with the drug.” See USSG App. C, amend. 812 (effective Nov. 1, 2018). The amendment also amends the Commentary to §2B5.3 to delete the “counterfeit drug” definition and provide that “drug” and “counterfeit mark” have the meaning given those terms in 18 U.S.C. § 2320(f).

<sup>53</sup> See USSG §2B5.3(b)(6); USSG App. C, amend. 773 (effective Nov. 1, 2013). See, e.g., *United States v. Rashid*, 616 F. App’x 721 (5th Cir. 2015) (vacating and remanding application of §2B5.3(b)(6)(A) because the court did not explain why defendant’s conduct created a risk of serious injury sufficient to justify the risk enhancement); *United States v. Shengyang Zhou*, 717 F.3d 1139, 1152 (10th Cir. 2013) (affirming application of §2B5.3(b)(6)(A) because the court found the defendant was sufficiently aware of the serious health risks posed by the ingredients in the counterfeit diet pills he manufactured and distributed).

<sup>54</sup> See USSG §2B5.3(b)(7).

- (A) is falsely identified or labeled as meeting military specifications, or
- (B) is intended for use in a military or national security application.

As noted above, §2B5.3(b)(6)(A) provides for a 2-level enhancement for the “conscious or reckless risk of death or serious bodily injury.” However, the Commission determined that the existing enhancement was not adequate to account for all the potential significant harms a service member could suffer as the result of the failure of a counterfeit military good or service. Section 2B5.3(b)(7)(C) addresses this concern. Because §§2B5.3(b)(6)(A) and (b)(7)(C) address different harms, double-counting concerns (*i.e.*, applying multiple enhancements based on the same conduct) are avoided. To clarify the interaction between these enhancements, the Commission added commentary at Application Note 3 providing that the “other significant harm” specified in subsection (b)(7) does not include death or serious bodily injury and that §2B5.3(b)(6)(A) would apply if the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death.<sup>55</sup>

## C. CHAPTER THREE ADJUSTMENTS AND DEPARTURE CONSIDERATIONS

### 1. Application of §3B1.3 (Abuse of Position of Trust or Use of Special Skill)

Application Note 4 at §2B5.3 provides that 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) may apply. As noted above in the section discussing §2B5.3(b)(3), a technological security measure protects a copyrighted or trademarked item from unauthorized access. Depending on the method of circumvention used in a specific case, the court retains the discretion to adjust the offense by two levels.

### 2. Departure Considerations

Application Note 5 at §2B5.3 provides that a departure may be warranted if the offense level determined under §2B5.3 substantially understates or overstates the seriousness of the offense. The application note also provides the following non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:

- (A) The offense involved substantial harm to the reputation of the copyright or trademark owner.

<sup>55</sup> See USSG App. C, amend. 773 (effective Nov. 1, 2013).

- (B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.
- (C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.
- (D) The offense resulted in death or serious bodily injury.

#### **IV. OTHER INTELLECTUAL PROPERTY PROVISIONS**

In addition to §2B5.3, the guidelines contain other provisions that may apply to intellectual property crimes.

##### **A. §2B1.1 (Fraud)**

Subsection (b)(14) at §2B1.1 addresses cases involving the misappropriation of a trade secret where the defendant knew or intended (A) that the trade secret would be transported or transmitted out of the United States, a 2-level increase, or (B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, a 4-level increase.

The Commission added §2B1.1(b)(14)(A) to account for the significant obstacles in effective investigation and prosecution of the transmission of stolen trade secrets outside of the United States, and the increased harm to victims and the nation such conduct causes.<sup>56</sup> Similarly, the Commission added §2B1.1(b)(14)(B) to address concerns that the involvement of a foreign government in trade secret theft increases the threat to the nation's economic and national security.

##### **B. §2D1.1 (Drug Trafficking)**

Application Note 4 of §2D1.1 provides that the drug trafficking guideline is applicable to “counterfeit” substances, defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.

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<sup>56</sup> See USSG App. C, amend. 771 (effective Nov. 1, 2013).