

Primer



Intellectual Property Offenses



Prepared by the
Office of the General Counsel

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I. INTRODUCTION

This primer provides a general overview of the statutes, sentencing guidelines, and case law regarding the application of the intellectual property guideline, §2B5.3. Although the primer identifies some of the key cases and concepts, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

II. INTELLECTUAL PROPERTY STATUTES

The most commonly used intellectual property statutes are discussed below.

A. 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 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 it 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 fine provision of title 18 U.S.C. § 3571. Because a violation of section 506 is a felony, the maximum fine for an individual is the greater of (1) \$250,000, or (2) if any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.¹ An organization that has been found guilty of an offense may be fined not more than the greater of (1) \$500,000, or (2) the greater of twice the gross gain or twice the gross loss from the offense to a person other than the defendant, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.²

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.”³ 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

¹ 18 U.S.C. § 3571(b)(3), (d).

² *Id.* § 3571(c)(3), (d).

³ 17 U.S.C. § 506(a)(1)(A).

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;

- (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.⁴

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.”⁵ 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 \$1,000.⁶

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.”⁷

⁴ 18 U.S.C. § 2319(b).

⁵ 17 U.S.C. § 506(a)(1)(B).

⁶ 18 U.S.C. § 2319(c).

⁷ 17 U.S.C. § 506(a)(1)(C).

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—
 - (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.⁸

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).⁹

⁸ *Id.* § 506(a)(3).

⁹ 18 U.S.C. § 2319(d).

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. Each of these three offenses is punishable by a fine of not more than \$2,500.¹⁰

B. 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 of the United States Code (Copyrights). The penalties for violations of section 1201 are detailed 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, and (2) not more than ten years for any subsequent offense.¹¹

C. 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 of not more than five years.¹²

D. 18 U.S.C. § 2319A—UNAUTHORIZED FIXATION OF AND TRAFFICKING IN SOUND RECORDINGS AND MUSIC VIDEOS OF LIVE MUSICAL PERFORMANCES

Section 2319A prohibits the unauthorized 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.¹³

E. 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.¹⁴

F. 18 U.S.C. § 2320—TRAFFICKING IN COUNTERFEIT GOODS OR SERVICES

Section 2320 prohibits trafficking in counterfeit goods or services. To secure a conviction under section 2320, the government must prove that the defendant:

¹⁰ 17 U.S.C. § 506(c)–(e).

¹¹ *Id.* § 1204(a).

¹² 18 U.S.C. § 2318(a)(1)(A), (B).

¹³ *Id.* § 2319A(a)(1)–(3).

¹⁴ *Id.* § 2319B(a)(1)–(2).

(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.¹⁵

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[.]”¹⁶ “[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.”¹⁷ 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.”¹⁸

A first-time violation of section 2320 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.¹⁹ 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 a person other than an individual.²⁰

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 a person other than an individual.²¹

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 a person other than an individual.²²

¹⁵ See, e.g., *Wang v. Rodriguez*, 830 F.3d 958, 961 (9th Cir. 2016) (identifying elements of 18 U.S.C. § 2320); *United States v. Cone*, 714 F.3d 197, 206 (4th Cir. 2013) (same); *United States v. Yi*, 460 F.3d 623, 629 (5th Cir. 2006) (same); *United States v. Giles*, 213 F.3d 1247, 1249 (10th Cir. 2000) (same).

¹⁶ *United States v. Beydoun*, 469 F.3d 102, 105 (5th Cir. 2006) (quoting 18 U.S.C. § 2320(a)).

¹⁷ *Id.*

¹⁸ 18 U.S.C. § 2320(f)(1)(A)(ii); *United States v. Foote*, 413 F.3d 1240, 1248 (10th Cir. 2005) (citing § 2320(e)(1)(A)(ii)); *United States v. Guerra*, 293 F.3d 1279, 1287–88 (11th Cir. 2002) (irrelevant that defendant did not know whether a trademark is registered in the United States or another country).

¹⁹ 18 U.S.C. § 2320(b)(1)(A).

²⁰ *Id.* § 2320(b)(1)(B).

²¹ *Id.* § 2320(b)(2)(A).

²² *Id.* § 2320(b)(2)(B).

If the offense involved counterfeit military goods or services, or 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 a person other than an individual.²³ 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 a person other than an individual.²⁴

G. 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.²⁵

III. INTELLECTUAL PROPERTY GUIDELINE

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

The guidelines instruct users to determine the applicable Chapter Two guideline by referring to Appendix A (Statutory Index) for the offense of conviction (*i.e.*, the offense conduct charged in the indictment or information of which the defendant was convicted).²⁶ Section 2B5.3 serves as the primary sentencing guideline for the intellectual property offenses described above.

Section 2B5.3 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 1997.²⁷ Since then, the Commission has amended §2B5.3 on several occasions in response to the enactment of laws by Congress.

²³ *Id.* § 2320(b)(3)(A).

²⁴ *Id.* § 2320(b)(3)(B).

²⁵ *Id.* § 2511(4)(a).

²⁶ U.S. SENT'G COMM'N, *Guidelines Manual*, §1B1.2 (Nov. 2018) [hereinafter USSG] (explaining how to determine the applicable guidelines).

²⁷ Pub. L. No. 105-147, 111 Stat. 2678; USSG App C, amend. 590 (effective May 1, 2000).

B. SECTION 2B5.3: SECTION BY SECTION

1. Subsection (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. It incorporates the “more than minimal planning” conduct that the Commission determined was present in the majority of offenses sentenced under this guideline.²⁸

2. Subsection (b)(1)—Infringement Amount

a. Generally

Guideline penalties in intellectual property cases are driven in large part by the infringement amount.²⁹ 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.³⁰ 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, Embezzlement, Receipt of Stolen Property, Property Destruction and Offenses Involving Fraud or Deceit) corresponding to that amount.³¹

The infringement amount typically 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.³² An “infringed item” is the copyrighted or trademarked item, while an “infringing item” is the item that violates the copyright or trademark laws.³³ The “retail value” of an infringed item or an infringing item is the retail price of that item in the marketplace in which it is sold.³⁴ As discussed further below, Application Note 2 provides guidance on how to determine the infringement amount using the retail value method.

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

²⁸ USSG App. C, amend. 593 (effective Nov. 1, 2000).

²⁹ USSG §2B5.3(b)(1); USSG §2B5.3, comment. (backg’d).

³⁰ USSG §2B5.3(b)(1)(A).

³¹ USSG §2B5.3(b)(1)(B); *see also* United States v. Lozano, 490 F.3d 1317, 1322 (11th Cir. 2007) (“[W]e hold that use of the retail value of the infringed item, as opposed to the infringing item, was appropriate and supported by the [g]uidelines.”); United States v. Beydoun, 469 F.3d 102, 105–06 (5th Cir. 2006) (“Under the copyright infringement guideline, ‘[i]n 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.’ ” (quoting USSG §2B5.3, comment. (n.2(E)))).

³² USSG §2B5.3, comment. (n.2(A)).

³³ USSG §2B5.3, comment. (n.1).

³⁴ USSG §2B5.3, comment. (n.2(C)).

information, including financial records.³⁵ As such, courts have used varying methods and considerations in determining the infringement amount.³⁶

b. 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 in Application Note 2(A) at §2B5.3,³⁷ 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;³⁸ or (II) is a digital or electronic reproduction of the infringed item.³⁹

³⁵ USSG §2B5.3, comment. (n.2(E)); *see also, e.g.*, *United States v. Foote*, 413 F.3d 1240, 1251 (10th Cir. 2005) (“[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.’ ”); *United States v. Slater*, 348 F.3d 666, 670 (7th Cir. 2003) (same).

³⁶ *See United States v. Al Halabi*, 563 F. App’x 55, 56–57 (2d Cir. 2014) (affirming district court finding that counterfeit jerseys were substantially similar to authentic jerseys, relying on assessment by representative of Coalition to Advance Protection of Sports Logos (“CAPS”) who examined counterfeit jerseys); *United States v. Sweeney*, 611 F.3d 459, 474 (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. Lozano*, 490 F.3d 1317, 1323 (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); *United States v. Brereton*, 196 F. App’x 688, 692 (10th Cir. 2006) (affirming district court’s use of television viewer habits to estimate infringement amount in a pirated television access card case); *cf. United States v. Trang Doan Huang*, 536 F. App’x 583, 590 (6th Cir. 2013) (reversing and remanding where the district court clearly erred by applying the retail value of the infringed items in calculating the infringement amount); *United States v. Yi*, 460 F.3d 623, 637–38 (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, 149 (9th Cir. 2006) (remanding because the district court did not state whether it relied on the value of the infringed items or the infringing items).

³⁷ USSG §2B5.3, comment. (n.2(A)).

³⁸ *See, e.g.*, *United States v. Lundgren*, 729 F. App’x 873, 876 (11th Cir. 2018) (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); *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). *But see United States v. Guerra*, 293 F.3d 1279, 1292 (11th Cir. 2002) (“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.”).

³⁹ *See United States v. Slater*, 348 F.3d 666, 671 (7th Cir. 2003) (affirming use of retail price of copyrighted software where defendants provided unauthorized copies over the internet for zero cost, and

- (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.⁴⁰
- (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.⁴¹
- (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

there was little or no evidence of the value of the infringing item).

⁴⁰ See *United States v. Yu Chunchai*, 476 F. App'x 119, 121 (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).

⁴¹ See *United States v. Yi*, 460 F.3d 623, 637–38 (5th Cir. 2006) (remanding for resentencing where record did not support district court's factual finding that the retail value of the infringed item provided a more accurate assessment of the pecuniary harm to the trademark owners).

lawfully the copyrighted work, and the “infringed item” is the accessed work.⁴²

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.⁴³

iii. Number of infringing items

In some cases, where a variety of infringing items may be involved, the infringement amount is the sum of all calculations made for those items under Application Notes 2(A) and 2(B) to §2B5.3.⁴⁴

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.”⁴⁵ 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 infringing goods.⁴⁶ However, in the context of an attempt or conspiracy offense under §2X1.1, such evidence of intent or ability must demonstrate a reasonable certainty that the defendant intended or had the means to complete the infringing goods.⁴⁷

⁴² Alternatively, where 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) applies by default and the infringement amount is determined by reference to the retail 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).

⁴³ USSG §2B5.3, comment. (n.2(B)).

⁴⁴ USSG §2B5.3, comment. (n.2(D)).

⁴⁵ USSG §2B5.3, comment. (n.2(E)); *see also* *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).

⁴⁶ *See, e.g.,* *United States v. Shengyang Zhou*, 717 F.3d 1139, 1148 (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. Sweeney*, 611 F.3d 459, 474 (8th Cir. 2010) (affirming district court’s reasonable estimate based on financial records of gross revenue); *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).

⁴⁷ *See, e.g.,* *United States v. Dosen*, 738 F.3d 874, 875–76 (7th Cir. 2013) (“uncertainty [about what would have happened had the conspiracy not collapsed before the commission of the substantive offense] does not negate the enhancement for conduct that the conspirators would have engaged in had the conspiracy been consummated, provided that the ‘intended offense conduct . . . can be established with reasonable certainty.’” (quoting USSG §2X1.1(a))).

3. Subsection (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,”⁴⁸ 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),⁴⁹ and also is known as a “pre-release work.”

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. The enhancement in subsection (b)(2) 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 previous guideline.⁵⁰

4. Subsection (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;⁵¹ or (B) the defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in “circumvention devices.”⁵²

Uploading is defined as making an infringing item 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.⁵³ Uploading does not include merely

⁴⁸ USSG §2B5.3(b)(2); *see also* 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).

⁴⁹ USSG §2B5.3, comment. (n.1).

⁵⁰ *See* USSG App. C, amend. 675 (effective Oct. 24, 2005); USSG §2B5.3, comment. (n.2(A)(vi)).

⁵¹ *See, e.g.,* 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. Beltran, 503 F.3d 1, 3 (1st Cir. 2007) (affirming application of 2-level enhancement for manufacturing where defendants made unauthorized copies of movies on DVDs and VHS tapes).

⁵² USSG §2B5.3(b)(3).

⁵³ USSG §2B5.3, comment. (n.1); *see also* 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.

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.⁵⁴

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).⁵⁵ 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.⁵⁶

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.⁵⁷

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.⁵⁸

5. *Subsection (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.”⁵⁹ “Commercial advantage or private financial gain” is defined to mean the receipt, or expectation of receipt, of anything of value, including other protected works.⁶⁰

⁵⁴ USSG §2B5.3, comment. (n.1).

⁵⁵ *Id.*

⁵⁶ 17 U.S.C. § 1201(a)(3)(A).

⁵⁷ *Id.* § 1201(b)(2)(A).

⁵⁸ USSG App. C, amend. 704 (effective Nov. 1, 2007).

⁵⁹ USSG §2B5.3(b)(4).

⁶⁰ USSG §2B5.3, comment. (n.1).

6. Subsection (b)(5)—Drug that Uses a Counterfeit Mark

Section 2B5.3(b)(5) provides for a 2-level increase if the offense involved a drug that uses a counterfeit mark on or in connection with the drug.⁶¹ The terms “drug” and “counterfeit mark” have the same meaning given those terms in 18 U.S.C. § 2320(f)(6).⁶² Section 2320(a)(4) prohibits trafficking in a drug while knowingly using a counterfeit mark on or in connection with such drugs.⁶³ 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).⁶⁴

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.⁶⁵ 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.⁶⁶

⁶¹ USSG §2B5.3(b)(5). 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.” USSG App. C, amend. 812 (effective Nov. 1, 2018). The amendment also amended 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).

⁶² USSG §2B5.3, comment. (n.1).

⁶³ 18 U.S.C. § 2320(a)(1), (4).

⁶⁴ Section 321(g)(2) also provides a definition of the term “counterfeit drug” as:

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.

⁶⁵ See USSG App. C, amend. 773 (effective Nov. 1, 2013).

⁶⁶ *Id.*

7. Subsection (b)(6)—(A) Risk of Death or Serious Bodily Injury; or (B) Possession of a Dangerous Weapon

Section 2B5.3(b)(6) provides for a 2-level increase, with a minimum offense level of 14, if the offense involved (A) the conscious or reckless risk of death or serious bodily injury, or (B) the offense involved the possession of a dangerous weapon (including a firearm) in connection with the offense.⁶⁷

8. Subsection (b)(7)—Counterfeit Military Goods or Services

Section 2B5.3(b)(7) provides for a 2-level increase, 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.⁶⁸ “Counterfeit military good or service” has the meaning given that term in 18 U.S.C. § 2320(f)(4),⁶⁹ 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—

- (A) is falsely identified or labeled as meeting military specifications, or
- (B) is intended for use in a military or national security application.⁷⁰

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.” The Commission determined, however, 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 to a member of the Armed Forces” specified in subsection (b)(7) means significant harm other than death or serious

⁶⁷ USSG §2B5.3(b)(6); *see also* USSG App. C, amend. 773 (effective Nov. 1, 2013); *United States v. Rashid*, 616 F. App’x 721, 725 (5th Cir. 2015) (vacating application of the enhancement and remanding where the court relied on generalized statements about safety concerns from counterfeit drugs, rather than “evidence that the particular drug or the particular counterfeit version poses a threat of serious bodily injury or death”); *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 specific health risks posed by the ingredients in the counterfeit diet pills he manufactured and distributed).

⁶⁸ USSG §2B5.3(b)(7).

⁶⁹ USSG §2B5.3, comment. (n.1).

⁷⁰ 18 U.S.C. § 2320(f)(4).

bodily injury.⁷¹ Thus, 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, subsection (b)(6)(A) would apply, rather than subsection (b)(7).⁷²

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.⁷³ 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.⁷⁴ 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.
- (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.

⁷¹ USSG §2B5.3, comment. (n.3).

⁷² USSG §2B5.3, comment. (n.3); *see also* USSG App. C, amend. 773 (effective Nov. 1, 2013).

⁷³ USSG §2B5.3, comment. (n.4).

⁷⁴ USSG §2B5.3, comment. (n.5).

IV. OTHER INTELLECTUAL PROPERTY PROVISIONS

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

A. SECTION 2B1.1 (COVERING VARIOUS THEFT AND FRAUD OFFENSES)

Subsection (b)(14) at §2B1.1 addresses cases involving the misappropriation of a trade secret and provides that 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 applies, or (B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, a 4-level increase applies, with a minimum offense level of 14.⁷⁵

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.⁷⁶ 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.⁷⁷

B. SECTION 2D1.1 (COVERING DRUG TRAFFICKING OFFENSES)

Application Note 4 at §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.⁷⁸

⁷⁵ USSG §2B1.1(b)(14).

⁷⁶ See USSG App. C, amend. 771 (effective Nov. 1, 2013).

⁷⁷ *Id.*

⁷⁸ USSG §2D1.1, comment. (n.4).