# 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 COPYRIGHT INFRINGEMENT

Section 506 of title 17 of the United States Code is the federal criminal copyright infringement statute.[1] Section 506(a)(1)(A)–(C), discussed below, sets out the offenses 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,[2] 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.[3]

### *1. Commercial Advantage/Private Financial Gain*

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."[4] For a violation of section 506(a)(1)(A), the offender—

(1) shall be imprisoned not more than 5 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 10 copies or phonorecords, of 1 or more copyrighted works, which have a total retail value of more than $2,500;

(2) shall be imprisoned not more than 10 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

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1 17 U.S.C. § 506.

2 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.

3 18 U.S.C. § 2319.

4 17 U.S.C. § 506(a)(1)(A).

(3) shall be imprisoned not more than 1 year, or fined in the amount set forth in this title, or both, in any other case.[5]

### *2. Reproduction/Distribution of Works Valued Greater than $1,000 During a 180-day Period*

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."[6] For a violation of section 506(a)(1)(B), the offender—

(1) shall be imprisoned not more than 3 years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution of 10 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of $2,500 or more;

(2) shall be imprisoned not more than 6 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 1 year, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000.[7]

### *3. Distribution of Work Before its Commercial Release*

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."[8]

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—

[5] 18 U.S.C. § 2319(b).

[6] 17 U.S.C. § 506(a)(1)(B).

[7] 18 U.S.C. § 2319(c).

[8] 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.[9]

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

(1) shall be imprisoned not more than 3 years, fined under this title, or both;

(2) shall be imprisoned not more than 5 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 6 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 10 years, fined under this title, or both, if the offense is a felony and is a second or subsequent offense under paragraph (2).[10]

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.[11] Each of these three offenses is punishable by a fine of not more than $2,500.[12]

[9] *Id.* § 506(a)(3).

[10] 18 U.S.C. § 2319(d).

[11] 17 U.S.C. § 506(c)–(e).

[12] *Id.*

### 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).[13] 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.[14]

### 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.[15] Violations are punishable by a term of imprisonment of not more than five years.[16]

### 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.[17] 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.[18]

### 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.[19] 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.[20]

### F. 18 U.S.C. § 2320—Trafficking in Counterfeit Goods or Services

Section 2320 prohibits trafficking in counterfeit goods or services.[21] To secure a conviction under section 2320, the government must prove that the defendant:

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13 *Id.* § 1201.

14 *Id.* § 1204(a).

15 18 U.S.C. § 2318.

16 *Id.* § 2318(a)(1)(A), (B).

17 *Id.* § 2319A.

18 *Id.* § 2319A(a)(1)–(3).

19 *Id.* § 2319B.

20 *Id.* § 2319B(a)(1)–(2).

21 *Id.* § 2320.

(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.[22]

Courts have held that section 2320(a) prohibits "intentionally traffic[king] or attempt[ing] to traffic in goods or services and knowingly us[ing] a counterfeit mark on or in connection with such goods or services [.]"[23] Further, section 2320 requires that the trademark be federally registered and in use at the time when the defendant uses it.[24]

A first-time violation of section 2320 by an individual is punishable by a term of imprisonment of not more than ten years.[25] In the case of subsequent convictions, violations are punishable by a term of imprisonment of not more than 20 years.[26] If the offense involved knowingly or recklessly causing or attempting to cause serious bodily injury, the violation is punishable by a term of imprisonment of not more than 20 years.[27] If the offense involved knowingly or recklessly causing or attempting to cause death, the violation is punishable by imprisonment of any term of years or for life.[28]

If the offense involved counterfeit military goods or services, or counterfeit drugs, the violation is punishable by a term of imprisonment of not more than 20 years.[29] In the case of subsequent convictions, violations are punishable by a term of imprisonment of not more than 30 years.[30] Individual defendants also are subject to fines, as are persons "other than an individual" who are convicted of violating section 2320.[31]

### 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.[32] Violations are punishable by a term of imprisonment of not more than five years.[33]

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22 *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).

23 *Cone*, 714 F.3d at 206 (quoting 18 U.S.C. § 2320(a)).

24 18 U.S.C. § 2320(f)(1)(A)(ii); United States v. Xu, 599 F.3d 452, 453 (5th Cir. 2010).

25 18 U.S.C. § 2320(b)(1)(A).

26 *Id.* § 2320(b)(1)(B).

27 *Id.* § 2320(b)(2)(A).

28 *Id.* § 2320(b)(2)(B).

29 *Id.* § 2320(b)(3)(A).

30 *Id.* § 2320(b)(3)(B).

31 *Id.* § 2320(b)(1)–(3).

32 *Id.* § 2511.

33 *Id.* § 2511(4)(a).

## III. INTELLECTUAL PROPERTY GUIDELINE: §2B5.3

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).[34] Section 2B5.3 (Criminal Infringement of Copyright or Trademark) serves as the primary sentencing guideline for the intellectual property offenses described above.[35]

Section 2B5.3 provides for a base offense level of 8,[36] and various specific offense characteristics, which are discussed further below.

### A. SUBSECTION (b)(1)—INFRINGEMENT AMOUNT

#### *1. Generally*

Section 2B5.3(b)(1) mirrors the Commission's general approach to most economic crimes in that it uses the pecuniary harm caused by the offense as a proxy for measuring a defendant's culpability. As a result, guideline ranges in intellectual property cases are driven in large part by the infringement amount.[37] 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.[38] 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."[39]

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.[40] An "infringed item" is the copyrighted or trademarked item, while an "infringing item" is "the item that violates the copyright or trademark laws."[41] The " 'retail value' of an infringed item or an infringing item is the retail price of that item in the market[place] in

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34 U.S. SENT'G COMM'N, *Guidelines Manual*, §1B1.2 (Nov. 2021) [hereinafter USSG] (explaining how to determine the applicable guidelines).

35 USSG App. A.

36 USSG §2B5.3(a).

37 USSG §2B5.3(b)(1); USSG §2B5.3, comment. (backg'd).

38 USSG §2B5.3(b)(1)(A).

39 USSG §2B5.3(b)(1)(B); *see also* United States v. Smith, No. 19-2063, 2021 WL 4129523, at *4 (3d Cir. Sept. 10, 2021) (district court did not err by using the retail value of the infringed item, multiplied by the number of infringing items, to calculate the infringement amount); United States v. Lundgren, 729 F. App'x 873, 876 (11th Cir. 2018) (per curiam) (district court did not err in using the value of the infringed item, or determining the proper value of the infringed item, to calculate the infringement amount).

40 USSG §2B5.3, comment. (n.2(A)).

41 USSG §2B5.3, comment. (n.1).

which it is sold."[42] As discussed further below, Application Note 2 provides guidance on how to determine the infringement amount using the retail value method.

If 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."[43] As such, courts have used varying methods and considerations in determining the infringement amount.[44]

### *2. Determination of the Infringement Amount*

#### a. 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) to §2B5.3, 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;[45] or (II) is a digital or electronic reproduction of the infringed item.[46]

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[42] USSG §2B5.3, comment. (n.2(C)).

[43] USSG §2B5.3, comment. (n.2(E)); *see also, e.g.*, United States v. Sweeney, 611 F.3d 459, 474 (8th Cir. 2010) (using a company's gross revenues was a reasonable starting point to estimate the infringement amount when the court could not determine the number of infringing items).

[44] *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); *Sweeney*, 611 F.3d at 474 (affirming district court's use of financial records to make a reasonable estimate of the infringement amount for cable television descramblers); *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").

[45] *See, e.g.*, United States v. Smith, No. 19-2063, 2021 WL 4129523, at *4 (3d Cir. Sept. 10, 2021) (affirming the district court's use of the face value, or retail value, printed on counterfeit sporting event tickets that were substantially equivalent to genuine tickets); United States v. Lundgren, 729 F. App'x 873, 876 (11th Cir. 2018) (per curiam) (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) (per curiam) (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) ("[D]istrict 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.").

[46] *See, e.g.*, Xiang Li v. United States, No. CR 10-112-LPS, 2017 WL 3222537, at *5–6 (D. Del. July 28, 2017) (using retail price of genuine software because "the pirated software was a digital and electronic

(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.[47]

(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.[48]

(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.[49]

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reproduction of the legitimate copyrighted software, and was also identical or substantially equivalent to the legitimate software").

[47] *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").

[48] *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).

[49] USSG §2B5.3, comment. (n.2(A)). 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

### b. Retail value of the infringing item

If the case is not covered by Application Note 2(A), the infringement amount is calculated using the retail value of the infringing item.[50]

### c. Variety and number of infringing items

Where a variety of infringing items are 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.[51]

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."[52] 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.[53] However, in the context of an attempt or conspiracy offense under §2X1.1(Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)), such evidence of intent or ability must demonstrate a reasonable certainty that the defendant intended or had the means to complete the infringing goods.[54]

## B. 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."[55] A "work being prepared for commercial distribution" is

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these cases would be the circumvention device. *See* USSG App. C, amend. 704 (effective Nov. 1, 2007); USSG §2B5.3, comment. (n.2(B)).

50 USSG §2B5.3, comment. (n.2(B)).

51 USSG §2B5.3, comment. (n.2(D)).

52 USSG §2B5.3, comment. (n.2(E)).

53 *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).

54 *See, e.g.*, United States v. Dosen, 738 F.3d 874, 875–76 (7th Cir. 2013) ("[U]ncertainty [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))).

55 USSG §2B5.3(b)(2); *see also* United States v. Ndhlovu, 510 F. App'x 842, 849 (11th Cir. 2013) (per curiam) (affirming application of 2-level enhancement pursuant to §2B5.3(b)(2) because the offense involved the reproduction of a pre-release work).

defined in Application Note 1 as having the same meaning given that term in 17 U.S.C. § 506(a)(3),[56] and also is known as a "pre-release work." The enhancement in subsection (b)(2) "addresses concerns that distribution of an item before it is legally available to the consumer is more serious conduct than distribution of other infringing items."[57]

### C. SUBSECTION (b)(3)—MANUFACTURE, IMPORTATION, OR UPLOADING OF INFRINGING ITEMS; CONVICTIONS UNDER 17 U.S.C. §§ 1201 AND 1204

Section 2B5.3(b)(3) provides for a 2-level increase, with a minimum offense level of 12, if the "(A) offense involved the manufacture, importation, or uploading of infringing items;[58] or (B) [the] defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in circumvention devices."[59]

"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."[60] "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."[61]

"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)."[62] 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."[63] Section 1201(b)(2)(A) explains that "to 'circumvent protection afforded by a technological

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56 USSG §2B5.3, comment. (n.1). See *supra* note 9 and accompanying text for the definition of the term "work being prepared for commercial distribution" in 17 U.S.C. § 506(a)(3).

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

58 *See, e.g.*, *Sweeney*, 611 F.3d at 475–76 (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).

59 USSG §2B5.3(b)(3).

60 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." *Id.*

61 USSG §2B5.3, comment. (n.1).

62 *Id.*

63 17 U.S.C. § 1201(a)(3)(A).

measure' means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure."[64]

Because trafficking in circumvention devices enables others to infringe copyrighted or trademarked works, the Commission determined that this offense warranted greater punishment.[65] This concern is reflected by the enhancement in §2B5.3(b)(3), which provides "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."[66]

### D. 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."[67] "Commercial advantage or private financial gain" is defined to mean "the receipt, or expectation of receipt, of anything of value, including other protected works."[68]

### E. 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.[69] The terms "drug" and "counterfeit mark" have the same meaning given those terms in 18 U.S.C. § 2320(f).[70]

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64 *Id.* § 1201(b)(2)(A).

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

66 *Id.*

67 USSG §2B5.3(b)(4).

68 USSG §2B5.3, comment. (n.1).

69 USSG §2B5.3(b)(5). In 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 revised 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). *Id.*

70 USSG §2B5.3, comment. (n.1). Section 2320(f)(6) defines the term "drug" by reference to section 201 of the Federal Food, Drug, and Cosmetic Act at 21 U.S.C. § 321. *See* 18 U.S.C. § 2320(f)(6); *see also* 21 U.S.C. § 321(g)(1) (defining the term "drug" to mean "(A) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia 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)"); *id.* § 321(g)(2) (defining 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");

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."[71] Additionally, counterfeit drugs, unlike other goods covered by §2B5.3, "circumvent a regulatory scheme established to protect the health and safety of the public."[72]

### F. Subsection (b)(6)—Risk of Death or Serious Bodily Injury; 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] possession of a dangerous weapon (including a firearm) in connection with the offense."[73]

### G. Subsection (b)(7)—Counterfeit Military Good or Service

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."[74] "Counterfeit military good or service" has the meaning given that term in 18 U.S.C. § 2320(f)(4),[75] namely:

> [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

18 U.S.C. § 2320(a)(1), (4) (prohibits trafficking in a drug while knowingly using a counterfeit mark on or in connection with such drugs).

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

72 *Id.*; *see also, e.g.*, United States v. Gordon, No. 20-1596, 2021 WL 3781722, at *3 (3d Cir. Aug. 26, 2021) (rejecting claim that the enhancements for §2B5.3(b)(1) (infringement amount), §2B5.3(b)(3) (importation), and §2B5.3(b)(5) (drug using a counterfeit mark) are duplicative because "each reflect separate offense characteristics that are analytically distinct").

73 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) (per curiam) (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).

74 USSG §2B5.3(b)(7).

75 USSG §2B5.3, comment. (n.1).

(B) is intended for use in a military or national security application.[76]

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." Section 2B5.3(b)(7)(C), in turn, addresses "other significant harm[s]."[77] Specifically, Application Note 3 to §2B5.3 provides that the "other significant harm to a member of the Armed Forces" specified in subsection (b)(7) means "significant harm other than serious bodily injury or death."[78] 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).[79] 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.

## H. Chapter Three Adjustments and Departure Considerations

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

Application Note 4 to §2B5.3 provides that "[i]f 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."[80] 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.[81] 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.

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76 18 U.S.C. § 2320(f)(4).

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

78 USSG §2B5.3, comment. (n.3).

79 *Id.*; *see also* USSG App. C, amend. 773 (effective Nov. 1, 2013).

80 USSG §2B5.3, comment. (n.4).

81 USSG §2B5.3, comment. (n.5).

(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.[82]

## 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.[83]

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.[84] 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.[85]

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

Application Note 4 to §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."[86]

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82 *Id.*

83 USSG §2B1.1(b)(14).

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

85 *Id.*

86 USSG §2D1.1, comment. (n.4); *see also, e.g.*, United States v. Gordon, No. 20-1596, 2021 WL 3781722, at *2 (3d Cir. Aug. 26, 2021) (affirming the district court's approximation of drug quantity involved by comparing the weights of seized and unseized parcels of counterfeit Xanax® pills because there was evidence with sufficient indicia of reliability to support the approximation).