

Proposed Amendment: Implementation of the NET Act

Synopsis of Proposed Amendment: *The No Electronic Theft (NET) Act of 1997, Pub. L. 105-147, directs the Commission to: (1) ensure that the applicable guideline range for a crime committed against intellectual property (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code)¹ is sufficiently stringent to deter such a crime; and (2) ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed.*

In January 1998, the Commission published in the Federal Register a general issue for comment on how the directives might best be carried out as well as a proposal from the Department of Justice on the implementation of these directives. The Commission did not promulgate any amendment during that amendment cycle; however, in May 1998, the Commission published three proposals on the implementation of these directives, including two from the Department of Justice.

¹Section 506(a)(1) of title 17, United States Code, makes it unlawful to infringe a copyright wilfully for purposes of commercial advantage or private financial gain. Under 18 U.S.C. § 2319, the statutory maxima for such violations are: (1) 5 years for reproduction or distribution, including electronically, during any 180-day period of at least 10 copies of copyrighted items, which have a total retail value of more than \$2,500; (2) 10 years for a second or subsequent such infringement; or (3) 1 year for any other case.

Section 506(a)(2) of title 17, United States Code, makes it unlawful to infringe a copyright wilfully by reproduction or distribution, including electronically, 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. Under 18 U.S.C. § 2319, the statutory maxima for such violations are: (1) 3 years for violations involving 10 or more copies or phonorecords, which have a total retail value of more than \$2,500; (2) 6 years for a second or subsequent offense; or (3) 1 year for violations involving 1 or more copies or phonorecords, which have a total retail value of more than \$1,000.

Section 2319A of title 18, United States Code, makes it unlawful to, without the authorization of the performer(s) involved, knowingly and for purposes of commercial advantage or private financial gain: (1) copy or record the sounds of a live performance; or (2) transmit the sounds of a live performance to the public, or distribute, or traffic in, such an unauthorized copy or record. The statutory maximum is (1) 5 years; or (2) 10 years for a second or subsequent offense.

Section 2320 of title 18, United States Code, makes it unlawful to knowingly traffic in goods and services with a counterfeit mark. The statutory maximum is (1) 10 years; or (2) 20 years for a second or subsequent offense.

This proposal presents three options for implementing the congressional directives. Each option implements the directives by changing the monetary calculation currently found in the copyright and trademark infringement guideline, §2B5.3 in order to provide for consideration of the retail value of the infringed item. (Currently, §2B5.3(b)(1) contains an enhancement based on a calculation of the retail value of the infringing item multiplied by the quantity of infringing items.) The Commission also may wish to incorporate some or all of a number of aggravating and mitigating factors into the guideline as an additional means of implementing the directive to provide sufficient deterrence. (These factors, or some combination thereof, are presented in Options 2 and 3 but could be added to Option 1 as well.)

The NET Act gave the Commission emergency authority to promulgate temporary amendments necessary to implement the Act's directives. The recently passed Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 would require the Commission to promulgate the emergency amendments within 120 days after the date of the enactment of that Act.

Even though proposed emergency amendments are not required to be published in the Federal Register, the Commission has traditionally made an effort to publish proposed emergency amendments for at least an abbreviated time period in order to afford some degree of public comment. Accordingly, the options below are presented for possible publication in the Federal Register. The vote on whether to actually promulgate an emergency amendment would occur after the receipt of public comment on these options.

(1) Option 1

Option 1 provides the most direct and straightforward manner for implementing the directive to provide for consideration of the retail value of the infringed item. Option 1 amends the copyright and trademark infringement guideline to provide a sentencing enhancement based on a calculation of the retail value of the infringed item multiplied by the quantity of infringing items for all copyright and trademark offenses. As presented, it does not incorporate any additional enhancements or adjustments for aggravating or mitigating factors, nor does it propose any change in the base offense level (although this, too, could be made a part of that option).

An arguable disadvantage of Option 1 is that it likely would overstate the pecuniary harm caused to copyright and trademark owners in the majority of cases currently sentenced under the guideline because it presumes: (1) a one-to-one correlation between the sale of infringing items and the displaced sale of legitimate infringed items, which is unlikely in most cases, and (2) that the pecuniary harm resulting from each lost sale is equal to the retail value of the infringed item. The Commission could address any overstatement of pecuniary harm through an invited downward departure provision.

Proposed Amendment - Option 1

§2B5.3. Criminal Infringement of Copyright or Trademark

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

(1) (A) Except as provided in subdivision (B), if the retail value of the infringing items multiplied by the quantity of infringing items exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount.

(B) If (i) the defendant was convicted of an offense under 18 U.S.C. § 2319A; and (ii) the retail value of the infringing items multiplied by the quantity of infringing items exceeded \$2,000, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount.

Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline:

“Infringed items” means the copyrighted or trademarked items with respect to which the crime against intellectual property was committed.

“Infringing items” means the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon).

2. In a case involving the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511, the “retail value of the infringed items”, for purposes of subsection (b)(1)(A), is the price the user of the transmission would have paid to lawfully receive that transmission. (In such a case, the “infringed items” are the satellite transmissions rather than the intercepting devices.)

Background: This guideline treats copyright and trademark violations much like theft and fraud. Note that the enhancement is based on the value of the infringing items, which will generally exceed the loss or gain due to the offense.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, which directs the Commission to ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed.

~~The~~ Section 2511 of title 18, United States Code, as amended by the *Electronic Communications Act of 1986*, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

(2) Option 2

Option 2 is a revised proposal submitted by the Department of Justice in August 1998 in response to the Commission’s May 1998 Federal Register notice, and has not previously been published in the Federal Register. Like Option 1, Option 2 amends the copyright and trademark infringement guideline to provide an enhancement based on a calculation of the retail value of the infringed items multiplied by the quantity of infringing items for all copyright and trademark offenses (except offenses involving a copyright violation of 18 U.S.C. § 2319A, for which there is no infringed item). In contrast to Option 1, Option 2 provides a 2-level reduction in offense level (but not less than offense level 6) for offenses involving infringing goods with a price less than 10% of the average retail price of the infringed item. According to the Department of Justice, this downward adjustment is proposed to address the likelihood that “relying on the price of the infringed-upon item may lead to an inappropriately high economic harm calculation where there is a dramatic price differential between the genuine and illegal products.” The Department of Justice’s comments accompanying this proposal, however, do not provide a rationale for using the 10% figure as the trigger mechanism for the offense level reduction, nor is there an explanation why the 2-level reduction is an adequate way to compensate for the overstatement of pecuniary harm in those cases in which that harm would be overstated.

In addition, Option 2 includes adjustments for two aggravating factors and one mitigating factor. It provides a 2-level increase for offenses involving “online electronic infringement,” and a 2-level increase for offenses involving a “reasonably foreseeable risk to public health or safety,” with a minimum offense level of level 13. It also provides a 2-level decrease (but not less than offense level 6) if the offense was not committed for purposes of commercial advantage or private financial gain.

Proposed Amendment - Option 2

Strike §2B5.3 and insert the following:

§2B5.3. Criminal Infringement of Copyright or Trademark

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) Except as provided in subsection (2), if the infringing value exceeded \$2,000, increase by the number of levels from the monetary table in §2F1.1 (Fraud and Deceit) corresponding to that value.

(2) If (A) the offense involved a copyright violation under 19 U.S.C. 2319A; and (B) the infringing value exceeded \$2,000, increase by the number of levels from the monetary table in §2F1.1 I corresponding to that value.

- (3) If the offense involved online electronic infringement, increase by 2 levels.
- (4) If (A) the offense was not committed for commercial purpose or private financial gain, or (B) subsection (1) applies and the offense involved greatly discounted merchandise, decrease by 2 levels, but not below level 6.
- (5) If the offense involved a reasonably foreseeable risk to public health or safety, increase by 2 Levels. If the resulting offense level is less than level [13], increase to level [13].

Commentary

Application Notes:

1. For purposes of this guideline -

Infringed value means the average retail price of the infringed-upon item multiplied by the number of the infringing items. Average retail price of the infringed-upon item means the average price in the retail market at the time of the offense, which may be different from the Manufacturer's Suggested Retail Price. In cases involving the interception of a communication in violation of 18 U.S.C. § 2511, the infringed value means the price the user would have paid if that communication had been obtained lawfully.

Infringing value means the average retail price of the infringed-upon item multiplied by the number of infringing items. Average retail price of the infringed-upon item means the average price in the retail market at the time of the offense, which may be different from the Manufacturer's Suggested Retail Price. In cases involving the interception of a communication in violation of 18 U.S.C. § 2511, the infringed value means the price the user would have paid if that communication had been obtained lawfully.

Infringing value means the price of the infringing item multiplied by the number of infringing items.

Greatly Discounted Merchandise means infringing goods whose price is less than 10% of the average retail price of the infringed-upon item.

Online Electronic Infringement includes the unlawful producing, reproducing, distributing, selling, performing, or trafficking in copyrighted or trademarked articles or services via an electronic bulletin board, a worldwide web site or any online facility.

Commercial advantage or private financial gain includes receipt, or expectation of receipt, of anything of value, including the receipt of other protected works or products.

2. In some cases a 2-level enhancement may not reflect the seriousness of the risk to public health or safety. In such cases, an upward departure may be warranted.

Background: This guideline treats copyright and trademark violations much like fraud. The enhancements in subsections (b)(1) and (2) are intended as an approximate determination of the aggregate pecuniary harm resulting from trafficking in goods or services that violate the copyright or trademark laws. The reduction in subsection (b)(4) for greatly discounted merchandise is appropriate because in such cases there is some reduced likelihood of loss of legitimate sales.

The Electronic Communications Privacy Act of 1986 prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

(3) Option 3

Like Options 1 and 2, Option 3 amends the copyright and trademark infringement guideline to provide for consideration of the retail value of the infringed item in all copyright and trademark cases, but that value ultimately might not be used in every case. For some cases, the retail value of the infringing item is used to calculate the monetary adjustment because that value is the more accurate measure of the pecuniary harm to the intellectual property owner for those cases.

Option 3 directs the court to use the retail value of the infringed item multiplied by the quantity of infringing items in any case in which: (i) the quality and performance of the infringing item are identical to, or substantially indistinguishable from, the infringed item; (ii) the retail value of the infringing item is difficult or impossible to determine; or (iii) the offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511; or any other case in which the government provides sufficient information to demonstrate that the retail value of the infringed item provides a more accurate assessment of pecuniary harm to the copyright or trademark owner than the retail value of the infringing item. The court would use the retail value of the infringing item multiplied by the quantity of infringing items (the calculation that currently exists in §2B5.3) for all other copyright and trademark offenses.

Option 3 implements the second directive of the NET Act (to provide for consideration of the retail value of the infringed item) by permitting the government to show, for any intellectual property offense, that such value is the more accurate assessment of lost sales to the intellectual property owner than is the use of the retail value of the infringing item. In doing so, it provides the district court some degree of flexibility to determine which method is more appropriate in any particular case. An arguable advantage of Option 3 over Options 1 and 2 is that, by using the retail value of the infringing item in some cases, such as those involving obviously inferior counterfeited goods, it reduces the likelihood that the pecuniary harm would be overstated when the sale of a counterfeit item is not likely to displace the sale of a legitimate item on a one-to-one basis.

Option 3 also presents a number of enhancements and adjustments that, as mentioned above, take into account aggravating and mitigating factors that may be present in an infringement case. For ease and clarity of presentation, they are presented for the most part as specific offense

characteristics. However, the Commission could adopt these as departure provisions, or not at all.

The possible additional enhancements and adjustments are as follows:

First, the Commission may wish to increase the base offense level from level 6 to level 8. A 2-level increase in the base offense level would bring the infringement guideline more in line with the fraud guideline, §2F1.1. Both guidelines have a base of offense level of level 6; however, the fraud guideline contains a 2-level enhancement for more than minimal planning, which applies in the great majority of fraud offenses. A similar enhancement does not exist in the infringement guideline, but, based on a review of cases sentenced under the guideline, if a more than minimal planning enhancement did exist, it similarly would apply in the majority of infringement cases. Thus, the majority of fraud offenses effectively start with an offense level of level 8, whereas infringement cases start at an offense level of level 6.

Second, the Commission may wish to provide an enhancement of 2 offense levels (or suggested upward departure) if the infringing item was distributed by the offender before the copyright or trademark owner commercially released the infringed item. If the infringing item is a close substitute for the infringed item, the harm is exacerbated by denying the copyright or trademark owner the front end of the market. If the infringing item is substantially inferior, the harm is exacerbated by damaging the reputation of the copyright or trademark owner.

Third, the Commission may wish to provide an enhancement of 2 offense levels (or suggested upward departure) if purchasers of the infringing item were deceived to believe that they were purchasing the legitimate infringed item. This enhancement takes into account harm to the consumer who is actually deceived, over and above the harm to the copyright or trademark owner. However, this enhancement may present significant proof problems. An attempt to ameliorate those problems by lowering the standard for triggering the enhancement to something less than actual deception, such as the reasonable likelihood of deception, risks promulgating an enhancement that is triggered merely by an element of the offense (see 8 U.S.C. § 2320(e)).

Fourth, the Commission may wish to provide a downward adjustment of 2 offense levels, but not less than the base offense level, (or suggested downward departure) if the offense was not committed for commercial advantage or private financial gain. This proposed adjustment is identical to one included in Option 2 and takes into account the different statutory penalty structures established for these offenses by the NET Act. The Commission has been unable to determine the frequency with which such a downward adjustment would apply because the statutory change criminalizing such conduct was enacted in December 1997, and has formed the basis for only 1 prosecution to date.

Fifth, the Commission may wish to provide an enhancement of 2 offense levels (and a minimum offense level of level 12) if the offense involved the manufacture, importation, or uploading of

infringing items. The uploading prong is similar to, but somewhat narrower than, the 2-level enhancement proposed in Option 2 for online electronic infringement. The Commission estimates that this enhancement would apply in approximately 60% of the cases currently sentenced under §2B5.3. Defendants who manufacture, import, or upload infringing items arguably are more culpable because they initially place infringing items in the stream of commerce, thereby enabling many others to infringe the copyright or trademark.

Sixth, the Commission may wish to provide an enhancement of 2 offense levels [and minimum offense level of level 13 as proposed in Option 2] (or suggested upward departure) if the offense involved the conscious or reckless risk of serious bodily injury. The Commission's review of cases sentenced under the guideline suggests that this enhancement rarely would apply, which might argue for taking this factor into account as a departure provision, if at all.

Seventh, the Commission may wish to provide an application note that expressly provides that §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply if the defendant engaged in decryption or circumvented some other technological security measure in order to gain initial access to copyrighted material. Alternatively, the Commission could suggest an upward departure or specific offense characteristic for such cases. As stated in the background commentary to §3B1.3, persons who use a special skill to facilitate or commit a crime generally are viewed as more culpable. Based on the Commission's review of cases sentenced under the copyright and trademark infringement guideline, it is anticipated that this adjustment rarely would be applied.

Proposed Amendment - Option 3

§2B5.3. Criminal Infringement of Copyright or Trademark

- (a) Base Offense Level: ~~6~~[8]
- (b) Specific Offense Characteristic
 - (1) If the ~~retail value of the infringing items~~infringement amount exceeded \$2,000, increase by the ~~corresponding~~ number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount.
 - ~~[(2) If the infringing item was distributed before the infringed item was commercially released by the copyright or trademark owner, increase by [2] levels.]~~
 - ~~[(3) If a purchaser of an infringing item actually believed such item was the infringed item, increase by [2] levels.]~~
 - ~~[(4) If the offense was not committed for commercial advantage or private financial gain, decrease by [2] levels[, but not less than level [6][8]].]~~

[(5) If the offense involved the manufacture, importation, or uploading of infringing items, increase by [2] levels. If the resulting offense level is less than level [12], increase to level [12].]

[(6) If the offense involved the conscious or reckless risk of serious bodily injury, increase by [2] levels.] If the resulting offense level is less than level [13], increase to level [13].]

Commentary

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Application Notes:

1. *Definitions.—For purposes of this guideline:*

“Commercial advantage or private financial gain” means the receipt, or expectation of receipt, of anything of value, including other protected works.

“Infringed item” means the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.

“Infringement amount” means the approximate pecuniary harm to the copyright or trademark owner caused by the offense.

“Infringing items” means the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon).

“Uploading” means making an infringing item available by electronic means with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item.

2. *Determination of Infringement Amount.—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).*

(A) *Use of Retail Value of Infringed Item.—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items in a case involving any of the following:*

(i) *The quality and performance of the infringing item are identical to, or substantially indistinguishable from, the infringed item.*

(ii) *The retail value of the infringing item is (I) difficult to determine without unduly complicating or prolonging the sentencing proceeding; or (II) impossible to determine.*

(iii) *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.)*

(iv) *The government provides sufficient information to demonstrate that the retail value of the infringed item provides a more accurate assessment of lost sales to the copyright or trademark owner than does the retail value of the infringing item.*

(B) *Use of Retail Value of Infringing Item.—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. § 2319A.*

(C) *Determination of Infringement Amount in Cases Involving a Variety of Infringing Items.—In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B). For example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (i.e., the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (i.e., the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).*

3. *Pre-Release Infringement.—Subsection (b)(2) applies to the distribution of an infringing item before the infringed item is commercially released by the copyright or trademark owner. For example, if the defendant unlawfully videotaped a film at a movie theater, then distributed copies of that videotape before lawful copies of the film were commercially available in videotape form, the enhancement will apply.*

4. *Manufacturing, Importing, and Uploading Enhancement.—With respect to uploading, subsection (b)(5) applies only to uploading with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item. For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant’s personal computer.*

5. *Application of §3B1.3.—If the defendant engaged in de-encryption or circumvented some other technological security measure in order to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply.*

Background: This guideline treats copyright and trademark violations much like theft and fraud.

Note that the enhancement is based on the value of the infringing items, which will generally exceed the loss or gain due to the offense. Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guidelines, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act by using the retail value of the infringed items, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be impracticable or inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

The Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

Departure Option

§2B5.3. Criminal Infringement of Copyright or Trademark

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Commentary

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Application Notes:

5. Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(A) The offense involved the manufacture, importation, or uploading of infringing items.

(B) The infringing item was distributed before the infringed item was commercially released by the copyright or trademark owner.

(C) A purchaser of an infringing item actually believed such item was the infringed item.

(D) The offense involved the conscious or reckless risk of serious bodily injury.

6. Downward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted. For example, a downward departure may be warranted if the offense was not committed for commercial advantage or private financial gain.

Issues for Comment Option

The Commission has found that a number of aggravating or mitigating factors may be present in a copyright or trademark infringement case. The Commission invites comment on whether, and if so, to what extent, the copyright and trademark infringement guideline, §2B5.3, should provide an enhancement for any of the following factors:

- (1) The offense involved the manufacture, importation, or uploading of infringing items.*
- (B) The infringing item was distributed before the infringed item was commercially released by the copyright or trademark owner.*
- (C) A purchaser of an infringing item actually believed such item was the infringed item.*
- (D) The offense involved the conscious or reckless risk of serious bodily injury.*

Conversely, the Commission invites comment on whether, and if so, to what extent, the copyright and trademark infringement guideline, §2B5.3, should provide a downward adjustment if the copyright or trademark offense was not committed for commercial advantage or private financial gain.