
US Sentencing Commission Increases the Penalties for Criminal Infringement of Copyright or Trademark

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Infringement of copyrights, trademarks, and other forms of intellectual property is commonly associated with private, civil enforcement. Nonetheless, for several years, federal law has provided criminal penalties for the willful infringement of intellectual property. When the United States Sentencing Commission established the federal sentencing guidelines, it drafted a special guideline, U.S.S.G. § 2B5.3, for intellectual property crimes. Until recent amendments, this relatively lenient guideline established a base offense level of six and provided for upward adjustments in penalties as the value of the *infringing* items increased. Thus, if a defendant was convicted of trafficking in fake Rolex watches to be sold on a street corner for \$20 each, the penalty would be tied to the retail value of the fake merchandise as opposed to the higher retail value of the genuine Rolex watches.

In response to an increase in intellectual property theft, in 1997, Congress issued a directive to the Sentencing Commission, instructing it to adjust the applicable guideline range for intellectual property crimes. In the directive, Congress expressed its view that the punishment range for an intellectual property crime should be "sufficiently stringent to deter such a crime," and, more specifically, that the guidelines should take account of the retail value of the *infringed* items. In response to the directive, the Sentencing Commission adopted Amendment 593 to section 2B5.3, which went into effect in November of 2000. The following are the major changes brought about by the Amendment:

Base Offense Level: Amendment 593 increases the base offense level of intellectual property infringement from a six to an eight. This adjustment brings the guideline more in line with the offense levels that would pertain under the guideline for Fraud and Deceit.

Upward Adjustments: Although the Amendment retains a sliding scale of upward adjustments based on the financial effects of a crime, it changes the way that the financial effects of a crime are calculated. In the Amendment, where the sale of an infringing item results in the displaced sale of a legitimate item, the financial effects of the crime are based on the retail value of the *infringed* items. In cases where the infringing item is an obviously inferior imitation, the loss will continue to be calculated based on the value of the infringing items.

Mitigating and Aggravating Factors: In addition to the upward adjustments based on the financial effect of the infringement, the Amendment sets out other instances where aggravating or mitigating factors require an adjustment of the offense level.

Use of the Internet

: The Amendment provides a two-level upward adjustment and a minimum offense level of 12 if the offense involved the manufacture, importation, or upload of infringing items onto the Internet. The Commission expressed its view that defendants who engage in this practice are more culpable, as they place infringing items into the stream of commerce, thereby enabling others to infringe the copyright or trademark. Based on a review of cases, the Commission expects that this upward adjustment will apply to approximately two-thirds of cases.

Offenses not Committed for Financial Gain

: The Amendment provides a two-level downward adjustment if the offense was not committed for commercial advantage or private financial gain. At the same time, the resultant offense level cannot be lower than an eight.

Technological Security Measures

: The Amendment contains an application note providing that, if the defendant de-encrypted or otherwise circumvented a technological security measure to gain access to an infringed item, an upward adjustment will apply.

General Upward Adjustment

: The Amendment provides for a general upward adjustment in cases where a court determines that the guideline understates the seriousness of an offense. The Amendment provides a non-exhaustive list of factors that a court may consider in determining whether such an adjustment is appropriate, including whether the offense involved substantial harm to the reputation of the copyright or trademark owner, and whether the offense was committed in connection with the criminal activities of an organized criminal enterprise.

In recent years, as a percentage of overall federal criminal cases, federal prosecutors have brought relatively few intellectual property crimes. Nonetheless, there was a 28 percent increase in intellectual property prosecutions between 1996 and 1998. Given this increase, and the heightened interest of Congress, the increased penalties under Amendment 593 may correspond to increasing enforcement by the Department of Justice. With this increased scrutiny, companies should remain vigilant with regard to their own intellectual property, and take extra care with regard to the intellectual property rights of competitors.