UNITED STATES SENTENCING COMMISSION

Amendments to the Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines, policy statements, and official commentary; notice of proposed amendment for public comment.

SUMMARY: Pursuant to its authority under section 994(p) of title 28, United States Code, the United States Sentencing Commission, on May 1, 1998, submitted to the Congress amendments to the sentencing guidelines, policy statements, and official commentary together with reasons for the amendments. The amendments submitted to Congress are set forth in Part I of this notice.

In addition, pursuant to its authority under section 994(a), (o), and (p) of such title and section 2(g) of the No Electronic Theft Act of 1997, Pub. L. 105–147, the Commission is considering promulgating an amendment to the guidelines and commentary in order to implement directives to the Commission contained in the No Electronic Theft Act. The proposed amendment and a synopsis of the issues addressed are set forth in Part II of this notice. The Commission seeks comment on the proposed amendment, as well as alternative proposed amendments. Bracketed text within a proposal indicates alternative proposals and that the Commission invites comment and suggestions for appropriate policy choices.

DATES: Pursuant to 28 U.S.C. 994(p), the Commission has specified an effective date of November 1, 1998, for the amendments submitted to Congress, subject to their acceptability to Congress.

Written public comment on the amendments proposed to implement the directives in the No Electronic Theft Act of 1997 should be submitted not later than August 31, 1998.

ADDRESSES: Public comment on the amendment proposed to implement the directives in the No Electronic Theft Act of 1997 should be sent to: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2–500, Washington, D.C. 20002–8002, Attention: Public Information.

FOR FURTHER INFORMATION CONTACT: Mike Courlander, Public Affairs Officer, telephone: (202) 273–4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission, an independent agency in the judicial branch of the U.S. Government, is empowered by 28 U.S.C. 994(a) to promulgate sentencing guidelines and policy statements for federal sentencing courts. The statute further directs the Commission to review periodically and revise guidelines previously promulgated and authorizes it to submit guideline amendments to the Congress not later than the first day of May each year. See 28 U.S.C. 994(o), (p). Additionally, a number of the amendments included in Part I of this report are authorized and directed by, or otherwise respond to, a variety of enactments of the 105th Congress. Absent action of Congress to the contrary, the amendments become effective on the date specified by the Commission (i.e., November 1, 1998) by operation of law.

Notice of the amendments submitted to the Congress on May 1, 1998, was first published in the **Federal Register** of January 6, 1998 (63 FR 602). Public hearings on the proposed amendments were held in San Francisco, CA, on March 5, 1998, and in Washington, DC, on March 12, 1998. After review of the hearing testimony and additional public comment, the Commission promulgated the amendments set forth in Part I below, each having been approved by at least four voting Commissioners.

In the **Federal Register** of January 6, 1998, the Commission also published a proposal from the Department of Justice on the implementation of the directives contained in the No Electronic Theft Act, as well as a general issue for comment on how these directives might best be carried out. The Commission heard testimony on these directives at the public hearing in Washington, DC, on March 12, 1998, and reviewed additional written public comment received on this issue in response to the **Federal Register** notice. The Commission also informally solicited and received the input of parties interested in copyright and trademark infringement sentencing issues, such as representatives of the Department of Justice, the defense bar, and other key groups, in an effort to determine how best to implement the directives. As a result of this input and after reviewing the hearing testimony and additional written public comment, the Commission voted, on April 23, 1998, to publish for comment the three proposals contained in Part II, below.

In connection with its ongoing process of guideline review, the Commission welcomes comment on any aspect of the sentencing guidelines, policy statements, and official commentary.

Authority: 28 U.S.C. 994(a), (o), (p).

Richard P. Conaboy
Chairman.

Part I—Amendments Submitted to Congress on May 1, 1998

1. *Amendment:* Section 2B1.1(b) is amended by adding at the end the following new subdivision:

''(8) If the offense involved theft of property from a national cemetery, increase by 2 levels.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following new paragraph:

''*National cemetery* means a cemetery (A) established under section 2400 of title 38, United States Code, or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.''.

The Commentary to § 2B1.1 captioned ''Background'' is amended by adding at the end the following new paragraph:

''Subsection (b)(8) implements the instruction to the Commission in Section 2 of Public Law 105–101.''.

Section 2B1.3(b) is amended by adding at the end the following new subdivision:

''(4) If property of a national cemetery was damaged or destroyed, increase by 2 levels.''.

The Commentary to § 2B1.3 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following new paragraph:

''*National cemetery* means a cemetery (A) established under section 2400 of title 38, United States Code, or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.''.

The Commentary to § 2B1.3 captioned ''Background'' is amended by inserting before the first paragraph the following:

''Subsection (b)(4) implements the instruction to the Commission in Section 2 of Public Law 105–101.''.

Section 2K1.4(b) is amended by striking ''Characteristic'' and inserting ''Characteristics''; and by adding at the end the following new subdivision:

''(2) If the base offense level is not determined under (a)(4), and the offense occurred on a national cemetery, increase by 2 levels.''.

The Commentary to § 2K1.4 is amended by adding at the end the following new application note and background commentary:

''4. *National cemetery* means a cemetery (A) established under section

2400 of title 38, United States Code, or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

Background: Subsection (b)(2) implements the directive to the Commission in Section 2 of Public Law 105–101.''.

Reason for Amendment: The purpose of this amendment is to provide an increase for property offenses committed against national cemeteries. This amendment implements the directive to the Commission in the Veterans' Cemetery Protection Act of 1997, Pub. L. 105–101, § 2, 111 Stat. 2202, 2202 (1997). This Act directs the Commission to provide a sentence enhancement of not less than two levels for any offense against the property of a national cemetery. In response to the legislation, this amendment adds a two-level enhancement to §§ 2B1.1 (Theft), 2B1.3 (Property Destruction), and 2K1.4 (Arson). *National cemetery* is defined in the same way as that term is defined in the statute.

2. *Amendment:* Section 2F1.1(b) is amended by striking subdivision (5) in its entirety and inserting the following:

''(5) (A) If the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) if a substantial part of a fraudulent scheme was committed from outside the United States; or (C) if the offense otherwise involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''.

Section 2F1.1(b) is amended by adding at the end the following new subdivision:

''(7) If the offense was committed through mass-marketing, increase by 2 levels.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by redesignating Notes 14 through 18, as Notes 15 through 19, respectively; and by inserting after Note 13 the following new Note 14:

''14. For purposes of subsection (b)(5)(B), *United States* means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(5)(C), *sophisticated concealment* means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''20. *Mass-marketing*, as used in subsection (b)(7), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.''.

Section 2T1.1(b) is amended by striking subdivision (2) in its entirety and inserting the following:

''(2) If the offense involved sophisticated concealment, increase by 2 levels.''.

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended by striking Note 4 in its entirety and inserting the following:

''4. For purposes of subsection (b)(2), *sophisticated concealment* means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.''.

Section 2T1.4(b) is amended by striking subdivision (2) in its entirety and inserting the following:

''(2) If the offense involved sophisticated concealment, increase by 2 levels.''.

The Commentary to § 2T1.4 captioned ''Application Notes'' is amended by striking Note 3 in its entirety and inserting the following:

''3. For purposes of subsection (b)(1), *sophisticated concealment* means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.''.

Section 2T3.1(b) is amended by striking subdivision (1) in its entirety and inserting the following:

''(1) If the offense involved sophisticated concealment, increase by 2 levels.''.

The Commentary to § 2T3.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''3. For purposes of subsection (b)(1), *sophisticated concealment* means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.''.

Reason for Amendment: This amendment has three purposes: (1) to provide an increase for fraud offenses that use mass-marketing to carry out the fraud; (2) to provide an increase for fraud offenses that involve conduct, such as sophisticated concealment, that makes it difficult for law enforcement authorities to discover the offense or apprehend the offender; and (3) to clarify and conform an existing enhancement that provides an increase for tax offenses that similarly involve sophisticated concealment.

First, this amendment adds a two-level enhancement in the fraud guideline for offenses that are committed through mass-marketing. The Commission identified mass-marketing as a central component of telemarketing fraud and also determined that there were other fraudulent schemes that relied on mass-marketing to perpetrate the offense (for example, Internet fraud). Accordingly, rather than provide a limited enhancement for telemarketing fraud only, the Commission determined that a generally applicable specific offense characteristic in the fraud guideline would better provide consistent and proportionate sentencing increases for similar types of fraud, while also ensuring increased sentences for persons who engage in mass-marketed telemarketing fraud.

Second, this amendment provides an increase for fraud offenses that involve conduct, such as sophisticated concealment, that makes it difficult for law enforcement authorities to discover the offense or apprehend the offenders. The new enhancement provides a two-level increase and a ''floor'' offense level of level 12 in the fraud guideline and replaces the current enhancement for ''the use of foreign bank accounts or transactions to conceal the true nature or extent of fraudulent conduct.'' There are three alternative provisions to the enhancement. The first two prongs address conduct that the Commission

has been informed often relates to telemarketing fraud, although the conduct also may occur in connection with fraudulent schemes perpetrated by other means. Specifically, the Commission has been informed that fraudulent telemarketers increasingly are conducting their operations from Canada and other locations outside the United States. Additionally, testimony offered at a Commission hearing on telemarketing fraud indicated that telemarketers often relocate their schemes to other jurisdictions once they know or suspect that enforcement authorities have discovered the scheme. Both types of conduct are specifically covered by the new enhancement. The third prong provides an increase if any offense covered by the fraud guideline otherwise involves sophisticated concealment. This prong addresses cases in which deliberate steps are taken to make the offense, or its extent, difficult to detect.

Third, this amendment provides a two-level enhancement for conduct related to sophisticated concealment of a tax offense. The primary purpose of this amendment is to conform the language of the current enhancement for ''sophisticated means'' in the tax guidelines to the essentially equivalent language of the new sophisticated concealment enhancement provided in the fraud guideline. Additionally, the amendment resolves a circuit conflict regarding whether the enhancement applies based on the personal conduct of the defendant or the overall offense conduct for which the defendant is accountable. Consistent with the usual relevant conduct rules, application of this new enhancement for sophisticated concealment accordingly is based on the overall offense conduct for which the defendant is accountable.

3. *Amendment:* Section 2K2.1(a) is amended in subdivision (4) by striking ''the defendant'' after ''20, if''; in subdivision (4)(A) by inserting ''the defendant'' before ''had one''; in subdivision (4)(B) by striking ''is a prohibited person, and''; and in subdivision (4)(B) by inserting ''; and the defendant (i) is a prohibited person; or (ii) is convicted under 18 U.S.C. 922(d)'' after '' 921(a)(30)''.

Section 2K2.1(a)(6) is amended by inserting ''(A)'' after ''defendant''; and by inserting ''; or (B) is convicted under 18 U.S.C. 922(d)'' after ''person''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 6 by striking ''or'' before ''(vi)''; and by inserting ''; or (vii) has been convicted in any court of a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921(a)(33)'' after ''922(d)(8)''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 12 in the first paragraph by striking ''924(j) or (k), or 26 U.S.C. 5861(g) or (h)'' and inserting ''924 (l) or (m)''; and in the second paragraph by striking ''only'' after ''if the''; and by inserting ''or 26 U.S.C. 5861(g) or (h)'' after ''922(k)''.

Reason for Amendment: This amendment has three purposes: (1) to change the definition of ''prohibited person'' in the firearms guideline so that it includes a person convicted of a misdemeanor crime of domestic violence; (2) to provide the same base offense levels for both a prohibited person and a person who is convicted under 18 U.S.C. 922(d) of transferring a firearm to a prohibited person; and (3) to make several technical and conforming changes to the firearms guideline.

The first part of the amendment amends Application Note 6 of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to include a person convicted of a misdemeanor crime of domestic violence within the scope of ''prohibited person'' for purposes of that guideline. It also defines ''misdemeanor crime of domestic violence'' by reference to the new statutory definition of that term in 18 U.S.C. 921(a).

This part of the amendment addresses section 658 of the Treasury, Postal Service, and General Government Appropriations Act, Pub. L. 104–208, 110 Stat. 3009 (1996) (contained in the Omnibus Consolidated Appropriations Act for Fiscal Year 1997). Section 658 amended 18 U.S.C. 922(d) to prohibit the sale of a firearm or ammunition to a person who has been convicted in any court of a misdemeanor crime of domestic violence. It also amended 18 U.S.C. 922(g) to prohibit a person who has been convicted in any court of a misdemeanor crime of domestic violence from transporting or receiving a firearm or ammunition. Section 922(s)(3)(B)(i), which lists the information a person not licensed under 18 U.S.C. 923 must include in a statement to the handgun importer, manufacturer, or dealer, was amended to require certification that the person to whom the gun is transferred was not convicted in any court of a misdemeanor crime of domestic violence. Section 658 also amended 18 U.S.C. 921(a) to define ''misdemeanor crime of domestic violence''.

Violations of 18 U.S.C. 922(d) and (g) are covered by § 2K2.1. The new provisions at § 922(d) (sale of a firearm to a ''prohibited person'') and § 922(g) (transporting, possession, and receipt of a firearm by a ''prohibited person'') affect Application Note 6 of § 2K2.1, which defines ''prohibited person''. This part of the amendment conforms Application Note 6 of § 2K2.1 to the new statutory provisions.

The second part of this amendment increases the base offense level for a defendant who is convicted under 18 U.S.C. 922(d), which prohibits the transfer of a firearm to a prohibited person. Specifically, this part amends the two alternative base offense levels that pertain to prohibited persons in the firearms guideline in order to make those offense levels applicable to the person who transfers the firearm to the prohibited person. A person who is convicted under 18 U.S.C. 922(d) has been shown beyond a reasonable doubt either to have known, or to have had reasonable cause to believe, that the transferee was a prohibited person.

This part of the amendment derives from a recommendation by the United States Department of Justice and is generally consistent with a proposed directive contained in juvenile justice legislation approved by the Senate Judiciary Committee in 1997.

The third part of this amendment makes two technical and conforming changes in Application Note 12 of § 2K2.1. First, the amendment corrects statutory references to 18 U.S.C. 924(j) and (k), which were added as a result of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, 108 Stat. 1796 (1994). In the Economic Espionage Act of 1996, Pub. L. 104–294, 110 Stat. 3488 (1996), Congress again amended 18 U.S.C. 924 and redesignated the provisions as subsections (l) and (m). The amendment conforms Application Note 12 to that redesignation. Second, the amendment corrects the misplacement of the reference to 26 U.S.C. 5861(g) and (h).

4. *Amendment:* The Commentary to § 2J1.6 captioned ''Application Notes'' is amended in Note 3 in the first paragraph by striking ''3D1.2'' and inserting ''3D1.1''; and by striking the second paragraph in its entirety and inserting the following as the new second paragraph:

''In the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under § 3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense, and the failure to appear count and the count or counts for the underlying

offense are grouped together under § 3D1.2(c). (Note that 18 U.S.C. 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, although if a sentence of imprisonment on the failure to appear count is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§ 3D1.1–3D1.5 apply. See § 3D1.1(b), comment. (n.1), and § 3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a 'total punishment' that satisfies the requirements both of § 5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. 3146(b)(2). For example, if the combined applicable guideline range for both counts is 30–37 months and the court determines that a 'total punishment' of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive, failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. 3146(b)(2).)''.

The Commentary to § 2J1.6 captioned ''Application Notes'' is amended by redesignating Note 4 as Note 5; and by inserting the following as new Note 4:

''4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (e.g., perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under § 3C1.1 (Obstruction of Justice) is made because of the operation of the rules set out in Application Note 3.''.

The Commentary to § 2P1.2 captioned ''Application Notes'' is amended in Note 2 by striking ''as amended,'' after ''18 U.S.C. 1791(c),''; and by inserting ''by the inmate'' after ''served''.

The Commentary to § 2P1.2 captioned ''Application Notes'' is amended in Note 2 by inserting before the first paragraph the following:

''In a case in which the defendant is convicted of the underlying offense and an offense involving providing or possessing a controlled substance in prison, group the offenses together under § 3D1.2(c). (Note that 18 U.S.C. 1791(b) does not require a sentence of imprisonment, although if a sentence of imprisonment is imposed on a count involving providing or possessing a controlled substance in prison, section 1791(c) requires that the sentence be imposed to run consecutively to any other sentence of imprisonment for the controlled substance. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§ 3D1.1–3D1.5 apply. See § 3D1.1(b), comment. (n.1), and § 3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a 'total punishment' that satisfies the requirements both of § 5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. 1791(c). For example, if the combined applicable guideline range for both counts is 30–37 months and the court determines a 'total punishment' of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the providing or possessing a controlled substance in prison count would satisfy these requirements.''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 6 by striking ''Where'' and inserting ''If''; and by striking ''where'' both places it appears and inserting ''if''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 7 in the first sentence by striking ''Where'' and inserting ''If''; by striking ''both of the'' and inserting ''both of an''; by inserting ''(e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally))'' after ''obstruction offense'' the first place it appears; and by striking ''the underlying'' the first place it appears and inserting ''an underlying''.

Section 3D1.1(b) is amended by striking the first sentence in its entirety and inserting the following:

''Exclude from the application of §§ 3D1.2–3D1.5 any count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment.''.

The Commentary to § 3D1.1 captioned ''Application Notes'' is amended by striking Note 1 in its entirety and inserting the following:

''1. Subsection (b) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. 924(c) (requiring mandatory term of five years to run consecutively). The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). However, a count covered by subsection (b) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under § 2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. 924(c), the mandatory five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. See § 5G1.2(a).

Unless specifically instructed, subsection (b) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (i.e., the statute does not otherwise require a term of imprisonment to be imposed). See, e.g., 18 U.S.C. 3146 (Penalty for failure to appear); 18 U.S.C. 924(a)(4) (regarding penalty for 18 U.S.C. 922(q) (possession or discharge of a firearm in a school zone)); 18 U.S.C. 1791(c) (penalty for providing or possessing a controlled substance in prison). Accordingly, the multiple count rules set out under this Part do apply to a count of conviction under this type of statute.''.

The Commentary to § 3D1.2 captioned ''Application Notes'' is amended in Note 1 in the third sentence by striking ''mandates imposition of a consecutive sentence'' and inserting ''(A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment''; and by inserting ''; id., comment. (n.1)'' after ''§ 3D1.1(b)''.

Section 5G1.2(a) is amended by striking ''mandates a consecutive sentence'' and inserting ''(1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment''; and by inserting ''by that statute'' after ''determined''.

The Commentary to § 5G1.2 is amended in the last paragraph by striking the first three sentences and inserting:

''Subsection (a) applies if a statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory term of five years to run consecutively to any other term of imprisonment). The term of years to be imposed consecutively is determined by the statute of conviction, and is independent of a guideline sentence on any other count.''.

The Commentary to § 5G1.2 is amended in the last paragraph in the fourth sentence by inserting '', e.g.,'' after ''See''; and by adding at the end the following new sentence:

''Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to § 2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.''.

Reason for Amendment: The purpose of this amendment is to clarify how several guideline provisions, including those on grouping multiple counts of conviction, work together to ensure an incremental, consecutive penalty for a failure to appear count. This amendment addresses a circuit conflict regarding whether the guideline procedure of grouping the failure to appear count of conviction with the count of conviction for the underlying offense violates the statutory mandate of imposing a consecutive sentence. *Compare United States* v. *Agoro,* 996 F.2d 1288 (1st Cir. 1993) (grouping rules apply), and *United States* v. *Flores,* No. 93–3771, 1994 WL 163766 (6th Cir. May 2, 1994) (unpublished) (same), with *United States* v. *Packer,* 70 F.3d 357 (5th Cir. 1995) (grouping rules defeat statutory purposes of 18 U.S.C. § 3146), cert. denied, 117 S. Ct. 75 (1996). The amendment maintains the current grouping rules for failure to appear and obstruction of justice, but addresses internal inconsistencies among different guidelines and explains how the guideline provisions work together to ensure an incremental, consecutive penalty for the failure to appear count. Specifically, the amendment (1) more clearly distinguishes between statutes that require imposition of a consecutive term of imprisonment only if imprisonment is imposed (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1791(b), (c) (Penalty for providing or possessing contraband in prison)), and statutes that require both a minimum term of imprisonment and a consecutive sentence (e.g., 18 U.S.C. § 924(c) (Use of a firearm in relation to crime of violence or drug trafficking offense)); (2) states that the method outlined for determining a sentence for failure to appear and similar statutes ensures an incremental, consecutive punishment; (3) adds an upward departure provision if offense conduct involves multiple obstructive acts; (4) makes conforming changes in § 2P1.2 (Providing or Possessing Contraband in Prison) because the relevant statute, 18 U.S.C. 1791, is similar to 18 U.S.C. 3146; and (5) makes conforming changes in §§ 3C1.1, 3D1.1, 3D1.2, and 5G1.2.

5. *Amendment:* The Commentary to § 3B1.3 captioned ''Application Notes'' is amended in the first paragraph of Note 1 in the third sentence by inserting ''public or private'' after ''position of''; in the fourth sentence by striking ''would apply'' and inserting ''applies''; and in the last sentence by striking ''would'' and inserting ''does.''.

The Commentary to § 3B1.3 captioned ''Application Notes'' is amended by redesignating Note 2 as Note 3; and by inserting the following as new Note 2:

''2. This enhancement also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not. For example, the enhancement applies in the case of a defendant who (A) perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker; or (B) perpetrates a fraud by representing falsely to a patient or employer that the defendant is a licensed physician. In making the misrepresentation, the defendant assumes a position of trust, relative to the victim, that provides the defendant with the same opportunity to commit a difficult-to-detect crime that the defendant would have had if the position were held legitimately.''.

The Commentary to § 3B1.3 captioned ''Background'' is amended by inserting after the first sentence the following:

''The adjustment also applies to persons who provide sufficient indicia to the victim that they legitimately hold a position of public or private trust when, in fact, they do not.''.

Reason for Amendment: The purpose of this amendment is to establish that the two-level increase for abuse of a position of trust applies to a defendant who is an imposter, as well as to a person who legitimately holds and abuses a position of trust. This amendment resolves a circuit conflict on that issue. Compare *United States* v. *Gill,* 99 F.3d 484 (1st Cir. 1996) (adjustment applied to defendant who posed as licensed psychologist), and *United States* v. *Queen,* 4 F.3d 925 (10th Cir. 1993) (adjustment applied to defendant who posed as financial broker), cert. denied, 510 U.S. 1182 (1994), with *United States* v. *Echevarria,* 33 F.3d 175 (2d Cir. 1994) (defendant who poses as physician does not occupy a position of trust). The amendment adopts the majority appellate view and provides that the abuse of position of trust adjustment applies to an imposter who pretends to hold a position of trust when in fact he does not. The Commission has determined that, particularly from the perspective of the crime victim, an imposter who falsely assumes and takes advantage of a position of trust is as culpable and deserving of increased punishment as is a defendant who abuses an actual position of trust.

6. *Amendment:* Section 3C1.1 is amended by inserting ''(A)'' after ''If''; by inserting ''the course of'' after ''during''; and by inserting ''of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense'' after ''instant offense''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 2 in the second sentence by striking ''Note 3'' and inserting ''Note 4''; in the third sentence by striking ''Note 4'' and inserting ''Note 5''; and in the fourth sentence by striking ''Notes 3 and 4'' and inserting ''Notes 4 and 5''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4 in the first paragraph by striking ''Note 7'' and inserting ''Note 8''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended by redesignating Notes 1 through 8, as Notes 2 through 9, respectively; and by inserting the following as new Note 1:

''1. This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant.''.

Reason for Amendment: The purpose of this amendment is to clarify what the term *instant offense* means in the obstruction of justice guideline, § 3C1.1. This amendment resolves a circuit conflict on the issue of whether the adjustment applies to obstructions that occur in cases closely related to the defendant's case or only those specifically related to the offense of which the defendant convicted. Compare *United States* v. *Powell,* 113

F.3d 464 (3d Cir.) (adjustment applies if defendant attempts to impede the prosecution of a co-defendant who is charged with the same offense for which defendant was convicted), cert. denied, 118 S. Ct. 454 (1997), *United States* v. *Walker*, 119 F.3d 403 (6th Cir.) (same), cert. denied, 118 S. Ct. 643 (1997), *United States* v. *Acuna*, 9 F.3d 1442 (9th Cir. 1993) (adjustment applies if defendant attempts to obstruct justice in a case closely related to his own), and *United States* v. *Bernaugh*, 969 F.2d 858 (10th Cir. 1992) (adjustment applies when defendant testifies falsely at his own hearing about co-defendants' roles in the offense), with *United States* v. *Perdomo*, 927 F.2d 111 (2d Cir. 1991) (cannot apply adjustment based on obstructive conduct outside the scope of charged offense), and *United States* v. *Partee*, 31 F.3d 529 (7th Cir. 1994) (same). The amendment, which adopts the majority view, instructs that the obstruction must relate either to the defendant's offense of conviction (including any relevant conduct) or to a closely related case. The amendment also clarifies the temporal element of the obstruction guideline (i.e., that the obstructive conduct must occur during the investigation, prosecution, or sentencing of the defendant's offense of conviction).

7. Amendment: The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4 in the first sentence of the first paragraph by striking ''enhancement'' and inserting ''adjustment''; and by inserting ''or affect the determination of whether other guideline adjustments apply (e.g., § 3E1.1 (Acceptance of Responsibility))'' after ''guideline range''; in the second sentence by striking ''enhancement'' and inserting ''adjustment''; in subdivision (d) by striking the period at the end and inserting a semicolon; and by adding at the end the following new subdivision:

''(e) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility).''.

Reason for Amendment: The purpose of this amendment is to establish that lying to a probation officer about drug use while released on bail does not warrant an obstruction of justice adjustment under § 3C1.1. This amendment resolves a circuit conflict on that issue. Compare *United States* v. *Belletiere*, 971 F.2d 961 (3d Cir. 1992) (lying about drug use is not obstructive conduct that impedes government's investigation of instant offense), and *United States* v. *Thompson*, 944 F.2d 1331 (7th Cir. 1991) (same), cert. denied, 502 U.S. 1097 (1992), with *United States* v. *Garcia*, 20 F.3d 670 (6th Cir. 1994) (falsely denying drug use, while not outcome-determinative, is relevant), cert. denied, 513 U.S. 1159 (1995). The amendment, which adopts the majority view, excludes from application of § 3C1.1 a defendant's denial of drug use while on pre-trial release, although the amendment provides that such conduct may be relevant in determining the application of other guidelines, such as § 3E1.1 (Acceptance of Responsibility).

8. *Amendment:* Section 5K2.13 is amended by striking the text in its entirety and inserting:

''A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Commentary

Application Note:

1. For purposes of this policy statement—

Significantly reduced mental capacity means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.''.

Reason for Amendment: The purpose of this amendment is to allow (except under certain circumstances) a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity. This amendment addresses a circuit conflict regarding whether the diminished capacity departure is precluded if the defendant committed a ''crime of violence'' as that term is defined in the career offender guideline. Compare *United States* v. *Poff*, 926 F.2d 588 (7th Cir.) (en banc) (definition of ''non-violent offense'' necessarily excludes a crime of violence), cert. denied, 502 U.S. 827 (1991), *United States* v. *Maddalena*, 893 F.2d 815 (6th Cir. 1989) (same), *United States* v. *Mayotte*, 76 F.3d 887 (8th Cir. 1996) (same), *United States* v. *Borrayo*, 898 F.2d 91 (9th Cir. 1989) (same), and *United States* v. *Dailey*, 24 F.3d 1323 (11th Cir. 1994) (same), with *United States* v. *Chatman*, 986 F.2d 1446 (D.C. Cir. 1993) (court must consider all the facts and circumstances to determine whether offense was non-violent; terms are not mutually exclusive), *United States* v. *Weddle*, 30 F.3d 532 (4th Cir. 1994) (same), and *United States* v. *Askari*, F.3d, 1998 WL 164561 (3d Cir. 1998) (en banc) (''non-violent offenses'' are those that do not involve a reasonable perception that force against persons may be used in committing the offense), abrogating *United States* v. *Rosen*, 896 F.2d 789 (3d Cir. 1990) (non-violent offense means the opposite of crime of violence). The amendment replaces the current policy statement with a new provision that essentially represents a compromise approach to the circuit conflict. The new policy statement allows a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity, except under the following three circumstances: (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. The amendment also adds an application note that defines ''significantly reduced mental capacity'' in accord with the decision in *United States* v. *McBroom*, 124 F.3d 533 (3d Cir. 1997). The McBroom court concluded that ''significantly reduced mental capacity'' included both cognitive impairments (i.e., an inability to understand the wrongfulness of the conduct or to exercise the power of reason) and volitional impairments (i.e., an inability to control behavior that the person knows is wrongful). The application note specifically includes both types of impairments in the definition of ''significantly reduced mental capacity''.

9. *Amendment:* Section 5B1.3(d) is amended by adding at the end the following new subdivision:

''(6) Deportation

If (A) the defendant and the United States entered into a stipulation of

deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable—a condition ordering deportation by a United States district court or a United States magistrate judge.''.

Section 5D1.3(d) is amended by adding at the end the following new subdivision:

''(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable—a condition ordering deportation by a United States district court or a United States magistrate judge.''.

Section 5D1.3(e)(5) is amended by striking ''to provide just punishment for the offense,''.

Section 5B1.3(c) is amended by inserting ''(Policy Statement)'' before ''The following''.

Section 5B1.3(d) is amended by inserting ''(Policy Statement)'' before ''The following''.

Section 5B1.3(e) is amended in the title by adding ''(Policy Statement)'' at the end.

Section 5D1.3(c) is amended by inserting ''(Policy Statement)'' before ''The following''.

Section 5D1.3(d) is amended by inserting ''(Policy Statement)'' before ''The following''.

Section 5D1.3(e) is amended in the title by adding ''(Policy Statement)'' at the end.

Reason for Amendment: The purpose of this amendment is to make several technical and conforming changes to the guidelines relating to conditions of probation and supervised release. The amendment has three parts. First, the amendment adds to § 5B1.3 a condition of probation regarding deportation, in response to section 374 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L 104–208, 110 Stat. 3009 (1996). That section amended 18 U.S.C. § 3563(b) to add a new discretionary condition of probation with respect to deportation. Second, this amendment deletes the reference in the supervised release guideline to ''just punishment'' as a reason for the imposition of curfew as a condition of supervised release. The need to provide ''just punishment'' is not included in 18 U.S.C. § 3583(c) as a permissible factor to be considered in imposing a term of supervised release. Third, this amendment amends the guidelines pertaining to conditions of probation and supervised release to indicate that discretionary (as opposed to mandatory) conditions are advisory policy statements of the Commission, not binding guidelines.

10. *Amendment:* Section 5K2.0 is amended in the first paragraph in the first sentence by inserting a comma after ''3553(b)''; by striking ''guideline'' and inserting ''guidelines''; in the second sentence by striking ''guidelines'' and inserting ''guideline range''; in the third sentence by striking ''controlling'' after ''The''; by striking ''can only be made by the courts'' and inserting ''rests with the sentencing court on a case-specific basis''; in the last sentence by inserting ''determining'' after ''consideration in''; by striking ''guidelines'' and inserting ''guideline range''; by striking ''guideline level'' and inserting ''weight''; by inserting ''under the guidelines'' after ''factor''; and by inserting before the period at the end ''or excessive''.

Section 5K2.0 is amended in the last paragraph by striking ''An'' and inserting ''Finally, an''; by striking ''not ordinarily relevant'' and inserting '', in the Commission's view, 'not ordinarily relevant' ''; and by striking ''in a way that is important to the statutory purposes of sentencing''.

The Commentary to § 5K2.0 is amended by inserting before the first paragraph the following:

''The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. *Koon* v. *United States,* 116 S. Ct. 2035 (1996). Furthermore, '[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District Courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.' Id. at 2046–47.''.

Reason for Amendment: The purpose of this amendment is to reference specifically in the general departure policy statement the United States Supreme Court's decision in *United States* v. *Koon,* 116 S. Ct. 2035 (1996). This amendment (1) incorporates the principal holding and key analytical points from the Koon decision into the general departure policy statement, § 5K2.0; (2) deletes language inconsistent with the holding of Koon; and (3) makes minor, non-substantive changes that improve the precision of the language of § 5K2.0.

11. *Amendment:* Section 2B3.2(b) is amended in subdivision (2) by striking ''(b)(6)'' and inserting ''(b)(7)''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 5 in the first sentence by striking ''subsections (1) and (2)'' and inserting ''subsections (a)(1), (a)(2), and (b)''.

The Commentary to § 6A1.3 is amended in the third paragraph by striking ''117 U.S.'' after ''Watts,'' both places it appears and inserting ''117 S. Ct.''.

Reason for Amendment: This amendment corrects technical errors in §§ 2B3.1, 2K2.1, and 6A1.3.

Part II—Proposed Amendment in Response to the No Electronic Theft Act of 1997

Synopsis of Proposed Amendment: In section 2(g) of the No Electronic Theft Act of 1997, Pub. L. 105B147, Congress directed the Commission to (1) ''ensure that the applicable guideline range for a defendant convicted of a crime against intellectual property (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2329 of title 18, United States Code) is sufficiently stringent to deter such a crime and to adequately reflect the additional considerations set forth in paragraph (2)''; and (2) ''ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed.''

Three possible approaches for implementing these directives are set forth below. Option One is the result of the Commission's review and consideration of the directives, after taking into account pertinent hearing testimony, written public comment, and

other input of interested parties. Upon the Commission's request for input from the Department of Justice, the Department proposed Options Two and Three as possible approaches for carrying out the statutory directives. The Commission invites comment on each of these three proposals, as well as any other comment on how the congressional directives might best be implemented. Additionally, the Commission invites comment on whether the Commission can and should promulgate any of these proposed amendments (or any other amendments to the guidelines, policy statements, and official commentary to carry out these directives) pursuant to the emergency amendment authority of section 21 of the Sentencing Act of 1987.

Note: Persons commenting on this issue may wish to consider whether the authority of the Commission to adopt emergency amendments to the guidelines in order to implement the directives is sufficiently clear inasmuch as the authority to act on an emergency basis under section 21 of the Sentencing Act of 1987, which was cited in section 2(g) of the No Electronic Theft Act of 1997, has expired and may not have been revived adequately by that section.

Proposed Amendment:

Option One [Commission Proposal]:

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) If (A) the offense involved (i) the infringement of a copyright other than a copyright violation under 18 U.S.C. 2319A, (ii) the infringement of both a copyright and a trademark, or (iii) palmed-off counterfeit goods; and (B) the infringed 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) subsection (b)(1) does not apply; and (B) the infringing value exceeded $2,000, increase by the number of levels from the monetary table in § 2F1.1 corresponding to that value.

[(3) If the offense involved online electronic infringement, increase by 2 levels.]

[(4) If the offense was not committed for commercial advantage or private financial gain, decrease by [2] levels, but not below level 6.]

[(5) If the offense involved the conscious or reckless risk of serious bodily injury or death, increase by [2] levels. If the resulting offense level is less than level [13][14], increase to level [13][14]].

Commentary

Application Notes:

1. For purposes of this guideline—

Infringed value means the average retail value of the infringed-upon item multiplied by the number of infringing items. *Infringed-upon item* means the legitimate item with respect to which or against which the crime against intellectual property was committed. *Average retail value of the infringed-upon item* generally means the average price that a well-informed consumer typically would pay for the legitimate item (which may be less than the Manufacturer's Suggested Retail Price). In cases involving the interception of a communication in violation of 18 U.S.C. § 2511, the *average retail value of the infringed-upon item* means the price the user would have paid if that communication had been obtained lawfully.

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

Infringing item means the item that violates the copyright or trademark laws.

Palmed-off counterfeit goods means counterfeit goods that a consumer reasonably would believe are the legitimate items, because of price comparability and apparent substitutability.

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.

2. The enhancement in subsection (b)(2) applies to any infringement case not covered by subsection (b)(1) and in which the infringing value exceeded $2,000. The types of cases to which subsection (b)(2) is intended to apply include, for example, most cases involving trademark infringement, as well as cases involving the unlawful recording of a musical performance in violation of 18 U.S.C. § 2319A.

3. There may be cases in which the offense level substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, an upward or downward departure, as appropriate, 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 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.''.

Option Two [Department of Justice Proposal]:

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) If the economic harm exceeded $2,000, increase by the corresponding number of levels from the table in § 2F 1.1 (Fraud and Deceit).

(2) If the offense involved online electronic infringement, increase by 2 levels.

(3) If the offense posed a threat to public health and safety, increase by 2 levels.

Commentary

Statutory Provisions: 17 U.S.C. § 506(a); 18 U.S.C. 2318, 2319, 2319A, 2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

Infringed upon items means the items (including phonorecords and computer programs) with respect to which or against which the crime against intellectual property was committed.

Infringing items means the items that violate the copyright or trademark laws; often, infringing trademarks, and the items bearing them, are referred to as *counterfeit* and items that infringe copyrights are referred to as *pirated*.

Retail value means the Manufacturer's Suggested Retail Price (MSRP).

Copies means both copies and phonorecords.

Trafficked in includes transported, transferred, distributed, sold or otherwise disposed of.

2. *Economic harm* in 2318, 2319 (506(a)), and 2320 cases is the retail value of the infringed upon items, multiplied by the number of copies produced and trafficked in. This recognizes that infringement causes losses not only for the trademark and copyright owners, but for others in the distribution chains of legitimate articles, and for members of the public who are

deceived into buying what they may believe are legitimate articles.

A single copy that is produced and then sold by a single defendant counts as one copy.

3. *Economic harm* in 2319A cases is the retail value of the infringing items, multiplied by the number of copies produced (including the number of primary unlawful fixations, i.e., 'masters,' from which those copies are made) and/or transmissions and/or the number of copies sold, offered for sale, distributed, offered for distribution, rented, offered for rent, and trafficked in. The value of infringing items is the standard in these cases because merchandise that violates § 2319A has no legitimate counterpart. A single copy that is produced and then sold by a single defendant counts as one copy.

4. *Online electronic infringement* includes the 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.* The ease with which infringers can operate in the online environment and the access they have to limitless numbers of customers gives them the capability of causing substantial harm. For example, a defendant may post copyrighted material to an electronic bulletin board, making it accessible for others to illegally obtain, copy, and further distribute. In such an instance, it may not be possible to determine precisely the number of items (copies) downloaded by persons who access the facility, but it is reasonable to assure, based on the worldwide possibility for distribution and the number of items offered at the facility, that the harm is substantial.

5. In many instances, items that violate the trademark and copyright laws also present public health and safety hazards. These hazards can appear in many contexts. For example, counterfeit products, such as automotive parts, airplane parts, foodstuffs, pharmaceuticals, and electrical devices, place members of the public in danger. The enhancement shall apply in cases in which the products, if used in their intended manner, would threaten public health and safety.

6. An upward departure may be warranted in cases in which the economic harm underrepresents the actual harm or would lead to an unfair result. This Application Note applies in infringement situations, other than those referred to in Application Note 4, in which the number of copies produced and trafficked in is impossible to calculate and the harm to the copyright or trademark owner, others in the legitimate distribution chains, and the public is substantial. For example, rather than operate as an individual, a defendant may be part of a distribution or manufacturing network in which he or she supplies other distributors with unlawful products or parts of products, such as counterfeit handbags or watches or their parts or pirated sound recordings or motion pictures. In such an instance, it may not be possible to determine precisely the number of items (copies) provided to other persons for distribution, but it is reasonable, based on the available facts (including the number of persons in the distribution network), that the number is large enough to create substantial harm. The upward departure provided for in this Application Note is available regardless of whether the conduct was for financial gain.

7. A downward departure may be warranted in cases in which the retail price of the infringing items is less than 30% of the retail value of the infringed upon item. In such cases, it may not be reasonable to conclude that each sale of an infringing item represents a lost sale for the copyright or trademark owner or others in the distribution chain. For example, a counterfeit watch may retail for $15, while the infringed upon watch may retail for $5,000. A sentencing calculation based on the retail value of the infringed items may lead to an unfair result.

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

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.''.

Option Three [Department of Justice Proposal]:

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) If the economic harm exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).

(2) If the offense involved online electronic infringement, increase by 2 levels.

(3) If the retail price of the infringing items is less than 50% of the manufacturer's suggested retail price of the infringed upon items, decrease by 2 levels; if the retail price of the infringing items is less than 30% of the manufacturer's suggested retail price of the infringed upon items, decrease by 4 levels.

Commentary

Statutory Provisions: 17 U.S.C. § 506(a), 18 U. S. C. 2318, 2319, 2319A, 2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline

Infringed upon items means the legitimate items (including phonorecords and computer programs) with respect to which or against which the crime against intellectual property was committed.

Infringing items means the items that violate the copyright or trademark laws; often, infringing trademarks, and the items bearing them, are referred to as *counterfeit* and items that infringe copyrights are referred to as *pirated.*

Copies means both copies and phonorecords.

2. *Economic harm* in section 2318, 2319 (506(a)), and 2320 cases is the manufacturer's suggested retail price (msrp) of the infringed upon items, multiplied by the number of copies involved in the offense. This recognizes that the economic harm caused by infringement affects not only the trademark and copyright owners, but also others in the distribution chains of legitimate articles, and members of the public who are deceived into buying what they may believe are legitimate articles.

Because there is no infringed upon item in section 2319A cases, 'economic harm' in those cases is the retail price of the infringing items, multiplied by the number of copies involved in the offense (including the number of primary unlawful recordings, i.e., 'masters,' from which those copies are made).

Economic harm in section 2511 caves is the price the user or users would have paid if the service had been obtained lawfully.

3. *Online electronic infringement* includes the 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.* The ease with which infringers can operate in the online environment and the access they have to limitless numbers of customers gives them the capability of causing substantial harm.

4. An upward departure may he warranted in cases in which the unlawful conduct presents a reasonably

foreseeable risk to public health or safety. These hazards appear in many contexts. For example, counterfeit products, such as automotive parts, airplane parts, foodstuffs, pharmaceuticals, and electrical devices, place members of the public in danger.

5. An upward departure may be warranted in cases in which the standard calculation of economic harm under-represents the actual harm or would lead to an unfair result. This Application Note applies in infringement situations, other than those referred to in Application Note 3, in which the number of copies involved in the offense is impossible to calculate and the harm to the copyright or trademark owner, others in the legitimate distribution chain, and the public is substantial. For example, rather that operate as an individual, a defendant may be part of a distribution or manufacturing network in which he or she supplies other distributors with unlawful products or parts of products, such as counterfeit handbags or watches or their parts or pirated sound recordings or motion pictures or their packaging, In such cases, it may not be possible to determine precisely the number of items (copies) provided to other persons for distribution, but it is reasonable, based on the available facts (including the number of persons in the distribution network), that the number is large enough to create substantial harm. The upward departure provided for in this Application Note is available regardless of whether the conduct was for commercial advantage or financial gain.

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

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.''.

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