

Revised Proposed Amendment: Implementation of the Stop Counterfeiting in Manufactured Goods Act

Synopsis of Proposed Amendment: *This proposed amendment addresses the emergency directive in Section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109–181. The directive provides that the Commission, not later than 180 days after the date of enactment of the Act,—*

shall review, and if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 2318 or 2320 of title 18, United States Code....

In carrying out this subsection, the United States Sentencing Commission shall determine whether the definition of "infringement amount" set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is adequate to address situations in which the defendant has been convicted of one of the offenses listed in paragraph (1) and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, such as an anti-circumvention device, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as U.S. v. Sung, 87 F.3d 194 (7th Cir. 1996).

The deadline for promulgating an amendment under the directive is September 12, 2006.

The proposed amendment adds subdivision (vii) to Application Note 2(A) of §2B5.3 (Criminal Infringement of Copyright or Trademark) to provide that the infringement amount is based on the retail value of the infringed item in a case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service.

Proposed Amendment:

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

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Commentary

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Application Notes:

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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:

* * *

- (vii) *A case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service.*