

Appendix A

Commonly Charged Intellectual Property Crimes

This overview provides the elements, defenses, penalties, and sentencing guideline sections concerning most of the intellectual property crimes and alternative charges discussed in this Manual, as well as an index indicating which section of the Manual that discusses each crime.

| | |
|---|------------|
| Trafficking in Counterfeit Trademarks, Service Marks, or Certification Marks. | 340 |
| Criminal Copyright Infringement (Felony & Misdemeanor). . . | 342 |
| Unauthorized Recording of a Motion Picture (Camcording). . . | 345 |
| Trafficking in Illicit Labels or Counterfeit Labels, Documentation or Packaging for Copyrighted Works. | 346 |
| Trafficking in Recordings of Live Musical Performances (Bootlegging).. | 347 |
| Digital Millennium Copyright Act (Anti-Circumvention).. . . . | 348 |
| Commercial Theft of Trade Secrets. | 350 |
| Foreign Economic Espionage. | 352 |
| Unauthorized Access of a Computer. | 353 |
| Interstate Transportation, Sale, or Receipt of Stolen Property. . | 355 |
| Mail and Wire Fraud. | 356 |
| Prohibition on Devices to Intercept Communications. | 358 |
| Unauthorized Reception of Cable Service. | 359 |
| Trafficking in Satellite Decryption Devices. | 360 |

**Trafficking in Counterfeit Trademarks, Service Marks, or
Certification Marks**

18 U.S.C. § 2320(a)

Chapter III

Elements

1. That the defendant trafficked, or attempted to traffic, in [goods]
[services]

[offenses committed on or after March 16, 2006, can
include labels, patches, stickers, wrappers, badges, emblems,
medallions, charms, boxes, containers, cans, cases, hangtags,
documentation, or packaging of any type or nature]
2. That such trafficking, or attempt to traffic, was intentional;
3. That the defendant

[knowingly used a counterfeit mark on or in connection
with the [goods] [services]]

[offenses on or after March 16, 2006, can also include: knew
that counterfeit marks had been applied to the labels,
patches, stickers, wrappers, badges, emblems, medallions,
charms, boxes, containers, cans, cases, hangtags,
documentation, or packaging]

in which the defendant trafficked, or attempted to traffic; and
4. That the use of the counterfeit marks was likely to cause
confusion, to cause mistake, or to deceive

Counterfeit mark: “a spurious mark—(I) that is used in connection with trafficking in any goods, services, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature; (ii) that is identical with, or substantially indistinguishable from, a mark registered for those goods or services on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered; (iii) that is applied to or used in connection with the goods or services for which the mark is registered with the United States Patent and Trademark Office, or is applied to or consists of a label patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature that is designed, marketed, or otherwise intended

to be used on or in connection with the goods or services for which the mark is registered in the United States Patent and Trademark Office; and (iv) the use of which is likely to cause confusion, to cause mistake, or to deceive”

Defenses

Overrun goods: Had authorization but exceeded it (i.e., authorized to make 1,000 copies but made 5,000)

Gray market goods: Goods legitimately manufactured and sold overseas and then imported into U.S. outside traditional distribution channels

Repackaging genuine goods: Genuine goods repackaged with genuine marks or reproduced marks, with no intent to deceive or confuse

Statutory maximum penalties

First offense: 10 years' imprisonment and fine of \$2,000,000 or twice the gain/loss (individual); fine of \$5,000,000 or twice the gain/loss (organization)

Subsequent offense: 20 years' imprisonment and \$5,000,000 fine or twice the gain/loss (individual); \$15,000,000 fine or twice the gain/loss (organization)

Guideline section: United States Sentencing Guideline § 2B5.3

Criminal Copyright Infringement (Felony & Misdemeanor)

17 U.S.C. § 506(a) & 18 U.S.C. § 2319

Chapter II

Elements for prosecutions under subsections 506(a)(1)(A) and (a)(1)(B)

1. That the works that the defendant is alleged to have [reproduced] [distributed] were protected by copyright
2. That the defendant infringed the copyrights of the works by [reproducing] [distributing to the public] one or more copies of [each of] the copyrighted works
3. That the defendant willfully infringed the copyrights [and]
4. That the defendant, during a 180-day period, reproduced or distributed ten (10) or more copies of one or more copyrighted works which have a total retail value of more than \$2,500 [and]
- [5. [optional] That the act of infringement was for the purpose of commercial advantage or private financial gain]

Elements for prosecutions under subsection 506(a)(1)(C)

1. That copyrights exist for the works that the defendant is alleged to have distributed
2. That the defendant infringed the copyrights of the works by distributing to the public one or more copies of [each of] the copyrighted works
3. That the defendant willfully infringed the copyrights
4. That the works distributed by the defendant were being prepared for commercial distribution
5. That the defendant knew or should have known that the works were intended for commercial distribution [and]
6. That the defendant distributed the works by making them available on a computer network accessible to members of the public [and]
- [7. Optional: That the act of infringement was for the purpose of commercial advantage or private financial gain]

Elements for Misdemeanor Copyright Infringement

Elements 1, 2 & 3 are the same as the base felony elements except that any infringement of the copyright is covered, not just infringement by reproduction or distribution.

4. The defendant infringed EITHER

(a) for purposes of commercial advantage or private financial gain, (17 U.S.C. § 506(a)(1)(A) (numbered § 506(a)(1) by the Apr. 27, 2005 amendments) & 18 U.S.C. § 2319(b)(3)); OR

(b) by reproduction or distribution of one or more copyrighted works with a total retail value of more than \$1,000 within a 180-day period, (17 U.S.C. § 506(a)(1)(B) & 18 U.S.C. § 2319(c)(3)).

Defenses

First sale: The first purchaser and any subsequent purchaser of a specific copy of a copyrighted work may sell, display (privately), or dispose of their copy, but may not reproduce and distribute additional copies made from that work.

Fair use: Allows otherwise infringing use of a work for purposes such as (but not limited to) criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.

Archival exception for computer software: Owner of a copy of a computer program may copy the program as necessary to use the program or do machine maintenance or repair, and as an archival backup, subject to certain limitations.

Statutory maximum penalties

Section 506(a)(1)(A)

First offense: 5 years' imprisonment and fine of \$250,000 or twice the gain/loss (individual); fine of \$500,000 or twice the gain/loss (organization)

Subsequent offense: 10 years imprisonment and fine of \$250,000 or twice the gain/loss (individual); fine of \$500,000 or twice the gain/loss (organization)

Section 506(a)(1)(B)

First offense: 3 years' imprisonment and fine of \$250,000 or twice the gain/loss (individual); fine of \$500,000 or twice the gain/loss (organization)

Subsequent offense: 6 years' imprisonment and fine of \$250,000 or twice the gain/loss (individual); fine of \$500,000 or twice the gain/loss (organization)

Section 506(a)(1)(C)

First offense: Same as § 506(a)(1)(A) if purpose was for commercial advantage or private financial gain; if not, same as § 506(a)(1)(B)

Misdemeanor: 1 year's imprisonment and fine of \$100,000 or twice the gain/loss

Guideline section: United States Sentencing Guideline § 2B5.3

Unauthorized Recording of a Motion Picture (Camcording)

18 U.S.C. § 2319B

Section II.F.

Elements

1. That the defendant used, or attempted to use, an audiovisual recording device to transmit or make a copy of a motion picture or other audiovisual work from a performance of such work in a motion picture facility, specifically [describe use or attempted use]
2. That such use, or attempted use of the device, was done knowingly
3. That such use, or attempted use of the device, was without the authorization of the copyright owner
4. That [describe motion picture or audiovisual work] is protected by copyright

Statutory maximum penalties

First offense: 3 years' imprisonment and fine of \$250,000 or twice the gain/loss (individual); fine of \$500,000 or twice the gain/loss (organization)

Subsequent offense: 6 years' imprisonment and fine of \$250,000 or twice the gain/loss (individual); fine of \$500,000 or twice the gain/loss (organization)

Guideline section: United States Sentencing Guideline § 2B5.3

**Trafficking in Illicit Labels or Counterfeit Labels, Documentation
or Packaging for Copyrighted Works**

18 U.S.C. § 2318

Chapter VI

Elements

1. That the defendant trafficked in
[labels affixed to/enclosing/accompanying/ designed to be
affixed to, to enclose, to accompany] [*describe*
work/ documentation/ packaging;]
[documentation/packaging]
2. That the
[labels were counterfeit/illicit]
[documentation/packaging was counterfeit]
3. That the defendant acted knowingly
4. Federal jurisdiction is satisfied because:
the offense occurred in special maritime territories or other
areas of special jurisdiction of the United States;
the offense used or intended to use the mail or a facility of
interstate or foreign commerce;
the counterfeit or illicit labels were affixed to, enclosed, or
accompanied copyrighted materials (or were designed to); or
the documentation or packaging is copyrighted.

Statutory maximum penalties: 5 years' imprisonment and fine of \$250,000 or
twice the gain/loss (individual); fine of \$500,000 or twice the gain/loss
(organization)

Guideline section: United States Sentencing Guideline § 2B5.3

**Trafficking in Recordings of Live Musical Performances
(Bootlegging)**

18 U.S.C. § 2319A

Section II.F.

Offense

Whoever, without the consent of the performer or performers involved, knowingly and for purposes of commercial advantage or private financial gain—

- (1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation;
- (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance; or
- (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States.

Statutory maximum penalties

First offense: 5 years' imprisonment and fine of \$250,000 or twice the gain/loss (individual); fine of \$500,000 or twice the gain/loss (organization)

Second offense: 10 years' imprisonment and fine of \$250,000 or twice the gain/loss (individual); fine of \$500,000 or twice the gain/loss (organization)

Guideline section: United States Sentencing Guideline § 2B5.3

Digital Millennium Copyright Act (Anti-Circumvention)

17 U.S.C. §§ 1201(a)(1)(A), 1204(a)

Section V.B.

Elements for Unauthorized Circumvention of Access Controls

1. The defendant acted willfully
2. The defendant circumvented a technological measure
3. The technological measure effectively controls access (i.e., access control)
4. The access control was to a copyrighted work
5. The act of circumvention was for the purpose of commercial advantage or private financial gain

Defenses

Regulatory: The Librarian of Congress promulgates regulatory exemptions every three years that apply only to § 1201(a)(1)(A)'s prohibitions against circumventing access controls.

Certain nonprofit entities: Nonprofit libraries, archives, educational institutions, or public broadcasting entities exempted from criminal prosecution in many cases.

Information security: “[A]ny lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee” or contractor of the federal government or a state government is exempt from all three of § 1201's prohibitions for information security work on “government computer, computer system, or computer network.”

Reverse engineering and interoperability of computer programs: Three reverse engineering or “interoperability” defenses for individuals using circumvention technology are provided by statute. These defenses are limited to computer programs.

Encryption research: Activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of knowledge in the field of encryption technology or to assist in the development of encryption products.

Restricting minors' access to internet: Courts may waive violations of subsections 1201(a)(1)(A) and 1201(a)(2) to allow parents to protect

their children from inappropriate material available on the Internet, or to prohibit manufacturers from producing products designed to enable parents to protect their children.

Protection of personally identifying information: Circumventing an access control to disable files that collect personally identifiable information.

Security testing: No violation of § 1201(a)(1)(A) occurs if testing does not constitute copyright infringement or a violation of other applicable law such as the Computer Fraud and Abuse Act of 1986.

Statutory maximum penalties

First offense: 5 years' imprisonment and fine of \$500,000 or twice the gain/loss

Second offense: 10 years' imprisonment and \$1,000,000 fine or twice the gain/loss

Guideline Section: United States Sentencing Guideline § 2B5.3

Commercial Theft of Trade Secrets

18 U.S.C. § 1832

Chapter IV

Elements

1. The defendant misappropriated a trade secret from its owner
2. The defendant knew or had a firm belief that the item/information was a trade secret
3. The item/information was in fact a trade secret (except in cases of attempt or conspiracy)
4. The defendant intended to convert the trade secret to the economic benefit of anyone other than the owner
5. The defendant intended or knew the theft would injure the owner of the trade secret
6. The trade secret was related to or was included in a product that was produced for or placed in interstate or foreign commerce

Defenses

Parallel development: Others may discover information underlying a trade secret through their own independent efforts.

Reverse engineering: Others may discover information underlying a trade secret by taking a thing that incorporates the trade secret apart to determine how it works or how it was made or manufactured.

Impossibility: Impossibility is no defense to charges of attempt or conspiracy.

Advice of counsel: May negate *mens rea*.

Claim of right—public domain and proprietary rights: *Mens rea* might be negated if defendant believed in good faith that he had a right to use the information, either because it was in the public domain or because it belonged to him.

Trade secret: All forms and types of financial, business, scientific, technical, economic, or engineering information, if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public.

Secrecy: Courts required to take any action necessary to protect the confidentiality of the trade secret during litigation.

Statutory maximum penalties: 10 years' imprisonment and fine of \$250,000 or twice the gain/loss (individual); \$5,000,000 fine or twice the gain/loss (organization)

Guideline section: United States Sentencing Guideline § 2B1.1

Foreign Economic Espionage

18 U.S.C. § 1831

Chapter IV

Elements

1. The defendant misappropriated a trade secret from its owner
2. The defendant knew or had a firm belief that the item/information was a trade secret
3. The item/information was in fact a trade secret (except in cases of attempt or conspiracy)
4. The defendant intended or knew the theft would benefit any foreign government, foreign instrumentality or foreign agent

Defenses: See **Commercial Theft of Trade Secrets** (18 U.S.C. § 1832).

Pre-Indictment Approval Required

Statutory maximum penalty: 15 years' imprisonment and fine of \$500,000 or twice the gain/loss (individual); \$10,000,000 fine or twice the gain/loss (organization)

Guideline section: United States Sentencing Guideline § 2B1.1

Unauthorized Access of a Computer

18 U.S.C. § 1030(a)(2), (a)(4)

Section IV.F.

Offense under § 1030 (a)(2)—Unlawfully accessing or attempting to access a computer to obtain information

Whoever intentionally accesses [or attempts to access] a computer without authorization or exceeds authorized access, and thereby obtains—

(A) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*)

(B) information from any department or agency of the United States OR

(C) information from any protected computer if the conduct involved an interstate or foreign communication

Enhancement pursuant to 18 U.S.C. § 1030(c)(2)(B)

(I) the offense was committed for purposes of commercial advantage or private financial gain;

(ii) the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State; or

(iii) the value of the information obtained exceeds \$5,000.

Statutory maximum penalty: 1 year's imprisonment and fine of \$100,000

Enhanced statutory maximum penalties: 5 years' imprisonment (second offense: 10 years' imprisonment) and fine of \$250,000 or twice the gain/loss (individual); fine of \$500,000 or twice the gain/loss (organization)

Guideline section: United States Sentencing Guideline § 2B1.1

Offense under § 1030 (a)(4) —Unlawfully accessing or attempting to access a protected computer to further a fraud

Whoever knowingly and with intent to defraud, accesses [or attempts to access] a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5,000 in any 1-year period

Statutory maximum penalties: 5 years' imprisonment and fine of \$250,000 or twice the gain/loss (first offense), 10 years' imprisonment and fine of \$250,000 (second offense)

Guideline section: United States Sentencing Guideline § 2B1.1

Interstate Transportation, Sale, or Receipt of Stolen Property

18 U.S.C. §§ 2314, 2315

Sections II.F. & IV.F.

Transportation offense under § 2314

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of \$5,000 or more

Sale or receipt offense under § 2315

Whoever receives, possesses, conceals, stores, barbers, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of \$500 or more, which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken

Statutory maximum penalties: 10 years' imprisonment and fine of \$250,000 (\$500,000 for organizations) or twice the gain/loss

Guideline section: United States Sentencing Guidelines §§ 2B1.1, 2B1.5

Mail and Wire Fraud Statutes

18 U.S.C. §§ 1341, 1343, 1346

Sections II.F., III.F., IV.F., VI.F.

Mail Fraud Offense Under § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing

Wire Fraud Offense Under § 1343

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice

Theft of Honest Services Under § 1346

[T]he term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.

Statutory maximum penalties

Base offense: 20 years' imprisonment and fine of \$250,000 or twice the gain/loss (individual); fine of \$500,000 or twice the gain/loss (organization)

If affecting a financial institution: 30 years' imprisonment and fine of \$1,000,000 or twice the gain/loss

Guideline section: United States Sentencing Guideline §§ 2B1.1, 2C1.1

Prohibition on Devices to Intercept Communications

18 U.S.C. § 2512

Offense

Any person who intentionally—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications; or

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce

Statutory maximum penalties: 5 years' imprisonment and fine of \$250,000 (\$500,000 for organizations) or twice the gain/loss

Guideline section: United States Sentencing Guideline § 2H3.2

Unauthorized Reception of Cable Service

47 U.S.C. § 553

Section II.F.

Offense

No person shall [willfully] intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.

Enhancement: Done for purposes of commercial advantage or private financial gain

Statutory maximum base penalties: 6 months' imprisonment and fine of \$5,000 or twice the gain/loss (individual); fine of \$10,000 or twice the gain/loss (organization)

Enhanced penalties: 2 years' imprisonment (5 years' for subsequent offense) and fine of \$250,000 or twice the gain/loss; fine of \$500,000 or twice the gain/loss (organization)

Guideline section: United States Sentencing Guideline § 2B5.3

Trafficking in Satellite Decryption Devices

47 U.S.C. § 605(e)(4)

Section II.F.

Offense

Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services

Statutory maximum penalties: 5 years' imprisonment and fine of \$500,000 or twice the gain/loss

Guideline section: United States Sentencing Guideline §§ 2B5.3, 2H3.1