

§2B5.3

the Armed Forces, or (iii) national security, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

Commentary

Statutory Provisions: 17 U.S.C. §§ 506(a), 1201, 1204; 18 U.S.C. §§ 2318–2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

“**Circumvention devices**” are devices used to perform the activity described in 17 U.S.C. §§ 1201(a)(3)(A) and 1201(b)(2)(A).

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

“**Counterfeit military good or service**” has the meaning given that term in 18 U.S.C. § 2320(f)(4).

“**Drug**” and “**counterfeit mark**” have the meaning given those terms in 18 U.S.C. § 2320(f).

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

“**Infringing item**” means the item that violates the copyright or trademark laws.

“**Uploading**” means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item as an openly shared file. “Uploading” does not include merely downloading or installing an infringing item on a hard drive on a defendant’s personal computer unless the infringing item is an openly shared file.

“**Work being prepared for commercial distribution**” has the meaning given that term in 17 U.S.C. § 506(a)(3).

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

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

- (i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item.
- (ii) The retail price of the infringing item is not less than 75% of the retail price of the infringed item.