

§2B5.4

- (E) **Indeterminate Number of Infringing Items.**—In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.
3. **Application of Subsection (b)(7).**—In subsection (b)(7), “*other significant harm to a member of the Armed Forces*” means significant harm other than serious bodily injury or death. In a case in which the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, subsection (b)(6)(A) (conscious or reckless risk of serious bodily injury or death) would apply.
4. **Application of §3B1.3.**—If the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.

Background: This guideline treats copyright and trademark violations much like theft and fraud. Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guideline, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105–147, by using the retail value of the infringed item, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

Subsection (b)(5) implements the directive to the Commission in section 717 of Public Law 112–144.

Section 2511 of title 18, United States Code, as amended by the Electronic Communications 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.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1993 (amendments 481 and 482); May 1, 2000 (amendment 590); November 1, 2000 (amendment 593); November 1, 2001 (amendment 617); October 24, 2005 (amendment 675); September 12, 2006 (amendment 682); November 1, 2006 (amendment 687); November 1, 2007 (amendment 704); November 1, 2009 (amendment 735); November 1, 2013 (amendment 773); November 1, 2015 (amendment 791); November 1, 2018 (amendment 812); November 1, 2025 (amendment 836).
------------------------	---

§2B5.4. [Deleted]

<i>Historical Note</i>	Section 2B5.4 (Criminal Infringement of Trademark), effective November 1, 1987, was deleted by consolidation with §2B5.3 effective November 1, 1993 (amendment 481).
------------------------	--

* * * * *