

Trade mark, unauthorised use of etc.

Trade Marks Act 1994, s.92

Triable either way

Maximum: 10 years' custody

Offence range: Discharge - 7 years' custody

Step 1- Determining the offence category

The level of culpability is determined by weighing up all the factors of the case to determine the offender's **role** and the extent to which the offending was **planned** and the **sophistication** with which it was carried out.

Culpability demonstrated by one or more of the following:

A – High culpability

- A leading role where offending is part of a group activity
- Involvement of others through coercion, intimidation or exploitation
- Sophisticated nature of offence/significant planning

B – Medium culpability

- A significant role where offending is part of a group activity
- Some degree of organisation/planning involved
- All other cases where characteristics for categories A or C are not present

C – Lesser culpability

- Performed limited function under direction
- Involved through coercion, intimidation or exploitation
- Little or no organisation/planning
- Limited awareness or understanding of offence

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Harm

Harm is assessed by reference to the counterfeit goods involved in the offending by taking the **equivalent value of legitimate goods**. The harm caused to legitimate businesses and to the owners of the trademark is reflected in the sentence levels at step two.

Category 1	£500,000 or more	Starting point based on £1 million
Category 2	£100,000 – £500,000	Starting point based on £300,000
Category 3	£50,000 – £100,000	Starting point based on £75,000
Category 4	£10,000 – £50,000	Starting point based on £30,000
Category 5	£2,500 - £10,000	Starting point based on £5,000
Category 6	Less than £2,500	Starting point based on £1,000

Step 2 – Starting point and category range

Having determined the category at step one, the court should use the appropriate starting point to reach a sentence within the category range in the table below. The starting point applies to all offenders irrespective of plea or previous convictions.

Where the value is larger or smaller than the amount on which the starting point is based, this should lead to upward or downward adjustment as appropriate.

Harm	Culpability		
	A	B	C
Category 1 £500,000 or more Starting point based on £1 million	Starting point 5 years 6 months' custody Category range 4 – 7 years' custody	Starting point 4 years' custody Category range 2 years 6 months' – 5 years' custody	Starting point 2 years 6 months' custody Category range 18 months' – 4 years' custody
Category 2 £100,000–£500,000 Starting point based on £300,000	Starting point 4 years' custody Category range 2 years 6 months' – 5 years' custody	Starting point 2 years 6 months' custody Category range 18 months' – 3 years 6 months' custody	Starting point 18 months' custody Category range 26 weeks' – 2 years 6 months' custody
Category 3 £50,000 - £100,000 Starting point based on £75,000	Starting point 2 years 6 months' custody Category range 18 months' – 3 years 6 months' custody	Starting point 18 months' custody Category range 26 weeks' – 2 years 6 months' custody	Starting point 26 weeks' custody Category range Medium level community order – 1 year's custody
Category 4 £10,000- £50,000 Starting point based on £30,000	Starting point 18 months' custody Category range 26 weeks' – 2 years 6 months' custody	Starting point 36 weeks' custody Category range Medium level community order – 21 months' custody	Starting point Medium level community order Category range Low level community order – 26 weeks' custody
Category 5 £2,500-£10,000 Starting point based on £5,000	Starting point 36 weeks' custody Category range Medium level community order – 1 year 6 months' custody	Starting point Medium level community order Category range Low level community order – 26 weeks' custody	Starting point Low level community order Category range Band B fine – Medium level community order
Category 6 Less than £2,500 Starting point based on £1,000	Starting point Medium level community order Category range Low level community order – 26 weeks' custody	Starting point Low level community order Category range Band A fine – Medium level community order	Starting point Band A fine Category range Discharge – Band B fine

This is an offence where it may be appropriate to combine a community order with a fine

The court should then consider further adjustment for any aggravating or mitigating factors. The following list is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

Factors increasing seriousness

Statutory aggravating factors

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail

Other aggravating factors

1. Purchasers put at risk of harm from counterfeit items
2. Attempts to conceal/dispose of evidence
3. Attempts to conceal identity
4. Failure to respond to warnings about behaviour
5. Failure to comply with current court orders
6. Offence committed on licence
7. Offence committed across borders
8. Blame wrongly placed on others
9. Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. Good character and/or exemplary conduct
4. Offender co-operated with investigation, made early admissions and/or voluntarily reported offending
5. Business otherwise legitimate
6. Lapse of time since apprehension where this does not arise from the conduct of the offender
7. Serious medical condition requiring urgent, intensive or long-term treatment
8. Age and/or lack of maturity where it affects the responsibility of the offender
9. Mental disorder or learning disability
10. Sole or primary carer for dependent relatives

Step 3 – Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Step 4 – Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

Step 5 – Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour.

Step 6 – Confiscation, compensation and ancillary orders

The court must proceed with a view to making a confiscation order if it is asked to do so by the prosecutor or if the court believes it is appropriate for it to do so.

Where the offence has resulted in loss or damage the court must consider whether to make a compensation order.

If the court makes both a confiscation order and an order for compensation and the court believes the offender will not have sufficient means to satisfy both orders in full, the court must direct that the compensation be paid out of sums recovered under the confiscation order (section 13 of the Proceeds of Crime Act 2002).

The court may also consider whether to make ancillary orders. These may include a deprivation order, and disqualification from acting as a company director.

Step 7 – Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

Step 8 – Consideration for time spent on bail (tagged curfew)

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.