

## Individuals: 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

Use this guideline when the offender is an individual. If the offender is an organisation, please refer to the **Organisations: Trade mark, unauthorised use of etc.** guideline.

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### Step 1- Determining the offence category

The court should determine the offence category with reference to culpability and harm.

#### Culpability

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.

##### A – High culpability

- Sophisticated nature of offence/significant planning (examples **may** include but are not limited to: the use of multiple outlets or trading identities for the sale of counterfeit goods, the use of multiple accounts for receiving payment, the use of professional equipment to produce goods, **the use of a website that mimics that of the trade mark owner or a legitimate trader**, offending over a sustained period of time)
- A leading role where offending is part of a group activity
- Involvement of others through coercion, intimidation or exploitation

##### B – Medium culpability

- Some degree of organisation/planning involved
- A significant role where offending is part of a group activity
- Other cases that fall between categories A or C because:
  - Factors are present in A and C which balance each other out **and/or**
  - The offender's culpability falls between the factors as described in A and C

##### C – Lesser culpability

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

The assessment of harm for this offence involves putting a monetary figure on the offending with reference to the **retail value of equivalent genuine goods** and assessing **any significant additional harm** suffered by the trade mark owner or purchasers/ end users of the counterfeit goods:

1. Where there is evidence of the volume of counterfeit goods sold or possessed:
  - a. the monetary value should be assessed by taking the **equivalent retail value of legitimate versions** of the counterfeit goods involved in the offending.
  - b. Where it would be impractical to assign an equivalent retail value of legitimate versions, an estimate should be used.
2. Where there is no evidence of the volume of counterfeit goods sold or possessed:
  - a. In the case of labels or packaging, harm should be assessed by taking the **equivalent retail value of legitimate goods** to which the labels or packaging could reasonably be applied, taking an average price of the relevant products.
  - b. In the case of equipment or articles for the making of copies of trade marks, the court will have to make an assessment of the scale of the operation and assign an equivalent value from the table below.

**Note:** the equivalent retail value is likely to be considerably higher than the actual value of the counterfeit items and this is accounted for in the sentence levels. However, in **exceptional** cases where the equivalent retail value is grossly disproportionate to the actual value, an adjustment **may** be made.

The general harm caused to purchasers/ end users (by being provided with counterfeit goods), to legitimate businesses (through loss of business) and to the owners of the trade mark (through loss of revenue and reputational damage) is reflected in the sentence levels at step 2.

Examples of **significant additional harm** may include but are not limited to:

- Substantial damage to the legitimate business of the trade mark owner (taking into account the size of the business)
- Purchasers/ end users put at risk of physical harm from counterfeit goods (this may be evidenced by a failure to take steps to be satisfied that the goods are safe)

Where purchasers/ end users are put at **risk of death or serious physical harm** from counterfeit goods, harm should be at least category 3 even if the equivalent retail value of the goods falls below £50,000.

	<b>Equivalent retail value of legitimate goods</b>	Starting point based on
<b>Category 1</b>	£1million or more <b>or</b> category 2 value with significant additional harm	£2 million
<b>Category 2</b>	£300,000 – £1million <b>or</b> category 3 value with significant additional harm	£600,000
<b>Category 3</b>	£50,000 – £300,000 <b>or</b> category 4 value with significant additional harm	£125,000
<b>Category 4</b>	£5,000 – £50,000 <b>or</b> category 5 value with significant additional harm	£30,000
<b>Category 5</b>	Less than £5,000 <b>and</b> little or no significant additional harm	£2,500

## Step 2 – Starting point and category range

Having determined the category at step 1, 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.

**For category 1 cases an upward adjustment within the category range should be made for any significant additional harm.**

Harm	Culpability		
	A	B	C
<b>Category 1</b> £1 million or more  Starting point based on £2 million	<b>Starting point</b> 5 years' custody  <b>Category range</b> 3 – 7 years' custody	<b>Starting point</b> 3 years' custody  <b>Category range</b> 2 – 5 years' custody	<b>Starting point</b> 2 years' custody  <b>Category range</b> 1 – 3 years' custody
<b>Category 2</b> £300,000 – £1million  Starting point based on £600,000	<b>Starting point</b> 4 years' custody <b>Category range</b> 2 – 5 years' custody	<b>Starting point</b> 2 years' custody <b>Category range</b> 1 – 3 years' custody	<b>Starting point</b> 1 year's custody <b>Category range</b> 26 weeks' – 2 years' custody
<b>Category 3</b> £50,000 - £300,000  Starting point based on £125,000	<b>Starting point</b> 2 years' custody  <b>Category range</b> 1 – 3 years' custody	<b>Starting point</b> 1 year's custody  <b>Category range</b> 26 weeks' – 2 years' custody	<b>Starting point</b> High level community order  <b>Category range</b> Low level community order – 26 weeks' custody
<b>Category 4</b> £5,000- £50,000  Starting point based on £30,000	<b>Starting point</b> 1 year's custody  <b>Category range</b> 26 weeks' – 2 years custody	<b>Starting point</b> High level community order <b>Category range</b> Low level community order – 26 weeks' custody	<b>Starting point</b> Band C fine  <b>Category range</b> Band B fine – Medium level community order
<b>Category 5</b> Less than £5,000  Starting point based on £2,500	<b>Starting point</b> High level community order <b>Category range</b> Low level community order – 26 weeks' custody	<b>Starting point</b> Band C fine  <b>Category range</b> Band B fine – Medium level community order	<b>Starting point</b> Band B fine  <b>Category range</b> Discharge – Band C 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 or others put at risk of some harm from counterfeit items (where not taken into account at step 1)
2. Expectation of substantial financial gain
3. Attempts to conceal/dispose of evidence
4. Attempts to conceal identity
5. Failure to respond to warnings about behaviour
6. Offences taken into consideration
7. Blame wrongly placed on others
8. Failure to comply with current court orders
9. Offence committed on licence or post sentence supervision

## 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. Expectation of limited financial gain
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
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 [section 74 of the Sentencing Code](#) (reduction in sentence for assistance to prosecution) 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 73 of the Sentencing Code](#) and the [Reduction in Sentence for a 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 in accordance with the [Totality](#) guideline.

## Step 6 – Confiscation, compensation and ancillary orders

**Confiscation orders** under the Proceeds of Crime Act 2002 may only be made by the Crown Court. The Crown Court must proceed with a view to making a confiscation order if it is asked to do so by the prosecutor or if the Crown Court believes it is appropriate for it to do so.

An offender convicted of an offence in a magistrates' court must be committed to the Crown Court where this is requested by the prosecution with a view to a confiscation order being considered (section 70 of the Proceeds of Crime Act 2002).

(Note: the valuation of counterfeit goods for the purposes of confiscation proceedings is not the same as the valuation used for the purposes of assessing harm in this sentencing guideline.)

Where the offence has resulted in loss or damage the court must consider whether to make a **compensation order** and must give reasons if it does not do so ([section 55 of the Sentencing Code](#)).

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).

### **Forfeiture – section 97 of the Trade Marks Act 1994**

The prosecution may apply for forfeiture of goods or materials bearing a sign likely to be mistaken for a registered trademark or articles designed for making copies of such a sign. The court shall make an order for forfeiture only if it is satisfied that a relevant offence has been committed in relation to the goods, material or articles. A court may infer that such an offence has been committed in relation to any goods, material or articles if it is satisfied that such an offence has been committed in relation to goods, material or articles which are representative of them (whether by reason of being of the same design or part of the same consignment or batch or otherwise).

The court may also consider whether to make other ancillary orders. These may include a [deprivation order](#) and [disqualification from acting as a company director](#).

- [Ancillary orders – Magistrates' Court](#)
- [Ancillary orders – Crown Court Compendium, Part II Sentencing](#)

## Step 7 – Reasons

[Section 52 of the Sentencing Code](#) 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 and [section 325 of the Sentencing Code](#).

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