

Sentencing Council

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Lead Council member:
Lead official:

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SC(18)SEP04 - MCSG
TBC
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1 ISSUE

1.1 At the July meeting the Council took the decision to revise the guideline for the either way offence of unauthorised use of a trade mark which is currently in the MCSG. The revised guideline would be for use in magistrates' courts and the Crown Court.

1.2 The Council is asked to consider a first draft of the revised guideline at Annex A. The existing MCSG guideline is at Annex B.

2 RECOMMENDATION

2.1 The Council is asked to consider the draft guideline at Annex A and agree:

- The approach to be taken to culpability and harm
- The approach to be taken to sentence levels
- The aggravating and mitigating factors

3 CONSIDERATION

The offence

3.1 The offence of unauthorised use of a trade mark contrary to section 92 of the Trade Marks Act 1994 has a maximum sentence of ten years' imprisonment. The legislative provisions are reproduced at Annex C. In summary the offence can be committed by possessing or selling counterfeit goods or by counterfeiting or possessing the means of counterfeiting goods.

3.2 Information on the nature of the offending has come from an analysis of 19 Crown Court transcripts (covering 43 offenders), and from consideration of a small number of CACD judgments. Cases that are prosecuted typically relate to clothing, footwear or accessories (such as bags), but also include films, music, computer games, cigarettes and tobacco and electrical equipment. Cases vary from the very unsophisticated such as selling a few obviously fake items on a market stall or online, to highly organised and profitable businesses manufacturing or importing a large quantity of high quality counterfeit 'designer' goods.

Sentencing volumes and levels

3.3 The table below shows the sentence outcomes for offenders sentenced for offences of unauthorised use of a trade mark in the period 2007-2017.

Outcome	Number	%
Absolute Discharge	11	<0.5
Conditional Discharge	619	10
Fine	1,736	27
Community Order	1,616	25
Suspended Sentence Order	1,037	16
Immediate Custody	1,207	19
Other	187	3
Total	6,413	100

3.4 The majority of these cases (4,648) were sentenced in magistrates' courts. Of the 1,765 cases sentenced in the Crown Court a significant proportion were sentenced within magistrates' court powers. It is likely that some of those cases were sent to the Crown Court because confiscation was sought.

3.5 Of the 1,207 (or 19%) sentenced to immediate custody, the estimated range of sentence lengths **before reduction for guilty plea** is shown in the table below:

Custodial sentence length (years) pre GP¹	Number	%
Up to and including 0.5	771	64
0.5 to 1	178	15
1 to 1.5	128	11
1.5 to 2	49	4
2 to 2.5	25	2
2.5 to 3	25	2
3 to 3.5	5	<0.5
3.5 to 4	13	1
4 to 4.5	6	<0.5
4.5 to 5	1	<0.5
5 to 5.5	2	<0.5
5.5 to 6	0	0
6 to 6.5	3	<0.5
6.5 to 7	1	<0.5
7.5+	0	0
Total	1,207	100

¹ Ranges include the upper value of the interval but not the lower value (e.g. 1 to 1.5 includes sentences just above 1 year and up to and including 1.5 years).

3.6 It can be seen that the majority of offenders receive a non-custodial sentence, but that sentences of custody (immediate and suspended) represent about a third of all sentences. We do not have data for the length of the custodial term for suspended sentence orders but we know that in all cases they will be two years or less (after reduction for a guilty plea). The small number of transcripts we have for this offence suggest that most SSOs are for less than one year. Taken with the data on sentence lengths for immediate custody, about 96 per cent of custodial sentences passed are for two years or less. There are, however, a small number of cases where the offending is organised, sophisticated and highly profitable where longer sentences are passed.

3.7 If the Council's intention is that the revised guideline should broadly reflect current sentencing practice the guideline will need to provide for a range of non-custodial sentences, with an offence range of a discharge to 7 years' custody.

Question 1: Should the guideline seek broadly to reflect current sentencing practice?

Applicability

3.8 The draft guideline applies to adult offenders. There were only 45 youths sentenced for these offences in the period 2007-2017 and so no guideline for under 18s is proposed. The transcript sample suggests that there may be a small but significant number of organisations sentenced for this offence (often alongside directors). Further work will be done to establish the volumes and the fine levels imposed to enable a decision to be made as to whether a separate guideline for organisations is justified or failing that some narrative guidance on the approach to sentencing organisations.

Culpability

3.9 The suggested approach to culpability is similar to that used in the Fraud offences guideline. There are a number of CACD cases for this offence, none is a guideline case but all consider the role of the offender and the sophistication of the operation to be relevant to sentence. Some more recent cases refer to the Fraud definitive guideline as providing useful assistance.

3.10 At this stage views are sought as to whether this approach is the right one. Further work will be done in consultation with Trading Standards prosecutors to ensure that all of the key factors are covered.

Question 2: Does the Council agree with the approach to culpability?

Harm

3.11 The suggested approach to assessing harm is to use financial values as in the fraud and money laundering guidelines as opposed to the number of items as in the MCSG

guideline. The difficulty is in establishing what aspect of the case to quantify. In the sample of cases for which we have transcripts courts variously refer to the value of the counterfeit goods, the equivalent value of legitimate goods, the turnover of the operation and the profit from the operation; others refer to the number of counterfeit items. Trading Standards have suggested that that the equivalent value of legitimate goods would be relatively easy to establish and could be used to represent the financial harm in a case.

3.12 The figures suggested for the various harm categories are indicative only at this stage. Depending on which measure of harm is used the values will have to be adjusted to ensure a representative spread.

3.13 The text above the harm table notes that: 'The harm caused to legitimate businesses and to the owners of the trademark is reflected in the sentence levels at step two'. This is an aspect of harm that is mentioned frequently in cases. It is present in all cases and it seems likely that the harm increases in proportion to the scale of the offending and therefore the best way to deal with it is to treat it as intrinsic to the sentence levels.

Question 3: Does the Council agree that harm should be assessed with reference to a financial value, and, if so, what value should be used?

Sentence levels

3.14 The sentence levels suggested cover the range of sentences passed and are loosely based on those for fraud offences with a seven year statutory maximum. Those shaded in blue have a non-custodial starting point, those shaded grey have a starting point of less than two years' custody and the remainder have a starting point in excess of two years. This illustrates that a third of the starting points are for less than one per cent of cases. Therefore (depending on changes to the harm and culpability factors) if current sentencing practice is to be maintained, sentence levels may need to be revised downwards.

3.15 The wording beneath the sentence table invites the sentencer to consider combining a community order with a fine. This replicates wording in the existing guideline.

Question 4: Does the Council have any comments on the sentence table?

Aggravating factors

3.16 Factor 1 reflects the harm that can result from counterfeit products not complying with safety standards. This can apply to low level unsophisticated offending as well as large scale offending, and so has been put at step 2.

3.17 Factors 2, 3 and 4 occur in several of the transcripts. The remaining aggravating factors are standard ones taken from the fraud guidelines.

Mitigating factors

3.18 Factor 4 is particularly relevant because these are offences that are often difficult and time consuming to investigate and prosecute. Linked to that, factor 6 was a feature in several cases in the transcripts, with a reduction being made for the delay in bringing the case.

3.19 Factor 5 would apply to those offenders who were paying, VAT and tax and otherwise operating lawfully. It is most likely to apply where the counterfeit trading was only a small part of the operation.

Question 5: Are there any aggravating or mitigating factors that should be added, amended or removed?

Other steps

3.20 Step 6 of the draft guideline is based on that in the fraud guideline and gives some additional guidance on confiscation and compensation. Reference is made to deprivation orders (forfeiture) and director disqualification, both of which are features of these cases.

4 IMPACT AND RISKS

4.1 If the Council decides to maintain current sentencing practise then there is unlikely to be any impact on correctional resources.

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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.

Trade mark, unauthorised use of etc.

Trade Marks Act 1994, s.92

Effective from: 04 August 2008

Triable either way

Maximum when tried summarily: Level 5 fine and/or 6 months

Maximum when tried on indictment: 10 years

[User guide for this offence](#)**Offence seriousness (culpability and harm)****A. Identify the appropriate starting point**

Starting points based on first time offender pleading not guilty

Examples of nature of activity	Starting point	Range
Small number of counterfeit items	Band C fine	Band B fine to low level community order
Larger number of counterfeit items but no involvement in wider operation	Medium level community order, plus fine*	Low level community order to 12 weeks custody, plus fine*
High number of counterfeit items or involvement in wider operation e.g. manufacture or distribution	12 weeks custody	6 weeks custody to Crown Court
Central role in large-scale operation	<i>Crown Court</i>	<i>Crown Court</i>

***This may be an offence for which it is appropriate to combine a fine with a community order. Consult your legal adviser for further guidance.**

B. Consider the effect of aggravating and mitigating factors (other than those within examples above)The following may be particularly relevant but **these lists are not exhaustive****Factors indicating higher culpability**

1. High degree of professionalism
2. High level of profit

Factor indicating greater degree of harm

1. Purchasers at risk of harm e.g. from counterfeit drugs

Factor indicating lower culpability

1. Mistake or ignorance about provenance of goods

Common aggravating and mitigating factors

Form a preliminary view of the appropriate sentence, then consider offender mitigation

Offender mitigation

- Genuine remorse
- Admissions to police in interview
- Ready co-operation with authorities

Consider a reduction for a guilty plea

Consider ancillary orders, including compensation

View guidance on available [ancillary orders](#) and [compensation](#).

Decide sentence

Give reasons

Trade Marks Act 1994 c. 26

Part III ADMINISTRATIVE AND OTHER SUPPLEMENTARY PROVISIONS

Offences

This version in force from: **October 31, 1994 to present**

92.— Unauthorised use of trade mark, &c. in relation to goods.

(1) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—

(a) applies to goods or their packaging a sign identical to, or likely to be mistaken for, a registered trade mark, or

(b) sells or lets for hire, offers or exposes for sale or hire or distributes goods which bear, or the packaging of which bears, such a sign, or

(c) has in his possession, custody or control in the course of a business any such goods with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b).

(2) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—

(a) applies a sign identical to, or likely to be mistaken for, a registered trade mark to material intended to be used—

(i) for labelling or packaging goods,

(ii) as a business paper in relation to goods, or

(iii) for advertising goods, or

(b) uses in the course of a business material bearing such a sign for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods, or

(c) has in his possession, custody or control in the course of a business any such material with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b).

(3) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—

(a) makes an article specifically designed or adapted for making copies of a sign identical to, or likely to be mistaken for, a registered trade mark, or

(b) has such an article in his possession, custody or control in the course of a business,

knowing or having reason to believe that it has been, or is to be, used to produce goods, or material for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods.

- (4) A person does not commit an offence under this section unless—
- (a) the goods are goods in respect of which the trade mark is registered, or
 - (b) the trade mark has a reputation in the United Kingdom and the use of the sign takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the trade mark.
- (5) It is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark.
- (6) A person guilty of an offence under this section is liable—
- (a) on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;
 - (b) on conviction on indictment to a fine or imprisonment for a term not exceeding ten years, or both.

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