

Individuals: Trade mark, unauthorised use of etc.

Trade Marks Act 1994, s.92

Triable either way

Maximum: 10 years' custody

Offence range: Discharge - 6 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.

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
- 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, the monetary value should be assessed by taking the **equivalent retail value of legitimate versions** of the counterfeit goods involved in the offending (where this cannot be accurately assessed an estimated equivalent retail value should be assigned);

2. Where there is no evidence of the volume of counterfeit goods sold or possessed:
- 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.
 - 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 significant physical harm from counterfeit goods

	Equivalent retail value of legitimate goods	Starting point based on
Category 1	£1million or more or category 2 value with significant additional harm	£2 million
Category 2	£300,000 – £1million or category 3 value with significant additional harm	£600,000
Category 3	£50,000 – £300,000 or category 4 value with significant additional harm	£125,000
Category 4	£5,000 – £50,000 or category 5 value with significant additional harm	£30,000
Category 5	Less than £5,000 and 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.

Harm	Culpability		
	A	B	C
Category 1 £1 million or more	Starting point 5 years' custody	Starting point 3 years' custody	Starting point 2 years' custody
Starting point based on £2 million	Category range 3 – 6 years' custody	Category range 2 – 5 years' custody	Category range 1 – 3 years' custody

Category 2 £300,000 – £1million Starting point based on £600,000	Starting point 4 years' custody Category range 2 – 5 years' custody	Starting point 2 years' custody Category range 1 – 3 years' custody	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody
Category 3 £50,000 - £300,000 Starting point based on £125,000	Starting point 2 years' custody Category range 1 – 3 years' custody	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody	Starting point High level community order Category range Low level community order – 26 weeks' custody
Category 4 £5,000- £50,000 Starting point based on £30,000	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody	Starting point High level community order Category range Low level community order – 26 weeks' custody	Starting point Band C fine Category range Band B fine – Medium level community order
Category 5 Less than £5,000 Starting point based on £2,500	Starting point High level community order Category range Low level community order – 26 weeks' custody	Starting point Band C fine Category range Band B fine – Medium level community order	Starting point Band B fine Category range 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. Attempts to conceal/dispose of evidence
3. Attempts to conceal identity
4. Failure to respond to warnings about behaviour
5. Offences taken into consideration
6. Blame wrongly placed on others
7. Failure to comply with current court orders
8. 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. Lapse of time since apprehension where this does not arise from the conduct of the offender
6. Serious medical condition requiring urgent, intensive or long-term treatment
7. Age and/or lack of maturity
8. Mental disorder or learning disability
9. 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

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).

Forfeiture – s.97 Trade Marks Act 1994

On the application for forfeiture by a person who has come into possession of goods, materials or articles in connection with the investigation or prosecution of the offence, the court shall make an order for the forfeiture of any goods, material or articles 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](#).

Blank page