

should be submitted on or before November 14, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

J. Lynn Taylor,

Assistant Secretary.

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BILLING CODE 8010-01-P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of temporary, emergency amendments to sentencing guidelines, policy statements, and commentary.

SUMMARY: Pursuant to (A) section 105 of the Family Entertainment and Copyright Act of 2005, Pub. L. 109-9 (the "FECA"); and (B) the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109-76 (pertaining to the directive in section 6703 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458), the Commission hereby gives notice of temporary, emergency amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the temporary, emergency amendments and the reason for each amendment.

DATES: The Commission has specified an effective date of October 24, 2005, for the emergency amendments.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

SUPPLEMENTARY INFORMATION: The Commission must promulgate temporary, emergency amendments to implement the FECA directives by October 24, 2005, and to implement the directive in United States Parole Commission Extension and Sentencing Commission Authority Act of 2005 by November 27, 2005. The statutory deadlines for the promulgation of the temporary, emergency amendments, in conjunction with the Commission's public meeting schedule (the promulgation of such amendments must occur in a public meeting) and pressing needs of other Commission business, made it impracticable to publish proposed temporary, emergency amendments in the **Federal Register** in order to provide an opportunity for

public comment. The Commission therefore had good cause not to publish proposed amendments before their effective date. See 5 U.S.C. 553(b), (d)(3).

The temporary, emergency amendments set forth in this notice also may be accessed through the Commission's Web site at <http://www.ussc.gov>.

Authority: 28 U.S.C. 994(a), (o), (p), (x); section 105 of Pub. L. 109-9; and Pub. L. 109-76.

Ricardo H. Hinojosa,
Chair.

1. *Amendment:* Section 2B5.3(b) is amended by redesignating subsections (b)(2) through (b)(4) as subsections (b)(3) through (b)(5), respectively; and by inserting after subsection (b)(1) the following:

"(2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by 2 levels."

The Commentary to § 2B5.3 captioned "Application Notes" is amended in Note 1 by striking "'Uploading'" and all that follows through "the infringing item." and inserting the following:

"'Uploading' means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item in an openly shared file. 'Uploading' does not include merely downloading or installing an infringing item on a hard drive on a defendant's personal computer unless the infringing item is placed in an openly shared file.

'Work being prepared for commercial distribution' has the meaning given that term in 17 U.S.C. 506(a)(3)."

The Commentary to § 2B5.3 captioned "Application Notes" is amended in Note 2 in subdivision (A) by inserting after subdivision (v) the following:

"(vi) The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the 'retail value of the infringed item' is the value of that item upon its initial commercial distribution."

and by inserting after subdivision (D) the following:

"(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."

The Commentary to § 2B5.3 captioned "Application Notes" is amended by striking Note 3; and by redesignating Notes 4 and 5 as Notes 3 and 4, respectively.

Appendix A (Statutory Index) is amended by inserting after the line reference to "18

U.S.C. 2319(A)" the following: "18 U.S.C. 2319B 2B5.3".

Reason for Amendment: This proposed amendment implements the directive in section 105 of the Family Entertainment and Copyright Act of 2005, Pub. L. 109-9. The directive, which requires the Commission to promulgate an amendment under emergency amendment authority by October 24, 2005, instructs the Commission to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes * * *"

"In carrying out [the directive], the Commission shall—

(1) Take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements * * * are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes;

(2) Determine whether to provide a sentencing enhancement for those convicted of the offenses [involving intellectual property rights], if the conduct involves the display, performance, publication, reproduction, or distribution of a copyrighted work before it has been authorized by the copyright owner, whether in the media format used by the infringing party or in any other media format;

(3) Determine whether the scope of 'uploading' set forth in application note 3 of section 2B5.3 of the Federal sentencing guidelines is adequate to address the loss attributable to people who, without authorization, broadly distribute copyrighted works over the Internet; and

(4) Determine whether the sentencing guideline and policy statements applicable to the offenses [involving intellectual property rights] adequately reflect any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

Pre-Release Works

The proposed amendment provides a separate two-level enhancement if the offense involved a pre-release work. The enhancement and the corresponding definition use language directly from 17 U.S.C. 506(a) (criminal infringement). The amendment adds language to Application Note 2 that explains that in cases involving pre-release works, the infringement amount should be determined by using the retail value of the infringed item, rather than any premium price attributed to the infringing item because of its pre-release status. The proposed amendment addresses concerns that distribution of an item before it is legally available to the consumer is more serious conduct than distribution of other infringing items and involves a harm not addressed by the current guideline.

Uploading

The concern underlying the uploading directive pertains to offenses

¹⁴ 17 CFR 200.30-3(a)(12).

in which the copyrighted work is transferred through file sharing. The proposed amendment builds on the current definition of "uploading" to include making an infringing item available on the Internet by storing an infringing item in an openly shared file. The proposed amendment also clarifies that uploading does not include merely downloading or installing infringing items on a hard drive of the defendant's computer unless the infringing item is in an openly shared file. By clarifying the definition of uploading in this manner, Application Note 3, which is a restatement of the uploading definition, is no longer necessary and the proposed amendment deletes the application note from the guideline.

Indeterminate Number

The proposed amendment addresses the final directive by amending Application Note 2, which sets forth the rules for determining the infringement amount. The proposed note provides that the court may make a reasonable estimate of the infringement amount using any relevant information including financial records in cases in which the court cannot determine the number of infringing items.

New Offense

Finally, the proposed amendment provides a reference in Appendix A (Statutory Index) for the new offense at 18 U.S.C. 2319B. This offense is proposed to be referenced to § 2B5.3.

2. *Amendment:* Section 2J1.2(b) is amended by striking subdivision (1) and inserting the following:

"(1) (Apply the greater):

(A) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by 8 levels.

(B) If (i) defendant was convicted under 18 U.S.C. 1001 or 1505; and (ii) the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, increase by 12 levels."

The Commentary to § 2J1.2 captioned "Statutory Provisions" is amended by striking "18 U.S.C. 1503" and inserting the following:

"18 U.S.C. 1001 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, 1503".

The Commentary to § 2J1.2 captioned "Application Notes" is amended in Note 1 by inserting after "Definitions.—For purposes of this guideline:" the following:

"'Domestic terrorism' has the meaning given that term in 18 U.S.C. 2331(5).

'International terrorism' has the meaning given that term in 18 U.S.C. 2331(1)."

The Commentary to § 2J1.2 captioned "Application Notes" is amended by striking Note 2 and inserting the following:

"2. Chapter Three Adjustments.—

(A) Inapplicability of Chapter Three, Part C.—For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation, prosecution, or sentencing of the obstruction of justice count.

(B) Interaction with Terrorism Adjustment.—If § 3A1.4 (Terrorism) applies, do not apply subsection (b)(1)(B)."

Appendix A (Statutory Index) is amended in the line referenced to "18 U.S.C. 1001" by inserting ", 2J1.2 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable" after 2B1.1".

Reason for Amendment: This amendment implements section 6703 of the Intelligence Reform and Prevention Act of 2004 (the "Act"), Pub. L. 108-458. Section 6703(a) provides an enhanced penalty of not more than 8 years of imprisonment for offenses under sections 1001(a) and 1505 of title 18, United States Code, "if the offense involves international or domestic terrorism (as defined in section 2331)." Section 6703(b) requires the Sentencing Commission to amend the sentencing guidelines to provide for "an increased offense level for an offense under sections 1001(a) and 1505 of title 18, United States Code, if the offense involves international or domestic terrorism, as defined in section 2331 of such title." The Commission is directed under section 3 of the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109-76, to promulgate this amendment as an emergency amendment.

First, the amendment references convictions under 18 U.S.C. 1001 to 2J1.2 (Obstruction of Justice) "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable." It also adds a new specific offense characteristic at § 2J1.2(b)(1)(B) providing for a 12 level increase for a defendant convicted under 18 U.S.C. 1001 and 1505 "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable." This 12 level increase is applied in lieu of the current 8 level increase for injury or threats to persons or property. The increase of 12 levels is intended to provide parity with the treatment of federal crimes of terrorism within the limits of the 8 year statutory maximum penalty. It is also provided to ensure a 5 year sentence of imprisonment for offenses that involve international or domestic terrorism.

Second, the amendment adds to Application Note 1 definitions for "domestic terrorism" and "international terrorism," using the meanings given the terms at 18 U.S.C. 2331(5) and (1), respectively.

Third, the amendment adds to Application Note 2 an instruction that if § 3A1.4 (Terrorism) applies, do not apply § 2J1.2(b)(1)(B).

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Applications of Platinum Airlines, Inc. for Certificate Authority

AGENCY: Department of Transportation.

ACTION: Notice of Order to Show Cause (Order 2005-10-13); Dockets OST-2005-21286 and OST-2005-21287.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue orders finding Platinum Airlines, Inc. fit, willing, and able, and awarding it certificates of public convenience and necessity to engage in interstate and foreign charter air transportation of persons, property and mail.

DATES: Persons wishing to file objections should do so no later than October 31, 2005.

ADDRESSES: Objections and answers to objections should be filed in Dockets OST-2005-21286 and OST-2005-21287 and addressed to U.S. Department of Transportation, Docket Operations, (M-30, Room PL-401), 400 Seventh Street, SW., Washington, DC 20590, and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Vanessa R. Balgobin, Air Carrier Fitness Division (X-56, Room 6401), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-9721.

Dated: October 17, 2005.

Susan McDermott,

Deputy Assistant Secretary for Aviation and International Affairs.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Application of U.S. Helicopter Corporation for Certificate Authority

AGENCY: Department of Transportation.

ACTION: Notice of Order to Show Cause (Order 2005-10-12) Docket OST-2005-20405.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding U.S. Helicopter Corporation fit, willing, and able, and awarding it a certificate of public convenience and necessity to engage in interstate scheduled air transportation of persons, property, and mail.