

The logo for the Sentencing Academy, featuring the words "SENTENCING" and "ACADEMY" in a light teal, sans-serif font, stacked vertically and centered within a dark teal rectangular background.

SENTENCING ACADEMY

Sentencing Academy Response to Consultation: Unauthorised Use of a Trade Mark

29 September 2020

The Sentencing Academy welcomes this opportunity to provide input into the Council's proposed guideline relating to the Unauthorised Use of a Trademark. We will confine our response to the draft guideline for individuals.

Question 6: Do you agree with the proposed sentence levels? If not please suggest changes.

As a general rule, Council reproduces judicial practice with respect to the offence for which a guideline is issued. On a few occasions, however, Council has attempted to shift current practice, by issuing a guideline which has a prescriptive element, rather than simply descriptive – reproducing current sentencing practices within the guideline's sentencing levels. We believe that in issuing guidance for this offence Council should steer judicial practice. We are not advocating a lowering of severity levels, but rather suggesting that the guideline could place greater emphasis on community sanctions and sanctions with a reparative focus. As a general proposition, Council should promote the most cost-effective sanctions, and in particular where the offending is of a less serious nature. This offence is one where we believe a greater effort could be made to promote such sanctions, rather than sentences of imprisonment.

At present, almost all convictions (according to the Council's data Bulletin) result in a sentence other than immediate imprisonment. In 2018, immediate custody was imposed in only 5% of cases, with 11% receiving a suspended sentence order (p. 8). Despite this, fully 12 out of 15 cells in the grid employ a sentence range including imprisonment. This projects an inappropriate image of the appropriate response to this form of offending. Our suggestion would be to reduce the presence of custody in the less serious cells of the sentencing matrix – for example by removing custody from the level 5 cells. The most common disposal for this offence in 2018 was a community order (imposed in 44% of cases – p. 8) and yet the starting point in only 3 of the 15 cells is a community order, and community orders feature in the range for only 5 cells. Whilst it may be that in practice a significant minority of cases land within these categories, care must be taken to ensure that some cases that currently attract a community order are not being nudged over the custody threshold by this draft guideline. This is a particular concern as the vast majority of cells (9 out of 15) have custody at the bottom of the range.

In our view, the predominance of custodial sentences across the 15 cells conveys a poor message about the use of custody for this offence. The recommended sentences for a less serious offence involving financial harm to the victim should privilege community orders and fines and this would appear to better reflect current practice.

The guideline states that: *‘There is a note below the table pointing out that this is an offence where it may be appropriate to combine a community order with a fine’* (p. 9). We are of the view that a stronger steer is necessary. Language along the lines of: *‘When sentencing this offence, a court should attempt to promote reparation to the victim or society. This can best be accomplished through the imposition of community orders with a work element and fines’* may be more appropriate.

A Category 4A offence involving violations amounting to £5,000 and where the offender used a sophisticated means to exploit the trademark without authorisation carries a one year starting point sentence with 26 weeks’ custody at the bottom of the range. This seems disproportionate to the offence and may place excess reliance on individual sentencers to move below the category range in order to impose a proportionate sentence. Without knowing more about current sentencing practice for these offences we are unable to comment on whether this is likely to alter practice or not but we suggest that careful consideration is given to this area in light of your greater knowledge about the current caseload of these offences that tend to come before the courts which we are left to assume are predominantly at the lower end of the scale given the relatively limited use of custody.

There is also a possible grey area in circumstances in which someone has, perhaps unwittingly, played a small role in what is in fact a much larger operation. Whilst the guideline will lead this person to ‘Lesser culpability’ due to their performance of ‘limited function under direction’ it is not entirely clear to which harm category they should be assigned. Is it based on the value of the goods they were involved with/had knowledge about or the total value of the wider operation? It would seem that it is possible that someone involved with goods worth just a few thousand pounds could find themselves in Category 1C if unbeknown to them there is a much wider operation going on elsewhere.

A further minor, but potentially important, point is that it is creating an unnecessary complication by allowing certain values to overlap between two different categories. If the value is £50,000, does that put the offence in Category 4 or Category 3; if it is £300,000, should it be Category 3 or Category 2; and if it is £1 million, is it Category 2 or Category 1? As this may have a non-trivial impact on the sentencing outcome it would be preferable to not have three values that happen to straddle two different categories.

Question 8: Do you agree with the proposed mitigating factors? If not please suggest changes.

The proposed guideline currently notes that:

‘The three factors that are particularly relevant to this offence are:

- Offender co-operated with investigation, made early admissions and/or voluntarily reported offending
- Business otherwise legitimate
- Lapse of time since apprehension where this does not arise from the conduct of the offender.’

In order to promote the reparative nature of any sanctions, the mitigating factors could include ‘voluntary reparation’ or ‘offender took steps to compensate the trademark owner’ in the list of factors at step 2. An additional factor of this kind would appear to be particularly relevant and related to the interests of the victim.

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