Sentencing Luxury: The Valuation Debate in Sentencing Traffickers of Counterfeit Luxury Goods

Jana Nicole Checa Chong

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Law Commons

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/flr/vol77/iss3/5

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
Sentencing Luxury: The Valuation Debate in Sentencing Traffickers of Counterfeit Luxury Goods

Cover Page Footnote
J.D. Candidate, 2009, Fordham University School of Law. I would like to thank Professor Susan Scafidi for her invaluable guidance and advice during the writing process. Thank you to my parents and sister for their endless love, support, and inspiration, and to my friends for their constant encouragement.

This article is available in Fordham Law Review: https://ir.lawnet.fordham.edu/flr/vol77/iss3/5
SENTENCING LUXURY:  
THE VALUATION DEBATE IN SENTENCING TRAFFICKERS OF COUNTERFEIT LUXURY GOODS

Jana Nicole Checa Chong*

This Note examines the contentious debate that exists regarding the property valuation used by the U.S. Sentencing Guidelines with regard to counterfeiting. Currently, the Sentencing Guidelines employ “street value.” However, many scholars and organizations argue that the alternative use of “retail value” will best assess the harm to the intellectual property owner as well as combat the growing problem of counterfeiting. This Note suggests that amending the Sentencing Guidelines, in order to allow for application of “retail value,” will best combat a growing national and international problem posed by the counterfeit luxury goods market.

INTRODUCTION

Luxury — (1) lasciviousness, lust . . . (2) luxuriance . . . (3) the habitual use of, or indulgence in what is choice or costly, whether food, dress, furniture, or appliances of any kind . . . (4) refined and intense enjoyment . . . (5) . . . means of luxurious enjoyment; sumptuous and exquisite food or surroundings . . . (6) luxuriousness; abundance of appliances for comfort . . .1

The thirst for the sometimes unobtainable can force some people to do just about anything to obtain a moment of extravagance that symbolizes privilege and social status. A startling trend has long existed where young girls work as prostitutes in order to purchase luxury goods.2 In the 1961 movie adaptation of Albert Moravia’s novel, La Ciociara, a girl in post–World War II Italy goes home with a man and instead of being paid for her “services” requests a pair of nylons.3 This trend has extended the postwar

---

* J.D. Candidate, 2009, Fordham University School of Law. I would like to thank Professor Susan Scafidi for her invaluable guidance and advice during the writing process. Thank you to my parents and sister for their endless love, support, and inspiration, and to my friends for their constant encouragement.

2. See DANA THOMAS, DELUXE: HOW LUXURY LOST ITS LUSTER 11 (2007) (discussing the existence of this trend in Japan).
3. ALBERTO MORAVIA, TWO WOMEN (1958). The movie starring Sophia Loren was known in the United States as Two Women. TWO WOMEN (Compagnia Cinematografica Champion 1961).
Europe of the past into today's society. Dana Thomas, in her exploratory book, tells a story of this continued trend:

A rich, hip New York banker met a pretty Russian girl in the bar of the Hôtel Byblos in Saint-Tropez late one night and took her home with him. The next morning, she told him pointedly: "I could really use a new pair of Gucci shoes." He understood immediately that she was a working girl and took out his wallet. "No," she said, "Gucci shoes." And to the store they went.4

With the desire to obtain an item of luxury plaguing the general public, it is not surprising that the counterfeit market has been willing to serve those desires. Those who cannot afford to purchase the $800 Louis Vuitton "it" bag have been given alternative routes to own the sacred "LV." The perceived need to obtain status through luxury items creates what many, including writer James B. Twitchell, believe to be quite a paradox about luxury items and whether displaying their logo is enough:

[m]any people who drink Evian water simply refill the bottle from the tap. But others insist on purchasing the brand then tossing the container when [they are] finished. And it's those consumers who tell us something about the shift in luxury, the shift from moving outward to moving inward, from conspicuous consumption to consumption as reward, from display to epiphany.5

The counterfeit market for luxury goods has been a powerful problem that most governments have been unable to defeat.

The United States has taken intellectual property rights seriously and over the last twenty years has made significant progress in enacting trademark and copyright protections. Attempting to match the public policy determination that the trafficking of counterfeits needs to be curtailed, the U.S. Sentencing Commission has continued to amend the Sentencing Guidelines to provide for adequate penalties.6 However, the valuation determination that the Guidelines incorporate has led us to a scenario where punishment is determined by a calculation based on either the "street value" or "retail value" of the items.7 The application of the appropriate valuation has an effect on the continuation of trafficking of counterfeit luxury goods.

4. THOMAS, supra note 2, at 12.
5. JAMES B. TWITCHELL, LIVING IT UP: AMERICA'S LOVE AFFAIR WITH LUXURY 122 (2002).
6. See infra Part I.B.
7. The U.S. Sentencing Guidelines discuss the use of the "retail value of [an] infringed item" versus the use of the "retail value of [an] infringing item." U.S. SENTENCING GUIDELINES MANUAL § 2B5.3 cmt. n.2 (2006). For clarity, this Note refers to the "retail value of infringing item" as "street value" and the "retail value of the infringed item" as "retail value." The street value of an item, as referenced in this Note, refers to the price at which a counterfeit item is sold on the street. For example, a counterfeit Kate Spade handbag's street value would be the $25 it is sold for on the street. On the other hand, the retail value references the price of the actual item being counterfeited. For example, the retail value of the counterfeit Kate Spade handbag would be $225, the price the actual Kate Spade handbag is sold for in a store.
Applications of the Sentencing Guidelines have favored application of street value and, arguably, as a result have had little effect on decreasing the illegal activity. With Congress's continued efforts to provide more protection for intellectual property rights as well as public policy decisions to end counterfeiting, the need for a re-examination of the Sentencing Guidelines is pressing. Moreover, current court sentencing decisions, such as United States v. Diallo,\(^8\) cast suspicion on whether the current Sentencing Guidelines are appropriate.

Part I of this Note discusses the magnitude and depth of the counterfeit luxury goods trade and how the U.S. Sentencing Guidelines currently outline punishment. It also examines the history of governmental action in this area. Part II discusses the different approaches to valuation—retail vs. street—and how they interplay with the current and future Sentencing Guidelines. Part II also presents the political and theoretical support for both approaches. Part III urges the Sentencing Commission to amend the Guidelines to provide for an easier application of retail value.

I. ATTEMPTS TO ERODE THE COUNTERFEIT LUXURY GOODS MARKET

The counterfeit luxury goods market has risen to a level that challenges the protections provided by intellectual property laws. This part tracks the development of trademark law to encompass protections and create rights for intellectual property owners. Additionally, this part looks at Congress and the Executive branch and how they have worked toward great protection in these areas. Next, this part examines the U.S. Sentencing Guidelines and the proper methodology for sentencing those who are found guilty of trafficking in counterfeit goods. Ultimately, this part examines the full effect of the counterfeit luxury goods market.

A. The Importance of Protecting Intellectual Property Rights

Congressional development of trademark law shows a continued policy choice to expand the protection of intellectual property rights.\(^9\) The importance of expanding such protection is seen by the development of federal counterfeiting laws. Looking to both the legislative history of trademark protection and current anticounterfeiting laws, it is evident that our government values intellectual property rights and will continue to develop protections in this area.

1. An Historical Look at the Development of Trademark Protection and Anticounterfeiting Laws

Intellectual property rights find their source in what is known as the "Intellectual Property Clause" of the U.S. Constitution, which authorizes Congress "[t]o promote the Progress of Science and the useful Arts, by

\(^8\) 476 F. Supp. 2d 497 (W.D. Pa. 2007).
\(^9\) See infra Part I.A.1–2.
securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." While federal copyright and patent law find their source in the above clause, federal trademark law finds its source in the Commerce Clause. The first comprehensive trademark legislation passed by Congress was the Trademark Act of 1870. Today, the main source of trademark protection is found in the Lanham Act, originally passed in 1946. The Lanham Act protects sellers and producers of goods and services from competitors by prohibiting the

(1) [Use of] any counterfeit, copy, or colorable imitation of a registered trademark [that have been registered with the U.S. Patent and Trademark Office] in connection with the sale . . . of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . . .

(2) [Uses] in commerce any word, term, name, symbol, or device, or any combination thereof, or any designation of origin, false or misleading description of fact . . . which—

(a) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(b) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.

In addition to the above provisions, the Lanham Act also grants owners of “famous” trademarks the right to seek injunctive relief against someone who is using in commerce “a mark or trade name” if its use causes “dilution

11. Id. cl. 3. In the Trade-Mark Cases, the U.S. Supreme Court held the first federal trademark act to be unconstitutional because it was enacted pursuant to the Copyright and Patent Clause: “Any attempt . . . to identify the essential characteristics of a trade-mark with inventions and discoveries in the arts and sciences, or with the writings of authors, will show that the effort is surrounded with insurmountable difficulties.” 100 U.S. 82, 93–94 (1879). Subsequent federal trademark laws avoided this problem because they were adopted pursuant to Congress’s power to regulate interstate commerce, foreign commerce, and commerce with the Native American tribes. BRIAN T. YEH, CONG. RESEARCH SERVS., CRS REPORT FOR CONGRESS, INTELLECTUAL PROPERTY RIGHTS VIOLATIONS: FEDERAL CIVIL REMEDIES AND CRIMINAL PENALTIES RELATED TO COPYRIGHTS, TRADEMARKS, AND PATENTS 1 n.3 (2007).
14. See id. § 1114(1).
15. See id. § 1125(a)(1).
by blurring or tarnishment of the distinctive quality of the famous trademark.\textsuperscript{16}

The Lanham Act provides for civil penalties only. At the same time, Congress recognized that the lack of criminal penalties for "counterfeiting was harming certain sectors of the U.S. Economy."\textsuperscript{17} To solve this problem, Congress passed the Phonograph Records-Counterfeit Labels Act of 1962, which criminalized trafficking in counterfeit labels.\textsuperscript{18} Ultimately, Congress passed the Comprehensive Crime Control Act of 1984, which provided for federal penalties of counterfeits.\textsuperscript{19} The corresponding Senate report explained that there are "virtually no criminal penalties for the sale of goods and services through the use of false trademarks," and as a result it had "emboldened counterfeiter, who now defraud consumers out of billions of dollars each year in the United States alone."\textsuperscript{20} The intent of the Comprehensive Crime Control Act was to empower federal prosecutors and trademark owners with the "essential tools for combating this insidious and rapidly growing form of commercial fraud."\textsuperscript{21} The growth of the counterfeit goods trade led Congress to pass the Anticounterfeiting Consumer Protection Act of 1996.\textsuperscript{22} This Act added "trafficking in goods or services bearing counterfeit marks" as a predicate act under RICO.\textsuperscript{23} Passage of this legislation signified Congress's acknowledgment that counterfeiting had become more than just an economic problem due to the growing connection to organized crime.\textsuperscript{24} The Act has been just one of a number of laws passed by Congress to signify the importance of protecting intellectual property rights and fighting the counterfeit market.

2. Current Action by Congress and the Executive Branch

Congress has continued to pass legislation that extends further protection to intellectual property owners in light of the expanding counterfeit market. In addition, executive agencies have begun to highlight the problems caused by counterfeiting in order to change public perception of the problem. The

\textsuperscript{16} YEH, supra note 11, at 2; see 15 U.S.C. § 1125(c)(1).
\textsuperscript{17} Debra D. Peterson, Criminal Counterfeiting and Component Parts: Closing the Perceived "Label Loophole," 30 AIPLA Q.J. 457, 468 (2002).
\textsuperscript{19} This Act resulted in the creation of 18 U.S.C. § 2320.
current action of both Congress and the executive branch shows the public policy determination to work toward an end of counterfeit luxury goods.

The U.S. Court of Appeals for the Tenth Circuit decided a pivotal decision in the realm of counterfeiting in 2000 in the case of *United States v. Giles.*\(^\text{25}\) The court held that "an individual who sold patches with a counterfeit trademark for placement on counterfeit products to make them appear genuine was not guilty of criminal counterfeiting because he did not traffic in 'goods.'"\(^\text{26}\) The result in *Giles* led Congress to consider whether the current statutes were too restrictive.\(^\text{27}\) The result was the passage of the Stop Counterfeiting in Manufactured Goods Act in 2006,\(^\text{28}\) which amended title 18 of the U.S. Code in terms of the criminal penalties provided for trafficking in counterfeit marks.\(^\text{29}\) Within the Act, Congress included various findings that highlighted the plague caused by counterfeit goods today, including,

\[\text{(A) the United States economy is losing millions of dollars in tax revenue and tens of thousands of jobs because of the manufacture, distribution, and sale of counterfeit goods;}\]

\[\text{(B) the Bureau of Customs and Border Protection estimates that counterfeiting costs the United States $200 billion annually;}\]

\[\text{...}\]

\[\text{(E) ties have been established between counterfeiting and terrorist organizations that use the sale of counterfeit goods to raise and launder money.}\(^\text{30}\)

The Stop Initiative forces an individual who is convicted of violating §2320 to forfeit any property amounting to or derived from any proceeds obtained through trafficking in counterfeit goods, such as a house; any property used, . . . to traffic in, or facilitate, aid or abet the trafficking of counterfeit goods, such as a vehicle; and any property that displays or consists of a counterfeit trademark.\(^\text{31}\)

\(^{25}\) 213 F.3d 1247 (10th Cir. 2000).


\(^{27}\) Id.

\(^{28}\) See id. at 108 n.294. "This modification is intended to overrule the holding in the case *United States v. Giles.* . . ." Id. (quoting H.R. REP. 109-68, at 7 (2005)). ""This bill closes a loophole that has allowed counterfeitors to avoid prosecution. Current law does not prohibit trafficking in counterfeit labels, so many counterfeitors simply ship fake brand name labels to warehouse and then traffic them to avoid prosecution."" Id. (quoting H.R. REP. 109-68, at 19).


\(^{30}\) Id. § 1(a)(2), 120 Stat. at 285.

\(^{31}\) Sam Cocks, Note, The Hoods Who Move the Goods: An Examination of the Booming International Trade in Counterfeit Luxury Goods and an Assessment of the
Including these mandatory forfeitures ensures that those convicted will have some punishment that did not exist prior to this legislation.\textsuperscript{32} Congress also expressed that “strong domestic criminal remedies against counterfeiting will permit the United States to seek stronger anticounterfeiting provisions in bilateral and international agreements with trading partners.”\textsuperscript{33} The government continues to take a strong position with respect to fighting the trafficking of counterfeit goods. Securing protection of intellectual property rights and ending the trade has continuously caused Congress to review the associated penalties. In May of 2007, the U.S. Justice Department sent to Congress the Intellectual Property Protection Act of 2007, which calls for even stronger penalties, in hopes to continue to curb the problem.\textsuperscript{34}

The last few years have also brought congressional and executive attention to the role of China in the counterfeit trade.\textsuperscript{35} Much of this attention has been due to China’s entering the World Trade Organization, which subjected it to the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement).\textsuperscript{36} In responding to the growing trend, U.S. Customs and Border Protection has increasingly worked to stop imports of items labeled with counterfeit trademarks. Counterfeit items coming from China and Hong Kong comprised about ninety percent of all intellectual property seizures by U.S. Customs and Border Protection from 2005 to 2006.\textsuperscript{37} Although much is done to stop and seize these items, numerous shipments of counterfeit goods are still making it into the country.\textsuperscript{38}

B. The U.S. Sentencing Guidelines

The U.S. Sentencing Guidelines lay out how to calculate the punishment for traffickers of counterfeit luxury goods. The Guidelines utilize a type of valuation in order to calculate the penalties. The U.S. Sentencing


32. \textit{See id.} at 534.
37. THOMAS, \textit{supra} note 2, at 285.
38. \textit{Id.}
Commission has taken many things into consideration when deciding what type of valuation to use.

Section 2320 of title 18 of the U.S. Code creates the offense of "[t]rafficking in counterfeit goods or services." The U.S. Sentencing Guidelines outline the offense of criminal infringement of copyright or trademark and the appropriate procedure of determining penalties under sections 2B5.1 and 2B5.3. In *United States v. Booker*, the U.S. Supreme Court held that the Federal Sentencing Guidelines were just that—guidelines. Striking down § 3553(b), the Supreme Court declared that the Federal Sentencing Guidelines no longer were mandatory. Moreover, since the *Booker* decision, "district courts [now] have the discretion to sentence individuals outside the sentencing ranges established in the Federal Sentencing Guidelines, but they still must take the applicable Guidelines range into consideration during sentencing."

Currently, the Sentencing Guidelines determine the infringement amount by taking the street value of the items, the amount for which the counterfeit item is sold, multiplied by the number of counterfeit items. The calculation is only changed to use retail value if the case falls within one of a number of enumerated situations in the commentary notes. These situations include: whether a "reasonably informed purchaser" would believe the counterfeit item to be identical or equivalent to the actual item; the street value of the item is difficult to calculate and delays the sentencing proceedings; the retail value is believed to be a better formula to assess the pecuniary harm; the item includes the use of or is accompanied by a label or other signifier of the logo that would cause an informer to be mistaken as to


(a) Whoever intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services, or intentionally traffics or attempts to traffic in labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature, knowing that a counterfeit mark has been applied thereto, the use of which is likely to cause confusion, to cause mistake, or to deceive, shall, if an individual, be fined not more than $2,000,000 or imprisoned not more than 10 years, or both, and if a person other than an individual, be fined not more than $5,000,000 ....

Id.


42. *Booker*, 543 U.S. at 220.


44. U.S. SENTENCING GUIDELINES MANUAL § 2B5.3 cmt. n.2(B) (noting that the infringement amount "is the retail value of the infringing item[] multiplied by the number of infringing items").
the authenticity of the item.45 Aside from these categories, the Sentencing Guidelines put a presumption on the use of street value.

The Sentencing Commission added two "encouraged upward departure grounds" to section 2B5.3.46 The two grounds were, (1) "when the offense involved substantial harm to the reputation of the copyright or trademark owner"47 and (2) "when the offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international organized criminal enterprise."48 Both of these departures were added in response to public comment.49 Public comment called for the first departure because there was a general worry that "infringement may cause substantial harm to the reputation of the copyright or trademark owner that is not accounted for in the monetary calculation of the infringement amount."50

This choice of valuation was not always the case. Prior to the 2000 amendments of the relevant sections, "the monetary calculation for all intellectual property crimes was based on the retail value of the infringing

45. The language of comment n.2(A) of the U.S. Sentencing Guidelines section 2B5.3 lays out the categories as follows:

(i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item.

(ii) The retail price of the infringing item is not less than 75% of the retail price of the infringed item.

(iii) The retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding.

(iv) The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511 . . .

(v) The retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.

(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.

(vii) A case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service.

Id. cmt. n.2(A).


47. Id.; see also U.S. SENTENCING GUIDELINES MANUAL § 2B5.3 cmt. n.4(A).

48. POLICY DEVELOPMENT TEAM REPORT, supra note 46, at 6; see also U.S. SENTENCING GUIDELINES §2B5.3 cmt. n.4(B).

49. See POLICY DEVELOPMENT TEAM REPORT, supra note 46, at 6. "Public comment to the Commission also indicated that some copyright and trademark offenses are committed in connection with, or in furtherance of, the criminal activities of certain organized crime enterprises." Id.

50. Id.
The change to street value was done in response to the No Electronic Theft (NET) Act. In explaining the reason for the change, the Sentencing Commission stated, "The Commission believed that use of that calculation would provide a reasonable approximation for those classes of infringement cases in which it is highly likely that the sale of an infringing item results in a displaced sale of the legitimate, infringed item."

Furthermore, in deciding to change the valuation standard, the Sentencing Commission looked to cases sentenced under the original version of section 2B5.3. In so doing, the Commission found "that using the [retail value] likely would overstate substantially the pecuniary harm caused to copyright and trademark owners in some cases currently sentenced under the guideline." In assessing the problem with using retail value as the base level of determining the infringing amount, the Commission justified abandoning the retail value standard by estimating that it was a more accurate assessment of the revenue lost:

[A] one-to-one correlation between the sale of infringing items and the displaced sale of legitimate, infringed items is unlikely because the inferior quality of the infringing item and/or the greatly discounted price at which it is sold suggests that many purchasers of infringing items would not, or could not, have purchased the infringed item in the absence of the availability of the infringing item.

Finding that the best way to assess the pecuniary harm resulting from the counterfeit items was to adopt street value, the Sentencing Commission expressly decided not to place a presumption on retail value when it amended the Sentencing Guidelines in 2000.

In practice, the presumption to apply street value is evidenced by recent decisions. In Diallo, Mamadou Diallo was caught driving through Mercer County, Pennsylvania with over three hundred items of clothing, jewelry, and handbags. All of these items bore the trademarks of several luxury designers, particularly Louis Vuitton. It was at least the third time that Diallo had been caught trafficking counterfeit luxury goods. Diallo was

51. Id. at 4–5.
52. See id. at 4; see also No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (codified in scattered sections of 17 and 18 U.S.C.).
53. POLICY DEVELOPMENT TEAM REPORT, supra note 46, at 5; see also U.S. SENTENCING COMM'N, NO ELECTRONIC THEFT ACT: POLICY DEVELOPMENT TEAM REPORT 22 (1999).
54. These cases were all decided when the infringement amount was based on the retail value multiplied by the number of infringing items. POLICY DEVELOPMENT TEAM REPORT, supra note 46, at 5.
55. Id.
56. Id.
57. Id.
59. Id.
60. Id. Mamadou Diallo had been caught in 2003 attempting to sell about 700 counterfeit handbags at the Peddler's Mall in Indianapolis, Indiana. Id. at 499. In 2004,
found guilty of trafficking in goods bearing counterfeit trademarks in violation of 18 U.S.C. § 2320(a).\textsuperscript{61} 

When it came to sentencing, federal prosecutors asked the court to impose "a sentence of 33 to 41 months in prison" based "on the cost of the genuine versions of the goods that Diallo sold—approximately $215,000."\textsuperscript{62} While the prosecutor relied on retail value to determine the appropriate sentence, Diallo's lawyers "argued that the sentence should be based on what Diallo would have sold the counterfeits for—around $10,000."\textsuperscript{63} U.S. District Court Judge Nora Barry Fischer agreed with the defendant and applied the street value in determining the infringement amount because she found the prosecution unable to meet the categories set out in the Sentencing Guidelines.\textsuperscript{64} Notably, the court found that "given the context of the purchase of the items (i.e. at a flea market) and the price of the items, such items could not appear to a reasonably informed purchaser to be identical or substantially equivalent to the infringed items" and also concluded that the retail value "does not provide an accurate assessment of the pecuniary harm to the copyright or trademark owner."\textsuperscript{65} Instead the street value "provides a more accurate assessment of the harm."\textsuperscript{66} Moreover, the Court used the fact that Diallo was selling the counterfeit items at a price that was "significantly less than 75% of the price of the infringed items" to show that you could not invoke retail value under the Sentencing Guidelines.\textsuperscript{67} In the end, Diallo was sentenced to "6 months' home detention, 3 years' probation and restitution of $2,600."\textsuperscript{68} The choice of valuation made a significant effect on the sentencing outcome.

C. Harm to the Fashion Industry and Beyond

The counterfeit market for luxury goods affects more than just bankrolls of fashion houses. Understanding the extent to which this trade affects the United States is crucial to an examination of the proper way to punish offenders. Furthermore, it is important to examine why such trafficking has continued to grow in popularity. A good grasp of these two areas will explain the true problem of the counterfeit luxury goods market.

\textsuperscript{61} Diallo was investigated and arrested for selling counterfeit Louis Vuitton handbags again at Peddler's Mall. \textit{Id.} He also tried to sell these bags for use in "purse parties." \textit{Id.} at 498–99.

\textsuperscript{62} \textit{Id.} at 497.


\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} \textit{See 'Tentative Rulings and Findings at 3–4, Diallo,} 476 F. Supp. 2d 497 (No. 05-324).

\textsuperscript{67} \textit{Id.}

Seen by most criminals as a "victimless crime," counterfeiting is a "low-risk venture" because the perceived likelihood of being caught and punished is not very high and because the penalties, if caught, are not too great, and thus the trade continues to grow. Counterfeiting of luxury goods continues to be linked to numerous illicit activities, including prostitution, drug trafficking, money laundering, and terrorism. The manufacture of counterfeits in China also relates to human trafficking—since reports indicate that many of the workers making the goods are children who were sold into slavery. Trafficking of counterfeit luxury goods weakens intellectual property rights, while increasing levels of various types of criminal activity.

1. The Numbers Tell All

Counterfeiting is particularly a problem in regard to luxury goods. The realm of luxury goods opens itself up to counterfeiting because people crave items that provide them with status. Research is beginning to show that some of the highest profile counterfeit prosecutions are those that involve luxury goods. With advanced technology, counterfeiters are more and more able to produce counterfeit items that look like the real thing. Moreover, some luxury brands believe that the ratio of real to fake handbags has risen to the level of one to one.

The magnitude of the problem is shown in the numbers, and it seems that it will only continue to grow. The International Anticounterfeiting Coalition (IACC) in Washington has examined the growing impact of counterfeiting worldwide:

In 1982, the International Trade Commission estimated losses from counterfeiting and piracy at $5.5 billion. In 1988, losses were estimated at $60 billion. In 1996, damage to the United States economy was estimated at $200 billion. . . .
The situation is no better outside America’s borders. The trade in counterfeit goods in just four select industries “reduces EU gross domestic product by €8 billion per annum and costs 17,000 jobs.” On the global level in 1998 five to seven percent of world trade is counterfeit goods, a market worth $350 billion.

The fashion industry sees an immediate threat to its profits and future success. Some, however, see the rise of counterfeiting as the ultimate compliment; openly finding counterfeiting “‘fantastic,’” designer Marc Jacobs has noted that “as long as I’ve been here, everything that we have done has been copied . . . We hope to create a product that is desirable.” Although some designers, like Marc Jacobs, love the compliments, design houses internationally have had to take on extensive legal departments solely to deal with intellectual property violations. Hoping to help end the problem, many luxury brands are highlighting the connection between counterfeit producers and terrorism.

Counterfeit luxury goods are clearly hurting not only the fashion industry but also local and national governments. American intellectual property has a significant impact on the nation’s economy: “copyrighted products alone total over $100 billion annually. In 2002, the United States earned more than $44 billion in royalties and license fees overseas, higher than any other country in the world.” In New York City alone, the United States is estimated to lose over $1 billion in tax revenue annually. New York State is estimated to see $34.4 billion spent on purchasing counterfeit goods.

The IACC, which looks to New York City to explain the impact on the economy by counterfeiting, stated, “New York City alone loses over $400 million per annum.”

78. THOMAS, supra note 2, at 276 (alteration in original).
79. Id. at 276–77. “Louis Vuitton, one of the world’s most copied brands, has forty lawyers in-house and 250 outside private investigators . . . and spends approximately . . . ($18.1 million) each year fighting counterfeiting . . .” Id.
80. The law firm of Davenport Lyons commissioned a recent report that found that, Brand owners must pull together as a collective wherever possible and hammer home this simple message:
   By buying fakes, you are funding organized crime—including terrorism.
   Clearly, for that message to be effective it must be backed up with specific evidence. At the moment, the evidence to support this message is rather murky—it needs drawing out in unambiguous terms.
Davenport Lyons, COUNTERFEITING LUXURY: EXPOSING THE MYTHS 22 (2d ed. 2007).
81. INT’L ANTICOUNTERFEITING COAL. WHITE PAPER, supra note 77, at 6 (citations omitted).
83. Id. at 4 (showing a summary table of counterfeit trade in the United States, New York State, and New York City in 2003).
million a year in lost sales and excise taxes due to the sale of counterfeit goods.84 That number continues to expand if you look to the national level ($286.8 billion) and worldwide ($456 billion).85

Numbers also help illustrate the policy determination by Congress to fight counterfeits and protect intellectual property rights domestically and abroad. The Foreign Operations Bill for 2004 was amended to include $2.5 million for the U.S. Department of State to establish programs to aid developing nations in protecting intellectual property rights.86 Not only has it been established that counterfeiting affects international trade, but the numbers keep showing how it hurts individual trademark and copyright owners. According to the International Trademark Association, trademark holders worldwide lost “$2 billion in 1995[] as a result of trademark infringement and counterfeiting.”87

2. A Danger-Free Crime?

The lure of the counterfeiting market continues to grow in the United States for many reasons that include “the increasing recognition and popularity of certain trademarked goods, [and the fact that] unscrupulous companies found it easier to market counterfeit goods than to market their own goods under less well-known trademarks.”88 In terms of counterfeit luxury goods, many believe that our society’s acceptance of them is what has helped the industry flourish and not die.89 The counterfeit luxury goods market has the unique element of being a “high-return, low-risk business.”90 Andrew Oberfeldt, a New York security expert, explained the low-risk element of the business:

“If I brought in $18,000 worth of handbags in from China”—which would retail for at least 10 times more—“you’d put me in jail overnight, maybe. And I’d call my lawyer and be out in the morning. Ninety-nine percent of the people caught in New York State selling counterfeit goods do not go to jail. The judges do not have the laws to sentence. The highest-level

85. See BOOTLEG BILLIONS, supra note 82, at 4.
86. Statement of Sen. Leahy, supra note 84.
87. Id.
88. LALONDE, supra note 26, at 135.
89. See Amendola, supra note 23, at 809–10; see also TIM PHILLIPS, KNOCKOFF: THE DEADLY TRADE IN COUNTERFEIT GOODS 43–52 (2005) (discussing the popularity of luxury bags and counterfeit goods after the success of the television show Sex and the City, resulting in a wave of purse parties where no one feels as if counterfeiting is a crime).
90. THOMAS, supra note 2, at 292.
crime to be charged with in New York State is trademark counterfeiting, which is a C felony, like stealing a nice car. If you sell heroin you'll have the DEA, the FBI, New York State and city police, Customs, and the IRS all looking for you—and you'll go to jail forever. If I sell counterfeit goods, all those people except the DEA could chase after me, but can't do anything once they get me. So most don't get involved."

Added to the virtually riskless aspect of counterfeiting, the lack of fear by the public increases the problems facing deterrence and punishment of counterfeiting. There is speculation that this is changing as the public is finally beginning to see the potential threat. While the attention has primarily been on counterfeits that on their face affected the public health, the shift toward a spotlight on counterfeit goods has also begun. As the ties between organized crime, terrorism and counterfeit goods come to the forefront, so too does the need to fight back. In 1997, a former leader of the Vietnamese gang “Born to Kill,” based in New York, was jailed for murder and was also linked to profiting over $13 million from counterfeit watches. New York City’s Chinatown, particularly Canal Street, are now said to be run by the Fukienese gang, who, although possessing a tight network, are known for keeping things rather tame. Although it appears to be a rather tame business, the reign of these gangs have been established through violence. According to U.S. Attorney David N. Kelley, the gangs ‘achieved their dominance through unflinching use of violence and fear.’ During their reign, a man who was suspected of cooperating with police received ‘a beating with pipes until his bones snapped’... A rival gang member was shot in the head and survived only because the bullet miraculously shattered against his skull[].

91. Id. at 292–93 (internal quotation marks omitted).
92. See Katherine Bruce, Riskless Crime?, FORBES, Aug. 11, 1997, at 100.
93. “Last year bogus baby formula was seized in 16 states after several kids suffered convulsions. There have also been cases involving fake ulcer medication and birth control pills, not to mention counterfeit parts for cars, airplanes and nuclear plants.” Id. at 100–01.
95. See DAVID M. HOPKINS, LEWIS T. KONTINIK & MARK T. TURNAGE, COUNTERFEITING EXPOSED: PROTECTING YOUR BRAND AND CUSTOMERS 175–84 (2003) (discussing the involvement of organized crime and terrorists in the business of counterfeiting as well as describing ways businesses can protect their brands).
96. Id. at 176; see also, THOMAS, supra note 2, at 293 (discussing the “Born to Kill” gang and New York’s inability to stop its counterfeiting reign).
97. See THOMAS, supra note 2, at 293–94 (“During a two-day sweep in November 2004, New York police arrested fifty-one members of two violent gangs and charged them with a host of crimes ranging from racketeering to trafficking in counterfeit goods. Police seized... $4 million in counterfeit merchandise carrying the names of Chanel, Gucci, and Coach.”).
98. Id. at 294 (quoting U.S. Attorney David N. Kelley).
Recognition of the connection between counterfeiters and organized crime has begun to play a role in the work of the Sentencing Commission.\textsuperscript{99}

The link between counterfeit goods and terrorism has helped to bring public attention to the potential dangers of counterfeiting. The Senate Homeland Security and Governmental Affairs Committee held hearings in May 2005 to discuss the link between trafficking of counterfeit goods in the United States and criminal activities and terrorism.\textsuperscript{100} The primary focus was the link between the counterfeit items and activities by the terrorist group Hezbollah.\textsuperscript{101} Senator Susan M. Collins of Maine urged the public to reassess the importance of ending its participation in counterfeiting:

"People think that when they buy a fake designer bag . . . that they’re just getting a good deal and having some harmless fun. But the reality is that buying these goods not only supports criminals, but also possibly terrorists. People need to realize that they could be helping to fund a terrorist group like Hezbollah, which has attacked and is known to be planning attacks on Americans . . . . The production, sale, and purchase of counterfeit goods is not a victimless crime."\textsuperscript{102}

Recognition of the link between counterfeiting and terrorism is not confined merely to the United States. Magnus Ranstrop, the former director of the Centre for the Study of Terrorism and Political Violence at the University of St. Andrews in Scotland, has researched the situation to conclude that "[p]rofits from counterfeiting are one of the three main sources of income supporting international terrorism."\textsuperscript{103}

Policy has dictated that ending trafficking of counterfeit luxury goods is a priority. Understanding the seriousness and depth of the problem has led to the changes seen in the Sentencing Guidelines. The Guidelines have changed in the area of valuation as the Sentencing Commission has continued to struggle with the proper remedy and punishment for trafficking in counterfeits. The intricacies of the role luxury goods play in society combined with the growing strength of the counterfeit trade world enables an examination of the proper tools necessary to fight this battle.

\textsuperscript{99} The International Anticounterfeiting Coalition (IACC) and the U.S. Sentencing Commission were extremely aware of the "role of organized crime in counterfeiting and piracy" in designing the 2000 amendments to the Sentencing Guidelines. Quam Testimony, supra note 84.


\textsuperscript{101} Id.

\textsuperscript{102} Id. (quoting Sen. Susan Collins).

\textsuperscript{103} THOMAS, supra note 2, at 276.
II. THE VALUATION BATTLE BETWEEN THE CURRENT USE OF STREET VALUE VERSUS THE SUGGESTED USE OF RETAIL VALUE

The Sentencing Guidelines currently hold a presumption toward the use of street value in determining sentences. Part II of this Note examines this current valuation scheme and its justifications. In addition, this part looks to a growing opposition to the Guidelines and the justifications behind the proposed change to the use of retail value. Finally, this part addresses the growing valuation debate that has occurred and how the different values affect the policy decision to end trafficking of luxury counterfeit goods.

A. Arguments in Favor of Using Street Value in the U.S. Sentencing Guidelines

The Sentencing Guidelines were amended after the passage of the NET Act. The justifications behind passage of the NET Act have been used by the Sentencing Commission in their choice of relying on street value. Scholars have relied on various theories, particularly the Incentive Theory and the Piracy Paradox to defend the current valuation in the Guidelines. Many argue that the current Guidelines, coupled with recent case law, are creating results that fulfill the goals of the amended Guidelines.

1. The Aftermath of the No Electronic Theft Act

Looking to the background of the 2000 amendments to section 2B5.3 of the Sentencing Guidelines, the Sentencing Commission explains why the monetary calculations formula was changed. Much of the changes were in response to the NET Act directive. Congress passed the NET Act in 1998 to amend the penalties for criminal infringement of a copyright. A crucial aspect of this valuation decision is how the NET Act chose to deal with the trafficking in counterfeit goods or services. The Sentencing Commission specifically addressed their decision in the 2000 amendments: “the Commission determined that defendants who engage in such conduct are more culpable than other intellectual property offenders because they place infringing items into the stream of commerce, thereby enabling others to infringe the copyright or trademark.”

The discussion of the proper valuation was central to the Intellectual Property Amendments of 2000 and 2006 to the Sentencing Guidelines.

105. POLICY DEVELOPMENT TEAM REPORT, supra note 46, at 4-5.
106. See infra Part II.A.3.
107. See infra notes 133-36 and accompanying text.
108. POLICY DEVELOPMENT TEAM REPORT, supra note 46, at 4-5.
109. See No Electronic Theft Act, 111 Stat. at 2678.
110. See id.
111. See POLICY DEVELOPMENT TEAM REPORT, supra note 46, at 5.
112. See supra notes 50-53 and accompanying text.
In determining the proper valuation, the Sentencing Commission sought to achieve the calculation that provided "a reasonable estimate of the resulting harm." The Commission believed that using street value would be the best way to estimate the harm caused by the counterfeiting. In response to the enactment of the NET Act, the Commission had difficulty with the question of valuation and found that proportionality was the best solution: "The sale of obviously counterfeit purses at deep discounts at a flea market and the illegal uploading to an Internet site of high quality, pirated software that results in the infringed software being made widely available at no cost cause very different types and magnitudes of harm." This exemplifies the need to reexamine the valuation used in the Sentencing Guidelines.

However, the Commission did recognize that there may be situations where for "reasons of practicality" application of retail value should be permitted. In recognizing the need for this caveat, the Commission looked to the U.S. Court of Appeals for the Second Circuit's decision in *United States v. Larracuente*, and discussed the court's finding that use of the retail value of the tapes copied was the "appropriate value for use to compute the infringement amount where the unauthorized copies were of sufficient quality to permit their distribution through normal retail outlets." This instance is the exception rather than the rule. The Commission decided that under the guide of fairness, the proper valuation should be street value. If the formula was to be primarily based on retail value then it "would overstate substantially the pecuniary harm caused to copyright and trademark owners."

Furthermore, the Sentencing Commission in its 2006 Policy Development Report addressed the need to look to both the NET Act and the *Booker* decision in developing its current set of amendments. In looking at the impact of *Booker*, the Policy Development Team looked into all cases from fiscal year 2003 that had been sentenced under section 2B5.3 and all cases sentenced under that guideline in the first six months after *Booker* in 2005. The Policy Development Team found eighty-six cases sentenced under section 2B5.3 in 2003. Of those eighty-six cases, approximately 20.9% involved trademarked goods, such as watches and

113. POLICY DEVELOPMENT TEAM REPORT, supra note 46, at 5.
114. "The Commission believed that use of that calculation would provide a reasonable approximation for those classes of infringement cases in which it is highly likely that the sale of an infringing item results in a displaced sale of the legitimate, infringed item." *Id.*
115. Timothy McGrath, Interim Staff Dir., U.S. Sentencing Comm., Testimony Before the Courts and Intellectual Property Subcommittee of the House Judiciary Committee 3 (May 12, 1999) [hereinafter McGrath Testimony].
116. See POLICY DEVELOPMENT TEAM REPORT, supra note 46, at 5.
117. *Id.* at 5 n.7; *see* United States v. Larracuente, 952 F.2d 672 (2d Cir. 1992).
118. POLICY DEVELOPMENT TEAM REPORT, supra note 46, at 5.
119. See *id.* at 6.
120. *Id.* at 7.
121. *Id.*
handbags. The analysis of these eighty-six cases' sentencing under the Sentencing Guidelines led the Team to believe that courts apply specific offense characteristics when appropriate.

The findings of the Policy Development Team in looking to these cases show the success of the current Guidelines. Not only did they find that courts were appropriately applying the Guidelines but they also found that the change in valuation in the Guidelines caused an increase in defendants being sentenced with prison terms. This increase of sentenced prison terms was in relation to those individuals who had been sentenced under the earlier versions of the Guidelines, which had a valuation based on retail value. When the Policy Development Team looked to the post-Booker cases, they found similar results. They found that courts were still applying the Guidelines “when appropriate.” Notably, the Team found that “an even greater percentage of defendants sentenced under [section] 2B5.3 in the post-Booker era received a prison term than those sentenced in FY 03.”

2. The Use of “Street Value” Provides for the Most Equitable Results

It appears that the Guidelines are working as hoped. The intent of the Commission was to amend the Guidelines to allow for the most equitable results. Cases dealing with counterfeit luxury goods have shown that the courts have easily handled the Guidelines and continued to support them. Courts have concluded that there is an importance of using street value:

So the point is not one of real value . . . as much as it is a look to see what the mark is worth when it’s placed on an item that might be totally worthless . . . . [S]omething worthless becomes worth something at the point that the reputation of someone else is attached to it.

Moreover, courts have been able to apply full retail value when they have found it necessary to do so. In United States v. Alim, Husain Abdul

122. Id.
123. Id.
124. “The Team’s empirical analysis also revealed that an increased number of defendants sentenced under this section received a prison term. Fifty (50) percent received prison terms with a median term of 18 months imposed.” Id. (footnotes omitted).
125. Id.
126. See id.
127. See id. at 8.
128. Id.
129. Id.
130. Id. at 4–5.
131. For example, in United States v. Yi, the U.S. Court of Appeals for the Fifth Circuit vacated the defendant’s sentence because the lower court failed to properly utilize the Sentencing Guidelines. 451 F.3d 362 (5th Cir. 2006). This case did not deal with counterfeit luxury goods, rather it dealt with counterfeit batteries, extension cords, and toys.
132. Id. at 374 (alterations in original) (quoting the district court opinion).
133. See United States v. Alim, No. 06-15987, 2007 WL 2551564, at *4 (11th Cir. Sept. 7, 2007) (quoting the district court and applying the retail value standard because the
Alim owned a store where he sold thousands of counterfeit luxury goods bearing the trademarks of Lacoste, Louis Vuitton, Burberry, and many others.\(^1\) Alim received prison time and a fine of $25,000. U.S. Attorney Alice H. Martin explained, “The prison term reflects that counterfeiting is a serious crime which carries a stiff penalty.”\(^1\)

Defining valuation as “street value” and keeping the current Guidelines falls in line with arguments posed by many intellectual property scholars. Professor Mark A. Lemley of Stanford Law School points out that the “absolute protection or full-value view draws significant intellectual support from the idea that intellectual property is simply a species of real property rather than a unique form of legal protection designed to deal with public goods problems.”\(^1\) Lemley disagrees with allowing the law of intellectual property to mirror the law of property, believing that it is fundamentally misguided and does not follow our legal regulations of other sectors of the economy.\(^1\) Much of his belief regarding the proper penalties falls in line with the incentive-based element—that individuals believe ownership of a luxury will denote status—of luxury goods. Lemley explains that in the economy and the world of producers, as long as a price stays above “marginal cost producers will still make the good[s].”\(^1\) In the world of intellectual property, Lemley explains how the courts have defined the elements of the “quasi-intellectual property tort of misappropriation by reference to whether the defendant is free riding on the plaintiff’s information.”\(^1\)

---

\(^{134}\) Id. at *2.


\(^{136}\) Id.

\(^{137}\) Mark A. Lemley, Property, Intellectual Property, and Free Riding, 83 TEX. L. REV. 1031, 1031–32 (2005). In this particular article, Mark A. Lemley argues that full internalization of positive externalities is not a proper goal of tangible property rights except in unusual circumstances, for several reasons: (1) there is no need to fully internalize benefits in intellectual property; (2) efforts to capture positive externalities may actually reduce them, leaving everyone worse off; and (3) the effort to capture such externalities invites rent-seeking.

\(^{138}\) Lemley explains that,

In no other area of the economy do we permit the full internalization of social benefits. Competitive markets work not because producers capture the full social value of their output—they do not, except at the margin—but because they permit producers to make enough money to cover their costs, including a reasonable return on fixed-cost investment.

\(^{139}\) Id. at 1032.

\(^{140}\) Id. at 1043; see NBA v. Motorola Inc., 105 F.3d 841, 843 (2d Cir. 1997) (discussing how free riding reduces the incentive to produce new products). In defining what constitutes a “hot news” claim, the Court discussed the necessity of five elements, including whether “the ability of other parties to free-ride on the efforts of the plaintiff or others would so
To understand the application of free-riding to trademark law it is important to understand the remedy of disgorgement, which is the principle that “[a]nyone who benefits from the use of the intellectual property right must forfeit the benefit to the intellectual property owner.”\textsuperscript{141} Lemley continues to argue that “increases in intellectual property protection that restrict more innovation than they encourage cannot be economically justified.”\textsuperscript{142} Ultimately, Lemley proposes that we abandon the analogies often made to real property and allow intellectual property to grow on its own.\textsuperscript{143} The needs of intellectual property are unique; therefore the application of remedies must not be based on an analogy to tangible real property.\textsuperscript{144}

3. The Incentive Theory and the Use of Street Value

Remaining with the current standards set forth by the Sentencing Guidelines recognizes the role of the “incentive theory” in dealing with the luxury goods industry.\textsuperscript{145} For the incentive theory to apply to intellectual property, Jonathan M. Barnett argues that it is subject to two conditions: “(1) there actually exist few or no effective extralegal means for preventing or delaying imitation, and (2) intellectual property rights are effective at thwarting imitators.”\textsuperscript{146} Critics of the Sentencing Guidelines argue that the Guidelines must be cognizant of the incentive theory and recommend that the Guidelines be amended to contain tougher penalties to overcome this phenomenon.\textsuperscript{147} Barnett argues the contrary, that the incentive thesis depends on the factual assumption that “third-party imitators necessarily take away sales that would have been captured by the innovator”\textsuperscript{148} and that the thesis might not apply because producers benefit from the existence of counterfeits in the market.\textsuperscript{149}

\textsuperscript{141} Lemley, \textit{supra} note 137, at 1045–46.
\textsuperscript{142} \textit{Id.} at 1068. Lemley uses the example of the Sonny Bono Copyright Term Extension Act, “which provided no new incentive to authors and complicated efforts to make use of a large number of existing works.” \textit{Id.}
\textsuperscript{143} See \textit{id.} at 1073–75.
\textsuperscript{144} See \textit{id.} at 1075.
\textsuperscript{145} “The standard incentive argument would anticipate that such widespread counterfeiting, and the relative paucity of effective legal deterrents, should limit legitimate producers’ ability to fully appropriate investment proceeds and therefore significantly reduce their incentive to develop new products.” Jonathan M. Barnett, \textit{Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis}, 91 \textit{VA. L. REV.} 1381, 1384 (2005).
\textsuperscript{147} See \textit{infra} Part II.B.
\textsuperscript{148} Barnett, \textit{supra} note 145, at 1382.
\textsuperscript{149} See Malletier v. Dooney & Bourke, 340 F. Supp. 2d 415 (S.D.N.Y. 2004) (discussing an expert report prepared for Louis Vuitton that found consumer awareness of fake Louis Vuitton bags actually made the real bags more desirable); see also Barnett, \textit{supra}
This unusual result may arise when three conditions are met: (1) the relevant market consists of goods that confer significant status benefits, (2) imitators generally produce imitations of the original that are obviously imperfect, and (3) the legitimate producer cannot introduce imperfect grades of the original without significantly depleting its accumulated brand capital.\(^\text{150}\)

In fact, Barnett believes that prosecution of counterfeiting needs to be less stringent, because the "[p]rosecution of counterfeiting may reduce socially excessive consumption by increasing the cost of acquiring counterfeit fashion goods, thereby having the counterintuitive effect of advancing social welfare generally while (to the extent counterfeiting boosts revenues earned on sales of the original) reducing the welfare of fashion-goods producers in particular."\(^\text{151}\)

Barnett believes that maintaining the status quo for enforcement and punishment of counterfeiters "may be the best of all possible worlds for the legitimate producer."\(^\text{152}\) Barnett points out that the luxury goods industry provides various conditions that could make it possible for legitimate producers to profit from counterfeiting.\(^\text{153}\) "If imperfect counterfeits increase total expected revenues on sales of the original, then, from the perspective of the legitimate producer, the desired level of unauthorized imitation is likely to be greater than zero, irrespective of enforcement costs."\(^\text{154}\) Barnett even takes it one step further, believing that it is possible that the fashion industry does not need anticounterfeiting protection.\(^\text{155}\) To Barnett, anticounterfeiting laws create a scenario where, instead of protecting, they actually detract from intellectual property protections.

What we may be seeing in the context of counterfeit luxury goods is Barnett's reverse incentive theory, that "access to the lower-quality version makes buyers all the more interested in eventually getting the real stuff."\(^\text{156}\) Barnett's theory suggests that these counterfeit items may not be causing substantial harm to the fashion industry. His theory would hold that instead of diluting the value of a designer's trademark or taking away from the profits of the particular luxury handbag, the existence of the counterfeit may

---

\(^{145}\) Barnett, supra note 145, at 1399–401 (discussing the effects of counterfeit goods on various luxury brands such as Giorgio Armani, Louis Vuitton, and Gucci).

\(^{150}\) Barnett, supra note 145, at 1382–83.

\(^{151}\) Id. at 1385.

\(^{152}\) Id. at 1412.

\(^{153}\) See id.

\(^{154}\) Id. at 1413.

\(^{155}\) "[A]nti-counterfeiting laws are at best unnecessary in the fashion-goods industry with respect to imperfect counterfeiting since ... legitimate producers are expected to forego vigorous enforcement of their rights under these laws." Id. at 1416.

\(^{156}\) James Surowiecki, The Piracy Paradox, NEW YORKER, Sept. 24, 2007, at 90; see also Barnett, supra note 145, at 1411 (proclaiming "aspirational utility" and discussing incentive-based justifications for intellectual property rights).
in fact be spreading the brand name and increasing desires to obtain the "actual label."  

B. Arguments in Favor of Using Retail Value in the U.S. Sentencing Guidelines

Although the Commission has chosen to take a stronger stance against counterfeit goods, some commentators argue that the Sentencing Guidelines and how the courts are using them are not achieving the stated goals. These commentators point to congressional policy decisions and urge amending the Sentencing Guidelines to either define valuation as retail value presumptively or to create more categories to permit this upward departure.

In analyzing whether the Sentencing Guidelines should be amended to determine the infringement amount based on the full retail value, it is imperative to look to the current framework. The current Sentencing Guidelines do have provisions that allow for the use of retail value in calculating the infringement amount. However, recent counterfeiting cases show the difficulty courts have had with fitting cases into these categories, and thus street value is routinely used. Many scholars and organizations that are well-versed in the area of intellectual property rights urge the Sentencing Commission to refine the Guidelines to result in harsher penalties. The foundation of these arguments is that the Sentencing Guidelines no longer make sense, because hardly any cases qualify for application of retail value, and no longer address the plague of counterfeit luxury goods.

1. Judicial Misapplication of the Guidelines?

Since the Booker decision in 2005, the Sentencing Guidelines are no longer mandatory; instead, they are just supposed to be one factor that judges use in determining sentencing. However, it is becoming

---

157. Although designers like Marc Jacobs have spoken out in support of counterfeits, design houses employ large legal departments for the sole purpose of dealing with intellectual property violations. THOMAS, supra note 2, at 290-95 (discussing various design houses' efforts to crack down on counterfeiters).


159. See United States v. Alim, No. 06-15987, 2007 WL 2551564, at *4 n.4 (11th Cir. Sept. 7, 2007) ("We also reject Alim's argument that the district court failed to articulate its reasoning for using the retail value of the infringed items to calculate his offense level. The district court listened to the parties' arguments and testimony on the matter, and then expressly adopted the factual findings of the PSI, which noted, among other things, that the counterfeit items [were] substantially equivalent to the actual items ...." (internal quotation marks omitted)); United States v. Yi, 451 F.3d 362, 373 (5th Cir. 2006); see also supra text accompanying note 132.

160. See Peterson, supra note 17, at 461 ("Civil penalties alone will not deter violators trafficking in counterfeit component parts."); John S. Bliss, President, Int'l Anticounterfeiting Coal., Testimony Before the U.S. Sentencing Comm'n (Mar. 12, 1998) [hereinafter Bliss Testimony]; Quam Testimony, supra note 84.

increasingly evident that courts are not using them as a guide, but rather as
the only factor. The U.S. Court of Appeals for the Ninth Circuit faced
this predicament in *United States v. Huang*. The Ninth Circuit reversed
Frank Fu Jen Huang’s sentence of “six months [of] home confinement, five
years of probation, and 2,500 hours of community service.” The Ninth
Circuit criticized the district court for failing to “calculate a Guidelines-
range sentence and failure to provide a clear statement of reasons for
imposing the sentence it chose.” The question raised is whether the
Guidelines are becoming more mandatory than the *Booker* Court
intended.

The Sentencing Guidelines only permit application of retail value when
the incident falls within one of a few specifically enumerated categories.
Although courts have, on occasion, been able to utilize these categories,
some courts are finding it extremely difficult to do so. In particular,
courts of appeals find themselves in a hard place when reviewing district
court decisions: “Ultimately, this court is left with a situation in which the
district court found that the retail value . . . provided a more accurate
assessment of the pecuniary harm to the trademark owners, but apparently
did not base its finding on any facts in the record.” As in *United States v.
Yi*, courts are pressured to vacate sentences when they find that a court did
not rely fully on the categories of the Sentencing Guidelines but relied on
the belief that retail value was the best assessment of the pecuniary harm.
Commentators fear that judges are giving lenient sentences because their
hands are tied by the current set of Sentencing Guidelines.

Judicial application of the Sentencing Guidelines seems to be in conflict
with the government’s policy of cracking down on counterfeiters. The

("Since the Supreme Court’s decision in *U.S. v. Booker*, district courts have the discretion to
sentence individuals outside the sentencing ranges established in the Federal Sentencing
Guidelines, but they still must take the applicable Guidelines range into consideration during
sentencing.").

162. See infra notes 168–71.
163. No. 05-50455, 2006 WL 1345541 (9th Cir. May 17, 2006).
165. Id.
166. See supra note 41 and accompanying text.
167. See supra notes 44–50 and accompanying text.
168. See United States v. Alim, No. 06-15987, 2007 WL 2551564 (9th Cir. May 17,
2006) (“Because this testimony supports the district court’s factual finding that the
counterfeit items would appear to a reasonably informed purchaser to be substantially
equivalent to the genuine versions of the items, the district court was instructed by the
Guidelines to use the retail value of the infringed items.”); see also supra notes 133–36 and
accompanying text.
169. See United States v. Yi, 451 F.3d 362, 373–74 (5th Cir. 2006) (discussing how the
Sentencing Guidelines lay out particular categories that must be fulfilled to apply retail value
and noting that it is almost impossible for courts to fulfill those requirements).
170. Id. at 375.
171. See, e.g., id. at 375–76.
Diallo case illustrates this conflict. Although Diallo was a repeat counterfeit offender, and was found with boxes of counterfeits bearing the trademarks of Louis Vuitton, Prada, Coach, Kate Spade, Burberry, and Chanel, the court still simply applied street value in determining his sentence. The judge determining sentencing in the Diallo case believed "that the value of a genuine item does not provide an accurate assessment of the harm to a trademark or copyright caused by counterfeiting, reflecting a fairly sanguine view of the harms caused to brand-owners by counterfeiting." In response to the growing problem, some judges are actually handing down stiffer penalties. For instance, federal judges in south Florida have begun to give strong sentences. Judge Jose E. Martinez in August 2006 sentenced Ji Wu Chen and his coconspirator to ninety-seven months and eighty-seven months, respectively, for trafficking in counterfeit luxury goods. In April 2007, a Massachusetts federal judge seemed to be willing to do the same when he sentenced four individuals to almost three years imprisonment for trafficking in counterfeit luxury handbags worth, at street value, more than $1 million. Though these trendsetters exist, the general trend in counterfeit luxury goods cases has been to impose sentences similar to that in Diallo.

2. Using Retail Value to Measure Harm

The Sentencing Commission, in their 2000 Amendments believed that using street value was the best way to calculate harm. However, many scholars and organizations argue that the best measure of injury is found when using retail value. Those in favor of retail value argue that this valuation is the only way to meet congressional goals and measure the harm to the intellectual property owner.

Lenient sentences demand an evaluation of the Sentencing Guidelines to determine whether or not street value is an adequate valuation in fighting counterfeits. Prior to passage of the NET Act, Kevin V. DiGregory, Deputy

173. Id.; see also supra notes 57–68 and accompanying text.
174. See supra note 172.
178. See POLICY DEVELOPMENT TEAM REPORT, supra note 46, at 5.
179. See infra notes 197–202.
Assistant Attorney General, Criminal Division of the Department of Justice (DOJ), testified before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary to discuss the Guidelines' flawed reliance on the street value of an item rather than the retail value:

[Section 2B5.3's] exclusive focus on the low retail value of the infringing goods, without regard to the actual value of the legitimate goods, has led courts to impose lower sentences on defendants who commit intellectual property crimes than those who commit other types of fraud. The low sentences lead to a reluctance on the part of law enforcement agencies and prosecutors to commit scarce resources to investigating and prosecuting these cases.180

After passage of the NET Act, the Sentencing Commission put out a general request for comment on how to include the NET Act in the Sentencing Guidelines.181 The DOJ responded with a suggestion to implement more stringent provisions for copyright infringement.182 The DOJ found there to be a “crisis of non-prosecution due to inadequate sentencing.”183 Congressmen Bob Goodlatte and Howard Coble wrote to the Sentencing Commission regarding their views of the NET Act, “the purpose of the [NET Act] directive was to... increase the potential criminal liability of infringers because it is the view of Congress that the current standard fails to offer an appropriate and effective level of deterrence.”184 Joseph F. Savage and Kristina E. Barclay call to attention the language ultimately adopted by the Sentencing Commission in its 2000 Amendments. They argue that the choice of the Commission to use “retail value of infringing items” makes no distinction from the potential use of “retail price.”185 These scholars believe that the 2000 Amendments to the Sentencing Guidelines are flawed because of their choice of valuation. Choosing street value, to Savage and Barclay, “ignores the fact that the entire retail value of the infringed-upon item is not won by the criminal... infringer (in fact, most of the time the infringer wins nothing at all).”186

The amended section 2B5.3, to these authors, has lost its focus of determining the actual loss to the intellectual property owner and, in fact,


182. See Savage & Barclay, supra note 180, at 378.

183. Id. at 382.

184. Id. at 383 (citing U.S. SENTENCING GUIDELINES MANUAL § 2B5.3 app. E, at 1 (2006)).

185. Id.

186. Id. at 388.
his or her loss now is irrelevant "due to the reality—particularly in Internet piracy cases—that such loss would be virtually impossible to establish."  

The misplaced view of what harm is caused to the intellectual property owner is signaled by the use of retail value in the amended Guidelines.188 The IACC continues to urge the Sentencing Commission to reevaluate the Guidelines, drawing attention to the tension between congressional intent to end counterfeiting and the leniency of the Sentencing Guidelines.189 In his 1998 testimony before the Sentencing Commission, John S. Bliss, president of the IACC, urged an increase in factors when calculating losses:

"[I]t is very difficult to calculate damages to a trademark holder from counterfeiting.... In the criminal context, courts should consider all aspects of the crime, the value of the legitimate goods, the value of the fakes, harm to reputation, dilution of the trademark, and other market forces when evaluating the amount of losses."190 Bliss attempted to bring the Commission's attention to the fact that Congress intended to stop counterfeiting as evidenced by the passage of the Anticounterfeiting Consumer Protection Act of 1996 (ACPA), which increased the priority of intellectual property crimes.191 In response to both the ACPA and the NET Act, Bliss urged the Commission to fall in line with international organizations like the World Trade Organization (WTO) by increasing imprisonment and monetary fines in order to deter counterfeiting.192 At the heart of his testimony was the clear conflict between the Sentencing Guidelines and policy decisions to end the trade of counterfeiting.193 Bliss proposed a list of suggestions on how best to prevent continued counterfeiting.194

This conflict still exists today. The IACC complained of the ineffective nature of the Sentencing Guidelines again in 2000.195 Looking to the guidelines that dealt with the offenses of counterfeiting,196 it argued that "the high monetary thresholds required to impose meaningful sentences"

187. Id. at 389.
188. Id.
189. The IACC is a nonprofit trade association dedicated to the protection of intellectual property rights. See generally The International Anticounterfeiting Coalition, http://www.iacc.org/ (last visited Nov. 10, 2008).
191. Id. at 3-4.
192. Id. at 4.
193. Id. at 4-5 ("It is important to note that in its directive to the Commission, Congress did not make corresponding changes to USC 2320, the underlying statute governing trademark counterfeiting. One explanation for Congress's omission is that it believes that existing penalties under the statute are stringent enough to provide a deterrent, if enforced.").
194. Among the recommendations that the IACC presented to the commission were: (1) to increase the link between counterfeiting and theft, and (2) require a minimum penalty of "one year imprisonment for most counterfeeters." Id. at 6-7.
195. See generally Quam Testimony, supra note 84.
prevented the possible sentences from being an effective deterrent.\textsuperscript{197} Once again, the IACC urged changes in the Sentencing Guidelines in order to help the United States in its efforts to increase global intellectual property protection.\textsuperscript{198} Strongly put, the "[s]entencing guidelines that fail to provide strong penalties under U.S. law will undermine the [g]overnment’s efforts abroad and provide trading partners with a basis to argue that the United States itself lacks the political will to impose strict penalties."\textsuperscript{199} During its 2000 testimony, the IACC provided various recommendations to the Sentencing Commission, primarily based on returning the baseline valuation to retail value instead of street value.\textsuperscript{200} The IACC looked to the four alternative proposals that the Sentencing Commission had in mind for section 2B5.3.\textsuperscript{201} The IACC found particularly persuasive the idea of returning the valuation back to retail value.\textsuperscript{202}

Critics of the current Sentencing Guidelines emphasize two major points: (1) courts are using the Guidelines as more than just a factor in determining sentencing, and (2) that the current scheme does not work to deter counterfeiters.\textsuperscript{203} Debra D. Peterson reminds that the "[m]onetary penalties for counterfeiting are usually minimal, which barely affect the counterfeiter’s operation."\textsuperscript{204} Peterson explains that due to the sophisticated nature of the counterfeit business, "monetary penalties alone" will not act as a sufficient deterrent.\textsuperscript{205} Congressional intent has been to "increase penalties and sentencing for intellectual property violations."\textsuperscript{206}

III. AMENDING THE SENTENCING GUIDELINES TO MORE EASILY PERMIT APPLICATION OF RETAIL VALUE

In evaluating the two sides of the valuation debate, it is important to determine which valuation standard would best fulfill policy directives regarding intellectual property rights and the counterfeit luxury goods trade. The valuation debate shows that there is a conflict between congressional intent and judicial action, which commentators argue is the result of the choice of the street value valuation standard.\textsuperscript{207} Because this conflict

\footnotesize
\begin{itemize}
\item \textsuperscript{197} Quam Testimony, \textit{supra} note 84, § 1(B).
\item \textsuperscript{198} \textit{Id.} The IACC discussed with the Sentencing Commission the use of "domestic trade law provisions like [19 U.S.C. § 2242] and multilateral tribunals such as the World Trade Organization . . . to persuade trading partners to strengthen their national laws to combat and deter counterfeiting and piracy." \textit{Id.}
\item \textsuperscript{199} \textit{Id.}
\item \textsuperscript{200} \textit{Id.} § II.
\item \textsuperscript{201} \textit{Id.}
\item \textsuperscript{202} \textit{Id.} § II(1) ("Reliance upon the actual price of legitimate product, instead of the value of the [street value], more accurately reflects the injury to the intellectual property rights holder, and provides greater certainty for both prosecutors and the Courts in applying the guidelines . . . .").
\item \textsuperscript{203} See Bliss Testimony, \textit{supra} note 160; Quam Testimony, \textit{supra} note 84.
\item \textsuperscript{204} Peterson, \textit{supra} note 17, at 493.
\item \textsuperscript{205} \textit{Id.}
\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} See \textit{supra} note 189 and accompanying text.
\end{itemize}
exists, it is necessary to determine which valuation will best serve the rights of intellectual property owners. Abandoning the current presumption of street value and moving toward a system where it is much easier to apply retail value is the best option currently available. This move will not only help to strengthen intellectual property rights, but will also help curb trafficking of counterfeit luxury goods.

In assessing the best way to deal with valuation, it is important to decide what will best help the crusade against trafficking of counterfeit luxury goods. The Guidelines should move away from the street value standard in light of the aftermath of the *Booker* decision. Following *Booker*, a departure from the street value standard is warranted. Moreover, the strength of luxury goods in our society has created a need for stronger sentences in order to disincentivize individuals from trafficking in counterfeit luxury goods. To this end, it is essential to understand why ending trafficking in counterfeit luxury goods is important public policy. An examination of the totality of the circumstances and the use of retail value as a valuation standard will ultimately solve the problems created by the trafficking of counterfeit luxury goods.

This part examines why the use of street value is inadequate to address the problems posed by the counterfeit luxury market. It also discusses how changing to a system of retail value and looking at the totality of the circumstances will best fight counterfeiting. Finally, it discusses the relevant societal implications. Taking these factors into consideration, it is clearly necessary to move to the use of retail value.

**A. The Current Use of Street Value: A Clear Conflict Between Congressional Intent and Judicial Action**

The counterfeit luxury goods trade should continue to be a policy priority. Research shows the growing ties between counterfeiting and organized crime. Trafficking of counterfeit goods has risen above the level of an economic problem—it now is considered a public health and safety risk. Government reports have exposed links between counterfeiting and terrorism. Congress has signaled the importance of ending the trade of counterfeit luxury goods by passing numerous laws that protect trademarks and penalize those who traffic counterfeit goods. Counterfeiting has become more than just an economic problem, and as the public awareness grows, so does the priority placed on ending counterfeiting.

In the NET Act, Congress directed the Sentencing Commission to “create penalties to deter counterfeiting and piracy” in the Commission’s 1998

---

209. See supra notes 95–99 and accompanying text.
210. See supra notes 93–95 and accompanying text.
211. See supra notes 100–03 and accompanying text.
212. See supra Part I.A.
amendments to the Sentencing Guidelines. In doing so, Congress recognized the necessity of "increas[ing] the actual length of sentences."

Although Congress holds ending the sale of counterfeit goods as a high priority by providing stricter penalties and laws, judicial imposition of sentencing seems to be running against congressional initiatives. The sentences imposed by many judges seem to provide little deterrence to counterfeiters. Diallo is a classic example. Diallo was given a lenient sentence considering it was at least his third offense—all three offenses involved the selling of numerous counterfeit luxury handbags. Although it was his third offense, he was only sentenced to thirty-three to forty-one months in prison. It seems unlikely that Diallo’s past and recent sentences will deter him from committing the offense again.

This point is absolutely essential in the valuation debate. Cases like Diallo demonstrate that low sentences, imposed mostly because of the street value presumption, fail to prevent counterfeiting. Low sentences coupled with the perception of the victimless nature of the crime need to be addressed. Moving away from the view that counterfeiting is just a victimless crime is essential to making progress to end it. Particularly, it is important to communicate this message to those who would purchase counterfeits. General public opinion can no longer be that counterfeiting is a harmless crime.

Most people don’t get aroused by the spectacle of poor immigrants selling tacky handbags and obviously fake Rolexes in flea markets and on sidewalks. [They do] get aroused by the drug trade and the threat it poses to public safety. Responding to what the public wants, law enforcement officials and prosecutors have tended to hit the drug dealers and leave the counterfeiters of goods pretty much alone.

However, it is apparent that congressional intent is to inform the public of this connection to terrorism and to separate counterfeiting from the victimless crime stereotype. Currently, the public observes traffickers of counterfeit luxury goods receiving minor punishments—almost no jail time—which reinforces the view that the crime is harmless. The current view of counterfeiting as being a harmless crime would be eradicated by the existence of stiffer penalties.

The Sentencing Guidelines in their current state do not fulfill the goals Congress has stated regarding trafficking of counterfeit luxury goods. The Sentencing Commission, when determining how best to measure the pecuniary harm caused by counterfeits, should take into consideration the

213. See Bliss Testimony, supra note 160, at 4.
214. Id.
215. See supra notes 58–68 and accompanying text.
216. See supra note 60 and accompanying text.
217. See supra note 68 and accompanying text.
218. See supra Part I.C.2.
219. Bruce, supra note 92, at 100.
220. See supra notes 69–71 and accompanying text.
full effect of counterfeit luxury goods on luxury brands. The current standard makes it extremely difficult to apply retail value, which is the standard that would lead to harsher punishments. The Sentencing Guidelines allow for the application of retail value in the case of a "counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging" that has not been attached to the item yet would appear to a "reasonably informed purchaser" that it could be attached to a noncounterfeit item.

Although it appears to provide protection for the existence of counterfeit labels or patches, the Sentencing Guidelines do not have provisions that would protect the copying of the overall design that might also add to the confusion of the consumer. For example, a counterfeit Kate Spade traditional, nylon rectangle-shaped bag might fall in this category if the trademarked label is present and meets the criteria. However, if the "Kate Spade" label to be attached to the bag by the counterfeiter is not of a quality that a "reasonably informed purchaser" would believe that it is the authentic label, then the bag itself has to be valued at street value. Clearly a consumer purchasing a Kate Spade bag for twenty dollars on the streets of Chinatown might suspect that it is a fake because of its price; however, this is still taking away potential profits. The Sentencing Guidelines do not necessarily provide for instances like this. Additionally, the Sentencing Commission should consider altering the category that deals with the comparison of the two values of the items. The current set of standards that are found within the comments to the May 2000 amendments are too stringent and should be broadened so that more items fall within them. The Sentencing Commission should adopt a standard that would deter counterfeitors in the future. The best way to provide for such deterrence is to amend the Sentencing Guidelines to allow additional applications of full retail value.

With the passage of the NET Act, Congress directed the Sentencing Commission to refashion the Guidelines to best meet congressional goals of measuring harm. The Commission chose to apply street value because they felt that proportionality was the answer to the NET Act. The Commission believed that the alternative choice of retail value would overstate the harm to the intellectual property owners. The harm caused to the intellectual property owner is a loss of the right to control his or her intellectual property. The current Guidelines provide for low penalties, which have created a riskless crime and do not prevent the continued harm to the intellectual property owner.

222. See id.
223. See supra Part II.A.1.
224. See McGrath Testimony, supra note 115, at 3.
225. See POLICY DEVELOPMENT TEAM REPORT, supra note 46, at 5.
Most of the sentences imposed over the last few years seem to be the result of courts' handling of Booker. After the Supreme Court's decision in Booker, the Sentencing Guidelines were to be just that—guidelines.\textsuperscript{227} They were to be a mere factor for courts imposing sentences. The cases discussed in Part II.B showcase numerous examples where it seems that the guidelines were not used as just a guide.\textsuperscript{228} However, the stringency of courts makes it even more important that the Sentencing Guidelines be changed to allow for more application of retail value. If the goal of the Sentencing Guidelines is to allow courts to calculate sentences based on the harm actually caused to the intellectual property right owner, then such calculations need to actually be done. The stringency of the courts makes it apparent that such calculations may not actually be happening. Thus, to achieve congressional goals of protection of intellectual property rights and fairness in the sentencing process, amending the Sentencing Guidelines is necessary.

B. Considering the Totality of the Circumstances

To establish the pecuniary harm caused by counterfeit goods, it is important to conduct an evaluation of the totality of the circumstances. This means that courts should be urged to look at more than just the Sentencing Guidelines. The IACC has previously recommended that the Sentencing Commission include provisions that would cause courts to consider "all aspects of the crime, the value of the legitimate goods, the value of the fakes, harm to reputation, dilution of the trademark, and other market forces."\textsuperscript{229} Maintaining the presumption of street value is workable as long as the Sentencing Guidelines are amended to provide more opportunities to apply retail value. Including the IACC recommended analysis would prevent the problems that those opposing street value have highlighted.\textsuperscript{230} As of now, the Sentencing Guidelines only allow retail value when dealing with a particular set of categories.\textsuperscript{231} Many courts have found utilization of the Guidelines to be difficult because of these categories.\textsuperscript{232} The current categories create a situation where everything revolves around whether or not a particular label is affixed. This ignores the impact of those counterfeit luxury goods that do not have the labels but still have brand recognition. Brand recognition can occur by more than just a simple logo, and adopting the perspective of brand recognition would best evaluate the pecuniary harm to the brand owner.

\textsuperscript{227} See supra notes 161–65 and accompanying text.
\textsuperscript{228} See supra notes 168–71 and accompanying text.
\textsuperscript{229} See Bliss testimony, supra note 160, at 7.
\textsuperscript{230} See supra notes 44–50, 168–72 and accompanying text.
\textsuperscript{231} See supra note 45.
\textsuperscript{232} See supra notes 168–71 and accompanying text.
C. The Demand for the Unobtainable "Luxury"

The counterfeit market for luxury goods has begun to affect more than just bankrolls of fashion houses. The desire for luxury goods is an obstacle that makes ending trafficking of counterfeit goods difficult. Many believe that the "want" and "need" of luxury will always be a part of society.\textsuperscript{233} The allure of luxury has much to do with why luxury items are the most popular, and therefore most profitable, counterfeit items today.\textsuperscript{234} In his book, \textit{Living it Up}, James B. Twitchell discusses this apparent predicament in the context of Shakespeare's \textit{King Lear}:

True, Lear doesn't need these soldiers any more than Scrooge needed silver, Midas needed gold, the characters on \textit{Friends} need stuff from Crate & Barrel, those shoppers on Rodeo/Worth/Madison Avenues need handbags . . . . But not needing doesn't stop the desiring. Lear knows that possessions are definitions—superficial meanings, perhaps . . . Without possessions he is no king. Without a BMW there can be no yuppie, without tattoos no adolescent rebel, without big hair no southwestern glamourpuss, without Volvos no academic intellectuals, without cake no Marie Antoinette.\textsuperscript{235}

Twitchell believes that we've brought ourselves to a "social decision, not a[] moral one or even an economic one."\textsuperscript{236} A situation has developed where wants have become needs. Individuals are willing to do anything—young Asian women are working as prostitutes—to own luxury.\textsuperscript{237} Knowing that luxury in a sense plagues our society, its existence must be taken into consideration when determining how to fight the battle of counterfeit luxury goods. The desire for status creates a unique human element. The existence of that human element is one of the most difficult obstacles facing the U.S. government in its efforts to end the counterfeit luxury goods trade.

The incentive theory and "piracy paradox" presented by supporters of the current standard of street value play an integral role in the context of luxury goods.\textsuperscript{238} However, the numbers presented and discussed in Part I call into question the validity of the arguments presented by commentators like Barnett.\textsuperscript{239} Even if it can be shown that the existence of counterfeit goods expands the market for a particular design house, evidence still shows that the existence of counterfeit goods takes profits away from businesses as well as the government.\textsuperscript{240} If the "piracy paradox" truly exists, this should not mean that the intellectual property rights of the designer should not be protected. The United States has long seen the importance of protecting

\textsuperscript{233} See supra notes 2–5 and accompanying text.
\textsuperscript{234} See supra Part I.C.1.
\textsuperscript{235} TWITCHELL, supra note 5, at 276.
\textsuperscript{236} Id. at 277.
\textsuperscript{237} See supra notes 2–4 and accompanying text.
\textsuperscript{238} See supra Part II.A.3.
\textsuperscript{239} See supra Part I.C.1.
\textsuperscript{240} See supra Part I.C.1.
intellectual property.241 As trademark law has developed, the emphasis has been on protecting the consumer from potential confusion. Barnett’s arguments emphasize protection of the producer, which is contrary to a fundamental aspect of federal trademark law.242 If we apply Barnett’s argument to counterfeiting then we will no longer be protecting the consumer. The valuation of retail value protects both the producer and the consumer. The current Sentencing Guidelines do not protect the consumer in this way. The current standard follows Barnett’s arguments of an emphasis on protecting the producer. The world of counterfeiting has been successful because of lax punishment.243 This does not protect the consumer—instead it allows for a continuous flow of counterfeits in the market that permits further confusion.

Individuals want to obtain items that denote status. This obstacle must be overcome: “‘The only way to stop counterfeiting . . . is to get people to stop buying all this crap just to have these logos. We have to take it into our own hands.’”244 To move away from the power of luxury, we have to choose not to define ourselves by a brand name. The best way we may be able to stop people from craving these items is to make sure they understand the ramifications of participating in this not-so-victimless crime.

By taking a harder approach and allowing retail value to be more easily applied, the public will be shown that counterfeiting is not tolerated. The Sentencing Commission needs to move the Sentencing Guidelines toward a different standard of valuation so that the consumers purchasing the items do not view them as just cheap look-alikes, but rather as a violation of the law that takes away from a company’s profitability and success. The first step in this direction is to end the valuation battle and to side with the intellectual property owners and lessen the grip of luxury’s power on society.

CONCLUSION

Individuals crave the status that they receive from owning luxury goods. The desire to own the unattainable has helped fuel trafficking of counterfeit luxury goods. At the same time, governmental and congressional action shows an acknowledgement for continued protection of intellectual property rights. As the areas of trademark and copyright laws have flourished, Congress has seen the need to develop a body of anticounterfeiting legislation.

Congress continues to fight counterfeiting, especially in light of connections to terrorism and other illegal activities. However, the Sentencing Guidelines have been amended to address the proper valuation of goods when dealing with sentencing of counterfeiters. Currently the

242. See supra Part II.A.3.
244. See THOMAS, supra note 2, at 295.
presumption in most cases is to use valuation according to street value. This Note has attempted to highlight the growing conflict of whether street value is the correct standard of valuation to be used. A growing number of advocates believe in a change toward a valuation of full retail value.

In understanding the unique context of the counterfeit luxury goods market, it has also been essential to understand the human elements involved when luxury goods are counterfeited. The Sentencing Commission should amend the Sentencing Guidelines to permit easier application of full retail value. This standard of valuation will help dispel the public’s belief that counterfeiting is a harmless crime and encourage support of public policy decisions to further protect intellectual property rights.