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THE EFFECTS OF “BLUE MAGIC”: A CALL TO PUNISH CRIMINAL
ORGANIZATIONS THAT BENEFIT FROM THE USE OF TRADEMARKS

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ABSTRACT

Throughout history, criminal organizations have produced, packaged, transported, marketed, and sold illegal products. These organizations and their individual members can be punished for all of the steps in this process, except one: marketing. These groups routinely market their products with trademarks affixed to the illegal products they sell, and benefit from these trademarks the same way a company like the Coca-Cola Company benefits from its trademarks. Criminal organizations should not be free to use trademarks without fear of any additional punishment for doing so. Congress and the United States Sentencing Commission should look at this issue to determine an appropriate way to prevent this ongoing activity.

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THE EFFECTS OF “BLUE MAGIC”: A CALL TO PUNISH CRIMINAL ORGANIZATIONS THAT BENEFIT FROM THE USE OF TRADEMARKS

THOMAS J. KELLEY *

INTRODUCTION

In the film *American Gangster*, Denzel Washington portrayed Frank Lucas, a Harlem narcotics distributor from the late 1960s and early 1970s who put the trademark “Blue Magic” on the high-grade brand of heroin he sold.¹ When he found someone distributing a lower-grade heroin and also calling it Blue Magic, the following exchange took place:

Frank: See brand names, brand names mean something. You understand? . . . Blue Magic. That’s a brand name. Like Pepsi. That’s a brand name. I stand behind it. I guarantee it. They know that even if they don’t know me anymore than they know the, the chairman of General Mills.

Nicky: What . . . are you talkin’ about, Frank?

Frank: What I’m talkin’ about is, when you chop my dope down to one, two, three, four, five percent, and then you call it Blue Magic, that is trademark infringement. You understand what I’m sayin’?

Nicky: With all due respect, Frank, if I buy something, I own it, you know?

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¹ AMERICAN GANGSTER (Universal Pictures 2007). The film is based on a true story about Lucas and his gang, the Country Boys. *Id.*; *Gangland: American Gangster* (History Channel television broadcast Nov. 1, 2007). According to Lucas himself, his “Blue Magic” was 10% pure heroin while his competitors were only selling 5% pure heroin. Mark Jacobson, *The Return of Superfly*, N. Y., Aug. 14, 2000, at 38; *Gangland: American Gangster, supra*. The high purity of “Blue Magic” distinguished Lucas’s product from the numerous “brands” of heroin in Harlem during this era and was meant to drive his rival, Nicky Barnes, out of business. Jacobson, *supra*, at 38 (listing almost forty “brands” of heroin that could be purchased in Harlem during the late 1960s and early 1970s); *Gangland: American Gangster, supra*. The high potency of “Blue Magic” caused heroin users in Harlem to overdose on the drug, killing thousands of them. *Gangland: American Gangster, supra*. The purity of heroin has increased dramatically since Lucas’s era. ARTHUR FRIES ET AL, INST. FOR DEF. ANALYSES, THE PRICE AND PURITY OF ILLICIT DRUGS: 1981–2007 73, fig. IV-4 (2008), available at http://www.whitehousedrugpolicy.gov/publications/price_purity/price_purity07.pdf [hereinafter PRICE AND PURITY REPORT]. In 2007, a drug user would expect one gram of heroin in New York City to be around 50% pure, which is 40% higher than Lucas’s “Blue Magic.” *See id.*; Jacobson, *supra* at 38; *Gangland: American Gangster, supra*. The highest purity rate in New York City between 1981 and 2007 was 70% in 1995. PRICE AND PURITY REPORT, *supra*.

Frank: No. That ain’t true. That ain’t true.²

In Nuevo Laredo, Mexico, the street vendors’ fill their shelves and tables with pirated CDs and DVDs.³ All the counterfeit items bear a trademark with a black horse surrounded by four “Zs.”⁴ This trademark represents Los Unicos, a label owned by a ruthless Mexican drug cartel called “Los Zetas.”⁵

Finally, the Full Tilt Poker website contains a trademark with a red triangle with the words “Full Tilt Poker,” in it.⁶ Additionally, during the 2009 World Series of Poker, many of the players wore the same Full Tilt Poker trademark on their shirts and hats.⁷

What do these three scenarios have in common? All three products are illegal under U.S. law (heroin, counterfeit merchandise, and online gambling).⁸ Yet, those engaging in criminal activity are still using a trademark or trade dress to identify the source of the product or service.⁹ While the law may prohibit the product or service, it does not prohibit the mark that is used.¹⁰ The use of trademarks by criminal

² AMERICAN GANGSTER, *supra* note 1.

³ David Luhnnow & Jose de Cordoba, *The Perilous State of Mexico*, WALL ST. J., Feb. 21, 2009, at W1.

⁴ *Id.*

⁵ *Id.* “Los Zetas are universally feared, highly trained, and armed as well as any military.” *Gangland: To Torture or to Kill?* (History Channel television broadcast Nov. 28, 2008). Los Zetas were originally members of the special forces of the Mexican military that defected when offered lucrative salaries to protect the Gulf Cartel run by Osiel Cardenas. *Id.* Some believe that there are currently 10,000 members of Los Zetas. Luhnnow & de Cordoba, *supra* note 3. Law enforcement officials speculate that Los Zetas have committed hundreds, or maybe even thousands of murders, including the murder of the Nuevo Laredo Police Chief. *Gangland: To Torture or to Kill?*, *supra*. Some also believe that Los Zetas have kidnapped at least forty American citizens. *Id.* One Texas law enforcement official equated the terror that Los Zetas imposes to that of Al-Qaeda. *Id.* Los Zetas use this fear to distribute their counterfeit products by force, telling the street vendors that they must sell the product. Luhnnow & de Cordoba, *supra* note 3. For example, after being ordered by Los Zetas to allow drugs to be sold in his pool hall, one owner asked, “What can I do[?]” *Id.* There is also wide speculation that Los Zetas have Mexican police officers working for them. *Id.*; *see, e.g., Gangland: To Torture or to Kill*, *supra* (describing an incident where two American women were pulled over by Mexican police officers in Nuevo Laredo, kidnapped, and likely given as gifts to Los Zetas); Alfredo Corchado & Lennox Samuels, *Video Offers Brutal Glimpse of Drug Cartel*, DALLAS MORNING NEWS, Dec. 1, 2005, at 1A (describing a video where kidnapped members of Los Zetas divulged information regarding their criminal activities, including corrupting police officers).

⁶ Online Poker - Play Online at Full Tilt Poker Room, <http://www.fulltiltpoker.com> (last visited Apr. 23, 2010).

⁷ *See, e.g., 2009 World Series of Poker* (ESPN television broadcast Nov. 10, 2009) (broadcasting the final table of the main event for the 2009 World Series of Poker where James Akenhead, Phil Ivey, and Steve Begleiter wore Full Tilt Poker attire, while Kevin Schaffel, champion Joe Cada, and Eric Buchman donned PokerStars.net apparel).

⁸ 21 U.S.C. § 844(a) (2006) (criminalizing the possession of controlled substances such as heroin); 18 U.S.C. § 2320(a)(1) (2006) (criminalizing the trafficking of counterfeit items); 18 U.S.C. § 1084(a) (criminalizing online gambling).

⁹ *See* Jacobson, *supra* note 1, at 38; Luhnnow & de Cordoba, *supra* note 3; Online Poker - Play Online at Full Tilt Poker Room, *supra* note 6.

¹⁰ *See* 15 U.S.C. § 1052(a) (2006) (prohibiting the registration of a trademark that “[c]onsists of or comprises immoral, deceptive, or scandalous matter[.]” but not prohibiting such a trademark’s use in commerce); 18 U.S.C. § 2320(a)(1) (2006) (criminalizing the importation of a good with a counterfeit mark that is “likely to cause confusion, to cause mistake, or to deceive,” but not criminalizing a trademark on an illegal good that is distinct and not likely or intended to cause

enterprises allows them to market their product, expand their reach, and garner repeat customers; and the law allows them to do so without fear of additional punishment.

A trademark serves several fundamental purposes, as discussed in Section I. This section also illustrates how legitimate companies and criminal enterprises use trademarks to serve these fundamental purposes. Next, the section discusses the Trademark Counterfeiting Act of 1984 (“TCA”), and a recent attempt by the federal government to take possession of a criminal organization’s registered mark. Section II analyzes whether legitimate companies and criminal enterprises use trademarks for the same fundamental purposes. Finally, Section III proposes a criminal statute and a sentencing enhancement that Congress and the United States Sentencing Commission (“USSC”) can enact concurrently or separately.

I. BACKGROUND

A trademark serves several fundamental purposes for the mark holder.¹¹ The Coca-Cola Company’s trademarks, for example, serve these purposes.¹² Criminal organizations, however, use trademarks for these same purposes.¹³ In an effort to hinder a criminal organization’s use of its registered trademark, the federal government has sought to forfeit a motorcycle gang’s mark.¹⁴ After discussing these topics, this section concludes by addressing the TCA.¹⁵

A. Purposes of a Trademark

The Lanham Act defines a trademark as a “word, name, symbol, or device . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”¹⁶ In particular, a trademark serves five fundamental

confusion); 21 U.S.C. § 843(a)(5) (2006) (criminalizing the possession of any device used to recreate a trademark on a controlled substance, “so as to render such drug a counterfeit substance[.]” but not criminalizing a trademark on an illegal narcotic that is meant to be a distinctive substance); 21 U.S.C. § 843(c) (criminalizing the use of advertisements meant to entice another to enter into an agreement to receive, sell, or distribute any Schedule I narcotic, but not criminalizing the use of a trademark in any such advertisement).

¹¹ 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 3:2 (4th ed. 2008).

¹² See discussion *infra*, Section I.B.2.

¹³ See, e.g., Criminal Complaint, Aff. of William Svilar at 6, United States v. Austin, No. 06-CR-0451 (N.D. Ill. June 20, 2006) [hereinafter *Mickey Cobras Complaint*]; Criminal Complaint, Aff. of Joseph Deluco at 9, United States v. Freeman, No. 07-CR-0843 (N.D. Ill. Dec. 17, 2007), *appeal docketed*, No. 09-4043 (7th Cir. 2009) [hereinafter *Gangster Disciples Complaint*].

¹⁴ Indictment at 173, United States v. Cavazos, No. 08-CR-1201 (C.D. Cal. Oct. 9, 2008) [hereinafter *Mongols Indictment*]; Scott Glover, *U.S. Targets Bikers’ Identity*, L.A. TIMES, Oct. 22, 2008, at A1.

¹⁵ 18 U.S.C. § 2320(a) (2006).

¹⁶ 15 U.S.C. § 1127 (2006). In this comment, the Lanham Act is used as an analogy to define and illustrate the fundamental purposes of a trademark, not to bring up any issues of criminal trademark infringement.

purposes: (1) to distinguish one seller’s goods from another, (2) to show that the goods are from a single source, (3) to signify that the goods have an equal level of quality, (4) to advertise the goods, and (5) to garner repeat customers through “good will.”¹⁷

Under the “level of quality” function of trademarks, consumers expect that the quality of the goods will remain consistent with the quality of other goods identified by the same trademark.¹⁸ This function does not necessarily mean the quality is high, but only that the quality is consistent.¹⁹

Trademarks also function as one of the most important advertising tools of an organization.²⁰ In many instances, the trademark not only identifies the source of the good, but helps sell it.²¹ This function allows mark holders to engender good will with consumers through advertisements using their marks.²²

B. Legitimate Use of Trademarks

1. An Example: The Coca-Cola Company’s Trademarks

Many companies focus on the advertising function of a trademark.²³ The Coca-Cola Company, for example, spends billions of dollars to advertise its products,²⁴ and uses its trademarks in those advertisements.²⁵

The COCA-COLA trademark²⁶ is one of the most recognized trademarks in the world.²⁷ It appears in magazines, newspapers, billboards, display materials,

¹⁷ MCCARTHY, *supra* note 11, § 3:2. McCarthy defines good will as “consumer satisfaction and preference.” *Id.*

¹⁸ *Id.* § 3:10.

¹⁹ *Id.* (noting that consumers should not use a trademark to “guarantee” the quality of the product).

²⁰ *Id.* § 3:12.

²¹ *Id.*; Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 819 (1927).

²² MCCARTHY, *supra* note 11, § 3:12.

²³ *See, e.g.*, *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1186–87 (E.D.N.Y. 1972) (describing the Coca-Cola Company’s use of its trademarks in its advertisements).

²⁴ Coca-Cola Co., Annual Report (Form 10-K), at 74 (Feb. 26, 2010), *available at* <http://www.sec.gov/Archives/edgar/data/21344/000104746910001476/a2195739z10-k.htm>.

²⁵ *E.g.*, Jeremiah McWilliams, *NASCAR Drivers Take Spin On Classic Coke Ad*, ATLANTA J.-CONST., Feb. 13, 2010, at 14A (describing a television advertisement where NASCAR drivers drink Coca-Cola and sing a song together).

²⁶ COCA-COLA, U.S. Trademark No. 0238146 (filed Sept. 13, 1927). The COCA-COLA trademark has distinctive stylized script lettering with the lower portion of the “C” in “Coca” extending under the remaining letters in the form of a curved dash. *Id.*; *Gemini Rising*, 346 F. Supp. at 1186.

²⁷ *See Gemini Rising*, 346 F. Supp. at 1187 n.1 (“Indeed, Coca-Cola has been described as one of the three most-recognized trademarks in the world. The other two are B.V.D. and Singer.”) (internal quotations omitted) (quoting Don N. Curdie, *Infringement on the Trademark “Coca-Cola,”* 27 BUS. LAW. 297, 309 n.51 (1971)). The Coca-Cola logo has become so well known that:

The name now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name [of] the drink.

television, and truck panels.²⁸ Additionally, the Coca-Cola Company markets more than 3,000 different products in addition to the flagship Coca-Cola beverage.²⁹ Most of these additional products have their own distinct trademark and trade dress.³⁰ These distinct trademarks allow consumers to differentiate Coca-Cola's products from a competitor's product.³¹

2. *The Coca-Cola Company and the Fundamental Purposes of a Trademark*

The Coca-Cola Company has used its trademarks to achieve all of the five fundamental purposes of a trademark. The most conclusive proof of this accomplishment came from a 2004 neurological study conducted by the Princeton University Department of Neuroscience ("Princeton Study").³² The researchers in the Princeton Study concluded that individuals preferred Coca-Cola over Pepsi, but only when they saw the COCA-COLA trademark prior to drinking the soda.³³

The Princeton Study conclusively indicated that consumers were able to distinguish Coca-Cola's soda from a competitor's based *solely* on the trademark.³⁴ Additionally, the test subjects were aware of the COCA-COLA trademark prior to the study.³⁵ Thus, one can infer from the Princeton Study that the Coca-Cola Company's

Coca-Cola Co. v. Koke Co., 254 U.S. 143, 146 (1920).

²⁸ *Gemini Rising*, 346 F. Supp. at 1186–87.

²⁹ Coca-Cola - Our Company - The Coca-Cola System, http://www.thecoca-colacompany.com/ourcompany/the_cocacola_system.html (last visited Apr. 8, 2010).

³⁰ *E.g.*, DIET COKE, U.S. Trademark No. 1260160 (filed Sept. 23, 1982); CHERRY COKE, U.S. Trademark No. 3434466 (filed June 6, 2007); SPRITE, U.S. Trademark No. 0704043 (filed Feb. 11, 1955); DASANI, U.S. Trademark No. 3041809 (filed May 2, 2005).

³¹ See Sandra Blakeslee, *If Your Brain Has a "Buy Button," What Pushes It?*, N.Y. TIMES, Oct. 19, 2004, at F5 (stating that a scientific study found that consumers are generally more persuaded by brand names and trademarks, than they are with the actual quality of the product).

³² Samuel M. McClure, Jian Li, Damon Tomlin, Kim S. Cypert, Latané M. Montague & P. Read Montague, *Neural Correlates of Behavioral Preference for Culturally Familiar Drinks*, 44 NEURON 379, 379–87 (2004); see also Blakeslee, *supra* note 31 (describing the study).

³³ McClure et al., *supra* note 32, at 382. The researchers had the subjects go through a structured series of taste tests with both Coca-Cola and Pepsi in either marked or unmarked cups. *Id.* at 380. During this process, a functional magnetic resonance imaging ("fMRI") machine monitored the subject's brain activity. *Id.* at 379. When individuals did not know what soda they had tasted, 50% stated that they preferred Coca-Cola, while 50% stated they preferred Pepsi. *Id.* at 381. The researchers found that these subjects had significant brain activity in the ventromedial prefrontal cortex ("VMPFC"). *Id.* at 381–82. The VMPFC has been associated with an individual's decisions when based only on sensory information. *Id.* at 383. However, when the trademark was shown to the subjects prior to drinking the soda, brain activity increased in the bilateral hippocampus, parahippocampus, midbrain, dorsolateral prefrontal cortex, thalamus, and left visual cortex. *Id.* These regions of the brain have been associated with an individual's decision when based on cultural information, like a famous trademark. *Id.* Subjects who saw the COCA-COLA trademark prior to drinking the soda showed a strong preference for the Coca-Cola soda over the Pepsi soda. *Id.* at 383 fig. 3(C). The study concluded that the latter brain regions work independently from the VMPFC and create a bias (based on cultural information) in an individual's mind when he or she is making a decision. *Id.* at 383. Thus, viewing the COCA-COLA trademark prior to drinking a soda significantly affected whether an individual preferred the product or not. *Id.* at 385.

³⁴ See *id.* at 385.

³⁵ *Id.*

advertisements using the COCA-COLA trademark are ingrained in the minds of consumers.³⁶ Finally, one can infer from the Princeton Study that, under McCarthy’s definition of good will, consumers who see the COCA-COLA trademark see a product that satisfies them and that they prefer over a competitor’s product.³⁷

C. Trademarks on Illegal Goods

While Frank Lucas was one of the most innovative and notorious drug dealers of his time, he was not the first to put a trademark on an illegal product.³⁸ During the Prohibition Era of the 1920s and early 1930s,³⁹ many liquor manufacturers, bootleggers, and mobsters put trademarks on the illegal alcohol they manufactured and distributed.⁴⁰

Today, many street gangs have followed in Lucas’s footsteps and have put a trademark on the narcotics they distribute and sell. In a recent opinion, the United States Court of Appeals for the Seventh Circuit recognized that “[c]ocaine peddlers often brand their products with logos.”⁴¹ In Chicago, Illinois, two rival gangs,⁴² the

³⁶ *See id.*

³⁷ *See* MCCARTHY, *supra* note 11, § 3:2.

³⁸ Jacobson, *supra* note 1, at 38; *Gangland: American Gangster*, *supra* note 1. Lucas’s innovativeness included making a connection with a heroin manufacturer in Southeast Asia, and having the narcotics shipped directly to the United States in secret compartments located in the coffins of American soldiers killed during the Vietnam War. Jacobson, *supra* note 1, at 38; *Gangland: American Gangster*, *supra* note 1.

³⁹ The Prohibition Era began on January 17, 1920, when the 18th Amendment took effect. U.S. CONST. amend. XVIII, §§ 1, 3 (prohibiting the “manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes”); National Prohibition (Volstead) Act, ch. 85, § 3, 41 Stat. 30 (1919) (outlawing alcoholic beverages). The Supreme Court found the Volstead Act constitutional. *Rhode Island v. Palmer* (The Prohibition Cases), 253 U.S. 350, 387–88 (1920). In 1933, Congress repealed the Eighteenth Amendment, making the Volstead Act unconstitutional and ending the era of Prohibition. U.S. CONST. amend. XXI, § 1.

⁴⁰ *See* HERBERT ASBURY, *THE GREAT ILLUSION: AN INFORMAL HISTORY OF PROHIBITION* 282–86 (4th Greenwood Press reprinting 1977) (1950) (naming “Panther Whiskey,” “Old Stingo,” “White Lightning,” “Jackass Brandy,” “Old Horsey,” “Scat Whiskey,” “Soda Pop Moon,” “Squirrel Whiskey,” “Goat Whiskey,” “Red Eye,” “Straitsville Stuff,” “Pumpkin Wine,” “Cherry Dynamite,” “Sweet Whiskey,” “Yack Yack Bourbon,” “Sugar Moon,” “American Whiskey,” “Hollywood Special,” and “Jake” as various trademarks used on illegal alcohol during prohibition); LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 104 (2002) (providing a similar list).

⁴¹ *United States v. Loera*, 565 F.3d 406, 409 n.2 (7th Cir. 2009); *see also* *Torres v. Girdich*, No. 04 Civ. 1512, 2006 WL 1230328, at *2 (S.D.N.Y. May 9, 2006) (summarizing the testimony of a New York City police officer who stated that, “each individual or group of persons that deal in narcotics have their own name brand or—it’s like name brands, it’s like buying a pair of Levis. Basically you know what you’re buying and whom you’re buying it from,” and that “pretty much every different corner or different group of people have their own brand, so it’s—I mean hundreds, hundreds of different [brands], everyone has a different name.”).

⁴² *Gangland: Gangster City* (History Channel television broadcast Jan. 3, 2008) (describing an incident where the Mickey Cobras predecessor, the Cobrastones, and their rival, the Gangster Disciples, agreed to a truce if the Gangster Disciples shot and killed two local police officers).

Mickey Cobras⁴³ and the Gangster Disciples, use trademarks and trade dress to sell their narcotics.⁴⁴ Additionally, the Mongols, an outlaw motorcycle gang in Southern California, have actually registered a trademark⁴⁵ and a service mark with the U.S. Patent and Trademark Office (“USPTO”).⁴⁶ The U.S. Department of Justice has recently charged the Mongols with several violent crimes, including murder and witness intimidation.⁴⁷

All three of these extremely dangerous criminal organizations use trademarks to some extent.⁴⁸ The following paragraphs delve into the inner-workings of these criminal organizations, their use of trademarks, and how trademarks help further their illicit goals.

1. *The Mickey Cobras*

The Mickey Cobras street gang operates on the South Side of Chicago.⁴⁹ As part of its criminal enterprise, it cuts and sells numerous lines of heroin.⁵⁰ An overall leader⁵¹ and a board of directors control the gang.⁵² The leader and board of directors

⁴³ *Mickey Cobras Complaint*, *supra* note 13, at 6 (describing the Mickey Cobras’ system of drug distribution, including their use of trade dress on narcotics).

⁴⁴ *Gangster Disciples Complaint*, *supra* note 13, at 9 (describing the Gangster Disciples’ system of drug distribution, including their use of trademarks on narcotics).

⁴⁵ M.C., U.S. Trademark No. 3076731 (filed Apr. 15, 2005).

⁴⁶ MONGOLS, U.S. Trademark No. 2916965 (filed July 28, 2003).

⁴⁷ *Mongols Indictment*, *supra* note 14, at 5–6.

⁴⁸ *See, e.g., id.* at 173; *Mickey Cobras Complaint*, *supra* note 13, at 6; *Gangster Disciples Complaint*, *supra* note 13, at 9.

⁴⁹ *Mickey Cobras Complaint*, *supra* note 13, at 4. The Mickey Cobras formed in 1960 under the name Cobrastones. *Id.* at 5. In 1976, another gang killed the Cobrastone’s leader, Mickey Cogwell, in an intra-gang war. *Id.* at 6. Those loyal to Cogwell then formed their own gang and named it the Mickey Cobras in honor of Cogwell. *Id.* The Mickey Cobras control most of the drug trafficking in the Dearborn Homes, a housing project run by the Chicago Housing Authority located on the South Side of Chicago. *Id.* Their rival, the Gangster Disciples, control the rest of the drug trafficking in the Dearborn Homes. *Id.*

⁵⁰ *Id.* at 6. The affidavit defines “line” as “a brand of heroin . . . with distinctive packaging and name.” *Id.* at 16. “Cutting” is the practice of adding a substance (usually dormin or lactose) to heroin in order “to dilute the purity and increase the quantity of narcotics.” *Id.* at 15.

⁵¹ *Id.* at 21 (stating that James Austin is the overall leader of the Mickey Cobras and that no one can run a heroin line in the Dearborn Homes unless Austin gives his approval). No member of the Mickey Cobras can initiate violence with another gang without Austin’s approval. *Id.* at 42. Anyone who runs a heroin line in the Dearborn Homes must pay a tax to Austin. *Id.* at 21. For example, one individual pays Austin \$500 a week for permission to sell his heroin line. *Id.* at 32. Austin has used violence or the threat of violence against individuals running heroin lines without his approval and those that fail to pay the tax. *Id.* at 24. For example, Austin and several other individuals shut down the “Dynasty” heroin line by threatening to use their handguns. *Id.* at 27. They allegedly did this because the leader of the “Dynasty” line had been supplied heroin from a rival gang and had failed to pay the appropriate tax to Austin. *Id.*

⁵² *Id.* at 24 (stating that no one can sell a heroin line in the Dearborn Homes unless they are sanctioned by a member of the board of directors and Austin approves). The gang’s hierarchy is described as being headed by the “Emperor,” followed down the line by the “King of Kings,” the “Kings,” the “Princes,” the “Supreme Sultans,” the “Sultans,” the “Dons,” and the “Soldiers”. *Id.* at 21.

allow several high-ranking members in the gang to run various heroin lines,⁵³ which they staff with lower-ranking members.⁵⁴

According to a criminal complaint filed in the Northern District of Illinois, a faction of the gang sold its lines of heroin in different-colored baggies.⁵⁵ Some lines also had a trademark affixed to the baggie.⁵⁶ The gang manufactured each heroin line slightly differently⁵⁷ and each had distinct packaging.⁵⁸ For example, the gang sold its popular “Penicillin” line in small green baggies.⁵⁹

In November 2005, two high-ranking members of the Mickey Cobras discussed the fact that a rival gang began to sell heroin in the Dearborn Homes with packaging identical to their own line.⁶⁰ The two agreed that they could not allow the rival gang to continue selling heroin in the same area with the same packaging because it would cut into their drug profits.⁶¹ Additionally, in May 2006, two members of the Mickey Cobras discussed a marketing strategy for a new line of heroin they wanted to start.⁶² They decided that they would entice customers with a “buy one, get one free” deal to kick-start the new line.⁶³

⁵³ *Id.* at 24.

⁵⁴ *Id.* at 34. The heroin line workers have assigned shifts. *E.g., id.* at 22 (stating that the morning shift for the “Reaper” line starts at 8:00am and ends at 4:00pm). The gang needs approximately seven to eight individuals to run a heroin line. *Id.* A typical shift will include two individuals that stand at the front of the building, two that stand at the rear, one who acts as a security guard and checks customers for weapons, one who protects the heroin and drug proceeds with a firearm, and one who conducts counter-surveillance and alerts the other workers if the police are in the area. *Id.* at 22–23. It is commonplace for juveniles to work on these heroin lines. *Id.* at 42 (stating that individuals working on the heroin lines can be as young as thirteen years-old).

⁵⁵ *Id.* at 6, 40. The Supreme Court has held that the use of a particular color on a product can be recognized as a trademark deserving of protection under the Lanham Act. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 174 (1995); *see also* U.S. Trademark No. 2901090 (filed June 20, 2002) (granting United Parcel Service a service mark in a particular shade of the color brown (equal to Pantone Matching System 462C, also known as “chocolate brown”) for use on its delivery trucks, aircraft, and uniforms).

⁵⁶ *Mickey Cobras Complaint*, *supra* note 13, at 41 (showing a chart with some of the gang’s heroin lines and their distinct packaging and trademarks).

⁵⁷ *Id.* at 56. For the “Reaper” line, drug manufacturers mix seven grams of heroin with 35 grams of dormin, 10 grams of quinine, and 2.5 grams of lactose. *Id.* The dealers then mix and package the substance in black bags for individual sale. *Id.* For the “Penicillin” line, the drug manufacturers mix seven grams of heroin with 30 grams of dormin, 10 grams of quinine, and 3.5 grams of lactose. *Id.* The dealers then mix and package the substance in green bags for individual sale. *Id.* For the “Drop Dead” heroin line, drug manufacturers add pain killers to the mixture to give the drug a specific taste for the customers. *Id.* at 87.

⁵⁸ The “Reaper” line was packaged in black bags. *Id.* at 22. The “Penicillin” line was packaged in green bags. *Id.* at 24–25. The “Fear Factor” line was packaged in peach-colored bags. *Id.* at 37. The “Fight Club” line was packaged in bags with a star design on them. *Id.* at 41. The “Skyrocket” line was packaged in gray bags with a star design on them. *Id.* The “Final Call” line was packaged in clear bags with a basketball design on them. *Id.* The “Girls Gone Wild” line was packaged in red bags. *Id.* The “Bass Ale” line was packaged in blue bags. *Id.* at 56. The “Drop Dead” line was also packaged in black bags. *Id.* at 86–87. The “Network” line was packaged in clear plastic bags with a yellow stripe. *Id.* at 108. The “Max Payne” line was packaged in clear plastic bags with red stripes. *Id.* The “Demon” line was also packaged in blue bags. *Id.* at 186.

⁵⁹ *Id.* at 24–25.

⁶⁰ *Id.* at 90–91.

⁶¹ *Id.* at 91.

⁶² *Id.* at 60.

⁶³ *Id.*

In 2006, the Drug Enforcement Administration (“DEA”) arrested twenty-nine members of the Mickey Cobras.⁶⁴ The criminal complaint charged the gang members with violating various drug laws.⁶⁵ Even though the gang members used trademarks and trade dress to distribute the narcotics, the government did not charge the gang members with an additional crime for this conduct, and the gang members will not receive additional punishment if found guilty.⁶⁶

2. *The Gangster Disciples*

The Gangster Disciples are purportedly the largest street gang in Chicago,⁶⁷ and have factions all over the city, its surrounding areas, and across the country.⁶⁸ As part of its criminal enterprise, a faction of the Gangster Disciples sold narcotics at the Cabrini-Green Homes.⁶⁹ Rondell Freeman led this faction.⁷⁰ As part of his narcotics distribution organization, Freeman packaged cocaine, crack cocaine, and marijuana in baggies with either a blue devil marking or an orange stripe on the packaging.⁷¹

One cooperating witness in the case stated that Freeman did this to signify to customers that he supplied the drugs.⁷² Freeman sold high-quality drugs that were

⁶⁴ Press Release, U.S. Dept. of Justice, U.S. Attorney, Northern Dist. of Ill., U.S. Charges 47 Alleged Mickey Cobra Gang Leaders and Associates in Conspiracy to Distribute Drugs in the Dearborn Homes (June 21, 2006), *available at* http://www.ojp.usdoj.gov/ccdo/programs/062106_chicago.pdf.

⁶⁵ Indictment at 2, 7, United States v. Austin, No. 06-CR-0451 (N.D. Ill. Sept. 20, 2006) (charging fourteen members of the Mickey Cobras’ leadership only with conspiracy to possess and intent to distribute heroin and fentanyl).

⁶⁶ *See id.*

⁶⁷ *Gangster Disciples Complaint*, *supra* note 13, at 4 (stating that there could be anywhere between 7,300 and 30,000 members of the Gangster Disciples); *Gangland: Gangster City*, *supra* note 42 (stating that the gang’s membership has swelled to over 30,000). The gang has existed in Chicago since the 1960’s. *Id.*

⁶⁸ *Gangster Disciples Complaint*, *supra* note 13, at 4–5 (estimating that the gang has factions in thirty states across the United States). Traditionally, the Gangster Disciples have controlled all narcotics trafficking at the Cabrini-Green Homes, a Chicago Housing Authority housing project on the city’s North Side. *Id.* at 5. At one point, the United States Department of Justice estimated that the gang’s revenue from drug sales exceeded \$100 million a year. *Gangland: Gangster City*, *supra* note 42.

⁶⁹ *Gangster Disciples Complaint*, *supra* note 13, at 5. As a rival to the Mickey Cobras, the Gangster Disciples also sell narcotics at the Dearborn Homes. *Mickey Cobras Complaint*, *supra* note 13, at 6.

⁷⁰ *Gangster Disciples Complaint*, *supra* note 13, at 5; *see Gangland: Gangster City*, *supra* note 42 (stating that Larry Hoover is the overall leader of the Gangster Disciples). Hoover organized the Gangster Disciples much like a corporation, or the Mickey Cobras. *Id.* (stating that Hoover structured the gang after the Italian Mafia and a Fortune 500 company).

⁷¹ *Gangster Disciples Complaint*, *supra* note 13, at 9, 12. Investigators also found baggies with a red apple logo on them, but did not find any narcotics in these bags. *Id.* at 16, 56. One individual also mentioned that someone other than Freeman supplied him with drugs and that he sold those drugs in baggies with a blue dolphin logo on them. *Id.* at 76 n.48.

⁷² *Id.* at 9.

popular among customers in the area.⁷³ Consequently, drug sales declined for other drug dealers in the area.⁷⁴

In 2007, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) arrested ten members of the Gangster Disciples, including Freeman.⁷⁵ Similar to the indictment filed against the Mickey Cobras, the government charged these individuals with violating several drug statutes.⁷⁶ Once again, however, the defendants were not charged with an additional crime for using trademarks while distributing narcotics and will not receive any additional punishment if found guilty.⁷⁷

3. *The Mongols*

In October 2008, the police arrested sixty-one members of the Mongols, a violent Southern California motorcycle gang, on racketeering charges.⁷⁸ The indictment charges the defendants with eighty-six counts of racketeering, various violent crimes, drug distribution, and money laundering.⁷⁹

The Mongols formed in the 1970s.⁸⁰ The gang has approximately 600 members nationwide, mostly recruited from various Los Angeles, California-area street gangs.⁸¹ The Mongols have an established structure and leadership.⁸² A “Mother Chapter” heads the gang,⁸³ to which regional chapters report.⁸⁴ The gang also has a “constitution” and “by-laws.”⁸⁵

The Mongols have registered the MONGOLS service mark⁸⁶ and M.C. trademark for its organization.⁸⁷ According to the registrations filed with the

⁷³ *Id.* at 13–14.

⁷⁴ *Id.* at 14.

⁷⁵ Jeff Coen, *U.S. Charges 16 in Gang-backed Drug Ring at Cabrini*, CHI. TRIB., Dec. 19, 2007, § Metro, at 4.

⁷⁶ Indictment at 1–2, *United States v. Freeman*, No. 07-CR-0843 (N.D. Ill. Apr. 16, 2008), *appeal docketed*, No. 09-4043 (7th Cir. 2009) (charging fifteen members of the Gangster Disciples’ leadership with conspiracy to possess and intent to distribute crack cocaine, cocaine, heroin, and marijuana). The indictment also charges the gang members individually for their various drug crimes, and some are also charged with being a felon in possession of a weapon. *Id.* at 6–39.

⁷⁷ *See id.* at 1–42 (not charging any of the defendants with an offense for using a trademark to facilitate the various crimes charged).

⁷⁸ Glover, *supra* note 14. Press Release, U.S. Dept. of Justice, U.S. Attorney Central Dist. of Cal., ATF Undercover Investigation Leads to Federal Racketeering Indictment and Arrest of 61 Members of So. Cal.-Based Mongols Outlaw Motorcycle Gang (Oct. 21 2008), *available at* <http://www.usdoj.gov/usao/cac/pressroom/pr2008/142.html> [hereinafter *Mongols Press Release*].

⁷⁹ *Mongols Indictment*, at 1–2; *Mongols Press Release*, *supra* note 78.

⁸⁰ *Mongols Press Release*, *supra* note 78.

⁸¹ *Id.*; *Mongols Indictment*, *supra* note 14, at 7 (listing fourteen states plus Mexico and Canada where the Mongols have members).

⁸² *Mongols Indictment*, *supra* note 14, at 8.

⁸³ *Id.* at 7. The “Mother Chapter” collects money from Mongol members for the gang’s expenses, including legal fees for defending arrested members. *Id.*

⁸⁴ *Id.* at 8–9.

⁸⁵ *Id.* at 8. The “constitution” and “by-laws” that “set forth the rules of membership and a code of conduct” for Mongol members. *Id.* They also proscribe the penalties for a member’s non-compliance. *Id.*

⁸⁶ MONGOLS, U.S. Trademark No. 2916965 (filed July 28, 2003).

USPTO, the services rendered under the MONGOLS mark are to, “Promot[e] the interests of persons interested in the recreation of riding motorcycles.”⁸⁸ The gang lists jackets and t-shirts as goods sold bearing the M.C. mark.⁸⁹ By registering the marks, the Mongols attempted to create the illusion that they use the marks for a legitimate purpose.⁹⁰ In an attempt to prohibit the use of the MONGOLS mark, the prosecuting U.S. Attorney has sought its forfeiture⁹¹ under the criminal forfeiture procedures found in the Racketeer Influenced and Corrupt Organizations Act (“RICO”).⁹² Shortly after the arrests, the court granted the government’s ex parte request for a restraining order.⁹³ This order requires the defendants and any of their associates or family members to surrender all materials displaying the MONGOLS mark for seizure.⁹⁴ Like its charges against the Mickey Cobras and the Gangster Disciples, the government has not charged the Mongols with an additional crime for using their marks during the commission of a crime.⁹⁵

D. Current Trademark and Criminal Laws

The Lanham Act prohibits the registration of a trademark that consists of “immoral, deceptive, or scandalous matter.”⁹⁶ Regardless, a trademark holder has a right in the trademark whether or not the holder registers it on the principal register.⁹⁷ The registration of a trademark on the principal federal register merely provides additional protections not available under common law at the state level, such as state trademark and unfair competition causes of action.⁹⁸

⁸⁷ M.C., U.S. Trademark No. 3076731 (filed Apr. 15, 2005).

⁸⁸ MONGOLS, U.S. Trademark No. 2916965 (filed July 28, 2003).

⁸⁹ M.C., U.S. Trademark No. 3076731 (filed Apr. 15, 2005).

⁹⁰ See M.C., U.S. Trademark No. 3076731 (filed Apr. 15, 2005); MONGOLS, U.S. Trademark No. 2916965 (filed July 28, 2003).

⁹¹ *Mongols Indictment*, *supra* note 14, at 173. The U.S. Attorney stated that this approach was unprecedented, and that his goal is to go “after their very identity.” Glover, *supra* note 14.

⁹² 18 U.S.C. § 1963(a) (2006).

⁹³ United States v. Cavazos, No. 08-CR-1201, at 2-3 (C.D. Cal. Oct. 22, 2008) [hereinafter *Mongols Amended Order*] (amended order restraining trademark). The court denied the government’s request to restrain Mongols members and associates from wearing and displaying the trademark. United States v. Cavazos, No. 08-CR-1201, at 3 (C.D. Cal. Oct. 21, 2008) (order restraining sale or transfer of trademark).

⁹⁴ *Mongols Amended Order*, *supra* note 93, at 3.

⁹⁵ See *Mongols Indictment*, *supra* note 14, at 1-2.

⁹⁶ 15 U.S.C. § 1052(a) (2006).

⁹⁷ *E.g.*, *In re Int’l Flavors & Fragrances, Inc.*, 183 F.3d 1361, 1366 (Fed. Cir. 1999); MCCARTHY, *supra* note 11, at § 19.3.

⁹⁸ *E.g.*, *In re Int’l Flavors & Fragrances*, 183 F.3d at 1366; *Bongrain Int’l. (American) Corp. v. Delice de France, Inc.*, 811 F.2d 1479, 1485 (Fed. Cir. 1987) (“The primary purpose of the Trademark Act of 1946 is to give Federal procedural augmentation to the common law rights of trademark owners—which is to say legitimate users of trademarks.”); *Derringer v. Plate*, 29 Cal. 292, 298 (1865) (describing the common law remedies for trademark infringement as, “an action at law for the recovery of damages, and an injunction, in which case pecuniary compensation might be incidentally awarded.”); MCCARTHY, *supra* note 11, at § 19.3. The additional federal protections are contained in the Lanham Act. See, *e.g.*, 15 U.S.C. § 1121 (giving a trademark holder the option to adjudicate a claim in federal court); 15 U.S.C. § 1117 (allowing the victim in certain infringement cases to seek costs, treble damages, and attorney’s fees); 15 U.S.C. § 1118 (allowing the victim of trademark

The Lanham Act did not originally provide any criminal penalties.⁹⁹ In 1984, however, Congress enacted the TCA.¹⁰⁰ This statute criminalizes the willful trafficking of a good bearing a counterfeit mark.¹⁰¹ At the same time, Congress made a violation of the TCA a predicate offense under RICO.¹⁰² Under the TCA, one of the elements of the offense is that the counterfeit marks create a likelihood of confusion, cause mistake, or deceive.¹⁰³

The law has traditionally favored the use of trademarks for many reasons.¹⁰⁴ It does so, for example, to “encourage[] the production of quality products, and simultaneously discourage[] those who hope to sell inferior products.”¹⁰⁵ On the other hand, the law has routinely opposed conspiracies,¹⁰⁶ and has recently focused on punishing those participating in organized criminal activity.¹⁰⁷ This contempt for organized crime was the principal Congressional motive for enacting the Organized Crime Control Act of 1970, which included RICO.¹⁰⁸

Additionally, since President Richard Nixon announced the “War on Drugs” in 1971,¹⁰⁹ the government has increased its focus on decreasing the distribution and use of narcotics in the United States.¹¹⁰ Lawmakers have enacted anti-drug

infringement the opportunity to ask that the infringing items be destroyed); 15 U.S.C. § 1124 (giving U.S. trademark holders the ability to prevent the importation of marks that copy or simulate their own marks).

⁹⁹ See Trademark Act of 1946, ch. 540, 60 Stat. 427 (codified as amended in scattered sections of 15 U.S.C.).

¹⁰⁰ Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2178–79 (codified as amended at 18 U.S.C. § 2320 (2006)). The Trademark Counterfeiting Act also provides for the forfeiture and subsequent destruction of the infringing goods and allows for the payment of criminal restitution to the victims. 18 U.S.C. § 2320(b).

¹⁰¹ 18 U.S.C. § 2320(a)(1).

¹⁰² 18 U.S.C. § 1961(1)(B).

¹⁰³ 18 U.S.C. § 2320(a)(1).

¹⁰⁴ See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995) (stating that the law favors trademarks because they decrease consumer shopping costs and promote the production of superior products as opposed to inferior products).

¹⁰⁵ *Id.* (internal quotation and citation omitted).

¹⁰⁶ 18 U.S.C. § 371 (the general federal statute prohibiting conspiracies); *United States v. Rabinowich*, 238 U.S. 78, 88 (1915) (describing the heinousness of the crime of conspiracy).

For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

Id.

¹⁰⁷ See generally Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (putting forth new laws and provisions for combating organized crime in the United States). The Organized Crime Control Act included RICO, found in Title IX of the Act. *Id.* at 941–48 (codified as amended at 18 U.S.C. §§ 1961–68 (2006)).

¹⁰⁸ § 1, 84 Stat. at 923 (stating that “[i]t is the purpose of this Act to seek the eradication of organized crime in the United States”).

¹⁰⁹ Roberto Suro, *The Old Drug Policy That Could*, WASH. POST, Nov. 8, 1998, at X8.

¹¹⁰ See Patricia Brennan, *Politics, Policy and Pot: A 'Frontline' Report Assesses America's War Against Drugs*, WASH. POST, Oct. 8, 2000, at Y6 (stating that the United States' federal drug enforcement budget was \$60 million in 1968 and increased to \$17 billion by 1999).

statutes,¹¹¹ created new law-enforcement agencies,¹¹² and funded anti-drug advertising.¹¹³ Since the start of the “War on Drugs,” the number of inmates incarcerated in federal prisons for drug offenses has increased more than 2,000%.¹¹⁴ As of November 2004, more than fifty percent of the federal prison population was incarcerated for a drug-related offense.¹¹⁵

Trademark and criminal law rarely cross paths.¹¹⁶ The law supports the use of trademarks and fiercely discourages organized crime and narcotics distribution.

II. ANALYSIS

This section examines whether the three aforementioned criminal organizations use their marks for the same fundamental purposes as a legitimate company. It next compares the Mongols’ case with the Mickey Cobras’ and Gangster Disciples’ cases, and describes how the current trademark law does not provide any way to punish the gangs for using a trademark in the latter two scenarios.

A. *Criminal Organizations and Legitimate Companies Use Trademarks for the Same Fundamental Purposes*

1. *A Similar Corporate Structure*

Criminal organizations use trademarks to gain the fundamental marketing advantages of a strong mark. Before comparing the use of trademarks by legitimate and criminal organizations, it is important to begin by comparing the parallel hierarchal structure of these entities. The parallels between the organizations indicate their similar goals despite being on opposite ends of the business spectrum.

The Coca-Cola Company, the Mickey Cobras, and the Gangster Disciples each have a leader.¹¹⁷ All three organizations also have a group of individuals who assist

¹¹¹ See, e.g., Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (updating the old narcotics laws and emphasizing law enforcement as a tool against narcotics use).

¹¹² See, e.g., Exec. Order No. 11,727, 38 Fed. Reg. 18,357 (July 6, 1973) (creating the DEA); Drug Enforcement Admin., DEA History, <http://www.justice.gov/dea/history.htm> (last visited Apr. 11, 2010) (stating that the DEA was created to be a single unified command to combat “an all-out global war on the drug menace.”).

¹¹³ Donna Leinwand, *Anti-drug Advertising Campaign a Failure, GAO Report Says; Drug Czar Disputes Results of Study*, USA TODAY, Aug. 29, 2006, at 5A (stating that the U.S. government spent \$1.4 billion on anti-drug advertising between 1998 and 2006).

¹¹⁴ See U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 519, tbl.6.57 (Ann L. Pastore & Kathleen Maguire eds., U.S. Gov’t Printing Office 31st ed. 2005) (stating that in 1970 there were 3,384 inmates in federal prisons who were found guilty of drug crimes and 77,867 such inmates in 2004).

¹¹⁵ *Id.* (stating that 54.1% of all federal inmates are incarcerated for a drug offense).

¹¹⁶ *Cf.* 18 U.S.C. § 2320(a)(1) (2006).

¹¹⁷ Press Release, Coca-Cola Co., The Board of Directors of the Coca-Cola Company Elects Muhtar Kent Chairman (Apr. 23, 2009), available at http://www.thecocacola.com/presscenter/nr_20090423_muhtar_kent.html (explaining that Muhtar Kent is the Coca-Cola Company President, Chief Executive Officer, and Chairman of the Board); *Mickey Cobras*

the leader in making decisions, such as a board of directors.¹¹⁸ The leaders and board of directors collaborate to make decisions regarding the direction of the organization,¹¹⁹ and the introduction of new products.¹²⁰ They also discuss the use of marks on their products, as well as marketing strategies to promote and advertise the new products.¹²¹ These parallels indicate that legitimate and criminal organizations have the same general goals, and use trademarks to help them achieve these goals.

2. Trademark Use Benefits Criminal Organizations

As discussed above, the COCA-COLA trademark has achieved all of the five fundamental purposes of a trademark.¹²² Similarly, criminal organizations realize these same benefits when they use a trademark on an illegal product.¹²³

For example, in a government-intercepted phone conversation, Duante Falls and Larry Smith of the Mickey Cobras discussed their anger with another area gang.¹²⁴

Complaint, *supra* note 13, at 7 (stating that James Austin is the Mickey Cobra’s overall leader, and is also known as the “King”); *Gangster Disciples Complaint*, *supra* note 13, at 5 (stating that Rondell Freeman is the leader of the Gangster Disciples faction that was distributing narcotics out of the Cabrini Green homes); see *Gangland: Gangster City*, *supra* note 42.

¹¹⁸ Press Release, Coca-Cola Co., *supra* note 117; *Mickey Cobras Complaint*, *supra* note 13, at 24 (stating that Larry Smith, Lynn Barksdale, and an unidentified individual make up the Mickey Cobras’ Board of Directors); *Gangland: Gangster City*, *supra* note 42 (describing the hierarchy of the Gangster Disciples as having a Board of Directors and that Hoover was the Chairman of the Board).

¹¹⁹ Coca-Cola Company, http://www.thecoca-colacompany.com/ourcompany/board_kent.html (last visited Apr. 8, 2010) (stating that “[t]he board is elected by the shareholders to oversee their interest in the long-term health and the overall success of the business and its financial strength.”); *Mickey Cobras Complaint*, *supra* note 13, at 24 (stating that if an individual wants to sell heroin in the Dearborn Homes, the sale has to be sanctioned by a member of the Mickey Cobras’ Board of Directors and must be approved by Austin).

¹²⁰ See, e.g., Press Release, Coca-Cola Co., The Coca-Cola Company Announces Refreshing Line-Up Of Fountain And Bottled Beverages For McDonald’s U.S. Restaurants (Apr. 27, 2009), available at http://www.thecoca-colacompany.com/presscenter/nr_20090427_mcdonalds.html (announcing a new initiative by the company’s leadership to begin serving bottled Coca-Cola at McDonald’s restaurants in the United States); *Mickey Cobras Complaint*, *supra* note 13, at 24.

¹²¹ See, e.g., Press Release, Coca-Cola Co., Coke Zero And Coca-Cola To Debut New Ads During Telecast Of Super Bowl XLIII (Jan. 26, 2009), available at http://www.thecocacola.com/presscenter/nr_20090126_superbowl_zero.html (stating that the Coca-Cola Company would debut new ads for Coke Zero during the Super Bowl); *Mickey Cobras Complaint*, *supra* note 13, at 128 (describing a conversation between Larry Smith, a member of the Mickey Cobras’ Board of Directors, and another gang member where they discussed what color baggies to buy to package heroin in).

¹²² *Supra* Section I.B.2.

¹²³ The following analysis does not discuss the advertising function of trademarks because it does not seem to be a function that criminal organizations utilize. This is most likely due to the extreme risk to the criminal organizations in advertising an illegal product like heroin. Additionally, it should be noted that whether certain street gangs are infringing on another street gang’s mark is irrelevant to this analysis. Instead, this analysis demonstrates that criminal organizations are using trademarks for their benefit. This comment does not encourage the protection of these marks, but instead advocates that criminals who benefit from the use of trademarks be punished for doing so.

Their aggravation arose out of the fact that the other gang was selling heroin in the Dearborn Homes using the same color baggies.¹²⁵

This conversation proves that the Mickey Cobras intended for the different color baggies to serve as a source identifier.¹²⁶ Using the Lanham Act's definition of a trademark,¹²⁷ the Mickey Cobras' use of distinctive baggies distinguished their heroin from other gangs' heroin.¹²⁸ Smith and Falls worried that local drug users would not distinguish their heroin from the rival gang's heroin because the rival gang sold its heroin in the same colored baggies in the same geographic location.¹²⁹ Thus, the Mickey Cobras intended for its trade dress to serve the same basic purpose as the COCA-COLA mark, to distinguish its product from another's product.

This conversation also confirms that the Mickey Cobras intended the different color baggies to signify to local drug users that the heroin came from a single source.¹³⁰ The single source function does not require that consumers know the actual source of the product.¹³¹ Instead, the single source function only presumes that one product with a mark on it, and another product with the same mark, came from the same source.¹³² Whether the drug users knew that the Mickey Cobras distributed the narcotics is irrelevant.¹³³ To show that the Mickey Cobras used the different color baggies as a source identifier proves that it used trade dress to indicate the heroin came from a single source.¹³⁴

The Mickey Cobras' leader, James Austin, also used the different color baggies to indicate that the Mickey Cobras' heroin had a different level of quality than the rival gang's heroin.¹³⁵ At one point, Austin learned that heroin sold out of the Dearborn Homes was killing people because it contained fentanyl.¹³⁶ Believing that another individual sold the deadly heroin, Austin continued to sell heroin in the Dearborn Homes, and did not change his trade dress.¹³⁷ Austin intended to distinguish his heroin from the deadly heroin by continuing to use the different color baggies to indicate to drug users that his drugs maintained their safe quality.¹³⁸ Therefore, the Mickey Cobras used the different color baggies in an attempt to show the consistent quality of its narcotics.

¹²⁴ *Mickey Cobras Complaint*, *supra* note 13, at 90–91.

¹²⁵ *Id.* at 91.

¹²⁶ *See id.* at 90–91.

¹²⁷ 15 U.S.C. § 1127 (2006).

¹²⁸ *See Mickey Cobras Complaint*, *supra* note 13, at 90–91.

¹²⁹ *Id.*

¹³⁰ *Mickey Cobras Complaint*, *supra* note 13, at 90–91.

¹³¹ MCCARTHY, *supra* note 11, at § 3:9.

¹³² *Id.*

¹³³ *See id.*

¹³⁴ *See Mickey Cobras Complaint*, *supra* note 13, at 90–91 (describing a conversation between Mickey Cobra members who were disturbed about a new drug dealer in the Dearborn Homes with similar drug packaging).

¹³⁵ *Compare Mickey Cobras Complaint*, *supra* note 13, at 44 (describing the low level of heroin sold by one member of the Mickey Cobras) *with Gangster Disciples Complaint*, *supra* note 13, at 13–14 (stating that the Gangster Disciples distributed good-quality narcotics).

¹³⁶ Plea Agreement at 7–8, *United States v. Austin*, No. 06-CR-0451 (N.D. Ill. filed Sept. 20, 2007) [hereinafter *Austin Plea Agreement*].

¹³⁷ *See id.* at 7.

¹³⁸ *See id.* Despite his efforts, Austin later learned that his own heroin lines, “Penicillin” and “Reaper,” contained the fentanyl and caused at least one of the deaths. *Id.* at 9.

Finally, the Mickey Cobras used the different color baggies to establish good will with its customers. For example, the extremely popular “Penicillin” and “Reaper” heroin lines produced sales between \$20,000 and \$30,000 per day.¹³⁹ These profits remained steady for seven consecutive years.¹⁴⁰ Based on these facts, an inference emerges that the Mickey Cobras established good will with drug users in the area.¹⁴¹ A high volume of sales over a long period of time indicates that the drug users in the area returned to the Mickey Cobras to purchase heroin in black or green baggies.

The Gangster Disciples used its blue devil mark for the same purposes.¹⁴² A confidential witness expressly stated that Freeman used this mark to indicate that he supplied the narcotics.¹⁴³ The witness’s statement supports the premise that Freeman intended that the mark distinguish his narcotics from a competitor’s narcotics.¹⁴⁴ Additionally, the statement supports the “single source” purpose of trademarks.¹⁴⁵

Another confidential witness stated that Freeman sold good quality narcotics, which became popular among drug users in the area.¹⁴⁶ As a result, sales declined for other drug dealers in the Cabrini-Green area.¹⁴⁷ Freeman’s blue devil mark signified a higher-quality product.¹⁴⁸ Thus, Freeman established good will with drug users in the area and had repeat customers.¹⁴⁹

B. Current Criminal Trademark Law is Inadequate

Under the TCA, an offending mark must mimic an already established mark to warrant criminal punishment.¹⁵⁰ As such, the government could not prosecute the Mickey Cobras and Gangster Disciples under the TCA, the only criminal trademark provision in federal law.¹⁵¹ These street gangs do not wish for their trademarks or trade dress to cause any confusion or to be deceptive.¹⁵² In fact, the intent of their

¹³⁹ Plea Agreement at 3, United States v. Williams, No. 06-CR-0451 (N.D. Ill. Sept. 24, 2007) [hereinafter *Williams Plea Agreement*]. But see *Austin Plea Agreement*, *supra* note 136, at 4 (stating that the “Penicillin” and “Reaper” lines made generally \$10,000 to \$15,000 per day).

¹⁴⁰ *Williams Plea Agreement*, *supra* note 139, at 3 (“Between 1999 and 2005, the ‘Reaper’ and ‘Penicillin’ lines were making as much as \$20,000 to \$30,000 per day.”).

¹⁴¹ See *id.*; *Austin Plea Agreement*, *supra* note 136, at 3–4.

¹⁴² *Gangster Disciples Complaint*, *supra* note 13, at 9.

¹⁴³ *Id.*

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ *Id.* at 13–14.

¹⁴⁷ *Id.* at 14; see also *Gangland: Gangster City*, *supra* note 42 (where a former member of the Gangster Disciples stated that if his cocaine was of better quality than a competitor’s, he was going to get the sale).

¹⁴⁸ See *Gangster Disciples Complaint*, *supra* note 13, at 13–14.

¹⁴⁹ See *id.*

¹⁵⁰ See 18 U.S.C. § 2320(a)(1) (2006) (“Whoever; intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark . . . , *the use of which is likely to cause confusion, to cause mistake, or to deceive . . .*”) (emphasis added).

¹⁵¹ See 15 U.S.C. § 1052(a) (2006); 18 U.S.C. § 2320(a)(1) (2006); 21 U.S.C. §§ 843(a)(5), (c) (2006).

¹⁵² See *Mickey Cobras Complaint*, *supra* note 13, at 90–91.

marks is *to be distinctive* from other local drug dealers.¹⁵³ Therefore, it would be futile to prosecute these gangs under the TCA because the marks are not counterfeit, and do not create a likelihood of consumer confusion.¹⁵⁴

C. Distinguishing the Mongols Case

In the Mongols case, the U.S. Attorney has sought to forfeit the gang's registered marks.¹⁵⁵ While this approach may appear to be a feasible solution to combating the use of trademarks by criminal organizations, several key differences exist between the Mongols' case and the Mickey Cobras' and Gangster Disciples' cases. Because of these differences, the government's solution in the Mongols' case would prove inadequate not only in the latter two scenarios, but also in most drug prosecutions where a criminal uses a trademark.

The Mongols registered its marks, as the organization purported to be engaged in legitimate and legal activities.¹⁵⁶ The Mickey Cobras' and Gangster Disciples', on the other hand, are purely criminal organizations, and under 15 U.S.C. § 1052(a), were barred from registering their marks.¹⁵⁷ While a mark owner does not need to register the mark for it to be valid,¹⁵⁸ by registering it, the owner asserts its exclusive right to use the mark in commerce.¹⁵⁹ Thus, by registering its marks, the Mongols asserted this right, while the Mickey Cobras and the Gangster Disciples could never assert this right. In seeking the forfeiture of the MONGOLS service mark, the government is attempting to restrict this right.¹⁶⁰ Because the Mickey Cobras and Gangster Disciples cannot assert this right by registering their marks, the government cannot restrict the right through forfeiture.

Based on the preceding discussion, the current law is inadequate to address the Mickey Cobras' and Gangster Disciples' cases. To be effective, any solution to this problem needs to address all scenarios where a criminal organization uses a mark for its benefit.

¹⁵³ *See id.*

¹⁵⁴ *See* 18 U.S.C. § 2320(a)(1) (2006).

¹⁵⁵ *Mongols Indictment*, *supra* note 14, at 173.

¹⁵⁶ *See* M.C., U.S. Trademark No. 3076731 (filed Apr. 15, 2005); MONGOLS, U.S. Trademark No. 2916965 (filed July 28, 2003).

¹⁵⁷ *See* 15 U.S.C. § 1052(a) (2006) ("No trademark . . . shall be refused registration on the principal register on account of its nature unless it consists of or comprises immoral, deceptive, or scandalous matter").

¹⁵⁸ *E.g.*, *In re Int'l Flavors & Fragrances, Inc.*, 183 F.3d 1361, 1366 (Fed. Cir. 1999) (stating that a trademark becomes valid through its prior use, and not its registration); *Gilbert/Robinson, Inc. v. Carrie Beverage-Missouri, Inc.*, 989 F.2d 985, 991 (8th Cir. 1993) (stating that "a trademark registration of itself *does not create the underlying right to exclude*. Nor is a trademark created by registration The Lanham Act protects unregistered marks as does the common law.") (quoting *San Juan Prods., Inc. v. San Juan Pools, Inc.*, 849 F.2d 468, 474 (10th Cir. 1988)).

¹⁵⁹ 15 U.S.C. § 1072 ("[r]egistration of a mark on the principle register . . . shall be constructive notice of the registrant's claim of ownership thereof.")

¹⁶⁰ *See Mongols Indictment*, *supra* note 14, at 173.

III. PROPOSAL

Two possible workable solutions could combat the use of trademarks by criminal organizations. First, Congress could enact a statute making it a criminal offense to use a trademark during the commission of a crime.¹⁶¹ Second, the U.S. Sentencing Commission could enact a sentencing enhancement for using a trademark during the commission of the crime.¹⁶² It is also feasible to enact both measures concurrently. This section proposes both solutions.

A. *Solution One: Enact a Statute*

To enact a criminal statute, Congress must have jurisdiction to do so.¹⁶³ Next, the drafters should specify an appropriate mens rea for the offense.¹⁶⁴ Then, the drafters must clearly describe the conduct the statute purports to prohibit in order to prevent the court from finding the statute “void for vagueness.”¹⁶⁵ Finally, the drafters must specify a punishment for violating the offense.¹⁶⁶ This subsection suggests a statute that meets these criteria and describes some of the characteristics of the proposed statute.

1. *Congress has Jurisdiction to Enact the Statute*

Congress bases many federal criminal laws on the Constitution’s Commerce Clause.¹⁶⁷ Congress can use that same jurisdictional basis for enacting this statute.¹⁶⁸ The Supreme Court has upheld laws prohibiting the sale of narcotics

¹⁶¹ See *infra* Section III.A.

¹⁶² See *infra* Section III.B.

¹⁶³ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“The Constitution creates a Federal Government of enumerated powers.”); THE FEDERALIST NO. 45 (James Madison) (“The powers delegated by the proposed Constitution to the federal government are few and defined.”).

¹⁶⁴ *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952) (finding that even though Congress did not expressly provide for a mens rea element in a criminal statute, such an omission, “will not be construed as eliminating that element from the crimes denounced.”).

¹⁶⁵ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (stating that, “the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”).

¹⁶⁶ See, e.g., 18 U.S.C. § 711 (2006) (proscribing a fine and/or a term of incarceration not to exceed six months for knowingly using the character “Smokey Bear” for profit); 18 U.S.C. § 2196 (2006) (proscribing a term of imprisonment not to exceed one year for a sailor who neglects his duties because he is intoxicated).

¹⁶⁷ See U.S. CONST. art. 1, § 8, cl. 3; e.g., 21 U.S.C. §§ 841(a)(1), 844(a) (2006) (assuming enactment under the Commerce Clause as noted in *Gonzales v. Raich*, 545 U.S. 1, 22 (2005)); 18 U.S.C. § 1951(a) (2006) (found constitutional under the Commerce Clause in *United States v. Pearson*, 159 F.3d 480, 483 (10th Cir. 1998), *United States v. Einfeldt*, 138 F.3d 373, 379 (8th Cir. 1998), and *United States v. Robinson*, 119 F.3d 1205, 1208 (5th Cir. 1997)).

¹⁶⁸ See U.S. CONST. art. 1, § 8, cl. 3.

against jurisdictional challenges.¹⁶⁹ If the Commerce Clause covers the good being distributed, surely the trademark affixed to the good would be covered as well. Additionally, Congress passed the Lanham Act pursuant to its Commerce Clause authority.¹⁷⁰ The use of a trademark on such items would, therefore, fall under the same jurisdictional basis, giving Congress the right to enact such a statute.¹⁷¹

2. *The Text of the Statute*

The statute would fit appropriately into Title 18 of the United States Code with the following text:

Whoever,

(a) intentionally affixes a trademark or service mark to any illegal good, so as to be used in the sale or marketing of the illegal good, or

(b) sells or distributes any illegal good knowing that a trademark or service mark is affixed to the illegal good, shall be fined not more than \$50,000 or imprisoned not more than two years or both.

As used in this section, the term “illegal good” shall mean any good described in 21 U.S.C. § 841 (a law against the possession and distribution of controlled substances), 18 U.S.C. § 2320(a)(1) (a law against the importation and sale of counterfeit items), and 18 U.S.C. § 1084(a) (a law against online gambling).

As used in this section, the term “trademark” includes any word, name, symbol, or device, or any combination thereof used by a person to identify and distinguish his or her illegal goods from those manufactured or sold by others and to indicate the source of the illegal goods, even if that source is unknown. Nothing in this section shall require that the trademark be likely to cause confusion, mistake, or to deceive.

As used in this section, the term “service mark” means any word, name, symbol, or device, or any combination thereof used by a person to identify and distinguish the illegal services of one person from the illegal services of others and to indicate the source of the illegal services, even if that source is unknown. Nothing in this section shall require that the service mark be likely to cause confusion, mistake, or to deceive.

a. *The Mens Rea*

¹⁶⁹ *E.g., Gonzales*, 545 U.S. at 22 (“[W]hen it enacted comprehensive legislation to regulate the interstate market in a fungible commodity [narcotics], Congress was acting well within its authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce . . . among the several States.’”) (quoting U.S. CONST. art. 1, § 8, cl. 3).

¹⁷⁰ *See Philco Corp. v. Phillips Mfg. Co.*, 133 F.2d 663, 668 (7th Cir. 1943) (“[W]e believe it is clear that Congress has the power to legislate upon the substantive law of trade-marks. . . . [W]e believe that the effect of trade-marks on interstate commerce is sufficient for them to be regarded as instrumentalities or agencies of such commerce.”).

¹⁷¹ *See* U.S. CONST. art. 1, § 8, cl. 3.

The appropriate mens rea for the statute must be “intentionally.”¹⁷² The TCA, for example, prohibits similar conduct, and uses the mens rea of “intentionally.”¹⁷³ Laws prohibiting the sale of narcotics similarly have a mens rea of “intentionally.”¹⁷⁴ Thus, “intentionally” is the appropriate mens rea for the statute.¹⁷⁵

b. The Actus Reus

The act of affixing a trademark or service mark, or selling an illegal good with a trademark or service mark affixed to it are the actus reus of the statute.¹⁷⁶ Congress will need to clearly define the term “illegal good” to avoid confusion, irrational and inconsistent judicial interpretation, and a “void for vagueness” problem.¹⁷⁷ The clearest way to define the term is to incorporate other statutes that criminalize the use, possession, or distribution of an item.¹⁷⁸ This way, courts and Congress would have already defined and interpreted every “illegal good” under the statute, leaving the term unambiguous.¹⁷⁹ Therefore, the statute would be narrow and focused on the precise act that the law seeks to prohibit.

Congress will also need to clearly define the term “trademark.” A mark on an illegal good does not need to create a likelihood of confusion for an individual to commit the crime.¹⁸⁰ Instead, all an individual needs to do to violate the statute is use a source identifier on an illegal good.¹⁸¹ Finally, Congress should add the statute to the list of RICO predicate acts.¹⁸² The goal of RICO is to punish criminal organizations as a whole for the crimes they commit.¹⁸³ Because criminal organizations routinely use trademarks to sell narcotics, it would be appropriate to characterize such an act as a predicate offense to show a pattern of racketeering

¹⁷² BLACK’S LAW DICTIONARY 883 (9th ed. 2009) (“Intentional” means “[d]one with the aim of carrying out the act.”).

¹⁷³ 18 U.S.C. § 2320(a)(1) (2006) (“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 . . .”) (emphasis added).

¹⁷⁴ 21 U.S.C. § 841(a) (2006) (“[I]t shall be unlawful for any person knowingly or *intentionally* . . .”) (emphasis added).

¹⁷⁵ See 18 U.S.C. § 2320(a)(1) (2006); 21 U.S.C. § 841(a) (2006).

¹⁷⁶ See *supra* Section III.A.2.

¹⁷⁷ *E.g.*, Kolender v. Lawson, 461 U.S. 352, 357 (1983).

¹⁷⁸ See, *e.g.*, 21 U.S.C. § 844(a) (2006) (criminalizing possession of controlled substances).

¹⁷⁹ See, *e.g.*, *id.*

¹⁸⁰ *Cf.* 18 U.S.C. § 2320(a)(1) (2006) (requiring that the offending items cause a likelihood of confusion) The proposed statute would not require such an element because the marks on the narcotics are not meant to cause confusion, but only to act as a source identifier.

¹⁸¹ See, *e.g.*, *Gangster Disciples Complaint*, *supra* note 13, at 9 (stating that the Gangster Disciples use the blue devil marks to distinguish their narcotics from other drug dealers).

¹⁸² See 18 U.S.C. § 1961(1). RICO uses predicate acts to define what constitutes “racketeering activity,” an element of the substantive RICO criminal offense. *Id.* In RICO, Congress used statutes describing other crimes to define what a predicate act is. *Id.* RICO predicate acts are crimes that criminal organizations typically engage in, including, for example: sports bribery, the transmission of gambling information, money laundering, producing counterfeit items, and forging immigration papers. See *id.*

¹⁸³ Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

activity under RICO.¹⁸⁴ In essence, making the violation of the proposed statute a RICO predicate would give prosecutors another tool in the shed in the War on Drugs against criminal organizations.¹⁸⁵

This statute gives fair notice to criminals of the prohibited conduct by narrowly defining “illegal good.” At the same time, it gives the term “trademark” a broad enough definition to allow for successful prosecution of the offense. Therefore, the statute would successfully punish criminal organizations and individuals that use trademarks for their benefit.

B. Solution Two: Create a Sentencing Enhancement

A second solution would be to make the use of a trademark during the commission of a crime eligible for judicial consideration during sentencing.¹⁸⁶ Section 2D1.1(b) of the United States Sentencing Guidelines (“Guidelines”) provides numerous enhancements for drug crimes based on specific offense characteristics.¹⁸⁷ Generally, if certain conduct makes the commission of a drug crime easier for the offender that conduct is subject to an increased sentencing level under the guidelines.¹⁸⁸ Under this proposed sentencing enhancement, the government would seek to punish those who sell narcotics with an intent to create a distinguishable brand name using a more elaborate business model than the normal “back-alley” drug-dealer.¹⁸⁹

A provision in the Guidelines increasing the base offense level for using a trademark during the commission of a drug offense would fit nicely into the same section. Such a provision could read as follows:

(12) If the defendant used a trademark, service mark, or any other type of source identifier to assist in the distribution of a controlled substance, increase by 2 levels.

This enhancement will punish an offender who uses a trademark similarly to how the Guidelines punish other offense-specific conduct.¹⁹⁰ Thus, the two-level

¹⁸⁴ See, e.g., *Gangster Disciples Complaint*, *supra* note 13, at 9; *Mickey Cobras Complaint*, *supra* note 13, at 6; *United States v. Loera*, 565 F.3d 406, 409 n.2 (7th Cir. 2009); *Torres v. Girdich*, No. 04 Civ. 1512, 2006 WL 1230328, at *2 (S.D.N.Y. 2006).

¹⁸⁵ See 18 U.S.C. § 1961(1).

¹⁸⁶ See, e.g., U.S. SENTENCING GUIDELINES MANUAL, § 2D1.1(b) (2009).

¹⁸⁷ See, e.g., *id.* § 2D1.1(b)(1)–(10).

¹⁸⁸ See, e.g., *id.* § 2D1.1(b)(1) (increasing the base offense level by two if a firearm was in the defendant’s possession when he/she committed the crime); *id.* § 2D1.1(b)(2) (increasing the base offense level by two if the defendant used a non-commercial aircraft to transport narcotics or piloted an aircraft that was carrying drugs); *id.* § 2D1.1(b)(6) (increasing the base offense level by two if the defendant mass-marketed a controlled substance over the internet).

¹⁸⁹ See, e.g., *id.* § 2D1.1(b)(1)–(10).

¹⁹⁰ *Id.* § 2D1.1(b). All of the following specific offense characteristics result in a two level increase: possessing a dangerous weapon, using a non-commercial aircraft to traffic narcotics, piloting an aircraft to traffic narcotics, distributing narcotics inside a prison, importing or manufacturing methamphetamine, using the internet to mass-market a controlled substance, distributing an anabolic steroid with a masking agent, distributing an anabolic steroid to an athlete,

increase is appropriate, presumably as effective as the other level increases in § 2D1.1(b) of the Guidelines, and should be implemented.¹⁹¹

C. Potential Counterarguments

Three counterarguments exist that opponents to these proposals could make. The first issue could arise during the investigative process. The second could crop up during any subsequent prosecution. The third counterargument is that the “real-offense” sentencing procedure in the Guidelines is problematic.¹⁹² These counterarguments, however, should not override the need to punish criminal organizations that benefit from the use of trademarks.

The first counterargument is that deterring this activity would hinder law enforcement’s efforts to combat criminal organizations trafficking narcotics. For example, the police may find narcotics with a trademark on them.¹⁹³ Detectives can then use this trademark to track down the source of the narcotics.¹⁹⁴ By taking the identifying mark away, these investigations could become more difficult. The core tools law enforcement uses to investigate these organizations, however, are wiretaps, confidential informants, and undercover officers.¹⁹⁵ These traditional tools would maintain their effectiveness.¹⁹⁶ Thus, deterring the use of trademarks by criminal organizations should not substantially impair investigations by law enforcement.¹⁹⁷

If enacted, these proposals could also raise a new defense for defendants at trial. Sometimes, when one gang puts a trademark on its narcotics, and it becomes popular with drug users, another gang might put the same trademark on its product (*i.e.*, trademark infringement in the criminal world). At trial, a defendant being prosecuted under the proposed statute could claim that the drugs are not his, but are a “counterfeit.” Once again, however, the traditional forms of investigating these

and selling a “date-rape” drug over the internet knowing such a sale would result in a sexual assault. *Id.* § 2D1.1(b)(1)–(10)(A),(B). Other more serious offense characteristics result in higher level increases. *Id.* § 2D1.1(b)(10)(C)–(D).

¹⁹¹ *See, e.g., id.* at § 2D1.1(b)(1)–(10).

¹⁹² David Yellen, *Reforming the Federal Sentencing Guidelines’ Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 272 (2005).

¹⁹³ *See generally* AMERICAN GANGSTER, *supra* note 1 (showing how law enforcement found a baggie of heroin with the “Blue Magic” trademark on it, and then searched for the distributor of Blue Magic, who it eventually found to be Frank Lucas).

¹⁹⁴ *See id.*

¹⁹⁵ *See, e.g., United States v. Loera*, 565 F.3d 406, 408 (7th Cir. 2009) (stating that the DEA used an undercover agent and an informant to investigate and arrest the defendant); *Gangster Disciples Complaint*, *supra* note 13, at 8–10, 20–21 (describing information divulged by a confidential witness and the court-authorized wiretaps that the ATF used to investigate the Gangster Disciples); *Mongols Press Release*, *supra* note 78 (stating that eight ATF agents went undercover to investigate the Mongols).

¹⁹⁶ *See Loera*, 565 F.3d at 408; *Gangster Disciples Complaint*, *supra* note 13, at 8–10, 20–21; *Mongols Press Release*, *supra* note 78.

¹⁹⁷ *See Loera*, 565 F.3d at 408; *Gangster Disciples Complaint*, *supra* note 13, at 8–10, 20–21; *Mongols Press Release*, *supra* note 78.

organizations (wiretaps, confidential informants, and undercover officers) would override any possible defense.¹⁹⁸

Finally, some might maintain that offense-specific sentencing enhancements are too rigid, and do not give judges enough discretion to order an appropriate sentence in every case.¹⁹⁹ This fear is alleviated, however, by the Supreme Court's decision in *U.S. v. Booker*.²⁰⁰ In that case, the Court held that under the Sixth Amendment, Congress cannot require judges to sentence within the Guideline range.²⁰¹ Therefore, judges are not bound by the "rigidity" of the Guidelines; but instead, can use them as a tool during the sentencing phase of trial.²⁰²

CONCLUSION

Criminal organizations routinely use trademarks to market and sell illegal narcotics.²⁰³ They benefit from this activity in the same way law-abiding organizations do. Furthermore, they do so without fear of any additional punishment if caught. The time has come for Congress and the U.S. Sentencing Commission to enact provisions to combat this activity and prevent criminal enterprises from benefiting from the use of trademarks.

¹⁹⁸ See, e.g., *Loera*, 565 F.3d at 408; *Gangster Disciples Complaint*, *supra* note 13, at 8–10, 20–21; *Mongols Press Release*, *supra* note 78.

¹⁹⁹ See Yellen, *supra* note 192, at 272 (“The federal approach to real-offense sentencing has been widely and severely criticized as overly complex, rigid, and unfair. It is striking that no other structured-sentencing system has adopted similar policies.”).

²⁰⁰ *U.S. v. Booker*, 543 U.S. 220, 258 (2005).

²⁰¹ *Id.*

²⁰² See *id.*; 18 U.S.C. § 3553(a)(4)(A) (2006) (“The court, in determining the particular sentence to be imposed, shall consider . . . the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .”).

²⁰³ See, e.g., *Gangster Disciples Complaint*, *supra* note 13, at 9; *Mickey Cobras Complaint*, *supra* note 13, at 6; *Loera*, 565 F.3d at 409 n.2; *Torres v. Girdich*, No. 04 Civ. 1512, 2006 WL 1230328, at *2 (S.D.N.Y. May 9, 2006).