



TRIPs Baseline

- Art. 41(1) *Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.*



Nature of IP Crime

- Economic crime
- Hard to detect and prove
- Cross-border
- Facilitated by Internet and digital technology
- Extends over time - hard to sentence



PoC – a developing international policy

- “It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential. The provisions of the 1988 Act are aimed at depriving such offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises. These objectives reflect not only national but also international policy.” *R v Rezvi [2003] 1 AC 1099*, per Lord Steyn



MailOnline

Father and sons ordered to pay back £1m from Britain's biggest ever DVD pirating racket worth £7m

- Trio made millions from counterfeiting operation while signing on the dole
- Court orders them to cough up - or face having their jail terms extended

By KERRY MOQUEENY

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13 View Comments

They raked in a massive £7million from what was described as the largest DVD pirating racket ever seen in this country.

However, a father and his two sons behind an 'industrial scale' counterfeiting operation have been ordered to pay back £1 million of the spoils made from their criminal enterprise.

Khalid Sheikh, 55, and his children Rafi, 29, and 30-year-old Sami, netted millions by churning out hundreds of thousands of illegal copies of blockbuster films while signing on the dole.

The trio lived a life of luxury buying sports cars and jetting off to the Far East on the back of their pirating operation, which was run from a warehouse in Harlow, Essex.



Proceeds of Crime and IP crime

PROTECTING IP FOR 30 YEARS

- HOME
- NEWS
- ABOUT FACT
- CONTENT THEFT
- INTERNET SAFETY
- RESOURCES
- REPORT IT
- FACT CERTIFICATION
- HOW TO STAY LEGAL
- PARTNERS
- REAL DEAL
- GLOSSARY OF TERMS

£213,000 in criminal assets seized from counterfeiter

Posted on January 16, 2014

Criminal assets worth £213,166.00 have been taken during a Proceeds of Crime of Crime confiscation proceeding after a large-scale, international counterfeiting operation was uncovered.

Lebanese Crown Court on 13 January took the criminal assets from Mr Kim Man Chan after being presented last year by Central Bedfordshire Council for his part in the online counterfeit DVD business. The Court said he had benefited from criminal activity to the tune of £321,367.89.

Mr Kim Man Chan, 45, of The Highway, Stannemore, London pleaded guilty to conspiracy to supply counterfeit goods in 2012 after a joint criminal and financial investigation began in 2010.

Last year's investigation, undertaken in conjunction with the Federation Against Copyright Theft (FACT), revealed that payments amounting to hundreds of thousands pounds were being made via PayPal to an internet sales website offering film, gaming and music products.

After the proceedings, Councillor Brian Spurr, Executive Member for Sustainable Communities, Services at Central Bedfordshire Council said: "This joint investigation by our Trading Standards team and Financial Investigation Unit and FACT has been going on for some time and we're extremely pleased that together we were able to put a stop to this."





PoC – a developing international policy

- **UN Convention against Illicit Traffic in Narcotic Drugs & Psychotropic Substances** (Vienna, 1988)
- **Council of Europe Convention on Laundering, Search, Seizure & Confiscation of the Proceeds of Crime** (1990)
- **UN Convention against Transnational Organized Crime** (Palermo, 2000)
- **UN Convention against Corruption** (Merida, 2003)

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PoC – a developing international policy

- **Financial Action Task Force** - IGO set up in 1989: sets standards (FATF Forty Recommendations) and promotes effective implementation.
- 36 members (inc. RSA), 8 associate members (including regional *Caribbean Financial Action Task Force (CFATF)*).
- CFATF founded 1990 – its 27 members participate in self-assessment process to assess progress in implementing the FATF Forty Recommendations. Secretariat located in Port of Spain, Trinidad and Tobago.

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Members of the Caribbean Financial Action Task Force (CFATF)

Anguilla	Dominica	Saint Kitts and Nevis
Antigua and Barbuda	Dominican Republic	Saint Lucia
Aruba	El Salvador	Saint Vincent and the Grenadines
Barbados	Grenada	Sint Maarten
Belize	Guatemala	Suriname
Bermuda	Guyana	The Bahamas
Cayman Islands	Haiti	Trinidad and Tobago
Curacao	Jamaica	Turks and Caicos Islands
	Montserrat	Venezuela
		Virgin Islands

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Anti-Counterfeiting Trade Agreement (Tokyo, 2011)



5. With respect to the [stipulated offences] for which a Party provides criminal procedures and penalties, that Party may provide that its judicial authorities have the authority to order:

- (a) the seizure of assets the value of which corresponds to that of the assets derived from, or obtained directly or indirectly through, the allegedly infringing activity; and
- (b) the forfeiture of assets the value of which corresponds to that of the assets derived from, or obtained directly or indirectly through, the infringing activity.

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Proceeds of Crime - concepts

- Scope and application to IP
- Remedies
- Possession offence
- Issues
- International reach/Mutual assistance

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Palermo Convention: Scope (Article 3(1))

- Applies to money laundering offences and 'serious crime':
 - 'Conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty' (Art. 2(b))
- 'Involves an organized criminal group':
 - 'structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other benefit' (Art. 2(a))
- 'Where the offence is transnational in nature':
 - Offence is committed in more than one State; or substantial preparation, planning, direction or control or involves OCG or has 'substantial effects' in another State (Art. 3(2))

Restraint and confiscation

- Before trial, court can freeze or seize proceeds or any property into which they have been converted, in whole or part, (Art. 12(3))
- Restraint order – *ex parte* order to restrain dealing with property where a person has been (or is about to be) charged with a relevant offence.
- Court can confiscate proceeds of crime **or other property** the value of which corresponds to their value (Art. 12(1)(a))
- May apply non-conviction based confiscation (FATF Rec. 4)

Restraint and confiscation

- 'Confiscation' is misleading: the order is to pay a sum of money to the State – the proceeds may no longer exist.
- Quantification of benefit:
 - Member States may reverse burden of proof (Art. 12(7))
 - Usually a statutory presumption that property held at conviction (sometimes also property transferred to defendant in a preceding period of several years) is proceeds of crime (Belize: 6 years; Jamaica: 10 years in certain cases).

Palermo Convention: Basic offence

- Subject to basic concepts of their legal systems, States must criminalise 'the acquisition, possession or use of property, knowing at the time of receipt, that such property is the proceeds of crime' (Art. 6(b))
- 'Proceeds of crime': 'any property derived from or obtained, directly or indirectly, through the commission of an offence' (Art. 2(e))
- Predicate offence (e.g., copyright piracy) can have taken place abroad, if the conduct would be a domestic offence (Art. 6(2)(c))
- If required by fundamental principles of its domestic law, State may provide that ML offences do not apply to predicate offender (Art. 6(2)(e))

Jamaica: Proceeds of Crime Act, 2007 (as amended)

- S. 93. (1) Subject to [statutory defences], a person commits an offence if that person acquires, uses or has possession of criminal property and the person knows or has reasonable grounds to believe that the property is criminal property.
- 'criminal property': 'property is criminal property if it constitutes a person's benefit from criminal conduct or represents such a benefit, in whole or in part and whether directly or indirectly (and it is immaterial who carried out or benefitted from the conduct)' (s. 91(1)(a))
- 'criminal conduct': '(a) conduct which constitutes an offence in Jamaica; (b) occurs outside of Jamaica and would constitute such an offence if the conduct occurred in Jamaica' (s. 2(1))
- Maximum penalty: imprisonment 20 years/fine \$3m (s. 98(1))

Antigua and Barbuda Proceeds of Crime Act 13/1993//3/2014

- to deprive persons of the proceeds of, and the benefits derived from, the commission of scheduled offences;
- forfeiture of property used in, or in connection with, or for the purpose of facilitating the commission of scheduled offences;
- forfeiture of property derived, directly or indirectly from the commission of scheduled offences:
- confiscation orders
- enable law enforcement authorities to trace such proceeds, benefits and property.

What are 'proceeds of crime'?

- **Palermo Convention: Article 2(e)**: "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence'
- **R. v GH [2015] UKSC 24**: Money obtained by crime from the victim is possessed as 'criminal property' once in the hands of the criminal (fraudulent insurance web site).
- **Shaikh v RSA [2008] ZACC 7**: In South Africa, 'proceeds' are receipts resulting from the crime, without giving credit for expenses incurred to obtain the receipt.
- **R. v May [2008] UKHL 28; HKSAR v Li Kwok Cheung FACC 4/2013**: But there is room for argument how substantive the benefit must be: an intermediary paid a fee or commission may benefit only to extent of fee.
- **R. v Loizou [2005] 2 Cr App R 618**: Money intended to be used in crime is not *per se* 'criminal property' (purchase money for contraband) (NB: forfeitable as an instrumentality?).

Prosecutorial approach to self-laundering

- **R. v GH [2015] UKSC 24**
- 'It would be bad practice for the prosecution to add additional counts of [possession of criminal property etc] unless there is a proper public purpose in doing so, for example, because there may be doubt whether the prosecution can prove that the defendant was the thief but it can prove that he concealed what he must have known or suspected was stolen property, or because the thief's conduct involved some added criminality not just as a matter of legal definition but sufficiently distinct from the offence that the public interest would merit it being charged separately.'
- 'The courts should be willing to use their powers to discourage inappropriate use of the provisions of POCA to prosecute conduct which is sufficiently covered by substantive offences.'
- **[NB]**: post-conviction confiscation orders are a separate matter.]

Sentencing

R. v Greaves [2010] EWCA Crim 709

- Where same offender, no additional penalty if the conduct involved in the ML offence adds nothing to the culpability of the conduct in the primary offence.
- Where the conduct involved in the ML offence adds to the culpability of the primary offence, additional penalty was appropriate.
- If ML offence merited it, its sentence could add to that for the primary offence bringing it above the maximum for the latter, and it might, if appropriate, itself exceed the maximum for the latter.

Palermo Convention: Inter-State Cooperation

- **International cooperation for purposes of confiscation (Art. 13)**

State with jurisdiction may request another Convention State to confiscate or freeze with a view to confiscation proceeds of crime, property, equipment or other instrumentalities.

- **Mutual legal assistance (Art. 18)**

Where reasonable grounds to suspect a relevant offence is transnational and involves an organized criminal group, investigating State may request another Convention State to take evidence, serve judicial documents, carry out searches, seizures and freezing, examine objects and sites, provide information, trace proceeds etc, facilitate voluntary appearances.

- **Extradition (Art. 16)**

For ML offences; or 'serious crimes' with OCG involved.



- For more information: 'Policy responses to the involvement of organized crime in intellectual property offences', WIPO 2009

http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_5.pdf