

The level of penalties has to be comparable to those for crimes of a corresponding gravity.

TRIPS does not identify them.

It is left to member countries.

Comparable crimes are commercial crimes such as fraud.

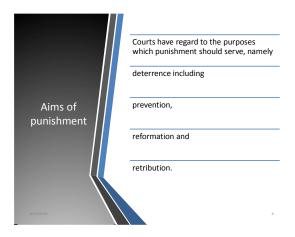
Sentence levels and sentencing attitudes differ from society to society.

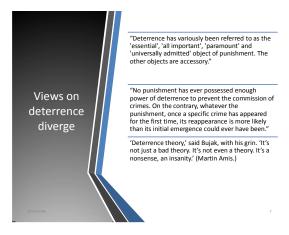
It is impossible to make any sensible comparisons to draw any meaningful conclusions.

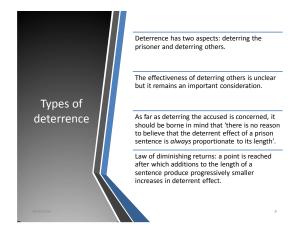
"At present maximum fines for violating intellectual property rights range from £586 in Greece to £67,000 in Holland. Maximum prison sentences range from three months in Greece to 10 years in Britain."

"Sufficient to provide a deterrent"

Debatable proposition







### Judicial approach to sentencing



What has to be considered is the triad consisting of

- the crime,
- · the offender and
- · the interests of society.

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# The deterring effect of sentences depends on the certainty of detection and conviction. Unless the police are properly equipped and able to investigate all crime within a reasonable time and bring the case to court and unless the court system is effective no sentence can have any deterrent value. A criminal commits a crime on the supposition that he will not be caught. The more realistic this supposition the more motivation there is for ignoring laws and committing crimes.

### Gary Becker's economic analysis

- Criminals respond to incentives as they weigh up the <u>costs and benefits</u> of crime.
- Increased punitive measures increase the costs of crime to criminals.
- Increasing the probability of getting caught is more effective than increasing fines or other punishment.

### **Public opinion**

- The object of sentencing is not to satisfy public opinion but to serve the public interest.
- A sentencing policy that caters for public opinion is inherently flawed.
- It remains the court's duty to impose fearlessly an appropriate and fair sentence even if it does not satisfy the public.

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### Proportionality

Voltaire said in 1766:

If the death penalty is imposed for both small and considerable thefts, it is obvious that [the offenders] will try to steal much. They may even become murderers if they believe that this is a means not to be detected. All that proves the profound truth that a severe law sometimes produces crimes!

### Proportionality II

- "Sentencing practice for trade mark crimes should not neglect the issue of proportionality.
- Too severe penalties may not deter, but even encourage counterfeiting at a larger scale (because taking the risk of harsh punishment only pays off in relation to larger operations),
- and they may undermine public respect and acceptance of trade mark and criminal law alike."

(Andreas Rahmatian)



### Proportionality

- The empirical data on norms and copyright infringement suggests that harsh sanctions, including criminal ones, may be ineffective in promoting lawful behaviour.
- Strong-armed enforcement tactics induce strong anti-copyright aversion.
- Excessive sanctions can actually prove counterproductive.
- No evidence that increasing criminal penalties encourages innovation.

(Irina D. Manta)

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# Moral culpability

- The legislative justification for severe sentences is based on the perceived harm to the public.
- But harm depends on the nature of the counterfeiting and generalizations are inapposite.
- The type of goods involved, as well as the nature and degree of deception perpetrated, should be considered.
- Level of moral culpability and economic harm perpetrated should be considered.
- The defendant who sells a \$25 "Rolex" is not in the same category as one who sells a \$25 sugar pill labelled AZT, to a sick and unsuspecting AIDS patient.

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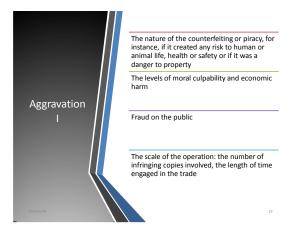
# Moral culpability

- A distinction should be drawn between the proprietors of retail outlets and warehouses to commit these offences, and the persons employed by them.
   The former should receive longer sentences than the latter.
- The roles played by storemen, packers, delivery men and salesmen may be different, but we do not see much difference between them in terms of criminal culpability.

SECRETARY FOR JUSTICE v CHOI SAI-LOK 4 HK 334 Hong Kong Court of Appeal

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The prevalence of the crimes within the jurisdiction

Difficulty of detection

The role of the accused

That the accused was the mastermind behind the operation

The financial rewards

Whether the operation was planned, its scale and complexity of the operation

The loss (actual and reputational) to the right holder

The effect of these crimes on international relations and the reputation of the country

The cost to the state

The loss of state revenue: tax, customs and excise

Repeat offences.

In mitigation of sentence:

If accused, fully, truthfully and to the best of his ability disclosed all information and particulars available to him in relation to:

The source from which the counterfelt goods were obtained;

The identity of the persons involved;

The identity and, if reasonably demanded, the addresses or whereabouts of the persons involved in the distribution; and

The channels of distribution.

Should the street value of the counterfeit goods be used or the value of the genuine goods? USA courts use the street value:

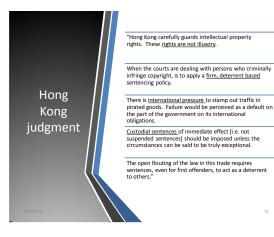
Given the context of the purchase of the items, such items could not appear to a reasonably informed purchaser to be identical or substantially equivalent to the infringed items.

The retail value does not provide an accurate assessment of the pecuniary harm to the copyright or trademark owner.'

Restitution in a criminal copyright case must reflect the copyright owner's lost profits.

The fact that a consumer purchased an infringing copy at a greatly reduced price is not sufficient, alone, to establish that the consumer would have purchased an authentic copy at full price.

US Ninth Circuit, 12/19/2013 US v. Anderson, No. 12-10344



Singapore judgment I

Infringement involves usually offenders working not merely alone, but in groups in a well organised manner.

Such concerted effort creates a greater degree of criminality.

The repercussion of criminal activity goes beyond national boundaries. The national reputation can be easily imperilled if it is perceived that the law is too lenient in dealing with offenders.

The financial incentive to commit such crimes can be great, thereby calling for a significant deterrent element.

Sweden Supreme Court 2014

- While the primary objective is to protect the rights of trade mark proprietors, when it comes to assessing a "penal value", thirdparty interests should also be considered, because trade mark infringement may both mislead and harm consumers.
- Imprisonment justified because
  - the infringement was of considerable magnitude,
  - the defendant had criminal intent,
  - the defendant was aware of the risk to third parties, and
  - the defendant's objective was clearly to benefit financially from the infringement.

Prosecutor General v CS (Case B-5484-13)

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## US Federal

Court

- F convicted in trafficking in counterfeit goods
- Sold a single counterfeit Mont Blanc.
- F openly advertised that he sold counterfeit merchandise, 'replicas', and informed each customer that his merchandise was fake.
- Customers were never misled into thinking that they were purchasing authentic merchandise.
- The court sentenced F to
  - 37 months' imprisonment,
  - three years of supervised reliance and a
  - fine of US\$104.000.

### Nigerian Copyright Commission

- Decries <u>increasing book piracy</u> in the country.
- Over the five last years, the Commission has seized about 18 containers of pirated books, which worth millions of naira.
- Several arrests have also been made and convictions secured with the twoyear jail term without option of fine.



R. v Evans [2017] EWCA Crim 139: general approach to sentencing.

R v C [2016] EWCA Crim 1617: grey goods

R v M [2017] UKSC 58: grey goods