SENTENCING AND PROPORTIONALITY

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TRIPS obligation

Member countries have to provide for remedies for counterfeiting and piracy,

- which must include imprisonment and/or monetary fines,
- sufficient to provide a deterrent,
- consistently with the level of penalties applied for crimes of a corresponding gravity.

“Crimes of a corresponding gravity”

- The level of penalties has to be comparable to those for crimes of a corresponding gravity.
- The TRIPS agreement does not state what those other crimes are and it is left to member countries to identify them.
- By the very nature of counterfeiting and piracy it is to be expected that the comparable crimes are commercial crimes such as fraud.

Sentencing levels

- Since sentence levels and sentencing attitudes differ from society to society, it is impossible to make any sensible comparisons between countries and to draw any meaningful conclusions.
- If local law provides for full sentencing discretion regard should be had to this requirement as a general guide.

Different approaches to sentencing

- Sentence levels and sentencing attitudes differ from society to society.
- If local law provides for full sentencing discretion regard should be had to this requirement as a general guide.
- 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”

- The drafters of TRIPS regarded deterrence as the main purpose of criminal sanctions.
- Debatable proposition

Aims of punishment

Courts have regard to the purposes which punishment should serve, namely

- deterrence including
- prevention,
- reformation and
- retribution.

Views on deterrence diverge

- “Deterrence has variously been referred to as the 'essential', 'all important', 'paramount' and 'universally admitted' object of punishment. The other objects are accessory.”

- “No punishment has ever possessed enough power of deterrence to prevent the commission of crimes. On the contrary, whatever the punishment, once a specific crime has appeared for the first time, its reappearance is more likely than its initial emergence could ever have been.”

Types of deterrence

- Deterrence has two aspects: deterring the prisoner and deterring others.
- The effectiveness of deterring others is unclear but it remains an important consideration.
- As far as deterring the accused is concerned, it should be borne in mind that 'there is no reason to believe that the deterrent effect of a prison sentence is *always* proportionate to its length'.
- Law of diminishing returns: a point is reached after which additions to the length of a sentence produce progressively smaller increases in deterrent effect.

Judicial approach to sentencing

What has to be considered is the triad consisting of

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

Balanced approach to sentencing

Among the faults of judges are, on the one hand, severity and, on the other, misplaced pity.

Cicero, the advocate, said:

“Let the punishment be equal with the offence.”

“Care should be taken that the punishment does not exceed the guilt.”

“Anger should be especially contained in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little.”

Certainty of detection and conviction

- 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 costs and benefits of crime.
- Increased punitive measures increase the costs of crime to criminals.
- This cost-benefit analysis is based on **expected** costs and benefits (known as expected utility).
- This associates the probability of getting caught with the costs of getting caught.
- Becker and evidence suggest that, for online copyright infringement, increasing this probability is more effective than increasing fines or other punishment.

Posted By Nicola to The IPKat on 7/29/2015

The criminal's analysis

Assume the following:

- Probability - there is a probability (p) that I will be caught and found guilty
- Costs - being found guilty costs me fines (f)
- Benefits - infringement provides me benefits and utility (U)
- Income - infringement saves me money and increases my income (y)

$$E(U) = pU(y - f) + (1 - p)U(y)$$

$E(U) > 0$ then infringe

$E(U) < 0$ then do not infringe

So, the expected utility of infringement = the probability and costs of getting caught + the probability and benefits of not getting caught.

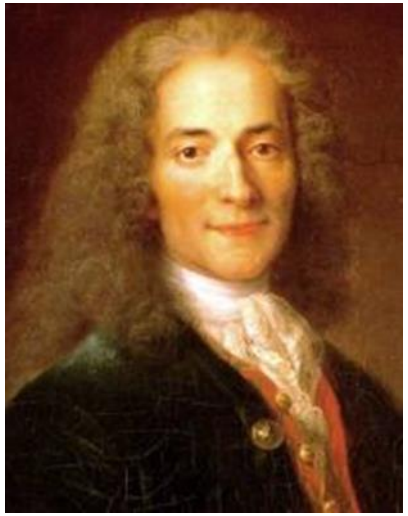
If expected utility is positive, then the infringer becomes a hardened criminal. If expected utility is negative, then the infringer stays cute and fluffy.

To nudge criminals to not infringe, you either increase *p* or *f.* That is, you either increase the likelihood they'll get caught and found guilty, or you increase the fine or 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.

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 III

- The empirical data on norms and copyright infringement suggests that harsh sanctions, including criminal ones, may be ineffective in promoting lawful behavior.
- Some studies have found that "[s]trong-armed enforcement tactics induce strong anti-copyright aversion," and therefore excessive sanctions can actually prove counterproductive.
- No evidence that increasing criminal penalties truly encourages more innovation.

(Irina D. Manta)

Moral culpability I

- 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.

Moral culpability II

- 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

Aggravation I

- The nature of the counterfeiting or piracy, for instance, if it created any risk to human or animal life, health or safety or if it was a danger to property
- The levels of moral culpability and economic harm
- Fraud on the public
- The scale of the operation: the number of infringing copies involved, the length of time engaged in the trade

Aggravation II

- 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

Aggravation III

- 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.

Mitigation

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 counterfeit 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.

Determining the value of counterfeit goods for purposes of sentencing

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 (i.e. at a flea market) and the price of the items, such items could not appear to a reasonably informed purchaser to be identical or substantially equivalent to the infringed items.
- The retail value does not provide an accurate assessment of the pecuniary harm to the copyright or trademark owner.'

Determining restitution

- Restitution in a criminal copyright case must reflect the victim's actual losses, not the defendant's gain.
- That will consist of the copyright owner's lost profits on sales that would have taken place if not for the infringing conduct.
- 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.
- Exact precision is not required and courts do have a degree of flexibility in accounting for a victim's complete losses; thus, a “reasonable estimate” will suffice.
- US Ninth Circuit, 12/19/2013 US v. Anderson, No. 12-10344

Hong Kong judgment

- “Hong Kong carefully guards intellectual property rights. These rights are not illusory.
- When the courts are dealing with persons who criminally infringe copyright, is to apply a firm, deterrent based sentencing policy.
- There is international pressure to stamp out traffic in pirated goods. Failure would be perceived as a default on the part of the government on its international obligations.
- Custodial sentences of immediate effect [i.e. not suspended sentences] should be imposed unless the circumstances can be said to be truly exceptional.
- The open flouting of the law in this trade requires sentences, even for first offenders, to act as a deterrent to others.”

Singapore judgment I

- “The criminal infringement of intellectual property rights carries a high degree of seriousness. It involves not merely the violation of the property rights of another, but generally the exploitation of that violation in order to obtain financial gain.
- The infringement is therefore generally calculated and deliberate with the intention to obtain profit from the wrongful act.
- It differs from theft or misappropriation of property because it involves not merely the defalcation of property but its further exploitation.”

Singapore judgment II.

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 as opposed to offences involving a single perpetrator.

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", third-party 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)

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.