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INTELLECTUAL PROPERTY RIGHT INFRINGEMENTS AND CRIMINAL REMEDY: A JURISPRUDENTIAL ANALYSIS

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ABSTRACT

Substantial part of global economy is now a days constituted by Intellectual Property. Thereby it has become necessary to protect intellectual property rights. The domestic government and also the international organizations have prescribed various rules and regulations for their protection. As the technology is growing there are now new ways that have evolved for the violations of intellectual property rights. This paper makes an attempt to understand that how the new crimes have evolved under the umbrella of intellectual property infringements. Then further this paper also studies that whether there can be any justification for criminal remedies for the violations of IPRs. Intellectual property owners can protect their rights by civil remedies but it is considered that the threat of civil remedies sometimes is not enough to deter the infringers. This paper enunciates on the point that whether there is justification for having criminal remedy in the cases of intellectual property rights infringement. The paper discusses that how the liberty can be curtailed for the enforcement of certain rights and thus criminal remedy can be granted in those rights violations, but the question of research in this article is how the infringement of all intellectual or some intellectual property rights can lead to criminal remedy or is it viable to have criminal remedy for them.

Keywords: *Intellectual property infringements, Criminal remedy, Global economy, Liberty, Intellectual property crimes.*

Introduction

Legal systems that initially developed in ancient civilisations did not specifically distinguish between civil and criminal law. The first signs of the modern distinction between crimes and civil matters emerged during the Norman invasion of England.[3]

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[3]Kenneth Pennington, *The Prince and the Law, 1200-1600: sovereignty and rights in the Western Legal* 76(University of Colombia Press1993).

Today, every society sufficiently developed to have a formal legal system uses the criminal-civil distinction as an organising principle. Although both criminal law and civil law are means by which the state controls externalities in the society, it holds that crimes represent injuries to society generally, while torts involve only private interests.[4]Traditionally, protection of intellectual property rights was known to be an area of law that came within the realm of civil law, i.e. only involving private interests. However, as discussed in the previous chapter, in the past two decades lawmakers have shown a greater willingness to bring the protection of intellectual property rights within the latitudes of criminal law. The first chapter also mentioned the level of criticism raised against the use of criminal law for the protection of private property rights. In this background, it is reasonable to assume that any academic discourse on the enforcement of criminal sanctions for the protection of intellectual property rights would benefit from a study that provides a plausible and coherent justification for this end. That is the very objective of this chapter. Attempts will be made in this chapter to recognise popular theories on criminalisation and identify the most comprehensive theory by a process of elimination. Thereafter, the justifiability of criminalising IPR violations will be analysed based on this identified theory. It is also important to note that scholarly analysis of criminalisation of intellectual property violation based on legal theory is deficient. Although a few authors have tangentially referred to this issue, while commenting on the protection of trade secrets, there is no substantive legal scholarship regarding the justification of criminalising intellectual property violations. Further, this chapter will also attempt to demonstrate the effect of enforcing criminal sanctions in this field. In this regard, it will highlight the manner in which criminal procedures could fit in with other available remedies for IPR protection.

Criminal Sanctions vs. Liberty

Criminal law is not a regulatory tool that could be used loosely by the state whenever it feels so. As a regulatory device, it is a bluntly coercive and a morally loaded tool, something to be used sparingly and with care.[5] Further, since coercion is an intrinsic

[4]Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, (1996) 76 Boston U.L.R. 201; Drane and Neal, *On Moral Justification for the Tort/Crime Distinction*, 68 C.A.L.I.F. L. Rev. 398.
[5]Simester and Sullivan, *Criminal Law: Theory and Doctrine*581(Hart Publications, Oxford 2007).

component of criminal law, it follows that when the state creates a criminal statute it directly intrudes upon the liberty of its citizens. The criminal law sanction represents the most severe infringement of a person's liberty in a society, and, as such, should be available only where there is clear social justification.[6]Thus, although it may appear to be appropriate to deal with a particular situation with criminal prohibitions, lawmakers should always be careful not to over-extend the iron arm of criminal law and thereby intrude upon the citizen's right to free choice and individual liberty. Discussions on the importance and the necessity of liberty in our societies have a long ancestry. Legal scholars have debated this issue extensively based on moral and political theory. Sometimes, more than the necessity, the disagreements have concentrated on the priority liberty should receive when regulating the conduct of citizens in society. Defining the theory of liberty in relation to human actions, James Fitz James Stephen explained that:

"*All voluntary acts are caused by motives. All motives may be placed in one of two categories - hope and fear, pleasure and pain. Voluntary acts of which hope is the motive are said to be free. Voluntary acts of which fear is the motive are said to be done under compulsion or omitted under restraint.*"[7]

As such, he is of the view that no one is ever justified in trying to affect anyone's conduct by exciting his fears, except under certain cases. While it is easy to overemphasise the value of liberty since it represents individual freedom as against repression of the majority, there is no denying its necessity; and for that reason, many writers have endorsed a kind of "presumption in favour of liberty". In this regard, John Stuart Mill elaborates the importance of individual liberty by stating that, "Mankind are greater gainers by suffering each other to live as seemed good to themselves, than by compelling each to live as seemed good to the rest".[8] Joel Feinberg also endorses this view when he writes: Loss of liberty both in individuals and in societies entails the loss of flexibility and greater vulnerability to unforeseen contingencies. Free citizens are likelier to be highly capable and creative persons through the constant exercise of their capacities to choose, make decisions, and

[6]*Ibid*.
[7]James Fitzjames Stephen, *Liberty, Equality, Fraternity*57(2d ed. Cambridge University Press1967).
[8]John Stuart Mill, *On Liberty* Chap. I, 27 (Oxford University Press1869).

assume responsibilities.[9] Lord Denning elaborates the responsibility of courts to safeguard liberty in stating:

"*The fundamental principle in our courts that, where there is any conflict between the freedom of the individual and any other rights or interests, then no matter how great or powerful those others may be, the freedom of the humblest citizen shall prevail.*"[10]

It is perceptible from the above sentiments of legal philosophers that liberty is expected to prevail as the norm in society and that coercion, by any means, should always require some special justification. In other words, when the legislature contemplates extending the latitudes of criminal law to prohibit a new type of action, it should be satisfied that the presumptive case for liberty could be overridden by the reasons in favour of coercion (prohibition). Therefore, in answering the question whether criminalising violations of intellectual property rights is justifiable, the primary issue that needs to be addressed is whether sufficient and cogent reasons exist to outweigh the presumptive case for liberty. In addressing this issue, the types of criteria that the legislature needs to take into consideration when extending criminal law to regulate conduct in general are identified and then used to demonstrate, on a parity of reasoning, whether violations of intellectual property rights would satisfy the commonly accepted criteria.

Criminalisation: Commonly Proposed Liberty-Limiting Principles

The decision whether a particular action or state of affairs is sufficiently serious to warrant criminalisation always involves difficult judgements and will be affected by the political values, state of development and social structure of a society.[11] Although legal writers from John Stuart Mill (1859) to Joel Feinberg (1984-1987) have emphasised the importance of the legislature maintaining parsimony in criminalising social conduct, there is no sphere of industrial, commercial or administrative activity untouched by criminal law. As a result, some writers have felt that criminal law has been constructed in an unprincipled and chaotic manner over the past 150 years,

[9]Joel Feinberg, *Harm to Others*9(Oxford University Press1984).
[10]Lord Denning, quoted in Sir. Norman Anderson, *Liberty, Law and Justice* (Stevens &Sons1978).
[11] Simester and Sullivan, supra note 4, 581.

making it almost a lost cause.[12]Referring to English criminal law, Professor Andrew Ashworth states that:

"*In the realm of description, we can affirm that the contours of English criminal law are "historically contingent" – not the product of any principled inquiry or consistent application of certain criteria, but largely dependent on the fortunes of successive governments, on campaigns in the mass media, on the activities of various pressure groups, and so forth*."[13]

In support of this claim, Professor Ashworth relies on the concluding remarks made by Glanville Williams in an article titled "The Definition of a Crime"[14], where he remarked that "there is no workable definition of a crime in English Law that is content-based: only the different procedures of criminal, as distinct from civil, cases can serve as a reliable distinguishing mark."[15] Lord Patrick Devlin also states in the 1959 Maccabaean Lecture titled "Morals and Criminal Law" that "Statutory additions to the criminal law are too often made on the simple principle that 'there ought to be a law against it'."[16] Similarly, in the American context William Stuntz observes, "American criminal law's historical development has borne no relation to any plausible normative theory – unless "more" counts as a normative theory."[17] In this background of uncertainty, identifying legitimate liberty-limiting criteria or a normative theory of criminalisation that could be applied, if not fully, yet largely to any society, becomes a challenge.

- Economic Analysis of Law

The Economic Theory of Law attempts to explain as many legal phenomena as possible using economics. According to Richard Posner:

...economics is the science of rational choice in a world – our world – in which resources are limited in relation to human wants. The task of economics, so defined,

[12]Andrew Ashworth, *Is Criminal Law a Lost Cause?*,(2000) 116 L.Q.R. 225.
[13]*Ibid*, 226.
[14]Granville Williams, *The Definition of a Crime*, (1955) C.L.P. 107.
[15]Ashworth, supra note 10.
[16] Vol. XIVMaccabaean Lecture in Jurisprudence read at the British Academy on the 18th March 1959 and printed in the proceedings of the British Academy,*The Enforcement of Morals*, quoted in Keith Culver, *Readings in Philosophy of Law* 364 8 (Broadview Press1999).
[17]William Stuntz, *The Pathological Politics of Criminal Law*, (2001) 100 Michigan Law Review 505 at 508.

is to explore the implications of assuming that man is a rational maximiser of his ends in life, his satisfactions what we shall call his "self-interest".[18]

Therefore, this theory tries to explain law as a tool for economic maximisation. This school of thought had made considerable contributions to the progression of certain branches of law.

An Economic Approach', there had been an outpouring of economic work on criminal law, concentrated in areas such as certainty and severity of punishment, economic properties of fines and imprisonment, the economics of law enforcement and criminal procedure and, above all, the deterrent and preventive effects of criminal punishment.[19] However, regarding the question of criminalisation, the significance of this movement has been deficient, until the article by Richard A. Posner in the Colombia Law Review in 1985. Although the economic analysis of law has progressed substantially from the time of Posner's important contribution, relatively little additional work on the implications of economic analysis for the substantive criminal law have been produced.[20]

According to this theory, in relation to IP it will be justifiable to criminalise trade in counterfeit and pirated goods in situations where the consumers are deceived to purchase fake goods as genuine. Such trade would bypass the system of voluntary, compensated exchange of goods in society and thereby warrant criminalisation. For example, if a consumer is deceived to purchase a pair of fake "NIKE" shoes, then this transaction is not a voluntary exchange of goods. Further, this sale has deprived the seller of genuine "NIKE" shoes a customer and hampered the operation of the market. Therefore, Economic Theory would warrant criminalising such trade in counterfeit or pirated goods. However, if the consumer purchased the pair of fake "NIKE" shoes knowing them to be counterfeit, then the question arises whether the same justification could be used for criminalisation. In this situation, a voluntary exchange has taken place between the seller and the buyer. Nevertheless, there is no issue of bypassing the market. As a result, it may not be justifiable to criminalise the sale of counterfeit goods in this situation under the Economic Theory. Therefore, it is

[18]Richard Posner, *Economic Analysis of Law*3(7d ed. Wolters Kluner Law & Business2007).
[19]Richard Posner, *An Economic Theory of Criminal Law*, (1985) 85 Colombia Law Review 1193.
[20]Husak, supra note 17.

contended that criminalising IP violations under the Economic Theory will only be justifiable in certain situations.

- Utilitarianism

The second theory of criminalisation to be explored is utilitarianism. Utilitarianism is the ethical theory that the production of happiness and reduction of unhappiness should be the standard by which actions are judged right or wrong and by which the rules of morality, laws, public policies and social institutions are to be critically evaluated.[21] As a moral theory, utilitarianism has been influential for the past two centuries in fields such as politics, law, economics, the philosophy of action and sociology.

- Moral Legitimacy

The idea of applying a theory of moral legitimacy for criminalising conduct has been a subject of lengthy debate in legal philosophy. Although various philosophers have argued the validity or the absurdity of using moral standards in criminalising conduct extensively, legal scholars have failed to reach a plausible consensus in this regard. As a result, it is difficult to identify an all-agreeing definition to the concept of moral legitimacy.

What is a Prima Facie Case for State Intervention under Moral Legitimacy?

In addressing this criterion, it is important to identify the type of social behaviour that could be considered, prima facie, serious enough to justify intervention by criminal law. In this regard, the classic discussion of Joel Feinberg[22] of the commonly proposed liberty limiting principles provides a plausible analysis. He identifies four possible grounds that justify intervention by criminal law. According to Feinberg,[23] state interference with a citizen's behaviour tends to be morally justified under 1) *The Harm Principle,* when it is reasonably necessary (that is, when there are reasonable grounds for taking it to be necessary as well as effective) to prevent harm or the

[21]Henry R. West, *An Introduction to Mill's Utilitarian Ethics*1(Cambridge University Press2004).
[22]Joel Feinberg, *The Moral Limits of Criminal Law* (1984-1987): Vol. I, *Harm to Others* (1984); Vol. II, *Offence to Others* (1985); Vol. III, *Harm to Self* (1986); Vol. IV, *Harmless Wrongdoings* (1988).
[23]*Ibid*.

unreasonable risk of harm to parties other than the person interfered with; 2) *The Offence Principle,* when it is reasonably necessary to prevent hurt or offence (as opposed to injury or harm) to others; 3) *Legal Moralism,* when it is reasonably necessary to prevent inherently immoral conduct whether or not such conduct is harmful or offensive to anyone and 4) *Legal Paternalism,* when it is reasonably necessary to prevent harm to the very person it prohibits from acting, as opposed to "others". In this analysis he does not suggest that the existence of all four of the above grounds as a prerequisite for the justification of criminal intervention in a particular situation, but he states that "it is logically open to us to hold only one of them, rejecting all the others (as Mill did),[24] or to hold two or more of them at once, even all of them together, and it is possible to deny all of them (as an anarchist might)".[25]

The four liberty-limiting principles discussed above under the theory of moral legitimacy have their own merits and weaknesses and they are based on common-sense and have evolved over the years receiving varying levels of attention from legal scholars and lawmakers. As demonstrated, they provide plausible reasons for the state to intervene and curtail the liberty of its citizens. In other words, conduct justifying intervention under these theories create prima facie cases for state intervention. Nevertheless, even when all the relevant principles have been applied and all the proper standards have been contemplated by a legislature in deciding to criminalise a particular conduct, the decision may yet be unwise and properly criticised as "wrong" due to social, political and other such reasons. However, as long as the reason for criminalisation is based on any one or more of the above-mentioned grounds, the decision cannot be said to be "illegitimate", in the sense of applying an inadmissible kind of reason.

Conclusion

This article ventures to discuss the justification of imposing criminal sanctions against intellectual property rights violations. Having considered the importance of non-interference with individual liberty in a society by criminal law, it emphasises the coercive nature of the criminal law and the importance of maintaining parsimony in using criminal law as a regulatory device. After identifying liberty-limiting principles

[24]Referring to John Stuart Mill.
[25]Feinberg, supra note 7, 12.

supported and justified by legal scholars such as the Economic Theory, Utilitarianism and Moral Legitimacy, under which the imposition of criminal sanctions for the regulation of conduct have been commonly recommended, the theory of Moral Legitimacy is identified as the most plausible for criminalising conduct in a society. Analysis of the four possible grounds under Moral Legitimacy which create a prima facie case for state intervention, namely, the Harm Principle, the Offence Principle, Moralism and Paternalism, together with the relevant negative constraints demonstrates that the Harm Principle is the most appropriate principle to consider criminalisation of conduct, which defeats financial interests and interests pertaining to well-being. In order to determine the justifiability of criminalisation the significant harm caused to rights' holders, consumers, non-purchasing users and governments by violations of intellectual property rights' is discussed in detail.

To this end, regardless of the level of development, it is hopeful that policymakers in every country will appreciate the utility and the effectiveness of introducing criminal sanctions against intellectual property rights violations to strengthen existing civil law remedies in order to undermine the rising rate of counterfeiting and piracy in world trade.