



# Proceeds of Crime and Mutual Legal Assistance

**Workshop on Building Respect for IP Rights  
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# 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

## 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 MCQUEENEY](#)

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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

The screenshot shows the FACT website interface. At the top left is the FACT logo with a '30 YEARS' badge. To the right are navigation links for Home, About FACT, and Contact Us. Below the logo is the tagline 'PROTECTING IP FOR 30 YEARS'. A left-hand navigation menu lists various categories such as HOME, NEWS, ABOUT FACT, CONTENT THEFT, INTERNET SAFETY, RESOURCES, REPORT IT, FACT CERTIFICATION, HOW TO STAY LEGAL, PARTNERS, REAL DEAL, and GLOSSARY OF TERMS. The main content area features a news article titled '£213,000 in criminal assets seized from counterfeiter', posted on January 16, 2014. The article text describes the seizure of criminal assets worth £213,166.09 during a Proceeds of Crime confiscation proceeding, and mentions that Luton Crown Court on 13 January took the assets from Mr Kin Man Chan after he was prosecuted for his part in an online counterfeit DVD business. It also notes that Mr Kin Man Chan pleaded guilty to conspiracy to supply counterfeit goods in 2012 and that last year's investigation revealed payments of hundreds of thousands of pounds were made via PayPal to an internet sales website.



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**INTELLECTUAL PROPERTY RIGHTS**

12/17/2015

### 6 defendants plead guilty in Missouri to \$100 million software-piracy scheme

KANSAS CITY, Mo. — A Seattle, Washington, man on Wednesday became the sixth defendant convicted in federal court for his role in one of the largest software-piracy schemes ever prosecuted by the U.S. Department of Justice.

This conviction resulted from an investigation titled "Operation Software Slashers" led by U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI).

Rex Yang, 37, of Seattle, waived his right to a grand jury and pleaded guilty before U.S. Chief District Judge Greg Kays Dec. 16 to a federal information that charged him with participating in a criminal conspiracy from Jan. 1, 2009 to Dec. 10, 2014.

"An investigation that began in Kansas City, Mo., uncovered one of the largest software piracy schemes ever prosecuted by the U.S. Department of Justice, with tentacles reaching into cities across the United States and overseas," Dickinson said. "Investigators seized more than \$20 million in assets from conspirators who are estimated to have sold in excess of \$100 million worth of illicit, unauthorized and counterfeit software products to thousands of online customers.

"Pirating software, particularly on this massive scale, damages the American economy, hurts private businesses and harms the unsuspecting buyer," said acting Special Agent in Charge James Gibbons of HSI Chicago. "These plea agreements mark a historic day for our HSI special agents and our law enforcement partners in the fight to stop the theft of intellectual property."

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# 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)



# PoC – a developing international policy

- *Financial Action Task Force* - IGO set up in 1989: sets standards (FATF Forty Recommendations) and promotes effective implementation.
- *Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL) (CoE) (1997)*
- *Eurasian Group on Combating Money Laundering and Financing of Terrorism (EAG) (2004)*
- Mutual evaluations carried out and published.

## Membership of Palermo Convention against Transnational Organized Crime

Country	Membership of Convention	FATF etc
Azerbaijan	30 October 2003	Moneyval
Georgia	5 September 2006	Moneyval
Hungary	22 December 2006	Moneyval
Tajikistan	8 July 2002	EAG
Turkey	25 March 2003	FATF; observer EAG
Ukraine	21 May 2004	Moneyval; observer EAG
Uzbekistan	9 December 2003	EAG

# Ukraine: MLAT Agreements and Relevant Conventions

- Canada (1996)
- USA (1998)
- India (2002)
- Hong Kong, China (2004)
- CoE Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Azerbaijan, Hungary, Georgia, Ukraine and others) (1990)
- Minsk Convention (Azerbaijan, Georgia, Russia, Tajikistan, Ukraine and others) (1993)
- European Convention on Mutual Assistance in Criminal Matters (Azerbaijan, Hungary, Georgia, Ukraine and others) (1998)
- CoE Budapest Convention on Cybercrime (2001)

# Proceeds of Crime - concepts

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

# 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 5 – 7 years) is proceeds of crime.

# 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))



# Ukraine Criminal Code

## **Article 209. Legalization (laundering) of criminally obtained money and other property**

1. Effecting financial transactions and other deals involving money or other property known to be proceeds from crime, and also use of such money and other property in business or other economic activities, and creation of organized groups in or outside Ukraine for the purpose of legalization (laundering) of money and other property known to be proceeds from crime, - shall be punishable by fine of 500 to 3,000 tax-free minimum incomes, or restraint of liberty for a term of three to five years, or imprisonment for a term up to three years, with the forfeiture of criminally obtained money and other property.

2. The same actions, if repeated, or committed by a group of persons upon their prior conspiracy - shall be punishable by imprisonment of five to twelve years with the forfeiture of criminally obtained money and other property and forfeiture of property.

# When does money = ‘proceeds of crime’?

## ■ 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).

## ■ 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?).

## ■ Shaikh v RSA [2008] ZACC 7

‘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.

# 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](http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_5.pdf)