

## Negative Constraints vs. Criminalising Intellectual Property Violations

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### Abstract

In the developing global economy, intellectual property rights have proved their existence and importance. It is indeed true that with such importance attached to them, they need to be given adequate protection. The remedy aspect for violation of intellectual property rights violations can be reconsidered with the growing scope for infringement. Although on face value, intellectual property rights relating to exclusive property rights, the degree of harm caused by violations of such rights can vary from minimal to life-threatening levels. Thus, civil remedies may sometimes be not enough, and that may lead to injustice. As per the principles of criminalization, the analysis of the 'Harm Principle' is made concerning the justification of criminal remedies in IPRs violations. The paper is an attempt to analyse the facet about the negative constraints concerning enforcing or enacting criminal remedies for intellectual property rights violations. The requirement to address these negative constraints could be seen as satisfying an inherent balancing mechanism in a legal system before setting-off the most coercive regulatory device possessed by the system. Therefore, to establish a convincing case for utilizing criminal remedies against intellectual property violations, it will be necessary to demonstrate that criminal remedies against such violations satisfy the relevant negative constraints.

Any state's decision to implement stringent procedures for intellectual property rights protection may not necessarily be voluntary but may be contingent upon many internal and external factors. When it comes to the issue of using criminal law to regulate and deter intellectual property rights violations, certain countries may show reluctance to use criminal law since intellectual property rights violations cause minimum harm to the economic development of these countries, contrary to the damage such harsher measures could cause to other interests.

(Keywords *Principles of Criminalization, Criminal Remedies, Intellectual Property Right violations, National interests*)

## I. Intellectual Property Violations and Harm Principle

The harm principle suggests that for any conduct to become proper conduct for criminalization, the conduct which is at issue should set back the interests of the owners. That conduct should have left the owners at a position in a state where their interests are in the worst condition. Thus, to justify the criminalization of intellectual property violations under this principle, it would be essential to demonstrate that such types of violations satisfy two elements. Firstly, the violations of intellectual property rights must have set back the interests of the owner of such rights, and that left owners in the worst situation as they were before. Secondly, those violations must also be wrong.

The second element in itself proves that the act is wrongful, and nobody can justify the wrongful nature of any action. Feinberg explains, “a person wrongs another when his indefensible conduct violates the rights of another.”<sup>1</sup> In the case of intellectual property rights, the counterfeiter or the pirate violates the rights owner’s exclusive property rights intentionally and deliberately for mere financial gain. Therefore, the harm caused to the interests of stakeholders by intellectual property rights’ violations is analysed next, to demonstrate the degree of damage caused to the well-being of stakeholders.

When protected, intellectual property rights are not just the interests of the owners of intelligible assets, which are protected. These are the interests of non-purchasing users by guaranteeing the safety of goods and services and also enforcing market rules and creating employment opportunities by protecting the interests of the state and society. Therefore, when anyone is analyzing the harm caused by especially counterfeiting and piracy, the attention should also be given to these aspects so that actual damage can be estimated.

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<sup>1</sup> On Feinberg’s account, “one person wrongs another when his indefensible (unjustifiable and inexcusable) conduct violates the other’s right, and in all but certain very special cases such conduct will also invade the other’s interest and thus be harmful...”.

### 1.1. Harm caused to the Interests of the Rights' Holders

Innovation and also creation can be considered as one of the essential elements in a free market economy. It may be regarded as that both for innovation and creation, it is mandatory to invest capital on research and development. The primary concern of the economist has been that if everybody will be allowed to use freely, then the problem of free-riders would arise.<sup>2</sup> Then, under those circumstances, no one would invest in research, innovation, and creation, and thus, that would give them a competitive disadvantage.<sup>3</sup> Therefore, the inventors and the creators are required to be given an incentive that would protect and ensure the returns of their investments.

In this backdrop, the availability of property right for the result of their own speculation stimulates individuals and enterprises to invest in research and development.<sup>4</sup> Thus, for obtaining exclusive property rights and benefits, many entrepreneurs invest in research and development, thereby leading to the economic development of the country. Therefore, it is incidental that the ultimate motivating factor for entrepreneurs is the desire to maximize profits, either by exploiting the exclusive property rights granted for the invention or creation by himself or by having it exploited by others. This argument also applies to intangible property rights such as patents, which determine the value of an item in a direct way, and to ownership such as trademarks, which do so only indirectly through their use as a means of communication.<sup>5</sup> Thus, creators of intellectual property and owners of intellectual property rights have an inherent interest in recouping their investments by maximizing profits by utilizing their intellectual property rights. In this context, it is reasonable to state that the owners of intellectual property have a formidable stake in their intangible assets protected by intellectual property rights and that these rights are distinguishable components of their well-being. In other words, their well-being is contingent upon these intangible assets such as patents, trademarks, copyright, and trade secrets. They flourish or languish as the assets protected by intellectual property rights flourish or languish.

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<sup>2</sup> Paul Torremans, *Holyoak & Torremans Intellectual Property Law*, (4th edn Oxford University Press, 2005) 13.

<sup>3</sup> *Ibid.*

<sup>4</sup> P. Lunn, 'The Roles of Property Rights and Market Power in Appropriating Innovative output' (1985) *Journal of Legal Studies* 423 at 425.

<sup>5</sup> See Lehmann, 'The Theory of Property Rights and the Protection of Intellectual and Industrial Property', in D. Vaver, *Intellectual Property Rights: Critical Concepts in Law* (Routledge publications, 2006) 525 at 531.

Infringements of intellectual property rights directly cuts the rights of the intellectual property rights holders. The harm caused by such infringements may not be calculated in statistical terms, but the impact counterfeiting and piracy have on the economy is well known. The author of a novel will flourish only by novelties received by him by legitimate sale of copies but not by sale of pirated copies. The same applies with any owner of trademark that the benefits can only be received by sale of original product and not by the sale of counterfeit product.

A decrease in world trade in legitimate goods due to increased level of trade in counterfeit and pirated goods has a direct impact on parties who has a legitimate interest in legitimate trade, like the owners of intellectual property rights. Thus, there is no doubt that the loss of profits as a result of reduced market share for legitimate goods in global trade, consequent to increased levels of trade in pirated and counterfeit products, harms the “property interests” of the owners of intellectual property rights. When the property interests of this category of stakeholders are harmed, it is obvious that their well-being is defeated, since their well-being is contingent upon intangible assets. Therefore, it can be contended that the harm caused by counterfeiting and piracy to the interests of this category of stakeholders falls within the focus of the Harm Principle for criminalization. The pressure imposed by lobbying groups on government for stronger protection of intellectual property rights emphasis on the misuse of intellectual property violations.

## **1.2. Harm caused to the Interests of Consumers**

In Asian markets, counterfeiting and piracy have always been a significant problem. Counterfeiters have always kept an eye for top-end luxury products such as designer bags.<sup>6</sup> According to a survey conducted by OECD in 2008, the evidence was collected, and it was established that counterfeiting and piracy are growing and it is becoming numerous.

The primary market for counterfeit products can be broadly divided into two categories, that is the primary market and the tributary market. In the primary market, consumers are buying the counterfeited products believing that those are authentic or genuine products. Though the products are generally below standard and they are hazardous to one's health. Whereas in the secondary market, customers are actually looking for whatever they believe in snipping significantly buy

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<sup>6</sup> OECD, ‘The Economic Impact of Counterfeiting and Piracy’ (OECD Project on Counterfeiting and Piracy, 2008) 11, available at: <http://www.oecd.org/sti/counterfeiting>, accessed on 19.11.19.

counterfeit and pirated products. Fake products could affect the interest of consumers in the secondary market as well; for example, a consumer may knowingly buy cheap fake brake pads for his vehicle and meet with a life-threatening accident due to the failure of brakes. Nevertheless, counterfeiting and piracy mainly threaten the interests of unwitting consumers in the primary market.

The top ten rankings for highest number of counterfeit cases being reported, which include alcohol, currency, agriculture, document, FMCG, apparel, automotive, pharma, tobacco, and lifestyle.

In India states which need immediate attention are Uttar Pradesh, Bihar, Rajasthan, Madhya Pradesh, West Bengal, Punjab, Jharkhand, Delhi, Gujarat, and Uttarakhand. These are the states which need immediate policy framing for counterfeiting and piracy. UP continues at the top followed by Bihar, Rajasthan. Together, these three states represent almost 45 percent of the total counterfeit incidents reported in India in the last two years.<sup>7</sup>

It is not only high-end luxury items on which the counterfeiting is limited. There is a common day-to-day item such as cumin seeds, ghee, oil, baby care, and certain vaccines, which are also counterfeited and defied by criminals.<sup>8</sup>

### **1.3. Harm caused to the Interests of Non-purchasing Users**

Counterfeit and pirated products can wound not only the owners of the intellectual property rights and the early purchasers, but also third parties who actually use goods and services after the initial purchase. Such as, passengers can be considered as victims of counterfeit spare parts, airline passengers can be victims of counterfeit airplane parts, and coronary patients are victims of counterfeit heart pumps even though in each case another person purchased the counterfeit goods for those consumers' benefit.<sup>9</sup>

The harm caused to the interests of non-purchasing users is best illustrated when considering infant fatalities caused by counterfeit milk powder in developing countries. In this regard, incidents

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<sup>7</sup> Available on <https://www.expresshealthcare.in/covid19-updates/covid-19-crisis-exploited-as-opportunity-by-counterfeiters.aspx/423848>.

<sup>8</sup> *Ibid*

<sup>9</sup> See, United States Department of Justice, 'Prosecuting Intellectual Property Crimes Manual' (3rd edn, September 2006) 87, available at: [www.usdoj.gov/criminal/cybercrime/ipmanual.htm](http://www.usdoj.gov/criminal/cybercrime/ipmanual.htm), accessed on 4<sup>th</sup> February, 2020.

reported from China demonstrate the degree of harm that could be caused. With China's dairy industry struggling to meet the increasing demand for dairy goods— one of the most significant growth areas of which is infant formulas – the door was left open for counterfeiters.<sup>10</sup>

The harm caused to the interests of non-purchasing users by counterfeit and pirated products can be further illustrated with reported incidents in the airline industry. For example, in 1989, a Norwegian Convair 580 aircraft crashed while en-route from Norway to Germany, resulting in 55 deaths.<sup>11</sup> The crash was later found to have been caused by a fake bolt in the tailplane assembly. In the above two examples, the level of injury caused to non-purchasing users, namely, infants in the incident involving milk powder and airline passengers in the incident involving the airline accident, defeated their interests to personality.

Undoubtedly, their interests in personality deteriorated to a worse condition after the incidents involving counterfeit products than they were before. Thus, as illustrated above, the harm caused by counterfeiting to the interests of non-using consumers satisfy the required threshold for criminalization based on the Harm Principle.

#### **1.4. Harm caused to the Interests of the State and Society**

In social terms, the damage suffered by businesses because of counterfeiting and piracy is reflected ultimately in its impact upon employment. Loss of employment, for any reason, hinders the quality of family life of the members of the society and thereby affects the wellbeing of the next generation, due to the impact it could have on the family unit. Such an event is capable of crippling the nutrition, education, and well-being of their children and thereby defeating the interest of the society at large.

Just as counterfeiting money and forging financial instruments undermine fundamental rules of the market place, counterfeiting trademarks weakens modern commercial systems.<sup>12</sup> Equally, the circulation of pirated versions of copyrighted material threatens the existing market rules designed

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<sup>10</sup> Neil Davey, 'The problem with fake foods' (Food Safety, Business Action to Stop Counterfeiting and Piracy, International Chamber of Commerce), available at: [http://www.gdspublishing.com/ic\\_pdf/fsa/gds3.pdf](http://www.gdspublishing.com/ic_pdf/fsa/gds3.pdf), accessed on 12/01/2020.

<sup>11</sup> International Chamber of Commerce, "Intellectual Property: Sources of innovation, creativity, growth, and progress", 15 July 2005, available at: [www.iccwbo.org/bascap/id7808/index.html](http://www.iccwbo.org/bascap/id7808/index.html), accessed on 06/01/2020.

<sup>12</sup> Peter Toren, 'The Criminalisation of Trade Mark Counterfeiting' (1998) 31 Conn. L. Rev.1, 17-19.

to regulate and advance the voluntary, compensate exchange of goods. On the one hand, by granting property rights for knowledge-based assets, the state expects to provide incentives to its citizens to invest in innovation, creation and

reputation for quality work, which are essential elements for the progression of the economy. But counterfeiting and piracy undermine this fundamental postulate of intellectual property protection and thereby stymie the underlying economic interests of the state. On the other hand, when a government implements a legal regime for intellectual property rights' protection, it necessarily considers the conflicting interests involved and finitely balances the interests of users of intellectual property, i.e., interests of the general public, against the interests of owners of intellectual property rights, in order to minimize unfair advantage to anyone party with the use of other legislative measures such as competition laws. Thus, the implementation of such a well-balanced legal system is of fundamental interest to the overall commercial structure of any modern society. However, counterfeiting and piracy subvert the cardinal rules of this balance and hinder the transaction structure the society has chosen.

In view of the above analysis, it can be seen that the degree of injury inflicted by counterfeiting and piracy on various stakeholder interests is consistent with the type of conduct contemplated and addressed by the Harm Principle for criminalization. In addition, the legitimacy of criminalizing intellectual property rights violations under the Harm Principle is further highlighted by the mere fact that the harm caused is not limited to one group of stakeholders, but affects the well-being of several stakeholder categories representing every level of society. In addition, although on face value, intellectual property rights relating to exclusive property rights, the degree of harm caused by violations of such rights can vary from minimal to life-threatening levels. Under these circumstances, it can be concluded without any hesitation that intellectual property rights violations cause harm to the interests of stakeholders and thus satisfy the threshold stipulated under the Harm Principle for criminalization.

## **II. Guidelines for Imposing Punishments for Offences Satisfying the Harm Principle**

Although humans consider a wide range of interests important to well-being, we may not attach the same degree of importance to all our interests. As a result, it is reasonable to assume that the degree of harm caused by the thwarting of a particular interest by another should vary according

to the importance we attach to the specific interest. The more critical an interest to us, the more harm that would result in its defeat by others. Thus, when considering the criminalization of conduct based on the Harm Principle, the degree of harm caused (which depends on the value we attach to the defeated interest) becomes a deciding factor in determining the most suited punishment. As Simester and Sullivan state:

This is one of the payoffs of the Harm Principle: in forcing us to consider more precisely why we are concerned about the activity that is to be criminalized, it gives us tools with which to rank the seriousness of offenses and thus decide what level of punishment, if any, is appropriate.

Andrew Von Hirsch and Nils Jareborg attempt to rank the seriousness of crimes on an analysis of the living standard of the victim: to identify the seriousness of a crime, they use a scale designed to gauge the degree to which the particular intrusion (crime) affects the living standard of the victim. By 'living standard,' they refer to the means or capabilities for achieving a certain quality of life. In this regard, they propose a four-level 'living-standard scale' to gauge the degree to which a given intrusion affects a victim's living standard as follows: 1) subsistence (survival, with the maintenance of no more than elementary human capacities to function); 2) minimal well-being (maintenance of a minimal level of comfort and dignity); 3) adequate well-being (maintenance of an adequate level of comfort and dignity); 4) enhanced well-being (significant enhancement in quality-of-life above the mere adequate level). After that, to accomplish their objective, they identify four broad legally protected generic-interests of a potential victim that could be intruded upon by a criminal act as: 1) physical integrity; 2) material support and amenity; 3) freedom from humiliation, and 4) privacy/autonomy. In other words, these represent interests that could be harmed by others.

After having defined the living standard scale and generic-interest dimensions, Von Hirsch and Jareborg propose a two-step assessment process for identifying the seriousness of any existing or prospective crime. In using this process, firstly, one should identify the categories of generic-interests of a typical victim that a particular offense would intrude upon. Secondly, it is necessary to assess the degree to which the standard instances of the particular offense affect the living standard of a typical victim. If we consider the violations of intellectual property rights through their approach, the interests at stake could be identified as physical integrity, on the one hand, in cases where counterfeit goods cause life-threatening effects on consumers, and material support

and amenity, on the other hand, in cases where counterfeit and pirated goods cause economic loss to rights' holders, unsuspecting consumers, third parties and governments. Thereafter, if we apply the rating-criteria to each of these interest dimensions, it could be noted that the intrusion of consumers' physical integrity could affect the subsistence level of their living standards and, therefore, would warrant harsher punishments. However, the intrusions upon material support and amenity may only affect adequate wellbeing and enhanced well-being levels of the stakeholders, thereby only warranting a lesser degree of punishment, since the financial loss could be replaced easily. This analysis demonstrates how the degrees of harm caused to the interests of stakeholders provide valuable guidelines for the determination of punishment. On this premise, it is evident why we consider homicide more serious than robbery and robbery more serious than theft.

### **III. Negative Constraints vs. Criminalising Intellectual Property Violations**

As mentioned earlier, even though there is a positive case for criminalizing intellectual property rights violations based on the Harm Principle, the state may not be justified in doing so, unless it meets the negative constraints against criminalization. The requirement to address these negative constraints could be seen as satisfying an inherent balancing mechanism in a legal system before setting-off the most coercive regulatory device possessed by the system. Therefore, to establish a convincing case for utilizing criminal sanctions against intellectual property violations, it will be necessary to demonstrate that criminal sanctions against such violations satisfy the relevant negative constraints.

#### **3.1. Regulatory Alternatives**

Intellectual property rights infringement has been treated as a tortuous invasion of property rights. Thus, remedies found for their violation is in civil law. With these civil remedies, there are specific administrative remedies that can be used effectively for the protection of intellectual property rights.

In India, the guidelines for national intellectual property regime were announced in 2016, and it was considered as one of the best steps adopted by the country. There are though certain gaps that can be fulfilled by these policies. The other goals for the country are to set up a certain regime by which entrepreneurs can become aware of IP rights, and also the registration process for intellectual property rights can be streamlined.

**Patrick Kilbride**,<sup>13</sup> said "India will be unable to take full advantage of the transformative benefits of a strong IP system unless and until it addresses gaps in its IP laws and regulations," he said, underlining that to him, it seems that "influential stakeholders" are content with India's IP laws as they stand currently.

### **3.1.1. The need for criminal sanction**

#### *3.1.1.1. Inadequacy of Alternative Remedies*

Intellectual property rights violation has great importance in economic development, and the impact of their violation is huge. This aspect is recognized by various countries and the economist. Considering the emphasis of civil remedies on damages and the lack of social reprobation, it can be argued that the threat of civil sanctions against intellectual property violations in the modern world poses to a potential infringer nothing more than the stress of making another financial decision. In other words, the decision to operate a business to

trade in counterfeit and pirated products may boil down to a financial calculation of the cost of misappropriation and the possibility of a damage award against either the cost of purchasing economic rights, in the case of products protected by copyright, or the cost of developing and establishing a reputation for own products in the market, in the case of trade marks. Punitive measures if implemented in the place of these civil remedies, then the deterrent effect may be different, and the losses that are incurred to business and the economy may be reduced. The discretionary nature of such punitive measures can be left on judges or the jury as the case may be.

The quantum of damages may be required to be identified in those circumstances by using certain caution for such damages. In the USA, the courts are ordering punitive damages, but civil courts have been reluctant to award such damages.<sup>14</sup>

Sometimes the civil remedies may not do justice with the person whose intellectual property right is being misappropriated. For instance, consider the situation where company X, which

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<sup>13</sup> Executive director of International Intellectual Property of the US Chamber of Commerce's Global Intellectual Property Centre (GIPC) on the occasion of the first anniversary of rolling out of India's ambitious IPR policy.

<sup>14</sup> See, Adam Liptak, 'Courts outside U.S wary of punitive damages' *New York Times* (26 March 2008), available at: <http://www.nytimes.com/2008/03/26/world/americas/26int-damages.1.11433403.html>, accessed on 15/01/2020.

manufactures cars, placing an urgent order with company Y, which manufactures tires. Also, assume that without the delivery of tires from company Y, company X would come to a standstill with the loss of hundreds of jobs. Despite this, if Y breaches the contract and sells tires at a higher price to another company, there is a clear ground for a cause of action under civil law for X against Y for breach of contract. What is important in this situation is that the damage caused by the breach of contract by Y to X for the failure to supply goods is clearly quantifiable. Therefore, civil law provides a satisfactory remedy. However, in the case of intellectual property rights violations, the damage caused to the right-holders is indeterminate in the majority of cases. Since, in the present context, counterfeiters and pirates have become more sophisticated in the techniques used for copying and more organized and devious in avoiding control, detecting and quantifying counterfeit goods for the purpose of civil legal action is not an easy task. Many fakes are of such a high standard that even company executives say it takes a forensic scientist to distinguish them from the real item.

It is often seen that most of the time the person is unaware of the fact that the injury caused to them until the investigation is sustained. With the rapid development of technology in the present scenario, it can be presumed that the methods of misappropriation of intellectual property rights have also become sophisticated, and the infringers are using this technology as means to infringe intellectual property rights of the holders. Keeping this background, civil law's concept of compensating the victims after the wrong has been committed would become most futile in dealing with a misconduct that evolves and is interwoven with the advancement of technology.

Under these circumstances, it can be contended that, due to the degree to which intellectual property violations threaten the security and well-being of society and due to the difficulty in calculating the damage caused by such violations to the right-holders and society at large, it is not safe to leave such violations redressable only by way of compensation and administrative control. The marked increase in intellectual property misappropriation, combined with the ineffective deterrence provided by civil law and administrative remedies, lends force to the argument that criminal sanctions are the most appropriate regulatory device to address the more egregious acts of intellectual property infringements.

### *3.1.1.2. Inadequate Reach of Alternative Remedies*

In trade, counterfeiting is a lucrative area for benefits gaining. A historical link is there, which clearly shows that there has always been a connection between counterfeiting and organized crime. In addition to theft of intellectual property rights committed by legitimate business establishments such as licensed producers trading in overrun goods<sup>15</sup> or trading in grey market goods,<sup>16</sup> there appear to be many clandestine organizations involved in the trade of counterfeit and pirated products, having numerous production and supply units with global distribution networks. In this backdrop, it can be presumed that restricted reach of remedies, which are, in a way, are subject to the willingness of parties to dispute to abide by order of compensation. This type of remedy may seem useless in front of organized criminal groups that are specifically involved in intellectual property infringements.

Civil law injunctions can have an effect on any business if the location of such business is fixed. When the business is illegitimate, and there are multiples plants, then in such situations, closure of one plant by injunction order without the unpinning order of infringer may not serve purpose. Further, while prospective injunctive relief is not to be belittled, its effectiveness as a deterrent is diluted largely because it imposes no serious economic sanctions against the counterfeiting activity, which was the subject of the proceeding.<sup>17</sup> Although an injunction might compel an infringer to close one or more production plants, it would only be a matter of time for the infringer to re-organize more production sites in new locations registered under different names.

In this light, it is seen that there are complex and indeterminate situations which are existing in the area of intellectual property rights infringements; in those circumstances, only criminal law may provide effective remedies. The ability of criminal law to extend its scope beyond corporate bodies or to arrest and to punish infringers. These criminal law remedies punish the infringers and provide for permanent and effective remedies to the victims of intellectual property rights infringers.

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<sup>15</sup> Goods or services an authorised manufacturer or producer makes and sells on the side, without the right-holder or licensor's knowledge or approval.

<sup>16</sup> Also known as parallel imports are goods legitimately manufactured and sold overseas and then imported back through channels outside the right owners traditional distribution channels.

<sup>17</sup> Peter Toren, 'The Criminalisation of Trade Mark Counterfeiting' (1998) 31 Conn. L. Rev.1, 17-19.

### 3.2. Other National Interests

A State's measure to implement stringent IPR policy maybe because of certain internal and external factors. It may not be voluntary. When the issue is with respect to the use of criminal law for infringement of intellectual property rights, some countries are reluctant to implement criminal law in those circumstances. Those countries believe that intellectual property violations cause minimum harm to their economic development, and the damage that can be inflicted by them on other interests may be harsher.

Rapp and Rozek<sup>18</sup> conducted an empirical research and claimed that there is an empirical relationship between economic development and IPR. Though the analysis was only in reference to patent protection still, it can be used to assess the bigger picture for IPRs protection. Thus any state would adopt intellectual property rights policies as per their technological needs and their economic development. When the status of economic policies does not require stronger IPR protection, then it becomes reasonable for that country to place IPR protection lower in the list of priorities needing expenditure by the state. Thus, it is observed that though there are international policies for IPR protection, still the states are not adopting the same if such protection bears the extra cost to them, which in a way affects other national interests.

The non-implementation or adoption of criminal remedies is limited to only a few countries which are developing or are at a particular level of development. Those countries which have overcome this threshold of development are working towards stronger regime for the protection of IPRs.

### 3.3. Rule of Law and Practical Concerns

The rule of law emphasises on the use of cautious approach towards criminalizing IPRs. The rule of law does not refuse to enact criminal provisions for intellectual property right infringements or for any misconduct that threaten the societies. Thus, the rule of law implies that if any criminal legislation is drafted for IPRs protection, then they should be prospective in the application, and they shall also be transparent with respect to their language.

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<sup>18</sup> Richard Rapp and Richard Rozek, 'Benefits and Costs of Intellectual Property Protection in Developing Countries' *Journal of World Trade* 75/77:75-102, quoted in, Robert Ostergard, *Development Dilemma: The Political Economy of intellectual Property rights in the International System* ( LFB Scholarly Publishing LLC, 2002) 62.

The practical issue with respect to such enactments is that the cost of disputes relating to private rights will now be transferred to the public purse. Whereas when the harm and the negative impact caused by intellectual property rights violations are calculated, then the lost trade, lost tax revenues, social welfare, and sometimes the health of major group of people is jeopardized. Thus, when these aspects are looked upon, then the cost of implementation would be less than the harm caused. In other words, the state loses revenue many times more than the cost of implementing such criminal provisions.

The circumstances pertaining to IPRs infringements meet negative constraints against criminalization required under the theory of moral legitimacy in various situations. Sometimes there can be certain crosscutting situations created in developing countries for criminal enforcement of IPRs. When these situations are resolved, then the criminal enforcement can be implemented in any developing countries as well. These impediments will not exist forever.

#### **IV. Moral Legitimacy of Criminalising Intellectual Property Rights' Violations**

The analysis in the above section demonstrated that the current level of intellectual property rights infringement taking place in international trade creates a *prima facie* case for state intervention with the use of criminal law under the Harm Principle. After that, this section also elaborated on how the impact of such infringements meets the negative constraints for criminalization. Therefore, it can be stated that intellectual property rights violations satisfy the threshold for criminalization under the theory of Moral Legitimacy, subject to the concerns of national interests that fades with development. As a result, it can be concluded that the criminalization of intellectual property rights is justified under the criminal theory.

##### **4.1. Criminal remedies and their effect against IPRs infringement**

As Professor George Gardner explains:

“The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a courtroom; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by the sentence of the law. It is the expression of

the community's hatred, fear, or contempt for the convict, which alone characterizes physical hardship as punishment."<sup>19</sup>

This explains that in the general opinion of society, the offender's actions are unacceptable or blameworthy. Thus, it can be concluded that criminal law has a communicative function, whereas civil law does not have this kind of function. The criminal law judgment has a symbolic significance, whereas civil judgment lacks such significance. As explained by Richard Posner, "Almost every criminal punishment imposes some non-pecuniary disutility in the form of stigma, enhanced by such rules as forbidding a convicted criminal to vote. There is no corresponding stigma to tort judgment."<sup>20</sup> Thus the fear of conviction in cases of can be considered as one of the major deterrent force for intellectual property right infringements. Therefore, the threat of criminal sanctions may prove to be very useful in these situations.

The method of criminal law involves more than a threat it also involves unpleasant physical consequences, which is punishment. If only threats are given, and no punishment is given, then subsequently, the purpose will be defeated and the threat would lose its significance.

Criminal punishment mostly includes imprisonment or a fine. If any punishment is inflicted, which is more than the tortuous remedy such as damages, then that would have more deterrent effect as compared to other punishments. As mentioned earlier, persons responsible for large-scale intellectual property infringements are mostly adventurous entrepreneurs who have taken advantage of the weaknesses of the system and exploited the avenues with the least resistance in making quick profits. Thus, if only civil sanctions are imposed, then that may not discourage the further infringements. Fear of imprisonment or fine, in the event of criminal action, can create concrete effects among potential violators in the commercial world. The effectiveness of criminal remedies has always been a question of debate, and it has received a mixed response from the researchers and legal scholars. Anthony Doob and Marie Webster report on a study based on interviews with sixty experienced, and presently incarcerated, burglars and armed robbers and state that, "The respondents were blunt in reporting neither they nor other thieves whom they knew

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<sup>19</sup> George Gardner, 'Bailey v. Richardson and the Constitution of the United States' (1953) 33 Boston University Law Review 176 at 193

<sup>20</sup> Richard Allen Posner is an American jurist and economist who was a United States Circuit Judge of the United States Court of Appeals for the Seventh Circuit in Chicago from 1981 until 2017, and is a senior lecturer at the University of Chicago Law School.

considered legal consequences when planning crimes. Thoughts about getting caught were put out of their minds.”<sup>21</sup> Further, even institutions responsible for enforcing the law have felt at times that the concept of deterrence does not work in practice.

The United Kingdom Home office wrote in 1990:

“much crime is committed on impulse, and it is committed by offenders who live from moment to moment. It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up possibilities in advance and base their conduct on rational calculation.”<sup>22</sup>

The utility of criminal remedies depends on deterrence, and Jeremy Bentham argues that if there are clarity and predictability in sentencing along with proportionality between crime and punishment.<sup>23</sup> The arguments supporting and not supporting deterrent effects of criminal remedies are in direct contradiction with each other, for attaining consensus in such situations if the criminal activities are distinguished and deterrent effect on criminal remedy on each kind of activity is considered individually.

If taken into consideration, on the one hand findings of the study which were conducted by Anthony Doob and Marie Webster can be considered apt with respect to violent crimes which are committed on impulse. Whereas on the other hand, Jeremy Bentham’s analysis of deterrence may be considered valid when it comes to “white collar crimes”, as these crimes are committed by self interest groups. John Gallo, former United States prosecutor states:

“My experience has been that law-enforcement has had an impact in deterring and/or reducing criminal activity, but that the type of deterrence generally varies depending on the nature of the criminal activity. Specifically, in the case of white-collar crime, where the actors are generally rational, informed individuals, enforcement of criminal law generally deters additional criminal conduct of the kind at issue; On the other hand, in the case of

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<sup>21</sup> Anthony Doob and Marie Webster, ‘Sentence Severity and Crime: Accepting the Null Hypothesis’, in Michael Tonry, *Crime and Justice: A Review of Research* (University of Chicago Press, 2003) 30.

<sup>22</sup> Home Office (1990): *Crime Justice and Protecting the Public*, London: HM Stationary Office, para. 2.8. quoted in M. Tonry and D. Farrington (eds), *Building a Safer Society: Strategic Approaches to Crime Prevention* (University of Chicago Press, 1995) 7.

<sup>23</sup> Jeremy Bentham, *The Rationale of Punishment*, quoted in Freedman, Lawrence, ‘Deterrence’ (Polity Press, 2004) 8.

violent crime, the prosecution of an individual is far less likely to deter others from engaging in the same criminal conduct, either because such actors do not act rationally or because they are unaware of the punishment for their conduct.”<sup>24</sup>

Intellectual property rights infringement is most of the times committed with premeditation and full preparation. For counterfeiting and piracy, the first requirement is a sufficient amount of money to invest in the business and make counterfeited goods. The second requirement for these kinds of crimes is that there should be chains by virtue of which these goods can be introduced in the market. Thus, this implies that the person who commits counterfeiting or piracy is not just merely offending intellectual property rights on impulse. Still, they are taking financial risks to commit these crimes, in fact laying foundation of a business for committing the crime. Therefore, a criminal conviction can also have a labelling effect on infringers. Those entrepreneurs can be termed as criminals and this could end their businesses. Hence if intellectual property rights violations are criminalized, then it will deter other individuals as well to commit similar kinds of offences.

In criminal laws, there is the availability of resources and state law enforcing authority's expertise; thus the investigation can be carried out successfully, and the justice could be done, whereas in cases of civil remedy, this is not the case. Where police action is undertaken, significant investigative resources including search warrants, powers of arrest, covert surveillance, and even controlled deliveries may be deployed. This could mean breaking into clandestine factories manufacturing counterfeit. It is needless to emphasize the utility of police powers in such situations, especially when countering clandestine outfits operated by organized criminal gangs having links with notorious terrorist organizations.<sup>25</sup>

#### **4.2. Role of Criminal Sanctions in the Campaigns against Intellectual Property Infringements**

Although civil remedies can be considered useful in a lot of situations though sometimes the justice can not be attained by only civil remedies. In other words, “although civil remedies may help

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<sup>24</sup> John Gallo, 'Effective Law Enforcement Techniques for Reducing Crime' (1998) 88 The Journal of Criminal Law and Criminology 1475.

<sup>25</sup> John Gallo, 'Effective Law Enforcement Techniques for Reducing Crime' (1998) 88 The Journal of Criminal Law and Criminology 1475.

compensate victimised intellectual property rights holders, criminal sanctions are often warranted to punish and deter the most egregious violators repeat and large-scale offenders, organised crime groups and whose criminal conduct threatens public health and safety.”<sup>26</sup> Cases which involve large scale piracy or counterfeiting falls under this category. Thus, if these situations arise then the civil suit can be helpful only if it has effect of punishing the accused with imprisonment and also recovering financial losses by way of damages.

## V. Conclusion

Having considered the importance of non-interference with individual liberty in a society by criminal law, it emphasizes 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 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 criminalizing 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 criminalization of conduct, which defeats financial interests and interests pertaining to well-being.

In order to determine the justifiability of criminalization, the significant harm caused to rights’ holders, consumers, non-purchasing users, and governments by violations of intellectual property rights’ is discussed in detail. It is argued that the categories of stakeholders harmed by fake products differ from country to country, depending on the state of development. For instance, fake trade-in pharmaceutical may harm the interests of more rights holders in the USA than in China, but such fakes would also harm more consumers in China than in the USA.

Therefore, the fact remains that because of the advancement of international trade, such violations harm every category of stakeholders more or less in every country in the world. In this light, this

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<sup>26</sup> US Department of Justice, Computer Crimes and Intellectual Property Section, *Prosecuting Intellectual Property Crime* (3rd edn, September 2006) 5.

study demonstrates that given the value attached to intellectual property in the current economic environment and the magnitude of harm violations of such property rights cause to the interests of various stakeholders, implementation of criminal procedures against intellectual property rights violations is well justified. Further, what this article recommends is not an outright repeal of the type of civil remedies used at present, but rather the justification and desirability of using criminal sanctions in addition to civil remedies in the fight against intellectual property rights violations. To this end, regardless of the level of development, it is hopeful that policy makers 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.