

IP Infringers or Innocent
Bystanders? Consumers,
facilitators & intermediaries.

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What do you mean?

- Consumers
 - Buyers and users of trademarked, copyright-protected or patented products
 - End users of software
 - Downloaders

Definitions (cont.)

- Facilitators
 - Copy shops
 - Supplying essential element, s.60(2) Patents Act 1977
 - *Amstrad*-type equipment
 - Suppliers of P2P software
 - YouTube; Baidu
 - eBay?

Definitions (cont.)

- Intermediaries
 - Warehouse keepers or Landlords?
 - Printers?
 - ISPs
 - eBay?

Copyright: Primary infringement

- Direct Infringement
 - Copying/publishing/communicating
- Authorisation
- Indirect infringement
 - Display or offer for sale
 - Authorisation
 - Distribution

Primary infringement

- Innocence generally no excuse
 - s. 97(1) Copyright, Patents and Designs Act 1988 excludes damages award only, if defendant did not know, or have reason to believe that copyright subsisted in the work
 - BUT defendant is presumed to know all relevant law

Secondary infringement

- Possessing in course of business
 - Importing and exporting
 - Providing means for making
 - Providing apparatus for infringing performance etc
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- Knowledge (or reason to know) needed

Real world issues

- Consumer: not liable for merely possessing an infringing article, eg book
- Facilitator: not liable for infringement
 - *Amstrad* (UK), *CCH* (Canada)
- Intermediary: If either incited or procured infringement or if authorised infringement (if had control), then liable
 - *Amstrad*; cf *CCH* (Canada) and *Ong Seow Pheng v Lotus* (Singapore)

Lord Templeman in *Amstrad*

- “I accept that a defendant who procures a breach of copyright is liable jointly and severally with the infringer for the damages suffered by the plaintiff as a result of the infringement. The defendant is a joint infringer; he intends and procures and shares a common design that infringement shall take place. A defendant may procure an infringement by inducement, incitement or persuasion”

The search for deep pockets (and ways to access them)

- Causes of action:
 - Copyright infringement
 - Trade mark infringement
 - BUT no “authorisation” concept
 - Negligence:
 - DOES THE INTERMEDIARY OWE A DUTY OF CARE TO AN IP OWNER?
 - PRINTER OWES NO DUTY, *Paterson Zochonis v Merfarken Packaging* [1983] FSR 273

... and deeper

– Common design?

- “A bold step, since it applies a common law doctrine to the interpretation of a statute”
- “[there is not] any need for a common design to infringe. It is enough that the parties combine to secure the doing of acts which in the event prove to be infringements.”

– Joint tortfeasor

- “Participation in a common venture may cause someone to become directly liable as a tortfeasor, together with the person who actually did the damage”, per Mustill LJ in *Unilever v Gillette* [1989 RPC 583

BUT:

- **A person who only facilitates (as opposed to procures the commission of) a tort would not be liable as a joint tortfeasor**
- *Amstrad*, followed in *Newzbin* [2010] FSR 21.
- Although “he comes under a duty to assist” by giving full information and disclosing identity of wrongdoers, *per* Lord Reid in *Norwich Pharmacal* [1974] AC 133 at 175.

No more?

- Tortious invasion of property right?
- Procuring breach of a statutory tort?
 - Chadwick LJ in *MCA Records v Charly Records* [2002] FSR 26: “[Lord Templeman in *Amstrad*] does not seem to have been attracted by [the view] .. that the procurement of an infringement of a statutory right is best regarded as a distinct tort, actionable at common law”

Digital world

- Consumer
 - Primary infringers
- Facilitator
 - No infringement unless something more...
 - What if filtering technology readily available but not used?
- Intermediary
 - Depends on nature. May be primary infringers through authorisation and may procure/incite, thus being joint tortfeasors

But remember ...

- “It is not machines which infringe copyright, it is people”, Laddie, Prescott & Vitoria, *The Modern Law of Copyright and Designs*, 3rd ed., at para.34A.20.