

Private Prosecutions in the IP arena

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Private prosecution: basis in law

- Right of PP retained through s.6 Prosecution of Offences Act 1985 (“POA”)
 - Long-standing right these days commonly exercised in complex IP and commercial fraud & recognised by CofA as particularly appropriate for IP crime
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Why is private prosecution used?

- CPS must prioritise caseload of violent/sexual allegations
 - Novel/ complex cases too expensive or challenging & require expert evidence/legal representation not available to public prosecutors
 - Often involve a high volume of hardware requiring forensic examination- delays if public prosecutor required to analyse
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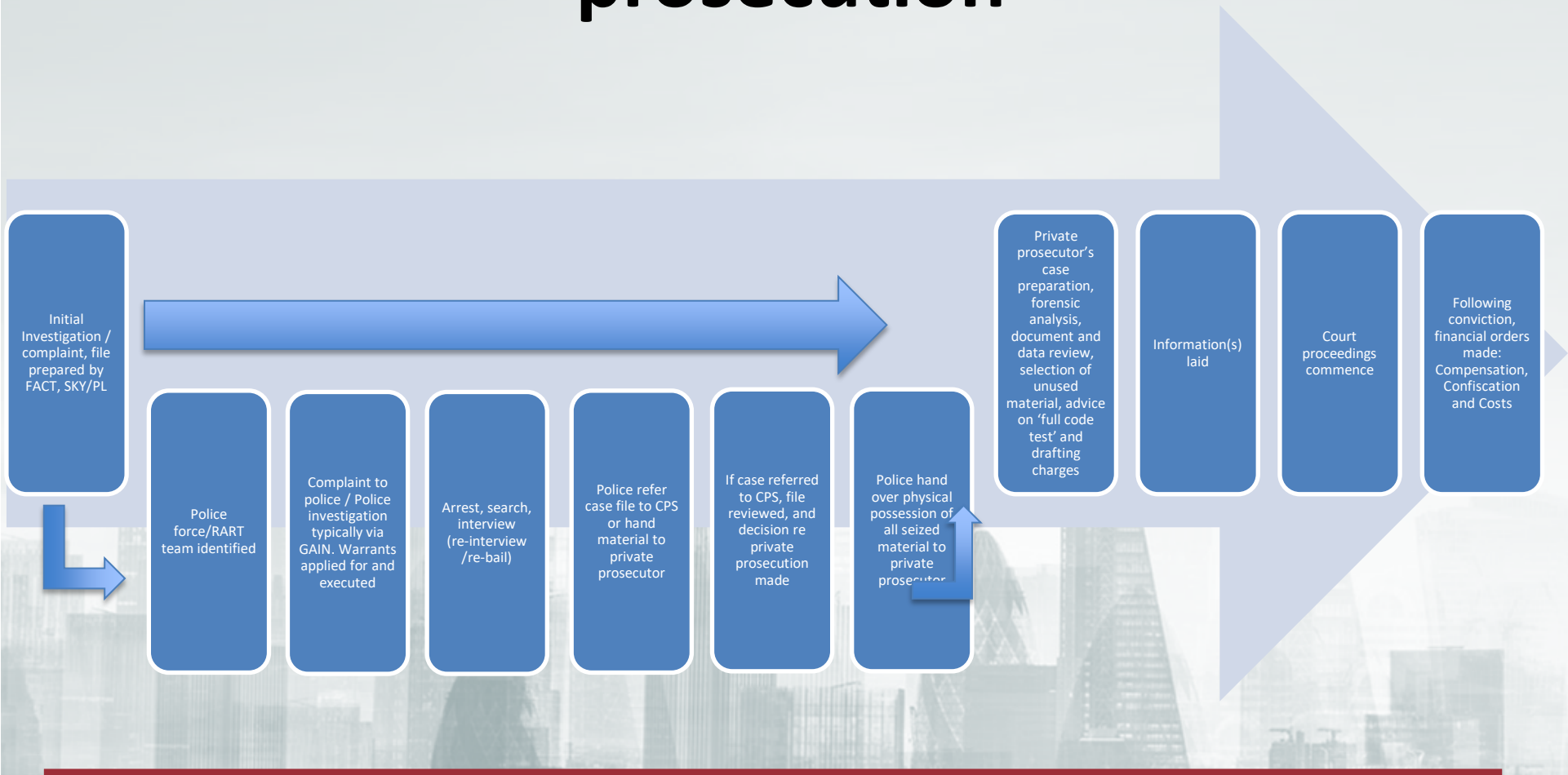
“...In a time when allegations of terrorism and other extremely serious crime take up more and more time and involve ever increasing resources, it is inevitable (and appropriate) that the CPS will have to be selective.”

Leveson LJ in *Scopelight* [2009] EWCA Civ 1156

Who undertakes IP private prosecutions?

- Premier League
 - SKY
 - FACT
 - British Recorded Music Industry
 - PPL – Public Performance Limited
 - Virgin Media Ltd
 - Individual / corporate “victims” of crime
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The timeline of a private prosecution



Benefits of law enforcement involvement

- Fruits of exercise of police powers of search / arrest / seizure may lawfully be relied upon as evidence;
- Interview under caution
- Law enforcement engagement relatively straightforward- forensic analysis/expert evidence supplied by FACT on behalf of PL/SKY etc- involvement often limited to warrant & interview

Legality of use of seized material- judgment of 5 judge civil/criminal combined constitution of the Court of Appeal in *Scopelight*

Typical offences

- Very important to select appropriate offences & avoid an unnecessarily complex/technical jury trial- the trick is to present in simple terms what may be technically challenging;
 - Fraud Act- s7, 11
 - Conspiracy to Defraud
 - Various offences under 107 CDPA
 - Advantage of FA/Con to Defraud- easy to comprehend, judges more used to these than CDPA & sentencing guidelines focus on loss/potential loss
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Pushing the boundaries...

- *Scopelight 2009* - first CofA judgment setting out the right of police to hand over to a private prosecutor property seized during a police raid
 - US law enforcement (FBI/ USDA) cooperated with private prosecutor in handing over drives belonging to D1's principal programmer + co-opting him into giving evidence for the Crown as a participating informant
 - First conviction for facilitation of copyright infringement in the world.
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Pushing the boundaries...

- Followed by CofA judgment in Zinga 2014- £8.4m confiscation appealed on basis private prosecutors not entitled to engage POCA- dismissed

In each instance when the CofA has been asked to consider the lawfulness of private prosecutions, their ability to rely upon seized evidence, the availability to a private prosecutor of POCA, judgment has been in favour of the private prosecutor

Once initial convictions obtained, CPS & other public prosecutors have greater confidence to follow the precedents set- ideal scenario to combat IP fraud is a combination of both private and public prosecutions, given the scale of the problem

Case Study 1: Dreambox, 2019-2022

Dreambox TV Ltd – organised crime group responsible for a wholesale fraud on broadcasters/ IP rights' holders, by provision of equipment into pubs which enabled unlawful access to pay-tv

- 19 computers; large quantity of docs (500k plus pages)
- If CPS led, there would have been significant delay to analyse computers alone
- PP = six months to prepare – five-week trial. Con to Defraud. All 3 defs convicted. 7 years 4 months for principal
- POCA order 2 weeks ago- £5m benefit £1m recoverable

Case Study 2: Supremacy, 2020-2022

The Problem

- Software developer who created and distributed the means by which hardware could be converted to enable unlawful access to pay-tv
 - Thousands of members of Facebook support group & viewers to his YouTube channel
 - Millions in potential losses but D only made a few thousand pounds
 - Offences contrary to s7, 11 FA & 107 CDPA
 - Pleaded guilty and sentenced on 30 November 2021 to 30 months' imprisonment
 - Very significant not only as 1st prosecution of someone for creating piracy enabling software but also represented another conviction against an end user for watching pay-tv illicitly
 - This type of novel case very well suited to private prosecution as CPS would have been unwilling to seek 1st conviction but, following successful conclusion, the public prosecutor more likely to follow
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