

A PRACTICAL VIEW OF INTELLECTUAL PROPERTY PIRACY

The term “intellectual property piracy” may be defined as the *unauthorized use, distribution and/or sale, for commercial gain, of material or works in which the Intellectual Property rights belong to another*. The phrase “intellectual property rights” generally refers to the proprietary rights which benefit the creator or authorized owner of a trademark, copyright, patent and/or an industrial design.

For many consumers and providers of consumer goods and services, trade marks – that is, the marks which distinguish one undertaking from another undertaking - are important in that they convey information about the quality of goods and services, and many consumers purchase goods solely on the basis of the presence of a trade mark in connection with a particular good or service. In fact, many consumers purchase goods – particularly luxury goods - based more on the mark associated with the goods and what that mark represents in terms of prestige, than for the goods themselves. In comparison, the appeal for consumers of material which is most often the subject of copyright protection, such as movies and music, is based less on prestige or reliability, and more on the often instantaneous emotive effects of such material on the individual.

In the Caribbean context, and certainly in the Jamaican context, we most often see widespread intellectual property piracy occur in the form of copyright infringement, including but not limited to the unauthorized copying and distribution of music and movies for profit.

Under the Jamaican **Copyright Act** (the “Act”) the owner of copyright in a work shall have the exclusive right to:

- (a) copy the work;*
- (b) issue copies of the work to the public;*
- (c) to perform, play or show the work in public;*
- (d) to broadcast the work;*
- (e) to make an adaptation of the work.*

The Act provides that copyright in a work is infringed by any person who, without the license of the copyright owner, does any of the acts listed above.

Additionally, copyright in a work is infringed by any person who, without the license of the copyright owner:

- (a) imports into Jamaica for any purpose other than private and domestic use,*
- (b) possesses in the course of business,*
- (c) sells, offers or exposes for sale,*
- (d) exhibits in public or distributes in the course of business, or*
- (e) distributes other than in the course of business, to such an extent as to affect prejudicially the owner of the copyright,*

an article which is, or which he knows or has reason to believe is an infringing copy of the work.

The act of intellectual property piracy, therefore, inevitably involves an infringement of the intellectual property rights of the owner thereof and a breach of the Act.

The appeal for pirates, however, in continuing to infringe such rights is the great potential for economic gain to be derived from the unauthorized sale of such copyright material.

This is made easier for pirates for two main reasons:

- (1) It is often cheaper and easier to copy, package and sell copyright material such as music CD's and movie DVD's, particularly with advancements in reproduction technology, than it is to produce many other types of goods and, for example, place another's trade mark on it fraudulently; and
- (2) Consumers in general appear to be much more wary of buying counterfeit goods such as bottled drinks, foodstuff or even automobiles, because of the potential hazards to health and safety, than they are of purchasing a CD or DVD created without the authorization of the copyright owner.

In fact, one of the difficulties faced, particularly in the Caribbean context, in educating the public about the importance of respect for intellectual property rights, is that many copyright owners are generally not as concerned as trademark owners, for example, that the goodwill or popularity in their product will be diminished as a result of the unauthorized use of a product in which they hold the copyright. Many entertainers have openly stated that the illegal distribution of their music has actually enhanced their popularity. Nonetheless, as the popularity of many such entertainers increases along with

the technological advances that allow for easier unauthorized copying of their material, the main complaint of copyright owners and the authorized beneficiaries of works in which copyright exists, is the economic losses they sustain as a result of the illegal sale by pirates of the results of their hard work.

As a copyright owner or authorized beneficiary of the rights of the copyright owner, however, there are methods you may consider implementing to deter infringement of your intellectual property rights. These include:

- (1) *Mail-Back System*: Sending a copy of your creation to yourself by dated registered mail, and leaving the package unopened and carefully stored. This package may be useful later on as persuasive evidence, in any possible Court proceeding, of the duration of your right to a piece of work and your efforts to protect it.
- (2) *Advertising your Rights*: Advertising your intellectual property rights to your creations via the media (newspapers, for example) and your intention to take action against potential or actual infringers of your rights. You may also wish to inform the public of where they can apply for authorization to use your copyright material.
- (3) *Keeping Records*: Keep a record of the particulars of your copyright material, or a copy thereof, including the dates of creation, with a reputable organization or individual (such as a Justice of the Peace or your Attorney-at-Law) for safe-keeping.
- (4) *Written License Agreements*: In the event that you use distributors or exporters or even third party manufacturers for the products in respect of which you are the intellectual property rights holder, you should ensure that you have proper written license agreements in place with such persons, which detail the terms under which

(5) *Copyright Notices on Products*: Display a copyright notice (including the date of creation and the copyright “©” symbol) on the labels of the products in respect of which you have intellectual property rights.

Despite the measures you put in place to try and prevent or deter infringement of your intellectual property rights, however, you may still fall victim to piracy.

In Jamaica, statutory legislation (including the Act) provides viable criminal and civil remedies to combat and deter intellectual property piracy.

Under the Act, an infringement of copyright shall be actionable at the suit of the copyright owner and, in any civil action for such an infringement, all such relief by way of damages, injunction or otherwise, shall be available to the successful plaintiff.

Section 46 of the Copyright Act, which outlines the criminal offences under the Act, states that any person who at a time when copyright in a work subsists by virtue of the Act –

- (a) *makes for sale or hire; or*
- (b) *in the course of a business sells or lets for hire, or offers or exposes for sale or hire, exhibits in public or distributes; or*
- (c) *imports into Jamaica for purposes other than his private and domestic use; or*

(d) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright,

any article which he knows or has reason to believe is an infringing copy of that work, commits an offence.

The penalties for such offences include a prison sentence of up to five years and fines of up to One Hundred Thousand Dollars (J\$100,000.00) per offence.

In Jamaica, and throughout the Caribbean, there is no doubt that the problem of intellectual property piracy has rapidly increased over time. Contributing to this rapid increase are factors which include the advances in easily available reproduction technology, the emphasis of certain law enforcement officials and members of the judiciary and the government on other forms of crimes or breaches of the law (such as the illegal drug trade), and even the apparently dispassionate or moderate attitude of many members of the public and certain copyright owners themselves towards the problem of intellectual property piracy.

Those persons who do work assiduously to eliminate this problem, however, often put forward very valid reasons as to why respect for, and the protection of, intellectual property rights should be encouraged. Through recent admirable efforts of members of law enforcement, we have witnessed an example in Jamaica which links the illegal music and movie trade to the funding of organized crime and the illegal firearm trade – a connection long understood by those who study and follow intellectual property developments. Many intellectual property experts also emphasize the harm and disenchantment that piracy causes to the actively creative people within a country and its

ultimate effect on the creative national identity of a country. The reality is that if we do not encourage respect for the intellectual property rights of others, we can hardly argue for the respect by others for our own rights.

From a practical perspective, however, it should be clearly understood and enunciated that the infringement of intellectual property rights of others, in Jamaica and around the world, is illegal and can attract severe sanctions under our laws. As the problem of piracy continues to increase locally, we expect to see such sanctions more rigorously enforced and more severely applied.

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