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Copyright infringement as a major economic loss to rights-owners and the broader cultural industry. Can this problem be fixed?”

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1. INTRODUCTION

For this presentation I will be highlighting the problem of copyright infringement insofar as it affects the cultural industries and with specific references to music industry. I will re-examine the economic purpose of copyright law, as well as investigate the economic value of copyright and look closely at the impact that copyright infringement has on aspects of the micro and macroeconomy and society.

Finally I will examine some of the approaches being taken to remedy the problem and recommend some possible solutions of my own.

The problem of copyright infringement as we will see is of a phenomenal dimension not just overseas, but right here at home, so much so that within the Jamaica Constabulary Force there is an Organized Crime Investigation Division under which a Copyright Unit falls. It is the work of the JCF and in particular the OCID to combat copyright infringement in collaboration with the rights-owners.

Most of us will be familiar with the well publicized matter in 2010 of HBO claiming copyright infringement due to signal piracy by several local cable operators.

Many of us would also be familiar with the case of the Canadian based company AudioMax which up to a few years ago was commercially exploiting reggae music online before it was shut down by the Canadian authorities.

And there has been many other high profile cases relating to copyright infringement both locally and overseas.

A crucial aspect of minimizing the piracy problem is to get a much wider cross section of the population fully aware of the detrimental impact of piracy, on businesses and individuals.

In the field of intellectual property it is very often the case that the creators and owners of copyright are unable to enforce the rights which the law gives to them. This is the essential problem of piracy. The rights of Record Producers, Artists, songwriters, composers, publishers, broadcasters and many others whose lives depend upon the recognition of their intellectual property rights, particularly copyright, are too often ignored by persons intentionally, deliberately, and systematically attempting to profit from the

creation of others. The matter of intellectual property rights can be complex and indeed there are those who do not fully understand the rights of others and so may negligently infringe copyright. But piracy properly understood is a wilful determination not to respect the property rights of others.

2. PIRACY DEFINED

So let us define piracy. You will have noticed that I have begun to use the term copyright infringement and piracy interchangeably. Whereas copyright infringement embodies a broader range of violation of rights, piracy is the dominant form of violation, and copyright protection was initially concerned with piracy.

So what is piracy? Piracy or Copyright infringement is the unauthorized or prohibited use of works covered by copyright law, in a way that violates one of the copyright owner's exclusive rights, such as the right to reproduce or perform the copyrighted work, or to make derivative works.

So we ask again – what is piracy? Piracy derives from the fact that creators such as songwriters and composers have been given the rights of authorship which is generally protected by copyright. And rights of ownership have been granted to record producers whose rights are protected by neighbouring rights.

Because of the different forms of exploitation of a piece of work which are possible, there are different rights which exist in a work. As a result copyright is therefore seen as a bundle of rights. The major set of rights granted to creators and owners are as follows :

1. The exclusive right to make copies of ones work i.e to reproduce
2. The exclusive right to distribute copies of the work
3. The exclusive right to publicly perform the work
4. The exclusive right to broadcast the work

Based on the above bundle of economic rights the creator or owner is able to control the exploitation of his work, and appropriate revenues from the sales and licensing of the work.

Piracy occurs therefore when there is a violation of the exclusive rights of the creators or owners.

3. THE EXTENT OF THE PROBLEM

Let us now take a look at the extent of the problem of piracy.

A few years ago the World Customs Organization found that around 5% of world trade was trade in pirated goods. This equated to approximately 200-300 billion Euros in lost trade.

Another measure of the extent of the problem can be seen in the number of job losses directly attributable to piracy. These have been estimated to be about 120,00 per year in the USA and over 100,000 in the European Union.

In a more recent study which was published in March 2010, projections indicate that more than 1 million jobs will disappear from the creative industries in the EU by 2015 if piracy is not addressed.

Though there not is much hard data available regarding its impact in Jamaica, we have seen in recent years the closer of numerous record stores and video rental stores. This means lost jobs – and lost income for many persons beyond the actual employees who were sent home.

a. Piracy of Music embodied in physical format

One does not have to go beyond Half Way Tree to see evidence of flagrant piracy of musical works. But one really should go beyond Half Way Tree as the problem stretches right across Jamaica in every major town.

The change in the dominant format of music consumption from cassettes and vinyl 45s to CDs have made the problem more complex.

Decades ago when the predominant format was vinyl records, and there was only one or two radio stations, a hit record in Jamaica could sell tens of thousands of copies. At that time piracy was much more difficult, as the means of reproducing recorded work was very limited and costly. Copyright law was therefore an effective means of combating piracy as on the supply side the creators and owners were able to control the reproduction of their work and appropriate value from sales of the physical product.

As the methods of reproducing work changed, and the formats of consumption changed, particularly with the advent of the optical disk (i.e cd & dvd) it became a lot easier and cheaper for works to be reproduced. The problem of piracy then began to spiral as pirates would only need to incur marginal costs to reproduce and sell the works. Additionally pirates were able to enter the market very soon after the

original product entered the market, thus further diminishing the prospect of the original product doing well commercially.

Although there is not much actual empirical data in relation to the dollar value or volume of local music piracy, there is indicative data from around the world, that gives an idea of the scale of the problem of copyright infringement, where reproduction is concerned. As far back as the early 2000s IFPI reported that annual pirate sales approached two billion units, worth an estimated US \$4 - \$5 billion, while globally, 2 in 5 recordings are pirate copies. Total optical disc manufacturing capacity (all formats) - was approximately 30 billion units. Manufacturing capacity massively exceeded legitimate demand. This created a business environment ripe for exploitation by criminal syndicates. Production costs may be as little as US\$0.25¢, whilst retail value normally exceeds US\$2.50 and can reach US\$15.00. Given that the pirate producer has few or none of the overheads associated with genuine production, the profit margin is substantial.

In the case of Jamaica the problem of pirated works may well be bigger than we recognize, and it affects the industry in a profound way. For every single pirate CD that is sold it is a dent in the pocket of the creators and owners who took on the financial risk to produce the works. Whereas some persons see piracy as serving a useful purpose of helping to promote and spread the music, the gain from this accrues to the pirates themselves and to some extent the artists whose popularity may grow with the spread of the music. The inability of the record producers to enjoy commercial gain from sales is however not looked at by many, though it is the producer who would have financed the production of the works.

Piracy therefore has the effect of reducing the possibility of earning from sales and by so doing helps to “crowd-out” some creators and owners who are unable to remain viable due to low economic returns.

Sales of Jamaican music has fallen not just in Jamaica but also overseas, partly because of consumption in digital format, and partly because the same music is now downloaded and shared illegally online. Despite the newer phenomenon of internet piracy, commercial piracy in its traditional form continues to be an important problem in many foreign territories where Jamaican music is popular. A recent visit by some music industry professionals from Senegal, Burkina Faso and Ivory Coast gave testimony to this fact.

In measuring the full economic impact of piracy on music, it is necessary to look beyond just the losses of record labels and record producers, who cannot sell as many units as before. There is lost income to the music publishers, songwriters and composers also who do not earn when pirated products are sold.

In essence pirates act as manufacturers and distributors, but they pay no advances to artists, they pay no royalties on sales, they pay no licensing fees to composers, songwriters and music publishers, they do not have to pay graphic artists, and photographers, and do not pay taxes.

Piracy is a lucrative business and accordingly is linked closely to organized crime. According to a report put out by IFPI It should come as no surprise to governments and law enforcement agencies that the prospect of huge profits for a small capital outlay and very small potential penalties, in a poorly regulated environment, is attractive to the criminal and is exploited in an organised and determined fashion. This lack of risk is a major incentive for criminal only motive is profit. The manufacture and traffic of illegal music products, both domestically and internationally, is therefore often an organised-crime activity.

b. Broadcasts, cable, satellite, and other forms of signal piracy

While my main focus is on piracy in the cultural industries and specifically the music industry I will highlight briefly the problem of signal piracy in the broadcast industry.

The market for broadcasts, in particular satellite transmissions, is worldwide and signal piracy is a feature of this market. A Motion Picture Association of America fact sheet indicates that in some developed markets such as Germany and Australia, the level of signal piracy is as low as 1%, whereas in others such as the UK, the level of signal piracy is thought to be approximately 10%.

I am not certain if there is any similar existing data in relation to the Jamaican market; however, the issue raised by HBO points to the likely existence of such a problem on a wide scale.

c. Internet and online piracy

Recent technological advances such as music and video compression, and high speed internet have helped to make legal storage and dissemination of such works more feasible. However these continuing advances have also helped to make piracy more effective and profitable.

For example a study published by Variety Technology showed that as far back as 2004 58% of South Korean internet users had downloaded a commercial film without authorization.

Where music is concerned it has been estimated that millions songs are downloaded each month illegally.

The overall impact of digital piracy has been to dramatically reduce revenues in the recording industry. IFPI's Digital Report 2011 highlighted that despite the surge by more than 1000% in the digital music

market between 2004 and 2010 to an estimated US\$4.6 billion, global recorded music revenues fell by 31% over the same period.

Where Jamaican music is concerned we must however sometimes ask ourselves as to how did the music get online? From talking to a myriad of Record Producers over time, it is realized that part of the problem lies in how the industry players sometimes choose to promote and market the music.

In promoting the music, the content is sometimes blast of to hundreds of persons online without full recognition that invariably these songs may end up in a viral network of illegal download and peer-to-peer services. For the artist it may not become a major problem, at least not in the short run, as with popularity of the song he may be able to do live performances and dub plates and thus earn income. For the record producer the story is different. He has invested in production, and the music is now available for free online. Even if the music does become popular and he distributes it through legal online music services, the potential revenues from the legal music services will be affected by the competition from the illegal downloads.

d. Broadcasting and public performance of recordings with copyright License

In Jamaica less well known forms of copyright infringement, though equally important, are the broadcasting and public performance of recorded music without a license from the rights-owners or their agents.

Music is consumed by the public in different ways and through different formats and media. The different ways in which works move from the creators and owners to consumers gives rise to different rights. The right to broadcast or publicly perform music are exclusive rights granted to creators and owners of music. In granting these rights the economic purpose of copyright law therefore is to enable rights-owners to benefit from the exploitation of their work, by protecting the work in the different manner in which the work is delivered and consumed by the public.

Within the context of striking a balance of incentive for creators and owners and access by the public to creative works the law offers a limited period of protection to creators and owners, as it relates to their ability to earn an economic return from the broadcasting and public performance of their works. After the period expires the works goes into the public domain and no permission is required nor fee payable in respect of broadcast or public performance of the work.

Broadcasting and public performance rights are administered through collective management organizations. Although the rights granted to creators and owners are exclusive they are also transferrable, and so creators and owners assign the rights to a Collecting Society or grant them an exclusive license to administer the particular set of rights on their behalf.

Collecting Societies are not-for profit membership organizations and have four main functions:

1. To license the works to broadcasters such radio, tv, cable and operators, as well as to music users such as event organizers, show promoters, club operators, hotels, gyms restaurants, bars etc
2. To monitor and collect revenues
3. To distribute revenues as royalties to members; and,
4. To enter into reciprocal arrangements with foreign collecting societies to collect and distribute royalties earned in Jamaica to foreign rights holders, and to receive and distribute royalties earned abroad to Jamaican rights-holders who are members.

By means of a blanket license, collecting societies, enable music users to have access to the full repertoire of works they manage for one fee.

The Collective Management Organizations that operate in Jamaica in respect of musical rights are Jamaica Music Society (JAMMS), which administers rights on behalf of Record Companies and Independent Record Producers, and JACAP which administers rights on behalf of lyricists and composers.

In the category of radio broadcasters there is a fair level of compliance in Jamaica, however there are still some broadcasters that are negligent in becoming duly licensed.

In the area of cable operators there is a higher incidence of copyright infringement due to the non-compliance of a large number of operators.

The area of greatest potential for earnings for rights-owners lies in the public performance market. This market is comprised of all business and events that play music as part of their offerings to customers. It therefore incorporates businesses such as clubs, restaurants, hotels, gyms, stores and events such as parties, festivals, carnivals, stage shows etc. A example of the scale of the market can be seen by looking at for instance the number of events held in a particular year. From PIOJ data it is estimated that in 2009 there were approximately 17,000 events held in Jamaica. Of course not all of them may have played music – but it gives you an idea of the scale of the market.

4. THE ADVERSE EFFECTS OF PIRACY

a. Adverse effects on local economies and creative industries

Wherever piracy flourishes it is virtually impossible for local software, film, and music industries to compete, to grow, and remain viable.

The music industry and other copyright based industries require investment and even in the absence of piracy involves considerable risk.

The problem can be situated as follows: for every 100 songs that are released maybe only 5-7 become commercially successful. However it would generally take approximately the same costs to produce each recording for release into the market. More fundamentally however it generally takes years of investment in an artist's development before he is among the group which may generate commercially successful recordings. In practice, throughout the development of an artist's career he may voice for several different record labels and so the cost of developing his career is spread over a number of different interests. The aggregate cost however of creating and releasing significant number of recordings, and aiding in developing an artist's career, before a hit is made, can be extensive, and is not always recovered. Very few artists will become stars, and very few songs will become bona-fide hits. And so although there is a cost of production along the entire process, over the years, the many different creators and owners involved are not always able to recoup their investment – especially in the popular music market. The problem is compounded further by the fact that at every step of the way, some form of infringement may take place compounding the difficulty of remaining viable in the music business.

For the cultural industries on a whole to survive and remain viable creators and owners must have the protection necessary to ensure that the virtuous cycle of production continues.

A telling example is the case of Mexico. For many Years Mexico was among the 10 top ranking markets for recorded music.

In the year 2000 its market was 8th in the world. Only three years later retail sales had fallen by 50% and job losses throughout the industry had halved the number of individuals working in the music industry.

b. Adverse effects on the cultural sector generally

The cultural industries form an important component of the economic development of any country. It adds considerably to national wealth, and therefore pirate activities which undermine these industries, have a corresponding negative effect on national wealth.

From a recent WIPO study conducted by Dr, Vanus James of the UWI, it is shown that the copyright based sector of the economy is able to generate the highest rate of economic return for every dollar invested, when compared to the same dollar invested in other sectors. Conversely for each investor that pirates put out of business the economy suffers disproportionately.

c. Adverse Influences on Society and Criminal Patterns

Failing to deal with a growing problem of piracy can have wide ranging effects on society. The close connection between organized crime and many forms of piracy has been recognized and documented, even here in Jamaica. A report published in the Intellectual Asset Magazine, and written by Jamaican IP Attorneys indicated that on August 17, 2006 police raided a premises in Kingston and seized roughly 35,000 illegal CDs, DVDs, and audio Cassettes valued at approximately J\$1 million. The police arrested the owner of the premises who was believed to be Kingston's largest supplier of illegal CDs and DVDs. Police reported that evidence pointed to the operation being the centre of an islandwide network of illegal trading activities connected to the trade in illegal arms.

5. MEANS OF ENFORCING COPYRIGHT

We turn our attention to some of the different means of enforcing copyright. Someone one once said, property right only has value if it is enforced. And this is true of copyright.

Although intellectual property piracy is in some ways similar to traditional property crimes, it differs from most crimes as anti-piracy enforcement and criminal regulation tend to be the result of coordination between the government and rightful property owners.

a. Evidentiary rules

Rights-owners also frequently assert that they are faced with unreasonably restrictive evidentiary rules concerning proof of ownership and subsistence of rights in seized and pirated works. Antipiracy operations sometimes results in seizure of thousands of different infringing CDs and DVDs and other copyrighted works. Requiring proof of ownership of every disc or sometimes of every track embodied on every disc can be an unjustified expenditure of time and resources for rights holders, as well as for courts and law enforcement. Simpler evidentiary rules are required.

b. Civil Action Suits (Damages)

Damages recoverable in civil actions must be sufficiently high to dissuade potential pirates from attempting to take the risk of infringement. If the pirates know the worst that can happen is that they may ultimately be asked to pay a nominal fine, there is little or no deterrent effect whatsoever.

From anecdotal evidence this seems to be a feature of the problem in Jamaica. Police involved in anti-piracy work, to rid the streets pirates and the illicit wares, often complain of the minimal fines imposed by Resident Magistrates in most instances, thereby resulting in no real change to the status quo. The fines are generally significantly below the sum stipulated in the regulations.

This is a matter which must be addressed if piracy is to be minimized and a strong signal sent that it won't be tolerated. The work of JIPO will be important to sensitize the Resident Magistrates of the scale of the problem at hand.

Additionally enforcement of copyright through litigation can be a costly affair and is therefore an unrealistic prospect for many small businesses and individuals unless there costs and fees are recoverable.

c. Criminal Prosecution (penalties)

One of the difficulties encountered in criminal prosecution of piracy stems from the fact that in some countries law enforcement authorities do not have the power to investigate criminal infringements of intellectual property or initiate criminal actions, unless a right holder has first complained.

There needs to be appropriate criminal sanctions over and above action based on complaints by victims, who in most cases are reluctant to come forward to give evidence.

d. Other very important means of tackling piracy includes

- I. Training and public awareness including the police and officials
- II. Regulation of optical media manufacturers and resellers, including the imposition of levy on blank media as a way of channelling some funds back into the industry to mitigate against the effect of piracy, as is done in other countries.
- III. Licensing opportunities – if the problem cannot be stamped out completely organize an effective means of licensing the pirates and enable some flow of funds back into the industry

6. Conclusion

Without copyright protection the problem of piracy and other forms of copyright infringement would decimate the creative sector. It is important therefore that enforcement measures continue and are improved.

It is unlikely that piracy will be eliminated but all efforts must be made to minimize its effect to protect our creators and owners of works, and the country's cultural heritage on a whole.

At the end of it all copyright infringement results in economic loss to rights-owners, economic profits to pirates, and a welfare loss to society.

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