

5 CHALLENGES TO COMBATTING PIRACY AND COUNTERFEITING IN JAMAICA

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ABSTRACT

The creative industries in Jamaica can exponentially increase their already significant contribution to the local economy if effective protective mechanisms are put in place to ensure proper administration and sustained enforcement of intellectual property rights. This paper will review the landscape of the Jamaican intellectual property (IP) regime and assess the challenges to combatting piracy and counterfeiting. The paper makes the following assumptions:

- Modern legislation which is compliant with international standards in conjunction with an efficient administration will provide adequate safeguards and enhances creativity and sustainable development.
- Public education will help change the perception that piracy and counterfeiting is a victimless crime.
- Piracy and counterfeiting will decline and profit margins will increase if sufficient human and financial resources are employed in the enforcement of rights.

This paper will explore the extent to which Jamaica's IP regime can be considered to be modern, effective and consistent with international standards. It will also examine the administrative infrastructure for intellectual property rights and the strategies that have been adopted to heighten public education and bolster enforcement efforts. In addition, traditional approaches to combatting piracy and counterfeiting and their imperfect results will be discussed, in conjunction with reflections on how other emerging countries have suggested these issues should be approached in the future.

In conclusion, it is postulated that a collaborative effort on the part of stakeholders is necessary in order to fashion a tailor-made solution for Jamaica, having regard to the experiences of other like and different countries. To this end, Jamaica's national IP strategy should include three 'Es': (i) education of stakeholders and the public; (ii) enforcement of intellectual property rights;

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Prior to joining the Mona Law Faculty, Mrs Corthésy was a civil servant for ten years. She assumed duties as Legal Officer for the Ministry of Labour, Social Security and Sports in 1999. In 2001, she was seconded to the Jamaica Intellectual Property Office, where she held the position of Manager of Copyright and Related Rights for four years. During her tenure, she led the legislative reform process necessary to implement the World Intellectual Property Organization Internet Treaties and assisted the Organized Crime Investigation Branch of the Police in prosecuting copyright criminal cases and conducting the first public destruction of pirated copyright works. Her last substantive government post was Director of Entertainment Policy in the Ministry of Culture, which she held for six years. In this capacity, she played an important role in facilitating the formation of the Jamaica Anti-Piracy Alliance.

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and (iii) empowerment of the creative industries through the provision of a modern IP framework conducive to vibrant competition in the global market.

Keywords: *piracy, counterfeiting, IPRs in Jamaica, IPR enforcement*

I. BACKGROUND

The creative industries in Jamaica are driven by the symbiotic relationship between persons, such as the late Hon. Robert Nesta Marley¹ and his creative talent, and the economic demand from the public for their creative output. Jamaica's dynamic culture fuels its growth, diversification and continuity. The role of key stakeholders such as right holders, collective management societies, government policy makers and legislators and law enforcement officials cannot be underscored. Notably, the core copyright industries² that have made a significant economic contribution are the press and literature, music, theatrical productions, motion picture, video, radio and television, photography, the graphic arts, advertising services, software, databases and collective management societies.³ The final report of the World Intellectual Property Organization (WIPO) study on 'The Economic Contribution of Copyright-Based Industries in Jamaica' revealed that in 2005 Jamaica's copyright sector contributed approximately US\$464.7 million or 4.8 per cent of gross domestic product (GDP).⁴ It was also stated in the report that 'the data shows that each dollar of foreign exchange invested in the leading elements of the core copyright sector contributes about J\$6.18 of value added to Jamaica, mainly in the form of wages and indirect taxes.'⁵ Regrettably, this study did not take into account the debilitating impact of piracy⁶ and counterfeiting⁷ and it may be inferred that the figures stated do not represent an accurate picture of the true economic value of copyright-based industries in Jamaica. The suggestion that the findings of the study provide a compelling argument for the policy direction to be reprioritized in support of the copyright sectors⁸ must be counterbalanced with parallel support for the implementation of mechanisms to counteract piracy and counterfeiting, which represent a serious threat to the intellectual property system and Jamaica's economy. These mechanisms must include:

- (a) Modern legislation compliant with international standards;
- (b) efficient administration;

¹ The late Hon. Robert Nesta Marley, otherwise known as Bob Marley, remains to date Jamaica's most outstanding and accomplished song writer, musician and brand.

² WIPO, 'Guide on Surveying the Economic Contribution of the Copyright-Based Industries', 18,22.

³ V James, *The Economic Contribution of Copyright-Based Industries in Jamaica*, WIPO Publication, No.1009 E/Jamaica, 3 January 2007, page 28.

⁴ *ibid.*, 1.5, page 10.

⁵ *ibid.*, 1.6, page 10.

⁶ P Groves, *A Dictionary of Intellectual Property Law*, (Edward Elger Cheltenham UK 2011), page 244: Piracy defined as 'The unauthorized duplication of goods protected by intellectual property laws – usually, material protected by copyright, such as sound recordings, films and computer software. Exact copying on a commercial scale is the hallmark of piracy'.

⁷ *ibid.*, page 79: Counterfeiting defined as 'An imitation of a product made to look identical (or as nearly identical as possible, or necessary) with the original. This might involve copying designs, copyright material, and possibly patents, but it is the use of trademarks or get-up that usually completes the deception'. Contrast this with 'contraband' products which are original products not intended for sale in the local market, thus a customs offence, not an intellectual property infringement.

⁸ V James, note 3, page 11.

(c) public education; and

(d) enforcement of rights.

II. MODERN LEGISLATION

A. NATIONAL REGIME

Jamaica has a modern IP regime characterized by national laws, regional agreements, bilateral and multilateral agreements.⁹ National laws include:

- The Copyright Act of 1993;¹⁰
- The Designs Act of 1937;¹¹
- The Geographical Indications Act, 2004;¹²
- The Layout-Designs (Topographies) Act, 1999;¹³
- The Merchandise Marks Act No. 1888;¹⁴
- The Patent Act of 1857; and¹⁵
- The Trade Marks Act of 2001¹⁶

In June 2001 Jamaica was subject to legislative review by the TRIPS Council¹⁷, and it was found that the Trade Marks, Copyright and Layout-Designs Acts were compliant with the TRIPS Agreement; however, Jamaica remains non-compliant in respect of patents.

B. REGIONAL AGREEMENTS

Pursuant to Article 66 of the Caribbean Common Market (CARICOM)¹⁸ Agreement, the Council for Trade and Economic Development (COTED) was established to promote *inter alia* the protection of IP rights, public education and the participation of member States in international regimes for the protection of intellectual property rights. This provision was bolstered in 1997 by the creation of a Caribbean Regional Negotiating Machinery (RNM) and

⁹ Details of primary legislation, regulations and orders are compiled and reviewed in D Daley, *International Encyclopaedia of Laws*, Kluwer Law International, Jamaica, 2008.

¹⁰ *ibid.*, page 51.

¹¹ *ibid.*, page 275.

¹² *ibid.*, page 251.

¹³ *ibid.*, page 295.

¹⁴ *ibid.*, page 170.

¹⁵ *ibid.*, page 152.

¹⁶ *Ibid.*, page 170.

¹⁷ The 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was outlined pursuant to the General Agreement on Tariffs and Trade (GATT) Uruguay Round, where GATT was renamed the World Trade Organization. The Council was established, *inter alia*, to oversee the implementation of agreed minimum standards on intellectual property protection by member States.

¹⁸ CARICOM is a trade coalition consisting of member States of the Caribbean Community including Jamaica. It was created by the Treaty of Chaguaramas in 1973.

the creation of a CARICOM Single Market and Economy (CSME), which was implemented in Jamaica on 1 January 2006. The removal of trade barriers in this manner provided a platform for dissimilar creative industries in the Caribbean, of unequal economic value, to compete as a block internationally and presumably benefit as a region. It seems obvious that this shift in status quo would require a revision of national, regional and international border measures. What is less obvious is whether the impetus for doing so should come from independent sovereign design or as a result of international trade-related pressure of considerable proportions.

Bilateral and multilateral agreements

Several bilateral and multilateral agreements have been ratified by Jamaica in the area of intellectual property:

- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), 1994;¹⁹
- Berne Convention for the Protection of Literary and Artistic Works, 1886;
- Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971;
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention), 1961;
- Paris Convention for the Protection of Industrial Property, 1883;
- United States-Jamaica Bilateral Agreement, 1994;
- WIPO Copyright Treaty, 1996;
- WIPO Performances and Phonograms Treaty, 1996.

A significant milestone was reached on 15 October 2008 when Jamaica, along with States in the Caribbean Forum (CARIFORUM), and with their homologues from the African, Caribbean and the Pacific Group of States entered into a European Partnership Agreement with Member States of the European Community.

Arguably, one of the primary objectives of this Agreement is to strike a balance between heightened protection of intellectual property in ACP States, the promotion of economic growth through access to the European Union market and programmes on innovation. The Agreement is scheduled to come into effect on 1 January 2014. It is left to be seen whether more stringent TRIPS-plus customs obligations²⁰ will facilitate access to EU markets and sustainable trade.

¹⁹ Please note that Article 51 of TRIPS empowers a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, to lodge an application with customs authorities to prevent entry into the market place of such goods.

²⁰ For example, Article 163 of the European Partnership Agreement expands border measures, requiring customs authorities to take cognizance of imports and exports, and therefore goes beyond obligations imposed on WTO Members pursuant to Article 15 of TRIPS.

III. EFFICIENT ADMINISTRATION

The Jamaica Intellectual Property Office (JIPO)²¹ was established under the JIPO Act in 2001 with a mandate to administer IP laws, advise the Minister on matters relating to the administration of these laws and promote the progressive development of IP rights in Jamaica. In particular, JIPO operates registries for trademarks, patents, and designs and is currently exploring the implementation of a voluntary copyright registration system.²²

In its ten years of existence, JIPO has valiantly and consistently endeavored to administer IP rights efficiently. In particular, persistent efforts were made to implement legislative reform in all areas of intellectual property. However, the reliance on cooperation from other government entities²³ that were late in responding and the input from key stakeholders who were unable to arrive at a consensus, fettered aspirations of an expeditious execution of the process. For instance, the first draft of the proposed Bill to repeal the Patent Act of 1857 was prepared in 1999, revised in 2001, and has still not been tabled before Parliament. Similarly, the WIPO Internet Treaties, which were ratified in 2002, have not as yet been incorporated into local legislation.

IV. PUBLIC EDUCATION

Since its inception²⁴, JIPO has pursued a national strategy targeting educational environment and law enforcement officials, and collaborated with its stakeholders to host public education activities and training workshops.²⁵

In commemoration of National Intellectual Property Week in April 2011, JIPO collaborated with the Jamaica Anti-Piracy Alliance (JAPA)²⁶ and the University of the West Indies, Mona to host a public lecture on challenges to IP enforcement; a training workshop for IP enforcement officials;²⁷ and a comic strip competition in a national newspaper. It also assisted the Organized Crime Investigation Division of the Police (OCID) with a public destruction exercise of pirated and counterfeit goods.

²¹ <http://www.jipo.gov.jm/>

²² There already exists a private organization called the Intellectual Property Service Centre (IPC) that offers voluntary IP registration services. In addition, the Legal Deposit Act 2002 mandates a 'national publisher' to deposit a copy of their IP works with the National Library for archival purposes (see Section 2(1)).

²³ These include the Ministries of Commerce, Science and Technology; Trade and Foreign Investment; and Foreign Affairs and Culture.

²⁴ JIPO opened to the public on 1 January 2001 as an agency of the Ministry of Commerce, Science and Technology.

²⁵ On 9-20 April 2011, JIPO, under the auspices of WIPO, hosted a workshop on sports and intellectual property' - a first for Jamaica and a first for WIPO.

²⁶ The Jamaica Anti-Piracy Alliance (JAPA) was founded in 2005 and officially launched during National Intellectual Property Week in April 2007. It is a partnership of 25 organizations that represent and or manage IP rights, entities whose IP rights are not presently represented or managed by an existing organization, state agencies and departments, and special interest groups. Among their partners are JAMCOPY, JACAP, JAMMS, JIPO, the OCID and the Ministry of Culture.

²⁷ Participants included customs officials, members of the Jamaica Constabulary Force and personnel from the Office of the Director of Public Prosecutions. A similar workshop was held for Resident Magistrates in September 2011, and one is planned for Clerks of the Resident Magistrates Court in April 2012.

It may be asserted that the individual and collaborative efforts of stakeholders to promote public education of their consumer constituency have been adequate and sustained. Arguably, the objective of creating awareness has been achieved; however, the assumption that public education would alter the perception that piracy and counterfeiting is a victimless crime and therefore infringements would decline has proved to be a fallacy.

In 2007, when JAPA was in production mode of four audio-visual public service announcements²⁸ for music, film, software and publishers, one prominent music professional pointed out that in his opinion, piracy was the driving force behind the rise to stardom of local artists in Jamaica - in local parlance 'Is piracy buss artists in Jamaica'. This opinion is based on the popular belief that piracy of local music is an exceptional promotional tool and a necessary delict to pave the way for new artists to emerge who would otherwise have limited means of garnering publicity and a fan base.

In another incident relating to the film industry, a contrary opinion was expressed. Storm Saulter, a Jamaican film-maker and presenter at the JAPA/UWI, Mona, Faculty of Law, Mona National Anti-Piracy Training Workshop for Law Enforcement Officials in April 2011, stated that he often conversed with pirates to inquire whether his latest film 'Better Must Come' was available for sale. He added that invariably the response was 'we are going to leave that film alone. We are not going to fight against one of our own people'. This sentiment evinces some knowledge of the harm that piracy engenders to local creators, as distinct from international industry giants who are perceived as overwhelmingly successful and relatively unscathed by the negative effects of piracy.

Thus, it can be deduced that the attitude and behavioural disposition of local consumers towards piracy and counterfeiting of non-Jamaican products remains largely influenced by low-cost or free alternatives to legitimate products.²⁹

V. ENFORCEMENT OF RIGHTS

A. ENFORCEMENT AND BANDEROLE

A case for the implementation of an anti-piracy device called banderole³⁰ was unsuccessfully submitted in 2001, despite indications that world sales for Jamaican music had fallen in retail value from US\$5.4 million in 1999 to US\$2.2 million dollars in 2000.³¹ The absence of piracy statistics did not fare well for its adoption either.³² Stakeholder concerns that the system was not infallible, together with the possibility that the banderole itself could become the subject of counterfeiting, posed an insurmountable block to this innovative proposal. Furthermore, there was scepticism that the banderole would elucidate the actual size of the

²⁸ These public service announcements were produced and directed by Natalie Thompson for JAPA.

²⁹ This reflects the findings outlined in the March 2011 study conducted by the Social Science Research Council in Brazil, India, Russia, South Africa, Mexico and Bolivia entitled 'Media Piracy in Emerging Economies' (MPEE).

³⁰ Banderole is a security device which is attached to a product like a seal. It is usually made of special paper similar to a monetary note and bears a serial number. The inclusion of a hologram is the characteristic of a high quality banderole device.

³¹ International Federation of the Phonographic Industry (IFPI) world sales figures, April 2001.

³² Similar experiences in Africa at that time did not deter the adoption in 2000 of the banderole in Ghana, Nigeria and Malawi.

music industry, resulting in negative repercussions in respect of fiscal obligations on the part of stakeholders.

B. ENFORCEMENT AND PUBLIC DESTRUCTION

On 23 June 2004, JIPO, in collaboration with the OCID, conducted the first public destruction of pirate CDs and DVDs. Admittedly, the booty was meagre, but the symbolic gesture resonated with the government officials, stakeholders and the public.

On 15 April 2011, JIPO, in collaboration with the OCID and JAPA, conducted the second public destruction of pirated and bootleg optical discs and counterfeit goods. On this occasion 1,200,312 CDs and 211,620 DVDs were destroyed. A large number of counterfeit goods were also destroyed, including shoe polish, socks, toilet paper, batteries, t-shirts, alcohol, cigarettes and a variety of skin bleaching agents.³³ It can be deduced from the marked increase of the volume of goods destroyed and the diversification of the goods confiscated by the OCID, that enforcement efforts have escalated, and that the operations of the pirates and the counterfeiters have become more sophisticated.³⁴

**Table 5.1 Public Destruction Statistics (1)
15 April 2011**

Type of Product	Volume	Pirate Sale Value	Market Sale Value
CDs	1,200,312	J\$120,000,312 (1,200,312 @ J\$100 per CD)	J\$1,560,405,600 (1,200,312 @ J\$1,300 per CD)
DVDs	211,620	J\$21,162,000 (211,620 @ J\$100 per DVD)	J\$529,050,000 (211,620 @ J\$2,500 per DVD)

³³ Eighteen different brands of skin bleaching agents were involved.

³⁴ This observation is mirrored in Europe. In 2009, the European Commission reported that piracy and counterfeiting is a growing phenomenon, with 43,500 cases of confiscated goods suspected of infringing IP rights at the European Union's external border. Of the top categories of goods detained, cigarettes accounted for 19 per cent, other tobacco products 16 per cent, labels 13 per cent and medicines 10 per cent.

**Table 5.2 Public Destruction Statistics (2)
Real Market Value v. Pirate Value
15 April 2011**

Music	Market Sale Value	Pirate Sale Value
Average 12 track CD	US\$15.00	US\$1.20
Average 12 track download	US\$8.00	Free
Average per track download	US\$1.30	Free
Film	Market Sale Value	Pirate Sale Value
Average movie theatre admission	US\$12.00	US\$1.20
Average DVD	US\$30.00	FREE
Average DVD download	US\$15.00	
Apparel	Market Sale Value	Counterfeit Sale Value
Sun Island MVP T-Shirts	J\$1,700.00	J\$500.00

C. ENFORCEMENT AND ARRESTS

Over 256 arrests were carried out by the police between 2003 and April 2011 for breaches of the Copyright and Trade Mark Acts. In an outstanding raid conducted in an upscale neighbourhood of the capital, Kingston, a haul of counterfeit cigarettes and cash was undertaken to the value of over J\$46 million. The OCID reports³⁵ that the lack of vehicles to transport confiscated goods and the absence of space to store them pending trial is problematic.

In an effort to improve the effectiveness of search and seizure processes, the OCID has entered into 'task force' agreements with customs and certain rights owners to identify counterfeit goods. For example, a 'task force' effort successfully raided a factory that was distilling spirits and unlawfully bottling the liquid into recycled bottles originally distributed by the legitimate trademark owners, Wray and Nephew Distillers Company Ltd.

D. ENFORCEMENT AND PROSECUTION

The OCID reports difficulties in identifying pirated and counterfeit goods, especially in a market flooded with the same or similar products. Accordingly, there is a reluctance on the part of the OCID to adopt a 'big sweep' approach to search, seizure, arrests and prosecution. There is also a concern that a particular community may feel they are being targeted, resulting in negative social implications.

Furthermore, according to the OCID, often right holders are impossible to locate or otherwise unwilling to come forward and give evidence. In such cases, if the accused pleads 'not guilty', he is unlikely to be charged with an IP offence; instead, he may be charged with breach of the Town and Communities Act for exposing goods for sale without a licence. Consequently, the accused could face a fine as low as J\$5,000 as opposed to J\$100,000 for a single infringing copy under Section 46 of the Copyright Act.

³⁵ Interview conducted with the Head of OCID, Senior Superintendent Fitz Bailey/Natalie Corthésy, Lecturer in Law, Faculty of Law, University of the West Indies, Mona, Jamaica, 21 April 2011.

Punishment meted out in IP criminal prosecutions has ranged from fines of J\$500 up to J\$200,000, 140 hours community service, destruction of goods and equipment seized, and deportation. However, no identifiable trend can be detected in the manner in which magistrates have handed down sentences. The OCID reports that in one instance, a judge ordered that the pirated goods be returned to the accused who was admonished and discharged.

Arguably, the inability of the police to effectively enforce IP rights and the inconsistent manner in which these matters are dealt with by the judiciary could likely result in an increase in the manufacture and supply of pirated and counterfeit goods in Jamaica; and ultimately, the spread of organized crime related to these goods on a large scale in Jamaica. This is not currently a feature of the Jamaican landscape.

E. PARALLEL CRIMES

A review of a sample of the DVDs seized by the OCID revealed that several discs contained explicit pornography. Further, there were over 18 different skin-bleaching products potentially very harmful to the user, some of which specifically warn against dispensing or use without a medical prescription. These findings raise concerns not typically associated with piracy and counterfeiting in Jamaica. However, there is evidence that public health and safety is becoming a growing appendage to counterfeiting in other countries in particular.³⁶

VI. DEBATE ON THE TRADITIONAL APPROACH

Data on levels of piracy and counterfeiting have been used to propagate the myth that pirate and counterfeit sales represent displaced legitimate sales.³⁷ It is likely that the comparatively high cost of legitimate goods is in itself an effective deterrent for consumers, particularly in developing countries. The dilemma posed by the extensive availability of cheap quality 'knock-offs' and free infringing identical copies on an industrial scale is significant. Imposing stronger enforcement mechanisms in international agreements, such as the European Partnership Agreement, on developing countries like Jamaica, a country not associated with the production of pirate and counterfeit goods on a large scale, is unlikely to affect the supply and demand for such goods at the global level. A more pragmatic step would be to approach known suppliers of pirate and counterfeit goods³⁸ at the governmental level through bilateral agreements.³⁹

³⁶ See C Wadlow, 'The Great Kenyan Coffee Crop Disaster: A Cautionary Tale of Coffee and Counterfeiting', *Journal of Intellectual Property Law & Practice*, Vol. 4, No. 12, 2009, page 867; the United Nations Office on Drugs and Crime found that counterfeit drugs have proliferated across Africa and Asia; as much as 50-60 per cent of the malaria and HIV drugs tested were found to be weak and or useless: 'The Transnational Trafficking and the Rule of Law in West Africa: A Threat Assessment' 2009, accessible at: www.unodc.org/documents/data-and-analysis/Studies/West_Africa_Report_2009.

³⁷ The Organization for Economic Cooperation and Development (OECD) estimates that international trade in counterfeit and pirated goods amounted to over US\$250 billion in 2007.

³⁸ In 2009, The European Commission reported that China continued to be the main source of IPR-infringing products, totalling 64 per cent of all articles seized.

³⁹ In December 2011, The Anti-Counterfeiting Trade Agreement (ACTA), an executive trade agreement on IP enforcement was concluded between Australia, Canada, the European Union, and its member States, Japan, Korea, Mexico, New Zealand, Singapore, Switzerland and the United States. ACTA has yet to come into force and remains open to others who wish to join. China's absence is cause for consternation.

The impact of confiscation and destruction, while an indication of aggressive enforcement tactics, remains a symptomatic approach, as there is no direct correlation between this method of enforcement and the perennial supply of pirated and counterfeit goods from foreign markets.⁴⁰ Admittedly, savvy pirates and counterfeiters would gravitate towards countries with a low threshold of IP protection, relaxed border measures and a demand for goods easily wedded to frugal purse strings.

VII. MEDIA PIRACY IN EMERGING ECONOMIES – AN ALTERNATIVE APPROACH

In March 2011, the Social Science Research Council released 'Media Piracy in Emerging Economies' (MPEE) - the first independent, large-scale study of music, film and software piracy in emerging economies, with a focus on Brazil, India, Russia, South Africa, Mexico and Bolivia.⁴¹

The study was conducted over three years by some 35 researchers. It explores the journey through which industry players have grappled with the exponential growth of piracy as digital technologies became more affordable and accessible around the world. In addition, it considers the rise of industry lobbies and their efforts to coerce lawmakers and law enforcement officials to heighten copyright protection and enforcement. The report argues that these efforts have largely failed and the problem of piracy is better conceived as a failure of affordable access to media in legal markets.

Articulating the choice

'The choice,' said Joe Karaganis, director of the project, 'isn't between high piracy and low piracy in most media markets. The choice, rather, is between high-piracy, high-price markets and high-piracy, low-price markets. Our work shows that media businesses can survive in both environments, and that developing countries have a strong interest in promoting the latter. This problem has little to do with enforcement and a lot to do with fostering competition.'⁴² Further, in a March 8, 2011 posting on Techdirt, Mike Masnick states that the study 'highlights how almost all of the policy discussions in the West concerning infringement focus on "enforcement," but that may be the wrong way to go about it. The research instead, points out that a better focus may be on setting up the structures for successful business models to emerge - which include local firms who can compete on price.'

*Major findings of the MPEE study*⁴³

- 'Prices are too high. High prices for media goods, low incomes, and cheap digital technologies are the main ingredients of global media piracy. Relative to local incomes in Brazil, Russia, or South Africa, the retail price of a CD, DVD, or copy of MS Office

⁴⁰ Although the European Union has implemented stringent enforcement measures and has obligated its trade partners to do the same through trade agreements, the 2009 EC report on piracy and counterfeiting identifies piracy and counterfeiting as a growing phenomenon and thus supports this view. See *supra* 32.

⁴¹ Social Science Research Council, 'Media Piracy in Emerging Economies (MPEE)', United States, March 2011, accessible at: <http://piracy.ssrc.org/the-report>

⁴² SSRC Releases 'Media Piracy in Emerging Economies' (<http://infojustice.org/archives/1661> accessed 19 January 2012)

⁴³ Accessible at: <http://piracy.ssrc.org/about-the-report>

is five to ten times higher than in the United States or Europe. Legal media markets are correspondingly tiny and under-developed';

The public destruction statistics of Table 5.1 above would tend to suggest that this finding would also hold true for Jamaica.

- 'Competition is good. The chief predictor of low prices in legal media markets is the presence of strong domestic companies that compete for local audiences and consumers. In the developing world, where global film, music, and software companies dominate the market, such conditions are largely absent';

This status quo is mirrored in Jamaica.

- 'Antipiracy education has failed. The authors find no significant stigma attached to piracy in any of the countries examined. Rather, piracy is part of the daily media practices of large and growing portions of the population'.

There is no evidence to negate or support a claim that the robust anti-piracy public education campaign of JIPO and JAPA has failed. Nevertheless, the findings reported by the OCID clearly reflect a general sense of indifference to piracy and, in certain instances, compassion for pirates.

- 'Changing the law is easy. Changing the practice is hard. Industry lobbies have been very successful at changing laws to criminalize these practices, but largely unsuccessful at getting governments to apply them. There is, the authors argue, no realistic way to reconcile mass enforcement and due process, especially in countries with severely overburdened legal systems'.

While changing the laws remains a challenge for Jamaica, the existing copyright and trademark laws meet with international standards. The critical issue plaguing effective enforcement in Jamaica is lack of resources, as pointed out by the OCID above.

- 'Criminals can't compete with free. The study finds no systematic links between media piracy and organized crime or terrorism in any of the countries examined. Today, commercial pirates and transnational smugglers face the same dilemma as the legal industry: how to compete with free'.

As noted by James in 'The Economic Contribution of Copyright-Based Industries in Jamaica':

[M]odern information technology makes the measure of trade in copyrighted products sketchy and inadequate ... copyright-based industries involve significant levels of piracy and other negatives that are addressed by diverting resources to policing and offsetting their impact. These have not been netted out in our calculations.⁴⁴

It is significant that media piracy, as opposed to large-scale traffic of pirated and counterfeit goods, has been singled out in the MPEE study. Is it to be deduced that because media piracy is not a natural corollary of organized crime or terrorism, it should be endorsed, ignored or decriminalized? Perhaps the better view is that stealing is wrong in any environment and that

⁴⁴ V James, note 3, page 9.

economic expediency should not be used as a veil to mask behavior which is *contra bonos mores et decorum*. The inability to compete with free argument is a travesty of the real dilemma - the dilution of creativity and disinclination to innovate that media piracy is likely to engender. There is no 'free' pass.⁴⁵

- 'Enforcement hasn't worked. After a decade of vamped up enforcement, the authors can find no impact on the overall supply of pirated goods'.

Perhaps the focus should be on the demand for intellectual property rather than on the supply of the goods which are distributed or otherwise communicated to the public. The debacle requires a profound assessment of the perennial need for creativity beyond technological advancements in communication and the apparent ineptitude of the law to keep abreast of them.

VIII. CONCLUSION

A collaborative effort on the part of stakeholders to think outside of the box is necessary in order to fashion a tailor-made solution for Jamaica, while having regard to the experiences of other like and different countries. This national IP strategy should include three 'Es':

(i) Education of stakeholders and the public

Triggering a change in behavior and attitude by raising awareness of the cultural cost as well as the economic loss caused by piracy and counterfeiting, can make a difference on the demand side, even if the supply of pirated and counterfeit goods cannot be eliminated altogether.

(ii) Enforcement of intellectual property rights

Taking enforcement seriously is not only a national concern, but an international requirement.

(iii) Empowerment of the creative industries through the provision of a modern IP protection framework conducive to vibrant competition in the global market.

Jamaica's distinctive culture and the brand it represents has secured for many Jamaican copyright-based industries one of the most coveted reputations in the world. This is priceless, not free.

⁴⁵ United States Government Accountability Office, 'Report to Congressional Committees: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods', GAO-10-43, 12 April 2010, pp. 9 to 10 gives credence to this view. The GAO found that the negative effects of piracy did not only include lost sales, lost brand value, and reduced incentives to innovate; it also resulted in lost tax revenue, expenses incurred to carry out enforcement as well as risks of national security and civilian safety where counterfeits entered supply chains.

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Town and Communities Act 1843, Section 5

Trade Marks Act 2001

Bilateral and multilateral agreements

Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994

Berne Convention for the Protection of Literary and Artistic Works, 1886

Convention for the Protection of Phonograms Against Unauthorized Duplication of their Phonograms, 1971

International Convention for the Protection of Performers and Producers of Phonograms and Broadcasting Organizations (Rome Convention), 1961

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List of abbreviations

ACTA – Anti-Counterfeiting Trade Agreement
CARICOM – Caribbean Common Market
CRNM – Caribbean Regional Negotiating Machinery
CSME – Caricom Single Market Economy
GATT – General Agreement on Tariffs and Trade
IPC – Intellectual Property Service Centre
JACAP – Jamaica Association of Composers, Authors and Publishers
JAMCOPY – Jamaica Copyright Licensing Agency
JAMMS – Jamaica Music Society
JAPA – Jamaica Anti-Piracy Alliance
JIPO – Jamaica Intellectual Property Office
OECD – Organization for Economic Cooperation and Development
OCID – Organized Crime Investigation Division
TRIPS – Trade-Related Aspects of Intellectual Property Rights
WIPO – World Intellectual Property Organization
WTO – World Trade Organization
