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**ENFORCEMENT OF IP RIGHTS: PUBLIC AND PRIVATE PERSPECTIVES:
(B) THE ROLE OF RIGHTS HOLDERS IN THE EFFECTIVE ENFORCEMENT OF
INTELLECTUAL PROPERTY RIGHTS**

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The property rights created by IP legislation are rights in private property and as such the intention of these laws is for the protection of Rights holders more or less like owners of any other private property.

However in societies like ours where tangible assets like land and other physical goods are highly prized and seem to be in woefully short supply intangibles like music, art, trade marks etc are not considered by the general public as products that are worthy of the name property. In Dominica we consider praedial larceny such a threat to national wealth creation that our law provides for rather stiff penalties for theft of any quantity of agricultural produce and the society applauds and dishes out the prescribed punishment. In fact one of our more famous musical creations in Dominica, "COCO SEC" (dry coconut) written by Phillip "CHUBBY" Mark tells of his incarceration for taking a single lonely dry coconut from an estate. How ironic it is that almost thirty years after his run in with the law that the national radio station finds it perfectly legitimate to appropriate his property, the song he felt moved to write and record to document his experience, to make a pirate CD in a commercial venture!!!

In the case cited above I had, as publisher and thus legal owner of the song, three choices:

1. Do nothing
2. Make a complaint to the police with a view to having them bring criminal charges or
3. Take action in the civil court for copyright infringement.

To do nothing was not an option, because to allow the brazen theft would send a signal to all the other pirates in Dominica that there was no law to prevent them from plying their trade; after all even the government's radio station was doing it!

We were left with options two and three. In most parts of the world including Dominica piracy is a criminal act and the criminal law is the main weapon to fight it. Logically we should have gone this route but we considered that the investigative arm of law enforcement would most likely not act because they would claim:

1. They are not sure if any crime was committed and
2. In any case even if there was a crime copying a couple hundred CD's was not a sufficiently grave offence to warrant exertion on their part when there were real criminals to deal with; drug dealers; burglars, coconut thieves and so on. After all probably every officer had a couple pirate CD's in his car!

By default therefore we were left with Option three – civil action. Taking civil action has some obvious advantages: in the first case one does not have to convince some other persons or agency to take action. Secondly if one succeeds he not only gets his costs back but damages as well. However these advantages are to be balanced against the fact that the rights holder must initially bear all the expenses of the action himself. He must of course also undertake whatever investigation is needed to acquire the required evidence and diligently follow up through the long and tedious court process. He has no assistance from the state. In the face of these two difficulties most rights holders, particularly in the music business, give up in frustration and seek no redress in the court system. A further discouraging complication in using the civil court has to do with the way damages are assessed. The damages realized in a successful action against an infringer depend mostly on the ability of the claimant to show the extent of damages caused by the acts of the defendant. The proof of the extent of these

damages is often difficult to provide. How for example does one prove to a court that a pirate has caused tens of thousands of damages when one can only provide one or two copies of a Cd or DVD in court as evidence of infringement?

The copyright system in the United States has many features which are lagging behind the world standard. However there is one feature of US copyright law that I strongly recommend we should adopt here; that is the inclusion of statutory damages at a substantial level for copyright infringement. With the advent of litigation against individual p2p file sharers in the US, statutory damages have become a spectacular threat which the RIAA has used against private individuals. The typical American file sharer who probably has thousands of songs on his hard drive would face statutory damages larger than all of their assets. At the present time a plaintiff who shows wilful infringement may be entitled to statutory damages of up to US\$150,000.00 per work. If we had statutory damages at a substantial level the Rights holder would be much more confident that civil action would be financially rewarding and at the same the potential infringer would be deterred by the substantial damages that he would have to pay even on a relatively few copies of proven infringing material.

Pirates of the Caribbean; Pirates in the Caribbean; Pirates from the Caribbean. Pirates seem to be everywhere in Dominica and the rest of the Caribbean whether on film or on the sidewalks. The hottest movie in the west is **Pirates of the Caribbean 2 Dead man's Chest**, a movie that was partly filmed in Dominica. While some persons were lamenting the fact that our movie house was out of action and would not be able to show the movie most persons could not care less since they had already secured their pirated copies on DVD. I am sure some you in the audience have already seen, and probably bought, an illegal DVD copy. You are probably thinking so what's wrong with making a few copies, after all Disney is a multibillion dollar business so they won't miss a couple DVD sales. After all we are not involved in the movie business! Well this not so.

In a piece appearing in the Guardian of July 8th Polly Patullo tells of the tremendous economic impact which the film had on the local economy. She recounts the story of a coconut picker who made enough money picking dry nuts (lest they fall on the heads of cast or crew) to build a small house. I met the gentleman and he confirms the story. It is also reported that some 400 persons were employed in the production; hotels and other accommodations were rented, food had to be prepared, vehicles rented, drivers hired, extras, secretaries etc. All this activity pumped quite a few million dollars into the local economy. We are quite definitely in the movie business. We are served by an OECS agency that is spending money to develop the film and music businesses in Dominica and the rest of the OECS. The intention is not only to maximize on the location potential for shooting big budget Hollywood movies, but also to develop local capacity for production of filmed entertainment. We therefore have no advantage in encouraging theft of intellectual property associated with music or film. Right now some friends of mine are in the process of finishing a movie which they hope to put on the local market before the end of the year. While they are excited about the project they are also fearful because they know that as soon as the movie hits the market the pirates will pounce on it and erode their sales, whether the movie is good or bad.

The pirates in Dominica operate with complete brazenness, openly selling their illicit wares on the public thoroughfare with no fear of arrest or prosecution. They can do this with impunity because even if the police were minded to intervene the law requires that there be a virtual complainant. Given the extreme reticence of local Rights holders to take action and the perceived inability or unwillingness of foreigners to file complaints they have little or nothing to fear.

In the early 1980's Dominica was faced with a problem of old time piracy i.e. the theft of physical goods, particularly jewellery, from stores and individuals in Guadeloupe by some Dominicans. This loot was then returned to Dominica by small boats and was openly sold to individuals on the street. The pirates actually took orders from potential customers and then delivered the goods, pretty much in the same way that you can walk into any pirate den in town and place your order for your pirate compilation of music.

After a year or two of going about their business with impunity the police finally put an end to this nefarious activity by activating the law relating to having or receiving stolen goods and began confiscating goods that individuals could not prove that they had bought or that had come into their possession by legal means. Both the buyers and the sellers faced stiff penalties and the trade was quickly brought to an end. I am not a lawyer or a police officer, but I am wondering whether the law against having or receiving stolen property can't be used to rid the sidewalks of sellers of stolen intellectual property by having the police making seizures of obviously pirated goods. Additionally or in the alternative we should move to amend the copyright act so that a complainant is no longer necessary for a successful prosecution.

With respect to this last suggestion a proposal was put forward in the context of the negotiations for the so-far still born FTAA in article 4.6 of the draft agreement that would require FTAA signatory countries to grant criminal law enforcement agencies the power to initiate criminal prosecutions for infringement without the requirement that the rights holder or an injured party file a complaint about the infringement. http://www.ipjustice.org/FTAA/IPJ_FTAA_White_Paper_r_1_2.html - [fn17](#) We need not wait for the FTAA, if it ever comes about, to force us to take useful and necessary action. We can amend our law and practice and serve as an example to the rest of the region by taking action now.

I have so far not mentioned the difficulties that rights holders have in enforcing their right of public performance. This right is protected and enforced in the music field collectively and infringement and enforcement is pretty much limited to civil action although giving the law makes provision for criminal sanctions. This right is managed collectively by Performing Right organisations and our main difficulties with the state lie in the fact that the government and its agencies are failing to take the lead in seeking the required licenses for the use of copyright material.

For the individual right holder seeking to protect his right of public performance his main job is to seek out a suitable PRO of which to become a member and then to understand and follow the rules of his organisation in order to derive the maximum benefits.