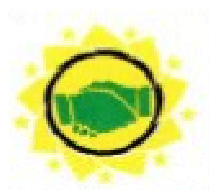


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WORLD INTELLECTUAL
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**THE PRIVATE SECTOR AND THE ENFORCEMENT OF IP RIGHTS:
(B) COPYRIGHT BASED INDUSTRIES**

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THE COPYRIGHT INDUSTRIES

1.1 Definitions

1.1.1 *The Copyright, Creative and Cultural Industries*

The *copyright industries* are defined by WIPO in its 2003 *Guide on Surveying the Economic Contribution of the Copyright-based Industries* as consisting of four categories: core, partial, non-dedicated support, and interdependent:

1. The *core industries* are those which have as their primary purpose the production or distribution of copyright material, including radio and television broadcasting, book publishing, music, computer software and films.

2. The *partial copyright industries* are industries which have some products protected by copyright including furniture, footwear, fabrics and architecture.

3. The *non-dedicated support industries* include industries that distribute copyright protected material to businesses and consumers such as transportation, telecommunication services, and wholesale and retail trade.

4. The *interdependent industries* are those which manufacture and sell equipment which facilitates the creation, production and exploitation of copyright material.

The Creative Industries Unit and Taskforce of the Department for Culture, Media and Sport (DCMS) in the United Kingdom defines *the creative industries* as, “*those industries that have their origin in individual creativity, skill and talent, and which have a potential for wealth and job creation through the generation and exploitation of intellectual property*¹” – the application of technology combined with intellectual property.

According to UNESCO the distinction between the cultural and creative industries is that the creative industries have a broader view of the creative process than the cultural industries including, software, advertising, architecture and business intelligence services. The products resulting from these activities are termed “related products” while “traditional” cultural products are categorised as “core cultural products” which have a tangible aspect, (the physical support and an intangible aspect, cultural content. The definition is further specified by distinguishing “core” products which related to those with a direct cultural content and “related” products which relate to those services, equipment and support materials that serve the creation, production and distribution of core cultural products. The differences are illustrated in the following example, where a recorded CD of music and the associated copyrights are classified as “core cultural products” and the blank CDs or the CD player are categorised as “*related cultural products*”.

For the purpose of this discussion, there will be no distinction made between the copyright and creative industries with the cultural industries as a sub-group.

Additionally, another related term has been coined, the Intellectual-Property Industries which is defined as those industries that “*rely most heavily on copyright or patent protection to generate revenue, employ and compensate workers and contribute to growth in the economy.*”

¹ “*Creative Industries and Development*” 11th Session, Sao Paulo, 13-18 June 2004, UNCTAD

The Governments of the Caribbean recognise that under the present trade regime and market conditions we must diversify our economic base. One area commonly agreed as offering the greatest growth potential is that of the creative industries. The value of the creative industries reside not only in their economic potential to generate direct and indirect employment and income through the added value in the chain of activities with inter-sectoral linkages in education, manufacturing, trade, administration and services but also numerous social and environmental benefits through the investment made in communities and tourism.

The growth in these industries has been spurred worldwide by innovative technological advances, the growth in international trade, increasing affluence which allows for increased spending on income-elastic, luxury products, the growth of the service economy and de-regulation in many sectors. Given the developments in information and telecommunications technologies the Caribbean cultural industries are now more than ever ready for further development and exploitation.

In turn our Governments have responded to these opportunities by repositioning the cultural industries and granting them developmental priority within the macro-economic policy framework. However, as with most developing nations, the cultural industries remain a fringe sector of our economy. It is estimated that out of the 132 developing countries in the world, five have large film industries, while 85 have never produced a film and in 2002 the share in world exports in the visual arts were: painting 3%, sculpture 5% and photography 9%².

- Estimated Employment in the Barbadian Cultural Sector

Unit	Narrow Concept ^(a)	Broad Concept ^(b)
Institutions	1,300	1,300
Businesses	3,178	8,960
Own Account	1,279	1,279
Total	5,757	11,539

^(a) Excludes Hotels, Restaurants and Bars; ^(b) Includes Hotels, Restaurants and Bars

Source: A Survey of Cultural Industries in Barbados, SALISES

- Individual Sector Analysis

Informal Survey of Financial Value of Cultural Industries in Barbados (Arts & Entertainment and ancillary entities)

Discipline	Annual Turnover (BB\$)	Full-time Employment	Part-time Employment	Recreation
Literary Arts	\$6,330,000	50	180	200
Dance	\$3,500,000	50	125	100
Visual Arts	\$9,000,000	70	200	250
Theatrical Arts	\$3,000,000	30	100	100

² "Creative Industries can Boost Regional Economy", Miranda La Rose, <http://mail.klein.org/pipermail/incom-1/2006-March/001203.html>

Music	\$11,000,000	100	250	500
Videography	\$6,000,000	60	50	20
Sub-total	\$37,000,000	360	905	1,170
Festivals: Economic Impact	\$60,000,000 \$97,000,000			

Source: Report of Barbados National Task Force on Culture

THE INTELLECTUAL PROPERTY REGIME IN THE DEVELOPMENT OF THE COPYRIGHT/CREATIVE INDUSTRIES

Intellectual Property Rights protect the applications of ideas and creative expressions. This is achieved through the regulation of various types of intangible property – the most well-known being patents, trademarks, copyrights and trade secrets. This protection is given in order to foster innovation; creators are provided the opportunities of economic rewards and to recover investment through the grant of exclusive rights. Copyright and related rights are the forms of intellectual property protection of greatest importance to the creative industries. Copyright protects the original expression of the creators of artistic works, including literary and musical works, sound recordings, dramatic works and pictorial, graphic and sculptural works amongst others. Related rights are a form of protection offered to those who invest in the creative process by enabling the commercialisation, manufacture and distribution of creative works such as the producers of phonograms and broadcasters. The levels of investment are often high and without a system which adequately protects the investment, the risk of losing the investment would be too great.

CHALLENGES TO THE DEVELOPMENT OF A FUNCTIONING INTELLECTUAL PROPERTY SYSTEM

The development of the intellectual property system in the Caribbean is hindered, as in most developing nations because:

1. We are net-users and not owners of Intellectual Property Assets and net exporters of Intellectual Property Royalties.
2. Given the strengthening of protection as well as the relationship between knowledge ownership and innovation, access to and the transfer of technology actually decreases under the present system -reduced social welfare by restricted access to protected technologies and knowledge.
3. The Caribbean faces serious financial and human resources constraints in implementing Intellectual Property legislation and lack the necessary institutional capacity for policy coordination.
4. There is the potential for the real increase in the prices of essential areas such as education.
5. It may be argued that the time, energy and money devoted to the development of the system would be better allocated to areas such as health care.

6. There has been a growth in copyright piracy and although rights-holders have been able to benefit from the development of collective management organisations (CMOs), the growth of, in particular, the music industry has been severely hampered by the increasing levels of piracy and complaints from rights-owners of various shortcomings in their ability to enforce their rights.

7. There is a low level of appreciation for the creative process and the development of the arts generally.

SPECIFIC ISSUES AFFECTING THE DEVELOPMENT OF THE INTELLECTUAL PROPERTY REGIME

(i) Business Models

Over 70% of businesses in the Caribbean are classified as small or micro in their scale of operations and are extremely important in the economy contributing significantly to employment and trade. Due to their very nature, which often tends to be based on informal structures, small businesses do not engage in formal methods of Intellectual Property protection, relying instead on trust and secrecy.

(ii) The impact of competition on the varying types of Intellectual Property

Intellectual Property ownership through the conferment of monopoly rights is capable of being a source of immense market power – the rights owner is able to generate high profits by reducing output and increasing prices. However, it is still possible to control this behaviour through direct price control mechanisms, competition policy and through compulsory licensing schemes.

(iii) The Division of Markets and Free Movement and Market Access Concerns

By effectively using Intellectual Property Rights protection, the rights owner in one territory can prevent his products from being moved to another territory by barring imports or exports as he is granted the exclusive rights to authorise such activities.

With the development of the free market, the ability of rights owners to behave in this manner can have a detrimental impact on competition and the free movement of goods and services. It means that within the Caribbean Single Market and Economy (CSME), there will have to be the CSME wide exhaustion of rights, which mean that once Producer X has placed his goods for sale anywhere within the CSME, he can no longer inhibit the free movement of these goods within that market unless there are very specific exceptions granted to protect certain goods.

GENERAL CHALLENGES AFFECTING THE DEVELOPMENT OF THE COPYRIGHT INDUSTRIES

(i) There is a lack of strong institutional support infrastructure for the copyright industries and although there some cooperative groupings exist, many enterprises tend to operate on an individual basis and fail to share knowledge and experience.

(ii) The convergence of broadcasting, cable, satellite, telecommunications and multimedia are complicating the application of the rights and obligations of new trade agreements will apply.

(iii) While the continual opening of global markets have created opportunities through the development of niche markets continuing economic interdependence but are simultaneously forming challenges for domestic policies to protect cultural identity.

(vi) With economic growth there are changes in wage and employment rates which must also be appropriately addressed in our domestic policies.

Collective Management Organisations

A major institution in the development of the copyright industries is the collective management organisation (CMO). The CMO serves a number of functions:

- 1) Licensing the use of works and generating wealth through the distribution of royalties to rights-owners;
- 2) Enabling rights-owners to be adequately compensated for the exploitation of their works by documenting ownership information and sharing this with other societies so that owners can be properly identified and payment facilitated;
- 3) Providing a structured environment, increasing the profile of and improving the negotiating position of rights-owners;
- 4) Lobbying for improvements in legislation and the operating conditions of rights-owners;
- 5) Providing education, public awareness and social-welfare programmes for members.

Copyright Owners are generally granted a number of rights under copyright laws which fall under two groups:

- 1) Economic Rights, which relate to the commercial exploitation of works
- 2) Moral Rights, which relate to the protection of the author and the integrity of his works.

Economic Rights Principal Rights

1. Reproduction (copying) – may be a literal or non-literal copy

- (a) the action of making a copy
- (b) the copy itself
- (c) the use of the copy in such a manner that allows the original work to be seen
 - The reproduction may be in the same or a different medium.
 - An infringing action may concern the copying of the work as a whole or a substantial part of the work where “substantial” refers to quality and not necessarily the quantity of the work copied.

- Examples of reproduction
 - (a) photocopying a book
 - (b) the making of a sound recording from a literary or musical work
 - (c) making a photograph of a sculpture
 - (d) music for download on the internet
- 2. Public Performance – the performance of the work outside of the normal domestic context.
 - Examples of public performance
 - (a) the transmission of films to hotel guests in their rooms
 - (b) the performance of music for members of a club or for staff in an office
 - (c) the playing of music at sports grounds or at parades
 - (d) the playing of music on hold
- 3. Other Economic Rights
 - (a) the right of adaptation
 - (b) the right of rental and lending
 - (c) the right of distribution

The economic rights are treated as rights in real property and may be transferred by way of sale, assignment or licence. Additionally, these rights are treated as a bundle and may be treated as a whole or separately, so that there may be multiple interests in the rights of an individual work.

4. Two Main Moral Rights

- (a) The right of attribution – the right of the author to have his name on the work or to choose to have the work published anonymously or pseudonymously.
- (b) The right of integrity – the right to prevent derogatory treatment of the work.

The moral rights remain with the author although they may be in some cases waived.

Due to the nature of the public performance and the reproduction rights, where multiple persons from multiple territories may be interested in exploiting these rights in a work, for example, the broadcast of a work, it is impractical for the rights-owner(s) to effectively control, monitor and be remunerated for all such use and this is the main justification for a collective approach. As with copyright, the owners of the rights in sound recordings and performers are also granted certain rights under the law, which due to their nature are the subject of collective administration.

Through reciprocal agreements based on the principle of national treatment, a CMO in one territory administers the rights of sister societies in that jurisdiction and they do likewise in their respective territories. CMOs generally administer rights in a particular field, so there are CMOs which administer the rights in musical, dramatic, literary and audio-visual works

and in some cases, there exists “one-stop” organisations administering multiple rights in multiple fields.

The Caribbean Copyright Link

The Copyright Society of Composers, Authors and Publishers Incorporated (COSCAP) in Barbados is a founding member, along with the Copyright Music Organisation of Trinidad and Tobago (CMOTT), the Hewanorra Musical Society (HMS) of St. Lucia and the Jamaica Association of Authors and Publishers (JACAP), of the Caribbean Copyright Link (CCL) which was incorporated in the year 2000. The aegis of the CCL was a “*Business Plan for the Implementation of a Regional System for Collective Management of Copyright and Related Rights in the Caribbean*” which was commissioned by the WIPO which was requested by the CARICOM Ministers with responsibility for Intellectual Property to assist in the creation of a regional system for collective administration. The articulated purposes of the CCL were to provide data and rights management for the member societies and to promote, represent and defend the interests of the member societies.

Thus far, with the exception of the reprographic society, JAMCOPY in Jamaica, the CMOs in the English-speaking Caribbean only represent the rights in musical works although a feasibility study has been recently commissioned for a regional approach to the collective administration of the reprographic right.

Rights of CMOs

Upon joining a CMO a member will normally execute a contract assigning specific present and future rights in full to the CMO in consideration for the payment of royalties, however, some societies take an exclusive licence or mandate. The CMO is then responsible for the administration of these rights and has the right to take legal action. Similarly, in the reciprocal agreements with foreign CMOs, a licence including the right to take legal action is normally granted.

Challenges faced by CMOs in the Caribbean

- (i) There is a low level of compliance by local music users;

The problem of low compliance is commonplace in the English-speaking Caribbean. This problem is generally caused because:

- Ignorance and a lack of understanding;
- A principled decision not to comply due to opposition to the concept of copyright licensing;
- Disagreement on the amount to be paid;

As a result, the approach of the members of the CCL has been:

- To embark on educational and public awareness campaigns
- To meet with and negotiate with users in an effort to reach an amicable agreement
- To provide a series of written notices including the intention to take the necessary legal action. In the interim evidence of infringing use will be gathered.
- To evaluate the infringing action and the cost of taking legal action

- Where legal steps are deemed necessary, injunctive relief may be applied for if the matter warrants this or a suit may be filed for copyright infringement.

Although in most cases legal action has been successfully taken, the desired results have not come to fruition. The process is long and expensive and even where judgments have been awarded to the CMO, there is still the problem of enforcing the judgment. For example, there have been cases where damages have been awarded to COSCAP and users refuse to pay and subsequent summons have been fruitless, as users “can not be found”.

- (ii) A lack of understanding by policymakers and broadcasters;

There are low levels of local music being broadcast which has resulted in the out-flow of royalties

COSCAP Distribution Analysis for the years 2001 to 2005

Payments to other societies	
Total to American societies	17%
Total to English society	9%
Total to Caribbean societies	7%
Total to Barbados	23%
Other	43%

Incoming Royalties to COSCAP 2002-2005

USA	55
Japan	7
UK	34
Canada	2
Others (including rest of Caribbean)	2

The total of the royalties exported by COSCAP in the surveyed period was US\$254,100 whilst the total incoming was US\$57,416. Further, of the total received from the USA, approximately US\$31,000, represents payments received in 2005 of which three-quarters was on behalf of a former writer who had achieved some international success and was subsequently encouraged to join a bigger European society.

Regional policy-makers have consistently refused to implement local content requirements and broadcasters argue for the case of free market principles and that they only play what customers are interested in. The problems presented by the broadcasters are compounded by the fact that even though these are the biggest users of music, there have been many problems getting them licensed.

Nonetheless, the nexus between the development of the creative industries and the promotion of local cultural heritage and works, recognizing that these are the foundation of the creative industries is well-documented and has been adopted by many countries. It is hoped that the Caribbean will embrace the principles of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions especially in international trade negotiations. The CMOs will also continue to lobby for the increased use of local works in an effort to increase the revenue earned by their members.

(iii) A lack of appreciation for copyright and collective management

There is a general lack of understanding of copyright licensing principles by policy makers, enforcement agencies and the judiciary. Individually and collectively, the regional CMOs have facilitated workshops and educational programmes specifically for these stakeholders with limited success. There have been cases where politicians have intervened in the licensing process and in one case, a member of the local judiciary called COSCAP to voice his anger when COSCAP approached a family member for a licence.

(iv) Competition policy and International Developments

The changing landscape of collective management in Europe following the ruling of the European Commission which found certain provisions of the standard CISAC reciprocal agreement anti-competitive and this has resulted in the movement away from the principle of not competing for membership. The CCL member societies have begun to feel the effect of this as previously whereas the transfer of regional rights-owners to national societies was facilitated in a prompt manner; this no longer appears to be the case. This means that there is a risk that the national societies will not appeal to local rights-owners and possibly lose their sustainability.

(v) The need to modernize regional Copyright Laws

The Internet and technological developments represent both a threat and an opportunity for regional rights-owners once effective systems are established to allow for the proper exploitation of rights. The failure of many Caribbean Governments to ratify the WIPO Copyright Treaty and the WIPO Producers and Phonograms Treaty and make necessary amendments to copyright laws have meant that it does not have the capacity to adequately administer the online exploitation of music. This is further complicated by the lack of a comprehensive international framework which provides clarity in online and new media music licensing.

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