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Public Prosecution
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“Strengthening the Rule of Law in Arab States - Project on Modernization of Public Prosecution
Offices”
Regional Conference on
“Intellectual Property Crimes”

Types of Intellectual Property Crimes: Piracy and Counterfeiting”

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Good morning,

Distinguished guests,
Ladies and gentlemen.

It is a real pleasure and an honour for me to be here in Manama.

I wish to thank, in particular, the Organization of UNDP Programme for Arab States and the Public Prosecution Office of the Kingdom of Bahrain for having invited me here today.

My task this morning which is easy and difficult at the same time. I have to set the scenes, in other words, to set the parameters of the discussions of this session: that is, the different forms of Intellectual Property Crimes (without making reference to national laws).

Accordingly, first I will briefly touch the notion of IP crimes, essentially piracy and counterfeit, and, then, I will address some features of IP rights, as they are part of the problem of defying IP Crimes.

The experts who will follow me this morning will deal in more details with the above matters.

Intellectual Property (IP) Crimes

“*IP Crimes*” is a generic term used to describe a wide range of illicit activities linked to IP Rights infringement.

IP Crimes may be divided into two main categories (like the IP Rights which are divided into two classes: Intellectual Property and Industrial Property):

- Copyright Piracy, and
- Trademark Counterfeiting

although they are commonly perceived as the two faces of a single phenomenon.

Piracy v. Counterfeiting

Both crimes are characterized by the willful infringement of an IP Right by copying or imitating the protected work.

However, in the “traditional” form of counterfeiting (when the buyer is not aware of purchasing a counterfeit article) there is also an element of fraud, which consists of deceiving the buyers as to the provenance/qualities of the products.

Copyright piracy, instead, is commonly referred to as a sort of theft, although of intangible property.

In both cases the “fake” products exploit somebody else’s creations and related investments.

Counterfeiting and piracy have been considered criminal activities almost since the inception of IP laws in most national legislations.

Criminal sanctions usually apply in addition to the civil and administrative remedies provided for IP Rights infringement by State laws.

However, the extent of protection and enforcement of IP Rights still vary widely around the world.

In particular, there are still:

- a) distinctions between civil and criminal enforcement (what is a civil IP infringement is not necessarily a criminal one), and
- b) considerable differences in regards to the definitions of IP crimes and the degree of punishment established in the various State legislations.

The TRIPS Agreement

Such disparities exist notwithstanding the international obligation to provide for criminal sanctions set forth by art. 61 of the TRIPS Agreement¹ of the World Trade Organization (WTO), as follows:

“Members shall provide for criminal procedure and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on a commercial scale”.

However, the TRIPS Agreement established minimum standards of protection of IP Rights, but left certain flexibilities as to the methods of implementation and enforcement.

In particular, the TRIPS Agreement incorporates certain “flexibilities” to permit countries to use TRIPS compatible norms in a form that enables them to pursue their own public policies. Such as the flexibilities as to the method of implementing TRIPS obligations, as to the substantive standards of protection and as to the mechanisms of enforcement.

Why criminal sanctions?

Criminal sanctions are often warranted to punish and deter the most serious violators:

- repeat and large-scale offenders (“*on a commercial scale*” as required by the TRIPS Agreement, or “for profit” or “for a commercial purpose”)
- organized crime groups, and
- any behavior which may threaten public health and safety.

In addition, in the era of globalization, international competition and technological developments, the enforcement issues of IP has become more and more important, and civil remedies are not always effective against the organized crime (who is now mostly in control of the counterfeit and pirated goods market).

¹ The Agreement on Trade-Related Aspects of Intellectual Property approved as part of the multilateral negotiations of the Uruguay Round in 1994.

In fact, criminal law, in general, protects private rights against infringement if there is a public policy element involved.

In most countries the identification of the scope of protection of IP is at the source of an ongoing debate.

While for technological inventions and copyright it is commonly accepted that it is the protection of the investments made by the creators, the protection of the trademark (for the “reputational” investment made) is more open especially when the “buyer” is aware of purchasing counterfeit or pirated goods.

In fact, the OECD² has recently drawn a distinction between 2 sub-markets of counterfeit goods:

- in the primary market, consumers purchase counterfeit goods and pirated products believing they have purchased genuine articles (even if the products are often sub-standard and may carry health and safety risks), while
- in the secondary market, consumers are looking for what they believe to be bargains knowingly buying counterfeit and pirated goods.

The policies and measures to combat piracy and counterfeit in such markets are clearly different.

A few countries punish with administrative fine the intentional or “negligent” purchase of counterfeit goods for private purposes.

What is counterfeiting ?

The term “counterfeiting” is generally used to describe the deliberate infringement of trademark (for profit/on a commercial scale/for a commercial purpose).

The TRIPS Agreement contains the following definition:

“counterfeit trademark goods” shall mean goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation” (footnote 14 (b) to sect. 51 of the TRIPS Agreement).

(Sectors + Ferrari)

What is piracy?

The term “piracy” is generally used to describe the deliberate infringement of copyright (for profit/on a commercial scale).

The TRIPS Agreement gives the following definition:

² The Economic Impact of Counterfeiting and Piracy , Executive Summary, 2007

“pirated copyrights goods” shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation”

Originally copyright piracy consisted of the unlawful duplication/copying of the original work, which was subsequently produced and distributed as a “physical” pirated product.

However, with the advent of the photocopy machine, and, later, the software and internet technology, it is now possible to copy and distribute unlawfully almost anything, anywhere and in few seconds (es., file sharing), without having a physical product.

Clearly, counterfeiting may compound piracy when the unauthorized reproductions bear the logos and/or names of the original producers.

Examples of Piracy

Software piracy:

- the unauthorized { [HYPERLINK "http://webopedia.internet.com/TERM/s/copy.html"](http://webopedia.internet.com/TERM/s/copy.html) } of { [HYPERLINK "http://webopedia.internet.com/TERM/s/software.html"](http://webopedia.internet.com/TERM/s/software.html) }. Most retail programs are { [HYPERLINK "http://webopedia.internet.com/TERM/s/software_licensing.html"](http://webopedia.internet.com/TERM/s/software_licensing.html) } for use at just one { [HYPERLINK "http://webopedia.internet.com/TERM/s/computer.html"](http://webopedia.internet.com/TERM/s/computer.html) } site or for use by only one { [HYPERLINK "http://webopedia.internet.com/TERM/s/user.html"](http://webopedia.internet.com/TERM/s/user.html) } at any time.

Music piracy:

- the illegal downloading/sharing of music files on the internet (so called, mp3 files)
- bootlegging (i.e., making and distributing an { [HYPERLINK "http://en.wikipedia.org/wiki/Sound_recording"](http://en.wikipedia.org/wiki/Sound_recording) } and/or { [HYPERLINK "http://en.wikipedia.org/wiki/Video"](http://en.wikipedia.org/wiki/Video) } recording of a live or broadcast performance that was not officially released by rights owner)
- pirated CDs (making or distributing copies of sound recordings on CDs without permission of the rights owner).

Film Movies

- CAM (sneaking a { [HYPERLINK "http://en.wikipedia.org/wiki/Camcorder"](http://en.wikipedia.org/wiki/Camcorder) } into a movie theater and secretly taping the projection).

What is Intellectual Property (IP)³ ?

IP refers to creations of the mind: inventions, literary and artistic works, symbols, names and images used in commerce.

IP is divided into two categories:

- **Industrial Property** includes patents for inventions, trademarks, industrial designs and geographical indications

³ WIPO's definitions.

- **Copyright** includes literary work such as novels, poems and plays, films, musical works, artistic works, computer programs and electronic databases.

What are IP Rights?

IP laws protect the interests of creators by giving them property rights over their creations.

Patents give an exclusive right against any use of the invention for a duration usually of 20 years after the filing of the patent application. The invention must be disclosed in an official register.

Copyright protects only the form of expression of ideas (not the ideas themselves), and prevents the unauthorized copy or use thereof for a term usually equal to the life of the author + 50 years after his/her death.

What is a Trademark?

A trademark is a distinctive sign, which identifies certain goods or services as those produced or provided by a specific person or enterprise. It generally creates expectations with respect to the quality and characteristic of the products concerned, and, accordingly, it helps consumers identify and purchase a product or service because its nature and quality, indicated by its unique trademark, meets their needs.

A trademark provides protection to the owner of the mark by ensuring the exclusive right to use it to identify goods or services, or to authorize another to use it in return for payment.

Looking forward...

Infringements of IP are a constantly growing phenomenon which nowadays have an international dimension, and the disparities among the national systems of penalties make it difficult to combat counterfeiting and piracy effectively. This means that the approach should be “global”.

The TRIPS Agreement contains provisions on criminal matters which are common standards applicable at international level, but the disparities between Member States are still too great, and they do not permit effective combat of IP offences.

At the European Union level, a proposal for a directive aimed at harmonizing criminal sanctions for IP Rights (so called IPRED 2) was approved on April 26, 2007.

A common effort is, thus, required by the international community at all levels to effectively enforce IP Rights.

Italy: Main Criminal Provisions

Sect. 473 of the Criminal Code imposes prison sentences of up to 3 years and a monetary fine up to euro 2,065 on any part found guilty of counterfeiting or altering a trademark, a patent or a model, or make use of a counterfeit trademark, patent or design.

Sect. 474 of the Criminal Code imposes prison sentences of up to 2 years and a monetary fine up to euro 2,065 on any part found guilty of selling or offering for sale products bearing a counterfeit trademark or importing counterfeits into Italy.

Sect. 517 of the Criminal Code imposes prison sentences of up to 1 year and a monetary fine up to euro 1,032 on any part found guilty of selling products bearing signs capable of deceiving the buyer as to the origin, provenance or quality of the products.

The above crimes may be enforced ex officio.

Sect. 171 of the Copyright Act (Law no. 633 of April 22, 1933 as amended) imposes a fine up to euro 2,065 on any part found guilty of copying, selling or make available via a digital network the works of third parties without authorization.

Sect. 171-ter of the Copyright Act (Law no. 633 of April 22, 1933 as amended) imposes sentences up to 3 years and a fine up to euro 15,000 on any part found guilty of illegitimately copying, selling, import or make available via a digital network the works of third parties without authorization and for business purposes.