Practical Tips for Combating the Scourge of Global Piracy

By Doris Estelle Long[1]

According to a recent report on global software piracy, 35% of all installed software in 2004 was pirated, resulting in over $33 billion dollars in lost revenue for US industries alone.[2] Estimates by the US Department of Commerce place global piracy losses by US industries at approximately $250 billion in lost sales.[3] Moreover, the economic impact of global piracy is not limited to IP owners in the developed world. To the contrary, in a 1995 report focusing on hard goods piracy, the United Nations Conference on Trade and Development (UNCTAD) reported that while the Jamaican music industry generated in excess of $1billion (US) globally in 1995, the total value of Jamaican music exports amounted to only $1.4 million (US).[4]

Countless factors have contributed to the growth of the global "scourge" of piracy. Perhaps one of the most significant contributing factors is the simple ease of reproduction offered by modern technologies. Not only can digital copies be created at ever-diminishing costs, these copies, unlike the analog copies of old, are virtually indistinguishable from the original in quality. Worse, the creation of such copies generally does not diminish the quality of the original.

On a recent trip to Jamaica, I was surprised to discover that one of the largest stumbling blocks to effective enforcement of music copyright were the musicians themselves. Many of these musicians had proclaimed publicly that they did not object to piracy. To the contrary, they believed that piracy would help enhance their popularity because it made their music available to the masses.[5] We hear the same argument from many musicians in connection with digital piracy in the United States.[6] These same musicians, however, may find it difficult to land a recording contract because *they have no evidence of the amount of sales they could generate.* [7] It is counterintuitive to believe that people who are used to getting music for free or at drastically reduced prices will suddenly pay full price when there is little but anecdotal evidence to support such a view.[8]

In reality, many of the perceived "benefits" of piracy are based on wishful thinking and a lack of information about the actual costs of pirate activities. There is no question that piracy has become big business with perceived potentially large gains and few costs.[9] Pirates do not have to invest in research and development for new product creation. They do not engage in advertising activities to create consumer demand for new products. Since enforcement is often negligible, even if the pirate is caught, penalties remain surprisingly low. Despite the obligation under TRIPS that criminal penalties be available to *deter* copyright piracy on a commercial scale,[10] current global penalties are so slight they serve as a mere "cost of doing business."[11] Yet, despite the facial appeal, the benefits of this new business model do *not* bode well for the host country. At some point, lack of consistent intellectual property protection can have devastating consequences, not the least of which is the "brain and talent drain." Gifted

individuals flee to countries where their intellectual creations are protected, thus, guaranteeing them a steady source of income for their future creative efforts. [12]

A pirate culture may actually impede a country's industrial growth as the revenue benefits of legitimate industries dissipate. Pirate industries are not generally known for their stellar accounting principles or their willingness to pay taxes on the revenue generated from their "entrepreneurial" activities. Since piracy is generally highest in those countries which are least developed industrially or commercially, any lost tax revenue is directly translatable into lost opportunities to improve education, health and domestic infrastructure. Even in countries where corruption and lax enforcement reduces the likelihood of significant tax revenues, there is at least a better chance of obtaining revenues from lawful industries than from pirate ones.

The presence of unchallenged pirate industries, and their unintended encouragement of a culture of "scofflaws" can erode other law enforcement efforts. The money earned from the "victimless" crime of copyright piracy is often used to finance other more directly dangerous criminal enterprises, including drug and arms dealing.[13] The destabilizing effects of these enterprises at both a domestic and international level have been well-documented.

Piracy is often considered a private matter involving only the issue of lost compensation. This "private harm" view of piracy is supported by a dangerous corollary – that piracy is a local industry, conducted by local Mom and Pop "stores" surviving at a subsistence level. This corollary supports another, equally dangerous misperception – that piracy is actually a pro-development activity.

The reality is distinctly different.

As Kamil Idris, Director General of the World Intellectual Property organization recognized, intellectual property can serve as a "power tool" for economic development.[14] Pirates, however, do not create new works. They do not invent new cures; they do not innovate. Worse, rampant piracy may actually reduce foreign direct investment.[15]

In addition to the economic harm to intellectual property owners and lawful domestic industries as a result of the sale of pirated goods, pirates generally do not guarantee the quality of the goods they produce, or exercise control to prevent the creation and marketing of defective or even harmful goods. Many pirates copy the label and packaging so that consumers may not realize they are buying counterfeit goods. This problem has increased with advances in graphics technologies that facilitate the ease with which packaging can be copied. There is nothing "private" about harmful products being marketed under otherwise respectable labels.

Finally, "Mom and Pop" are only the front men for cross-border, criminal enterprises who use money earned from the "harmless" crime of piracy to support more deadly activities.[16]

Pirates take the path of least resistance. Strong enforcement in one country may cause pirate operations to move across the border. This means that solutions to the global piracy scourge require a *global* solution. Tougher penalties are needed in *all* countries, not just in those countries which are a problem today. These penalties must take the profit out of piracy. Slight monetary penalties which leave the pirate with the means to continue his activities are no penalties at all.

Conclusion

Strong copyright protection can be a benefit for all parties in the global creation "mix" – authors, artists, publishers, producers, distributors and even consumers. Such protection, however, must presently grow in a rocky field filled with misconceptions, corruption and money earned from pirate activities. For the scourge of piracy to be reduced to a slow growing, controllable weed, concerted pre-planning and active involvement in the enforcement process is required by all interested parties.

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[1] Doris Estelle Long is a Professor at The John Marshall Law School in Chicago Illinois and is currently the Chair of its Intellectual Property, Information Technology and Privacy Group. She is a former Attorney Advisor in the Office of Legislative and International Affairs of the US Patent and Trademark Office and has served as a consultant on IPR protection issues and enforcement matters for foreign government agencies under the auspices of the US Department Commercial Law Development Program and the US State Department International Information Programs. The views expressed in this Article are hers alone and do not represent the views of the John Marshall Law School or any government agency with which she has worked.

[2] BSA Global Piracy Study for 2004, http://www.bsa.org/globalstudy.

[3] Bush creates new post to fight global piracy, http://news.com.com/2102-1028_3-5800092.html (July 22, 2005). This figure presumably does not include lost tax revues, or lost business and employment opportunities.

[4] Speaking Notes for HM at Official Launch of JIPO, http://www.mct.gov.jm/jipo_launch.pdf.

[5] *See, e.g.,* Red Flag, JAMAICA GLEANER (July 31, 2005)(http://jamaica-gleaner.com/gleaner/20050731/ent/ent1.html); Camille Royes, *Bootlegging and Piracy of Copyrighted Material,* THE DAILY OBSERVER 12 (August 20, 2005).

[6] *See, e.g.*, Pew Internet and American Life Project, ARTISTS, MUSICIANS AND THE INTERNET (December 2004); *See also* Upstart Labels See File Sharing as Ally, Not Foe, THE NEW YORK TIMES (September 23, 2003).

[7] Upstart Labels, *supra* note 16.

[8] While the success of such legitimate music downloading sites as iTunes support the view that some former purchasers of pirated goods will eventually purchase lawful product, the number of such purchasers remains slight in comparison with the number who persist in illegal purchase and file trading activities. *See, e.g*., Economists Spar Over Impact of File Sharing on Record Sales, 68 Patents, Copyright and Trademark Journal (BNA) (June 25, 2004)(Eric Garland comments).

[9] *See, e.g.*, Doris Estelle Long, *"Globalization": A Future Trend or a Satisfying Mirage?,* J. Copyrt Soc'y USA 313 nn. 104 – 106 and accompanying text.

[10] TRIPS, Article 61.

[11] *See* Special 301 Report, *supra* note 13.

[12] Both India and Russia saw many of their talented computer programmers leave in the early 80's and 90's to work abroad in Europe and the United States. These countries provided strong protection for their works, resulting in more secure sources of compensation for their efforts

[13] See Remarks of Attorney General John Ashcroft on Release of Report of the Department of Justice's Task Force On Intellectual Property (October 12, 2004)(www.usdoj.gov/ag/speeches/2004/agremarksprip.htm); Idris, *supra* note 14.

[14] Idris *supra* note 14.
[15] Long, *supra* note 21 and works cited therein.
[16] *See* note 21 *supra*.