

Combating Counterfeit and Piracy Through Intellectual Property Law

Chamila S. Talagala LLB [Hons], ADMA [UK], PA Dip in IPL [Merit], LLM [Merit] Attorney-at-Law of the Supreme Court of Sri Lanka

I. INTRODUCTION

Counterfeiting is the act of making an exact copy of something in order to trick people into think that it is the real thing [Hornby 2005]. It can take various forms; counterfeiting of money, products and documents. Counterfeiting has a long history. Counterfeiting of money, perhaps the most frequent form of counterfeiting, is old as money itself. It was an offence even in the pre-colonial times in Sri Lanka [Amerasinghe 1999].

Piracy is the act of making illegal copies of video tapes, computer programs, books etc. in order to sell them [Hornby 2005]. The term 'piracy' has also been defined as 'infringement of copyright, trademarks or other intellectual property rights' [Law & Martin 2009]. Joe Karaganis [2011, p.2] observes that the term 'piracy' has never had a stable legal definition. He submits:

"Piracy is almost certainly better understood as a product of enforcement debates than as a description of specific behavior. The term blurs, and is often used intentionally to blur, important distinctions between types of uncompensated use. These range from the clearly illegal, such as commercial-scale, unauthorized copying for resale, to disputes over the boundaries of fair use and first sale as applied to digital goods, to the wide range of practices of personal copying that have traditionally fallen below the practical threshold of enforcement".

[Emphasis added]

Music which is the work that is pirated most often [World Intellectual Property Organization 2010] has a history that runs back to the 1920's [Danoff 2007].

Counterfeiting and piracy have an adverse effect on national security as well as economies of countries. These two are linked to organized crime and terrorism. They cause economic harm, defraud consumers, constitute unfair competition to legitimate businesses. Acts of counterfeiting and piracy erode the market for genuine goods and services, and harm every individual and company that works to produce high quality legitimate products [International AntiCounterfeiting Coalition 2005].

In the modern context counterfeiting and piracy have become almost industrial-scale activities offering criminals and terrorists the prospect of large economic profit without excessive risk. With the advent of ecommerce, the rapidity of illegal operations and the difficulty of tracking the operations have further reduced the risks for the criminals and terrorists. As a result, counterfeiting and piracy have become a major factor in promoting crime and terrorism [Blakeney 2012].

The World Customs Organization [WCO] in 2003, has affirmed that the trade in counterfeit and pirate products was as high as US\$450 billion per annum. Controlled by organized crime, it had been used to fund terrorist activities [Blakeney 2012]. The Interpol and various other authorities have

expressed their opinion that piracy and counterfeiting are lucrative activities the extremist organizations such as, Al-Qaeda, Hamas, Hezbollah or the Irish Republican Army rely on to finance their operations [Millar 2002]. In this respect, the Interpol claims that counterfeiting has become one of the illegal activities that the extremist groups prefer for ensuring the financial support. According to experts, Al-Qaeda, Hezbollah, Chechen separatists, ethnic Albanian and Northern Ireland paramilitary groups have made substantial profits from the production or sale of the counterfeit goods, including CDs, DVDs, clothing, software and cigarettes [Interpol 2003 cited in Caunic & Prelipcean 2011].

Sri Lanka is a country that has experienced mass terrorism for nearly three decades. Though she was freed from terrorism in 2009 with the defeat of the Liberation Tigers of Tamil Elam [LTTE]; world's deadliest terrorist organization, the threat of re-emergence of terrorism in Sri Lanka still persists, especially in the light of the efforts toward reorganization of the LTTE in the international arena. In addition, there is a growing concern in Sri Lanka over the rise of organized crimes during the past couple of decades. Apart from these two aspects, Sri Lanka would have to focus much attention on creating an economic environment conducive for attraction of more and more foreign investment in to the country in its direction towards a rapid economic development. Counterfeiting and piracy pose a major obstacle in this regard. As such, combating counterfeit and piracy has become an issue of front rank importance for Sri Lanka.

Counterfeiting of commercial products and piracy involve infringement of intellectual property rights. The prime objective of intellectual property law is to protect the rights of the intellectual property right holders so as to stop others from encroaching upon their rights or doing certain things which would amount to infringement of those rights. This paper attempts to identify whether the current intellectual property law regime in Sri Lanka provides an effective mechanism for combating counterfeiting and piracy in relation to commercial goods, in the interest of national security and national economy.

II. INTELLECTUAL PROPERTY LAW

The term 'intellectual property law' has been used for almost one hundred and fifty years to refer to the general area of law that encompasses copyright, patents, designs, and trademarks as well as a host of related rights [Bently & Sherman 2008]. A striking feature of intellectual property law is the continuing expansion of the scope of its subject matter.

Intellectual property law regulates the creation, use, and exploitation of mental or creative labour. It creates property rights in a wide and diverse range of things, and various insignia that are applied to goods and services [Bently & Sherman 2008].

Intellectual property rights are intangible property rights and the right-holder can exclude others from using the subject matter without his consent. Hence, intellectual property rights relate to aspects of monopoly and privilege [Drahos 1999]. Due to this inherent nature of intellectual property rights, instances may occur where these rights conflict with the other recognised rights of the people. Conflict between right of expression and copyright is one such instance [Helfer 2003].

The main concern for intellectual property law is to foster human creativity, through protection of

intellectual property rights. This should be done without unduly restricting dissemination of their benefits and without obstructing the interests of the people. For this reason, intellectual property rights have been subjected to various limitations. These restrictions include; insistence of substantive requirements for obtaining intellectual property rights, specific exceptions, time limitations etc.

Intellectual property law is gaining increasing recognition and acceptance in many countries around the world, especially in the West. As its economic potential has rapidly expanded, intellectual property has become a subject of front-rank legal importance [Cornish in Sherman & Bently 1999]. This has not only led the subject of intellectual property law grow in variety of directions over recent years, but made it both international and more complex [Cornish, Llewelyn & Aplin 2010]. Professor Cornish [2010, p.5] submits:

“The subject [Intellectual property law] is growing in importance, to the advanced industrial countries in particular, as the fund of exploitable ideas becomes more sophisticated and as their hopes for a successful economic future come to depend increasingly upon their superior corpus of new knowledge and fashionable conceits. There has recently been a great deal of political and legal activity designed to assert and strengthen the various types of protection for ideas.”

[Emphasis added]

III. THE TRIPS AGREEMENT

Out of the various international instruments that deal with intellectual property rights, the Agreement on Trade Related Aspects of Intellectual Property Rights [TRIPS] which came into force on 01st January 1995 can be perceived as the most striking effort designed to assert and strengthen the intellectual property rights. It is also considered as the most comprehensive multilateral agreement on intellectual property that has come up ever [Karunaratna 2010]. The TRIPS Agreement recognises the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods.

The TRIPS Agreement covers all the main areas of intellectual property, [Bently & Sherman 2008] such as, copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs, undisclosed information. It lays down the minimum standards for the protection of intellectual property rights by member countries and requires them to incorporate those standards into their domestic laws. The most significant difference between TRIPS and other exiting treaties in the field is in the detailed provisions on enforcement of intellectual property rights. Before TRIPS, matters of procedure, remedies, and criminal sanctions had largely been left to national laws of the countries [Bently & Sherman 2008].

The TRIPS Agreement has introduced intellectual property law into the international trading system for the first time. The principle objective of linking intellectual property law into the international trading system was the perception that the existing international intellectual property regime lacked effective enforcement. The Ministerial Declaration of 20 September 1986 which launched the Uruguay Round [1986-1994] and resulted in the Agreement establishing the World Trade Organization

[WTO] and the TRIPS Agreement explained that [Blakeney 2012, p.28]:

“In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.

Negotiations shall aim to develop a multi lateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.”

[Emphasis added]

Members of the WTO, who become, signatories to the TRIPS Agreement by virtue of that membership are obliged to comply with the enforcement provisions of the Agreement [Blakeney 2012]. As a result of TRIPS being part of the WTO Agreement, if a country fails to bring its laws into line with TRIPS, another member may complain to the WTO and set in motion the WTO integrated dispute resolution mechanism [Bently & Sherman 2008; Karunaratna 2010].

IV. PROVISIONS RELATING TO ENFORCEMENT UNDER THE TRIPS AGREEMENT

Part III of the TRIPS Agreement deals with the enforcement of intellectual property rights. Section I which enumerates the general obligations of the member countries stipulates, *inter alia* that countries should ensure that enforcement procedures as specified in Part III of the TRIPS Agreement are available under their laws so as to permit effective action against any act of infringement of intellectual property rights covered by the Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures should be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse. Procedures concerning the enforcement of intellectual property rights should be fair and equitable, and should not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

Procedures concerning enforcement enumerated in the TRIPS Agreement, *inter alia* cover the following:

- Civil judicial procedures should be made available to the holders of intellectual property rights covered by the TRIPS Agreement, concerning the enforcement of those rights.
- The judicial authorities should have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods.

- The judicial authorities should have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who has knowingly, or with reasonable grounds to know, engaged in infringing activity. The judicial authorities should also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, the judicial authorities should have authority to order recovery of profits and/or payment of pre-established damages even where the infringer had not knowingly, or with reasonable grounds to know, engaged in infringing activity.
- In order to create an effective deterrent to infringement, the judicial authorities should have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities should also have the authority to order that materials and implements, the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed should not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.
- The judicial authorities should have the authority to order prompt and effective provisional measures: (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance and (b) to preserve relevant evidence in regard to the alleged infringement.
- Procedures should be adopted to enable 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 in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Such an application should be enabled in respect of goods which involve other infringements of intellectual property rights in appropriate circumstances. Corresponding procedures should also be provided concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.
- Provision should be made for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available should 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 should 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. Provision may be made 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.

V. LEGAL FRAMEWORK OF INTELLECTUAL PROPERTY LAW IN SRI LANKA

Sri Lanka is a developing country that has been following a free market system of economy for more than three decades. She is heir to a multitude of legal systems. Roman-Dutch law and the English law are the main legal traditions that are of general application throughout the country. While Roman-Dutch law was received during the Dutch rule and forms the common law of the country today, English law was received during the British rule, mainly through legislation and case law [Cooray 1992]. There are many areas of Sri Lankan law, which are exclusively governed by the principles based on English law. Commercial laws are one such example [Cooray 1992].

The intellectual property law in Sri Lanka is of British origin. The entirety of English law on intellectual property was introduced to Sri Lanka during the British rule. Even after Sri Lanka received her independence, old legal regime with its English flavour continued [Cabral 2004]. However, with the introduction of the open economy, Sri Lanka was compelled to introduce a better regime for the protection of intellectual property rights in the context of evolving commercialised society. Having adhered to this requirement the Code of Intellectual Property Act No. 52 of 1979, based on the World Intellectual Property Organisation's [WIPO] guidelines was enacted as part of the programme to update all commercial laws in the country. The law relating to the protection against unfair competition was first introduced to Sri Lanka under the provisions of this Code.

Sri Lanka being a signatory to the TRIPS Agreement was obliged to create an intellectual property law regime on guidelines set out by the Agreement. Thus, in 2003, the Intellectual Property Act No. 36 of 2003 was enacted with total compliance with the TRIPS guidelines.

The Intellectual Property Act confers rights of ownership in subject matters such as, copyright, patents, designs, marks and trade names. The Intellectual Property Act also governs the current law of unfair competition and embraces a variety of comparatively broader and novel features. Majority of the number of cases on intellectual property law in Sri Lanka is seen under the unfair competition regime.

VI. ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

A proper mechanism of enforcement of intellectual property rights not only enhances the protection of the existing intellectual property rights, but also sends positive signals to those concerned such as creators and investors about an environment conducive to creative activity and investment [Karunaratna 2006].

Mechanism of enforcement of intellectual Property rights under the Intellectual Property Act envisages four aspects: civil judicial procedures, criminal procedures and penalties, customs control and dispute resolution through the Director General of Intellectual Property.

The owners of intellectual property rights are entitled to institute civil action against persons who commit, threaten to commit or are likely to commit acts of infringement of their rights protected under the Act. Such owners may seek three remedies from court, namely injunctions, damages, and such other relief as the court may deem just and equitable. In addition, the court has jurisdiction to make a variety of orders dealing with various aspects of enforcement of intellectual property rights such as disposal of the infringing goods outside the channels of commerce or destruction of such goods without compensation.

The Intellectual Property Act has made wilful infringement of intellectual property rights offences punishable with fine, imprisonment or both. Offences being acts against the State, proceedings can be instituted by the owner of the intellectual property right in concern or the police.

Criminal prosecution can be an attractive mechanism of enforcement of intellectual property rights because of the publicity that a criminal trial can attract and the deterrent effect of the sanction. They are also likely to be expeditious than civil actions, and a losing prosecutor may avoid paying costs [Bently & Sherman 2008]. In view of these concerns, the Sri Lankan Police Department with the assistance of the American Chamber of Commerce in Sri Lanka has established a special unit called 'the Anti Piracy and Counterfeiting Unit' within the Criminal Investigation Department to address the crimes related to piracy and counterfeiting [Island 2010].

The Intellectual Property Act has introduced amendments to the Customs Ordinance [Chapter 235] which prohibit the importation and exportation of counterfeit trade mark goods or pirated copyright goods or any other goods in contravention of the other intellectual property rights protected under the Act. Such prohibited goods can be disposed outside the channels of commerce or if such disposal damages the interests of the owner of any intellectual property right protected under the Act, they can be destroyed. The Act has also introduced amendments to the Customs Ordinance specifically relating to suspension of goods imported in violation of intellectual property rights by the customs authorities.

The Intellectual Property Act has introduced a novel method of enforcement of intellectual property rights where owners of copyright or related rights aggrieved or affected by any infringement of their rights can seek relief through the Director General of Intellectual Property. The Director General is empowered to determine any question that may be necessary or expedient to determine in connection with the application made by any such owner of copyright or related right. This method of enforcement takes the form of a system of dispute resolution rather than a quasi-judicial inquiry [Karunaratna 2010].

Thus, the Intellectual Property Act has comprehensive provisions dealing with the aspect of enforcement of intellectual property rights. Despite a strong legal mechanism being available for the enforcement of intellectual property rights, its practical usage appears to be very weak in Sri Lanka. This has been the main cause for existence of high levels of counterfeits and piracy in the country. The 2012 National Trade Estimate Report on Foreign Trade Barriers (NTE) prepared by the Office of the United States Trade Representative [2012, pp.353-354] states:

“Weak intellectual property rights (IPR) enforcement remains a problem in Sri Lanka. Piracy levels remain very high for sound recordings and software. According to an industry-commissioned study, as much as 86 percent of personal computers in Sri Lanka used pirated software in 2010 (down slightly from 89 percent in 2009). However, the commercial value of pirated software rose to \$83 million in 2010 from \$77 million in 2009 due to increased personal computer sales. Despite this problem, industry reports that there has been an improvement in the use of legal software by large companies in Sri Lanka. Further, while government use of unauthorized software remains a problem, the government of Sri Lanka has published an information and communications technology policy requiring all government ministries and departments to use only licensed software.

Redress through the courts for IPR infringement is often a frustrating and time-consuming process. While police can take action against counterfeiting and piracy without complaints by rights holders, they rarely do so. In the apparel sector, however, rights holders have had some successes in combating trademark counterfeiting through the courts.”

Moreover, a survey conducted by KPMG Sri Lanka titled ‘Awakening Sri Lanka Fraud Survey Analysis 2011/12’ has indicated that 27 percent of its respondents, which was the highest figure, had stated that weak enforcement was the main reason for the existence of intellectual property fraud [Perera 2012].

VII. ISSUES RELATED TO ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Enforcement of intellectual property rights in Sri Lanka embraces a range of issues and challenges, both in law and implementation of the law [Karunaratna 2006]. Dr. D. M. Karunaratne [2006, p.4] submits:

“Sri Lanka encounters, like any other developing country, various and diverse issues in the implementation of the provisions of the law relating to enforcement of IP [intellectual property] rights, some of which are roughly and broadly summarized as follows: poor awareness on IP and related matters among all the strata of society, lack of training for the officers in the enforcement agencies, inadequate facilities available to the enforcement agencies, high cost of litigation, reluctance of the owners of IP rights to get involved in litigation and disorganized owners of IP rights and consumers.”

[Emphasis added]

Quite apart from the aforesaid important issues, it is submitted that there is a key issue that impedes the effective enforcement of intellectual property rights in Sri Lanka ingrained in the public perception of the conceptual basis of the present intellectual property rights regime in the country.

Intellectual property denotes proprietary rights in intangibles, particularly ideas, information, and knowledge. Conventional arguments which justify the grant of private property rights in tangible resources, which are often premised on the scarcity of such resources and the impossibility of sharing, are inapplicable in respect of intellectual property rights, since ideas, information and knowledge

“Weak intellectual property rights (IPR) enforcement remains a problem in Sri Lanka. Piracy levels remain very high for sound recordings and software. According to an industry-commissioned study, as much as 86 percent of personal computers in Sri Lanka used pirated software in 2010 (down slightly from 89 percent in 2009). However, the commercial value of pirated software rose to \$83 million in 2010 from \$77 million in 2009 due to increased personal computer sales. Despite this problem, industry reports that there has been an improvement in the use of legal software by large companies in Sri Lanka. Further, while government use of unauthorized software remains a problem, the government of Sri Lanka has published an information and communications technology policy requiring all government ministries and departments to use only licensed software.

Redress through the courts for IPR infringement is often a frustrating and time-consuming process. While police can take action against counterfeiting and piracy without complaints by rights holders, they rarely do so. In the apparel sector, however, rights holders have had some successes in combating trademark counterfeiting through the courts.”

Moreover, a survey conducted by KPMG Sri Lanka titled ‘Awakening Sri Lanka Fraud Survey Analysis 2011/12’ has indicated that 27 percent of its respondents, which was the highest figure, had stated that weak enforcement was the main reason for the existence of intellectual property fraud [Perera 2012].

VII. ISSUES RELATED TO ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Enforcement of intellectual property rights in Sri Lanka embraces a range of issues and challenges, both in law and implementation of the law [Karunaratna 2006]. Dr. D. M. Karunaratne [2006, p.4] submits:

“Sri Lanka encounters, like any other developing country, various and diverse issues in the implementation of the provisions of the law relating to enforcement of IP [intellectual property] rights, some of which are roughly and broadly summarized as follows: poor awareness on IP and related matters among all the strata of society, lack of training for the officers in the enforcement agencies, inadequate facilities available to the enforcement agencies, high cost of litigation, reluctance of the owners of IP rights to get involved in litigation and disorganized owners of IP rights and consumers.”

[Emphasis added]

Quite apart from the aforesaid important issues, it is submitted that there is a key issue that impedes the effective enforcement of intellectual property rights in Sri Lanka ingrained in the public perception of the conceptual basis of the present intellectual property rights regime in the country.

Intellectual property denotes proprietary rights in intangibles, particularly ideas, information, and knowledge. Conventional arguments which justify the grant of private property rights in tangible resources, which are often premised on the scarcity of such resources and the impossibility of sharing, are inapplicable in respect of intellectual property rights, since ideas, information and knowledge

can be replicated without any direct detriment to the original possessor of such rights [Bently & Sherman 2008].

Even the concept of private ownership of tangibles is a relatively new phenomenon in Sri Lanka, which has arisen as a result of both economic pressure and political changes [Tambiah 1968]. Though there is evidence of instances of private ownership over tangibles during the distant and dim periods of Sri Lankan history, Dr. H. W. Tambiah [1968, p.157] submits that the dictum of Sir Henry Mayne, that the communal ownership precedes individual ownership, becomes apparent when the Sinhalese system of law is examined. Dr. Tambiah [1968, p.157] observes:

“The existence of communal ownership in ancient Ceylon could be gleaned from the vestiges of practices which are soon dying off in Ceylon. In Ceylon, the system of tenure known as ‘karaiyadu’ [which means shore of the sea, bank or bund] which prevailed in certain districts of South India [e.g. Tanjore], was in existence as late as the 17th century as evidenced in the Portuguese ‘tombos’. In this form of tenure, the joint responsibility of cultivation fell on the village and there was periodical distribution of lands on an equitable basis to the different families which jointly inherited that village.....”

[Emphasis added]

Be that as it may, there is hardly any evidence in the pre-colonial Sri Lanka which suggests that private proprietary rights existed in ideas, information, and knowledge in the true legal sense, as found today.

According to T. C. James [2007, p.1] the enclosing of the public space of knowledge into private property is a modern phenomenon. He submits [2007, p.1]:

“IPRs [intellectual property rights] are creations of law. The IPR system evolved as a solution to the problem of rewarding creativity and inventiveness. These are the sources of knowledge and wisdom. Knowledge in most traditions had been held as sacred and not subject to mundane laws, for long. Appropriation of the gains of knowledge to purely one’s own personal well being was considered as against the grain of wisdom, since knowledge is that which liberates – “Sa vidya ya vimuktaye”. This has been the guiding principle of India. In the West too, knowledge was for public good and also ‘public goods’ since “non-rivalry and costly exclusion generally apply to their use.....”

[Emphasis added]

Moreover, the submission that Buddhism was inherently suspicious of the concept of property and affected early attitudes toward the lack of proprietary rights in printed works in China is equally applicable to Sri Lanka, since the Sri Lankan culture has been predominantly influenced and guided by the Buddhist principles. Thus, as Dr. Charles R. Stone [2008, pp.229-230] suggests, it is reasonable to assume that Buddhist attitudes towards property might also have affected the attitudes toward intellectual property in general.

Intellectual property rights as found today in Sri Lanka is a Western concept, fitted to a specific social form; the market economy [Gudeman 1996]. While accepting the often quoted proposition that "intellectual property is foreign to no culture and native to all nations", [World Intellectual Property Organisation 2001] it is submitted that though intellectual creations are a common phenomenon in every culture and nation, the way in which intellectual property rights are recognised, protected, and enforced can be different from one country to another. In this sense, the current notion of intellectual property law is foreign to many Eastern societies, [Mun 2003] including Sri Lanka. For instance, it has been submitted that "although the Chinese developed writing during the third millennium B. C. and introduced paper to the world, it was not until the 1980's that China established a modern copyright system" [Polman & Hamilton 1980 cited in Mun 2003].

The western notion of intellectual property rights regime introduced to Sri Lanka, which is quite different from the concept of tangible property rights as recognised by the legal system, has created complexities and difficulties in understanding the fundamentals and core principles peculiar to intellectual property rights by the general public. For instance, a person who has purchased a car can rent it out to another person and earn money, whereas a person who has purchased a CD or a DVD cannot legally do so because of the provisions relating to copyright under the Intellectual Property Act. These difficulties have been further complicated by technological advancements of the modern day.

A significant point of controversy that has come to the fore due to developing countries acceding to the Western notion of intellectual property rights, especially aftermath of the TRIPS Agreement, is that the developing countries have done so as a trade bargain to obtain more liberated markets in developed countries for their exports and, to protect themselves from unilateral trade sanctions by the United States and other powerful Western countries [Emmert 1990; Gutowski 1999]. This has led to public resistance to the implementation of the TRIPS compliant intellectual property laws in countries such as, Indonesia [Kusmadara 2008].

It is submitted that the public perception of intellectual property rights as a Western notion, which is alien to the Sri Lankan culture as well as to the ingrained legal system, coupled with the belief that it was the protectionist approach of the developed countries in the West, which has forced Sri Lanka to follow the present intellectual property law regime, pose a serious impediment to the enforcement of provisions in the Intellectual Property Act towards the protection of intellectual property rights in the country. This is implicit in the fact that even after almost 10 years of the enactment of the Intellectual Property Act, Sri Lanka has failed to implement its provisions fully.

VIII. CONCLUSION

Sri Lanka has suffered from brutal terrorism for nearly three decades. Being a developing country that follows a market driven economy for more than three decades, achieving a rapid economic development in the country and safeguarding the nation from potential threats of terrorism and organised crime are the key issues in the agenda of post-war Sri Lanka.

Counterfeiting and piracy pose a serious obstacle for economic development in Sri Lanka since they impede the attraction of foreign investment in to the country, which is a *sine qua none* for economic

growth and development. Counterfeiting and piracy also aid terrorism and organised crime due to the fact that they have become a lucrative source of funding terrorism and organised crime. Thus, combating counterfeit and piracy is essential for Sri Lanka to reach its desired goals.

Intellectual property law provides an effective mechanism to combat counterfeiting and piracy. The main objective of the TRIPS Agreement, which is the most comprehensive multilateral treaty on intellectual property rights made hitherto and which provides for a high level of protection for the intellectual property rights, is to reduce distortions and impediments to international trade. Counterfeiting and piracy pose severe impediments to international trade and the TRIPS Agreement recognises the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods.

The prevailing intellectual property regime in Sri Lanka is based on the guidelines of the TRIPS Agreement. The argument is sometimes made that the Sri Lankan Intellectual Property Act has gone far beyond the requirements of the TRIPS Agreement towards a protectionist approach of intellectual property rights, especially in view of the longer term of protection provided in the Act in respect of copyright and, the narrow scope of the exceptions to intellectual property rights recognised by the Act.

The Intellectual Property Act lays down a comprehensive as well as an effective framework for protection and enforcement of intellectual property rights, which can be used as a successful mechanism for combating counterfeit and piracy. However, certain effective provisions of the Act on enforcement have remained to the letter of the law. Despite the Act being enacted by the parliament in 2003, Sri Lanka has not shown serious intentions on practically implementing the provisions of the Act as a whole. Though there have been very recent attempts on strict enforcement of the provisions of the Act, especially in respect of computer software, on piecemeal basis, these are too as a result of foreign influence and pressure.

The intellectual property regime in Sri Lanka is predominantly a Western concept. The notion of intellectual property as it stands today, especially the legal aspects of protection and enforcement, was unknown to Sri Lanka until very recently in her history, which dates back to over 2500 years. Moreover, the present intellectual property regime in Sri Lanka is sometimes perceived as a system which has been forced in to the country as a matter of trade bargain. It is submitted that the aforesaid aspects have created impeding obstacles to the full and effective implementation of the provisions of the Intellectual Property Act. This in turn, has crippled down an effectively viable mechanism for combating counterfeit and piracy in Sri Lanka.

As Professor William Alford has observed, laws premised on the values and institutions of economically advanced Western countries will not generate identical results when transplanted to a different setting [Alford 1992 cited in Mun 2005]. Law in democratic nations should be a reflection of the general will of the people and it has no exception for intellectual property law. When the law does not reflect this general will, it runs the risk of eventually being discarded. Intellectual property law is an area where the conflict between private interests and public interests, a perennial problem of legal philosophy, [Weeramantry 1998] is highly significant. The general will and acceptance of the people

play a crucial role in striking a balance between these two interests. Thus, it is submitted that the intellectual property law regime in Sri Lanka should advocate to the general will of the people and the genuine needs of the society in order to have wide acceptance from the society, which will make the implementation of the law a reality. While accepting that no nation in the modern globalised world could reach economic development isolated from the rest of the countries, especially the developed ones in the West, the priority task for the policymakers in Sri Lanka would be to ensure that the present intellectual property law regime in the country reflects the general will of the people and acceptance by the society at large.

REFERENCES

- Amerasinghe, ARB 1999, *The Legal Heritage of Sri Lanka*, The Royal Asiatic Society of Sri Lanka, The Law & Society Trust and Sarvodaya Vishva Lekha Publishers, Colombo.
- Bently, L & Sherman, B 2008, *Intellectual Property Law*, 3rd edn, Oxford University Press, Oxford.
- Blakeney, M 2012, *Guidebook on Enforcement of Intellectual Property Rights*, viewed 14 May 2012, <<http://www.delpak.ec.europa.eu/WHATSNEW/Guidelines.pdf>>.
- Cabral, H 2004, *Intellectual Property Law in Sri Lanka*, Author Published, Colombo.
- Caunic, I & Prelicpcan, G 2011, "The Market for Counterfeit Goods and Financing of the Extremist Organizations in Europe in the Last Decade" *IPEDR*, vo.17, viewed 12 May 2012, <www.ipedr.com/vol17/65-CHHSS%202011-H10119.pdf>.
- Cooray, LJM 1992, *An Introduction to the Legal System of Sri Lanka*, 2nd edn, Lake House Investments, Colombo.
- Cornish, W, Llewelyn, D & Aplin, T 2010, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 7th edn, Sweet & Maxwell, London.
- Danoff, A 2007, "The Moral Rights Act of 2007: Finding the Melody in the Music", *The Journal of Business, Entrepreneurship & the Law*, vol.1 pp.181-207.
- Drahos, P 1999, "The Universality of Intellectual Property Rights: Origins and Development", in World Intellectual Property Organisation [ed.], *Intellectual Property and Human Rights*, WIPO, Geneva.
- Emmert, F 1990, "Intellectual Property in the Uruguay Round – Negotiating Strategies of the Western Industrialized Countries", *Michigan Journal of International Law*, vol.11, pp.1317-1399.
- Gudeman, S 1996, "Sketches, Qualms and Other Thoughts on Intellectual Property Rights" in Brush, SB & Stabinsky, D [eds.], *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights*, Island Press, Washington, pp.102-121.
- Gutowski, R 1999, "The Marriage of Intellectual Property and International Trade in the TRIPS

Agreement: Strange Bedfellows or a Match Made in Heaven?", *Buffalo Law Review*, vol.47, pp.713-761.

Helfer, LR 2003, "Human Rights and Intellectual Property: Conflict or Coexistence?", *Minnesota Journal of Law, Science & Technology*, vol.5, pp.47-61.

Hornby, AS 2005, *Oxford Advanced Learner's Dictionary of Current English*, 7th edn, Oxford University Press, Oxford.

"In collaboration with AMCHAM CID establishes Anti Piracy and Counterfeiting Unit" 2010, *Island*, 07 July, p.4.

International AntiCounterfeiting Coalition 2005, "The Negative Consequences of International Intellectual Property Theft: Economic Harm, Threats to the Public Health and Safety, and Links to Organized Crime and Terrorist Organizations", *White Paper*, viewed 12 May 2012, <<http://counterfeiting.unicri.it/docs/International%20AntiCounterfeiting%20Coalition.White%20Paper.pdf>>.

James, TC 2007, "Intellectual Property Rights and Public Good: Challenges and Responses to Depleting Commons", Address delivered at the Convocation of the Second Batch of Students of GNA Gurukul, Mumbai, India, 9 June.

Karaganis, J 2011, "Rethinking Piracy", in Karaganis, J [ed.], *Media Piracy in Emerging Economies*, Social Science Research Council, New York, pp.1-74.

Karunaratna, DM 2006, "Issues Related to the Enforcement of IP Rights: National Efforts to Improve Awareness of Decision Makers and Education of Consumers", *WIPO Advisory Committee on Enforcement, Third Session*, WIPO, Geneva.

Karunaratna, DM 2010, *Elements of the Law of Intellectual Property in Sri Lanka*, Sarasavi Publishers, Colombo.

Kusmadara, A 2008, "Problems of Enforcing Intellectual Property Laws in Indonesia", Paper presented to the Law of International Business Transactions: A Global Perspective Meeting of the International Association of Law Schools, Hamburg, Germany, 10-12 April.

Law, J & Martin, EA [eds.], *A Dictionary of Law*, 7th edn, Oxford University Press, Oxford.

Millar, K 2002, *Financing Terror, Profits from Counterfeit Goods Pay for Attacks*, U. S. Customs Today, viewed 30 July 2012, <<http://www.cbp.gov/xp/CustomsToday/2002/November/interpol.xml>>.

Mun, S 2003, "A New Approach to U. S. Copyright Policy against Piracy in China", paper presented to the Annual Meeting of the International Communication Association, San Diego, CA, 27 May.

Mun, S 2005, "Chasing the Dragon: U. S. Copyright Policy against Piracy in China", *LBJ Journal of Public Affairs*, vol.18, pp.49-62.

Office of the United States Trade Representative 2012, *The 2012 National Trade Estimate Report on Foreign Trade Barriers (NTE)*, Office of the United States Trade Representative, Washington.

Perera, K 2012, "Weak enforcement main cause for IP Frauds KPMG Fraud Survey", *Daily Mirror*, 25 May, viewed 29 July 2012, <<http://epaper.dailymirror.lk/epaper/viewer.aspx>>.

Sherman, B & Bently, L 1999, *The Making of Modern Intellectual Property Law*, Cambridge University Press, Cambridge.

Stone, CR 2008, "What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes toward What the West Calls Intellectual Property", *Marquette Law Review* vol.92, pp.199-230.

Tambiah, HW 1968, *Sinhala Laws and Customs*, Lake House Investments Ltd., Colombo.

Weeramantry, CG 1998, *An Invitation to the Law*, Indian edn, Lawman [India] Private Ltd., Delhi.

World Intellectual Property Organisation 2010, *Learn from the Past, Create the Future: The Arts and Copyright*, WIPO, Geneva.

World Intellectual Property Organization 2001, *WIPO General Assemblies Open*, Press Release, 24 September, viewed 30 July 2012, <http://www.wipo.int/pressroom/en/prdocs/2001/wipo_pr_2001_287.html>.