



Training Manual on IP Crime Prosecution

9. EVIDENTIAL ISSUES

Evidential issues

- The IP right of the right holder;
- the infringing act;
- the participation of the accused in the infringing act; and
- the guilt of the accused.



The right of the copyright owner: piracy

- Problem areas
 - More difficult to establish the rights of copyright owner than it is with counterfeiting.
 - No registration
 - Author may not be the owner.
 - A written assignment (transfer) of copyright may be required.
- Presumptions

Introduction

- Object: establish
 - the commission of the crime and
 - the guilt of the accused
 - with reference to the elements of the crime
- Admissible evidence
- Presumptions
- Admissions

The right of the right holder: counterfeiting

- Trademark registration certificate
 - certified extract
 - issued by the local Registrar of Trademarks.
- Content:
 - Issued by an authorized person.
 - The trademark (word, device etc) as registered.
 - The class in which and the goods or services for which the trademark is registered.
 - Registration was current at the time of the alleged offense.

The right of the copyright owner: piracy 2

Witness statement or affidavit from the author of the work

- who was a qualified person
- on the date of first publication
- setting out that he created the work independently and
- that he did not copy it from another work.
- that the work was eligible for copyright.

Issues relating to change in ownership

The infringing act: counterfeiting

Infringement is established by

- comparing the counterfeit trademark and the trademark as registered.
 - identical to or
 - indistinguishable in its essential aspects from the trademark.
- comparing the class in respect of which the trademark is registered.
- lack of license or consent of the trademark owner.

Evidence/witnesses

Evidence:

- Production of counterfeit
- Representative of the trademark owner
 - produce an original product to compare
 - no licence
- Judicial notice re comparisons and class?

Chain of evidence



The infringing act: piracy

- Compare the original and the pirated copy.
- If identical or virtually identical the inevitable conclusion must be that the one was copied directly or indirectly.
- Whether the court will perform the exercise without evidence will depend on local law.
- The copy must have been made without the license or consent of the owner.
- These aspects are also conveniently dealt with by a representative of the copyright owner who in addition should produce an original product and compare it (also quality wise) with the pirated product.

Evidence/witnesses

Evidence:

- Production of pirated goods
 - Chain of evidence
- Representative of the copyright owner
 - produce an original to compare
 - no licence
- Judicial notice re comparisons?



Participation of the accused in the infringing act

- “Counterfeiting” and “piracy” are variously defined in local laws and usually include the making, importation or selling of counterfeit or pirated goods.
- Evidence of the accused’s participation is required.
- The nature and scale of the accused’s participation.
- The chain of movement of the goods from confiscation – safe storage – to court.

Guilt of the accused

- Wilfulness (or other statutory test)
- Direct evidence
- Circumstantial/inferential: See relevant factors in chapter 7, *Reasonable suspicion*.

Defendant abroad



IP crime is very commonly cross-border crime.

- Assistance from police and courts in foreign countries.
- United Nations Convention against Transnational Organized Crime (the Palermo Convention).
- INTERPOL: coordination of cross-border operations and in securing the arrest of fugitive suspects for purposes of extradition.

