

## COPYRIGHT PROSECUTION—THE FIJI EXPERIENCE

Joseph Daurewa  
*Film Fiji*

Since the introduction of the Copyright Act of Fiji in 1999 and its recent amendment, Fiji has seen a fluctuation in the respect afforded to intellectual property rights. This research looks at copyright infringement, in particular movie piracy and the laws that relate to it, including the Berne Convention, other relevant international instruments, and domestic laws. Research was undertaken in assessing a recent movie piracy case, which serves as a precedent for movie piracy cases in Fiji. This particular case shows that Fiji is ready to undertake efficient and effective prosecutions of movie piracy cases. However, it also shows a lack of commitment by enforcement agencies. The research concludes that Fiji needs holistic commitment to move forward in protecting and respecting intellectual property rights, in particular copyright.

### Introduction

INTELLECTUAL PROPERTY exists in most facets of Fiji's society today. From the day-to-day music performances in the clubs, to the creation of a particular corporate image, the issue of intellectual property remains relevant. The Fiji government has made fairly significant efforts to regulate the recognition and protection of some forms of intellectual property rights in line with those that are internationally recognized. The private and nongovernment sectors have also played a part in this process and continue to do so.

The protection of intellectual property is a broad topic. This article will focus on copyright of movies, and in particular copyright protection through prosecution, which is an ongoing issue in Fiji insofar as its realization is

concerned. The prosecution of copyright infringement has not developed to an expected standard, and, therefore, this article considers the existing legal framework and institutional mechanisms in relation to the prosecution of copyright infringement in movies. To illustrate some of the problems and shortcomings of the present situation, and some specificity to the bigger picture, it will provide some insight as to the practicality of the current legal framework by discussing two copyright infringement cases.

### **Institutional Mechanism for Copyright Prosecution**

The three main organizations that make up the institutional mechanism for copyright prosecution are the Fiji Police Force, the Director of Public Prosecution's office (DPP's office), and the newly established Fiji Intellectual Property Office (FIPO).

The Fiji Police Force is established by Section 21 of the State Services Decree No. 6 of 2009.<sup>1</sup> It also has its own legislation, which regulates its functions and responsibilities. According to Section 5 of the Police Act [Cap 85], the force, among other functions, is responsible for "*the protection of . . . property, the prevention and detection of crime and the enforcement of all laws and regulations with which it is directly charged*" (emphasis added).

Therefore, the protection of copyright as a form of intellectual property is a fundamental role of the Fiji Police Force. In 2011, the Fiji Police Force established a Copyright Division in all main police stations in Fiji.<sup>2</sup> As a result, when an official complaint pertaining to copyright infringement is made, the officer tasked with handling copyright cases conducts and oversees the investigation of the complaint. Once the investigation is completed, a case file is compiled and forwarded to the DPP's Office for advice on whether there is sufficient evidence to proceed to the charging of the accused.<sup>3</sup> At the time of writing however, the Fiji police force has suspended fresh investigations in copyright infringement cases because of a shortage of senior and experienced officers in all police stations around Fiji.<sup>4</sup>

The DPP's office was a constitutional office under Fiji's 1997 constitution. After the abrogation of the 1997 constitution in April 2009,<sup>5</sup> the DPP's office was established under the State Services Decree No. 6 of 2009. Under the said decree, the DPP's office can institute and conduct criminal proceedings against any person. It is under this authority that the DPP's office prosecutes criminal offenses under the Copyright Act of 1999. Prior to 2010, there was the informal establishment of a Copyright Unit that was tasked with handling copyright prosecutions. Only one copyright

infringement case managed to reach the trial stage. It resulted in an acquittal, since the prosecution failed to prove that the accused had knowledge that the copy that he was dealing with was an infringing copy.<sup>6</sup> In January 2010, the DPP's office established a formal copyright unit. The unit, although challenged with limited resources and lack of expert knowledge, managed to initiate ten copyright infringement cases in the Suva Magistrates Court, three cases in Nadi Magistrates Court, two cases in Lautoka Magistrates Court, and two cases in Sigatoka Magistrates Court. From all these cases, only two cases proceeded to full trial, and in each of these the respective accused persons were acquitted.<sup>7</sup>

FIPO was approved by cabinet in April 2011 and was to be based within the office of the attorney general.<sup>8</sup> The cabinet based its decision on a submission made by the Attorney General, Mr. Aiyaz Sayed-Khaiyum, in which he explained that Fiji is a state party to the World Intellectual Property Organization (WIPO) and is a signatory to a number of international treaties and conventions governing intellectual property, including the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS). The attorney general also pointed out that because the majority of Fiji's intellectual property laws continue to be a relic of the colonial era, and have not been revised since their original enactment, Fiji's current intellectual property regime does not fully comply with its international treaty obligations, including in particular, the TRIPS Agreement. The Attorney General also highlighted that government departments have been separately managing intellectual property rights without much coordination. Consequently, the establishment of FIPO should see a better management of intellectual property issues among government departments by having ready access to the necessary legal resources.<sup>9</sup>

A National Steering Committee was also established by government to oversee the foundation, staffing, management, and administration of FIPO, in consultation with WIPO. By August 2012, a senior officer from the Fiji police force was transferred to FIPO to assist Mr. Terence O'Neil Joyce, the manager of FIPO, in the investigation of copyright infringement cases and other tasks. Despite these latest developments in FIPO, it has yet to achieve full operation because of the confusion that exists in relation to its functions. In particular, there appears to be a general confusion among the public, which seems to believe that the Fiji Police Force are still responsible for the investigation of copyright infringement cases. A program of public awareness raising may be necessary in order to educate the public, in particular copyright owners or custodians of copyrights, about the role and functions of FIPO.

### **Legal Framework for Copyright Prosecution**

International law has served, among other fundamental purposes, to provide guidelines and standards for Fiji's domestic laws. According to the Fiji National Intellectual Property Strategy Report Draft 1, which was submitted to the World Intellectual Property Organization in 2011, Fiji has ratified the following intellectual property treaties and conventions:

- (1) World Trade Organisation and the TRIPS Agreement since January 1996.
- (2) Universal Copyright Convention since December 1971.
- (3) WIPO Convention, since March 1972.
- (4) Berne Convention (Literary and Artistic Works), since December 1971.
- (5) Rome Convention (Performers, Producers of Phonograms and Broadcasting Organizations), since April 1972.
- (6) Geneva Convention (Unauthorized Duplication of Phonograms), since April 1973.

Since the ratification of the above treaties and conventions in Fiji, there are fundamental principles that have been adopted and incorporated into national law through the Copyright Act. For example, the duration or term of protection of a copyright being fifty years as stipulated in Article 7 of the Berne Convention is reflected in Section 22 of the Copyright Act. The act was enacted in 1999 and came into force in July 2000. A broad spectrum of copyright issues are provided for in the act, but for the purposes of this article I will focus on the criminal provisions that exist in the act, since they provide for prosecutions of copyright infringements in Fiji.

Division 5 of the act provides for criminal offences. Section 121(1) focuses on criminal liability for dealing with infringing copies. An object is an infringing copy if its making constitutes an infringement of the copyright in the work in question.<sup>10</sup> Section 121(1) is the provision that the DPP's office uses when charging accused persons who are allegedly engaged in the illegal dealing of infringing copies. The other characteristic of this particular subsection is that it outlines the various ways of dealing with an infringing copy or copies.<sup>11</sup>

Since 2007, the DPP's office has focused on four aspects of the essential characteristics of Section 121(1), which prosecutors are to consider when handling copyright infringement cases. These aspects were also used to educate the Criminal Investigations Department of the Fiji police force and relevant stakeholders that dealt with copyright infringement cases.<sup>12</sup> They are as follows:

- (a) That copyright should exist in the work or subject matter;
- (b) That the person dealt with the copyright in the work in a way that would infringe it;
- (c) That this article or object is an infringing copy;
- (d) That the person knows or ought reasonably to have known that it is an infringing copy.<sup>13</sup>

All the characteristics except characteristic (b) apply to all subsections under Section 121(1). Characteristic (b) is viewed as the act or manner in which the copyrighted work was infringed. For example, the act under Section 121(1)(a) relates to the making an infringing copy for sale, whereas the act under Section 121(1)(b) relates to the importing of an infringing copy.

The Copyright Amendment Decree came into force in September 2009 and was introduced to primarily address fundamental issues in copyright that were considered not to be adequately provided for in the Copyright Act. One of these was the issue of proving who the copyright owner is during criminal proceedings. Generally, prosecutions for offences under Section 121(1) of the Copyright Act in relation to overseas copyrighted works were unsuccessful due to the difficulty of proving who the copyright owner was and, equally, that the defendant had no license in the work.<sup>14</sup> Section 126 of the Copyright Act requires the copyright owner to give evidence in court, and so it was difficult for the state with its limited resources to bring the copyright owner from overseas to Fiji to confirm ownership over the copyrighted work. However, when the Copyright Amendment Decree was passed in 2009, a big administrative burden was lifted off the state. The effect of Section 2 of the said decree meant that prosecution had only to bring to court an original copy of the movie that was the subject of the proceedings and show the court the name of the copyright owner and other required details, which appeared on the surface of the original copy. This was done to achieve two legal aims. First, it was to prove who the copyright owner was. Second, after showing the court who the copyright owner was, the burden of proof would naturally shift to the defense to prove that he or she had the license or authority from the copyright owner to deal with the copyrighted work.

The introduction of the Copyright Amendment Decree in 2009 compelled the Office of the Director of Public Prosecutions to apply its provisions in all the courts of law in Fiji. But because it was novel, the initial focus was restricted to the cases investigated in Suva, since the Copyright Unit within the Office of the Director of Public Prosecutions was primarily based in Suva. The following cases are classic examples of prosecutions.

### Reality on the Ground (Case Studies)

#### *The Case of Yogesh Lal*<sup>15</sup>

Mr. Yogesh Lal, the accused in this case, was charged with the offense of dealing in infringing copies contrary to Section 121(1)(d)(i) of the Copyright Act of 1999. The prosecution alleged that he was offering for sale three infringing copies in DVD format of the movie *Clash of the Titans*, which was owned by Warner Brothers Entertainment and Legendary Pictures.

When the matter proceeded to trial, the prosecution advised the learned magistrate that since this was the first copyright infringement case to reach trial after the Copyright Amendment Decree 2009 came into effect, the prosecution was going to rely on the provisions of the said decree to prove who the copyright owner was. This was accepted by the court. During judgment, the court confirmed the applicability of the Copyright Amendment Decree as conducted by prosecution. But the accused was acquitted because there was no evidence pertaining to the actual sale (as required for “dealing”) of the infringing copies.<sup>16</sup>

#### *The Case of Dharmend Rama*<sup>17</sup>

Mr. Dharmend Rama, the accused in this case, was charged with four counts of dealing in infringing copies contrary to Section 121(1)(d)(i) of the Copyright Act of 1999. The prosecution alleged that the accused had offered for sale six infringing copies of the movie *Sherlock Holmes*, copyright belonging to Warner Brothers Entertainment; ten infringing copies of the movie *2012*, copyright owned by Columbia Pictures; nine infringing copies of the movie *Legion*, copyright owned by Bold Films; and eight infringing copies of the movie *This Is It*, copyright of which was owned by The Michael Jackson Company.

The accused pleaded guilty to all the counts in the charge, and the matter was set for sentencing. During sentencing, the learned magistrate acquitted the accused because the prosecution had failed to meet the required standard of proof in their submission of the summary of the facts. A summary of facts for any criminal case after a plea of guilt has been entered in a court of law should show the relevant elements of the offense(s) in the charge. The elements of an offense when put together make up the offense. However, in this case, the prosecution argued that the summary of facts included all the elements of the offense(s) in the charge. This claim was not acceptable to the magistrate. The consequent acquittal resulted in

the decision being appealed to the high court of Fiji. However, at the time of writing, the Director of Public Prosecutions has not yet endorsed the filing of the appeal, much to the frustration of stakeholders. In part this is because of problems of understaffing and the management of caseloads. But it is also indicative of the challenges that advocates of stronger copyright enforcement face in trying to ensure that all the agencies involved in copyright enforcement share the same commitment to making copyright laws work successfully in Fiji.

### **Conclusion**

Fiji currently possesses the institutional mechanism and normative legal framework to combat copyright infringement in movies, but whether these are sufficiently adequate in the ongoing fight against movie piracy is a question of contention. This article has demonstrated that the Fiji Police Force, the DPP's Office, and FIPO have made efforts to combat copyright infringement. However, this research has also highlighted some major challenges to the realization of copyright prosecution in Fiji. The notion that the Fiji police force and FIPO are mandated to carry out the same task of investigating copyright infringement has caused some confusion, and this has contributed to the current situation where there have been no copyright infringement cases investigated and brought before the courts during 2012. The policy makers and those in control of the institutional mechanisms must make a move to educate all personnel concerned about the significance of copyright and the harmful effects of its infringement. The enforcement agencies, in particular the agencies referred to above, that make up the institutional mechanism for copyright prosecution in Fiji need to lobby for specialized training for the agencies so that there is uniformity in the mind-set and attitude toward the understanding of copyright. The fact that Fiji ratified relevant international legal instruments close to half a century ago and domesticated its fundamental copyright principles over a decade ago implies a lack of political will to combat copyright infringement. The establishment of FIPO is worthy of praise, but the fact that its functions and status are yet to be placed on a formal footing through legislation shows that the wheels of justice have in some respects ground to a halt for victims of copyright infringement cases. While in a general sense, Fiji has been moving forward with the respect for copyright through the prosecution of copyright infringement cases, essentially it needs successful copyright prosecutions in order to send out a clear message to the public that dealing in copyright infringement objects will not be tolerated under the law.

**NOTES**

1. Prior to April 2009, the Fiji Police Force was established under the (now) abrogated 1997 Constitution of Fiji.
2. Comment made by Assistant Superintendent of Police Luke Rawalai, Director of Criminal Investigations Department, Fiji Police Force, in conversation with the author.
3. This was the precharge procedure that existed between the Fiji police force and the DPP's office in 2010 and 2011.
4. Comment by Inspector Fisi Nazario, Fiji Police Force, during the Fiji Performing Rights Association Copyright Workshop in August 2012, at the Holiday Inn, Suva.
5. *Fiji Times Online*, "President Abrogates Fiji Constitution," accessed August 21, 2012, <http://www.fijitimes.com/story.aspx?id=118886>.
6. *State v. Seth Rizwan Ali* (unreported).
7. These statistics were obtained from the DPP's office database in August 2011. The number and the status of the cases are therefore subject to change.
8. However, according to Mr. Terence O' Neil Joyce, Manager of FIPO, it is yet to be established by way of legislation.
9. Elenoa Baselala, "Property Protection," *The Fiji Times Online*, April 13, 2011, <http://www.fijitimes.com/story.aspx?id=170635>.
10. Section 12, "Meaning of Infringing Copy," Copyright Act of Fiji, 1999.
11. The various ways of dealing with an infringing copy include the making of the copy, the importing of the copy, the possessing of the copy, the offering or exposing the copy for sale, and the distributing of the copy for commercial purposes.
12. Content of Course for police officers who underwent Criminal Investigator's Qualifying Course in 2011 at the Nasova Barracks in Suva.
13. These four principles resulted from discussions between the DPP's office and an IP expert from New Zealand.
14. Explanatory Note, Copyright Amendment Decree, 2009.
15. *State v. Yogesh Lal*, Criminal Case No. 867 of 2010.
16. According to the manager of the copyright unit of the DPP's office in September 2011, this case was in the process of being appealed because the essence of the charge was that the accused had *offered* the infringing copies for sale, which is provided for under Section 121(d)(1), but had not actually sold infringing copies, which is provided for under Section 121(1)(e) (emphasis added).
17. *State v. Dharmend Rama*, Criminal Case No. 1497 of 2010.