THE INTELLECTUAL PROPERTY DEBATE IN THE DIGITAL ENVIRONMENT: CHALLENGES AND OPPORTUNITIES FOR THE INFORMATION SECTOR

‘The Rights, Responsibilities and Liabilities of the Information Provider: The Development of Guidelines’

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The Digital Environment

Human society has moved from the industrial to the information age. In this new era, knowledge management and access to information are factors that cannot be ignored in any serious effort at social development and transformation. In this regard the United Nations Economic and Social Council in July 2000 called for the creation of an international strategic partnership to bridge the digital divide and establish a knowledge based society that is open and non-exclusive.

In line with this general objective, UNESCO’s stated mission regarding communication and information is:-

1) To promote the free flow of information, knowledge and data;
2) To encourage the creation of diversified content and
3) To facilitate equitable access to information.

These general international objectives must be examined in the context of our regional reality. The Caribbean is a culturally rich, ethnically diverse, magnificently talented
but economically challenged developing region of the world. In the industrial era of the past, limited natural resources and the realities of economies of scale presented great challenges to the region’s developmental initiatives. In the new global, knowledge-based society, the Caribbean is perhaps presented with an opportunity for the first time to take advantage of a more level playing field based on the intellectual products and development of its greatest asset – its human resource. The provision of information to that human resource is therefore critical to the development of the region and in this context, information-providers have perhaps become the gate-keepers of the future of the region.

Our radio and television broadcasters, web-casters, archivists, librarians, internet service providers and internet access providers are therefore all charged with a tremendous social responsibility for the provision of information and access to content. Information providers are also responsible for ensuring that in providing information and facilitating the acquisition of knowledge, the rights of content and access providers are respected and observed. The information provider is therefore at the cusp of the struggle to balance commercial exploitation of content and information with the fulfillment of the developmental role in providing easy and low cost access to content and information in the context of the socio-cultural realities previously referred to.

**The Issue of Access**

The digital age has signified easier access to knowledge and information. UNESCO estimates that at the end of 2000, internet users worldwide numbered approximately 407 million people and forecasts are that that number will exceed 1 billion by 2005. For the first time in mankind’s history, almost every conceivable source of knowledge and information is accessible at the click of a button. The internet represents a great opportunity for access to content and assists creators by providing a medium for easier dissemination of their works to
the public. Yet the internet simultaneously represents a great threat to content providers because it represents an easy method of infringement of Copyright through the unauthorized duplication and distribution of copyrighted material.

In the Caribbean access to information remains a challenge for a few reasons:-

1) The technologies which enable access to information remain out of the economic reach of a significant portion of the Caribbean population;

2) The content which is the subject of the access, is protected by a complex system of Copyright, which is not widely understood and which has not traditionally been a part of the Caribbean consciousness. Additionally, the Copyright system demands that content creators and providers be compensated through a system of licensing on payment of a negotiated sum for access to content; Sometimes, the cost of access rights prove prohibitive to regional providers;

3) New technologies challenge accepted Copyright norms and principles, requiring heightened awareness of international issues and responses relative to Copyright protection of content and information;

4) Even in circumstances where content is accessible and regional providers are willing to pay for same, access is denied for various reasons, including the unwillingness of content providers to undertake the technological and commercial logistics of negotiating and providing access to this part of the word;

Additionally, providers must seek to preserve the documentary heritage of the region, the integrity of information gleaned from regional and extra-regional resources and the cultural identity of the region by maintaining balance in the flow of information that is disseminated to the public, by actively promoting the dissemination of indigenous content and by seeking to maintain cultural integrity in the face of the influx of extraneous information that can
characterize the new borderless information society. For although the knowledge age represents many opportunities for social development, it also represents a threat in that the Caribbean in very real terms has suffered from a failure to recognize, document and preserve many of its indigenous cultural products and at the same time is faced with an influx of cultural products indigenous to other parts of the world for which it pays dearly in both economic and social terms.

Debates have raged about the role, rights, responsibilities and liabilities of information providers. In order to better understand the tension between the protection and the provision of content it is necessary to summarise the system by which content is protected.

**The Copyright Protection of Content**

The content which is the subject of dissemination generally consists of works which are subject to Copyright protection. The Berne Convention 1886 provides the international legal framework for the Copyright protection of original literary, musical, dramatic and artistic works. (Article 2 of Berne Convention). Signatories to Berne have enshrined the principles of Copyright protection in domestic laws.

Basically, Copyright subsists as an exclusive intangible property right in original literary, artistic, musical or dramatic works which qualify for protection. Copyright does not protect ideas but the expression of those ideas. It operates to prevent unauthorized persons from exploiting the protected work without the permission (often granted by license) of the author or owner of the Copyright in the work. Copyright is the term generally used in Common Law jurisdictions to refer to a bundle of economic and moral rights. Economic

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2 Note that the author (creator) of a work is not always the owner of the work. Works created during the course of one’s employment, for example, are, in Common Law legal systems, generally the property of the employer in the absence of an agreement to the contrary. Copyright Cherie Sue Ann Jones, October 2004.
rights are those rights which relate to the exploitation of the work for economic gain and include the rights of communication, adaptation, reproduction and distribution of protected works. Moral rights are those so-called ‘personality’ rights which protect the fundamental relationship of the author to the protected work and include the right of paternity (the right of the author to be identified as such) and integrity (the right of the author to have the creation maintained as he produced it).

Neighbouring Rights are those rights which attend to those who assist the author in disseminating his work to the public. For example, a broadcaster who tapes a reading of a poet’s works has no right in the poem that is the subject of the recording but has a recording right in the recording of that reading which in and of itself can be exploited to the benefit of both parties.

**The Ideological Underpinning of Copyright**

The ideological underpinning of Copyright Law is that it is a means of encouraging the creativity of the qualifying persons of any country by granting a proprietary right in the products of that creative process and investment and a resulting right to control the economic exploitation of that work. As with other intellectual property rights, the length of Copyright protection is limited in time\(^3\) because of equal importance in the Copyright system is the right of the society to have access to and to be enriched by the products of individual creative processes. The system therefore envisages social enrichment through free access to protected works after the period of protection has expired. At the expiration of the period of protection the works are said to be in the ‘public domain’.

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\(^3\) In Barbados, for example, Copyright protection generally extends to works for the life of the author plus fifty years after his death.

Copyright Cherie Sue Ann Jones, October 2004.
For information providers, this element of Copyright theory is of primary importance. As disseminators of content and information, information providers need access to content in order to be able to provide that content to the wider society.

**Rights of the Information Provider**

1. **Access to information and content**- The over-riding right which information providers should have is the right to access to knowledge and information. Once providers are willing to pay to access information, it should be theirs for the taking and a right to access information in the public domain is enshrined in Common law. The importance of this right in the context of the new global realities cannot be over-emphasized. Access to information by our people is critical to regional development and the ability of providers to access information at source is therefore critical.

In this context, however, Copyright becomes both a facilitating mechanism and a hindrance to access. The Copyright system operates to ensure that creators of content are compensated for access to their work. It is however based on a system of licensing, which requires the negotiation of access rights. Economic realities, the will of content providers, market demand and technological cost of access determine quantum for rights of access. For information providers in developing regions, this can be a serious challenge since many providers are unable to pay at the required levels to access content from providers unaware or unconcerned about the realities of the region.

Providers must respect and observe the rights of content creators as a vital part of encouraging continued creativity and social enrichment. Yet information providers must balance this with a social need to disseminate information to assist in social development in the face of unwilling providers or technological and economic difficulties in obtaining access.
Some guidelines for observation of such rights:- I wish to submit that the education of content providers in an effort to increase sensitivity to the realities of the region is one way to encourage equitable access to information that originates outside of the region. The education of the regional public, judiciary and providers themselves is another measure by which respect for the Copyright system and an understanding of the issues related to access can be fostered. However, in recognition of the issue of access as a developmental tool and as a crucial element for social development and the continued relevance and competency of the region in the global information arena, I also submit that regional Governments must be willing to explore and implement effective systems of compulsory licensing to ensure access for Caribbean people to content and information.

On the matter of access, I wish to acknowledge also, the role that fair use or fair dealing provisions play in regional Copyright laws. Fair use provisions essentially provide that works may be accessed by providers and the general public without compensation to owners or creators if the work is to be used for educational, scientific or research purposes. Further, fair dealing provisions ensure that the access of work for the purpose of comment (e.g during a news broadcast) is not an infringement of Copyright.

2. The right to protection of their own rights:- The work of providers and their role in bringing information to the public has been internationally recognized. Many providers such as broadcasters themselves enjoy intellectual property rights for their efforts. Recording and broadcasting rights must therefore be respected and observed. See sections 52(1)(b) and 52(2) of the Copyright Act No 4 of 1998 of Barbados. Other providers such as librarians and archivist might enjoy database rights for information which is gathered and arranged in an accessible, searchable catalogue for e.g. database right granted by the European Database Directive.
Information providers cannot merely be considered facilitators of access to content but important players in dissemination and the promotion of appreciation and understanding. In the Caribbean context where predominately oral traditions have meant a dearth of documentary heritage, the importance of the broadcaster who has captured history on audio or visual media cannot be neglected and his right to protection deserves great respect.

The Responsibilities of Information Providers

As with many things, it appears that the responsibilities of information providers outweigh their rights in the regional context.

1. Upholding the Copyright System and assisting in enforcement of copyright law:- Providers are responsible for upholding the Copyright system when disseminating information to the public. Continued education and dialogue on the very important system of Copyright and the development and expansion of Copyright doctrine in the face of new challenges to traditional doctrine posed by new technologies in the digital era is therefore crucial to the continued execution of the information provision mandate.

2. Ensuring Balance:- Additionally, providers must not shy away from agitation to ensure that the balance between the rights of content creators and information gatherers and the social objective of the widest, easiest and most equitable access to information and content by Caribbean people is maintained.

3. Acting Ethically in Disseminating Information:- Additionally, providers are charged with the responsibility of acting ethically and with integrity in disseminating information to the regional public. This includes, for example, ensuring that information is
faithfully reproduced true to source to ensure the integrity and veracity of information provided to the regional public and the purity of its documentary heritage. The Caribbean is unique in the mix of cultural elements that find a home in this region. The practice and expression of those disparate elements by our people must be faithfully recorded and this documentary heritage zealously preserved to ensure for our people a clear mirror of Caribbean identity.

4. Assisting in Dissemination of Caribbean content and information to the rest of the global community: Finally, providers must be proactive in ensuring the two-way flow of information in the new global arena. Broadcasters, web-casters, regional ISP’s and others must take responsibility for the presentation of the identity of the region to the rest of the world. As technologies have made it easier for us to access information and content, so too have they made it easier to provide information and content to the world for the enrichment of wider humanity.

5. To Ensure Currency & Relevance of Information Provided: Information providers must be widely read and aware of current developments in almost every area of human endeavour to be able to actively seek and provide current and relevant information.

Liabilities of Information Providers
Information providers are liable for failure to uphold and observe systems of intellectual property protection. However, the international community recently recognized the challenge posed to providers by the application of traditional Copyright doctrine to new technologies of the digital age. For example, the reproduction of Copyright works is an economic right which is the exclusive domain of the author of the work. However, it was observed that in order to provide access to information, new technologies often require the
transient copying of content as a means of facilitation of access through the electronic transfer of data. (E.g transfer on information via the internet)

Attempts to bring traditional Copyright doctrine in line with new developments in technology resulted in several revisions to the Berne Convention and finally the WIPO Copyright Treaty and WIPO Performace and Phonograms Treaty were adopted in 1996 to respond to problems created by attempts to apply the Copyright norms to new technologies. Article 8 of the WCT provides “Without prejudice to Articles 11 etc of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.’ This article makes it absolutely clear that information providers such as ISP’s can still infringe copyright merely by the transient storage of information in order to make it available to the public.

However, an agreed statement was adopted in this respect to the effect that contracting parties to the treaty could carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws to the apparent generality of Berne.

Information providers therefore run the risk of infringing Copyright by providing the means by which others effect unauthorized access to Copyright works.

At a much wider level, providers run the risk of failing to effectively carry out their role in the Caribbean context if they are unable to meet the other responsibilities outlined above and therefore contributing to a society characterized by extra-regional cultural penetration,
lack of respect for indigenous cultural products and global ignorance of the socio-cultural realities of the region.

**Conclusion**

As the Caribbean seeks to improve its social development initiatives, the role of the information provider in the new digitized information era as gate-keeper, as defender, as proponent cannot be overstressed. The way in which information providers respond to the clarion call to take the region beyond the 21st century in the new environment, and the way in which they seek to balance the rights and responsibilities and manage the liabilities of themselves, and other content and information providers, will in many ways determine the success of the Caribbean in remaining a region of growth, relevance and worth in the future. The development of industry guidelines on the management of and response to these rights responsibilities and liabilities must be effected with full awareness of the potential for damage to the region if information providers fail to get it right.