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AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

International Intellectual Property

PAMELA BENZÁN ARBAJE

This article focuses on the link between money laundering and intellectual property specifically as addressed in the Dominican Republic.

I. An Analysis of the New Criminal Framework for Intellectual Property

International organizations devoted to the fight against organized crime have studied thoroughly the close link between intellectual property crimes and money laundering. The alarming figures presented by these studies have encouraged intellectual property specialists to advocate for the tightening of criminal sanctions that punish the infringers of intellectual property laws.

Research conducted in 2008 by the Organization for Economic Co-operation and Development (OECD) estimated that the value of international trade in counterfeit and pirated goods exceeded \$250 billion in 2007.¹ This research included a general trade-related index of counterfeiting and piracy that reflected how economies are affected by counterfeit and pirated exports or products. According to this index, the relative intensity with which counterfeit products were exported in the Dominican Republic at that time was 0.286636, a considerably low rate when compared to economies such as those of Afghanistan (2.351017), Laos (2.849408), or Thailand (2.176103).² But, it is comparatively high compared to economies in the region recognized for their high level of institutionalism and legal certainty, such as Chile (0.010157) and Costa Rica (0.039002).³

Moreover, in 2013 the United Nations Interregional Crime and Justice Research Institute (UNICRI), along with the International Chamber of Commerce (ICC), published a study titled “Confiscation of the Proceeds of Crime: a Modern Tool for Deterring Counterfeiting and Piracy”⁴ which demonstrated the strong link between the illicit traffic of counterfeit goods and the laundering of capital. According to this study, counterfeiting,

1. The Organisation for Economic Co-operation and Development [OECD], *Magnitude of counterfeiting and piracy of tangible products: an update* (Nov. 2009), www.oecd.org/dataoecd/57/27/44088872.pdf.

2. *Id.*

3. *Id.*

4. United Nations Interregional Crime and Justice Research Institute [UNICRI] and the International Chamber of Commerce’s [ICC] Business Action to Stop Counterfeiting and Piracy [BASCAP], *Confiscation of the Proceeds of IP Crime: A modern tool for deterring counterfeiting and piracy* (2013), http://www.unicri.it/news/files/POC_Final041713_HR.pdf.

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smuggling, and piracy have a dual function for organized crime groups, serving on one hand, as a source of financing for illegal activities, and on the other, as an effective tool to launder the proceeds.⁵ By way of illustration, the report presents three cases,⁶ one from Thailand, one from the United States, and one from Mexico, where it was found that the profits earned from other crimes were used to finance counterfeiting and product piracy, and the proceeds of which were reinvested in drug trafficking and prostitution.⁷

It is under these considerations and alarming figures that the UNICRI and the ICC's Business Action to Stop Counterfeiting and Piracy (BASCAP) established the importance of national laws that provide strong sanctions against any form of money laundering, and provide for the confiscation of illicit proceeds from counterfeiting, piracy, or other intellectual property crimes that are susceptible to money laundering.⁸

On January 2017, at the request of BASCAP, the European company Frontier Economics presented an updated report which estimates that the value of international and domestic trade of counterfeits and pirated products in 2013 was between \$710 and \$917 billion, and the global value of digital piracy of movies, music, and software in 2015 was \$213 billion.⁹ The forecasted value of international and domestic trade in counterfeit and pirated products for the year 2022 ranges between \$1.9 and \$2.81 trillion.¹⁰ In describing the social, ethical, health, and environmental consequences of intellectual property crimes, such as the distribution of counterfeit medicines, foods, beverages, and cigarettes, as well as the harmful effects of intellectual property crimes on direct foreign investment and on the labor market due to the displacement of legitimate economic activities from piracy and counterfeiting, the Frontier Economics report projects a loss of 4.2 and 5.4 million jobs for the year 2022.¹¹

Finally, the United Nations Office on Drugs and Crime's (UNODC) 2016 publication "The illicit trafficking of counterfeit goods and transnational organized crime,"¹² highlights the state of danger and vulnerability in which people who work in the market of counterfeiting and piracy live, where abuse and the violation of child labor laws is quite frequent, thus demonstrating the enormous social and economic problems

5. *Id.*

6. *Id.* at 13.

7. *Id.*

8. *Id.*

9. FRONTIER ECONOMICS, *The Economic Costs of Counterfeiting and Piracy* (2017), available at <https://cms.iccwbo.org/content/uploads/sites/3/2017/02/ICC-BASCAP-Frontier-report-2016-Executive-Summary.pdf>.

10. *Id.*

11. *Id.*

12. United Nations Office on Drugs and Crime [UNODC], *The Illicit Trafficking of Counterfeit Goods and Transnational Organized Crime* (2016), https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf.

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posed by counterfeit and pirated products.¹³ Under these circumstances the Dominican Republic's government, with the support of the Financial Action Task Force for Latin America, has sought to redefine the current legal framework on anti-money laundering and terrorism finance to address the worldwide evolution of such practices.¹⁴

A. PURPOSE OF LAW 155-07 AGAINST MONEY LAUNDERING AND FINANCING OF TERRORISM

The eighth and ninth recitals of the new Law 155-17 (the Law) against money laundering and financing of terrorism indicate that its purpose is to protect the democratic institutions, the economy, the balance of payments, price stability, and unfair competition in legitimate commercial and productive activities.¹⁵

This objective underlying the legislation is further evidenced in the extensive catalog of precedent for determining infractions, where various crimes with a large social and economic component have been incorporated, including: counterfeiting, piracy, crimes against intellectual property, and market manipulation.¹⁶

The inclusion of intellectual property crimes as precedent has not been coincidental, since it is duly backed by numerous international studies that have demonstrated the close link between counterfeit products and money laundering. These predetermined offenses are also recognized as such in other foreign laws against money laundering, as is the case of Chile and Uruguay.

B. NEW CRIMINAL FRAMEWORK ON INTELLECTUAL PROPERTY CRIMES

The Law 155-17 establishes that intellectual property crimes will be considered preceding or determining infractions, which means that the infringements conceived on article 166 of Law 20-00 on industrial property, as well as those described on articles 169 and 170 of the Law 65-00 on copyright, will be considered preceding infractions that generate assets susceptible of money laundering.¹⁷

First, in the case of Law 20-00, sanctions to those who infringe the law in relation to trademarks and trade names rights could be punished with prison sentences ranging from six months to three years and a fine equivalent to a multiple of fifty to thousand times the monthly minimum wage—the law

13. *Id.*

14. *Id.*

15. Ley num. 155-17, D.R. CONST. (2017).

16. *Id.*

17. *See id.*

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only provides for economic sanctions for infringements in the case of patents.¹⁸

On another hand, Law 65-00 contemplates a sanction of three months to three years of imprisonment and a fine equivalent to a multiple of fifty to 1,000 times the monthly minimum wage to those who commit any of the infractions described in article 169 of the Law, including, the modification, reproduction, distribution, communication or unlawful alteration of copyright-protected works.¹⁹

In both cases, Law 155-17 greatly toughens these sanctions for offenders establishing a new criminal framework for intellectual property crimes and, consequently extending the protection of intellectual property rights in the Dominican legal system. As explained in the chart, Article 3 of Law 155-17 significantly increases the penalties for IP infractions, with the minimum sentence being four years and the maximum of twenty years. Likewise, it provides greater economic penalties that range from one hundred minimum wages to four hundred minimum wages.

18. Ley Num. 20-00 on Industrial Property, D.R. CONST. (2000).

19. Ley Num. 65-00 on Copyright, D.R. CONST., art. 169 (2000).

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Criminal infraction	Criminal sanction	Fines	Other penalties
Convert, transfer or transport goods, knowing that they are the product of any of the preceding infractions, with the purpose of concealing, disguising or concealing the nature, origin, location, disposition, movement or property or rights over goods.	Penalty of ten to twenty years of prison.	Fine of two hundred to four hundred times the minimum wage.	Seizure of all illicit assets, securities, instruments and rights over them, as well as the permanent disqualification to perform functions, provide services or be hired by financial intermediaries, participants of the securities market, and public entities.
Conceal, disguise or conceal the nature, origin, location, disposition, movement, real ownership or rights over assets, knowing that said assets come from any of the preceding infractions.	Penalty of ten to twenty years of prison.	Fine of two hundred to four hundred times the minimum wage.	Seizure of all illicit assets, securities, instruments and rights over them, as well as temporary disqualification for a period of ten years to hold positions, provide services or be hired by financial intermediaries, participants of the securities market, and public entities.
Acquire, possess, manage or use assets, knowing that they come from any of the preceding infractions.	Penalty of ten to twenty years of prison.	Fine of two hundred to four hundred times the minimum wage.	Seizure of all illicit assets, securities, instruments and rights over them, as well as the temporary disqualification for a period of ten years to hold positions, provide services or be hired by financial intermediation entities, participants of the stock market, and public entities.
Attend, advise, help, facilitate, encourage or collaborate with people who are involved in money laundering to avoid prosecution, submission or criminal convictions.	Penalty of four to ten years in prison.	Fine of two hundred to four hundred times the minimum wage.	Seizure of all illicit assets, securities, instruments and rights over them, as well as temporary disqualification for a period of ten years to hold positions, provide services or be hired by financial intermediaries, participants of the securities market, and public entities.
To participate, as an accomplice, in any of the activities mentioned in the above numerals, to be associated to commit this type of acts, the attempts to perpetrate them and the fact of helping their commission with an essential provision to perform them or facilitate their execution .	Penalty of four to ten years in prison.	Fine of one hundred to two hundred times the minimum wage.	Seizure of all illicit assets, securities, instruments and rights over them, as well as temporary disqualification for a period of ten years to hold positions, provide services or be hired by financial intermediaries, participants of the securities market, and public entities.

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20. Ley num. 155-17, *supra* note 15, art. 3.

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Likewise, the Law establishes the following as aggravating circumstances in the case of money laundering: the participation of organized criminal groups, committing the offense in association of two or more persons, entering the national territory with deceit or deception or without legal authorization, among others. In these cases, the offenders could be sanctioned with the maximum of the penalty established for each type of crime.²¹

The new law thus could be argued to have strengthened the Dominican intellectual property framework, providing greater security to the owners of trademarks, trade names, and copyrights, and thereby protecting the investment of both nationals and foreign investors. But, it is important to discuss the negative implications that it could bring to the owners of intellectual property rights.

For example, the combination of imprisonment with confiscation, which in turn is conditioned on obtaining a conviction, added to the precautionary measures that authorize the seizure or temporary immobilization of movable property or banking products—until reaching an irrevocable judgment—will make it difficult in many cases that those directly affected by these crimes (the owners of distinctive signs, patents, utility models, or authors of copyright-protected works), can obtain the corresponding compensation, either by the foreclosure of their assets or by reaching a transactional agreement to pay for the damages.

For instance, the holders of intellectual property rights, regardless of claiming the infringements to their rights before or after the prosecution for the infractions begins, would always be affected because they would have to continue to seek compensation by separate claims according to the provisions of laws 20-00 and 65-00. In the meantime, the assets of the defendant will probably be seized or immobilized, until it is determined if they have a direct link to money laundering, which could take years to prove.

Law 20-00, Law 65-00, and the DR-CAFTA establish that competent authorities can initiate measures such as border measures *ex officio*;²² however, the reality is that in most cases the interested parties must take the initiative to monitor and prevent the violation of their rights. Moreover, the fact that Customs does not require the brand name or product denomination does not allow the authorities to have a record or registry that could be later used in the investigations and prosecution for counterfeits. Likewise, in cases where there is an ongoing investigation, the owner of intellectual property rights would have difficulty obtaining information as the authorities require a court order to disclose information.

When evaluating other alternative measures in force in other legal systems, it is useful to review the conclusions of UNICRI and BASCAP that

21. *Id.*

22. Ley Num. 20-00, *supra* note 18; Ley Num. 65-00, *supra* note 19; Dominican Republic–Central America Free Trade Agreement (CAFTA-DR) art. 15.11, *signed* Aug. 5, 2004 (implemented by D.R. on Mar. 1, 2007), *available at* http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/chapter13_22.asp#Article15.11.

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studied the confiscation systems of assets and proceeds of crimes in force in the United Kingdom, Australia, Italy, and Switzerland. Their conclusions encompass both the common law system and the civil law system and conclude that the practice of jurisdictions where there are laws that allow the confiscation and recovery of assets have shown that confiscation is a very effective measure in the fight against organized crime, including intellectual property crimes.²³

The publication suggests that in order to ensure that confiscation regimes are applied in the broadest range of circumstances, jurisdictions should consider measures that allow them to carry out confiscations without obtaining a prior criminal conviction.²⁴ It argues that a system of confiscation without conviction would apply when assets originating from illicit activities have been found, but a criminal process cannot be carried out and a conviction obtained, either because the guilty person died or is missing; for technical or procedural reasons; because there is not enough evidence to prove the guilt of the accused, but to determine that the benefits were generated from a criminal activity; or because the accused is benefited by immunity, among others.²⁵

It is also argued that this system of confiscation without prior conviction offers several advantages from a point of view of applying the law and prosecuting the crime. For instance, the process can be separated from the criminal case and therefore can be started before, during, or after the end of the criminal case. Additionally, it can be prosecuted even when a criminal case is not sustainable. Finally, it can present significant results at a low cost. In terms of effectiveness and low cost, the example of the United States Department of Justice is presented, where, in 2006, \$1.2 billion was recovered through confiscation of assets, of which 38 percent were uncontested civil cases (\$456 million), 29 percent of appealed civil cases (\$348 million) and 33 percent criminal cases (\$400 million). These statistics represent cases of counterfeiting and piracy where the accused were found in possession of illicit products and were not willing to incur costs to defend against these crimes. To avoid abuse, the laws of the countries where this system is applied have established requirements and circumstances that must be taken into account, and that only in cases of verification could they proceed to the confiscation of assets without obtaining a prior conviction.

A discussion has begun in this regard in the Dominican Republic, with the bill on claims for the extinction of property for the civil forfeiture of illicit

23. United Nations Interregional Crime and Justice Research Institute [UNICRI] and the International Chamber of Commerce's [ICC] Business Action to Stop Counterfeiting and Piracy [BASCAP], *Confiscation of the Proceeds of IP Crime: A modern tool for deterring counterfeiting and piracy*, at 47-48, (2013), http://www.unicri.it/news/files/POC_Final041713_HR.pdf.

24. The United Nations Interregional Crime and Justice Research Institute (UNICRI) and the International Chamber of Commerce (ICC) Business Action to Stop Counterfeiting and Piracy. *Confiscation of the Proceeds of Crime: a Modern Tool for Deterring Counterfeiting and Piracy* (2013).

25. *Id.*

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goods. It would be opportune to review and study the bill, along with the legislation of the countries where this system already exists, to evaluate those measures that have proven to be more effective, and make the necessary modifications and adjustments to adapt it to the national context and guarantee the protection of the property rights of citizens.

C. OTHER REFLECTIONS REGARDING THE NEW CRIMINAL FRAMEWORK

The infringements related to patents only have pecuniary penalties in Law 20-00. But, according to the new law, in cases where it is considered that the infringements related to patents generate goods or illicit assets, it would entail imprisonment.

The law declares the autonomy of anti-money laundering infractions, so that these infractions will be investigated, prosecuted, and adjudicated as autonomous facts of the infringement that preceded it and independently of the infringement being committed in another territorial jurisdiction. This last part will allow the Dominican courts to rule cases of infringements of intellectual property rights whose perpetration materializes abroad, but which involve a criminal offense of money laundering that is consummated in the Dominican territory, where the goods are collected or the illicit assets generated from such infractions are located. Such is the case, for example, of counterfeit products and illegitimate use of trademarks duly registered in the Dominican Republic, which are made and marketed in foreign territory, but whose benefits are received by natural or legal persons in Dominican territory.

Another very important element that adds this new law to the criminal framework in the matter of intellectual property is the fact that it expressly punishes the attempt to infringe,²⁶ since neither Law 20-00 nor Law 65-00 conceived any sanction for the attempt of the intellectual property infractions.

In fact, it is important to point out that the Law expressly indicates that the knowledge, intent, intention or purpose required as a subjective element for the prosecution of crimes may be inferred from the objective circumstances of the case.²⁷ Also, in determining the subjective intent, knowledge, fraud, obligation to know, and deliberate ignorance will be taken into account.²⁸ In principle, this would seem to indicate that in these cases the judges will have greater flexibility at the time of evaluating the evidence submitted to determine the type of criminal offense, which is of vital importance in cases of infringements to intellectual property where the intent is questioned.

This subjective intent element will also impose a greater obligation of preventive control on merchants, freight distributors, and other natural and

26. Ley Num. 155-17, *supra* note 15.

27. *Id.*

28. *Id.*

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legal persons involved in the trade, to make sure that the goods they buy, sell, transport, administer, and use have a legal origin. Specially, as set forth by the renowned Argentinean author Jorge Otamendi's doctrine, the crime of counterfeiting is consummated with the material manufacture of the brand in question and is demonstrated by the simple possession of products with the brand without the owner's consent, which entails that it is a crime of mere activity.²⁹

On the other hand, it is interesting that article 13 of Law 155-17 has included special investigative techniques, such as the use of informants and controlled delivery,³⁰ which are very useful for identifying and breaking down the structure of criminal organizations.

D. CONCLUSION

Law 155-17 against money laundering and the financing of terrorism has expanded the criminal framework of intellectual property crimes by adding new criminal types that consist of laundering of assets derived from infringements to industrial property rights and copyright protected works.

Considering the gravity of the prison sentences and the significant value of the fines, as well as the other punishments and precautionary measures provided by the Law for these cases, such as the seizure of all illicit assets, securities, instruments, and rights over them, it could dissuade possible offenders. But, the dissuasive power of the Law will only be effective if the investigative and prosecutorial bodies apply the Law correctly.

In addition, it will be necessary to improve the internal enforcement measures that are currently in force for the prevention and fight against these types of crime, such as the border measures of Customs. It is essential that Customs notify the registered owners of intellectual property rights whenever a shipment arrives from a non-registered authorized importer.

The absence of records with a precise indication of the brands also hinders the success of any criminal proceedings, unless the proceedings are initiated due to the seizure of merchandise at the port. The intellectual property organizations should advocate for the creation of international standards in relation to the customs declarations, which should include the precise denomination of the brand of the products that are being exported or imported so that there is public information available for the prosecution of intellectual property crimes. In most cases, the intellectual property rights holders can only successfully pursue a claim for counterfeit merchandise that is seized at the port and cannot obtain compensation for previous importations. This could be a very important step to penalize recurrent infringers.

It would not be unreasonable to evaluate the feasibility of modifying the confiscation to a system without prior condemnation, such as the ones that

²⁹ Jorge Otamendi, *DERECHO DE MARCAS* 267 (7th ed., Buenos Aires, Abeledo-Perrot 2010) (1989).

³⁰ *Id.*

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exists in the United Kingdom, Switzerland, Italy and Australia. In many cases, the elimination of the assets of a criminal network is a more effective measure for their disappearance than the simple personal condemnation of one of those involved, who are quickly displaced by new criminals. The key point is to eliminate their sources of income and financing that enables them to continue with counterfeiting, piracy and contraband, and thus prevent and significantly reduce these types of infractions and other related infractions, such as drug trafficking, prostitution, human trafficking, bribes, among others.

Finally, this law is an important development in the Dominican intellectual property framework and could be a useful tool to counterattack the increase of counterfeits and other violations to intellectual property rights, providing greater security to the intellectual property rights owners and thus, protecting national and foreign investment.

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