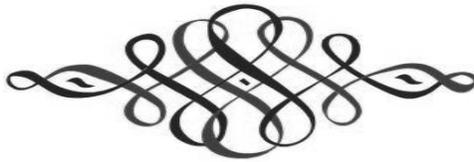


# **PRACTICAL CONSIDERATIONS FOR THE SPECIALIZED IP COURTS \***

by

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## **PRACTICAL CONSIDERATIONS FOR THE SPECIALIZED IP COURTS**

1. Protocols:
  
2. I am honoured and grateful for this invitation to address this very important meeting. My gratitude is multiplied by the implied recognition of the importance and value of CARICOM and the Caribbean Court of Justice (“CCJ”) in the global enforcement of Intellectual property rights. I am moved by the consistency of the support evinced by both the IPI and the US Patent and Trademark office. I recall that nearly eight years ago, in April 2004, before the CCJ was established, you shared in hosting a conference at the Sherbourne Conference Centre in Barbados to discuss the ESTABLISHMENT OF THE CARIBBEAN COURT OF JUSTICE and its EFFECT ON INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE. I had the honour of addressing that conference, and then, as today, was the beneficiary of Lester Hyman’s generous introduction. At that time I was Chief Justice of the Eastern Caribbean Supreme Court (“ECSC”).
  
3. In 2004 the ECSC had driven hard to improve justice delivery and increase the participation and confidence of the litigants and other court users. I would suggest that we learnt lessons that seem very apt to the discussions taking place at this symposium. The reforms we were then engaged in were focused on five different areas:
  - a. Firstly, we embarked upon the reform and modernisation of civil procedure rules and practice. We introduced *new civil procedure rules* that facilitated cost-effective, timely and expeditious resolution of cases and established court connected mediation as an important mechanism for giving effect to the imperative in the rules for appropriate methods of dispute resolution.

- b. Secondly, we engaged in reforms designed to establish, consolidate and expand the role of the court's department of *court administration* and reduced dependency on the Executive for the range of services that were required to enable it to function effectively.
  - c. Thirdly, we had embarked upon reforms aimed at introducing *modern and appropriate technology* into the court system with a view to saving expense for the litigant, improving access to justice and generally increasing the overall level of efficiency in the courts.
  - d. Fourthly, we had begun reforms that would establish and streamline *specialised divisions within the courts*.
  - e. And finally, we understood that all of the above reforms were practically useless unless we improved the *calibre of our judicial officers*. This we did through the development of a Judicial Education Institute which factored judicial education as a key component to improving justice delivery services, and I recall, as noted in the draft report of the survey for the meeting, that the ECSC also worked with the World Intellectual Property Organisation to train judges on IP matters by coordinating a colloquium for judges of the court on "The Protection of Intellectual property rights".
4. **Today, nearly Eight Years Later:** I return as President as the Caribbean Court of Justice, the premier judicial institution for CARICOM. Despite the fact that some contracting parties have not as yet severed the link with the Privy Council, the CCJ is now well established and has already completed adjudication on a number of important matters.
  5. In addressing the practical considerations affecting our courts' management of Intellectual Property law, some background is required.
  6. CARICOM is an association of 14 Caribbean Sovereign States, developing a Single Market and Economy. These are mostly small island developing states and three developing states in South and Central America, all with economic and human resource limitations. As more particularly specified in Article 6 of its Revised Treaty of Chaguaramas, the objectives are

aimed at improving economic development, social stability and regional integration. These specifically include expansion of trade and economic relations with third States and enhanced levels of international competitiveness. The CCJ functions at two levels. Firstly, it is an international court with exclusive jurisdiction for resolving disputes arising from the Revised Treaty of Chaguaramas, and secondly it is the final court of appeal to replace the Privy Council of the UK, for the Commonwealth Caribbean Countries.

7. As was apparent in 2004 when the conference was held, in CARICOM the commitment towards the development of the Single Market and Economy has necessarily involved the need to strengthen the institutions that support international trade including the management of the IP rights. This has been apparent from its inception. In the Revised Treaty of Chaguaramas provisions were made for three institutions supporting this.
8. The institutions are:
  - a. The **Council for Trade and Economic Development (COTED)** whose broad responsibility extends to the obligation to promote the development and oversee the operation of the CARICOM Single Market and Economy (CSME). COTED consists of Ministers designated by the Member States;
  - b. The **Competition Commission** which promotes and protects competition and coordinates the implementation of Competition Policy within CARICOM, and
  - c. The **CCJ** which is the centre-piece of the Single Market and Economy with its compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty.
9. Article 66 of the Revised Treaty of Chaguaramas specifically addresses Intellectual Property rights requiring **COTED** to promote the protection of intellectual property rights by, inter alia:
  - a. strengthening the existing regimes for their protection and simplifying registration procedures in Member States;

- b. the establishment of a regional administration for intellectual property rights except copyright;
  - c. increased dissemination and use of patent documentation as a source of technological information;
  - d. adopting measures to prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology, and
  - e. public education.
10. In keeping with the concept of a single market, Article 74 of the Revised Treaty requires Member States to harmonise their laws and administrative practices in respect of, inter alia, intellectual property rights; standards and technical regulations; competition policy and commercial arbitration.
11. In October 2008 the EC and CARIFORUM countries entered into an Economic Partnership Agreement aimed at a framework for EC and CARIFORUM relations, centred on economic development, the reduction and eventual eradication of poverty, and the smooth and gradual integration of CARIFORUM states into the global economy. CARIFORUM can be generally described as CARICOM together with the Dominican Republic.
12. A significant part of the arrangement deals with intellectual property and creates a very detailed regime in which the EC and CARIFORUM countries agreed to ensure for an adequate and effective implementation. The agreement defines the IP rights it addresses and included therein are copyright, utility models, patents protection for plant varieties, designs, geographical indications, and trademarks protection of databases, protection against unfair competition and protection of undisclosed confidential information on knowhow. In its enforcement provisions the Parties entered into very detailed obligations for the provision of measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this section. Those measures, procedures and remedies shall be fair and equitable, and shall not be unnecessarily complicated or costly, or entail

unreasonable time limits or unwarranted delays. The measures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

13. Despite the institutional framework attested by the Treaties into which the Member States have entered, the major practical problem has been the failure to develop a regional approach to the regulation of intellectual property law. That is acknowledged in the **WIPO-CARICOM MEETING OF EXPERTS ON THE CREATIVE INDUSTRIES AND INTELLECTUAL PROPERTY** which recognised that it is only recently that CARICOM Governments have turned their attention to the development of the region's creative industries as part of their national strategy for growth and sustainable development, and that although several studies and activities related to mapping the creative industries in the region have been undertaken there has been very little follow-up on many of these projects beyond the initial diagnostic study.
14. One possible exception may relate to an initiative to regionalise patent administration in the Caribbean. My understanding is that about four years ago there was a feasibility study on this matter conducted by WIPO. This study was followed by a series of meetings with representatives of the CARICOM Member States and it appears that currently, options are under consideration by CARICOM Ministers.
15. In the main, however, effective follow up action has been national rather than regional. This means that some States have developed more and faster than others. As pointed out in the **Study and Update of the 2005 International Bar Association Survey on Specialized IPR Courts and Subsequent Seminar** circulated in the conference papers, some States have created specialised units to address matters such as copyright royalties, licencing schemes and opposition hearings on copyright registration and although all States have jurisdiction in the high court, some States have a specialised commercial division which also hears IP matters. This leads us to the practical considerations for the courts in our region, and in particular for the CCJ as it assumes the mandate of final appeal court.

16. In summarizing, the PRACTICAL CONSIDERATIONS facing CARICOM, the matters that come to mind are the importance of regional responses based on recognising principles of economies of scale and the development of expertise including judicial training. These would include the development of regional solutions for regimes governing international trade and IP rights, and topping the list of this would be the pooling of drafting resources for harmonising the legislation. It would also address the utility of creating specialist dispute resolution mechanisms. From the perspective of the CCJ where we are looking at regional solutions, the concern about specialist judicial institutions in a group of small nations has to incorporate the reality of economies of scales, and the potential for waste in replicating institutions to address small workloads. So the idea of developing specialist judges who can support multiple jurisdictions has great appeal, despite the enormous practical hurdles to overcome. Then there is the concept of the CCJ's regional jurisdiction and its exclusive jurisdiction which points to the Court's role in improving consistency of decision making on a regional basis. And last but not least, the role of education in the development of expertise in judicial and supporting officers.
17. Although under the vision of the Revised Treaty it is COTED's job, the CCJ has to play a vital role in assisting COTED in this respect. The CCJ can bring together the stakeholders and experts. The CCJ is alive to the need for this mandate to be fulfilled and is in a good position to get it done. In this respect the role of the Court is more than just an adjudicatory body. It has already stimulated the establishment of two regional institutions using education as their main tools to improve justice delivery. They are: (1) **The Caribbean Academy of Law and Court Administration (CALCA)**, an educational arm of the Caribbean Court of Justice which has as its main objective the advancing of knowledge, education, learning, research, and practical application of Law and the Administration of Justice in the Caribbean context and (2) **The Caribbean Association of Judicial Officers (CAJO)** aimed at enhancing the administration of justice throughout the Caribbean Region by encouraging and promoting the development of impartial, competent, efficient and effective judicial officers.

18. One important element for education is the issue of enforcement which could include a public element to combat piracy in the entertainment law using the imagery of equating it to the common moral senses of theft. In any event the improvement of ethics is an important element in enforcement.

19. In conclusion, I would like once more to express appreciation to the IPI and the US Department of Patents and Copyrights for their consideration of the role of CARICOM in the global move towards regulation of the IP rights.

Thank you.



**The Right Honourable Sir Dennis Byron**

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