

The logo features a stylized, dashed line graphic that resembles a series of connected arches or a wavy path, starting from the top left and moving towards the right, ending just above the company name.

Wigley & Company

BARRISTERS *and* SOLICITORS

**PROSECUTIONS FOR SUPPLY OR USE OF
UNLICENSED SOFTWARE AND OTHER
INTELLECTUAL PROPERTY: A NEW CASE**

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Overview

Sale, distribution and use of pirated and unlicensed movies, software and music is widespread. Many regard it as a relatively soft and acceptable breach of a copyright owner's rights. Some even see it as morally appropriate for this to happen, particularly in regard to market-dominant IP owners.

It's a bit like the difference between drunk driving and speeding. The community no longer countenances drunk driving (like many used to) but many regard going 10 km over the speed limit as OK, even though it's illegal.

Whatever people's view might be about use of IP in breach of IP owners' rights, the Courts won't have a bar of it.

The 2003 amendment to the Crimes Act extends the ways in which there can be prosecutions. The Copyright Act already contains provisions that facilitate prosecution. Even someone getting a copy of proprietary unlicensed software at no cost from a friend could be prosecuted. Not only that, but the High Court, in a March 2005 judgment, has confirmed that quite substantial prison sentences will be imposed in appropriate cases. There are examples internationally, which will be applied here, of prison terms of between 1 and 2 ½ years. Misuse of IP in this way will be treated similarly to theft of goods, money, and so on, even though many of the public see misuse of IP as being "*softer*" than pinching money, TVs, handbags etc.

There have been some speed wobbles on the way (including that March 2005 case). But overall the Police (and the copyright owners) have a relatively wide arsenal on which to prosecute, in addition to civil remedies (such as damages and injunction remedies that are available to copyright owners).

- 1 Cinemas these days are often screening an ad maintaining that taking pirated movies is akin to theft of handbags, TVs etc. Watching pirated movies, using unlicensed software etc, is seen by many in the community as relatively soft (and sometimes even morally acceptable) breaches of IP owners' rights (just as speeding is often seen as morally acceptable when drunk driving is not).
- 2 The Courts increasingly don't see it that way. Can someone be prosecuted for distributing and/or accepting pirated videos, unlicensed software and so on? What about the common situation of someone using proprietary software and not paying for it? Can they be prosecuted?
- 3 The answer will often be yes, although as ever this will depend on the particular circumstances. Not only that, but the Courts are making it clear that these are serious

offences, warranting a response (including imprisonment) similar to that for theft of more tangible items such as equipment, money and so on. This is increasingly so, particularly following the 2003 amendment to the Crimes Act, which introduced computer crimes such as the hacking provisions etc. At the same time, the Crimes Act has been extended so that theft and other provisions better accommodate prosecutions for online and digital misuse.¹

- 4 The Police won't always get it right in the early days after the 2003 amendments. In March 2005 Zheng Wang² was lucky to get off the hook for this reason, when he was caught flogging off pirated DVDs on Manukau streets for a second time. He had been sentenced to 15 months' jail for forgery by the District Court, but on appeal, the High Court said:
 - 4.1 He could not be successfully prosecuted under the forgery provision in the Crimes Act (and therefore he got off); and
 - 4.2 Even if he could be convicted, 15 months was too high.
- 5 The problem was that, for technical legal reasons, selling pirated DVDs didn't fit the forgery provision, and the Court wouldn't substitute another charge. But this gives little comfort to those that sell, distribute and accept pirated and unlicensed movies and software. There are other ways that people can be prosecuted successfully. The case confirmed how seriously the Courts view misuse of intellectual property in this way. It noted that substantial sentences are being imposed internationally and there is a clear signal in this case that this will happen here. The case gave a number of examples of people being sent to prison for terms in the order of 1-2 ½ years. Of course the prison term or fine will reflect the severity of the offence, whether it is a repeat offence and so on.
- 6 The case noted also that Zheng Wang could have been successfully prosecuted under a provision in the Copyright Act, which can also apply not only to DVDs but to misuse of other intellectual property such as software. Although this section predominantly applies where money is being made, it can also apply where somebody distributes IP in breach of another's copyright even where there is no financial benefit to the distributor.

¹ In *R v. Wilkinson* [1999] 1 NZLR 403, the Court of Appeal concluded that the theft provisions in the then Crimes Act did not extend to electronic withdrawal of funds. For that, and other reasons, the theft and other provisions in the Crimes Act have been extended, particularly to widen the definition of "property" (section 2), but also to make the theft provision (section 219) more likely to apply in electronic circumstances. In particular the definition of "property" includes intangible assets (and IP is an intangible). There is also a widened definition of "documents" (section 2) which will often extend to computer-related situations, and therefore the provision in the Act dealing with dishonestly taking or using a document (section 228) can often apply where there is misuse of IP. The specific computer crimes might apply as well, particularly s249 that deals with accessing computers for dishonest purposes. The computer crimes revolve around computer systems which are widely defined, to include PCs, LANs, the Internet, etc. Downloading and using unlicensed software can be doing something for a dishonest purpose.

² *Zheng Wang v. New Zealand Police*, Auckland High Court, Baragwanath J, 23 March 2005; CRI-2004-404-476.

So, if Joe Smith gives to several of his mates a pirated version of Microsoft Office, he could be prosecuted under the Copyright Act, even though he is not making any money.

- 7 In view of the expansion of the Crimes Act, so could his mates be prosecuted as well. Potential maximum prison terms are in the order of a maximum of 5-7 years, depending on which provisions of the legislation apply. Of course, usually for first time offences, the penalty will be much lower, but this gives some idea of the risk involved.
- 8 Many in the community might see misuse of intellectual property in this way as not only minor, but even morally acceptable (taking the view that the music distributors, film providers, software providers and so on should be subjected to this kind of use, in view of the big money it is said that they make, their sometimes dominant position in marketplaces and so on). The Courts are sending a strong message: They won't have a bar of any of that.
- 9 The large companies that are affected by misuse of IP can be expected to continue to up the ante and to start pushing for more and more prosecutions. People may not like it, but that is the reality.

Wigley & Company is a specialist technology (including IT and telecommunications), procurement and marketing law firm founded 11 years ago. With broad experience in acting for both vendors and purchasers, Wigley & Company understands the issues on “both sides of the fence”, and so assists its clients in achieving win-win outcomes.

While the firm acts extensively in the commercial sector, it also has a large public sector agency client base, and understands the unique needs of the public sector. While mostly we work for large organisations, we also act for SMEs.

With a strong combination of commercial, legal, technical and strategic smarts, Wigley & Company provides genuinely innovative and pragmatic solutions.

The firm is actively involved in professional organisations (for example, Michael is President of the Technology Law Society and Stuart van Rij its secretary).

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