

**WIPO INTER-REGIONAL SYMPOSIUM
ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS (IPRS)**

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MALTA POLICE FORCE

Report by:

Inspector Angelo Gafa' B.Com. (Hons), M.A. (Pub. Pol.)

Economic Crimes Unit
Malta Police General Headquarters
Floriana. Malta.

BACKGROUND

My name is Angelo Gafa' and I am a Police Inspector within the Malta Police Economic Crimes Unit. I have been occupying this post for the past six and a half years following a one-year course after having had joined the Police Corps through the graduate-recruitment scheme. In fact I am in possession of the Bachelor of Commerce (Honours) degree and whilst serving within the Malta Police Force have also read for a Masters of Arts in Public Policy.

With a surface area of 316 square kilometres and a population of around 400,000 inhabitants, law enforcement in Malta is mainly the responsibility of the Malta Police Force, a 1900 strong agency.

Established in 1814, the Malta Police Force is one of the oldest Police agencies in Europe. Having been a British colony, policing in Malta traditionally follows the British public order model. The Malta Police Corps falls within the remit of the Ministry for Justice and Home Affairs and is headed by the Commissioner of Police.

As regulated by the Police Act, Chapter 164 of the Laws of Malta, the functions of the Malta Police Force are:

- (a)* to preserve public order and peace, to prevent the commission of offences, to promote and enforce the observance of the laws, as a first guarantee of the rights of all persons in Malta, even before action is needed through the judicial system to repress, sanction or remedy any breach;
- (b)* to respond immediately to any request for the protection and intervention of the law;
- (c)* to apply the law without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status;
- (d)* to promote the orderly and peaceful coexistence of all persons in Malta, paying due attention not only to private property rights but also to public property;
- (e)* to seek to protect the environment as part of the common good;
- (f)* to assist, within reasonable limits, any person seeking the help of a police or other public officer even though the ultimate responsibility to provide such help may not lie with the Force;

(g) to perform honestly and effectively all those duties assigned to it by this Act or by any other law' (Laws of Malta, Cap. 164: Art. 4).

In addition, Article 346 of the Criminal Code implies that it is also the duty of the Malta Police to 'detect and investigate offences, to collect evidence and to bring the offenders, whether principals or accomplices, before the judicial authorities.' It is the Commissioner of Police who decides on what charges the offender is to be brought to court. In case the victim does not agree with the charges presented in court against the offender, he may challenge the Commissioner through a request made to a Magistrate.

The Malta Police Force is today organised on a variety of fronts to fight crime, uphold law and order and to be of service to the public. The Maltese Islands are divided into two regions, eleven districts and twenty-one divisions. Apart from the divisional police, the Malta Police Force boasts a number of specialised sections. The principal specialised branch is the Criminal Investigations Department (CID) that is essentially divided into five main components, namely General Crime, Drugs Squad, Vice Squad, Money Laundering Unit and the Economic Crimes Unit which the undersigned forms part of.

The Economic Crimes Unit is headed by an Assistant Commissioner assisted by a Superintendent. Tasks are delegated to five offices each led by a Police Inspector whose team is generally composed of a Police Sergeant and two constables. Investigations conducted by the Economic Crimes Unit include various types of fraud, corruption, Customs-related crimes such as smuggling, and not least, breaches of intellectual property rights and related areas.

In terms of the above-cited Article 346 of the Criminal Code, the Police in Malta are endowed with the powers to investigate and prosecute criminal offences in Court. Prosecutions are generally led by Inspectors and criminal proceedings are heard before a Magistrate.

IPR ENFORCEMENT

Given the specialisation of IPR-related investigations, these are generally conducted by the Economic Crimes Unit. However, there is nothing that bars District Police from carrying out these investigations and ensuing prosecutions in Court themselves.

The Malta Police deals with three main IPR infringements, namely:

- (1) ***Commercial or industrial fraud*** – Article 298 of the Criminal Code, Chapter 9 of the Laws of Malta;
- (2) ***Violation of copyright*** – Article 298B of the Criminal Code, Chapter 9 of the Laws of Malta; and
- (3) ***Unauthorised use of trademark*** – Article 72 of the Trademarks Act, Chapter 416 of the Laws of Malta.

What follows is a brief analysis of each piece of legislation cited above.

Commercial or Industrial Fraud

298.(1) *Whosoever -*

- (a) forges or alters, without the consent of the owner, the name, mark or any other distinctive device of any intellectual work or any industrial product, or knowingly makes use of any such name, mark or device forged or altered, without the consent of the owner, even though by others;*
- (b) forges or alters, without the consent of the owner, any design or model of manufacture, or knowingly makes use of any such design or model forged or altered, without the consent of the owner, even though by others;*
- (c) knowingly makes use of any mark, device, signboard or emblem bearing an indication calculated to deceive a purchaser as to the nature of the goods, or sells any goods with any such mark, device or emblem;*
- (d) puts on the market any goods in respect of which a distinctive trade mark has been registered, after removing the trade mark without the consent of the owner thereof;*
- (e) applies a false trade description to any goods, that is to say, applies to goods any forged or altered figure, word or mark which according to the custom of the trade is taken to indicate -*
 - (i) the number, quantity, measure, gauge or weight of the goods,*

- (ii) *the place or country in which the goods are made or produced,*
- (iii) *the mode of manufacturing or producing the goods,*
- (iv) *that the goods are the subject of an existing patent, privilege or industrial copyright;*
- (f) *knowingly puts into circulation, sells or keeps for sale or imports for any purpose of trade, any goods bearing a fraudulent imitation of any mark, device or emblem;*
- (g) *knowingly makes, keeps or transfers to any person, any die, block, machine or other instrument for the purpose of forging, or of being used for forging, a trade mark,*
*shall, on conviction, be liable to **imprisonment** for a term from **four months to one year.***

The most common charges issued by the Malta Police under this Article of the law are those falling under sections (c) and (f). The main scope of the legislator here is to protect consumers from deceptive marks and emblems. Police action in this case is *ex-officio* and consequently to commence their investigations and possibly proceeding in filing charges in Court, the Police do not require a formal letter of complaint.

Given that to prove any criminal offence, the prosecution must always prove both the material element of the crime (*actus reus*) as well as the formal element of it (*mens rea*), the legislator has taken this into account in the following Articles of the law:

299. *In the cases referred to in article 298(1)(a), (b), (c) and (d), criminal intent shall be presumed, unless the accused proves that he has acted without such intent.*

302. *In the cases referred to in article 298(1)(f), criminal intent shall be presumed, unless the accused proves -*

- (a) *that, having taken all necessary precaution against committing the offence referred to in the said paragraph, he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or sign; and*
- (b) *that, on demand made by any member of the Police, he gave all the information in his power with respect to the persons from whom he obtained the goods in question; and*
- (c) *that otherwise he had acted innocently.*

In these cases thus there is a shift in the burden of proof whereby the accused must himself prove beyond doubt that his actions were in good faith.

Violation of Copyright

298B.(1) *Whosoever, for gain, or by way of trade prints, manufactures, duplicates or otherwise reproduces or copies, or sells, distributes or otherwise offers for sale or distribution, any article or other thing in violation of the rights of copyright enjoyed by any other person and protected by or under Maltese law, shall, on conviction, be liable to imprisonment for a term **not exceeding one year** or to a fine (multa) **not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87)** or to both such fine and imprisonment.*

(2) Proceedings under this article may not be taken except on the complaint of the injured party.

The focus of this particular legislation is to safeguard the rights enjoyed by the right holders. No criminal action could be instituted in such instances, however, unless the Malta Police is in receipt of the complaint of the injured party. In cases where the injured party is not a Maltese resident, his mandant could file the complaint on his behalf provided that authenticated powers of attorney are exhibited in Court. For the prosecution to prove this case, the right holder must prove that he is the originator of the product or enjoys its rights.

Unauthorised Use of Trademark

72. (1) *Any person who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor -*

(a) applies to goods or their packaging a sign identical to, or likely to be mistaken for, a registered trademark, or

(b) sells or lets for hire, offers or exposes for sale or hire or distributes goods which bear, or the packaging of which bears, such a sign, or

(c) has in his possession, custody or control in the course of a business any such goods with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b), or

- (d) *applies a sign identical to, or likely to be mistaken for, a registered trademark to material intended to be used-*
- (i) *for labelling or packaging goods,*
 - (ii) *as a business paper in relation to goods, or*
 - (iii) *for advertising goods, or*
- (e) *uses, in the course of a business material bearing such a sign for labelling or packaging goods, or as a business paper in relation to goods, or for advertising goods, or*
- (f) *has in his possession, custody or control in the course of a business any such material with a view to the doing of anything, by himself or another, which would be an offence under paragraph (e), or*
- (g) (i) *makes an article specifically designed or adapted for making copies of a sign of or to make a sign likely to be mistaken for, a registered trademark, or*
(ii) *has such an article in his possession, custody or control in the course of a business, knowing or having reason to believe that it has been, or is to be, used to produce goods, or material for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods, shall be guilty of an offence against this article.*

(2) *A person does not commit an offence against this article unless -*

- (a) *the goods to which the offence refers are goods in respect of which the trademark is registered, or*
- (b) *the trademark has a reputation in Malta and the use of the sign takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the trademark.*

(3) *It is a defence for a person charged with an offence against this article to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trademark.*

(4) *A person guilty of an offence under this article shall be liable on conviction to **imprisonment** for a term **not exceeding three years** or to a **fine** (multa) of **not more than twenty-three thousand and two hundred and ninety-three euro and seventy-three cents (23,293.73)** or to **both such fine and imprisonment.***

The focus here is absolutely the protection of the trademark proprietor. Action can only be taken if the trademark in question is registered either in Malta or features as a Community-Registered Trademark (CTD). Otherwise, Police action in such instances is *ex-officio* and no official letters of complaint are required from the injured parties.

Although as explained above, criminal proceedings for copyright and trademarks infringements are *ex-officio*, it is generally the practice that complaints are originated from the right-holders or trademark proprietors depending on the case. This is so because although the Economic Crimes Police have particular (though not exclusive) specialisation in this field, none of its members is an expert in the particular products.

Hence it is often the case that company representatives or legal representatives approach the Police with a complaint. Subsequent to that, the Police would generally request the proof of test purchases effected and differences between genuine and counterfeit products is explained. Even prior to that, in case of trademark infringements, proof is attained from the Commerce Division that the respective trademark is registered for the particular category under investigation.

Once it is highly suspected that counterfeit products are in the marketplace, the Police would generally request the Duty Magistrate to issue a Search and Arrest Warrant so that the necessary arrests and seizures could be effected. Where items are publicly visible, such as in a retail outlet, and everyone could access the premises, then no search warrant is necessary and once items on display are highly suspected to be fake, then the Police could proceed with effecting the necessary arrests and further searches in areas not accessible to the general public.

The seized items are then taken in Police custody and those involved are questioned in accordance with domestic legal procedures. If criminal action is deemed, the Court appoints an expert so as to confirm that the items seized and exhibited by the Police in the ongoing criminal proceedings are fake or otherwise.

Although it has been explained that investigations in this field are generally commenced following a report by the interested parties, the Economic Crimes Police in Malta carry out regular inspections at the main local markets in connection with the sales of copied audiovisual material. We have lately witnessed a gradual downturn in the sales of such items and the main reason attributed to this is that a large portion of the population has got access to free internet downloads.

In the case of a positive raid, the respective right holders are notified about the items seized by the Police and these are requested to furnish the Police with the letter of complaint which is a vital requisite in such instances as no criminal proceedings could be instituted without such complaint.

Also, in the field of copyright infringements, we have a private local organisation styled as Association Against Copyright Theft (AACT) which seeks to monitor the sales of copied audio CDs, DVDs and computer software/games both online as well as in the traditional marketplace. Private investigators are recruited by this agency and any reports of alleged infringements are referred to the Economic Crimes Unit for investigations.

Besides AACT and the private entities and/or their legal representatives, other stakeholders are generally liaised with depending on the nature of the case. Hence, if an investigation concerns fake pharmaceuticals, then the Police would require the assistance of the Medicines Authority, the Drug Regulatory Authority on the Island.

In addition to the penalties invoked by the legislation reference to which was made above, if the Court finds guilt in the accused, it also orders the confiscation and destruction of the seized items. Such destruction is then effected under the direction of the Courts Director.

SOME STATISTICS

In the past five years, the Malta Police Economic Crimes Unit has made the following main seizures of suspected counterfeit/copied items:

(1)	DVDs	75,109 pieces
(2)	Perfumes	23,747 pieces

(3)	Literature	21,822 pieces
(4)	Computer games	10,856 pieces
(5)	Audio CDs	9,444 pieces
(6)	Electrical supplies	7,584 pieces
(7)	Souvenirs	3,540 pieces
(8)	Pharmaceuticals	2,444 pieces

Throughout this period, the Malta Police Economic Crimes Unit has investigated 201 cases of IPR infringements in the various fields as above explained. These investigations have led to the arraignment of 200 persons in Court. Within this context it must be emphasised that the Malta Police is concerned with investigating IPR infringements on land. It is the Customs' role to investigate infringements at the borders.

When it comes to Court judgements, experience shows that the Law Courts are often reluctant to impose effective imprisonment penalties. They often tend to fine the subjects concerned and it was only in cases where the guilty person was convicted also of recidivism that a judgement of effective imprisonment was awarded. Unfortunately, no online database capturing IP Court cases is available to the general public.

CONCLUSION

In conclusion to this report highlighting the role of the Malta Police Force in the field of IPR infringements, it must be once more emphasised that IPR investigations and prosecutions represent just a fraction of a multitude of areas, often entailing more serious cases, held by the Economic Crimes Police.

Angelo Gafa'
Police Inspector

Malta Police Force
Economic Crimes Unit
Tel: (00356) 22942061

Annex A: Malta Police Force Organisational Chart