



Understanding and Developing Pakistan's Intellectual Property Law Framework

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I. INTRODUCTION TO INTELLECTUAL PROPERTY

Intellectual property generally refers to the rights associated with “intellectual activity in the industrial, scientific, literary and artistic fields.”¹ This property is generally termed as “creations of the mind” and it includes “inventions; literary and artistic works; and symbols, names and images used in commerce.”² Divided into two categories, intellectual property includes industrial property (patents for inventions, trademarks, industrial designs and geographical indications) and copyright (literary works, films, music, artistic works, performances, broadcast productions and architectural design).³

An entire framework of intellectual property rights was generally established to both protect the creators and those accessing or employing those creations, as well as to bolster economic growth for individual governments as part of a globally competitive scheme.⁴ These rights allow creators, the owners of the patented, trademarked or copyrighted works, to “benefit from their own work or investment.”⁵

A. PATENTS

A patent is defined as “an exclusive right granted for an invention, which is a product or a process that provides a new way of doing something, or offers a new technical solution to a problem.”⁶ More specifically, “[A] patent is the right granted by the State to an inventor to exclude others from commercially exploiting the invention for a limited period, in return for the disclosure of the invention, so that others may gain the benefit of the invention.”⁷ A patent is also understood as a “limited monopoly” that allows the patent holder to retain an exclusive right to make, use and sell the innovation for a specified period of time.⁸ This protection encourages the

¹ WIPO, *The Concept of Intellectual Property*, ¶ 1.1, available at: <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch1.pdf> [hereinafter “Concept of Intellectual Property”].

² WIPO, *What is Intellectual Property?*, 2, available at: http://www.wipo.int/export/sites/www/freepublications/en/intproperty/450/wipo_pub_450.pdf [hereinafter “What is Intellectual Property”].

³ *Id.*

⁴ Concept of Intellectual Property, *supra* note 1, at ¶ 1.2.

⁵ What is Intellectual Property, *supra* note 2, at 3.

⁶ WIPO, *What is a Patent?*, available at: http://www.wipo.int/edocs/pubdocs/en/patents/450/wipo_pub_1450pa.pdf.

⁷ WIPO, *Fields of Intellectual Property Protection*, ¶ 2.5, available at: <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch2.pdf> [hereinafter “Fields of Intellectual Property Protection”].

⁸ “Patent,” Legal Information Institute, CORNELL UNIVERSITY, available at: <http://www.law.cornell.edu/wex/patent>.
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development of such innovations, which are often costly and time-consuming, along with their public disclosure to the appropriate national institution handling such matters.⁹

For a patent to be issued, certain requirements must be fulfilled:

Patentable Subject Matter

The requirement of patentable subject matter is identified generally within international and national legislation.¹⁰ Article 27(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) states, “[P]atents shall be available for any inventions, whether products or processes, in all fields of technology”¹¹ The eligible subject matter, however, excludes items such as the following:

- Discoveries of materials or substances already existing in nature;
- Scientific theories or mathematical methods;
- Plants and animals other than microorganisms, and essentially biological processes for the production of plants and animals, other than non-biological and microbiological processes;
- Schemes, rules or methods, such as those for doing business, performing purely mental acts or playing games;
- Methods of treatment for humans or animals, or diagnostic methods practiced on humans or animals (but not products for use in such methods).¹²

The TRIPS Agreement also allows Member states to refrain from providing patent protection to those innovations, which may result in “commercial exploitation”, and those innovations, which may pose a threat to public order or morality, including threats to public health or the environment.¹³

⁹ *Id.*

¹⁰ Fields of Intellectual Property Protection, *supra* note 7, at ¶ 2.3.

¹¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 27(1), Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter “TRIPS Agreement”].

¹² Fields of Intellectual Property Protection, *supra* note 7, at ¶ 2.8.

¹³ TRIPS Agreement, *supra* note 11, at Art. 27(2).

Utility

To meet the standard of utility, the innovation for which the patent is sought must have a purpose that is practical and not solely theoretical.¹⁴ For example, if the innovation is a product, or part of a product, it should actually be possible to make that product, termed “applicability” or “industrial applicability.”¹⁵ This statement, considering the rapidity with which technology is developing, has its own implications that must be addressed in national laws establishing the framework for patent registration.

National laws currently in existence vary widely in manner in which they address the utility requirement.¹⁶ In some domestic jurisdictions, the requirement is met if the invention may be made, regardless of its usability.¹⁷ In other jurisdictions, utility is judged by the alleged usefulness of the invention.¹⁸ For example, in the United States, the utility requirement mandates that not only does logic and fact support an argument of utility, but also that “a person of ordinary skill in the art would accept that the disclosed invention is currently capable of the claimed use.”¹⁹

Novelty

Novelty is perhaps the most important requirement in the issuance of a patent.²⁰ Novelty, however, may not be established, only the absence of novelty may be demonstrated.²¹ Logically, an innovation is only such when it is not a replication of a “prior art,” which means “all the knowledge that existed prior to the relevant filing or priority date of a patent application, whether it existed by way of written or oral disclosure.”²²

¹⁴ Fields of Intellectual Property Protection, *supra* note 7, at ¶ 2.10.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Patent, *supra* note 8.

²⁰ Fields of Intellectual Property Protection, *supra* note 7, at ¶ 2.13.

²¹ *Id.*

²² *Id.*

What becomes part of prior art is a matter of some debate. There are arguments that a determination should be made only upon what is known within the country issuing the patent, excluding knowledge from other jurisdictions that has yet to reach the issuing jurisdiction.²³ In other words, what is known in a country refers to instances “where the invention was in public use or on sale in this country, or patented or described in a printed publication in this or another country more than one year prior to the date of the application”²⁴

Other arguments are based upon the medium through which a patent is made public, namely through: description in writing or publication; oral disclosure; or use of the innovation in public, known as disclosure by use.²⁵

Evaluations of novelty vary from issue to issue, but the determination is left to the approving institution as to whether or not the requirement is met. It should be noted that “prior art” may not be combined to demonstrate a lack of novelty.²⁶

Non-obviousness

The requirement of non-obviousness, or inventive step, requires that the innovation for which the patent is sought be unobvious to “a person having ordinary skill in the art.”²⁷ The need for some sort of actual innovation is based on the idea that a right of ownership should not be given to an obvious part of prior art or what may be considered common knowledge.²⁸

The idea of an inventive step itself implies that the patent contributes some sort of creative addition that is noticeable.²⁹ It must also be “significant or essential” as an invention.³⁰ The U.S. Supreme Court, in 2007, laid down a test in *KSR International co. v. Teleflex, Inc.* in which, “a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.”³¹

²³ *Id.*

²⁴ Patent, *supra* note 8.

²⁵ Fields of Intellectual Property Protection, *supra* note 7, at ¶ 2.18.

²⁶ *Id.* at 20.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Patent, *supra* note 8.

Disclosure

The final requirement for patent eligibility is sufficient disclosure within the application. Disclosure must be given to the extent that it would allow a person “skilled in the art” to replicate the invention.³² Generally, domestic requirements mandate that at least one method of completing the invention be demonstrated, some states specify the “best” method must be given.³³

•••

National legislation relating to patents often provide for a procedure that allows other parties to file oppositions to the grant or potential grant of a patent.³⁴ The opposition procedure allows third parties to object upon the above-stipulated grounds that the patent should not be issued to the applicant party.³⁵

In this procedure, disclosure is especially significant because it allows the application for a patent to be open for public examination and after an allotted period of time, it allows the patent to be issued barring any objections.³⁶

The grounds on which opposition procedures are generally initiated include: lack of novelty, inventive step or industrial applicability; insufficient disclosure of the invention; amendment in filing exceeded original disclosure in application; or, in some instances, the applicant has no right to a patent.³⁷

³² Fields of Intellectual Property Protection, *supra* note 7, at ¶ 2.32.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

B. TRADEMARKS

A trademark may be defined as, “a distinctive sign” that allows goods and services to be identified as associated with a particular individual or business.³⁸ A trademark that indicates the source of the product for the consumer does not necessarily have to convey the identification of the person selling or manufacturing said product.³⁹ The consumer must be able to recognize the trademark as belonging to a trusted enterprise that is ultimately responsible for the goods.⁴⁰ Thus, an appropriate addition to the definition is that “a trademark is any sign that individualizes the goods of a given enterprise and *distinguishes* them from the goods of its competitors.”⁴¹ More specifically, trademarks are “words, phrases, logos and symbols,” but certain jurisdictions may also allow “shapes, sounds, fragrances and colors” to be registered as trademarks.⁴²

There are generally three basic requirements that must be met to register an eligible trademark, commerce, distinctiveness and public morality.⁴³ First, the trademark must be registered for use in commerce, or for impending use in commerce.⁴⁴ Second, the trademark must be distinctive, such that it, again, serves the purpose of identifying the source of the goods for consumers.⁴⁵ Third, the potential trademark may not “deceive the public as to the nature, quality or any other characteristics of the goods or their geographical origin.”⁴⁶ Public morality within trademark registration also denies registration to signs that fail to meet national standards that identify what is moral or in line with public policy.⁴⁷

To register a trademark, an application must be filed with the trademark office operating within the state in which the filer is based.⁴⁸ The application must reproduce the exact trademark along

³⁸ WIPO, *Trademarks*, available at: <http://www.wipo.int/trademarks/en/trademarks.html>.

³⁹ Fields of Intellectual Property Protection, *supra* note 7, at ¶ 2.319.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² “Trademark,” Legal Information Institute, CORNELL UNIVERSITY, available at: <http://www.law.cornell.edu/wex/trademark>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Fields of Intellectual Property Protection, *supra* note 7, at ¶ 2.376.

⁴⁷ *Id.*

⁴⁸ WIPO, *How Extensive is Trademark Protection?*, available at:

http://www.wipo.int/trademarks/en/about_trademarks.html#how_extensive.

with a list of goods or services to which it applies.⁴⁹ An approved trademark registration is published in the appropriate documents in order to allow for any opposition filings. The opposition procedure may be initiated by any party that believes that the registration of the mark may be detrimental, including through dilution.

C. COPYRIGHTS

Copyright entails “the rights that creators have over their literary and artistic works.”⁵⁰ And “all works of authorship fixed in a tangible medium of expression” may be protected by copyright.⁵¹ In other words, copyright protections include “every production in the literary, scientific and artistic domain, whatever the mode or form of expression,” as long as it is an “original creation.”⁵² An original creation does not require that the idea be new, but the form, literary or artistic, must be original.⁵³

Items that may be covered by copyright protection include:

- Literary works such as novels, poems, plays, reference works, newspapers and computer programs;
- Databases;
- Films, musical compositions, and choreography;
- Artistic works such as paintings, drawings, photographs and sculpture;
- Architecture; and
- Advertisements, maps and technical drawings.⁵⁴

Also, the protections afforded under copyright are meant to extend only to “expressions” and not “ideas, procedures, methods of operation or mathematical concepts.”⁵⁵ Titles, slogans, or logos

⁴⁹ *Id.*

⁵⁰ WIPO, Copyright, *available at*: <http://www.wipo.int/copyright/en/>.

⁵¹ “Copyright,” Legal Information Institute, CORNELL UNIVERSITY, *available at*: <http://www.law.cornell.edu/wex/copyright>.

⁵² Fields of Intellectual Property Protection, *supra* note 7, at ¶ 2.174.

⁵³ *Id.*

⁵⁴ Copyright, *supra* note 50.

⁵⁵ *Id.*

may be eligible for copyright protection, provided they exceed the threshold for sufficient authorship.⁵⁶

Copyright protection allows the owner to have the exclusive right to “reproduce, distribute, perform, display, license, and to prepare derivative works based on the copyrighted work.”⁵⁷ Thus, the owner may use the work as they wish to the exclusion of others, but with due regard to their legal rights and interests.⁵⁸

It is important to note that copyright protections do not remain with the owner indefinitely.⁵⁹ The duration of the copyright begins at the creation of the work and extends to a period after the author’s death, at least fifty years after death for those states that are members of the Berne Convention.⁶⁰ The purpose of these extended protections is to allow the successors of the author to benefit economically even beyond the author’s life and it allows further protection for any investments made in production and distribution of the works.⁶¹

II. INTERNATIONAL LAW FRAMEWORK FOR INTELLECTUAL PROPERTY RIGHTS

The Universal Declaration of Human Rights (UDHR), the document from which, conceptually, several international law documents originated, also establishes a human rights based understanding of intellectual property. Article 27(2) states, “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”⁶² The International Covenant on Economic, Social and Cultural Rights (ICESCR), in Article 15(1)(c) states that member states to the Covenant recognize the right “To benefit from the protection of the moral and material interests resulting

⁵⁶ *Id.*

⁵⁷ Copyright, *supra* note 51.

⁵⁸ Fields of Intellectual Property Protection, *supra* note 7, at ¶ 2.174.

⁵⁹ *Id.* at 50.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Universal Declaration of Human Rights, Art. 27(2), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

from any scientific, literary or artistic production of which he is the author.”⁶³ From a human rights perspective, the ICESCR requires balanced protection for both the individual and the community.⁶⁴ Beyond treaties specifically administering the intellectual property law regime, the ICESCR, to which Pakistan is also a party, mandates that the innovation “be consistent with the inherent dignity of the human person and with central human rights norms.”⁶⁵

Compliance with this provision of the ICESCR requires first and foremost that member states respect the human right of an individual or entity to benefit from the protection of their moral or material interests.⁶⁶ It also requires that implementing legislation and subsequent regulations, along with other state-administered remedies be available to protect the “moral and material interests” of relevant parties.⁶⁷ States parties must also take “financial and other positive measures which facilitate the formation of professional and other associations representing the moral and material interests of authors.”⁶⁸

Regimes protecting the rights of owners may not create any “impediment to their ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant.”⁶⁹ Thus, it is an obligation to which Pakistan must adhere that the protection of one entity’s economic rights does not infringe unjustly upon the rights of another.

Essentially, the human rights protection of intellectual property operates in conjunction with the technical frameworks established under the World Intellectual Property Organization (WIPO)

⁶³ ICESCR, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3

⁶⁴ Audrey R. Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress and Access to the Benefits of Science*, 2, available at: http://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_5.pdf

⁶⁵ *Id.*

⁶⁶ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant)*, ¶ 30 (January 12, 2006).

⁶⁷ *Id.* at ¶ 18(a).

⁶⁸ *Id.* at ¶ 34.

⁶⁹ *Id.* at ¶ 35.

and the World Trade Organization (WTO). This parallel protection benefits not only the owner, but also the community at large.

A. WIPO & WTO

The legal regime on intellectual property is chiefly administered by two entities, WIPO and the WTO.

WIPO

WIPO identifies as the “global forum for intellectual property services, policy, information and cooperation.”⁷⁰ Established by the WIPO Convention in 1967, the Organization boasts 187 contracting parties. Pakistan became a member of WIPO in 1977 and it is a party to the Paris Convention for the Protection of Industrial Property (“Paris Convention”) and the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”), both administered by the Organization.

The objective of WIPO is “to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization.”⁷¹ It also seeks to promote cooperation among the “Unions,” which are comprised of the respective member states of the conventions administered by WIPO.⁷²

The Paris Convention, protection industrial property, dates back to 1883. It provides for the protection of property that includes, “object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.”⁷³ Generally, the Convention states that the industrial property that it protects “shall be understood in the broadest sense.”⁷⁴ Protection under the Convention shall extend across all member states and owners of industrial property, as per the Convention, shall receive treatment equal to nationals, including protection under the Convention in all

⁷⁰ WIPO, Main Page, *available at*: <http://www.wipo.int/portal/en/index.html>.

⁷¹ Convention Establishing the World Intellectual Property Organization, Art. 3(i), 828 U.N.T.S. 3 (July 14, 1967).

⁷² *Id.* at Art. 3(ii).

⁷³ Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, Art. 1(2), July 14, 1967, 828 U.N.T.S. 303.

⁷⁴ *Id.* at Art. 1(3).

member states.⁷⁵ The framework established by the Paris Convention administers guidelines for protecting industrial property as it is defined.

The Berne Convention was originally promulgated in 1886 and it generally established a regime of copyright protection for authors. The protection is issued to all “literary and artistic works,” which infers that “every production in the literary, scientific and artistic domain” no matter the manner of expression.⁷⁶ Authors also benefit from protection in other member states of the Berne Convention, beyond just the country of origin.⁷⁷ This protection allows authors to receive treatment equal to that of member state nationals, including all protections under the Convention.⁷⁸ The framework established by the Convention includes temporal limitations on copyright protections, fair use guidelines, rights specific to certain types of copyrighted works and protocols for infringement.

WTO

In 1995, the WTO replaced the General Agreement on Tariffs and Trade (established in 1948) under the Marrakech Agreement.⁷⁹ There are currently 160 member states participating in the WTO’s system of rules of trade between nations.⁸⁰ Its main activities include administering WTO trade agreements, providing a forum for trade negotiations, addressing trade disputes, monitoring national trade policies, providing technical assistance and training for developing countries and cooperating with other international organizations.⁸¹

The WTO administers a number of international agreements and there are several principles employed throughout these agreements that are indicative of the nature of the regime provided by the Organization. These principles include non-discrimination (most-favored nation, national treatment), freer trade through lowered tariffs (the ninth round of negotiation on such matters is

⁷⁵ *Id.* at Art. 2(1).

⁷⁶ Berne Convention for the Protection of Literary and Artistic Works, Art. 2(1), September 9, 1886, 828 U.N.T.S. 222.

⁷⁷ *Id.* at Art. 5(1).

⁷⁸ *Id.*

⁷⁹ From GATT to the WTO and Beyond Research Guide, Georgetown Law Library, *available at*: <http://www.law.georgetown.edu/library/research/guides/FromtheGATTtotheWTO.cfm>.

⁸⁰ Understanding the WTO, Members and Observers, as of 26 June 2014, *available at*: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

⁸¹ WTO, “What is the WTO?” *available at*: http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.

currently underway), stability and predictability (establishing tariff ceilings in member states) and fair competition.⁸²

B. TRIPS Agreement

During the 1986-94 Uruguay Round of discussions, the WTO introduced the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), incorporating intellectual property rules into the global trading system.⁸³ The TRIPS Agreement maintained the basic principles present throughout WTO agreements, incorporating the concepts of most-favored nation and national treatment into the intellectual property framework.⁸⁴ Additionally, the Agreement mandated that intellectual property should further technical innovation and the transfer of technology.⁸⁵ It states that both the producers and users of these innovations should be protected under a regime that provides benefits and enhances economic and social welfare.⁸⁶

Specifically, the TRIPS Agreement ensures that adequate protection for intellectual property is provided in WTO member states. It reinforces the protection provided by WIPO in the Paris and Berne Conventions,⁸⁷ but it adds additional protections where inadequacies were determined.⁸⁸ The Agreement covers copyright, trademarks, patents and other related areas of intellectual property including industrial design, geographical indications and trade secrets.

Generally, the scope of the Agreement covers the basic standards that every state should provide, it identifies the property it regulates and it provides enforcement and dispute settlement mechanisms.⁸⁹

⁸² “Principles of the Trading System,” WORLD TRADE ORGANIZATION, *available at*: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

⁸³ “What is the World Trade Organization,” WORLD TRADE ORGANIZATION, *available at*: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm.

⁸⁴ Principles of the Trading System, *supra* note 82.

⁸⁵ TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

⁸⁶ *Id.*

⁸⁷ *Id.* at Arts. 2.1, 9.1.

⁸⁸ Overview: the TRIPS Agreement, *available at*: http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.

⁸⁹ *See generally*, TRIPS Agreement, *supra* note 85.



The rights, privileges and mechanisms provided under the TRIPS Agreement are available to each member state and states are free to determine beyond the scope of the treaty certain mechanisms and increased protections that may be beneficial. Member states that are categorized as developing states were brought under the TRIPS Agreement through special extended transition arrangements for the purposes of compliance.⁹⁰ The Agreement recognizes “the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations.”⁹¹

TRIPS General Guidelines

	Copyright⁹²	Trademark⁹³	Patent⁹⁴
Scope	<ul style="list-style-type: none"> • Expressions, and not to ideas, procedures, methods of operation or mathematical concepts • Computer programs, whether in source or object code 	<ul style="list-style-type: none"> • Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings 	<ul style="list-style-type: none"> • Any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial

⁹⁰ Overview: the TRIPS Agreement, “Other Provisions,” available at: http://www.wto.org/english/tratop_e/trips_e/intel2c_e.htm#transitional.

⁹¹ TRIPS Agreement, *supra* note 85, at Preamble.

⁹² *Id.* at § I.

⁹³ *Id.* at § II.

⁹⁴ *Id.* at § V.

			application
Term	Life of the author and 50 years (no less than 50 years in certain limited circumstances)	At least 7 years and renewable indefinitely	20 years from the filing date
Additional Rights	<ul style="list-style-type: none"> In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. 	<ul style="list-style-type: none"> The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion 	<ul style="list-style-type: none"> Where the subject matter is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product Where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process
Application of WIPO	Berne Convention	Paris Convention	Paris Convention
Supplementary Information	<ul style="list-style-type: none"> Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. 	<ul style="list-style-type: none"> Members may make the ability to register a trademark depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark. The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements 	<ul style="list-style-type: none"> Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application. Members may exclude from patentability inventions, the prevention within their

			territory of the commercial exploitation of which is necessary to protect <i>ordre public</i> or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment
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Enforcement of TRIPS

Part III of the TRIPS Agreement addresses exclusively, the enforcement of intellectual property rights. These enforcement measures must be incorporated in the domestic law of states parties, allowing owners of intellectual property to have access to swift and judicious remedies in the case of breach of these rights.⁹⁵ Enforcement mechanisms, however, must not be designed in a manner that hinders legitimate trade.⁹⁶

TRIPS requires specific civil and administrative measures be employed to properly enforce the agreement and they are as follows:

- Timely written notice with sufficient detail, including the basis of the claims⁹⁷
- Representation by independent counsel⁹⁸
- Manageable court procedures and the right to present a claim or a defense, including with supporting evidence⁹⁹
- Cease and desist orders to prevent infringement and mechanisms to prevent the entry of goods that violate intellectual property rights in local channels of commerce¹⁰⁰
- Adequate damages may be payable as a result of an infringement on the holder of intellectual property rights as determined by the judicial authorities (this may also include expenses incurred by the injured party such as attorney’s fees)¹⁰¹

⁹⁵ Overview: the TRIPS Agreement, “Enforcement of Intellectual Property Rights,” *available at*: http://www.wto.org/english/tratop_e/trips_e/intel2b_e.htm#enforcement.

⁹⁶ *Id.*

⁹⁷ TRIPS Agreement, *supra* note 85, at Art. 41(2).

⁹⁸ *Id.* at Art. 42.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at Art. 44(1).

¹⁰¹ *Id.* at Art. 45.

Dispute Settlement Under TRIPS

The Agreement reinforces the principles in the General Agreement on Tariffs and Trade 1994 (GATT Agreement) as they apply to consultations and the settlement of disputes. Article XXII of the GATT Agreement states that “Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.”¹⁰²

Further, any laws, regulations or judgments that fall within the scope of the TRIPS Agreement in a member state shall be made public in order to enable governments, rights holders and the general public to access information on such developments.¹⁰³ Member states must also be prepared to respond to states parties to the TRIPS Agreement on legal developments within their domestic system that may affect the rights of other state rights holders.¹⁰⁴

Like other WTO disputes, issues regarding TRIPS may be settled through the Organization’s dispute settlement mechanisms. The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) prioritized consultations as the manner in which dispute settlement should be initiated.¹⁰⁵ If the specified period of time for consultations lapses with no agreement, then a panel may be convened upon request to take up the issue further.¹⁰⁶

The following timeline represents the approximate time the WTO settlement dispute procedures are intended to take, in lieu of additional alternative procedures under the flexible WTO dispute settlement system:¹⁰⁷

Consultations, mediation, etc.	60 days
Establishing a panel	45 days
Final panel report to parties	6 months

¹⁰² GATT 1994: General Agreement on Tariffs and Trade 1994, Art. XXII(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

¹⁰³ TRIPS Agreement, *supra* note 87, at Art. 63(1).

¹⁰⁴ *Id.* at Art. 63(3).

¹⁰⁵ Understanding the WTO: Settling Disputes, “A unique contribution,” *available at*: http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Final panel report to WTO body	3 weeks
Adoption of report by WTO	60 days

1 year total without appeals process

Appeals report	60-90 days
Adoption of appeals report	30 days

1 year and 3 months with appeals process

III. DOMESTIC LAW FRAMEWORK FOR INTELLECTUAL PROPERTY

A. Patents

The first patent-related law in Pakistan was the Patent and Design Act of 1911. The Patents Ordinance of 2000 replaced the Act, which was then further amended in 2002, 2007 and again in 2010. Patent law in Pakistan is presently governed by this Ordinance, along with the Patent Rules, 2003.

Under the Patents Ordinance, an invention is patentable as long as it meets the requisite criteria within the law.¹⁰⁸ Section 2(i) of the Ordinance defines invention as, “[A]ny new and useful product or process, in any field of technology and includes any new and useful improvement of either of them”¹⁰⁹

Under Section 3 of the Ordinance, the Federal Government shall appoint an officer known as the Controller of Patents.¹¹⁰ The Patents Office¹¹¹ is also established under Section 4, under the immediate purview of the Controller, acting within the superintendence of the Federal Government.¹¹² Currently the Patent Office is run under the supervision of the Intellectual Property Organization of Pakistan (IPO Pakistan), under the Federal Cabinet Division.¹¹³ The

¹⁰⁸ Patents Ordinance, No. 61 of 2000, PAK CODE, §7 (2000).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at §3.

¹¹¹ *Id.* at §4.

¹¹² *Id.* at §4(2).

¹¹³ Patents, “Introduction,” INTELLECTUAL PROPERTY ORGANIZATION OF PAKISTAN, *available at*: <http://ipo.gov.pk/patent/>.

Patents Office is entrusted with all the functions relating to the procedure for the grant of patents and for the administration of granted patents.¹¹⁴

Articles 7, 8, 9 and 10 relate to the patentability of inventions. Article 7(1), again, states “Any invention is patentable, if it is new, involves an inventive step and is capable of industrial application.” Section 8(1) expresses that an invention shall be considered to be new if it does not form part of the state of the art.¹¹⁵ Section 9 states that the invention shall be considered as involving an “inventive step” if it is not obvious to a person, prior to the date of application for a patent, skilled in the art having regard to any matter which forms part of the state of art by virtue of Section 8. Lastly, the industrial application of the invention is of essence; it should be manufactured or otherwise industrially used.¹¹⁶

Article 13 of the Ordinance requires every application for the patent to be on the prescribed form and shall be filed at the Patent Office in the prescribed manner and shall contain a declaration to the effect that the applicant is in possession of an invention of which he, or in the case of joint application, at least one of the applicants, claims to be the true and the first inventor or the legal representative or assignee of such inventor.¹¹⁷ The Ordinance requires each application to be in respect of one invention only or to be in respect of a group of inventions so linked as to form a single inventive concept.¹¹⁸ Complete or provisional specifications are required to accompany the application.¹¹⁹

Every complete specification is required:-

¹¹⁴ Patents Ordinance, supra note 108, at §4(3).

¹¹⁵ **The state of the art shall comprise-**

(a) everything disclosed to the public anywhere in the world, by publication in tangible form or by oral disclosure, by use or in any other way, prior to the filing or, where appropriate, the priority date, of the application claiming the invention; or

(b) contents of the complete specification and priority documents published under section 21 of an application filed in Pakistan;

(c) traditionally developed or existing knowledge available or in possession of a local or indigenous community.

¹¹⁶ Patents Ordinance, supra note 108, at §10.

¹¹⁷ *Id.* at §13.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

- a. to fully and particularly describe the invention and the method by which it is to be performed;
- b. disclose the invention; and
- c. end with a claim or claims defining the scope of the invention for which protection is claimed.¹²⁰

After the grant of a patent, any time within four months from the date of the advertisement, any person may give notice to the Controller of opposition to the grant of a patent.¹²¹ If and when the patent is granted and sealed without any objections, in the Register,¹²² the term of the patent shall be twenty years from the filing date.¹²³

In the case of infringement of a patent, the court has the power to grant relief in the form of damages, injunctions, or accounts provided that, where permitted, the Court may also order effective provisional measure.¹²⁴

B. Trademarks

The first trademark law in Pakistan was passed in 1940, known as the Trade Marks Act. Thereafter, in order to comply with its international obligations, the Government of Pakistan decided to amend and consolidate the law relating to trademarks and unfair competition to provide for registration, better protection, and the prevention of infringement. In 2001, the Trade Marks Ordinance was passed. Thus, the Trade Marks Ordinance, 2001 and its subsequent 2004 Trade Marks Rules presently govern trademark-related law in Pakistan.

Under Section 2 of the Trade Marks Ordinance, a trademark is defined as “[A]ny mark capable of being represented graphically which is capable of distinguishing goods or services of one

¹²⁰ *Id.* at §15,

¹²¹ *Id.* at §23,

¹²² *Id.* at §27,

¹²³ *Id.* at §31,

¹²⁴ *Id.* at §61,

undertaking from those of other undertakings.”¹²⁵ Sections 3 and 4 of the Ordinance explain in detail “goods or services” as associated or used in reference to trademarks.

Chapter Two of the Ordinance specifically addresses the appointment of a Registrar of the Trademarks Registry,¹²⁶ who must maintain a register of trademarks¹²⁷ and the classification of goods, services or both goods and services according to the international classification of goods and services.¹²⁸ This institution also works under the helm of IPO Pakistan.¹²⁹

In Section 17 of the Ordinance, trademarks may be refused for registration “if it is identical with an earlier trade mark and the goods or services, for which the trade mark is applied for, are identical with the goods or services for which the earlier trade mark is registered.”¹³⁰ A trademark is said to be registered when it is published and advertised in the Journal¹³¹ and any person within two months of the publication raise an objection as to the registration of the trademark, provided he pays the proscribed fee to do so.¹³²

Section 34 lays down the duration of a trademark as ten years from the date of registration and a registration may be renewed under section 35 for a further period of 10 years subject to a fee.¹³³

An infringement of a registered trademark shall be actionable by the proprietor of the trademark.¹³⁴ Additionally, “relief by way of damages, injunctions, accounts or otherwise shall be available to the proprietor of the trade mark as is available in respect of the infringement of any other property right.”¹³⁵ An order by the High court or Session court to erase, remove or obliterate the offending mark can also be given.¹³⁶

¹²⁵ Trade Marks Ordinance, No. 19 of 2001, PAK. CODE, §2 (2001).

¹²⁶ *Id.* at §7.

¹²⁷ *Id.* at §10.

¹²⁸ *Id.* at §12.

¹²⁹ Trademarks, “Introduction,” INTELLECTUAL PROPERTY ORGANIZATION OF PAKISTAN, *available at:*

<http://ipo.gov.pk/Trademark/Default.aspx>.

¹³⁰ Trade Marks Ordinance, *supra* note 126, at §17.

¹³¹ *Id.* at §28.

¹³² *Id.* at §28(2).

¹³³ *Id.* at §§34-35.

¹³⁴ *Id.* at §46(1).

¹³⁵ *Id.* at §46(2).

¹³⁶ *Id.* at §47.

New rights have been introduced enabling intellectual property rights holders to seek the custom authority's assistance to prevent infringement of their trademarks.¹³⁷

C. Copyrights

The first copyright law in Pakistan, the Copyright Act, 1914, was modeled after the United Kingdom's Copyright Act, 1911. The Copyright Ordinance replaced this act in 1962. However, the scope of the Ordinance did not establish a regime that sufficiently protected copyrights in Pakistan. After becoming a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in 1995, extensive amendments were needed to bring the Ordinance in line with international law.

A copyright, under the current law, is an exclusive right in relation to works that are literary, dramatic or musical¹³⁸, artistic works¹³⁹, cinematography¹⁴⁰ and recordings.¹⁴¹ Section 18 of the Ordinance states that a copyright is protected “in any literary, dramatic, musical or artistic work (other than a photograph) published within the lifetime of the author until fifty years from the beginning of the calendar year next following the year in which the author dies.”¹⁴²

According to Section 6 of the Ordinance, “a work published in Pakistan shall be deemed to be first published in Pakistan, notwithstanding that it was published simultaneously in some other country”¹⁴³ Section 39 on the other hand, requires the author, publisher or the owner of the copyright to register his copyright officially with the Registrar to include it in the Register of Copyrights.¹⁴⁴

¹³⁷ *Id.* at §53.

¹³⁸ Copyright Ordinance, No. 34 of 1962, Pak. Code, §3 (1962).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at §6.

¹⁴³ *Id.* at §39.

¹⁴⁴ *Id.* at §39(1).

The owner of a copyright may also license an interest in a current or future work, which allows a licensee to exercise certain rights of ownership as agreed upon in the licensing agreement.¹⁴⁵ There is some controversy, however, regarding involuntary licensing under Section 36(3) and the compatibility of such a right with the TRIPS Agreement. Section 36(3) states, “The Federal Government or the Board may, upon an application by any governmental or statutory institution in the public interest, grant a license to reprint, translate, adopt or publish any textbook on non-profit basis.”¹⁴⁶ The government bypass of owner rights illustrated in this section exposes a troubling precedent that allows government appropriation of private property to occur under vague public interest-related circumstances.

In case of infringement, the owner is entitled to all civil remedies including “injunction damages, accounts and otherwise as are or may be conferred by law for the infringement of a right.”¹⁴⁷ However, if the defendant could prove that they were unaware of the copyright infringement, the owner, in such a case may only be entitled to an injunction and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies.¹⁴⁸

D. Additional Domestic Laws Related to Intellectual Property

	Domestic Laws	Pertinent Sections
1	The Customs Act, 1969, (IV of 1969) (2010)	<u>Section 15</u> Provided that offences relating to goods imported or exported in violation of Intellectual Property Rights shall, notwithstanding anything contained in any other law for the time being in force, be adjudicated under Section 179 by the appropriate officer of customs.
2	Pakistan Electronic, Media Regularity Authority (Amendment) Act (2007)	<u>Section 2</u> Licensee shall ensure that no program is aired in violation of the intellectual property rights.
3	Pakistan Penal Code (Act XLV of 1860)	<i>See Sections 478, 479, 480, 481, 482, 483, 485, 486, 487, 488 and 489</i>

¹⁴⁵ *Id.* at §35.

¹⁴⁶ *Id.* at §36(3).

¹⁴⁷ *Id.* at §60.

¹⁴⁸ *Id.*

4	Competition Act No. (XIX of 2010)	<u>Section 10(1)</u> No undertaking shall enter into deceptive marketing practices. <u>Section 10(2)(d)</u> Fraudulent use of another’s trademark, firm name, or product labeling or packaging.
5	The Drugs Act (XXXI of 1976)	<u>Section 4</u> Regulation and prohibition of import, etc., of drugs <u>Section 5</u> Regulation of manufacture of drugs <u>Section 6</u> Regulation of sale of drugs <u>Section 7</u> Registration of drugs
6	Press, Newspaper, News Agencies and Books Registration Ordinance (2002)	<u>Section 37</u> Registration of memorandum of books <u>Section 40</u> Register of Newspapers

IV. OBSTACLES IN IMPLEMENTING AN INTELLECTUAL PROPERTY LEGAL REGIME

Although Pakistan recognizes the importance of intellectual property rights, there remains a substantial discrepancy between government intention and domestic action in shoring up the intellectual property law framework. While there was some legal development in the early 2000s with the Copyrights (Amendment) Ordinance, 2000, the Patents Ordinance, 2000 and the Trademarks Act, 2001, developments in law and policy related to intellectual property have stagnated. As mentioned above, there are several domestic laws currently in place that act to implement the TRIPS Agreement and its predecessors, but the implementation of such laws is considered substantially inadequate.

The Office of the United States Trade Representative (USTR) declared that Pakistan remains on its priority watch list in 2014.¹⁴⁹ USTR acknowledges the State’s continued efforts in attempting

¹⁴⁹ Ambassador Michael B.G. Froman, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, Special 301 Report, 45, available at: <http://www.ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf>.

to advance intellectual property rights enforcement and reform, but they also note that there were no significant improvements in rights protection over time.¹⁵⁰

A. Implementation Inadequacies

The current state of Pakistan's intellectual property law framework may be determined first by examining the effectiveness of the government in addressing such issues.

Intellectual Property Organization of Pakistan

Permanently established in 2012, the Intellectual Property Organization of Pakistan (IPO Pakistan) endeavored to “put Pakistan on the IP map of the world as a compliant and responsible country by promoting and protecting intellectual property rights.”¹⁵¹ It also intended to turn Pakistan into an “IP based nation” by raising public awareness and improving enforcement mechanisms.¹⁵²

The legislation implementing IPO Pakistan also requires the establishment of a Policy Board,¹⁵³ headed by a Chairman.¹⁵⁴ Currently, there exists neither.¹⁵⁵ This is problematic, in that one of the central tasks of the Board is proposing policies for “ensuring implementation of intellectual property rights in Pakistan in coordination with concerned agencies.”¹⁵⁶ The Policy Board held meetings between 2005 and 2010, but no meetings were publicized since then.¹⁵⁷ The appointed Chairman is tasked with calling meetings,¹⁵⁸ but a vacancy does not prevent meetings from taking place.¹⁵⁹ Thus, the potential effectiveness of this institution has dwindled to some extent over the course of its existence.

¹⁵⁰ *Id.*

¹⁵¹ “Introduction to IPO Pakistan,” INTELLECTUAL PROPERTY ORGANIZATION OF PAKISTAN, *available at*: <http://ipo.gov.pk/Contents/AboutIPO.aspx>.

¹⁵² *Id.*

¹⁵³ INTELLECTUAL PROPERTY ORGANIZATION OF PAKISTAN ACT, No. 22 of 2012, § 4(1) (2012) [hereinafter “IPOP Act”].

¹⁵⁴ *Id.* at § 4(3).

¹⁵⁵ Overseas Investors Chamber of Commerce & Industry, Newsletter: June 2014, 10, *available at*: <http://oicci.org/wp-content/uploads/2014/01/OICCI-Newsletter-June-2014.pdf> [hereinafter “OICCI Newsletter”].

¹⁵⁶ IPOP Act, *supra* note 112, § 6(2)(a)(ii).

¹⁵⁷ “Meetings of IPO Policy Board,” IPO PAKISTAN, *available at*: <http://ipo.gov.pk/Contents/Meetings.aspx>.

¹⁵⁸ IPOP Act, *supra* note 112, § 8(1).

¹⁵⁹ *Id.* at § 8(6).

Along with the Policy Board, IPO Pakistan requires the establishment of Intellectual Property Tribunals.¹⁶⁰ The Act states, “[A]n accused *shall* be tried and prosecuted for an offence in the Tribunal”¹⁶¹ and in these special courts, the case must be disposed of in ninety days.¹⁶² Also, the jurisdiction of the Tribunals extends to “All suits and other civil proceedings regarding infringement of intellectual property laws”¹⁶³ and the Tribunal has the *exclusive jurisdiction* to try any offence under the following laws:¹⁶⁴

1. The Trade Marks Ordinance, 2001 (XIX of 2001);
2. The Copyright Ordinance, 1962 (XXXIV of 1962);
3. The Patents Ordinance, 2000 (LXI of 2000);
4. The Registered Designs Ordinance, 2000 (XLV of 2000);
5. The Registered Layout-Designs of Integrated Circuits Ordinance, 2000 (XLIX of 2000); and
6. Sections 478, 479, 480, 481, 482, 483, 485, 486, 487, 488 and 489 of Pakistan Penal Code (XLV of 1860).¹⁶⁵

It appears that these special courts have not yet come into existence.¹⁶⁶ Though TRIPS did not specifically require any special courts for these matters, their incorporation in domestic law and the flagrant disregard of these provisions indicates that the substantive sections of this Act were largely ignored. The broader implication of such omissions is that the Government of Pakistan is not prioritizing the protection of intellectual property rights, at least for the time being.

Adjudication of Intellectual Property Cases

One of the chief criticisms of Pakistan’s intellectual property rights system is the delayed delivery of justice. Because there are no special courts specifically designed to address intellectual property cases, the process operates as per the specifications of the respective ordinances, meaning the cases may be presided over by a Magistrate of the first class or above. The current backlog of cases in the Lahore High Court alone is indicative of the severe delay to which intellectual property cases are subjected. As of May 31, 2014, there were approximately 14,614 “old” criminal cases (between 2008 and 2012) pending and approximately 23,164 current criminal cases (post-2012) pending and the rate at which new cases are being initiated exceed the

¹⁶⁰ *Id.* at § 16(1).

¹⁶¹ *Id.* at § 15.

¹⁶² *Id.*

¹⁶³ *Id.* at § 18(1).

¹⁶⁴ *Id.* at § 18(2).

¹⁶⁵ *Id.* at § Schedule.

¹⁶⁶ OICCI Newsletter, *supra* note 114, at 10.

rate at which current cases are being disposed. The civil case backlog is 53,023 and 83,004 of old and current cases respectively. Again, the rate at which new cases are being initiated exceeds the rate at which current cases are being disposed. The implication is thus that intellectual property cases will face similar, if not increased delays due to the highly technical or complicated nature of the issues involved.

One potential solution is to employ special courts already in operation (i.e. Banking Courts). Like other more developed jurisdictions, intellectual property cases require judges and a support staff that specializes in these issues to assure proper adjudication. A judiciary that is more aware of the complexities of intellectual property rights and that is aware of the true extent of the damage that crimes like piracy cause will be more prepared to issue harsher punishments in accordance with the law.

Another long-term solution may be to automatically institute harsher punishments within the relevant legislation, rather than allowing the presiding judge to have extensive discretion. This would entail either establishing mandatory minimum sentencing or increasing the fines associated with infringement of intellectual property rights. In the few convictions that occur, it may be noted “Maximum penalties are non-deterrent to begin with, and there are no minimum penalties. As a result, magistrates use their discretion in favor of the accused by imposing fines as low as a few hundred Rupees and no jail sentences.”¹⁶⁷

Offenders of Intellectual Property Related Laws

It appears that the notion of offender is rather limited in Pakistan’s domestic laws related to intellectual property. The current situation appears to be that access to websites that provide pirated content is increasing¹⁶⁸ and 90% of books found on university campuses are pirated,¹⁶⁹ along with 86% of software (a loss of approximately \$278 million a year),¹⁷⁰ which means that more effective measures must be implemented to curb such rampant criminal activity. Along with encouraging investigating agencies to employ their *ex officio* powers and conduct more

¹⁶⁷ Special 301 Report on Copyright Protection and Enforcement, 2013, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 215, *available at*: <http://www.iipa.com/rbc/2013/2013SPEC301PAKISTAN.PDF>.

¹⁶⁸ *Id.* at 214.

¹⁶⁹ *Id.* at 215.

¹⁷⁰ *Id.* at 216.

frequent raids on known pirates or markets where piracy is prevalent, it is possible that the relevant legislation may be amended to increase the scope of offenders that through act or omission violate domestic intellectual property law.

In the Copyright Ordinance, 1962, those individuals recreating and distributing pirated goods for commercial gain are said to commit infringement. For example, Section 29 states that an unauthorized person that “makes or causes the making of” published works “intended for sale in commerce” infringes upon the rights of publishers.¹⁷¹ The following sections of Chapter XIV, Offences and Penalties, within the Ordinance also illustrate the targeted offender:¹⁷²

Section 66A	Any person who knowingly <i>publishes</i> , or <i>causes to be published</i> , a collection or compendium
Section 66B	Any person who unauthorisedly <i>makes or distributes</i> counterfeit of sound recording and cinematographic work <i>for the purpose of business, profit or gain</i>
Section 66C	Any person who <i>for the purpose of business, profit or gain</i> , exploits or appropriates any sound recording or audio-visual work intended for private use
Section 66E	Any person who, without authorization of the copyright owner or his licensee <i>rents out</i> the original or copies of the cinematographic works or computer programmes

The primary focus is, as stated above, individuals recreating and distributing items including pirated books, CDs and DVDs for commercial profit. In these particular sections, there is no allotted penalty for individuals that consume these goods. If books sold by or on behalf of a university are largely the product of piracy, the university may also be liable in such a crime. Penalizing, within reason, both the distributor and the consumer, whether it is a business or an individual would act as a deterrent to the rampant infringement of intellectual property rights that occurs.

To this end, Section 66 of the Copyright Ordinance, reproduced below, may provide the legal base for penalizing consumers of pirated goods.

66. Offenses of infringement of copyright or other rights conferred by this Ordinance, -- Any person who knowingly infringes or abets the infringement of:-

¹⁷¹ Copyright Ordinance (*as amended*), No. 34 of 1962, PAK. CODE (1962).

¹⁷² *Id.*

- (a) the copyright in a work, or
- (ab) the rental rights in cinematographic works and computer programmes
- (ac) the rights of performers or producers of sound recording: or
- (b) any other right conferred by this Ordinance, shall be punishable with imprisonment which may extend to three years, or with fine which may extend to one hundred thousand rupees" or with both

Explanation. Construction of a building or other structure, which infringes or which, if completed, would infringe the copyright in some other work, shall not be an offence under this section.¹⁷³

However, this section is extremely vague. If the penalty may be imposed on anyone who “knowingly infringes” upon “the copyright in a work,” under Section 56 of the Ordinance, infringement is defined, again, largely upon the use of the works for commercial gain and not private consumption.¹⁷⁴ Thus, either Section 66 must be amended to specifically include consumers, or a new section must be introduced that defines the specific parameters under which a consumer, commercial or private, may be penalized for the use of pirated goods. The latter is perhaps the better option.

Trademark infringement is penalized in both the Trademarks Ordinance, 2001 and the Pakistan Penal Code (PPC). Like copyright infringement, trademark infringement is also prevalent throughout Pakistan. As the Copyright Ordinance punishes those infringing upon the copyright for commercial gain, the Trademarks Ordinance punishes mostly those persons that affix a false trademark, not necessarily those individuals that knowingly sell falsely trademarked goods.¹⁷⁵

¹⁷³ *Id.*

¹⁷⁴ *Id.* **56. When copyright infringed**, -- Copyright in a work shall be deemed to be infringed:-

- (a) when any person without the consent of the owner of the copyright or without a license granted by such owner or the Registrar under this Ordinance or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Ordinance;-
 - (i) does anything the exclusive right to do which is by this Ordinance conferred upon the owner of the copyright; or
 - (ii) permits for profit any place to be used for the performance of the work in public where such performance constitutes an infringement of the copyright in the work unless he was not aware and had no reasonable ground for suspecting, that such performance would be an infringement of copyright, or
- (b) when any person:-
 - (i) makes for sale or hire or sells or lets for hire, or by way of trade displays or offers for sale or hire, or
 - (ii) distributes either for the purpose of trade to such an extent as to affect prejudicially the owner of the copyright, or
 - (iii) by way of trade exhibits in public, or (iv) imports into Pakistan any infringing copies of the work.

Explanation. For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematographic work shall be deemed to be an "infringing copy"

¹⁷⁵ Trade Marks Ordinance, No. 19 of 2001, PAK. CODE (2001).

Section 40(8) of the Trademarks Ordinance does equivocate “a person who sells or offers or exposes goods for sale, or puts them on the market or has in possession for sale or any purpose of trade or manufacture any goods bearing a mark which infringes a registered trade mark” as some who “shall be treated as a party to infringement of a registered trade mark.”¹⁷⁶ However, it is unclear then under which section of Chapter XIII on penalties the offender would be penalized.¹⁷⁷ The PPC, in Section 486, penalizes the selling of goods that are known to bear false trademarks and directly dictates the punishment for such an act.¹⁷⁸ Although the PPC does provide some legal cover, the Trademarks Ordinance should be still be amended to address this discrepancy in order to strengthen the intellectual property legal regime and reduce rampant infringement.

Capacity Building & Public Awareness

One of the central challenges impeding Pakistan’s ability to properly enforce intellectual property rights involves the lack of capacity generally amongst the institutions administering these rights and the public-at-large. Currently, security issues generally dominate the national discourse, sitting atop the Government’s priority list both financially and politically. Issues with less immediate consequences, as the protection of intellectual property rights is deemed, are much further down the list. The United States, for example, is able to offer a more sophisticated system of intellectual property rights because the annual budge of the Patent and Trademark Office is approximately \$1 billion, with a staff of more than 3,000 professionals.¹⁷⁹ Speaking to judicial capacity, there are over 600 judges that are specifically trained to preside over intellectual property litigation. In stark contrast, the entire federal budge of Pakistan is approximately \$43 billion (almost \$7 billion is spent on defense).

Defense spending is a direct investment in national interests and funding for an intellectual property system with increased regulation and protection may be viewed as “benefitting primarily foreign interests.”¹⁸⁰ One view is that “Copyright piracy and trademark counterfeiting are allowed to proliferate on the theory that they are minor offenses against wealthy

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Intellectual Property Rights: A Survey of the Major Issues, ASIA BUSINESS COUNCIL, September 2005, *available at*: <http://www.asiabusinesscouncil.org/docs/IntellectualPropertyRights.pdf>.

¹⁸⁰ Intellectual Property and Developing Countries: An Overview, 4, 2005, *available at*: <http://www.nathaninc.com/sites/default/files/Intellectual%20Property%20and%20Developing%20Countries.pdf>.

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multinational concerns that can easily afford the loss.”¹⁸¹ This perspective is representative of the relative value judgment that the cost of more stringently enforcing intellectual property rights is higher than the return that the foreign direct investment of such multinationals may eventually provide.

Such a value judgment examines too narrowly the scope of persons or entities that infringement may affect. Consumers themselves may also suffer the negative consequences of lack of enforcement of intellectual property rights. Instead of creating an economically inviting environment for foreign investment that allows the state to enjoy a share of the economic prosperity enjoyed by developed states, such arbitrary treatment of intellectual property rights may instead result in direct harm to consumers in the sale and distribution of infringing goods and services.¹⁸²

B. Industry-Specific Intellectual Property Rights Issues

Pharmaceuticals

Among the various property rights systems, patents concerning pharmaceutical innovations are one of the most widely debated issues globally, for difficult balancing test they present between the industries that produce pharmaceuticals and the rights of states and by association, individuals, that require them but lack the requisite funds to purchase them at the manufacturers listed price.¹⁸³

Pakistan's \$1.64 billion pharmaceutical market is the 10th largest in the Asia Pacific region, behind the Philippines (\$2.58bn) and ahead of Vietnam (\$1.53bn).¹⁸⁴ Pakistan's Annual per-capita spending on medicine is \$10, far below the United States average of US\$142.¹⁸⁵ From 1991, the Government of Pakistan employed de-regulation policies, which led to an increase of domestic pharmaceutical companies in the market. Pakistan counts approximately 430

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Lalitha N, *A Review of the Pharmaceutical Industry of Canada*, ECONOMIC AND POLITICAL WEEKLY, 13(40), Mar. 26, 2005

¹⁸⁴ Muhammad Amir & Khalid Zaman, *Review of Pakistan Pharmaceutical Industry: SWOT Analysis*, 1, No. 1, INTERNATIONAL JOURNAL OF BUSINESS AND INFORMATION TECHNOLOGY, 114-117, (June 2011)

¹⁸⁵ Pakistan Pharmaceutical Sector 2008

pharmaceutical companies, 90% of which are domestic.¹⁸⁶ However, Pakistan has not maintained or expanded its domestic market share despite expanding in other Asian markets.

Considering the state of affairs surrounding Pakistan's pharmaceutical industry, the importance of domestic companies and the domestic market cannot be emphasized enough. Thus, the effects of the development of Pakistan's patent laws to a TRIPS-compliant regime impact not only the domestic market and in turn, growth of the industry, but also the debate between ensuring public health and the protection of intellectual property rights. The Doha Declaration¹⁸⁷ under the TRIPs Agreement acknowledges this debate, recognizing that the Agreement "does not and should not prevent members from taking measures to protect public health."¹⁸⁸ The Declaration affirms that the interpretation of the Agreement should allow member states to "protect public health and, in particular, to promote access to medicines for all."¹⁸⁹ However, it does acknowledge that intellectual property is critical for the development of new medicines,¹⁹⁰ which after extensive research and development costs are necessarily more expensive. Domestic laws must be carefully crafted to balance the needs of the public against the protections required by the pharmaceutical companies, so as not to deter companies (especially large multinationals) from creating and distributing much needed medicines.

In *English Pharmaceutical Industries v. Shire Biochem Inc*¹⁹¹, the Supreme Court upheld the decision of the lower court, which held that Biocare could supply generic drugs to the government against the tender. However, in order to secure the interest of the plaintiff, it first had to provide a bank guarantee for the tender. Biocare would be restrained from supplying "Lamivudine" to the market for all other purposes. Biocare's product was to be sent to reputable laboratories for analysis and to determine whether it was manufactured by the allegedly different process that Biocare claimed to use to manufacture its "Lamivudine" product. Biocare appealed to the Supreme Court¹⁹² against the order of the High Court requiring it to submit a bank

¹⁸⁶ 406 National companies; 24 multinational companies

¹⁸⁷ Article 4 Doha Declaration 2001

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ 2007 C L D 1570, Supreme Court of Pakistan.

¹⁹² *Id.*

guarantee for over Rs.8 million (approximately \$78,000), and against the order that its product be analyzed. After examination, the Supreme Court dismissed Biocare's appeal and held that the order of the High Court was just and proper. Thus, multinational pharmaceutical companies do receive protection when they seek to enforce a legitimate claim in domestic courts.

Issues with the application of Patent laws in Pharmaceuticals in Pakistan are manifold. The policy framework existing in Pakistan is laid down in two main documents; a National Health Policy¹⁹³ and a National Drug Policy¹⁹⁴, which essentially covers the major issues ranging from the selection of essential medicines, financing, pricing to regulation, procurement, distribution etc. Access to essential medicines is recognised as a right in the constitution¹⁹⁵ and the national legislation¹⁹⁶. However, severe shortage and non-availability of essential medicines is still prevalent in the health sector in Pakistan. Consequently, it is a common phenomenon to obtain medicines from a local physician rather than consult a basic government run rural health centre (more than 60% of patients do).¹⁹⁷

The 18th Amendment¹⁹⁸ to the Constitution was passed in June 2011, which inter alia gave more autonomy to the provinces, subsequently making health a provincial matter. This saw the dissolution of the Ministry of Health in 2011, although it was reinstated in April 2013. However, this gap of almost two years brought up major issues with regard to regulation of pharmaceuticals, as there was no regulatory body that replaced the Ministry of Health. After devolution, none of the provinces assumed their duties in governing the pharmaceutical industry.¹⁹⁹ This uncertainty left the industry in shambles, all procedures involving drug approval

¹⁹³ National Health Policy 2001, The Way Forward. Islamabad, Ministry of Health;

Government of Pakistan, *available at* <http://apps.who.int/medicinedocs/en/m/abstract/Js17120e/>

¹⁹⁴ National Drug Policy 2003, *available at* <http://apps.who.int/medicinedocs/en/m/abstract/Js17118e/>

¹⁹⁵ PAKISTAN CONST. art. 38(d)

¹⁹⁶ Objective 2(c), National Drug Policy 2003, Ministry of Health.

¹⁹⁷ PSLM 2004-2005, <http://www.statpak.gov.pk/depts/fbs/statistics/pslm2004-05/pslm2004-05.html>

¹⁹⁸ 18TH AMENDMENT TO THE PAKISTAN CONST., 2011, *available at*

<http://www.pakistani.org/pakistan/constitution/amendments/18amendment.html>

¹⁹⁹ PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PhRMA)

Special 301 Submission 2012, *available at*

<http://www.phrma.org/sites/default/files/pdf/phrmaspecial301submission2012.pdf>

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from registration to pricing were left unregulated bringing the industry to a standstill.²⁰⁰ Though the Ministry of Health was revived, the past two years were a serious setback for the industry.

Information Technology

Despite significant public awareness and enforcement drives by various bodies over the past several years, software piracy, including by businesses that use unlicensed software, remains a serious problem in 2014.²⁰¹ As mentioned above, Pakistan has one of the highest software piracy rates in the world, at 86%, with the commercial value of such unlicensed software rising to \$278 million annually.²⁰²

Reducing piracy would not only help the owners of copyrights to create a profit in Pakistan, it would also lead to positive economic benefits for Pakistan.²⁰³ Unfortunately, inspections and raids against businesses suspected to be engaged in the unauthorized use of software are few and far in between and prosecutions rarely turn over a conviction. Further, while many prosecutions were brought in previous years against those engaging in hard-disk loading of pirated software, lengthy court processes and minimal fines or sentences has not even remotely deterred infringers from such activities.²⁰⁴

With the increase in the use of the Internet in Pakistan, there is little the Internet Service Providers Association of Pakistan (ISPAK) has done in conjunction with the Intellectual Property Organization of Pakistan to curtail rampant internet piracy. Pre-release music, movies, software, games, and publications are all easily available online.

Agriculture

Pakistan's federal and provincial governments remain under pressure to strengthen regulations on intellectual property, specifically patents on seeds. However, any law or policy change regarding, for example, cotton production, would have serious economic implications for

²⁰⁰ *Id.*

²⁰¹ International Intellectual Property Alliance (IIPA) 2013 Special 301 Report on Copyright Protection and Enforcement, *available at*, <http://www.iipa.com/rbc/2013/2013SPEC301PAKISTAN.PDF>.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

Pakistan. Over 1 million farmers cultivate cotton crops and its trade represents approximately 10% of Pakistan's Gross Domestic Product and 55% of annual foreign exchange earnings.²⁰⁵

Multinational companies, like Monsanto, however, demand stricter patent regulation and a decrease in free sharing amongst farmers of seed products. To protect their market share, these companies want protection far greater than what is currently available in Pakistan under the TRIPS-compliant regime. However, the Government is wary of increasing such protections, which may, as a result, create a monopoly for much larger companies with which smaller domestic producers cannot compete. Ultimately, in a monopoly, farmers would not be able to sustain the current economic yield because the price of seeds would increase exponentially as suppliers would rapidly decrease.

The TRIPS Agreement obliges member states of the WTO to grant protection to inventors of micro-biological processes, micro-organisms and plant varieties.²⁰⁶ Article 27(3)(b) states, "Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof."

The International Union for the Protection of New Varieties of Plants (UPOV) is an inter-governmental body that promotes an effective system of plant variety protection. The UPOV restricts farmers' freedom to buy seeds from different sources other than the original breeders.²⁰⁷ For multinationals, Pakistan's acceptance of a treaty under this union would be extremely beneficial, but there is, as of yet, little inclination to do so.

As a reflection of the UPOV movement, a controversial bill on plant breeders rights was introduced in Parliament in 2012 to enforce multinational-friendly measures. The proposers of the bill faced substantial criticism over its introduction. If this legislation were passed, contracts drawn up by companies would force farmers to purchase their seed year after year along with

²⁰⁵ <http://tribune.com.pk/story/348614/branded-seeds-free-market-copyrights-and-farmers-welfare/>

²⁰⁶ TRIPs Agreement & Challenges for Pakistan by Majid Ali Wajid, *available at*, http://piqc.edu.pk/casestudies/Majid_Ali_Wajid_TRIPs_Agreement_&_Challenges_for_Pakistan_WTO_Presentation_PIQC.pdf

²⁰⁷ *Id.*

chemical inputs, a requirement that would raise farmers' costs and drive millions off the land.²⁰⁸ It would also allow seed companies to exact high royalties and increase their corporate control over agriculture and the food system of Pakistan.²⁰⁹

V. RECOMMENDATIONS

The following recommendations provide guidance on the steps Pakistan may take in improving its domestic intellectual property law framework, both in law and in practice.

A. General Recommendations

- The Government of Pakistan must reassess the central laws that comprise the domestic intellectual property framework to verify general compliance with international laws and norms
- Other international instruments that provide structure to the intellectual property law framework should be considered for ratification to strengthen Pakistan's domestic regime (*i.e.* WIPO Copyright Treaty addressing computer programs, databases, distribution rights, rental rights, *etc.*)
- Initiatives must be taken by public and private entities to train the judiciary on how to handle complicated intellectual property adjudications, especially those related to patents to ensure that justice is properly delivered to aggrieved parties
- Awareness initiatives must also be implemented amongst the public to acquaint them with what constitutes infringement of copyright and trademark and to deter them from participating in piracy-related criminal enterprise
- The various legal institutes or bar associations operating locally may consider establishing an additional set of qualifications for those lawyers specifically trained to practice intellectual property law, especially patent law (*see i.e.* U.S. Patent Bar)

B. Legislative

- Any discrepancies in domestic law must be addressed immediately through amendments or the passage of new rules, laws or policies

²⁰⁸ *Id.*

²⁰⁹ *Id.*

- Rules established pursuant to existing intellectual property laws must be examined in light of recurring implementation issues to ensure overall system improvement
- Section 36(3) of the Copyright Ordinance, 1962 must be evaluated in comparison with Pakistan's TRIPS Agreement obligations to ensure that it does not violate the law and if there appears to be a violation, then the section must be amended
- The respective Trademarks and Copyrights Ordinances should be amended to expand the scope of offenders penalized under the law to include consumers of infringing goods and services, within a specific set of eligible criterion
- Amendments may be made to the relevant legislation to increase the fines associated with penalties to an amount that may derive a more deterrent effect, including with the use of minimum fines and sentencing
- Customs officials must receive training on identification of infringing goods and must work in conjunction with law enforcement agencies to target criminal enterprises operating in contravention of domestic intellectual property laws

C. Implementation-Related

- The vacant position of the Chairman under the Intellectual Property Organization of Pakistan Act, 2012 must be filled immediately and a Policy Board must be subsequently constituted to properly examine and address domestic intellectual property concerns of domestic and international parties operating in Pakistan
- The Intellectual Property Tribunals established under the Intellectual Property Organization of Pakistan Act, 2012 must be convened as soon as possible to properly adjudicate cases under the supervision of a knowledgeable judiciary
- The Intellectual Property Organization of Pakistan must continuously dialogue with the business community all throughout Pakistan to keep their policies and initiatives up-to-date and to strengthen the intellectual property regime overall
- Law enforcement agencies operating to prevent intellectual property crimes must be more diligent about the investigations and subsequent raids they conduct to ensure that, for example, pirated goods are not widely available throughout the markets
- Industries, both local and international, susceptible to infringement under the current lax framework must adamantly petition the Government of Pakistan to fully

- implement the Intellectual Property Organization of Pakistan Act, 2012 and to enforce the rights guaranteed to these entities under the current law
- Court procedures related to intellectual property adjudication must be clarified and streamlined so as to assure international investors that their rights are protected and matters taken to the judiciary will be resolved in a just manner
 - In order to eventually derive economic benefits from intellectual property, works that are of Pakistani origin must gain proper protection under the law, so as not to disadvantage local owners
 - To foster development within Pakistan's agricultural market, intellectual property rights must be stringently enforced to encourage domestic research and development
 - Pakistani works, as identified in the Copyright Ordinance, 1962, must also be stringently protected to encourage domestic creative enterprise to drive economic growth (i.e. A 2012 report on the influence of intellectual property on the U.S. economy revealed that among 75 industries identified as intellectual property-intensive, there were created 27.1 million domestic jobs and from these intellectual property intensive industries, \$5.06 trillion was generated)