Practical Implication of Intellectual Property Law in Developing States such as Pakistan and role of International Arbitration Law in Disputed cases

(Does Pakistan Copyright Law reflect the standards of International Intellectual Property Rules?)

Candidate number: 8021
Submission deadline: 1st December 2016
Number of words: 16,400
CHAPTER 1
1.1 Introduction .................................................................................................................... 4
1.2 Structure ......................................................................................................................... 4
1.3 Legal Issues .................................................................................................................... 6
1.4 Origin of Intellectual Property ....................................................................................... 7
1.5 Significance ..................................................................................................................... 8
1.6 International Instruments ............................................................................................... 8
   1.6.1 World Intellectual Property Organization (WIPO) ................................................. 9
   1.6.2 History WIPO ........................................................................................................ 10
   1.6.3 Trade Related Aspects of Intellectual Property (TRIPS) ................................. 11
1.7 Contrasting analysis between Developed & Developing Country ................................. 12
   1.7.1 Financial Aspect .................................................................................................. 14
1.8 TRIPS trouble ................................................................................................................ 14
1.9 Foundational Cracks in TRIPS Implementation ......................................................... 16

CHAPTER 2
2.1 Intellectual Property Law and Copyright .................................................................... 17
2.2 Copyrights and Related Rights ..................................................................................... 18
2.3 TRIPS and Copyrights ................................................................................................ 18
2.4 Copyrights and Developing Countries .......................................................................... 20

CHAPTER 3
3.1 Introduction to Pakistan ............................................................................................... 21
3.2 Intellectual Property Rights and Pakistan ..................................................................... 22
   3.2.1 Ground Reality .................................................................................................... 24
3.3 International Standing (USTR) ..................................................................................... 24
3.4 Pakistan & Special 301 reports ..................................................................................... 25
3.5 2016 Special Report ..................................................................................................... 26
3.6 USTR Probes the light ................................................................................................. 26
3.7 USTR’s legal standing ................................................................................................. 27
3.8 Consequences .............................................................................................................. 27
CHAPTER 4
4.1 Copyright and Pakistan.................................................................29
   4.1.1 Ownership of Copyright.....................................................30
   4.1.2 Registration of Copyright...................................................31
   4.1.3 Rights of Exclusive licensee versus free movement of Goods........32
   4.1.4 Case law in South Asia.......................................................33
   4.1.5 Case law in Pakistan.........................................................35
4.2 Pakistan Copyright law and International Standards.........................37
   4.2.1 Probable Solution.............................................................39

CHAPTER 5
5.1 Digitization..............................................................................40
5.2 Piracy.......................................................................................42
5.3 International Norms Governing Copyright Protection of Computer Program........42
   5.3.1 Legislative Steps to combat piracy in Pakistan.........................43
5.4 Piracy: A Myth or a Reality.......................................................44
5.5 Minimizing Software Piracy.....................................................46

CHAPTER 6
6.1 Alternate Dispute Resolution....................................................47
6.2 Arbitration and Intellectual Property Law..................................48
   6.2.1 Pakistan ADR Experience....................................................50
   6.2.2 Infamous Case Law..........................................................51
   6.2.4 The way forward..............................................................52

CHAPTER 7
7.1 Conclusion..............................................................................53

REFERENCES................................................................................55
CHAPTER 1

1.1 Introduction

By the time I finish writing the first sentence of my thesis, chances are that some new development in the area of technology has already been accomplished. We are living in a time where science is progressing by leaps and bounds and the blame can be easily to put on to the limitless imagination of human mind as pragmatically described in Saint of Spitting Cobra’s that “the human mind is an undiscovered planet of vast space, bare deserts, rugged mountains and thick forests blessed with an innumerable number of the most beautiful oasis and fountains of creativity from where the rivers of imagination flow down. The sparkling waters from these streams of ingenuity light up the world of the human mind with intellect, vision and divinity.”

However such drastic evolution comes at a cost and that is the complexity it brings with itself. Till last century the economies were usually divided among the agricultural and industrial sector however by the end of 20th century there had been the emergence of third category of economy based on the technological research and development. The evolution of currency from coins, to paper and now wire transfers shows that human kind has come a long way. Similar is the case with the property. The structural dynamics of a property in legal world is not merely restricted to tangible form anymore but it has also adopted intangible framework considered as Intellectual Property. Intellectual property, broadly speaking, is not just an idea, but an expression of an idea that has been turned into something tangible like a book, a product design, a company logo or a prescription drug.

1.2 Structure

It is hard to overlook the wide range of areas covered under Intellectual Property law with each having its own structural framework and intricacies. These intricacies have

---

further been escalated due to the birth of digitized environment chipped together with the existence of internet, making a significant impact around the world. Therefore, I shall restrict the circumference of my thesis by concentrating on the controversial issues surrounding Intellectual Property (“IP”) Rights in Pakistan. The IP system of a country is too often evaluated solely in legal terms, the question posed being: does the system comply with international standards? A comparison of local copyright, patent, trademark, and other laws to international standards, especially those found in the international agreements such as TRIPS (Trade related aspects of Intellectual Property) Agreement and the Berne and Paris Conventions, would yield a detailed picture, and ignoring language barriers, be relatively easy to conduct. But, as I argue here, the resulting picture would be insufficient to support an assessment of the IP regimes in question. In order to have a full understanding of the IP system of a particular country, it is essential to contextualize it by adding more dimensions: the legal system at large, the political economy, local and regional politics and the local culture. Therefore, before we can critically evaluate the current loopholes in the IP regime of a country, we shall need to understand how it came into being in the very first place and were there any cracks present during the foundation of these law or did they just emerge due to the face paced and diverse nature of globe.

The purpose of my writing is not to pass a judgment on the state of enforcement of Intellectual Property law in Pakistan, rather it tries to identify the framework in which enforcement is being carried out and tries to highlight the salient features and key indicators related to enforcement. As highlighted earlier about the wide ambit of the topic, the area of Intellectual Property law that shall be targeted more would be in relations to copyright law in Pakistan. Although initially, there shall be references to the common ground realities and technical hardships countered by the developing nation, for the purposes of analytical comparison with the developed states, subsequently narrowing down to Pakistan.

The structure of my thesis is broken into 3 segments divided under 7 chapters. The first segment concentrates on the rational of IP systems and their origin. The second segment would include an intense discussion on the core subject matter of my thesis, highlighting the issues related to the setbacks faced by Pakistan’s IP law regime and the aftermaths of
digitization subsequently resulting in the failure of national laws to withhold the practical legal significance of IP law. And the last segment would be based on the probable solutions that are already under discussion in addition to the proposed framework of how to catalytically resolve the issues through alternate means, discussed in the thesis.

1.3 Legal Issues argued in Paper

- Does the social and economic state of affairs of developing countries had an impact for the legislative reforms that the developing countries had to undergo to ensure that they comply with the implementation of TRIPS?

To evaluate the given equation, it would be essential to have threshold levels of IP protection that development economists deem appropriate for a country given its overall economic profile, specific endowments, and social priorities.²

- Comparative analysis in consideration of the fact that whether, it is a justified requirement for developing countries to allocate limited resources to make rich multinational companies richer through collection of royalties and licensing fees.

In countries where copying and imitation of foreign technologies and knowledge are widespread, there are complaints that stronger enforcement of IP rights pose threats to the employment of millions of workers and raise the prices of products for poor consumers.³

- To what extent does this segment of law can make an impact on the economy and social structure of a developing country like Pakistan?

I shall consider certain ground realities of the countries that have made fortune on the basis of well established IP laws, most of them are the developed countries. We shall critically evaluate those countries that are still struggling with their socio-economic realities but yet by putting some hard rock laws in relation to IP law have managed to

give support to their economic spine. One can see this from the interview of federal Judge on the United Sates Court of Appeals for the Sixth Circuit, Bernice Donald, whereby he gave the example of South Korea, Taiwan and Singapore. Whereas Singapore was known for piracy but after rebuilding and reconstructing the IR laws, the country managed to become a leader in technological advancements.

- **Lastly, as to whether the laws of Pakistan are sufficient in dealing with the issues of Copyright Infringement and Piracy?**

The question that shall be raised is that whether the laws that have been adopted in a developing country like Pakistan are the able to reflect the social, political and economical stance of a country. In addition to the fact that whether these laws have any contradictions with the international legal instruments? Moreover how realistic is the implementation of these laws on practical grounds.

### 1.4 The Origin of Intellectual Property

The origins of formal IP protection date back to 15th century Venice when the first patents were issued and to the late seventeenth century when England laid the foundation for the first copyright laws. Since then, the range of IP rights has expanded. **Patents** protect the underlying ideas used for industrial products or processes. **Copyrights** protect forms of expressions, such as written materials and artistic works, whereas **trademarks** protect names and symbols associated with particular products and services. Through these and other IP rights (including but not limited to geographical indications, plant breeders rights, and utility models), governments grant inventors or creators private rights to use, transfer or profit from their work for a specified period of time. These rights enable IP holders to legally control, with certain conditions, the circumstances under

---


which others can use their products of the mind. Once the term of protection ends, patented inventions and copyrighted work falls into the public domain, they can be freely used without permission or payment.\(^7\)

1.5 The Significance

In today’s world, IP law is making a political process in which particular conceptions of rights and duties are institutionalized whereby each settlement prompts new disputes, policy shifts and new disputes again.\(^8\) There is one segment of society that encourages and lobbies for weak patent rights to help build domestic industries in addition to allowing them to copy and adapt foreign technologies. While on the other hand Research and Development (R &D) based intensive industries, usually lobby for stronger patent protection rights to protect their investments in research and development. Interestingly consumers and public health advocates frequently appeal for weaker patents rights to make products like medicines cheaper. Creators, artists and authors of innovative cultural industries sometimes call for stronger copyright protections as do those companies that invest in them.\(^9\) Yet to promote the availability of educational materials, librarians and educators frequently promote fair use exceptions to copyrights. In the absence of evidence based assessments, the process of IP reform is often a war of ideas among competing interest groups putting conviction against conviction, argument against argument, assumption against assumption.\(^10\)

1.6 International Instruments

There are numerous international legal instruments that deal with Intellectual Property law around the globe. These include different treaties, conventions, multi and plurilateral agreements between countries in order to ensure a synchronisation and lack of conflict in

\(^9\) Ibid 7
relation to the practical impositioning of the IP law. Few of the international conventions, agreements and treaties include but are not limited to;

- Berne Convention dealing with matters of Copyright,\(^{11}\)
- Paris Convention for the protection of industrial property rights,\(^{12}\)
- Rome Convention which attempts to create an equilibrium between three separate right owners namely performers, phonogram producers and broadcasters.\(^{13}\)
- TRIPS- Trade Related Aspects of Intellectual Property Rights including Trade and Counterfeit Goods: a General Agreement on Tariffs and Trade (GATT)/WTO agreement which encompasses a full range of currently recognised intellectual property rights including trade secrets.\(^{14}\)
- World Intellectual Property Organisation (WIPO)- The Copyright Treaty 1996, dealt with the rights of primary content providers such as authors, artist and composers in the digital environment.\(^{15}\)
- Performers and Phonograms Treaty 1996 dealt with the problems faced by record companies such as reproduction, rental and distribution.\(^{16}\)

The above mentioned list is just few of the legal instruments that administer the IP laws around the globe. However management of such highly technical area of law, seems next to impossible without having a single unit body which tries to ensure that there are no discrepancies in the formation, implementation and execution of these law. That body in today’s world is known as World Intellectual Property Right Organisation (WIPO).

1.6.1 **World Intellectual Property Right Organization (WIPO):**

\(^{11}\) Berne Convention for the Protection of Literary and Artistic Works; Paris Act of 24 July 1971, as amended on 28 September 1979

\(^{12}\) Paris Convention for the Protection of Industrial Property 1883

\(^{13}\) Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961


\(^{15}\) WIPO Copyright Treaty, 20 December 1996

\(^{16}\) Performers and Phonograms Treaty 1996
WIPO is a specialized agency of the United Nations established by the WIPO Convention in 1967 with a mandate from its Member States to promote the protection of IP throughout the world through cooperation among states and in collaboration with other international organizations.\textsuperscript{17}

1.6.2 History and background of WIPO:

One of the earliest and noteworthy conventions in IP history is the Paris Convention for the Protection of Industrial Property\textsuperscript{18} concluded in 1883, was revised at Brussels in 1900 and lastly amended in 1979, established reciprocal protection, in addition to priority rights in respect of patents, trademarks and industrial designs. An International Bureau was also formed at that time for administering the Paris Convention 1883.\textsuperscript{19}

Soon after Paris Convention in 1886 famous Berne Convention for the Protection of Literary and Artistic Works was presented to give Intellectual Property Rights (IPR)’s an international legal recognition, and to harmonize legislation on IPR’s specifically with respect to literary and artistic works. Similarly, a bureau was established to administer the Berne Convention. In 1983 both of the bureaus merged and emerged as a single independent International Organization called Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle (BIRPI).\textsuperscript{20}

Later when IPR regime expanded and became more important for the world BIRPI was converted into a much sophisticated and big organization we see today as WIPO. WIPO’s position on a global forum has significantly shifted since its birth, when it was formed for the purposes of administrating treaties furnished between different countries. Although, this function of WIPO is still maintained,

\textsuperscript{17} \url{http://www.wipo.int/about-wipo/en/what_is_wipo.html}
\textsuperscript{18} \url{http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.htm}
\textsuperscript{19} \url{http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html}
\textsuperscript{20} \url{http://www.wipo.int/about-wipo/fr/history.html}
in addition to the consequential function, of promoting intergovernmental cooperation in the administration of intellectual property, its activities have not only expanded, but also greatly diversified.

Furthermore, WIPO’s contribution in the sector of alternative dispute resolution (ADR) through the WIPO Arbitration and Mediation Center has been of great aid to tackle the disputes arising from the illegal use of domain names on the Internet between individual parties and companies.\(^{21}\) WIPO has been accredited by the Internet Corporation for Assigned Names and Numbers (ICANN) to administer cases filed under ICANN’s Uniform Domain Name Dispute Resolution Policy. The benefit of such operational dynamics is that it enables the relevant parties to settle the case online, in time with cost-effective management, without the need of physical presence of the parties in the same place.

WIPO’s cooperation for development program is closely interwoven with governmental and intergovernmental cooperation, including WIPO’s agreement with the World Trade Organization (WTO), whereby WIPO assists developing countries in the implementation of WTO’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The problem of development is compounded by rapid technological and scientific progress. WIPO’s approach is twofold. First, is to identify and secondly, to promote international solutions to the legal and administrative problems posed by digital technology, especially the Internet, to the traditional notions and practices of intellectual property.\(^{22}\) Currently WIPO administers 26 international treaties on IP and has 184 countries as members.\(^{23}\)

1.6.3 Trade Related Aspects of Intellectual Property (TRIPS)


\(^{22}\) Supra Note 15

The world trade organization (WTO) Agreement on Trade related Aspects of Intellectual Property Rights (TRIPS) can be considered as the core of the global system of rules, institutions and practices administering the ownership of knowledge, technology, and other intellectual assets.\textsuperscript{24} TRIPS emerged from the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) negotiations (1986-94) and were a victory for multinational companies determined to raise intellectual property standards.\textsuperscript{25} The conclusion of TRIPS represents a revolution in the history of IP protection. By establishing a universal, comprehensive and legally binding set of substantive minimum IP standards, TRIPS both strengthen and supplements the earlier patchwork of international IP agreements such as Berne Convention and Paris Convention.\textsuperscript{26} To meet these standards, TRIPS calls on all of the WTOs 164 members to take action within their borders.\textsuperscript{27} This requirement is particularly onerous for developing countries as TRIPS demands for higher standard of IP protection that most would otherwise provide as highlighted in the following paragraphs from financial as well as socio-political perspective.\textsuperscript{28}

### 1.7 Contrasting Analysis between Developed & Developing Countries

After the inauguration of Paris and Berne Conventions and later on formation of international organizations and treaties such as WTO, TRIPS and WIPO every step has been taken to create harmonization’s or greater uniformity in the intellectual property protection laws throughout the world, but while these efforts are made there is at the same time an increasing sense of dissatisfaction on these laws between the developed and less developed countries\textsuperscript{29}. These stringent laws certainly deprive the less developed countries from free access of much needed information, knowledge and do not take into

\textsuperscript{24} https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm  
\textsuperscript{25} https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm  
\textsuperscript{26} http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1617&context=faculty_scholarship  
\textsuperscript{27} https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm  
\textsuperscript{28} Supra Note 7  
consideration their abilities, interests and cultural differences. Recently it has been seen that access to medicines or patented formulas for medicines is in severe need in developing countries and governments have often breached IP right protections in order to make available cheap medicines for their local population. Some examples include India and Brazil where HIV patents are reportedly infringed in order to produce cheap local medicines produced.\(^{30}\) Furthermore, there is a strong criticism on the TRIPS agreement that it is not well equipped to handle latest Internet and communications technologies.\(^{31}\)

However if look from the perspective of the countries that are responsible for the production of all these patented medicines or all the creative, novel and innovative copyright protected material, we will realize that these IP related industries play a very critical role in the economy worldwide. We can take an example of copyrights for instance whereby the economic role of the copyright industries steadily increased their percentage contribution to U.S. GDP, U.S. jobs and U.S. foreign trade, at multiple rate of growth to the economy as a whole. In one of the old study’s, published in early 2007, the “core” copyright industries accounted for over $819 billion or over 6.5% of the U.S. GDP in 2005 ($173.7 billion in 1990).\(^{32}\) They accounted for 5.38 million jobs, or over 4% of U.S. employment (3.3% in 1990) and were paid average wages 40% higher than the national average. Contributions to foreign trade (foreign sales and exports) exceeded $110.8 billion ($22.3 billion in 1990), larger than any other major sector of the U.S. economy.\(^{33}\)

The significance of this one segment of Intellectual Property law which is copyright in one country, can be estimated by a study, done for the Institute for Policy Innovation (IPI), which concluded that global copyright piracy cost the U.S. economy at least $58 billion in total output in 2006, costs American workers 373,375 jobs and $16.3 billion in earnings, and costs federal, state, and local governments $2.6 billion in tax revenue.\(^{34}\)

\(^{30}\) [http://www.who.int/bulletin/volumes/84/5/news10506/en/](http://www.who.int/bulletin/volumes/84/5/news10506/en/)


\(^{32}\) [http://www.ifpi.org/content/library/20070130-highlights.pdf](http://www.ifpi.org/content/library/20070130-highlights.pdf)


\(^{34}\) Ibid pg200
1.7.1 Financial Aspect

Another aspect that can be considered from the developing countries point of view is the economical burden it constraints upon them. To administer and enforce IP reforms undertaken to implement TRIPS, developing countries faced the cost of financing and enhancing relevant government agencies and the opportunity cost of employing scarce human capital to administer IP rules in the face of more pressing social challenges.\textsuperscript{35} To implement TRIPS, most developing countries needed to develop or import the relevant legal expertise and depended on external assistance to surmount the considerable financial, technical and institutional challenges.\textsuperscript{36} In 2002 world bank estimated that TRIPS implementation would generate annual net losses for Brazil of US $ 530 million, for China of US $ 5.1 billion, for India US $903 million, and for the Republic of Korea of US $ 15.3 billion.\textsuperscript{37} The overarching disparity between developed and developing countries in the generation and ownership of technology continued to fuel global IP debates even as TRIPS implementation advanced. In 2005 despite the growth of Research & Development (‘R & D’) capacity in several developing countries, ten developed countries still accounted for over eighty percent global resources spent annually on R & D, controlled over 90% of technological output and received 90 % of global cross border royalties and technology license fees.\textsuperscript{38}

1.8 TRIPS Trouble

With such realistic scenario on the ground, the steps taken by less developed countries certainly harm the harmonization process intended to work.

\textsuperscript{35} Supra Note 7, pg 28
Non discrimination is one of the bedrock principles of the IP Protection rights and this has been stressed upon so much in every treaty. One can note from Article 3 of the TRIPS agreement which states that

“Each member state shall accord to the national of other Members treatment no less favorable than that it accords to its own nationals with regards to the protection of Intellectual property….”

Article 4 of TRIPS agreement further reiterates the principle of Most Favored Nation (MFN) Treatment

“With regard to the protection of intellectual property, any advantage, favor, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members….”

The minimum, a country can do is to offer equal protection to their fellow states when doing international trade. This is certainly not a new issue and not something out of the blue.

Actions were taken by the international bodies to intervene and solve these differences; however it is pertinent to note that formation of TRIPS, triggered an intense global debate on the relationship between IP regulation and its development39. In view of the, vocal concerns expressed by developing countries during the TRIPS negotiations and after it came to force, one would reasonably expect them to take full advantage of the possibilities, the agreement provides to tailor implementation in response to the national economic and social priorities, however the empirical evidence from 1995-2007 reveal a more complex picture of how developing countries responded to this room for maneuver.

So the question which arises is that why did the developing countries draw the line differently when implementing TRIPS? Why did so many developing countries, but curiously not all implement reforms that went beyond minimum TRIPS requirements? What explains the apparent contradiction between what most developing countries said

39 For summaries of debates that took place during the TRIPS negotiations see CIPR (220), UNCTAD (1996), UNDP (2003b-203-34), Watal (2001), and Yusef (1995). For the views of various economists during the negotiations, see for example Binley (1992), Deardorff (1990) and Rapp and Rozek (1990) pg 28- 37
about TRIPS and what many did in respect of its implementation? By understanding the initial foundation of the structural framework of law, only then we could be able to realize the problems and loopholes causing uneven platform for developed and non-developed part of the world.

1.8.1 Foundational Cracks in TRIPS Implementation

In general scholars of compliance focus on the rules that reflect a balance of advantage in a sense that the governments ought to comply with them either for their own good, for the credibility and durability of the system, or for the sake of some broader global public objective or principles (such as environmental protection, development or human rights).

These assumptions weaken the usefulness of the compliance literature for explaining TRIPS implementation. Only by acknowledging disagreements about the origins, legitimacy and interpretations of TRIPS and the uneven distribution of its benefits, can we understand the politics of implementation and the current regulation of it around the globe.

The demands of diversification are related to less developed countries. They feel threatened by the advance technological and creative process in developed countries and it is natural to feel that it cannot be competed with. Where harmonization creates a balance between the economies of governance and administration and provides safeguards against destructive protectionism but at the same time it limits the prospects of third world countries to advance. Instead of creating uniformity, economically it is increasing the gap between developed and less developed states, by letting developed countries cash out on their

40 Supra Note 7
advance knowledge and facilities and less developed countries always paying for what they in fact could produce themselves, given half the chance.

CHAPTER 2

2.1 Intellectual Property Law & Copyrights

Critically evaluating the formation of the major international instruments that deal with the IP laws around the globe in previous paragraphs, it is safe to assume that the disparity with respect to social, economical and political status of developing and developed nations are poles apart, subsequently resulting into success or failure of countries IP law regimes. Since the wide nature of IP law has been briefly discussed in the introductory paragraphs, and in view of the brevity nature of thesis, I intend to target one of the most complex and controversial areas of IP law which is Copyrights.

The copyright system is considered to burdening consumers, and economy with billions of cost in addition to simultaneously delineating the entire arena of creative works. Furthermore it is also being used as an excuse by the state to increase its surveillance, warrantless searches and seizures, punitive bans of people from the Internet without due process, censorship, cutting off websites accused of piracy, and control and regulation of the Internet and related technologies. As internet is one of the most significant tools ever to emerge to help people battle the state and communicate and learn and spread ideas, this is very chilling.

Before I get into the controversial aspect of the present copyright law from the developing countries perspective, I would critically evaluate the existence of this right through the presence of International legislature.

43 http://c4sif.org/2011/11/patent-vs-copyright-which-is-worse/
44 Copyright bill revives Internet ‘death penalty’; The Ominous PROTECT IP Act and the End of Internet Freedom; Masnick on the Horrible PROTECT IP Act: The Coming IPolice State; ACTA, Executive Agreements, and the Bricker Amendment; As Countries Sign ACTA, Many Finally Admit Their Copyright Laws Will Need To Change; US, EU, Canada, Japan, Australia & Others To Sign ACTA, Despite Legal Concerns; SOPA and Section 1201: A Frightening Combination.
2.2 Copyright and Related Rights

Copyright simply means “the right to copy”. Copyright is a form of intellectual property that gives the author, artist or performer of an original work, exclusive right for a certain time period in relation to that work, for example its publication, distribution, photographing, photocopying and adaptation; after that time the work is said to enter the public domain. Most jurisdictions also recognize the “moral rights” of the creator of a work, such as the right to be credited for the work at all times.\(^{45}\) The time period for enjoying copyright benefits has been internationally standardized; it lasts between fifty to a hundred years from the author’s death or a shorter period for anonymous or corporate authorship.\(^{46}\) Some jurisdictions have required formalities to establish copyright but most recognize copyright in any completed work, without formal registration. Generally, copyright is enforced as a civil matter, though some jurisdictions do apply criminal sanctions. There is a widespread perception of copyright as complex, inaccessible, productive of difficulty, and uncertainty in relation to otherwise lawful activities, and sometimes absurd. On the other hand piracy, the unlicensed mass reproduction of copyright material such as sound recordings, films and computer games for resale at prices far undercutting those of the copyright owner, continues undoubtedly to be a serious issue for the affected industries, as it was also for moot of the second half of the 20\(^{th}\) century.\(^{47}\)

2.3 TRIPS & Copyrights

In the area of copyrights, TRIPS requires most developing countries to strengthen existing rights and adopt new standard. Many of the Agreements provisions do, however provide options and flexibilities as to the scope and degree of protection offered.\(^{48}\) Countries have the opportunity, for example to specify certain limitations and exceptions to the rights of copyright holders.\(^{49}\)

---

\(^{45}\) Supra Note 6
\(^{46}\) Ibid
\(^{47}\) Ibid

Berne Convention strictly deals with the protection of rights of author in their literary and artistic works. Interestingly, TRIPS incorporates, by reference several provisions of the Berne Convention that provide the basis for what is commonly known as fair dealing or fair use with respect to copyright protected works. The Berne Convention provides for instance that governments can permit use (to the extent justified by the purpose) of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such use is compatible with fair practice (Article 10(2)). It also permits governments to allow reproduction of literary and artistic works in certain specified cases, provided this does not conflict with the normal exploitation of the author (Article 9(2)).\(^{50}\) Article 9(2) of Berne Convention which states the three steps test has been adapted in Article 13 of the TRIPS Agreement as well and it has been extensively interpreted in one the report of WTO panel on the case United States-Section 110(5) of the US Copyright Act (WT/DS 160/R) of 15 June 2000.\(^{51}\)

The significant part of the report was the interpretation of the three steps test as established in Article 13 TRIPS. First of all the Panel declared that Article 13 TRIPS is also applicable to the provisions of the Berne Convention incorporated to the TRIPS through Article 9 this Agreement (Par 6.94) and that for the interpretation of Article 13 TRIPS whose precedent is in Article 9.2 of the Berne Convention, the history of this article has to be taken into account.

The panel further declared that one should avoid interpreting the TRIPS Agreement to mean something different that the Berne Convention except where this is explicitly provided for (Para 6.66).

---

\(^{49}\) TRIPS also provides countries a choice as to whether or not comply with Article 6(b) of the Berne Convention, which provides for the protection of moral rights such as the authors right to be credited with authorship of a work that is cites or to maintain the integrity of work.


\(^{51}\) See comments on this case: Ginsburg, Jane; Fiesor, Mihaly, How much of what? The three step test and its application in two recent WTO dispute settlement cases, (2002) 192 Revue Internationale du Droit d’ Auture, 111-251, and Lipszye, Delia, Nuevos temas de derecho de autor y derechos conexos
By reference to the Berne Convention, TRIPS also incorporates the Berne Appendix, which permits developing countries under certain circumstances to use compulsory licensing to purchase or reproduce imports to promote access to literary and artistic works published abroad (such as where the royalties or fees that copyright holders might otherwise demand in return for authorization would be unaffordable).

2.4 Copyright Law & Developing Countries

Most developing countries did not take full advantage of the copyright limitations and exceptions in TRIPS, including those specifically available to them through the incorporation of the Appendix of Berne Convention. The majority of developing countries provided only a limited range of limitations and exceptions to copyright, particularly those with older copyright laws (though many had shorter terms of protection). Perhaps most surprising was that countries made little use of TRIPS flexibilities that might have helped improve access to education and distance learning. Moreover, many developing countries adopted additional TRIPS-plus copyright protection.

The most common limitation and exceptions were those that allowed the incorporation of short extracts of work in teaching material or the performance of a copyrighted work for educational purposes.

Beyond the generally weak use of TRIPS flexibilities, copyright is the area of IP protection in which developing countries demonstrated a particularly strong collective propensity for TRIPS plus standards. Many developing countries adopted laws that extended the term of copyright protection beyond that required TRIPS (i.e. life of the author plus 50 years). Of the 106 developing countries surveyed over sixty five provided a copyright term that extended to or beyond the TRIPS requirement. At the extreme end of the spectrum, countries such Cote d’Ivoir, Colombia, Guinea and Mexico all

---

52 Supra note 7
54 http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1555034&fileOId=1563525
provided life plus 80 years or more copyright protection. By contrast, a number of Least Developed Countries had not yet updated copyright laws and the terms of protection were far shorter.\footnote{https://www.plagiarismtoday.com/2015/09/23/which-country-has-the-longest-copyright-term/} In Haiti, for example, the term of protection of copyright was the life of author plus 25 years.\footnote{Supra Note 7}

**CHAPTER 3**

**3.1 Introduction to Pakistan**

Among these developing countries, there are countries like Pakistan and India which are considered to be the fastest growing economies with extra ordinary potential to be the trade hubs of the world in the next 25 years.\footnote{http://www.forbes.com/sites/timworstall/2016/05/31/indias-economic-growth-up-to-7-9-of-gdp-for-quarter-7-6-for-the-year/#3ba21f9a4777} In light of the recent socio-economic developments of both the countries, in addition to their ideal strategic geographical location, the amount of businesses and markets that it attracts is humongous. India has been considered as one of the fastest growing economies, with a lot of investment being done on the sector of research and development whereas Pakistan has been in the limelight due to its development on the Gawadar port and economic development corridor projects with China where chinese governments have invested huge sum of money.\footnote{http://www.geotauaisay.com/gwadar-and-chabahar-regional-significance.html}

Pakistan’s GDP growth has risen to hover between 4 to 5% in the last couple of years. The present government has taken major steps towards infrastructure development that act as a catalyst to future economic growth.\footnote{http://www.pc.gov.pk/vision2030/Pak21stcentury/Chapter%20Wise/Ch%2005,%20Macroeconomics,%2041-50.pdf} The public private partnership mechanism is gathering momentum in the country. Pakistan’s Foreign Direct Investment (FDI) and import policy are getting gradually liberal. And on the political front, with the growing volatility in the Middle East as well as increasing clout of China, Iran and India, Pakistan has upheld its own value over the last several years.\footnote{http://www.ip-watch.org/2016/05/23/guilty-as-charged-pakistan-and-the-special-301-reports/}
In the light of the above developments, considerable attention needs to be given to the prevailing law conditions of the country and the scope of possibilities that a sound intellectual property framework could act as a catalyst to further enhance the economic, social circumference of these countries. Although both these countries are neighbours who got independant from the british colonies at the same time, therefore in many ways their pathway towards the law making and the hurdles encountered by them resemble.

The emphasis of this thesis would be more on Pakistan as its legislative instrument in relation to IP laws still lags behind in numerous ways to tackle with the growing advancement around the globe. However where nessacary a comparitive analysis would be made with other related countries to understand the operational dynamics and to overcome the existing loopholes.

Like many other developing countries, Pakistan lacks sufficient socioeconomic data mainly concerning the services sectors. It has been a fairly recent development that trade data on services has been separately identified in the national statistics. It is within this data that some of the core sectors of copyright-based industries can be found. In addition to the fact that the world of IP law is not the same as it was 30 years ago. Computational technologies (computers, networks and other new media aspects) enable every person to create and distribute content in the ways that were heretofore limited to professional and corporate creative producers and distributers only.

However before I jump on to the particular topic of Copyrights law in Pakistan, it is essential to understand the presence of current IP regime of Pakistan. The purpose of doing this to understand the broader image of current legal scenario from afar before I narrow it down to one particular controversial area of the subject, nearly in a similar manner as I discussed earlier, the birth of IP laws around the globe before converging to the critical analytical observation of the implementation of IP laws in developing and developed countries.

---

3.2 Intellectual Property Rights & Pakistan

World Intellectual Property Rights Day is celebrated worldwide on 26th April, but in Pakistan it goes mostly unnoticed. For the purposes of enforcement and monitoring the Intellectual Property Rights, the government has furnished an Intellectual Property Organization (IPO), which can be considered as regulatory cum service body, under the administrative control of the Cabinet Division and is directly under the supervision of the Prime Minister of Pakistan.

As per its website: ‘It is an autonomous and corporate body and its governance structure is based on Public - Private partnership. The Deputy Chairman, Planning Commission and six Federal Secretaries represent the Public Sector and eleven Members, including the Chairman, represent the Private Sector’. The Chairman Policy Board is managed by a distinguished and experienced professional from the Private Sector. The Director General is the CEO and Secretary of the Policy Board is a Federal Secretary, which is the highest position in the civil service. Thus the Government of Pakistan has invested its finest human capital in the governance structure of IPO Pakistan’. Its vision is: ‘To put Pakistan on the IP map of the world as a responsible country, by promoting and protecting intellectual property rights’. And its mission is: ‘Integrating and upgrading IP infrastructure for improved service delivery, increased public awareness and enhanced enforcement coordination for achieving the goal of being an IP based nation’.

3.2.1 Ground Reality

However in view of the above mentioned circumstances, whereby one can safely assume that an organization being administered by such distinguished and widely experienced

---

66 Supra Note 49
professionals from the ‘Private Sector’ with such a lofty vision and mission, would be highly focused and aggressive, turns out that the reality is unfortunately entirely contrasting.

Like many numerous organizations with such distinguished personalities, its noble vision, has blurred. The markets are flooded with look-alike products and even the copy-rights logo is being illegally used to cheat the consumers. It is pertinent to note that the level of intellectual property rights protection and foreign investment are directly proportional.

Usually the primary target and victims of the violation of IPR laws are the multinational companies, because of the use of lookalike logos and products by unscrupulous manufacturers. Investors are normally reluctant to invest in the country which is infamous for such blatant IPR violations. Such tarnished image of country, damages the country on many fronts in a manner that not only is it cheating the consumers, but also discouraging foreign investors to invest in the country.67

3.3 International Standing (USTR)

Pakistan’s image in relation to IP law from international perspective can be analyzed by a special report issued by USTR (United States Trade Representative) as per section 182 of amended U.S Trade Act 1974, in relation to global IP infrastructural framework. This special report catalogues specific IPR problems in dozens of countries worldwide.68 Particular concerns have been expressly mentioned in that report about Pakistan, due to a lack of progress in this area subsequently listing us on the Priority Watch List. The annual report issued by the Office of the United States Trade Representative (USTR) is known as Special 301 Report. For the year 2016, if was issued in the last week of April whereby the report discusses the impediments faced by the US nationals and companies due to lack of intellectual property protection in foreign countries.69 The USTR is required to identify countries that fail in providing adequate and effective protection to

67 Supra Note 63
intellectual property rights or restrict market access to the US nationals relying on IPR protection in the host countries.⁷⁰ Countries thus identified are considered Priority Foreign Countries. A country may be considered a priority foreign country even when it is fully compliant with the WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS), the main multilateral agreement on IP rights today. Hence, this legislation and the determinations made in the Special 301 reports prioritize protection of commercial interests of the US nationals.⁷¹

The USTR administers two more instruments under the 301 report: Priority Watch List and Watch List. The reason for creation of such list is in order to ‘assist the (US) administration in pursuing the goals of Special 301 Provisions. Therefore, a country on one of these lists does not fall foul of Section 182, but it may be designated as a Priority Foreign Country in the next edition of the Report if the USTR determines so.⁷²

### 3.4 Pakistan & Special 301 Reports

USTR released its first 301 Report in 1989 and for the initial four years the reports featured all US trading partners on the Watch List for the purposes of engaging them in negotiations with respect to IP protection in a manner acceptable to the US companies. From 1993 onwards, countries were specifically named. Pakistan appeared on the Watch List in that year because of alleged trademark and copyright violations, especially of textile designs and interestingly remained on this list for various perceived violations till 2003. In 2004, the US elevated Pakistan to the Priority Watch List but moved it again to Watch List in 2006. Pakistan reappeared on Priority Watch List in the 2008 Report where it remained till 2015. Hence, the country has been on one of the two lists throughout the 27-year life span of the 301 process.⁷³

### 3.5 The 2016 Special 301 Report

---

⁷¹ Ibid
⁷² Ibid
⁷³ Ibid
⁷⁴ Supra Note 68
On a brighter note the report of 2016 has been better in case of Pakistan as for the first time since 2007 Pakistan was moved from the Priority Watch List to the Watch List. Two key sectors have been highlighted where the US perceives improvements in Pakistani IP governance. The first one is the establishment of IP tribunals in major Pakistani cities such as Lahore, Karachi and Islamabad. Second is the Government’s commitment to a transparent process of amendments in the Pakistani IP laws. All major laws such as copyrights, patents and trademarks would be amended by the end of the year, although the Report does not mention what those amendments would be. USTR is satisfied by the fact that the draft of the Plant Breeders Act is now in the National Assembly.\textsuperscript{74}

The digitization of data at the Trade Mark and Copyright registries and its subsequent usage by the Federal Bureau of Revenue (FBR) to control trade in pirated and counterfeit goods at the borders is appreciated in the report. The FBR Rules on the enforcement of IPRs are also being finalized.\textsuperscript{75} The Report also mentions a commitment from the Pakistan officials to engage with the US IPR officials on a regular basis in the areas of judiciary, enforcement and legislative reforms.\textsuperscript{76}

\section*{3.6 USTR Probes the Light}

In accordance with the past practices, the USTR advises Pakistan to ensure and synchronize the implementation of IP law. It strongly encourages Pakistan to reform its copyright law to tackle piracy in the digital sphere. With regard to violations in other copyrighted or trademarked products, the USTR suggests that Pakistan should introduce deterrent level penalties for criminal IP infringement in addition to giving ex-officio authority to enforcement officials. Furthermore USTR also asserts that Pakistan should provide an effective system of protection of the pharmaceutical safety and efficacy data, collective called test data.\textsuperscript{77}

\textsuperscript{74} Ibid
\textsuperscript{75} http://www.fbr.gov.pk/PressRelease.aspx?type=A
\textsuperscript{76} Ibid
\textsuperscript{77} Supra Note 68
The review related to Pakistan ends on the note of the Out-of-Cycle Review (OCR) whereby there shall be an evaluation on the quality and timeliness of government’s reform efforts, especially with regard to legislative reforms, effective enforcement measures and success of the IP Tribunals in providing relief to the right holders.\footnote{Supra Note 70}

### 3.7 USTR’s Legal Standing

An interesting fact that needs to be put in limelight is that the Special 301 Review process itself is in violation of international IP legal instruments. It is apparent from the above discussion that the above report acts as a unilateral pressure instrument forcing countries to implement IP legislation serving the interests of US commercial entities irrespective of whether they are in line with the national interests of the trading partners. Such nature of pressure is a clear violation of not only the report but the whole process as per Article 1 of the TRIPS Agreement. According to this article WTO Members cannot be obliged to implement in their laws stricter protection than required by the TRIPS Agreement.

### 3.8 Consequences

In case of not complying with Section 182 for a US trading partner, the reaction would be the withdrawal of benefits under the Generalized System of Preferences (GSP) program of the US. Under this system, the US allows imports from developing countries on preferential tariffs.\footnote{https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp} The GSP system was agreed in 1979 through a General Agreement on Tariffs and Trade (GATT) decision entitled ‘Differential and more favorable treatment reciprocity and fuller participation of developing countries’.\footnote{https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm} This decision specifically states in paragraph 5 that preference-granting countries (including the US) would not demand any reciprocation from the beneficiary countries (including Pakistan).\footnote{ibid} Therefore, any such sanctioning would violate this GATT decision, which has now been vetted by the WTO Members.
Hence, even if a country fails to fulfill the requirements as per the existing standards of the TRIPS agreement, the US still cannot initiate unilateral retaliatory measures or sanctions. The procedure will be to go through the WTO dispute settlement mechanism. Consequently, the Special 301 Review process is highly problematic in light of Article 23.2 of the Dispute Settlement Understanding of the WTO, which expressly prohibits Members from making a ‘determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded.’

From one perspective it can be assumed that the GSP system is a favor from the developed to the developing countries. But, reality is rather the other way round. This system is equally beneficial to the preference provider as well. For example, a 2006 US Chamber of Commerce study found that the GSP program provides the following advantages to the US such as it keeps US manufacturers competitive because of cheaper raw materials. Moreover it provides savings to many small businesses in the US allowing them to compete with their far stronger counterparts; and that the program supported at least 82,000 jobs alone in 2005. In addition to the direct benefits, the program also ensures the exporter to the US market, as the former would develop its business network there, and in some cases even invest in downstream activities like distribution and marketing.

Either way, the consequences of withdrawal of the GSP benefits are perceived to be bigger than they actually are portrayed and this can be supported by Pakistan’s exports and Foreign Direct Investment statistics in recent years. Pakistan’s total exports to the US stood at $3.6 billion 2013. Of this, only $195 million qualified under the GSP scheme. This means that of the total Pakistan’s export, merely 5% (in terms of value) benefitted from the GSP. Moreover, of the $19.9 billion US imports under GSP from all developing countries in the same year, Pakistan’s share of the pie was a measly 1%. As a proportion to total Pakistani exports to the world the number shrinks even further: 0.7%. The flipside

---

82 [https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_09_e.htm](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_09_e.htm)
84 [http://www.tradingeconomics.com/pakistan/foreign-direct-investment](http://www.tradingeconomics.com/pakistan/foreign-direct-investment)
of the coin presents a gloomier picture. In 2015, the US Foreign Direct Investment (FDI) in Pakistan fell to its lowest in the last 10 years to $209 million. That is an astounding 84% decrease since 2007-08. A less than 1% of preferred access and 84% decrease in FDI surely fail to make a case for a continuous shaming spanning over three decades.\textsuperscript{85}

The word is in the air that the US GSP program may end on December 31, 2017. It is not certain if it would be extended however the changes demanded by the US in national IP laws, on the other hand, are in most cases permanent. It is generally unlikely that the IP legal standards are rolled back once any external pressure subsides. Such implications would yield very obvious results as it not hard to access implications of the trade-off between short-term benefits and long-term costs to its economy, especially if the latter are adopted without analyzing national socio-economic imperatives.\textsuperscript{86}

Chapter 4

4.1 Copyrights & Pakistan

From the above discussion it can be deduced that the overall IP law regime in Pakistan needs some serious consideration in order to refurbish its tarnished image. Although, it can be debated in light of the preceding paragraphs that such image is slightly exaggerated by the developed nations, whereas they are themselves in conflict with international instruments, but nonetheless such deteriorated image does harm country on international forums. However, as said earlier the purpose of above mentioned detail was to understand the base area of the subject matter in Pakistan before converging into one of the significant segments of IP law which is copyrights industry. One can safely assume that law in relation to copyright would be suffering from the similar fate, however before critically bashing the law itself, it would be pertinent to know what law in relation to copyright in Pakistan is based upon.

Initially the copyright legislation in Pakistan was based on British Copyrights Act (1911) which had been replaced by Copyright Ordinance (1962) followed by amendments in the

\textsuperscript{85} Supra Note 68
\textsuperscript{86} ibid
year 1992 in compliance with TRIPS Agreement. Similarly, the Copyright Rules of 1967, the Copyright Board (Procedure) Regulations (1981) and the International Copyright Order of 1968 were amended in the year 2002. Pakistan’s copyright law protects the literary works, musical works including any accompanying words, dramatic works including any accompanying music, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works categories pursuant to section 10 of Copyright Act.

4.1.1 Ownership of Copyright

Copyright regimes around the world usually determine the fact of the rightful ownership of copyright based upon the nationality, domicile and place of first publication of the work and similar is the case with Pakistan. In order to determine who would be deemed to be the rightful owner of copyright in Pakistan, the relevant sections that would need consideration are Sections 10, 13 and 54 of the Act.

Pakistan is a member of the Berne Convention and the Universal Copyright Convention. And pursuant to SRO No. 790 (K)/68 “International Copyright Order, 1968, all the provisions of the Copyright Ordinance, 1962, other than those of Chapter (IV) thereof (Rights of Broadcasting Organisations) apply to members of the Berne Copyrights Union and the Universal Copyrights Convention.

In view of the above international treaties and agreements to which Pakistan is a signatory to, it is possible to conclude that foreign works of most countries of the world including the U.S.A. and those in Europe are protected in Pakistan.

92 http://www.vellani.com/copyright.html
4.1.2 Registration of Copyright is not mandatory

Section 39 of the Ordinance provides for registration of copyright. When Section 39 is read with Section 10(1) of the said Ordinance there is no doubt that copyright subsists by virtue of creation in respect of the expressly mentioned categories of works. Registration of copyright is merely optional. In any case as Pakistan is a member of the Berne Copyrights Union and the International Copyrights Union, Pakistan cannot impose any formal registration requirements in order to protect foreign copyright works within its own jurisdiction.

However, registration of copyright under Section 39 of the Ordinance by the author (owner) or other person interested in the work such as an exclusive licensee (distributor in Pakistan) shall constitute according to Section 42 of the Ordinance prima facie evidence that copyright subsists in the work and that the person shown in the certificate as the owner of the copyright is the owner of such copyright.

A certified copy of the registration in any country which is a member of any one of the International Conventions should facilitate registration of copyright in Pakistan. The owner of copyright or his exclusive licensee in Pakistan can apply for registration of copyright in Pakistan under Rule 4(1) of the Copyright Rules, 1967. The application is to be accompanied by a copy of the work along with the prescribed government filing fee in the sum of Rs. 500.00.

4.1.3 Rights of Exclusive licensee versus free movement of goods

United States Anti Trust law also referred to as Competition Law are for the purposes of promoting fair competition and breaking down exclusive monopolies of business corporations or individuals for the benefit of consumer and public at large. It is apparent that this principle directly contradicts with the principle of copyright protection which is based on exclusive monopolization of the rightful

---


94 Ibid 92
owner. In the U.S.A. the Government has brought suits against various, British and American Publishers on complaints that their Agreements were in breach of the Anti-Trust Laws of the U.S.A., and consent decrees have been secured which ensure that the publishers are enjoined directly or indirectly from preventing any purchaser of a lawfully published work from importing or exporting such works to or from the U.S.A.\textsuperscript{95}

In the U.K., which is a member of the European Economic Community, certain public policy principles such as free movement of goods, have had an impact on national copyright law. Apart from such converse European Economic Community policies some jurists have even suggested that since copyright does not encompass subsequent sale and use there exists an implied permission to export work which have been marketed by the owner of copyright. Furthermore an expressly or impliedly licensee may confer authority to produce copies in one country and then to transship them to another, notwithstanding the prohibitions in the copyright law in the country of import.\textsuperscript{96}

Such converse policies and considerations in the U.S.A. and EEC countries were tested in cases brought against parallel importers in Australia and India.

In Time-Life v/s Inter-state Parcel (1978) F.S.R. 251. Time-Life was exploiting its copyright in certain books by licensing them exclusively to a Dutch subsidiary, which in turn sublicensed an exclusive distributor in Australia. A parallel importer brought copies in the U.S.A., where it was first published, from the American licensee. The importer argued that he had an implied licence to import and sell the books in Australia by reason of the sale in U.S.A. in the ordinary course of business without restrictions on resale.\textsuperscript{97}

The high Court of Australia interpreted the Australian Copyright Act, which, in relevant part is parameter to provisions on the Copyright Ordinance 1967 in

\textsuperscript{95} http://www.zainassociates.com/articles/Article2.pdf
\textsuperscript{96} Ibid
\textsuperscript{97} Ibid
Pakistan, and held that an importer who purchased books in the U.S.A. from an American Licensee of the copyright infringed the Australian Act by importing the books into Australia without the permission of the Australian Licensee. The Court further held that the unconditional sales in U.S.A. did not carry any implied licence to import into Australia. In the circumstances, it was not necessary to show an express limitation such as (“not for sale in Australia”), or surrounding circumstances such as knowledge of exclusive distributorship in order to negate the argument in support of implied licence to export and/or import.  

4.1.4 Case Law in South Asia

There is no substantial case law directly on point in Pakistan. However, in Penguin Books Limited, England v/s Indian Book Distributors and others AIR 1985 reliance was placed on Time-Life International v/s Interstate Parcel Express Co. in order to prove secondary infringement by the importer. The case of the Plaintiff/Appellant Penguin Book Limited of England was that they were exclusive licensee and assignees of territorial rights in copyright in the imported books for India. Being exclusive licensee they claimed that they were entitled to restrain Indian Book Distributors from importing the parallel American Editions of 23 titles in India. The Court held at page 34, para 22, as follows:

“Importation of books which are ‘infringing copies of the work’ is an infringement. So is the sale thereof. If any person, without the licence of the copyright owner imports into India for the purpose of selling or distributing for purposes of trade the literary work the copyright is infringed. Any importation of infringing copies is therefore an infringement unless it is for the importer’s own use. American books may be lawfully published in America. But when the copies of those publications are imported into this country, an action for infringement would lie in this country against the importer in respect of those copies. An action would also lie against any person who for instance sold or distributed such copies.

http://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1547&context=sol_research
https://indiankanoon.org/doc/1899039/?type=print
here. Because the books have been imported and sold without the licence of the owner of the copyright or his exclusive licensee.”

The Court observed at page 35, paragraph 23, that;

“Infringing copy” is defined in S. 2(m). An infringing copy means a copy “imported in contravention of the provisions of the Act”. The central provision in S. 51 which says copyright shall be deemed to be infringed where any person without a licence granted by owner of the copyright “does anything the exclusive right to do which is by this Act conferred upon the owner of the copyright. The owner of copyright or his licensee has the “exclusive right” of printing or otherwise multiplying publishing and vending copies of the copyrighted literary production in India. India Distributors are infringing this right. Therefore India Distributors are deals in “infringing copies”. They are handling unlicensed copies.”

Before dealing with the issue of infringement the Court addressed the argument raised by the Defendants with respect to an implied right to import conceded by the Plaintiffs in a consent decree in the U.S.A. Under the terms of the consent decree the Plaintiffs were enjoined and restrained directly or indirectly from preventing or restricting any purchaser of lawfully published books from importing or exporting such books to or from the United States. In the U.S.A. such restrictions violate anti-trust laws. On this issue the Appellate Court was of the view that the relevant clause of consent decree has no extra territorial effect. According to the Court all jurisdiction is properly territorial, and that such a clause does not destroy or qualify the statutory rights belonging to publishers, which they may have in foreign countries under regional arrangements.

The Counsel for the Plaintiffs contended that importation is forbidden unless a license is given. Unless this view is accepted not only will the right to grant exclusive licenses be affected, but the national regimes of copyright, existing
under International treaties, in so far as they provide for partial assignments and exclusive licenses, would become ineffective. On this issue the Court held at page 32 in paragraph 10 as follows:

“Copyright law is a territorial concept and each nation has its own laws. In America it may not be possible to place restrictions on the resale of books. But sale within the United States obviously cannot abrogate the effect of the laws of the particular place where they are imported. It appears to me that an importer would be subject to the law of the particular country to which he happens to take the books. The importer cannot disregard the laws of other countries. I would decide against the freedom (“liberty” as the learned Judge phrased it) from restriction claimed by India Distributors. The learned Judge upheld this freedom. In my respectful opinion he was wrong. American books cannot be sold into India so as to defeat the rights of the exclusive licensee.”

In the light of the abovementioned cases it evident that in India and Australia, and in all probability in countries outside the EEC the national copyright law will prevail over claims of implied licence to import. In this respect the copyright law in Pakistan is paramateria and the Courts are more than likely to take the same view. In the circumstances, it is possible to conclude that outside the U.S.A. and the EEC there is no general “concept International exhaustion” in national copyright regimes.102

### 4.1.5 Case law in Pakistan

There has been a recent landmark ruling on the issues related to copyrights, in an intellectual property tribunal in Lahore, Pakistan in September 2016. The tribunal passed an interim ruling restraining a website (“rightjobs”) from displaying any job postings uploaded on another website (“rozee.pk”). The

102 [https://pakistanconstitutionlaw.com/copyright-law/](https://pakistanconstitutionlaw.com/copyright-law/)
tribunal also ordered the removal of all previous job postings by rightjobs that had been taken from rozee.pk.\textsuperscript{103}

Brief facts of the case are that Rozee.PK files a copyright case against RightJobs before Intellectual Property Tribunal with a plea that RightJobs had been copying its job postings on its website without its permission or the permission of the companies that posted the jobs originally on Rozee’s site.

While hearing the case, the Tribunal issued an interim order and heavily restrained RightJobs from displaying, offering, advertising job postings copied from Rozee.PK in addition to ordering of removal of all previous jobs on their site.\textsuperscript{104}

Ironically Pakistan’s online space was largely considered a lawless land till now. Anyone could freely copy anyone’s content and build their online empires on content that’s produced by others but this case seems to finish the era of ignorance.\textsuperscript{105}

Owner of rozee.pk stated that “when jobs are copied from our site without permission by third party sites, candidates unknowingly share their personal information with unauthorized sources and underlying companies never see their applications. We are committed to safeguarding our members’ personal information at all costs and are hopeful that this landmark injunction will serve as a precedent to prevent similar violations for other online publishers.” The act of unauthorized copying is a major concern for both employers and potential applicants as the personal information they submit to such websites can be used for various unethical and illegal purposes. Employers on the other can get a bad image as such activities violate confidentiality of job applicants not the mention the fact that employers have a right to control where their representation exists.

\textsuperscript{103} \url{http://pakwired.com/rozee-pk-wins-a-case-against-rightjobs-for-online-copyright-offense/}
\textsuperscript{104} \url{https://propakistani.pk/2016/09/26/rozee-pk-gets-landmark-ruling-rightjobs-online-copyrights-violations/}
\textsuperscript{105} ibid
Pakistan’s cyber space is mostly unregulated. However, the ruling will surely set a precedent and encourage others to approach courts to protect their copyrights and intellectual property.

4.2 Pakistan Copyright Law & International Standards

Taking a critical perspective over the present copyright regime of Pakistan, it seems like merely an obfuscate product of thoughtless legal transplantation. The primary legislation in this area, the Copyright Ordinance 1962, has been blindly adopted from the United Kingdom. This has subsequently led to a highly ineffective framework for copyright in addition to the fact that the inherited flaws in the UK’s copyright law have also been automatically incorporated in our system. Unsurprisingly then, our copyright framework provides insufficient protection to relevant copyright owners in addition to being obsolete.

The efficacy of any law is subject to certain external aspects including but not limited to political, legal and social milieu of the country in which it is in force. The reason behind the lack of effectiveness of laws in Pakistan is the mechanical copying of foreign laws into our domestic law without tailoring them according to the country’s political, legal, and social context.106

There are numerous copyright codes around the world which are based upon such theories that lend greater clarity to its object and purpose. Taking example of the US, where the principles of utilitarian theory is adopted and based for copyright law. The utilitarian theory implies that the copyright acts as a reward and an incentive to the creator.107 While on the other hand, France’s copyright law is founded on the basis of personality theory which protects the spirit of the author.108 Whereby interestingly, UK’s copyright law, however, lacks a clear philosophy without which, it attempts to achieve all but at the same time nothing.

107 http://www.law.harvard.edu/faculty/tfisher/iptheory.html
In light of above situation where fully borrowing the copyright regime of another country without critically evaluating the pros and cons, naturally mirrors its hapless philosophy as well. The Copyright Ordinance thus makes an ambitious attempt to protect authors but by failing to articulate the reason for such protection, it remains ambiguous and meaningless.

Another area which has caused considerable botheration due to this legal transplantation is with respect to the categorization of subject matter. The subject matter under the copyright law is the work which qualifies for protection. It can either be characterized according to the ‘closed list’ or ‘open list’ system. Under an ‘open list’ system, the subject matter of protection is broadly defined whereas under the ‘closed list’ system, it is compartmentalized into a few protectable categories\textsuperscript{109}. The UK follows the ‘closed list’ approach. Its Copyright Act is structurally complex and pigeonholes the protectable works to only a handful of categories\textsuperscript{110}

Accordingly, Pakistan has also restricted protection to a few categories. This is reflected in Section 10 of our Copyright Act, whereby a copyright only subsists in original literary, dramatic, musical and artistic works, cinematographic works and records. The overarching issue with such operational dynamics is that authors are precluded from protection if they fail to bring their creation within one of the categories\textsuperscript{111}

For a developing country like Pakistan, innovative technological advancement is an essential catalyst in order to achieve economic development. Such inflexible circumference of the law results and rather has rendered Pakistan’s current copyright law ill-equipped to deal with technological developments in the creation and exploitation of work. The rigidity of a ‘closed list’ system is catastrophic for spurring innovation.

The quantity of foreign investments and transfer of technology are directly proportional to the strengths and weaknesses of a country’s copyright legal regime and therefore has a

\textsuperscript{109}http://www.barcouncil.org.uk/media/313944/_46__stephanie_wickenden.pdf
\textsuperscript{110}Supra Note 106
\textsuperscript{111}Ibid
direct impact. It is obvious that an effective system of copyright protection has a positive impact on investment.\textsuperscript{112}

By way of example, the compilation of a database requires substantial investment; investors would hence be reluctant to invest in the creation of databases in Pakistan since the copyright law affords them limited protection. Similarly, investors would be deterred from investing in the creation of works other than those protected by the copyright.\textsuperscript{113}

4.2.1 Probable Solution

In the given circumstances it is apparent that it is highly unsuitable for Pakistan keep on relying on copyright law in its current imported form especially since the economic realities and imperatives of the UK and Pakistan are completely different. Interestingly UK has realized the demerits of such regime and therefore in view of its EU commitments, they would be amending their law.\textsuperscript{114} But the issues remain that what should country like Pakistan do?

The probable solution is to immediately consider incorporating relevant copyright laws from more progressive systems such as Netherlands or France. For example, under the Dutch Copyright Act, anything can be protected as long as it is original and perceptible\textsuperscript{115}. The expansive nature of protection is evident from the fact that even perfumes are protected under the copyright law. Similarly, the French Intellectual Property Code affords protection “in all works of the mind, whatever their kind, form of expression, merit or purpose”.\textsuperscript{116}

It is safe to assume that a workable domestic copyrights legal regime is an essential requirement in light of the revolutionary advancement around the globe and the only way possible is that the laws shall be reflective of our own cultural

\textsuperscript{112} https://www.publicknowledge.org/files/TPP%20Econ%20Presentation.pdf
\textsuperscript{113} Supra Note 82
\textsuperscript{114} https://hansard.parliament.uk/commons/2016-10-12/debates/F327EC64-3777-4D40-A98D-BEC2E11763A2/ParliamentaryScrutinyOfLeavingTheEU
\textsuperscript{115} http://www.wipo.int/wipo_magazine/en/2006/05/article_0001.html
\textsuperscript{116} https://www.legifrance.gouv.fr/content/download/1959/13723/version/3/file/Code_35.pdf
and economic values in addition to being adaptable to the fast paced technological evolution which strives to enhance and preserve them.

Chapter 5

5.1 Digitization:

Copyright law emerged during the analogue era and since then has evolved accordingly to cope up with new developments in digital reproduction and distribution age. Over the years, copyright law has managed to compete with the major advances in technology for example reprography, and is now beginning to respond to the new needs of major players in digitized time.

The digital world is understood in terms of binary codes that are 1s and 0s and it is these bits and binary codes on which the cyber world is founded upon. Conversion of analog information into digital information is usually defined as the digitization process. It has reinvented the working structure for television, music, book, gaming and film industries. With such advancement in science all the images, videos, music and text are reproducible multiple times to an infinite extent. The progression of digitalization chipped together with internet has revolutionized almost every sector of our daily lives, and it is feared that the countries that fail to accustom their laws in accordance with this development, will be left behind.

Such fast paced evolutionary process of technology has already affected the developed countries like Pakistan. Digitization has put the sector of IP law in limelight. Although the governments, legislators, think tanks, advisory committees are all working in collaboration with each other to tackle the Genie which is already out of the bottle. But even with all that collaboration the developed countries are moving steadily towards the goal to make themselves the world’s favorite destination for investments.

118 http://www.irjcjournals.org/ijmssr/sep2013/3.pdf
119 http://catalogue.pearsoned.co.uk/assets/hip/gb/hip_gb_pearsonhighered/samplechapter/0273752634.pdf
Like every other aspect of life, the process of digitization has its own merits and demerits. Digitization has aided in establishing many start ups into a multinational companies thereby giving access a variety of global market places.\textsuperscript{120} Such facility of overreaching a global market enhances the company’s capacity to incorporate customer’s feedback for product improvement, increased collaboration among industries and has almost evaporated the entry level obstacles. One can note from the recent example of India when the Indian government’s moved towards digitizing of the cable networks across country by the end of 2014.\textsuperscript{121} This resulted in a huge positive impact on the TV industry by boosting up the subscription revenues.

There is no doubt that digitization has made a significant impact on the economic growth of India. According to KPMG media and entertainment report 2013, The Indian Media & Entertainment industry grew from Rs 728 billion in 2011 to Rs 820 billion in 2012, registering an overall growth of 12.6 percent. Going forward, the sector is projected to grow at a healthy CAGR of 15.2 percent to reach Rs 1661 billion by 2017.\textsuperscript{122} Television continues to be the dominant segment; however, the report records strong growth posted by new media sectors, animation/ VFX and a comeback in the Films and Music sectors on the back of strong content and the benefits of digitization.\textsuperscript{123}

5.2 Piracy

One of the primary mediums through which the products of digitized information is dealt and processed, is possible through a computer program or a device with computing capacity. As the technology has evolved thereby making life easier for many segments of society and life itself, unfortunately it has simultaneously brought equal amount of trouble and nuisance as well. One such nuisance is copyright piracy which has assumed

\textsuperscript{120} https://hbr.org/1983/05/the-globalization-of-markets
\textsuperscript{123} ibid
around the global. Digital revolution means that greater opportunities exist to create and disseminate works. But it also increase the risk of piracy as these material can be acquired easily and copied and transmitted in perfect form worldwide.

The ulterior motive behind such actions is to dodge payment of legitimate taxes to the Government and royalty to owners of copyright works. Even the computer programs/softwares are not safe from piracy resulting in the loss of revenue in numerous industries that deal with digital content and media in one way or the other.\textsuperscript{124}

Like many other third world developing countries, Pakistan has plethora of video parlors and rental outlets. They have sprung up to exhibit sell and hire out uncertified video films and pirated sound recordings of local and foreign copyright works. However rigorous amendments have been made in the copyright laws of many third world countries at the insistence of International Organizations and the countries which are badly affected by such illegal acts.

5.3 International Norms Concerning Copyright Protection of Computer Programs

The prominent international legal instruments that primarily deal with the copyright protection of computer programs can be noticed in two international treaties, namely Article 10(1) of the TRIPS Agreement and Article 4 of the WIPO Copyright Treaty (WCT). Although the sentence structuring of both these instruments is slightly different, yet these two provisions both state that computer programs should be protected as literary works, and that the protection should be the same as that granted to such works under the Berne Convention. However this does not mean to exclude the fact that national laws may categorize computer programs as a separate category of works, provided that the level of protection is not lower than that granted to literary works under the Convention. Moreover the TRIPS Agreement reiterates that the protection applies to computer programs “whether in source or object code”, while the WCT expresses the same in a less

\textsuperscript{124} ibid
technical form: “Such protection applies to computer programs, whatever may be the mode or form of their expression.”

5.3.1 Legislative Steps to Combat Piracy in Pakistan

In order to combat piracy Pakistan also amended its Copyright Ordinance, 1962 in 1992. The legislative intent was primarily for two purposes, namely, to extend the scope of protection to new forms of copyright material and to ensure stringent enforcement of copyright. In accordance with the recommendation of the World Intellectual Property Organization (WIPO) Section 2, clause (p) now includes computer programs within the definition of literary works. In addition Clause (ca) to the said Section incorporates a new definition of audio visual works which covers all forms of visual and sound recordings regardless of the nature of the material object, such as film or tape in which the work is embodies. The clause (h) video films of every kind were included in the definition of the cinematographic works.

Major changes in the copyright legislation were made in the area of enforcement of copyright by the copyright (amendment) Act, 1992. Section 66 has been amended in order to enhance the punishment for infringement of copyright to imprisonment which may extend to 3 years and/or a fine which may extend to Rs. 100,000/- and in the case of a second conviction section 70(b) stipulates the fine may extend to Rs. 200,000.00.

Pursuant to Section 74, as amended all offences under the copyright law have been made cognisable and non-bailable. It further provides a Police Officer may if satisfied seize without warrant all copies of the work and all plates and recording equipment for purpose of making infringing copies. Prior to the amendment such Police Officers could only seize infringing material after a Magistrate had taken cognizance of the matter.

According to new Section 57(a), new disclosure requirements are required to be displayed on records and video films. Today publishers of records and video films in

---

125 The scope of protection for computer programs under Article 4 of WCT, read with Article 2, is consistent with Article 2 of the Berne Convention on a par with the relevant provisions of the TRIPS Agreement.

126 See Copyright (amended) Act 1992
respect of any Pakistani works are required to display on the record and video cassette and containers thereof the following information:

(a) the name and address of the person who made the record or video film and in the case of video film a declaration by him that he has obtained the necessary licence or consent from the owner of the copyright for making said video film;

(b) the name and address of the owner of the record or video film;

(c) the year of first publication in the case of a record and a copy of the censorship certificate in the case of film.\textsuperscript{127}

The display of the above mentioned information will greatly facilitate the detection and prosecution of pirates.

Considering the extent of piracy of foreign audio visual works it would be advisable to extend the disclosure provisions to publication of foreign audio visual works. At any rate the restriction to Pakistani works does not effect the copyright as such in foreign works and the right of the owner to sue for infringement thereof. Failure to comply with the said provision is punishable with imprisonment which may extend to 3 years and/or with fine which may extend to Rs. 100,000.00 in accordance with Section 70(a).\textsuperscript{128}

5.4 Piracy: A Myth or Reality

There are certain countries that are infamous for the purposes of being a piracy hub of technological world such as China, Singapore etc. Among these countries Pakistan is also perceived under the widely accepted notion of being a major hub of piracy in the world. According to Business Software Alliance, Pakistan had 84\% software piracy rate in 2007,\textsuperscript{129} and is considered to be same in 2015 as well.\textsuperscript{130} When considered individually, it seems a substantial percentage. However, the fact of the matter is that such figures are

\textsuperscript{127} ibid
\textsuperscript{128} ibid
\textsuperscript{130} https://www.techjuice.pk/pakistan-has-the-second-highest-software-piracy-rate-in-asia-pacific/
aimed for contemplation in the light of software piracy rate of other countries when taken together only.

Ashraf Kapadia, Managing Director for Systems Limited, (Pakistan’s oldest Information Technology Company formed in 1977 having a competitive edge in Software Development and Business Process Outsourcing (BPO) in the world, gives an interesting comparative analysis between the distinction of piracy among developed and developing countries.\(^{131}\)

“It is the ‘value of piracy’ that matters. For instance, the 5% piracy rate in US with a $3 trillion revenue base will generate more piracy loses than those recorded in Pakistan with considerably small revenue base”

Enterprises are losing huge loads of money in this raging battle of piracy. The enterprises can further be classified into two broad categories: multinationals and locals.

The major targets are the multinational companies as they have innovative solutions and software applications hence facing most of the piracy issues. While on the other hand, Pakistan ICT firms do not face any such instances in the local market due to lack of innovation culture\(^{132}\). And few of those providing advanced solutions take serious protection measures to reduce counterfeiting possibilities to negligible.

Shehryar Hydri, Chief Executive Officer for Trango Interactive states that “Pakistan ICT industry is based on 90% companies who are members of multinationals and have not much stake in Pakistan. Therefore, they are not affected by local software piracy. However, the remaining 10% of ICT companies like us who make products for the local usage and thus, are extremely affected by software piracy prevailing in the country,”

Trango Interactive is the only Pakistani IT firm that has been awarded Red Herring’s Asia 100 Winner Award; a distinction that makes it the cutting-edge private technology

company in Asia. Trango Interactive specializes in Web Games Development and recently has made a breakthrough by entering into Interactive Computer Graphics arena.\textsuperscript{133}

5.4.1 Minimizing Software Piracy

One pertinent factor that impacts significantly in order to keep the piracy tendency steady and going is the cost of software in high demand. As quoted by Shehryar Hydri

“For instance, the costs of original software CD is Rs.4000, why would the users like to go after it when the counterfeited CD is available for Rs.50 in the market. As a consequence, the original software CD due to its expensive-and-non-affordability nature is pirated and brought into the market at lower rates. The users cannot be tuned in to buy the expensive CD.”

According to Shehryar Hydri “One possible way to minimize software piracy tendency in the country is to have strong enforcement model in place which provides immediate and long lasting remedies to the victims of software piracy. That includes permanent shutdown of all illegal distribution, torrent websites; heavy penalties should be imposed on the pirates. Until and unless, these rules are intact, intellectual property thieves will remain free to exploit us.”\textsuperscript{134}

However the question then can be raised to the practicality of the legal enforcement model and its actual implementation. Usually the way to resolve a legal dispute is done through knocking at the door of court of law. But would that knock yield the desired results? Whether the justice is being provided efficaciously? More importantly whether the judicial system of a country is capable enough to tackle with the problems of fast paced evolutionary world?

Chapter 6

\textsuperscript{133} \url{http://www.redherring.com/events/red-herring-asia/}
\textsuperscript{134} \url{http://afshanzia.blogspot.com/2009/03/ceos-walk-ipr-talk.html}
From the above discussion the only probable solution so far seems to be through the amendment of law and its effective implementation. However like many other developed countries, Pakistan has transformed their intellectual property laws in line with the internationals standards but it seems that the root cause of the problem is yet to be identified. Although developed countries are already struggling with the plethora of disputes in relation to IP laws as per one study copyright disputes could soon outnumber patent infringement matters in the United States, but luckily for developing countries the number of disputes are not that much. One can say that the reason that the developed countries face those disputes is because of these developing countries, but even the developing countries are now gradually adopting the innovative landscape resulting in disputes of IP law emerging in their boundaries too.

The growing strength of the information available on the Internet, including all the digital content reaching to the every corner of the world, is mounting the value of copyrights. Disputes involving only copyrighted video make up a significant number of total copyright suits. The disputes range from battles between whales of media industry looking to offer similar products to content owners going after individual infringers.

With the rise in copyright litigation in the developed world, it is likely many companies, especially those that use digital content such as video, will find themselves either bringing an action or defending against a dispute. In the end, irrespective of the fact that whether it’s a developed or developing countries, the relevant parties on both sides of a copyright dispute desire to fully assess the value and importance of a copyright to their bottom line, the strength of their respective cases and the resources including time and money they are willing to commit to litigation.

As discussed in the preceding paragraphs that the quantity of litigation with respect Copyrights in Pakistan is almost negligible, due to lack of public awareness in addition to the fact that the judicial processes are expensive, time consuming and also in view of the fact paced evolutionary technology, they lack the necessary equipment to tackle the

disputes in the digital age. Hence, the preferable forum for confronting the complex issue, is usually considered through ADR, as one can realize the significance of it through WIPO’s official site.

6.1 Alternate Dispute Resolution

International commercial arbitration has progressed to be one of the most efficacious ways of dispute settlement outside the arena of national courts. The probability of achieving timely economic solutions in addition to providing finality through fast and informal procedure allures the corporate interest. Another benefit is the confidentiality of parties which plays a significant role when parties intend to protect their trade secrets and commercial interests. These factors are essential when dealing with cross border transactions involving foreign investment where neutrality in terms of venue, the law and the arbitrators are considered prime by the parties in settling their disputes. Such neutral nature makes it possible for the arbitral tribunal deciding the issues in dispute isolated from any direct or indirect national influence hence ensuring satisfactory loyalty, primarily to the parties. Thus, such mechanism provides a level playing field for both parties involved. It is pertinent to note that although the above mentioned qualities portray the feasibility of that arbitration offer but there are various other elements that make or break the entire arbitration such how well is the arbitration agreement drafted, the experience and competence of arbitrator and how a judge of a national court perceives the entire process of arbitration.

Today the most important field of international arbitration is foreign investment. The use of arbitration for resolving investment disputes provides a safe haven especially for foreign investors involved in global economic activity due to its trusted, credible and workable system in place. This safe haven encompasses two main things which are essential if party’s interests or expectations are to be preserved, the first is neutrality and the second is enforceability. These two points essentially curtail the grip of national courts.136

6.2 Arbitration and Intellectual Property Law

136 http://www.academia.edu/26539291/Pakistans_case_with_Arbitrability
From preceding paragraphs it is safe to presume that methods proposed in alternate dispute resolution precisely suit commercial intellectual property disputes. Usually the disputes in relation to IP law does not require an "either/or" result in which one party walks away with all the rights at issue, rather parties often consider some form of shared rights to be an acceptable, or even preferred, result.\textsuperscript{137}

Moreover the complexity of IP laws challenges the legal regime of certain developing countries due to their technical nature. Frequently, the legal issues require an arbiter to develop an understanding of the underlying technology involved. Parties may feel more comfortable with the ability to choose at least one arbiter whose background and knowledge.\textsuperscript{138}

The nature of copyright cases is fairly constrained in scope and complexity. Rarely do these cases require extensive discovery or documentation. Because similarity is viewed from the perspective of the "ordinary observer," no particular expertise is\textsuperscript{139} required or appropriate for deciding these types of cases. Accordingly, these cases often are amenable to resolution through ADR, but no more or less so than most relatively straightforward commercial disputes.

Disputes involving duplication or derivation of computer software and other highly technical issues, which are slightly more technical and complicated can also be appropriate candidates for ADR.\textsuperscript{140} Since parties understand the value added advantages of utilizing an arbiter with a particular technical background and ability to evaluate the subject matter at hand, ADR becomes an alluring option for resolving a dispute. Of course, disadvantages associated with some ADR methods, such as the unavailability of provisional relief or the absence of a jury trial, may also be important factors to a particular party. Nevertheless, the costs, duration, and complexity of technical software

\textsuperscript{137} See Hupp v. Siroflex of Am., Inc., 122 F.3d 1456, 1464 (Fed. Cir. 1997) (citing the well established "ordinary observer" standard).
\textsuperscript{138} \url{https://www.wcl.american.edu/journal/lawrev/47/blackman.pdf}
\textsuperscript{139} Ibid
disputes are often much easier to handle and control through ADR than by litigation. Unlike a trial, ADR allows the parties to determine for themselves the degree to which such information will or will not be made publicly available. This would likely be considered a substantial advantage in disputes regarding computer software, for example, where continued confidentiality is often a primary concern.

6.2.1 Pakistan ADR Experience

In Pakistan though there have been cases where the clause in the arbitration agreement has been wide enough to allow the arbitrators to rule on it validity and retain their jurisdiction however international arbitration is considered more risky than advantageous due to interventionist approach of the local courts during the arbitral process and at the time of enforcement of awards. Such behavior shows that there is an inherent distrust among the Court of Pakistan in the international process of arbitration especially in the field of foreign investment which the courts see as a vehicle solely for the benefit of the foreign party and one which will inevitably have a detrimental effect on the interests and expectation of the local party. Therefore arbitration is a mechanism considered inferior to the court. Such attitude has led Pakistan to earn reputation as arbitration black spots.

In Pakistan it is established law that matters involving question of criminality or public policy cannot be referred to arbitration. It is more controversial in matters of fraud or corruption where arbitrators can render the contract void. The Pakistani courts have had a keen interest in the arbitral process especially if the seat of arbitration is in Pakistan. This can be seen from numerous cases such as Rupali Polyster Ltd v Bunni, where the Pakistani courts will adopt an interventionist approach and take over the role of the arbitrator if the parties have decided Pakistan as the law in the contract. Similarly the

---

142 ibid
Indian Supreme Court’s comments in National Thermal Power Corp. v Singer Co.\textsuperscript{146} and the Singapore Court of Appeal comments in PT Garuda Indonesia v. Birgen Air show that where the parties have decided on the seat of arbitration, then that law will apply where the seat has closest territorial connection with in such cases mostly the national Courts will intervene and conduct the proceedings.

6.2.2 Infamous Case Law

One of the worth mentioning case that led Pakistan in earning an unstable reputation in the field of arbitration worldwide is of HUBCO Power Company v WAPDA.\textsuperscript{147} In this case the Supreme Court refused to enforce an arbitration agreement between Hubco (subsidiary of Britain’s National Power set up with World Bank support) and the Pakistani government on allegations of corruption and illegality in the revised terms of the commercial contract.\textsuperscript{148} The Supreme Court judges held that the case was prima facie one of the corruption and thus would be dealt fairly judicially instead of referring it to arbitration. This decision negated and violated the basic premise on which the international arbitration rested which was doctrine of separability.\textsuperscript{149} According to the principles of severability of arbitration clause, the illegality only goes to the substance of the main contract and does not affect the arbitration clause so therefore even if the agreement furnished between the parties is tainted by corruption, the clause to refer to arbitration still does not lose its legal validity. The courts were adamant that since the contract documents were tainted by alleged criminality, therefore it fell under the domain of the national courts hence the dispute was rendered non-arbitral and subsequently resulting to non referable to the arbitration.

Another significant decision adding on to the uncertain and stigmatizing future of arbitration in Pakistan is the recent RekoDiq\textsuperscript{150} case which was criticized to have chilling

\textsuperscript{146} \url{https://indiankanoon.org/doc/633347/}
\textsuperscript{147} \url{https://ranarizwanhussain.wordpress.com/tag/hubco-v-wapda/}
\textsuperscript{149} \url{http://courtingthelaw.com/2016/02/08/commentary/pakistans-case-with-arbitrability-2/}
\textsuperscript{150} \url{https://dawncompk.files.wordpress.com/2013/01/reko-diq-short-order1.pdf}
affects on foreign investors investing in Pakistan. The Supreme Court in its short order dated 01-01-2013 held that the joint venture agreement signed in 1993 between the respondent company Tethyan Copper Company (TCC) and Government of Baluchistan and the predecessors in interest of TCC was not valid as it was marred by illegality. This decision raises few important questions. What is the basis of such illegality? Who eventually determines the illegality? Should the courts interfere before even the arbitration is conducted? This decision shows serious discrepancies on the part of the State party which allows us to question that to what extent is the foreign investor liable for the action of the Government which does not itself follow the correct protocols and procedures laid down?

It is important to note that due to wider acceptance of bilateral and multilateral investment treaties many developing countries have rejected matters regarding concession agreements and natural resources projects as non-arbitrable and have let arbitral tribunal consider such matters.

The Supreme Court verdict in certain cases whether it relates to RekoDiq or others is a sign of discouragement for foreign investors. Such decisions have not only created uncertainty for foreign investment in Pakistan but also upset the entire process of international commercial arbitration which was set in place to create an even level field for both the domestic and foreign investors alike.

### 6.2.3 The way forward

In order to improve the current image of Pakistan in the arena of arbitration around the globe, there is a need for some serious steps to be taken to overcome the illogical precedents set. If the foreign investors will have complete faith in Pakistan Legal System, only then one can see free flowing capital investment, which is clearly not the case as discussed. From the above discussion of the highlighted cases one pertinent aspect that can be noted is the fear amongst the investors that the arbitration agreements will not be respected. Hence, the reality is that their capital, flow to a much protected and neutral destination where courts are not interfering and using a suffocated approach towards

---

international commercial arbitration. Although the national courts may have the intention to safeguard the valuable national resources and responding according to the public mood, however in the long run, such decisions may continue to haunt the nation and end up costing the country and its taxpayers far more.

7 Conclusion

As far as the rules governing the Intellectual Property Rights through international instruments are concerned, what in my opinion needs to be done here is to acknowledge the needs and differences of different member states rather than using the concept of “one size fits all” technique. Jurisdictional competition should be promoted and help should be provided to less developed countries to develop legal system and challenging and encouraging economic policies. This kind of leniency and charitable attitude was seen during Doha Rounds, where an extended transitional period of 10 years was given to less developed countries to incorporate protection laws regarding pharmaceuticals.152

As discussed earlier, the use of bilateral and pluri-lateral agreements to enhance their positions to be in a stronger bargaining position as well as to avoid any discrepancies in the process. Robert Zoellick opined on this that, the “can do” countries from the “won’t do” and it “will move towards free trade with only can do countries.153

Similarly the issues regarding the creation of non national systems as a response to internet dispute such as of domain names ownership, is equally as important as the reliance on the alternate methods by right holders. Many countries are not fully equipped to even consider new technological protections due to lack of infrastructure and required knowledge so they have to rely on the principles of convergence. There is no doubt that IP right should be protected and there should be stringent safety guidelines to do so, but at the same time, disharmonizing issues as stated above need to be addressed effectively as they not only involve major stake holders of tomorrow but also major contenders in the economic and financial market.

153 http://www2.weed-online.org/uploads/Watch%20out%20beyond%20the%20WTO.pdf
The Pakistani courts need to redefine the approach of its Courts to international arbitration. There is a need to reform the law especially in the field of arbitral disputes. A criteria needs to be set that specifically defines the stage at which the courts could interfere in determining matters of public policy. Is it pre-enforcement of award stage or is it during arbitral process? The lack of guidelines for the private investors have led to decisions such as RekoDiq where the courts have declared illegality without giving detailed reasoning to foreign investors of where they went wrong. There is a need of reform of legal process which directly interferes with the arbitration process. Such legal mechanism need to be put in place that compliment and assist international commercial arbitration instead of hampering it.

Most importantly there is a need of changing judicial mindset towards the arbitral process. Pakistan is labeled to have defensive and interventionist posture rather than just a supervisory one in the arbitration process. There is a need to recognize the pitfalls created with involvement of courts and its drawbacks for the overall economy. With the investment climate already fragile there is a need of foreign investment. However the deep entrenched distrust is only creating more fear than anything positive. This mindset can only be evaded with more academics, lawyers and judges having a pro arbitration stance and judging international arbitration as a neutral concept.
References

Conventions

- Berne Convention for the Protection of Literary and Artistic Works; Paris Act of 24 July 1971, as amended on 28 September 1979
- Paris Convention for the Protection of Industrial Property 1883
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961

Treaties & International Agreements

- WIPO Copyright Treaty, 20 December 1996
- Performers and Phonograms Treaty 1996

Statue

- Copyright (Amendment) Act 1992

Constitution

- The Constitution of Islamic Republic of Pakistan

Books

Articles/ Journals


Websites

- https://ranarizwanhussain.wordpress.com/tag/hubco-v-wapda/
- https://www.wcl.american.edu/journal/lawrev/47/blackman.pdf
- http://www.academia.edu/26539291/Pakistans_case_with_Arbitrability
- http://www.wipo.int/about-wipo/fr/history.html
- https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm
- https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm