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A HISTORICAL REVIEW OF INTELLECTUAL PROPERTY RIGHTS IN THE
PALESTINIAN TERRITORIES

by

IHAB GEORGE SAMAAN

(Under the Direction of Professor PAUL J. HEALD)

ABSTRACT

Before introducing any new intellectual property (IP) laws in the Palestinian Territories, it is necessary to determine which IP laws are in force there today. This study traces the development of IP laws in Palestine since the end of the Ottoman era until the Palestinian Authority assumed responsibilities in certain parts of the West Bank and Gaza Strip. The study then summarizes the pertinent laws established as currently in force, and offers a comparative analysis of these laws with the requirements of the TRIPS Agreement. Finally, this study raises a number of crucial issues that must be addressed prior to undertaking any attempt to replace the existing IP laws in the Palestinian Territories.

INDEX WORDS: Palestine, Ottoman Empire, British Mandate, Egyptian Administration, Jordanian rule, Israeli Occupation, Palestinian Authority, Intellectual Property Laws, Trademarks, Patents, Designs, Copyright, TRIPS Agreement.

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DEDICATION

To my parents for never letting me down
and to my wife
for her support and patience

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Lee Ann Bambach and Maiser Abunaj were our family away from home, who's unconditional support, warmth and hospitality towards both my wife and myself has made our stay in Georgia as pleasant and enjoyable as one could hope for. I can never thank them enough.

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CHAPTER 1

INTRODUCTION

Sometime during the year 2000 I attended a roundtable at the Grand Park Hotel¹ in Ramala organized by the U.S. Consulate in Jerusalem. The guest speaker at the roundtable was a lawyer working with the United States Trade Representative (USTR) in Geneva, who had come to discuss with those present the importance of protecting intellectual property for the development of any society -- including the Palestinian. A representative of the Palestinian Ministry of Trade quickly reassured the speaker that the Palestinian Authority (PA) was indeed working on preparing new intellectual property laws for the Palestinian Territories. The majority of those participating in the roundtable, including myself, had no knowledge of such an initiative nor its contents.² Further, when a question was posed to the speaker about the possible negative effects on the fragile Palestinian economy as a result of protecting foreign works, he gave no answer.

¹ A luxury hotel with a fancy restaurant, bar and café built in Ramala in the nineties after the Oslo accords and became the immediate choice for special events and conferences.

² The web site of the Palestine Trade Center -- PalTrade – (www.paltrade.org) mentions that the PA is working on such a law but this information was posted on the web sometime during the year....and has not been updated since. In an attempt to get a feedback from Paltrade on the status on the draft law I was forwarded to the Ministry of Trade. Despite e-mails sent to the Ministry no response was received (on file with the author). However it should be pointed out that since 1998 there has been an initiative for a new Copyright law in the Palestinian Legislatvie Council, but has not advanced since then, in file with the author. We mention this draft in the last chapter of this Thesis. Recently a workshop was held in Ramala attended by representatives of the Ministry of Trade to discuss issues related with Intellectual Property; *Al-Quds* newspaper, May 23, 2003.

Very few of us knew at the time that the U.S. had already been investigating allegations brought by the IIPA³ in 1999 and 2000 against the Palestinian Authority claiming that the Palestinian Territories had become a hub of IP piracy⁴ and demanding that the USTR take action against the PA in the form of economic sanctions under Special 301.⁵

A day will come when an independent Palestinian State will be a reality, necessitating the formidable task of creating institutions and capacities⁶ necessary for the good governance of the country. The challenges awaiting the Palestinians are not to be taken lightly and will require strong willed and future-looking leadership. In addition, significant financial resources will be needed to overcome decades of Israeli military occupation that has left the entire civil infrastructure of Palestine in ruins.

Paramount among these many challenges will be establishing the rule of law. This will require an independent and qualified judiciary and capable practitioners, as well as a legal system adapted to the social and economic needs of the young state and its relations with the world in this new era of globalization.

³ The IIPA, International Intellectual Property Association, was established in 1984 and includes eight member associations each representing an important sector of the U.S. copyright industry, including the Association of American Publishers, Business Software Alliance, Computer and Business Equipment Manufacturers Association, Information Technology Association of America, Motion Picture Association of America, National Music Publishers Association, and Recording Industry Association of America *see* www.iipa.com.

⁴ In their 2000 report submitted to the USTR stated that “The Palestinian Territories have become a hub of pirate optical media production in the Middle East, and continue to churn out thousands of pirate videos and audiotapes per day. Several CD production facilities churn out pirated audio CDs pirated CD-ROMs (of videogames or compilations containing thousands of dollars each of pirated software from different manufacturers) destined for sale in the territories and for export into neighboring Israel and elsewhere”, available at http://www.iipa.com/rbc/2000/palestinian_authority_2000.pdf (last visited Nov. 10 2002).

⁵ 19 U.S.C. sec. 2241. Special 301 empowers the USTR in certain cases to investigate claims against other countries that they are not providing, amongst other issues, sufficient protection to U.S. IP rights and to take retaliatory measures if the country so found fails to supply the protection demanded. For the influence of the IIPA on the decisions of the USTR and the US government in general on issues of IP protection *see* Paul C.B. Liu, U.S. Industry’s Influence on Intellectual Property Negotiations and Special 301, 13 UCLA PAC. BASIN L.J. 87, 87 (1994).

Putting priorities in the correct order will also be a challenge. Among the responsibilities that will face the architects of the new state will be to determine which laws or regulations need to be addressed immediately, and which can wait. And any changes ultimately made must be made for the correct reasons. The roundtable speaker mentioned above significantly forgot to include in his speech some interesting, and highly pertinent, historical facts about the development of the United States's own intellectual property laws. Specifically, the fact that during the nineteenth century the U.S. declared an official policy not to respect any foreign copyrighted material in order to provide the people with affordable education and that, additionally, at a much later stage when the U.S. started to respect foreign copyrighted materials, it was only under the condition that such materials be printed in the U.S. to help boost the local publishing industry.⁷

Almost immediately after the first Oslo Accords, the Palestinian Territories started to swarm with international experts sent by their governments to help the Palestinians “modernize” their institutions -- including the Palestinian legal system and its laws. Even before the Palestinian Territories resembled anything like a state, the Palestinian Authority was strongly “encouraged” to adopt new laws in a number of different areas,⁸ in many cases without a study of the impact of this modernization on the

⁶ The author is quite aware that many institutions have been created after the Oslo Accords and even before, and thus should have maybe said “developing the existing institutions and capacities”.

⁷ See Aubert J. Clark, *The Movement for International Copyright in Nineteenth Century America*, (1960), for a brief summary see William P. Alford, *Don't Stop Thinking About...Yesterday: Why There Was No Indigenous Counterpart To Intellectual Property Law In Imperial China*, 7 J. CHINESE L. 3, fn. 8 at 6 (1993).

⁸ During this period the PA adopted the Law for the Encouragement of Investment in Palestine in 1998; Industrial Cities and Free Trade Zones law in 1998; the Commercial Agents Law in 2000; the Palestine Labour law in 2000; the Criminal Procedure Law in 2001 in addition for the preparation of many draft laws, all available at <http://www.pal-plc.org/arabic/laws/lawslist.asp?cat=0>, last visited November 6, 2003.

society or even addressing the question of whether any change at all was truly necessary at this juncture.⁹

Before promulgating new IP laws, an understanding of the existing IP laws in the Palestinian Territories should be a first priority. This may seem obvious, but it is by no means straightforward. The fact of the matter is that there has thus far been no study establishing which IP laws are really in force there today. This view is not mine alone. A very recent legal history study¹⁰ noted the:

Large gaps also exist in our knowledge of specific areas of Palestinian law, and some have not been studied at all. Thus, not a single study of the history of tax legislation and case-law exists, nor are there works *on the history of intellectual property*, corporate law or even contract or tort law in Palestine.¹¹

In addition, in the absence of a thorough study, some mistakes have already occurred when referring to the existing intellectual property laws in the Palestinian Territories. This was evidenced in a recently published book that collected most of the intellectual property laws in the Arab countries,¹² including the laws in the Palestinian Territories.¹³ While a formidable piece of work, the book contained many very grave mistakes concerning Palestinian law, such as making no mention whatsoever of the laws in force in the West Bank,¹⁴ stating that the 1922 trademarks ordinance -- which was repealed in

⁹ However some Institutes took it upon themselves to create a forum in which these laws can be discussed before they are adopted such as the activities of the Institute of Law at BirZeit University that since its establishment in 1995 was a very active and driving force in this direction.

¹⁰ Israeli Legal History: Past and Present, Ron Harris et al in *The History of Law in a Multi Cultural Society-Israel 1917-1967* (2002).

¹¹ *Ibid*, p. 9

¹² Talal Abu-Ghazaleh, *Intellectual Property Laws of the Arab Countries*, (Kluwer Law International 2000).

¹³ *Ibid*, p. 619

¹⁴ *See below* Chapter 3. We will mention these mistakes in the body of our study, but we can already summarize that the laws of the West Bank are missing in their entirety, while those mentioned are either repealed versions, such as the Trademarks ordinance of 1922, or bringing the regulations instead of the primary legislation such as in the case of patents and designs.

1938 -- remains in force,¹⁵ and referring to the regulations concerning patents and designs but failing to mention the primary law.¹⁶ In addition, the book made no mention at all of the existence of any Palestinian copyright law.¹⁷

To assist in this crucial understanding of current laws, at a time when talks are under way on the possibility of drafting a new IP law for Palestine, this study will attempt to look back and define which laws regulating intellectual property existed in the Palestinian Territories prior to the establishment of the Palestinian Authority as well as the origins of such laws. In order for us to do so, we must establish legal continuity since the end of the Ottoman rule over Palestine and until the assumption of power by the Palestinian Authority. Accordingly, legal continuity has to be established between each of the different stages of rule over Palestine since the end of the Ottoman era. This will be dealt with in the next chapter.

Once legal continuity is ascertained, the next chapter will trace the development of IP laws from the sunset of the Ottoman era over Palestine until the transfer of authorities from the Israeli Military Administration to the Palestinian Authority (PA), and thereby establishing those IP laws that existed on the eve of the assumption of authority by the PA. This chapter will [conclude with?] a brief synopsis of the provisions of the main laws that remained in force.

The fifth chapter will be divided into three parts. The first part will discuss the relevance of the TRIPS Agreement to the Palestinian Territories. The second part will be

¹⁵ See below chapter 3.

¹⁶ See below chapter 3.

¹⁷ See below chapter 3; in addition until very recently (last visited June 3, 2003) the website of Abu-Ghazaleh Intellectual Property stated that there is no law governing copyright in both the West Bank and the Gaza Strip, this has been changed only very recently to state that "Information in the area is being prepared and will be posted promptly" available at <http://www.agip.com> (last visited July 12, 2003)

a general introduction to the provisions of the TRIPS Agreement. The last part will compare some of the provisions of the existing laws with some of the more obvious provisions of the TRIPS Agreement. In the last chapter we shall attempt to address some of the questions that should be raised and considered seriously by the PA before adopting any new law or amending any of the existing IP laws.

CHAPTER 2

LEGAL CONTINUITY: FROM THE OTTOMAN ERA TO THE PALESTINIAN AUTHORITY

A. Methodology

There is currently no official collection of the laws, regulations or other legislative decisions that are in force today in the Palestinian Territories. This means that any attempt to discuss whether a law exists, or whether it has been repealed or amended, has to be preceded with an understanding of the different legal layers that make up the law in Palestine today. Unlike most of the countries of the western hemisphere that have enjoyed legal continuity for some hundreds of years, the Palestinian Territories have within the span of fifty years¹⁸ changed hands multiple times: from the Ottomans to the British, then from the British to the Jordanians in the West Bank and the Egyptians in the Gaza Strip,¹⁹ and then from these two countries to Israel in both the West Bank and the Gaza Strip, before finally coming under the authority of the Palestinian Authority, at least in parts of the West Bank and the Gaza Strip.²⁰

¹⁸ From 1917 when the British Army (The Egypt Expeditionary Force) occupied Jerusalem from the Ottomans until 1967 when the Israeli Army (Israel Defense Forces) occupied Jerusalem from the Jordanians.

¹⁹ Of course not mentioning that Israel was established in 1948 on the larger parts of Palestine, which is clearly not included in this study, and the rest becoming what is referred to today as the West Bank and the Gaza Strip.

²⁰ The Oslo Accords did not transfer to the Palestinian Authority control over all of the Palestinian territories occupied by Israel in 1967, actually the contrary. The Palestinian Authority received only full control in the major parts of the Gaza Strip and in those areas of the West Bank designated as Areas A and civil authority, including Judicial, in the areas designated as Areas B while Israel retained full control of the

Due to these consecutive changes of hand, in the first part of our study we will explain how legal continuity was maintained from the Ottoman era until the transfer to the Palestinian Authority. Once this threshold requirement of legal continuity has been established, we can go back to the Ottoman era and to ascertain which intellectual property laws existed at that time which remained after the British took over. This process will be repeated for each subsequent change of hands until we reach the present time.

B. The Relevance of the Ottoman Era

Palestine was part of the dominion of the Ottoman Empire from 1516 until 1917. During that time the laws in force in Palestine were the Ottoman laws that were the law of the land in all parts of the empire.²¹ Until the middle of the nineteenth century, most, if not all, of the Ottoman laws were based on the Islamic *Shari'ah*, or religious, laws.²² However, by the middle of the nineteenth century, and mainly as a result of western influence and pressure, the Ottoman Empire underwent legal reform. These reforms, known as the *Tanzimat*, reformed and codified many of the Ottoman laws and restructured the court system in order to modernize them both.²³

larger parts of the West Bank, the areas generally referred to as Areas C, see Interim Agreement on the West Bank and the Gaza Strip 36 I.L.M. 551 (1997) and see Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories*, (Hague 1997) for a better understanding of the situation on the ground.

²¹ The principal exemption to this rule were the capitulations that exempted some of the foreigners from the Ottoman laws gave them special rights and were entitled to be adjudicated in front of their consuls. For an excellent review of the situation in the Ottoman Empire see Robert H. Eisenman, *Islamic Law in Palestine and Israel*, Leiden 1978.

²² *Ibid*, at 2.

²³ See Moshe Ma'oz, *Ottoman Reform in Syria and Palestine 1840 – 1861*, Oxford 1968, at 21; see also *Ibid*. at 2 and 12.

In order for us to understand the relevance of the Ottoman laws that were in force prior to the British Mandate, one must refer to article 46 of the British Order-in-Council of 1922²⁴ which stated in relevant part that:

The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914, and such later Ottoman laws as have been or maybe declared to be in force by Public Notices, and such Orders in Council, Ordinances and regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted...

Thus, by virtue of article 46, all the Ottoman Laws that were in force prior to November 1, 1914 remained in force, while any Ottoman laws issued after that date were considered not to be in force unless declared to be by a Public Notice. In addition, articles 73²⁵ and 74²⁶ of the Order-in-Council made it clear that all orders issued during the British military period and all the laws or regulations promulgated during the civil administration until the establishment of the mandate were to be considered as done in conformity with the requirements of the 1922 Order-in-Council, thus preventing the possibility of any legal gap between the occupation of Palestine by the British in 1917 and the establishment of the Mandate in August of 1922.

²⁴ Available at Norman Bentwich, *Legislation of Palestine*, 1918-25, 2 vols., Alexandria 1926 at v.1 p. 1; available also at <http://domino.un.org/UNISPAL.NSF/0/c7aae196f41aa055052565f50054e656?OpenDocument> (last visited 7/11/2003). We have omitted here a discussion of the Military Administration period, December 9, 1917, until July 1, 1920 and the Civil Administration period, July 1, 1920 until July 24, 1922 upon the establishment of the Mandate and satisfied ourselves with Mandate period and the Palestine Order-in-Council of 1922. For a summary of the proceeding periods *see* Eisenman at 11 for the Military Administration and at 73 for the Civil Administration.

²⁵ *Ibid.*

²⁶ *Ibid.*

C. The Relevance of the British Mandate

As we mentioned earlier, in order for the laws of the British Mandate to be of relevance we have to establish that there was legal continuity from that era to the subsequent era, in which the West Bank and Gaza Strip were controlled by Jordan and Egypt, respectively, that preceded the British Mandate over Palestine.

After the creation of Israel in 1948 on the greater part of what was British Mandate Palestine, the remaining parts of Palestine fell under Jordanian control in the area known as the West Bank and under Egyptian control in the areas known today as the Gaza Strip. We shall first start with examining the legal situation in the West Bank and then turn to the situation in the Gaza Strip, showing that in both regions the laws of the British Mandate remained in force until, of course, later affirmatively repealed or amended by the new controlling power.

C.1. In the West Bank

Article 2 of Jordanian Law No. 20 of 1948 (enacted May 13, 1948), entitled Schedule to Defense Law of 1935, extended the effect of the Jordanian Defense Law of 1935, as well as all regulations issued or to be issued pursuant to it, over all areas where the Jordanian Arab Legion might be found or entrusted with the maintenance of the peace and order.²⁷

Article 3 of the said law gave the prime minister the authority to delegate the powers

²⁷ Official Gazette (Jordan) No. 739, May 8, 1948, available at <http://213.244.124.245/data/pdf/1948/1066.pdf> (last visited July 12, 2003)

given to him under that law to any commander, officer or public servant.²⁸ Initially the West Bank came under Jordanian Military Administration on May 19, 1948, with a General Military Governor appointed and exercising his authorities in accordance with the said Defense Law pursuant to Proclamation No. 1, dated May 24 1948.²⁹ The General Military Governor issued Order No. 2 on May 24, 1948, in which he declared that all laws and regulations that were in force in Palestine on May 15, 1948 would remain in force in the areas administered by the Jordanian Army “in so far as such laws and regulations did not contradict the Jordanian Defense Law of 1935.”³⁰ Law No. 48 of 1949, which was enacted in December of 1949, granted the King of Jordan all the powers that the King of England and his Government had had over Palestine and further dictated that all “laws and regulations that were in force in Palestine [were] to remain intact unless repealed or amended.”³¹ The West Bank was formally annexed by Jordan in 1950. Jordan did so by formally uniting both the land on the East Bank Jordan River (i.e., Jordan) and the West Bank (i.e., Palestine) under the Hashemite Kingdom of Jordan in a special resolution adopted in a session of both Houses of Parliament on April 24, 1950, composed of equal number of representatives from both Banks.³² To avoid any confusion as to which laws applied after the unification of the Banks, article 2 of Law No. 28 of 1950, adopted on September 16, provided:³³

Even though the two Banks (the East and the West) of the Hashemite Kingdom of Jordan were united, the laws and regulations that are in force

²⁸ *Ibid.*

²⁹ See Kasim p. 27. For the text Kasim at fn. 30 refers to 3 Compilation of Laws and Regulations Issued and in Force in the Hashemite Kingdom of Jordan until 1960, at 13

³⁰ Kasim, p. 27; see also Mogannam at p. 196.

³¹ Kasim, p. 27. According to Kasim “The law also provided that all orders, instructions or directions issued by the King, the Military Governor or the General Administrative Governor should be deemed valid in the territory”, id. p. 27; see also Shehadeh, *From Occupation to Interim Accords*, p.77.

³² Id. p. 28.

³³ Id. 28.

in each of them shall remain in effect until new unified and universal laws for both Banks are issued, with the approval of the Parliament and the Endorsement by His Majesty the King.³⁴

As Anis Kasim rightfully points out in his study *Legal Systems and Developments in Palestine*,³⁵ as a result of this legislation “there were laws and regulations that were valid and applicable in one side of the Kingdom but not in the other. However, new legislation was enacted by the Jordanian Parliament in the period between 1950 and 1967 and these applied equally to both sides of the Kingdom.”³⁶

Despite this unification process, ultimately it did not result in the repeal of all the laws that were in force in the West Bank prior to the unification with the East Bank. One such example is the Civil Wrongs Ordinance No. 36 of 1944³⁷ as amended by Civil Wrongs Ordinance (Amendment), No. 5 of 1947.³⁸ This ordinance was never repealed by any later legislation and remained in force in the West Bank but not in the East Bank. Another such law of relevance to us here in this study is the Copyright Act (1911) as will be explained later.³⁹ Before we end this section and to close this circle, it is worth noting that the Hashemite Kingdom of Jordan adopted a new constitution in 1952.⁴⁰ Article 129

³⁴ Not available in Al-Muqtafi

³⁵ Anis Kasim, *Legal Systems and Developments in Palestine*, Palestine Year Book of International Law, v. 1, 19 (1984)

³⁶ Kasim, p. 28; *see also* E. Theodore Moganam, “*Developments in the Legal System of Jordan*”, The Middle East Journal, v. 6, Spring 1952, p. 194 explaining that: “With the election of the new Parliament the Government announced a program for the unification of the laws of the Kingdom, and accordingly a Judicial Committee was appointed to draft laws for the whole of JordanAs a result of the efforts of this committee a number of laws have subsequently been enacted, but in branches where no unified laws have been passed, each side of the Jordan still applies its own laws embodying different principles”, p. 196.

³⁷ Official Gazette (Palestine) No. 1380, December 28, 1944 at 149, available at <http://213.244.124.245/data/pdf/1944/3895.pdf> (last visited July 12, 2003)

³⁸ Official Gazette (Palestine) No. 1563, March, 15, 1947 at 52, available at <http://213.244.124.245/data/pdf/1947/3902.pdf> (last visited July 12, 2003)

³⁹ See below Chapter 3 section B.

⁴⁰ Jordanian Constitution of 1952, Official Gazette (Jordan) No. 1039, January 8, 1952, available at <http://213.244.124.245/data/pdf/1952/1066.pdf> (last visited July 12, 2003)

of the Constitution of 1952 repealed the Jordanian Constitution of 1946⁴¹ and the Palestine Order-in-Council of 1922,⁴² but it asserted that nothing in this repeal shall affect “the legality of any law or regulation issued pursuant to them⁴³ or any act made pursuant to them prior to the coming into force of this Constitution.”⁴⁴ In addition, article 128 of the Constitution stated “that all laws, regulations and all other legislation in force upon the coming into effect of this constitution shall remain in force until repealed or otherwise amended.”

This stage in Palestine’s legal history ended with Israel’s occupation of the West Bank in June of 1967, which will be discussed in Section D below.

In summary, therefore, all the laws and regulations in force in the West Bank on the eve of its occupation by the Jordanian Arab Legion remained in force after such occupation. This prevented the creation of any legal vacuum and maintained legal continuity, including of course the IP laws and regulations in force at the end of the Mandate.⁴⁵

C.2. In the Gaza Strip

The Gaza Strip, unlike the West Bank, was not annexed to Egypt, but rather placed under Egyptian Administration from May 26, 1948, under the control of an army officer

⁴¹ *Ibid*, Article 129(1)

⁴² *Ibid*, Article 129(2)

⁴³ Referring to the Jordanian Constitution of 1946 and the Palestine Order-in-Council of 1922

⁴⁴ *Ibid*, Article 129(3)

⁴⁵ As we shall see when discussing the legislative activity during the Jordanian era over the West Bank some of the IP laws inherited from the British Mandate were later repealed; see below Chapter 3 section D.

functioning as an “Administrative Governor.”⁴⁶ As Kasim⁴⁷ explains, “[d]uring this period between 1948 and 1967, the Egyptian Administration retained most of the basic legislation that was inherited from the Ottoman and the Mandatory authorities. The new legislation introduced by the Egyptian authorities during this period was largely regulatory, procedural and administrative in nature.”⁴⁸

The continued force of the inherited legislation was guaranteed in the following manner. On June 1, 1948, almost immediately after placing the Gaza Strip under Egyptian administration, the Administrative Governor issued Order No. 6.⁴⁹ This Order declared that “all courts operating in the areas subject to the supervision of the Egyptian Forces in Palestine should continue their functions in accordance with the laws, orders and regulations that were in force before May 15, 1948, to the extent that they do not contradict what had already been issued or is to be issued afterwards by the competent authorities in charge of these areas”.⁵⁰ In 1955 the Egyptian Government issued a Basic Law for the Gaza Strip⁵¹ that served as a basic constitutional document for this part of Palestine.⁵² Article 45 of this Basic Law “confirmed that the Palestine Order-in-Council 1922 and all Laws that were in force in Palestine and all laws, orders and instructions that were issued by the Egyptian military or administrative authorities subsequent to the entry

⁴⁶ Kasim, p. 28. Kasim explains that this authorization was made by virtue of Order No. 153/1948 issued by Egypt’s Minister of National Defense but the text of the order is not found, however it was relied upon by the Administrative Governor in exercising his authority.

⁴⁷ Id. p. 29

⁴⁸ Id. p. 29.

⁴⁹ Text in the Official Gazette (Gaza) No. 1 December 31, 1949, at 9.

⁵⁰ Kasim, p. 29; in addition Military Order concerning the Assumption of the Administrative Governor of the Powers and Authorities of the High Commissioner (No. 274), 1949 Official Gazette (Gaza) No. 11, September 15, 1949 at 429 as its title implies transferred to the Egyptian governor all the authorities and powers of the British High Commissioner as provided by the British Mandate legislation.

⁵¹ Law for the Issuing for the Areas Under the Supervision of the Egyptian Forces in Palestine the Basic Law No. 255 of 1955, text in the Official Gazette (Gaza) Special Issue, February 25, 1958, at 304. It is worth noting that article 1 of the law gave the area its name as the “Gaza Strip”, while the Basic Law itself came as an appendix to the law at page 306 of the same Gazette, available at Al-Muqtafi.

of the Egyptian forces into Palestine on May 15, 1948 should be respected and kept effective to the extent that they did [do?] not contradict the Basic Law.”⁵³ In addition, in 1962 the Egyptian Government proclaimed the Constitutional Order of 1962,⁵⁴ article 69 of which guaranteed that all British Mandate legislation would remain in force unless later repealed or amended and would remain in force unless they contradicted the Constitutional Order and this without derogating the power of the legislative authority to repeal or amend any of these laws.⁵⁵

Thus, such as was the case in the West Bank, the main body of laws and regulations that were in force on the eve of the entrance of the Egyptian Forces into the Gaza Strip remained in force afterwards, including any IP laws.

D. The Relevance of Jordanian Rule

The Israeli forces occupied the West Bank following the Six-Day War of 1967. Under Military Proclamation No. 2,⁵⁶ entitled “Proclamation Concerning Law and Order,” the Commander-in-Chief of the Israeli Defense Forces in the West Bank assumed for himself all the governance, legislative and administrative authorities of the previous regime⁵⁷ and in article 2 of the same Order proclaimed:

⁵² Kasim, p. 29.

⁵³ *Ibid, Ibid*

⁵⁴ Text in the Official Gazette (Gaza) Extraordinary Issue, March 29, 1962, available at <http://213.244.124.245/data/pdf/1962/1045.pdf> (last visited July 12, 2003)

⁵⁵ *Ibid*, Article 69

⁵⁶ 1 Proclamations, Orders and Appointments of the Israeli Defense Forces in the West Bank Area, August 11, 1967, at 3 (text available in Al-Muqtafi). The text of the Proclamations was is available in both Arabic and Hebrew.

⁵⁷ Article 3(a).

The Law⁵⁸ that was in force in the region on June 7, 1967 shall remain in force, so long as it does not contradict with this order or with any other proclamation or order, to be issued by me, and as a result of the establishment of the rule of the Israel Defense Forces in the region.⁵⁹

Thus, as a result of this Order, the law that was in force in the West Bank prior to June 7, 1967 remained in force. This includes all the Intellectual Property laws that were in force during the Jordanian rule over the West Bank.⁶⁰

E. The Relevance of the Egyptian Administration

Most of what we had already said in the previous section applies to the Gaza Strip as well. Only a few additional remarks are in order. A different Israeli military administration and command administered the Gaza Strip from the one that administered the West Bank and, accordingly, the Military Orders in the two regions were not issued by the same authority, despite the fact that in many instances the content was exactly the same. A case in point is Military Proclamation No. 2. Exactly as in the parallel

⁵⁸ Please note that the Hebrew text uses the word “Ha-Mishpat” which refers to Law in general, as in the French Droit or the Spanish Derecho, while the Arabic text uses the word “Al-Kawaneen” which is a narrower concept meaning specifically the Laws.

⁵⁹ A translation of the text of article 2.

⁶⁰ It is important to clarify that in this study we are not attempting to address the difficult question of the right of Israel as an occupying force in the West Bank and Gaza to change the laws of these areas under international law except in the areas of security and public order (see for example article 64 of the Fourth Geneva convention relative to the Protection of Civilian Persons in Time of War available at <http://www.icrc.org/ihl.nsf/0/6756482d86146898c125641e004aa3c5?OpenDocument> (last visited July 18, 2003) and article 43 of the IV Convention Respecting the Laws and Customs of War on Land available at <http://www.icrc.org/ihl.nsf/0/1d1726425f6955aec125641e0038bfd6?OpenDocument> that restricts the occupiers power to change the laws in force in the occupied territories except in very special circumstances) and compare with Shehadeh and Kuttub, Civilian Administration in the Occupied West Bank, analyzing Israeli Military Order No. 947 establishing a Civil Administration in the West Bank in 1981 and their claim that amongst other things that this order is an attempt to “change the status of certain military orders to that of regular law”, p. 18. A similar Military Order was introduced in the Gaza Strip, Military Order No. 725..... We have avoided this discussion not only for its complexity but mainly due to the fact that there has been no changes to the IP laws during the Israeli occupation as will be explained below. See below Chapter 3, section E.

proclamation in the West Bank, in Proclamation No. 2 for the Gaza Strip,⁶¹ the Commander-in-Chief of the Israeli Defense Forces in the Gaza Strip and North Sinai assumed for himself all the governance, legislative and administrative authorities,⁶² while ordering that the law⁶³ as it stood on June 6, 1967 continue to remain in force.⁶⁴

F. The Relevance of the Israeli Occupation⁶⁵

Unlike in previous transfers of authority, the Palestinian Authority did not issue a clear law or decree upon its assumption of authority regarding, specifically, the effect of the military orders promulgated during the Israeli occupation or, more generally, what law that would be in effect upon the transfer of authority from Israel to the Palestinians. Therefore, to ascertain what the effect of this transfer had on the legal landscape, we must analyze some of the individual decrees and laws issued by the Palestinian Authority. Prior to this, however, it is necessary for us to turn to the agreements between Israel and the Palestinian side that led up to the establishment of the Palestinian Authority. It is not the intention of this study, however, to analyze these agreements in detail, as such analysis is beyond the scope of this paper;⁶⁶ rather, we will look at a number of

⁶¹ Proclamation concerning the Administration of Law and Order (Gaza Strip and North Sinai) (No. 2) 1967 Proclamations, Orders and Appointments of the Israeli Defense Forces in the Gaza Strip and North Sinai Area, Issue 1, September 14, 1967, at 5 available at <http://213.244.124.245/data/pdf/1967/8036.pdf> (last visited 7/7/2003). The text of the Proclamations was is available in both Arabic and Hebrew

⁶² Ibid, article 3.

⁶³ See comment above at fn. 57.

⁶⁴ Article 2. The text of the article, except for the date, is exactly the same as the one used in the West Bank; see translation of text above, the text accompanying fn. no. 235.

⁶⁵ This paper does not attempt to answer the serious question about the legality and the binding nature of the accords signed between Israel and the PLO, referred to them in general as the Oslo Accords, to this end see for example Geoffrey Watson, *The Oslo Accords*, Oxford University Press, 2000

⁶⁶ For such an analysis see e.g. Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories*, (Hague, 1997).

provisions in these agreements that are necessary here on the issue of establishing legal continuity.

Legal Continuity under the Agreements

Article VI (1) of the Declaration of Principles on Interim Self Government Arrangements (DOP)⁶⁷ done at Washington, D.C., September 13, 1993 talks of “a transfer of authority from the Israeli military government and its Civil Administration.” Article VII (2) of the DOP specifies that the Interim Agreement that will be negotiated “shall specify, among other things, the...transfer of powers and responsibilities from the Israeli military government and its Civil Administration to the Council.” Article I of the Interim Agreement on the West Bank and the Gaza Strip⁶⁸ done at Washington, D.C., September 28, 1995 talks of a Transfer of Authority, thus, for example, article I (1) states that “Israel shall transfer powers and responsibilities from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement.” As long as it is a *transfer* of authority, then the Palestinian Authority is rightfully viewed as a continuation of the Military and Civil Administration in those spheres transferred to it and, as a result, the previous legislation and military orders will continue to be in force unless repealed. The agreements did not repeal any of the military orders; on the contrary, article IX of the DOP, entitled “Laws and Military Orders,” stated that “[t]he Council⁶⁹ will be empowered to legislate, in accordance with the Interim Agreement, within all the

⁶⁷ Israel – Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, 32 I.L.M. 1525 (1993), available at <http://www.jmcc.org/peace/agreements/dop.htm>, last visited November 6, 2003.

⁶⁸ Israel – Palestine Liberation Organization: Interim Agreement on the West Bank and the Gaza Strip, 36 I.L.M. 551 (1997), available at <http://www.jmcc.org/peace/agreements/oslo2.htm>, last visited November 6, 2003.

⁶⁹ To be established in the Interim Agreement in accordance with article 1 of the DOP.

authorities transferred to it.”⁷⁰ However “[b]oth parties will review jointly laws and military orders presently in force in remaining spheres.”⁷¹ This language clearly implies that the existing military orders would remain in force.⁷² Another indication that the military orders have survived the transfer of authorities to the Council can be clearly understood from Article XVIII (4)(1) of the Interim Agreement, which reads as follows:

Legislation, including legislation which amends or abrogates existing laws or military orders, which exceeds the jurisdiction of the Council or which is otherwise inconsistent with the provisions of the DOP, this Agreement, or any other agreement that may be reached between the two sides during the interim period, shall have no effect and shall be void *ab initio*.”

Legal Continuity as Inferred from Palestinian Authority Legislation

Decree No. 1 of the Palestinian Authority, issued May 20, 1994,⁷³ explicitly stated only that the law as it stood before June 5, 1967 would remain in force,⁷⁴ ignoring all the military orders that were given during the Israeli occupation.⁷⁵ Yet because of the fact that it failed to mention the military orders and decrees from the Israeli period, it neither declared their repeal nor their continuing in effect. As some have commented,⁷⁶ this omission was probably a deliberate attempt to deflect some of the criticism with which the new Palestinian Authority would have faced had it affirmatively confirmed all the military orders.

⁷⁰ Article IX(1).

⁷¹ Article IX(2).

⁷² See in addition the analysis provided by Shehadeh at p. 22.

⁷³ Decree Concerning the Continuation of the Effect of the Laws, Regulations and Orders that were In Force Before June 5, 1967 In the Palestinian Territories Until they are Unified (No. 1) of 1994, Official Gazette (Palestinian Authority), issue 1, November 20, 1994 at 10 available at <http://213.244.124.245/data/pdf/1994/9663.pdf> (last visited 7/10/2003).

⁷⁴ *Ibid*, article 1.

⁷⁵ *But compare, ibid*, with the vague language of article 2 which stated that “The civil courts and religious tribunal in all their instances shall continue to perform their functions in accordance with the laws and regulations in force” (translation from the Arabic language), not defining the meaning of the laws and regulations in force.

⁷⁶ Shehadeh, *From Occupation to Interim Accords*, p. 149

The conclusion that the military orders and regulations have remained in force was further enhanced with the issuance of Law No. 2 of 1995,⁷⁷ providing for the repeal of certain Israeli military orders. If indeed the intention of Decree No. 1 was to give effect only to the law as it stood in the West Bank and the Gaza Strip prior to June 5, 1967 to the exclusion of all subsequent Israeli military orders and regulations, then there would have been no need to repeal *any* military order and there would have clearly been no need for Law No. 2 of 1995.⁷⁸ Furthermore, Law No. 5 of 1995,⁷⁹ which concerns the transfer of powers and authorities, seemed to confirm the Israeli military orders and proclamations. Article 5 of this law transferred to the Palestinian Authority “all the powers and authorities mentioned in the legislation, laws, proclamations, declarations and orders in force in the West Bank and Gaza Strip before 19 May 1994.”⁸⁰ Prominent Palestinian lawyer Raja Shehadeh concludes that “it is clear from the above that the Palestinian Authority has retained the majority of the laws in force prior to the Interim Agreement...this was in line with the commitment in the Declaration of Principles and

⁷⁷ Law for the Repeal of Some Military Orders and Decrees (No. 2), 1995 Official Gazette (Palestinian Authority), issue 4, May 6, 1995 at 8 available at <http://213.244.124.245/data/pdf/1995/9666.pdf> (last visited 7/10/2003). *See also* A Decree for the Repeal of Certain Military Orders and Decrees (No. 20) of 1998, Official Gazette (Palestinian Authority), issue 23, June 8, 1998 at 60 available at <http://213.244.124.245/data/pdf/1998/12421.pdf> (last visited 7/10/2003) that provided for the repeal of other Israeli military orders and thus further enhances the same conclusion.

⁷⁸ Article 5 (translation from the Arabic), *see also* Shehadeh p. 149

⁷⁹ Law concerning the Transfer of Powers and Authorities (No. 5) of 1995, Official Gazette (Palestinian Authority), issue 4, May 6, 1995 at 17 available at <http://213.244.124.245/data/pdf/1995/1271.pdf> (last visited 7/10/2003).

⁸⁰ *ibid*, p. 150. *See also* from the Israeli perspective, which further enhances these conclusions, Proclamation concerning the Implementation of the Interim Accords (West Bank) (No. 7), 1995 Proclamations, Orders and Appointments of the Israeli Defense Forces in the West Bank Area, Issue 164, ...1995, at 1947 available at <http://213.244.124.245/data/pdf/1995/11916.pdf> (last visited 7/10/2003). Article 5 makes it clear that only the authorities given to the council in accordance with the Interim Accords have been transferred to the Council, while all residuary authorities remain with commander in chief of the Israeli forces whom only he alone can decide if a certain responsibility or authority has remained with him as stipulated by article 6(b), and of specific relevance to us here, article 7 stipulates clearly that all laws and military orders in force on the day this Proclamation comes into effect shall remain in force unless later repealed by effect of this proclamation or in accordance with the Interim Accords. The proclamation came into effect on September 28, 1995 (article 9). *See also* Shehadeh, p. 138.

the Interim Agreement to retain all the laws and legislation in force at the time of the signing of these agreements until and unless amended in accordance with the provisions of these agreements.”⁸¹

In light of the above, it is quite reasonable to conclude that legal continuity was maintained after the Palestinian Authority assumed its responsibilities, not only for the law that was in force on the eve of the Israeli occupation of both the Gaza Strip and the West Bank in 1967, but also the law as it had been amended on the eve of the Palestinians assuming authority. However, even if this conclusion is called into question, it will have little impact on this study, given the fact that the Israeli administrations made no substantive changes to any of the intellectual property laws in either the West Bank or Gaza Strip, excepting only a few small administrative changes that we shall explain immediately.

⁸¹ Ibid, p. 150.

CHAPTER 3

THE HISTORICAL DEVELOPMENT OF INTELLECTUAL PROPERTY LAWS IN PALESTINE

A. The Ottoman Empire

On the eve of the British occupation of Palestine, the Ottoman Empire had a number of laws regulating intellectual property matters. For this study we have been able to determine that three such laws existed. The first was the 1888 Regulation on Trademarks concerning Industrial Products and Commercial Goods, which replaced the 1871 Distinctive Marks Act,⁸² the second was the 1879 Patents Law⁸³ and the third was the 1910 Copyright Law.⁸⁴

⁸² “The first law on trademarks in Turkey was enacted on July 20, 1871, during the time of the Ottoman Empire” (Prof. Ergun Ezsunay, p. 1544: “The New Turkish Trademark Law”, 19 Fordham Int’l L.J. 1542). This quote is followed by footnote no. 8 referring as the basis to his words the work of Hyari Dericioğlu, 1 Our Trademark Legislation and Its Practice: Legislation (Ankara, 1967). In the footnote Prof. Ezsunay explains, “this law was replaced later by Regulation on Trademarks concerning Industrial Products and Commercial Goods of May 11, 1888. The Regulation of 1888 continued to exist after the foundation of the Republic of Turkey on October 29, 1923 with some amendments until 1965”. See also article 130 of the of the Syrian Legislative Decree No. 47 of October 9, 1946 Regulating Commercial and Industrial Marks that explicitly repeals this Ottoman Law (Abu-Ghazaleh, p. 870).

⁸³ See information available at the official website of the Japanese Registrar of Patents and Trademarks at <http://www.deux.jpo.go.jp/cgi/search.cgi?query=ottoman&lang=en&root=short> (Turkey adopted the special Patent Law for the protection of inventions in the year 1879 during the Ottoman Emperorship. This law introduced the granting of patents without examination, as contained a French law of 1844) (last visited July 13, 2003)

⁸⁴ *Id.* The BirZeit legal data base has reference to this law of 1328 Hijri, but no full text is available and it is referred to as a repealed in both the West Bank and Gaza without an indication how it was repealed, see below for an explanation of how it was repealed.

Not much is known to the author of these lines about the exact content of these laws⁸⁵ or how they were implemented, but what we can ascertain is that some of these laws remained in force in some countries well beyond the disappearance of the Ottoman Empire. For example, the Copyright Law was repealed in Iraq in 1971⁸⁶ and in Jordan only in 1992.⁸⁷ Similarly, the Trademark Law was repealed in Syria in 1946⁸⁸ and in Turkey only in 1965.⁸⁹ This indicates that in these countries there must be material relevant not only to the content of these laws but also how they were actually implemented.⁹⁰ It is possible that the Arabic text of some of these laws might be found in the “Aref Ramadan Collection.” Parts of this collection have been made available through the Palestinian Legal Data Base Project of the Institute of Law at Bir Zeit otherwise known as *Al-Muqtafi*,⁹¹ which does include the the Distinctive Marks Act.⁹²

This being said, there are a number of reasons why it is not necessary for this study to go any further in its research on or examination of these laws. The first is that, in Palestine, these laws remain of only historical significance as they were repealed in the early years of the British rule over Palestine, as we shall show below.⁹³ The other reason is that any attempt to understand these laws and how they were implemented on the ground would be impossible without significant historical research that included

⁸⁵ This study was made in the U.S. thus access to some material that might be available in Arabic was thus much limited. We know for example that the Ottoman Copyright Law remained in force in Jordan until 1992 when it was repealed by article 58 of the Copyright Protection Law No. 22 of 1992 (Abu-Ghazaleh, p. 287) and in Iraq until 1971 when it was repealed by article 50 of the Copyright Protection Law No. 3 of 1971 (Abu-Ghazaleh, p. 215).

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ See above fn. 25.

⁸⁹ See above fn. 25.

⁹⁰ See for example above in fn. 25 the reference to the book about the origins of Trade Mark Laws in Turkey.

⁹¹ Available at www.law.birzeit.edu. To access the Data Base a password is required.

⁹² Aref Ramadan Collection, p. 287; available at *Al-Muqtafi*
<http://213.244.124.245/data/pdf/1305/12138.pdf>

extensive examination of the primary sources, such as Ottoman era court records and registrations of Patents and Trademarks from that era. Even if access to such sources were possible, however, that would still not guarantee success at understanding these laws and their implementation, as the following quote from Professor Ron Harris in *The History of Law in a Multi Cultural Society-Israel 1917-1967* quite clearly demonstrates:

Little is known about the working of the local [Palestinian] civil courts of the [Ottoman] period and how they interacted with the Ottoman central courts. The identity, background and education of the lawyers and judges functioning at the time is also little known. We know that the central Ottoman government initiated legal reforms, but we do not know to what extent these reforms reached and affected the area that would become Palestine. We know little about the way Ottoman laws were applied in Palestine or how the local and central courts functioned or the amount of interaction between them. There was a Court of Appeals in Beirut and a Court of Cassation in Istanbul, but how often did litigants appeal? How long did it take? How effective were the judgments? According to the conventional view, the Ottoman legal system was corrupt, inefficient and suffered from a low level of compliance, but to what extent is this image historically grounded? Does it stem from the Orientalist viewpoint developed by British and Zionist narratives? We have some information on the land laws of the period, but there is no detailed analysis of the role of local courts in land disputes. In short, for legal historians, the Ottoman period remains almost *terra incognita*.⁹⁴

In discussing the emerging field of the study of the legal history of Israel,⁹⁵ the authors of *The History of Law in a Multi Cultural Society-Israel 1917-1967* emphasized that except perhaps for one book, that of the late Eliezer Malchi, entitled *The History of the Law of Palestine* and written in 1950 in Hebrew, there have been few writings that dealt with this field,⁹⁶ and those that exist have focused primarily on the legal history of only a few specific areas of law. For example, the historical development of constitutional law and

⁹³ See below section B.

⁹⁴ Israeli Legal History: Past and Present, Ron Harris et al p. 5, in *The History of Law in a Multi Cultural Society-Israel 1917-1967* (but see their footnote 19 referring to the work of Haim Gerber, "A new Look at the Tanzimat: The case of the province of Jerusalem" in *Palestine in the Ottoman Period*, ed. D. Kushner (Jerusalem: Yad Yitzhak Ben Tzvi, 1986), 30.

criminal law have been partially studied,⁹⁷ and those other areas of the law that have been studied at greater length, such as property law, have been studied mainly for political reasons due to the fact that a major part of “Zionist activity in Palestine was the acquisition of land for Jewish settlements.”⁹⁸ The authors note that: Large gaps also exist in our knowledge of specific areas of Palestinian law, and some have not been studied at all. Thus, not a single study of the history of tax legislation and case-law exists, nor are there works *on the history of intellectual property*, corporate law or even contract or tort law in Palestine⁹⁹

B. The British Mandate

As we shall see immediately below, the British were very diligent, even prior to the introduction of the mandate over Palestine in August of 1922, in taking legal steps to insure the continued protection of intellectual property rights in Palestine. B.1. Trade Marks

The first Trademark (TM) Ordinance enacted during the British rule was passed on December 9, 1921 and entitled “An Ordinance to Provide for the Registration and Protection of Trade Marks,”¹⁰⁰ although cited as the “Trade Marks Ordinance.”¹⁰¹ Prior to the enactment of the Trade Marks Ordinance, Public Notice No. 136 of September 30, 1919 had allowed for the registration of trademarks in accordance with the Ottoman

⁹⁵ Israel was created in 1948 on parts of Palestine, and thus until that date shares a common legal history.

⁹⁶ Id. p. 3

⁹⁷ Id. p. 9.

⁹⁸ Id. p. 10.

⁹⁹ Ibid, p. 9.

¹⁰⁰ Ordinance No. 36 of 1921 available at Bentwich p. 250.

¹⁰¹ Article 1.

Trademarks Law¹⁰² and, under the terms of the Trade Marks Ordinance, all trademarks that had been registered under the provisions of this Public Notice were deemed to have been registered under the Ordinance, with the date of registration of such marks remaining the date of registration under the Public Notice, however.¹⁰³

Upon the coming into force of this Ordinance, the Ottoman Laws relevant to the registration and protection of trademarks ceased to have effect.¹⁰⁴ The Trade Marks Ordinance was amended in 1923¹⁰⁵ and later in 1930,^{106 107} and was later revised and compiled as Chapter 144 of “The Laws of Palestine” in accordance with Ordinance No. 29 of 1934¹⁰⁸ and No. 30 of 1934.¹⁰⁹

“The Laws of Palestine” compiled the laws as in force on December 31, 1933 but it took until January of 1937 for the compilation process to be completed and they finally came into force on January 22, 1937.¹¹⁰ By that time some of the revised and compiled

¹⁰² I was not able to locate the text of the Public Notice and no mention of it at all appears in Bentwich’s comprehensive compilation of the laws of Palestine.

¹⁰³ Article 7(2).

¹⁰⁴ Article 28: “From the date at which this Ordinance comes into force, the registration and protection of trademarks in Palestine shall be governed by it to the exclusion of any existing Ottoman Laws”. As we have commented earlier the Ottoman Trade Mark Law remained in force in Turkey until 1965 and in Syria until 1946 see above fn.25.

¹⁰⁵ Trade Marks Amendment Ordinance No. 2 of 1923 incorporated with the Ordinance of 1921 in Bentwich at p. 250.

¹⁰⁶ Trade Marks Amendment Ordinance No. 12 of 1930 as is inferred from the preamble to the Trade Marks (Industrial Property Convention) Order, 1934 available at <http://213.244.124.245/data/pdf/1934/1086.pdf>, last visited July 20, 2003. The Amendment made the Priority period six months instead of four in accordance with the International Convention on the Protection of Industrial Property and also the States to which this arrangement shall apply can be declared by an Order of the High Commissioner and not an Order-in-Council as provided in article 27 of the original text.

¹⁰⁷ Palestine became a member to the International Convention for the Protection of Industrial Property signed in Lahay on November 26, 1925 and the Schedule to the Trade Marks (Industrial Property Convention) Order, 1934 available at <http://213.244.124.245/data/pdf/1934/1086.pdf>, last visited July 20, 2003, detailed the countries and areas to which articles 24, 25 and 26 of the Ordinance shall apply and thus shall exist reciprocal priority treatment; also see Trade Marks (British Territories) Order, 1935 available at <http://213.244.124.245/data/pdf/1935/1091.pdf>, last visited July 20, 2003, that extended the reciprocal priority treatment to the British Territories.

¹⁰⁸ Source...

¹⁰⁹ Source.... Ordinance No. 30 of 1934 allowed for the amendment of The Trade Marks Ordinance (see p. 28 in Al-Muqtafi: <http://213.244.124.245/data/pdf/1934/7744.pdf>, last visited July 20, 2003).

¹¹⁰ Preamble to Ordinance No. 1 of 1937

laws that were in force on December 31, 1933¹¹¹ were amended or otherwise completely repealed during the three year it took to compile the laws, thus and to facilitate the use of the compilation, Ordinance No. 1 of 1937 provided a schedule listing the repealed laws from the collection¹¹² and provided a detailed list of amendments that are to be considered as if compiled together with the revised version.¹¹³

The Trade Marks Ordinance, now Chapter 144, was amended twice during this interim period between the working on the revised edition of the Laws of Palestine in force on December 31, 1933 and their actual publication and coming into force on January 22, 1937. Ordinance No. 1 of 1937 incorporated the Trade Marks Ordinance (Amendment) of 1934 and Trade Marks Ordinance (Amendment) of 1935.¹¹⁴ It is important to understand that the “Laws of Palestine” as published in 1937 have to be read together with Ordinance No. 1 of 1937 to avoid mistakes in the law.¹¹⁵

In 1938, the 1921 Ordinance was repealed and replaced with Trademark Ordinance No. 35 of 1938. This Ordinance did not differ much from the 1921 Ordinance, as amended, and was more of a revised version of the previous Ordinance as we shall explain in the next Chapter.¹¹⁶

¹¹¹ Ordinance No. 29 of 1934

¹¹² Article 5, and second schedule to the Ordinance available at (<http://213.244.124.245/data/pdf/1937/9065.pdf>)

¹¹³ Article 3, and first Schedule to the Ordinance available at (<http://213.244.124.245/data/pdf/1937/9065.pdf>)

¹¹⁴ Ibid, see p. 170 in Al-Muqtafi for a detailed list of the amendments. The schedule does not include the number of the amending Ordinances.

¹¹⁵ One such mistake is to be found in Abu-Ghazaleh-Kluwer that brings the text of the Ordinance as it appeared in Chapter 144 without the amendments of 1934 and 1935 as incorporated by Ordinance No. 1 of 1937.

¹¹⁶ Compare with Abu-Ghazalleh, were in the book they still quote the Trade Marks Ordinance, 1921.

Before we end this section, it is worth pointing out that a very minor amendment was made to the 1938 Ordinance in 1941.¹¹⁷ This was the only time that it was amended after coming into force in 1938. Finally, our analysis would not be complete without clarifying that both Ordinances, the 1921, as amended, and the 1938, allowed for the Registrar to issue Rules concerning the application forms to be used for registration, the fees, the classification of the goods, the publishing and transferring of trade marks, and so forth.¹¹⁸ In addition, the revised version of the 1921 Ordinance, as amended,¹¹⁹ and the 1938 Ordinance¹²⁰ both authorized the Chief Justice to issue court rules to regulate appeal procedures.¹²¹

B.2. Copyright

The first Copyright Ordinance enacted during the British rule was in August of 1920.¹²² This was shortly after the establishment of the Civil Administration, which took

¹¹⁷ Trade Marks (Amendment) Ordinance, 1941, Palestine Gazette No. 1154, December 18, 1941, p. 150 available at <http://213.244.124.245/data/pdf/1941/1108.pdf>, last visited July 20, 2003.

¹¹⁸ Trade Marks Rules issued under article 22 of the 1921 Ordinance (article 31 of the revised version, Chapter 144), Bentwich p. 43, later revised and incorporated in the “Laws of Palestine” p. 2269. Despite the issuance of the 1938 Ordinance the rules remained in force in accordance with article 47 of the Ordinance until they were later abrogated by Trade Marks Rules, 1940 issued under article 46 of the 1938 Ordinance, Palestine Gazette 984, February 8, 1940 p. 228, available at <http://213.244.124.245/data/pdf/1940/1101.pdf>, it was amended several times. Twice in 1940, Trade Marks (Amendment) Rules, 1940, Palestine Gazette 992, March 12, 1940 p. 426 available at <http://213.244.124.245/data/pdf/1940/1103.pdf>, Trade Marks (Amendment) Rules (No.2), 1940, in 1942, Trade Marks (Amendment) Rules, 1942, Palestine Gazette 1198, June 4, 1942 p. 942 available at <http://213.244.124.245/data/pdf/1942/1110.pdf> and once again in 1947, Trade Marks (Amendment) Rules, 1947, Palestine Gazette 1565, March 20, 1947 p. 445.

¹¹⁹ Article 35, Trade Marks (Amendment) Ordinance 1935.

¹²⁰ Article 45.

¹²¹ High Court (Trade Marks) Rules, 1937, Palestine Gazette 681, April 15, 1937 p. 363 available at <http://213.244.124.245/data/pdf/1937/1097.pdf> issued in accordance with article 35 of the 1921 revised Ordinance as amended, and the rules remained in force after the repeal of the 1921 Ordinance in accordance with article 47 of the 1938 Ordinance and later amended by High Court (Trade Marks) (Amendment) Rules, 1940, Palestine Gazette 984, February 8, 1940 available at <http://213.244.124.245/data/pdf/1940/1100.pdf>, and amendment which was issued in accordance with article 46 of the 1938 Ordinance.

¹²² Bentwich, p. 641.

place in June of that year, but prior to the placement of Palestine under the British Mandate in August of 1922.

This Ordinance was not a comprehensive piece of legislation and did not replace the Ottoman Copyright Law; rather, it modified certain parts of it in its application over Palestine, as is clearly stated in the preamble to the Ordinance:

Whereas the rights of authors of literary and artistic productions were protected by the provisions of the Ottoman Copyright Law of 8th May, 1910 (12 Jamadi el Awal, 1328 A.H.);
And whereas it is now intended to make the said law applicable to Palestine, subject to such modifications and extensions thereof as are set forth below....

Thus, for example, the ordinance extended the provision of the Ottoman Copyright Act to photographs¹²³ and to “records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced.”¹²⁴ The period of copyright protection was amended to become the life of the author plus a period of fifty years for literary, musical and artistic and other works,¹²⁵ while for photographs and records the protection was for fifty years from the time of their making, without relation to the life of their creator.¹²⁶ In addition, the ordinance granted copyright protection to the works “although copies of the work have not been deposited nor the work registered as required by Articles 19-24 of the Ottoman Copyright Law.”¹²⁷ One explanation for this provision could be that it was no longer possible to comply with these deposit and registration requirements under the Ottoman Law were no longer possible, as the remnants of the

¹²³ article 2(a)

¹²⁴ article 2(b).

¹²⁵ article 3

¹²⁶ article 3; article 2 defines the date in which records and photographs are considered to have been created.

¹²⁷ Article 4

Ottoman Empire that still existed no longer controlled Palestine.¹²⁸ The more probable explanation, however, is that this provision was inserted to comply with the Berne Convention to which the UK was a party and which did not require deposit and registration to obtain copyright protection.¹²⁹

The life of this Ordinance was short-lived. Less than four years later it was repealed. On March 21, 1924, the “Order-in-Council extending the Copyright Act, 1911 to Palestine” was issued, which, as its title implies, extended the application of the British Copyright Act of 1911 to Palestine on a date to be proclaimed by the High Commissioner.¹³⁰ The Order-in-Council extended the Copyright Act of 1911 to Palestine subject to some minor changes resulting from the difference in the application date of the Act in Palestine from its original date in England.¹³¹

In accordance with the Order-in-Council, the High Commissioner for Palestine Proclaimed that the Copyright Act, 1911 should come into operation and have effect in Palestine as of March 21, 1924.¹³² On June 15, 1924, Ordinance No. 16 of 1924, “An Ordinance to Make Provision for the Application of the Copyright Act, 1911 in Palestine,” was issued,¹³³ providing that the Copyright Act, 1911 should be read as modified by said Ordinance.¹³⁴ Again, however, the modifications to the Copyright Act, 1911 were actually minor and resulted mainly from the fact that the Act was to be

¹²⁸ The Empire officially ceased to exist and gave up its territories only in 1924.

¹²⁹ Berne Convention, Article 5(2): “The enjoyment and the exercise of these rights shall not be subject to any formality;...”

¹³⁰ Available at Bentwich, p. 29. In Bentwich the date of the Order appears as May, see the index at page XVI, but the preamble of the revised version of Ordinance No. 16 of 1924 as compiled in “The Laws of Palestine” states that the date of the Order was March 21.

¹³¹ Article 1 of the Order in Council.

¹³² Proclamation under the Copyright Act, 1911 (Extension to Palestine), Order 1924; Bentwich p. 412.

¹³³ Available at Bentwich, p. 389.

¹³⁴ Article 4.

enforced in another country rather than in the United Kingdom.¹³⁵ With the enactment of this Ordinance, the Ottoman Copyright Law ceased to be in force in Palestine,¹³⁶ and the Copyright Ordinance 1920 was repealed retroactively from March 21, 1924¹³⁷ the date in which the Copyright Act was put into effect in Palestine. In accordance with Ordinance No. 29 of 1934, Ordinance No. 16 of 1924 was later revised and compiled as Chapter 25 of the “Laws of Palestine.”

The Copyright Ordinance No. 16 of 1924 as stated is short and only includes the necessary provisions for the implementation of the Copyright Act, 1911 in Palestine. For example, it provides that the Director of Customs, Excise and Trade shall perform the duties that are granted under article 14 of the Copyright Act, 1911 to the Commissioners of Customs and Excises in the United Kingdom,¹³⁸ or the definition of offences and penalties.¹³⁹ The substantive rules pertaining to the definition of copyrighted material, the period of protection, what constitutes a breach of the copyright, the rights the copyright infer on their owner, etc. remained in their entirety within the domain of the Copyright Act, 1911.

¹³⁵ Thus for example for the purpose of article 14 of the Copyright Act, concerning the Importation of Copies, the Director of Customs, Excises and Trade of Palestine replaces the Commissioner of Customs and Excises of the United Kingdom; see article 2(a) of the Ordinance, Bentwich p. 389.

¹³⁶ article 5

¹³⁷ article 5

¹³⁸ article 2(a)

¹³⁹ article 3.

B.3. Patents and Designs

Public Notice 136 of 1919 was issued on September 30, 1919¹⁴⁰ in order to allow for the registration of Patents and Trade Marks in accordance with the Ottoman Laws in force at the time.

On December 15, 1924, a new Patent and Design Ordinance, Ordinance No. 33 of 1924, was issued. It was entitled “An Ordinance to Replace the Ottoman Law of Patents by Provisions in Accordance with the Requirements of the International Conventions Relating to Industrial Property,”¹⁴¹ and cited as “Patents and Designs Ordinance, 1924.”¹⁴² Although this Ordinance did not officially repeal the Ottoman Law of Patents, once the Ordinance went into force, the previous Ottoman Law was, for all practical purposes, useless. All grants of patents and registration of designs in Palestine from that date forward were governed by the new Ordinance.¹⁴³ The Patents and Designs Ordinance No. 33 of 1924 was revised and compiled as Chapter 105 of “The Laws of Palestine” in accordance with Ordinance No. 29 of 1934, and No. 30 of 1934.¹⁴⁴ However, before Ordinance No. 29 of 1934 was issued, the Patents and Designs Ordinance, 1924 was amended twice and these amendments were integrated into Chapter 105.¹⁴⁵ Furthermore, a number of additional amendments were enacted prior to the publication of the Laws of

¹⁴⁰ See reference to the proclamation in article 11(c) of Chapter 105, “Laws of Palestine”.

¹⁴¹ Bentwich, p. 457

¹⁴² article 1.

¹⁴³ article 56(1): “From the date at which this Ordinance comes into force, the grants of patents and the registration of designs in Palestine shall be governed by it to the exclusion of any other law”.

¹⁴⁴ Ordinance No. 30 of 1934 in addition amended The Patents and Designs Ordinance (see p. 22 in Al-Muqtafi: <http://213.244.124.245/data/pdf/1934/7744.pdf>: amending article 2(1) so that the High Commissioner can appoint...with only an order without the need of Notice to be published in the Newspaper and article 53(a) adding the words “in its capacity as a court of appeal” after the words “Supreme Court of Palestine”)

¹⁴⁵ Amended by Ordinance No. 13 of 1930 (incorporated as articles 21(3), Compulsory Licenses and Revocation, and introduced article 38 to the revised version, concerning the Registration of Designs registered in the United Kingdom and amending article 52 concerning international conventions) and later

Palestine in 1937. To facilitate the use of the compilation, Ordinance No. 1 of 1937 removed from the compilation,¹⁴⁶ or added to the compilation,¹⁴⁷ such amendments.¹⁴⁸ Accordingly, Ordinance No. 1 of 1937 incorporated into the compilation the following amendments to the Patents and Designs Ordinance that occurred between the 31st of December 1933 and the 31st December of 1936: the Patents and Industrial Designs (Amendment) Ordinance of 1934,¹⁴⁹ of 1935,¹⁵⁰ and of 1936.¹⁵¹ Following the 1934 revision and the above mentioned amendments that were either incorporated directly into chapter 105 or issued separately through Ordinance No. 1 of 1937, the Patents and Designs Ordinance did not undergo any further amendments until the end of the Mandate except for one minor amendment in 1938.¹⁵² We will discuss some of the substantive provisions of the Patents and Design Ordinance in the next chapter. However, before ending this discussion of its history, it should be clarified that this Ordinance allowed for the Registrar, with the sanction of the High Commissioner,¹⁵³ to issue general rules for regulating such issues as the practice of registration,¹⁵⁴ classification of goods,¹⁵⁵ requirements for duplicates of specifications, drawings and other documents,¹⁵⁶ the

amended by Ordinance No. 9 of 1933 (amending article 38(2),(5), and (6) and article 52), available at <http://muqtafi.birzeit.edu/data/pdf/1925/366.pdf>

¹⁴⁶ Ordinance No. 1 of 1937, article 5.

¹⁴⁷ *Ibid*, article 3.

¹⁴⁸ Ordinance No. 1 of 1937 available at <http://213.244.124.245/data/pdf/1937/9065.pdf>

¹⁴⁹ *Ibid*, at p. 125-33 in Al-Muqtafi (No number appears in the schedule to Ordinance No. 1 of 1937): Amending article 38.

¹⁵⁰ No. 7 of 1935 (amending article 2, Definitions, article 52, international conventions; adding articles 52A, concerning Ships, Planes and Vessels, 52B, concerning Orders issued before February 26, 1935)

¹⁵¹ Replacing article 8, Examination of Specification; Adding article 20A, Exhibition of invention not to prejudice right to a patent,.

¹⁵² Patents and Designs Ordinance (Amendment) No. 19 of 1938.....

¹⁵³ Article 56 revised version, Chapter 105 (article 51 of the original ordinance).

¹⁵⁴ *Ibid*, 56(1)(a)

¹⁵⁵ *Ibid*, 56(1)(b)

¹⁵⁶ *Ibid*, 56(1)(c)

regulation of the Register of Patent Agents,¹⁵⁷ and the fees to be paid for the grant of patents and the registration of designs and applications therefore.¹⁵⁸

C. The Egyptian Administration in the Gaza Strip

No substantive Intellectual Property Laws were enacted during the period in which Egypt administered the Gaza Strip, and thus the Intellectual Property Laws that existed in Palestine on the eve of the entrance of the Egyptian forces into the Gaza Strip remained in force. This being said, we have no clear information as to the manner in which those registered Trademarks, Patents and Designs that existed in Palestine at the end of the British Mandate were treated in the Gaza Strip, taking into consideration that the official register was kept in that part of Jerusalem¹⁵⁹ that at the end of the 1948 became part of Israel.¹⁶⁰ What we do know is that in 1961 the Egyptian administrative ruler issued a decree¹⁶¹ in which he created an office in the Ministry of Finance and Trade for the registration of patents and designs, which would later become part of the department for trademark registration.¹⁶²

¹⁵⁷ Ibid, 56(1)(f)

¹⁵⁸ Ibid, 56(1)(g).

¹⁵⁹ The Trademarks, Patents and Designs registrar office was moved to Jerusalem in 1942, see article 2 of the Trademarks Regulations (Amendment), 1942, Official Gazette, 1198, June 4, 1942, p. 1131 available at <http://213.244.124.245/data/pdf/1942/1110.pdf>. Before this change it used to be in Haifa, see the definition of “office” in article 2 of Trademark regulations (Amendment) (No. 2), 1940, Official Gazette, 1006, May 2, 1940, p. 822 available at <http://213.244.124.245/data/pdf/1940/1105.pdf> (last visited 7/8/2003).

¹⁶⁰ This is an issue for further investigation: Did the Egyptian Administration recognize this registration? Did they allow for a re registration procedure? Did the Egyptians receive a copy of the Register from the British? Did they receive a copy from Israel?, *See also* below fn. 149.

¹⁶¹ Decree of the General Administrative Ruler (No. 44) of 1961, Official Gazette (Gaza), issue 183, December 2, 1961, p. 528 available at <http://213.244.124.245/data/pdf/1961/1436.pdf> (last visited 7/8/2003).

¹⁶² Ibid, article 1. When reading the text of article 1 it becomes clear that when this decree was issued a trademark registration department already existed at the ministry of trade and finance, but we were not able to find a similar decree or order based on which that department was established.

D. Jordanian Rule in the West Bank

As we explained earlier, the British Mandate Intellectual Property Laws that were in force on the eve of the entrance of the Arab Legion to the West Bank remained in force immediately following the assumption of control over the West Bank by Jordan.¹⁶³ This would not be the case for long, however.

In June of 1952, the Jordanian Parliament approved a new Trademarks Law for the Hashemite Kingdom that would apply to both banks of the Jordan River.¹⁶⁴ Likewise, in January of 1953, a new Patents and Designs Law was passed that was intended to apply to both banks.¹⁶⁵

The Jordanian Trademarks Law of 1952 explicitly repealed the British Mandate Trademarks Ordinance of 1938 and all its amendments,¹⁶⁶ as well as any other Jordanian or Palestinian legislation in as far as their provisions contradicted the new law.¹⁶⁷ The new Trademarks Law also provided that the existing register of trademarks would be incorporated into a new register established under the new law. The original registration

¹⁶³ See above the discussion in Chapter 3 section A.

¹⁶⁴ Trade Marks Law No. 33 of 1952, Official Gazette (Jordan) issue 1110, June 1, 1952, p. 243 available at <http://213.244.124.245/data/pdf/1952/12149.pdf> (Last visited 7/7/2003).

¹⁶⁵ The Patents for Invention and Industrial Designs Law No. 22 of 1953, Official Gazette (Jordan), issue 1131, January 17, 1953, p. 491 available at <http://213.244.124.245/data/pdf/1952/1438.pdf> (Last visited 7/7/2003).

¹⁶⁶ Article 46(2).

¹⁶⁷ Article 46(3); what is not clear is whether this also meant the repeal of the 1934 Order issued by the High Commissioner to make provision for Palestine's joining of the Paris Convention on November 6, 1925. This point is beyond the analysis of this paper, and is an issue for International Law, but it would be safe to assume that due to the fact that the West Bank was annexed to Jordan, Jordan would have to re join the Union for this to have effect. This also conclusion receives more emphasis when reading article 43 that provides that the provisions of articles 41 and 42 concerning priority rights given to trademarks first registered in foreign countries will have effect only by virtue of a ministerial proclamation.

dates were to be maintained, but going forward the existing marks were to be considered as if registered in accordance with the new law.¹⁶⁸

The 1953 Jordanian Patent Law provided similar provisions. This law repealed all the existing Palestinian laws and regulations regulating the registration of patents and designs.¹⁶⁹ In addition, the new law provided for the incorporation of the existing register of patents and designs in the register established under the new law, to be treated as if registered in accordance with the new law, but maintaining their original date of registration.¹⁷⁰

The fate of copyright was totally different from patents and trademarks, however. A new and unified Copyright Law was never promulgated. This meant that there were, in fact, two completely different sets of copyright laws in the Hashemite Kingdom, one for each bank of the Jordan River,¹⁷¹ thus keeping the British Mandate copyright enactments, as explained in detail above, in force in the West Bank.

A review of the Jordanian Trademarks Law and Patent and Designs Law will quickly reveal that they are both, for all practical purposes, almost exact copies¹⁷² of the British Mandate Ordinances that they repealed. The only differences are minor and include some changes necessary as a result of the change of the ruling authority. For example, as the name of the region over which the law was to be applied was no longer Palestine, but the Kingdom of Jordan, the name “Jordan” had to replace “Palestine,” and

¹⁶⁸ Article 4. What remains unclear is how was the old registration from the Mandate era proved when the register remained in Israel’s hands after the 1948 war.

¹⁶⁹ Article 55, as with the issue we raised above concerning Trademarks, it is not clear if this repeal also repealed the effect of the Orders extending the application of the Paris Convention to Palestine.

¹⁷⁰ Article 52. Here also it remains unclear how was the previous registration proved and how was the register incorporated when the original register remained in Israel’s hands.

¹⁷¹ The Ottoman copyright law in the East bank and the English Copyright Act, 1911 and Ordinance No. 16 of 1924 and all relevant Orders and regulations in the West Bank.

¹⁷² Probably more accurately put, Arabic translation of the British Mandate text.

the competent Jordanian Minister had to be named instead of the British High Commissioner wherever applicable.¹⁷³ In order to avoid repetition in the next chapter, when we discuss the British Mandate Trademark and Patent Laws, the same will hold true for the Jordanian Trademark and Patent Laws.

E. The Israeli Occupation: West Bank and Gaza Strip

Israel did not repeal any of the existing intellectual property laws; neither did it introduce any substantive amendments to the existing laws, thus leaving these laws, both in the West Bank and in the Gaza Strip, intact in almost their entirety. The few changes that were introduced were principally procedural in nature. The following analysis will concentrate on the situation in the West Bank, which underwent more changes than did the Gaza Strip, however, we will touch upon the situation in Gaza when the context obligates.

Two military orders are of relevance here. Military Order No. 397 concerning Trademarks,¹⁷⁴ and Military Order No. 555 concerning Patents and Designs.¹⁷⁵ The main purpose of these Orders, as stated in each of their preambles, was the creation of a register for trademarks and a register for patents and designs, respectively, and to allow

¹⁷³ The same is also true concerning the regulations that were issued by both laws. See Trademarks Regulations (No. 1) of 1952, Official Gazette (Jordan) issue 1129, December 16, 1952, p. 397, available at <http://213.244.124.245/data/pdf/1952/1114.pdf> and Patents and Designs Decision (No. 1) of 1953, Official Gazette (Jordan), issue 1136, March 16, 1953, p. 615, available at <http://213.244.124.245/data/pdf/1953/1439.pdf>.

¹⁷⁴ Trademarks Order, (Re Registration) (West Bank) (No. 397), 1970, Proclamations, Orders and Appointments of the Israeli Defense Forces in the West Bank Area, Issue 23, August 30, 1970, at 819 available at <http://213.244.124.245/data/pdf/1970/1121.pdf> (last visited 7/9/2003);

¹⁷⁵ Patents and Designs Order, (Re Registration) (West Bank) (No. 555), 1974, Proclamations, Orders and Appointments of the Israeli Defense Forces in the West Bank Area, Issue 34, December 24, 1975, at 1347 available at <http://213.244.124.245/data/pdf/1974/10782.pdf> (last visited 7/9/2003).

those who had such a registration in their possession to come forward and re-register the mark, the patent or the design, as the case might be, that they possessed.¹⁷⁶ In addition, all the duties and authorities that had belonged to the Minister of Trade, the Registrar of Trademarks and the Council of Ministers under the Jordanian Trademarks Law were vested instead in one person, an Officer in Charge to be appointed by the military commander of the West Bank.¹⁷⁷ The same Officer in Charge was also vested with all the duties and authorities of the Registrar of Patents and Designs, the Minister of Trade and the Council of Ministers under the Jordanian Patents and Designs Law.¹⁷⁸

Both Orders detailed the manner in which the existing rights had to be proved and thereby eligible for re-registration.¹⁷⁹ The Trademarks Order, which preceded the Patents and Designs Order by almost three years, provided that requests for re-registration should be submitted within six months of the date the Order came into effect,¹⁸⁰ which was July 16, 1970.¹⁸¹ The application deadline to re-register was later extended until January 1, 1973.¹⁸² Trademarks that were approved for re-registration were considered to have been

¹⁷⁶ The need to create a register of existing marks, patents and designs resulted from the simple fact that after the Israeli occupation, the West Bank was separated from the register that had been maintained until then for the whole of the Kingdom in the capital Amman.

¹⁷⁷ Trademarks Order, articles 1 and 2. This was subsequently changed and the Officer in Charge was given for the purpose of hearing objections for the registration of trademarks under article 14 of the law the authority to appoint people to hear those objections, see Trademarks Order, (Re Registration) (Amendment 2) (West Bank) (No. 617), 1975, Proclamations, Orders and Appointments of the Israeli Defense Forces in the West Bank Area, Issue 37, September 1, 1976, at 11 available at <http://213.244.124.245/data/pdf/1975/1126.pdf> (last visited 7/9/2003).

¹⁷⁸ Patents and Designs Order, articles 1 and 2. In reality the Officer in Charge, as explains Shehdeh in his book *Occupier's Law* at 76, was vested with a wide variety of capacities "with all the powers and privileges of the Minister of Justice under Jordanian Law, who had been granted powers by virtue of the law on the independence of the judiciary. Other powers include the power of the lawyer's Bar Association, the Registrar of Companies, and the Registrar of Trademarks, Tradenames and Patents".

¹⁷⁹ Article 3, Trademarks Order; Article 6 Patent and Designs Order.

¹⁸⁰ Article 3(b).

¹⁸¹ Article 5.

¹⁸² Article 1, Trademarks Order, (Re Registration) (Amendment) (West Bank) (No. 462), 1972, Proclamations, Orders and Appointments of the Israeli Defense Forces in the West Bank Area, Issue 29, September 12, 1972, at 1123 available at <http://213.244.124.245/data/pdf/1972/1122.pdf>

registered from the date of their original registration¹⁸³ and became subject to all the provisions of the Trademark Law.¹⁸⁴ The Patent and Designs Order, though more detailed, shared many of the effects of the Trademarks Order. It provided for the creation of a register,¹⁸⁵ guaranteed to those who had rights in patents and designs the right to re-register them,¹⁸⁶ specified a period in which applications for re-registration had to be submitted¹⁸⁷ as well as the manner in which the application was to be submitted, and detailed the authority of the Officer in Charge to request proof¹⁸⁸ and the issuance of a registration certificate¹⁸⁹ that would have effect from the date of the original registration and terminating on the original prescribed date.¹⁹⁰

However, article 5 of the Patents and Designs Order transferred the jurisdiction to hear appeals against the decisions of the registrar of patents and designs from the Civil Courts to an Objections Committee established under Military Order 172.¹⁹¹ No article to the same effect is available regarding the Trademarks Order.¹⁹²

To the best of our knowledge, no similar orders were issued in the Gaza Strip. However this should not come as a surprise, primarily due to the fact that there was no need to create a register and to provide for re-registration. Unlike the West Bank, where

¹⁸³ Article 3(f).

¹⁸⁴ Article 4.

¹⁸⁵ Article 4.

¹⁸⁶ Article 6(a)

¹⁸⁷ Article 6(b) (the prescribed period was 12 months).

¹⁸⁸ Article 6(c)

¹⁸⁹ Article 6(d)

¹⁹⁰ 6(d) and (e).

¹⁹¹ *Id.*, See Shehadeh, p. 87 for a description of the workings of the Objection Committee and its jurisdiction over civil matters originally under the jurisdiction of the civil courts. The text of Order No. 172 is available at <http://213.244.124.245/data/pdf/1967/502.pdf> (last visited July 9, 2003)

¹⁹² It is not clear to us why such a difference should exist when in fact it is the same person on who's decision an appeal is to be submitted. The Patents and Designs Order was issued a few years after the Trademarks Order and such a transfer could have thus been done on the Trademarks order by virtue of an amendment to it or by virtue of an amendment to the Annex to Military Order No. 172 that established the Objections Tribunals; we were not able to locate such an amendment.

the register was administered in Amman, in the Gaza Strip the register had been maintained prior to the Israeli occupation in Gaza itself; thus, no such need ever arose.¹⁹³ In addition, and by virtue of Military Proclamation No. 2, in which the military commander assumed all authorities of the previous regime including administration and the authority to appoint officials, there was no need to proclaim the creation of a new office or to transfer authorities as in the West Bank, again because the office already existed in the Gaza Strip prior to the Israeli occupation.¹⁹⁴

To end this section, we would like to point out that, with the limited resources available to this study, we were not able to ascertain how the Israeli Administration applied or administered the IP laws in the West Bank and the Gaza Strip. We do know, however, that Israel assimilated much of its laws into the Occupied Territories under the guise of military orders. For example Professor Eyal Benvenisti, in his study entitled “Legal Dualism,”¹⁹⁵ explained that this assimilation occurred not only on the legislative level but also on the administrative level:

¹⁹³ See *ibid* fn. 253 article 1 of the Decree of the General Administrative Ruler (No. 44) of 1961, Official Gazette (Gaza), issue 183, December 2. 1961, p. 528 available at <http://213.244.124.245/data/pdf/1961/1436.pdf> (last visited July 8, 2003) providing for the creation of a register in the Gaza Strip.

¹⁹⁴ See article 3 Proclamation concerning Law and Order, *ibid* fn. 248. What is not clear is whether appeals were submitted to the civil courts or to the objections committees established under Objections Committees Order (Gaza Strip and North Sinai) (No. 123) of 1967 later repealed by Objections Committees Order (Gaza Strip and North Sinai) (No. 409), 1971 Proclamations, Orders and Appointments of the Israeli Defense Forces in the Gaza Strip and North Sinai Area, Issue 31, June 1, 1972 at 2487 available at <http://213.244.124.245/data/pdf/1971/492.pdf> (last visited 7/10/2003).

¹⁹⁵ Eyal Benvenisti, *Legal Dualism: The Absorption of the Occupied Territories into Israel*, The Jerusalem Post 1989, (In which he explained the various methods by which Israeli law had been applied to the occupied territories, mainly the prescription of Israeli laws to the Jewish settlements, the extraterritorial prescription of Israeli law on the personal level and the assimilation of Israeli laws by the Military Government). However in the case of IP Israel did not assimilate its own laws. We can suggest a number of possible explanations. One such explanation might be that Israel had no need to do that when it can extraterritorially assimilate or in force its laws on a personal basis every time an Israeli might be involved in a dispute involving IP issues as suggested by Benvenisti. Another possible explanation might be the fact that Israel controlled the borders thus controlling all the border measures that are needed to protect IP from copied imported material by virtue of its own IP laws. Also Israel did not change all of the existing laws

It should be noted that the coordination between the economies of Israel and the territories is achieved not only on the level of assimilating Israeli laws, but also on the administrative level. The officials of the military administration who perform the various functions under these orders are regular employees of the relevant Israeli ministries. Each ministry selects among its staff people to serve in the military administration, whether as “staff officers” or as other functionaries.¹⁹⁶

We were, however, able to find indirect information suggesting that the trademarks office in the West Bank was, at least at times, in a sorry state. In speaking about this office, Shehadeh observed that “[f]orms for submitting applications to the offices of the Registrar of trademarks and land, for example, were unavailable for six months in 1982.”¹⁹⁷ He also observed, that “many transactions were refused or delayed in the various court offices and judicial departments for such reasons as lack of stationery and unavailability of employees to do the work”.¹⁹⁸

and the existing laws in the field of IP are very similar to those in Israel that share the same roots of the British Mandate.

¹⁹⁶ Id. p. 36.

¹⁹⁷ Occupier’s Law, p. 80.

¹⁹⁸ Id., Id.

CHAPTER 4

INTELLECTUAL PROPERTY LAWS

A. The Trademarks Ordinance and the Trademarks Ordinance of 1938

The original text of the 1921 Trademarks Ordinance included 28 articles¹⁹⁹ and its article 2, entitled “Interpretation,” included only the interpretation of the term “Trade Mark.”²⁰⁰ The Ordinance provided for the creation of a register of Trade Marks to be under the control of a Registrar²⁰¹ and that the Register would be open to inspection by the public.²⁰² It specified that, for a trademark to be capable of registration, it must be distinctive²⁰³ and it must be registered for a particular good or class of goods.²⁰⁴ The Ordinance provided for Marks that were not capable of registration as Trade Marks,²⁰⁵ including, for example, Marks that were identical or similar to the National Flag.²⁰⁶

Article 6 included a detailed list of the Marks²⁰⁷ that were not capable of registration, only a few of which are worth mentioning here. Article 6(4) excluded from

¹⁹⁹ The revised version of the Ordinance made in accordance with Ordinance No. 29 of 1934 revised the Ordinance into 34 articles and later with Ordinance No. 1 of 1937 that incorporated the amendments of 1934 into 37 articles adding articles 16.A., 27.A. and 35, please see below the text accompanying Fn....

²⁰⁰ article 2

²⁰¹ article 3

²⁰² article 4

²⁰³ 5(2), in the revised version as it appeared in Chapter 144 it became article 6.

²⁰⁴ 5(4), article 7(2) of the revised version Chapter 144

²⁰⁵ article 6, article 8 of the revised version

²⁰⁶ article 6(3), article 8(c) of the revised version.

²⁰⁷ The Ottoman Law in comparison did not include a detailed list of Marks that are not capable of registration, article 1 made it clear that Marks must be distinctive and article 2 prohibited Marks that are

registration Marks that “may be injurious to public order or morality, or which are calculated to deceive the public; or marks which encourage unfair trade competition, or contain false indications of origin.” Article 6(5) generally excluded generic and descriptive terms or words of ordinary geographical meanings: “Marks consisting of figures, letters or words which are in common use in trade to distinguish or describe goods or classes of goods or which are directly descriptive of their character and quality; words whose ordinary signification is geographical.”] Article 6(9)²⁰⁸ excluded the registration of Marks that were identical to those of another proprietor already on the Register or resembling it so closely as to be deceptive: “Marks identical with one belonging to a different proprietor which is already on the register in respect to such goods or description of goods, or so nearly resembling such trade mark as to be calculated to deceive....”

The Ordinance also provided for an application process,²⁰⁹ and an appeal procedure in case of refusal of the application.²¹⁰ It also provided that the application could be accepted subject to conditions.²¹¹ If the application was accepted, it would then be publicized²¹² to allow for opposition before the registration was finalized.²¹³ Article 14 of the Ordinance²¹⁴ provided that Trade Marks could be assigned or transmitted in connection with the goodwill of the business and that the period of registration was

contrary to public order and morality from registration, and compare article 6(4) of the Ordinance, article 8(d) of the revised version.

²⁰⁸ Article 8(i) of the revised version

²⁰⁹ Article 8, article 10 of the revised version

²¹⁰ Article 8(3), article 11 of the revised version

²¹¹ Article 8(2), article 10 of the revised version.

²¹² Article 9, article 12 of the revised version.

²¹³ Article 10, article 13 of the revised version.

²¹⁴ Article 17 of the revised version.

twenty years renewable²¹⁵ -- this compares to a period of fifteen years, renewable, in the Ottoman Law.²¹⁶

The Ordinance allowed for a request of cancellation of a Trade Mark by interested persons based on a list of grounds provided in article 17;²¹⁷ however, this request had to be submitted within five years of the registration.²¹⁸ Examples of grounds for cancellation included the mark not having been entitled to registration in the first place,²¹⁹ the registration of the Mark creating unfair competition with respect to the applicant's rights in Palestine,²²⁰ or the lack of any bona fide use of the mark for two years.²²¹ The Ordinance guaranteed exclusive use of the Trade Mark upon or in connection with the goods in respect to which it was registered.²²² And, as mentioned earlier, articles 25-27 allowed for the Crown, on behalf of the Government of Palestine,²²³ to enter into international treaties for the mutual protection of trademarks.

As we have already explained in the previous chapter, the above Ordinance was repealed in 1938 and replaced with Trade Marks Ordinance No. 35 of 1938. The Trade Marks Ordinance No. 35 of 1938 and the 1921 Ordinance, as amended and revised, were actually quite similar. Indeed, the 1938 Ordinance might well be considered a revised version of the 1921 Ordinance, incorporating mainly changes in form²²⁴ rather than substance. The details given above about the 1921 Ordinance are therefore quite

²¹⁵ article 15, article 18 of the revised version.

²¹⁶ article 4.

²¹⁷ Article 20 of the revised version.

²¹⁸ Article 17(1), article 20(2) of the revised version.

²¹⁹ article 17(1)(a), article 20(1)(a) of the revised version.

²²⁰ article 17(1)(b), article 20(1)(b) of the revised version.

²²¹ article 17(1)(c), article 20(1)(c)

²²² article 20, article 23 of the revised version

²²³ In the original text it was the Government of Palestine that was capable to enter into international arrangements, but was later amended by...to become the Crown on behalf of the Government of Palestine.

²²⁴ The 1938 Ordinance expanded the 36 Articles of the 1921 Ordinance into 48.

applicable to the 1938 Ordinance. Otherwise, some of the more obvious differences introduced by the 1938 Ordinance included:

1. Extending the right to apply for a Trade Mark to persons who intended to deal or offer for sale,²²⁵ which had not been recognized in the 1921 Ordinance.²²⁶
2. Including an interpretation of the meaning of “*distinctive*,”²²⁷ which though mentioned in the 1921 Ordinance, had not been interpreted in the text of the Ordinance.
3. Allowing for actual use to be a factor in determining if a Mark had acquired as result of such use distinctive characteristics, thus making it registrable.²²⁸
4. Preventing the registration of Marks that included such words as “Patent,” “Patented,” “By Royal Letters Patent,” “Registered,” “Registered Design,” “Copyright,” or words to that effect.²²⁹
5. Allowing for the registration of Certification Trade Marks.²³⁰
6. Providing that opposition to registration of a Mark must be submitted within 3 months from the date of advertisement²³¹ and not six months as under the previous Ordinance.²³² In addition, whereas under the previous Ordinance the opposition had been heard directly by the Court of

²²⁵ Article 6, see also article 11(1) describing who is entitled to apply for application includes “Any person claiming to be the proprietor of a trade mark used or proposed to be him....”

²²⁶ And compare with article 5 of the revised version, Chapter 144.

²²⁷ Article 7(2)

²²⁸ Article 7(3)

²²⁹ Article 8(d)

²³⁰ Article 10

²³¹ Article 14(1)

²³² Article 13(1)

Appeal,²³³ under the new Ordinance the opposition was first heard in front of the Registrar,²³⁴ whose decision would then be subject to appeal to the Supreme Court sitting as a High Court of Justice.²³⁵

7. Specifying that the duration of trademark rights would be shortened to seven years²³⁶ renewable in increments of fourteen years each,²³⁷ instead of a period of first registration of twenty years under the previous Ordinance²³⁸ renewable in increments of twenty years each.²³⁹
8. Requiring the Registrars to send a notice to the registered proprietor of the Mark at a prescribed time before the expiration of the registration, explaining when the registration would expire and the fee to be paid to renew the registration, as well as explaining that if such conditions were not duly complied with, the registration would be removed.²⁴⁰
9. Providing that, in such a case where the Mark was removed because of non-payment of fees, it would nevertheless be deemed a currently registered trademark for the purpose of subsequent registration applications for a year after the period of removal,²⁴¹ unless the registrar was satisfied that, prior to the removal, there had been no bona fide trade

²³³ Starting from February 26, 1935 Court of Appeal meant the Supreme Court sitting as a High Court of Justice in accordance with Trade Marks Amendment Ordinance, 1935 as incorporated by Ordinance No. 1 of 1937 whereas prior to that date it referred to the District Court.

²³⁴ Article 14(4)

²³⁵ Article 14(5)

²³⁶ Article 20

²³⁷ Article 21

²³⁸ Article 18 of the revised version.

²³⁹ Article 19 of the revised version.

²⁴⁰ Article 21(2)

²⁴¹ Article 21(3)

use of the removed mark for two years proceeding the removal²⁴² or that there is no likelihood of confusion with the removed mark.²⁴³

10. Extending the grounds for a request for cancellation of a registered Mark, so that such requests were not limited only to non bona fide actual use, as had been the case in the 1921 Ordinance, but would also include non bona fide *intent* to use the trademark in connection with the goods for which it was registered.²⁴⁴ The Ordinance did allow an exception for non use, so long as it was due to special circumstances and not as a result of any intent not to use or to abandon the trademark.²⁴⁵
11. Changing the language that had been in article 22 of the revised version of the 1921 Ordinance,²⁴⁶ which had given the proprietor of the trade mark “the right to the exclusive *use* of such trade mark,” and instead stating that the proprietor had “the right to the exclusive sales of such trade mark.”²⁴⁷ thereby allowing for an interpretation of whichever was narrower -- sales or use.
12. Finally, clarifying that the English Passing-Off action existed in Palestine independently of the 1938 Ordinance.²⁴⁸

²⁴² Article 21(3)(a)

²⁴³ Article 21(3)(b)

²⁴⁴ Article 22(1)

²⁴⁵ Article 22(1): “..unless in either case such non user is shown to be due to special circumstances in the trade, and not to any intention not to use or to abandon such trade mark in respect of such goods”.

²⁴⁶ Article 20 in the original 1921 version.

²⁴⁷ Article 26.

²⁴⁸ Article 37: “Nothing in this Ordinance shall be deemed to affect the right to bring an action against any person for passing off goods as those of another person or the remedies in respect thereof”. This provision is of specific importance due to the fact that the Common Law of Torts was considered unsuitable to the conditions of Palestine, *see e.g.* CA 113/40 *Sherman v. Danovitz*. This situation persisted until 1947 when in the famous *Orr* case (CA 29/47 *The London Society for Promoting Christianity Among the Jews v. Orr*) the English Common Law of Torts was applied to Palestine. Almost immediately after the decision in the *Orr* case the British High Commissioner declared the coming into force of the Civil Wrongs Ordinance.

In addition to what we have already discussed above, we shall note some of the provisions of the 1938 Trademarks Ordinance in the following chapter when comparing some of the provisions of the TRIPS Agreement²⁴⁹ with the existing IP Laws in Palestine.

²⁴⁹ See below.

B. Copyright Act (1911)

The Copyright Act, 1911 would probably require a separate analysis to cover all its provisions. Therefore, here we will confine ourselves to a short summary of the contents of the Act, leaving further explanatory work for a later study.

The Act was made up of three parts. Of these, the first part, which included articles 1 through 28 and dealt with copyrighted material²⁵⁰ in general, was the most important. Part II, articles 29 and 30 and entitled “International Copyrights,” dealt with foreign works. Part III, articles 31 through 35, contained supplemental provisions.

Part I, entitled “Imperial Copyright”, was divided into various sections. The first five articles of the Act dealt with the rights conferred. Article 1 defined the meaning of Copyright,²⁵¹ the cases in which copyright protection would apply,²⁵² and the meaning of publication for the purpose of the Act.²⁵³ Article 2 defined when a copyrighted work would be deemed to have been infringed²⁵⁴ and those acts which, despite the fact that they might be seen as infringing upon the copyright, did not actually constitute an infringement.²⁵⁵ Article 3 set the Term of Copyright, which in general was the life of the author and a period of 50 years after his death. Article 4 defined those cases in which a compulsory license could be issued for a copyrighted work.²⁵⁶

²⁵⁰ The title of Part I is actually “Imperial Copyright” and as explained in article 1(1) “..copyright shall subsist throughout the parts of His Majesty’s dominions to which this Act extends...” and thus the use of the title Imperial Copyright and not just Copyright.

²⁵¹ Article 1(2)

²⁵² Article 1(1)

²⁵³ Article 1(3)

²⁵⁴ Article 2(1), 2(2), 2(3)

²⁵⁵ Articles 2(1)(i)-(vi)

²⁵⁶ In general a compulsory license can be issued only after the death of the author, for an already published or performed work and as a result of the refusal of the owner of the copyright to republish or to allow the public performance of the work the work is withheld from the public.

Under the Act, the author of the work was deemed generally to be the owner of the copyright²⁵⁷ except for two situations. The first was when the work was an engraving, photograph or portrait and was ordered by some person for a valuable consideration. Then, unless there was an agreement to the contrary, the person who ordered the work was deemed the owner of the copyright.²⁵⁸ The second was when the author was in the employment of another person under a contract of service or apprenticeship and the work was done in the course of this employment. Then, absent any other agreement, the employer was to be deemed owner of the copyright.²⁵⁹

The Act provided for civil remedies for the infringement of the copyright, including injunction and such damages as were available under the law for the infringement of a right.²⁶⁰ All infringing copies and the plates intended for the production of such copies were deemed the property of the copyright owner.²⁶¹ In case the infringer proved in his defense “that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work,” the plaintiff (i.e., copyright owner) would not be entitled to any remedy except for an injunction or interdict in respect of the infringement.²⁶²

The next section, which consisted of articles 11 through 13, was entitled “Summary Remedies” and outlined the penalties for dealing with infringing copies and the fate of the infringing copies. The remedies specified in this section applied only to the

²⁵⁷ Article 5

²⁵⁸ Article 5(1)(a)

²⁵⁹ Article 5(1)(b)

²⁶⁰ Article 6, but compare with article 9 that limits the availability of injunctions or interdicts to restrain the construction or to order the demolition of a building or structure that infringes an Architectural copyright once the construction has commenced.

²⁶¹ Article 7, but compare with article 9(1)(a) that do not allow the same when the infringing copy is a building or structure.

²⁶² Article 8.

United Kingdom;²⁶³ in Palestine such remedies became available through article 3 of Ordinance No. 16 of 1924.²⁶⁴ Article 14 of the Act, the section entitled “Importation of Copies,” dealt with measures at the borders to prevent the importation of infringing copies, and their detention at the customs and the manner in which notice should be given to the customs authorities. As mentioned previously, for the purpose of applying article 14 of this Act, Ordinance No. 16 of 1924 introduced some changes²⁶⁵ to be incorporated when reading the provisions of the article in Palestine. As aforementioned, most of these changes were technical, resulting from the implementation of the Act in Palestine rather than in the United Kingdom.²⁶⁶ Article 14(3) of the Act allowed the Director of Customs, Excise and Trade,²⁶⁷ referred to as the “Director,”²⁶⁸ to make regulations respecting the detention and forfeiture of copies, the importation of which was prohibited by article 14,²⁶⁹ the conditions to be fulfilled, and the notices and security to be given before the detention or forfeiture and the mode of verification and evidence.²⁷⁰

Article 15 of the Act, the section entitled “Delivery of Books to Libraries,” required that every publisher of a book²⁷¹ published in the United Kingdom deliver at his

²⁶³ Article 13 and see the remark to the same effect at Bentwich, p. 418

²⁶⁴ Article 4 of the Ordinance reads: “The Copyright Act 1911 shall be read as modified or added to by this Ordinance”.

²⁶⁵ Article 2 of the Ordinance

²⁶⁶ See text accompanying fn 157.

²⁶⁷ As replaced by article 2(a) of Ordinance No. 16 of 1924 from the United Kingdom Commissioner of Customs and Excise.

²⁶⁸ In the revised version of the Ordinance, Ch. 25, as amended by Ordinance No. 30 of 1934.

²⁶⁹ “Copies made out of the United Kingdom of any work in which copyright subsists which if made in the United Kingdom would infringe copyright...”, article 14(1).

²⁷⁰ In accordance with article 2(b) of Ordinance No. 16 of 1924 such regulations required the approval of the High Commissioner in Council, a requirement that did not exist in the 1911 Act. Such regulation were made in 1929, Copyright Regulations, 1929 “Laws of Palestine” p. 1666, available at <http://213.244.124.245/data/pdf/1929/1518.pdf>

²⁷¹ Article 15(7) reads: “For the purpose of this section, the expression “book” includes every part or division of a book, pamphlet, sheet of letter press, sheet of music, map, plan, chart or table separately published, but shall not include any second or subsequent edition of a book unless such edition contains additions or alternatives either in the letter press or in maps, prints, or other engravings belonging thereto.”

own expense, within one month after a publication, a copy of the book to the British Museum²⁷² as well as to other libraries, such as the Bodleian Library at Oxford, if so demanded, before the expiration of twelve months after publication or, if the demand came before the publication, within one month after publication.²⁷³ This section was clearly not relevant to Palestine as it referred only to publications in the United Kingdom.²⁷⁴ In addition, no Ordinance was ever issued to make article 15 applicable to Palestine by amending its provisions so as to name libraries in Palestine.²⁷⁵ This being said, it is important to note that the requirement to deliver books was only procedural; non-compliance with it did not affect the copyright but only resulted in the payment of fines.²⁷⁶

The next section of the Act, articles 16 through 24, was dedicated to certain, specific kinds of works. We will not analyze all of these provisions, but will attempt to mention briefly some of these provisions. Article 16 dealt with Works of Joint Authorship and defined the manner in which the term of the copyright was to be determined, the rule in general being that the “copyright shall subsist during the life of author who first dies and for a term of fifty years after his death or during the life of the author who dies last, whichever period is the longer....”²⁷⁷ A “work of joint authorship” was defined as “a work produced by the collaboration of two or more authors in which

²⁷² Article 15(1)

²⁷³ Article 15(2).

²⁷⁴ See article 25(1) that reads in its relevant part: “This Act, except such of the provision that are expressly restricted to the United Kingdom, shall extend throughout His Majesty’s dominions....”

²⁷⁵ This conclusion is further enhanced by the fact that this article is omitted from Bentwich’s collection with the following footnote: “Section 15 has no application to Palestine”, p. 419.

²⁷⁶ Article 15(6) reads: “If a publisher fails to comply with this section, he shall be liable on summary conviction to a fine not exceeding five pounds and the value of the book, and the fine shall be paid to the trustees or authority to whom the book ought to have been delivered”.

²⁷⁷ Article 16(1).

the contribution of one author is not distinct from the contribution of the other author or authors.”²⁷⁸

The Act had special provisions affecting the term of protection of Posthumous Works, under which, in general, if a work was not published, performed or delivered in public, depending on the kind of the work, before the death of the author “then copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter...”²⁷⁹

The Act made special provisions for “records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced” so that copyright would subsist in them as if they were musical works,²⁸⁰ “but the term of copyright shall be for fifty years from the making of the original plates from which the contrivance was directly or indirectly derived, and the person who was the owner of such plate at the time when such plate was made shall be deemed to be the author of the work...”²⁸¹ The Act provided similar provisions for the term of copyright in photographs, but it was fifty years from the making of the original negative and it was the owner of this negative at the time it was made who was deemed the author of the work.²⁸²

Article 22 of the Act excluded from the application of this Act designs capable of being registered under the English Patents and Designs Act, 1907, except such designs that, though capable of such registration, were “not used or intended to be used as models or patterns to be multiplied by any industrial process.”²⁸³ It is not clear if this article ever

²⁷⁸ Article 16(3)

²⁷⁹ Article 17(1)

²⁸⁰ Article 19(1).

²⁸¹ *Ibid.* Article 19 has far more provisions to be analyzed here.

²⁸² Article 21.

²⁸³ Article 22(1)

had effect in Palestine – while it specifically referred to an English Act, it did not ask for actual registration under the English Act but only for the design to qualify for registration under that Act. As such, it might have been specifying only a legal condition, borrowing definitions from the English Patents and Designs Act.²⁸⁴

Article 1(a) of the Act guaranteed to any author who first published his work within the British Dominions copyright protection.²⁸⁵ This could lead to a situation in which the citizen of a state that did not provide protection to the works of British subjects could publish his work within the British Dominions and thereby gain protection under British Law, while his state did not provide the same protection to a British author. Article 23 of the Act was designed to prevent such a situation.²⁸⁶ It is worth noting that article 23 never actually protected Palestinian authors because it was limited only to situations in which a foreign state did not protect the works of British authors.

Article 24 provided for the protection of existing works in which copyright subsisted immediately before the commencement of the Act.

The last section of Part I of the Act, articles 25 through 28, dealt with the application of the Act to British Possessions. The section remains of almost purely historical value, but it is worthwhile to note that it was under the authority given to His Majesty in article 28 that the Order-in-Council extending the application of the Act to

²⁸⁴ This conclusion can be further based on the language of article 22(2) that reads: “General rules under section eighty-six of the Patents and Designs Act, 1907, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid”, in addition in Bentwich’s collection there is no remark indicating that this article is not applicable to Palestine.

²⁸⁵ Article 1(a) reads: “in the case of published work, the work was first published within such parts of His Majesty’s Dominions as aforesaid”.

²⁸⁶ Article 23 reads: “If it appears to His Majesty that a foreign country does not give, or has not undertaken to give adequate protection to the works of British authors, it shall be lawful for His Majesty by Order-in-Council to direct that such of the provisions of this Act as confer copyright on works first published within the parts of His Majesty’s dominions to which this Act extends, shall not apply to works published after the

Palestine was issued.²⁸⁷ Likewise, because of the requirement of Article 25, a Proclamation was issued by the High Commissioner of the British Mandate in Palestine declaring the the Act and the later Ordinance No. 16 of 1924 in force in Palestine.²⁸⁸

Part II of the Act, articles 29 and 30, was entitled “International Copyrights.”²⁸⁹ These articles are too long to be explained in detail here, but the idea behind them is quite straightforward. Under the Copyright Act, protection was extended on the basis of either first publication within any part of the British Dominion over which the Act extended²⁹⁰ or, in the case of an unpublished work, on the basis that the author was a British subject or a resident of any part of the British Dominions over which the Act extended.²⁹¹ To translate this into modern terms, given the fact that Palestine is no longer a part of the British dominion, protection is extended either on the basis that the work was first published in Palestine or, in the case of an unpublished work, on that basis that the author is a Palestinian citizen.

Article 29 allowed for the recognition of copyright when when the work was neither that of a British subject, nor that of a resident of any of its dominions, nor first published in any part of the British dominions.²⁹² This could be a result of the signing of

date specified in the Order, the authors whereof are subjects or citizens of such foreign country, and are not resident in His Majesty’s dominions, and thereupon those provisions shall not apply to such works”.

²⁸⁷ Article 28 reads: “His Majesty may by Order-in-Council extend this Act to any territories under his protection and to Cyprus and on the making of any such Order, this Act shall, subject to the provisions of the Order, have effect as if the territories to which it applies or Cyprus were part of His Majesty’s dominions to which this Act extends”.

²⁸⁸ The relevant part of Article 25(1) reads: “Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature”.

²⁸⁹ England signed the Berne Convention onsee below fn....

²⁹⁰ Article 1(1)(a).

²⁹¹ Article 1(1)(b).

²⁹² The first part of article 29(1) in its relevant part reads:

“29(1). His Majesty may, by Order-in-Council, direct that this Act (except such parts, if any, thereof as may be specified in the Order) shall apply –

a convention with a foreign country or countries,²⁹³ or if His Majesty was convinced that the foreign country had made, or had undertaken to make, such provisions that would guarantee the expedient protection of works protected under Part I of the Act.²⁹⁴ Article 29 allowed for flexibility in the application of the Act to foreign works and did not necessarily extend equal protection to the foreign work as if it were works under Part I. Thus, for example, for foreign works the term of protection might be limited to that term conferred by the laws of the foreign country.²⁹⁵

In addition, article 30(1) clarified that any Order-in-Council issued under article 29 would extend also to all British dominions that the Act has been extended, except for self-governing dominions or possessions that has been excluded by the Order-in-Council.²⁹⁶ It is by virtue of article 29 that Order-in-Council Copyright (Rome Convention), 1933²⁹⁷ was issued and by virtue of article 30 that it was extended to certain British dominions and possessions,²⁹⁸ including Palestine.²⁹⁹ Reading the preamble to the

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- (a) To works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's dominions to which this Act extends;
 - (b) To literary, dramatic, musical, and artistic works, or any class thereof, the authors whereof were at the time of the making of the work subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects;
 - (c) In respect of residence in a foreign country to which the Order relates, in like manner as if such residence were residence in the parts of His Majesty's dominions to which this Act extends;

And thereupon, subject to the provisions of this Part of this Act and of the Order, this Act shall apply accordingly....”

²⁹³ see the text of article 29(1)(i) referring

²⁹⁴ *Ibid.*

²⁹⁵ Article 29(1)(ii)

²⁹⁶ Article 30(1) reads: “An Order-in-Council under this Part of this Act shall apply to all His Majesty's dominions to which this Act extends except self-governing dominions and any other possession specified in the Order with respect to which it appears to His Majesty expedient that the Order should not apply”.

²⁹⁷ Published in the Palestine Gazette, No. 491, January 31, 1935 p. 135 available in Al-Muqtafi at <http://213.244.124.245/data/pdf/1933/7416.pdf>

²⁹⁸ See the preamble to the Order-in-Council.

²⁹⁹ *Ibid.*

Order-in-Council, it is clear that that Britain was party to the Berne Convention and was a signatory to the Berlin revision in 1908 and the Rome revision in 1928.

Article 1 of the Order-in-Council named the foreign countries that were members of the Union for the protection of literary and artistic works established under the Berne Convention and specified that the Order-in-Council would apply to them. Article 2 described the manner in which the Act would apply to the works of subjects of countries of the Union,³⁰⁰ or to works first published in a country of the Union,³⁰¹ or to works of people residing in one of the countries of the Union.³⁰² The Order provided for certain limitations to the application of the Act to such works; for example, the term of protection was not to be more than the term of protection in the country of origin.³⁰³ Another example of such limitations had to do with articles discussing matters of economics, politics or religion published in newspapers or magazines. Here no protection was to be provided generally, other than noting the original source, unless the original magazine or newspaper had clearly stated that copying was prohibited.³⁰⁴ A further example was the limitation of the term of protection of Literary and Dramatic works from certain countries, such as Greece or Japan, to ten (10) years, after which they could be published, copied, publicly acted or a translated.³⁰⁵ A last example has to do with mechanical reproduction of musical works. According to the Order-in-Council, if a musical work was published before May 26, 1925 and before that date no mechanical instruments were produced or sold in Palestine to play the work, then the right would

³⁰⁰ Article 2(b)

³⁰¹ Article 2(a)

³⁰² Article 2(c)

³⁰³ Article 2(1)

³⁰⁴ Article 2(2)(a).

³⁰⁵ Article 2(2)(b)

extend also to the production of records, perforated rolls, or any other inventions through which the work could be played mechanically.³⁰⁶

Article 3 of the Order guaranteed that no financial harm would come to any person who had incurred any financial expenses in the publication or the performance of a work that before this Order was considered legal, and that such person's rights would not be prejudiced, unless the owner of the right prohibited such a publication under the condition that he offered adequate financial compensation, and if no agreement was reached the amount of compensation shall be subject to arbitration.³⁰⁷

Until the end of the Mandate, other Orders were issued extending the application of the Act to other foreign countries that had become members of the Union.³⁰⁸ In addition, and despite the fact that the United States did not become a member of the Union until a much later stage, years after the end of the British Mandate over Palestine, an Order was issued to extend the application of the Act to works whose country of origin was the United States, even when they were not first published in His Majesty's dominions,³⁰⁹ or published simultaneously in the United States and any of His Majesty's dominions,³¹⁰ This Order was due to the difficulties caused by the Second World War

³⁰⁶ Article 2(4), 2(5).

³⁰⁷ Article 3.

³⁰⁸ Copyright Order (Rome Convention) (Morocco "Spanish Area"), 1935, Palestine Gazette, Issue No. 511, May 9, 1935, p. 424 available at <http://213.244.124.245/data/pdf/1935/7419.pdf>; Copyright Order (Rome Convention) (Vatican City), 1935, Palestine Gazette, Issue No. 598, May 28, 1935, p. 368 available at <http://213.244.124.245/data/pdf/1935/7466.pdf>; Copyright Order (Rome Convention) (Latvia), 1937, Palestine Gazette, Issue No. 721, September 23, 1937, p. 856 available at <http://213.244.124.245/data/pdf/1937/7482.pdf>. The Act was also applied to Sarawak despite it not becoming a member of the Union but by virtue of it enacting laws to guarantee protection to British works in accordance with article 29 of the Act: Copyright Order (Sarawak), 1937, Palestine Gazette, Issue No. 750, January 20, 1938, p. 79 available at <http://213.244.124.245/data/pdf/1937/1571.pdf>

³⁰⁹ See Copyright Act, 1911 article 1(1)(a)

³¹⁰ In accordance with article 35(3) "For the purpose of this Act, a work shall be deemed to be first published within the parts of His Majesty's dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place.....a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in

and therefore applied only to works first published in the United States between September 3, 1939 and one year after the end of the war.³¹¹

To end, Part III of the Act provided some Supplemental Provisions. Of these, worth mentioning here are articles 31 and 35. Article 31 made it clear that this Act abrogated any common law copyright rights and that copyright would subsist in accordance with the provisions of this Act.³¹² It is true that copyright in Palestine was not a common law right, but the result of Ottoman legislation; however, article 46 of the 1922 Order-in-Council was in force, which allowed for the incorporation of common law principles.³¹³ Of more substantive importance is article 35, entitled “Interpretation.” This article provided definitions for some of the expressions that appear in the Act, including “Literary work,” “Dramatic work,” “Artistic work,” “Work of Sculpture,” “Architectural work of art,” “Engravings,” “Photograph,” “Cinematograph,” “Collective work,” “Infringing,” and others.

the other place does not exceed fourteen days, or such longer period as may, for the time being, be fixed by Order-in-Council.”, thus allowing authors from the U.S. to fall under the protection of the Copyright Act, 1911 by publishing in Britain within 14 days after the publication in the U.S.A. in accordance with article 1(1)(a), that provides protection to works first published in His Majesty’s dominions regardless of the authors country of residence. To assure real publication article 35(3) provides: “unless the publication in such parts of His Majesty’s dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public....”

³¹¹ Copyright Order (United States of America), 1942 published in the Palestine Gazette, Issue No. 1562, March 13, 1947, p. 479 available at <http://213.244.124.245/data/pdf/1942/11774.pdf> .

³¹² Article 31 entitled “Abrogation of common law rights” reads: “No person shall be entitled to copyright or any similar right in any literary, dramatic, musical or artistic work, whether published or unpublished, otherwise than under and in accordance with the provision of this Act, or of any other statutory enactment for the time being in force....”

³¹³ See text of the article above, text accompanying fn 22.

C. Patents and Designs Ordinance No. 33 of 1924

The Ordinance will be discussed in detail in the coming chapter when comparing its provisions with those of the TRIPS Agreement. At this point a general overview of the Ordinance will suffice.

Article 3(1) of the Ordinance guarantees the establishment of a Registrar of Patents and Designs. Part I of the Ordinance, articles 4 through 29 regulate the registration of patents while Part II, articles 30 through 37 regulate the registration of Designs. Part III, articles 38 through 56, entitled General, regulate general issues that will shortly be mentioned.

Article 4 guarantees for the “true and first inventor of every new invention, subject in all respects to the conditions and provisions of this Ordinance” the grant of a patent. Article 4(2) makes it clear that the grant of a patent “shall be made at the risk of the grantee without guarantee or responsibility on the part of the Government either to the novelty or utility or merits of the invention”. Article 5 describes how an application for a patent should be made and by whom. The specifications that the application should include “must particularly describe the nature of the invention and the manner in which the same is to be performed”³¹⁴ and the registrar has the right to examine the application and the specifications and to require any amendments³¹⁵ and introducing any such amendments the application shall bear the date of the amendment.³¹⁶ The Registrar has the right to refuse an application if “satisfied that the invention claimed has been wholly

³¹⁴ Article 6(1).

³¹⁵ Article 8(1).

³¹⁶ Article 8(3).

and specifically claimed in any specification”.³¹⁷ In addition the Ordinance gives the Registrar the authority to “refuse to accept any application and specification for an invention the use of which would be in his opinion contrary to law or to morality or to public order”.³¹⁸ The Ordinance allows the applicant during the period between the filing of the application and the date of the sealing the right to use and publish the invention “without prejudice to the patent to be granted for the invention and such protection shall be known as provisional protection”.³¹⁹

The Ordinance puts certain limitations on applications for patents over inventions concerning munitions of war or of military value.³²⁰ In such circumstance the application has to be referred to the British High Commissioner who might after inquiry direct that no patent shall be issued³²¹ or that it shall be issued subject to conditions as he may think fit.³²²

Once a specification is accepted the applicant shall be notified of this³²³ and the Registrar shall advertise the acceptance and “the application and specifications, with the drawings, if any, shall be open to public inspection.”³²⁴ Worth noting that article 10(3) guarantees the applicant once the specification has been accepted “like privileges and rights as if a patent for the invention had been sealed on the date of the acceptance of the specification; provided that an applicant shall not be entitled to institute any proceedings for infringement until a patent for the invention has been granted to him.”³²⁵

³¹⁷ Article 8(4).

³¹⁸ Article 8(5).

³¹⁹ Article 7(2).

³²⁰ Article 9.

³²¹ Article 9(a).

³²² Article 9(b).

³²³ Article 10(1).

³²⁴ Article 10(2).

³²⁵ Article 10(3).

Any person within two months from the date of the advertisement may give notice to the Registrar of opposition to the grant of the patent on grounds enumerated in Article 11(1). Any person within two months from the date of the advertisement may give notice to the Registrar of opposition to the grant of the patent on grounds enumerated in Article 11(1).

CHAPTER 5
THE LAWS IN FORCE TODAY AND THEIR COMPLIANCE WITH THE MINIMUM
STANDARDS SET IN THE TRIPS AGREEMENT

A. Introduction

As we have established earlier, at present in the Palestinian Territories there are a number of laws protecting intellectual property rights. These are inherited from the British Mandate and the period of Jordanian rule in the West Bank.³²⁶ The Patents and Designs Ordinance No. 33 of 1924 and the Trademarks Ordinance No. 35 of 1938 are in force in the Gaza Strip, while the Patents for Inventions and Industrial Designs Law No. 22 of 1953 and the Trademarks Law No. 33 of 1953 are in force in the West Bank. The Copyright Act of 1911, as incorporated in Palestine and amended by the Copyright Ordinance No. 16 of 1924, is in force in both the West Bank and the Gaza Strip.

The question that this paper will attempt to address at this point is whether the laws currently in force in the Palestinian Territories are in compliance with the TRIPS Agreement. This discussion will be divided into two main parts. The first, and the shorter, will tackle the relevance of this question. That is, why should we compare the laws in force with the TRIPS Agreement? The second, and larger, part will perform such a comparison and illustrate some of the provisions of the existing laws that would have to

³²⁶ A completely different question which has not been addressed in this study is that of enforcement of these laws.

be amended for the PA to adhere to the TRIPS Agreement. This second part will be limited only to Copyright, Trademarks and Patents.

B. Relevance in the Palestinian Context

The requirement to comply with the TRIPS Agreement in Palestine is not an academic question; it is more real and immediate than many realize and has already taken the shape of signed Palestinian commitments, a fact that few actually realize, despite the fact that Palestine is still not a member of the WTO and has not received anything in return for its concessions to the TRIPS, as I will show in the following section.

The Gaza-Jericho Agreement, signed in Cairo on May 4, 1994,³²⁷ detailed in article II of Annex II the transfer of powers and responsibilities of the Civil Administration to the Palestinian Authority. Article II (B) states, that “[a]ll powers and responsibilities of the Civil Administration shall be transferred to the Palestinian Authority in the Gaza Strip and the Jericho Area, in accordance with the following provisions....” Sub-articles 1 to 38 detailed the various spheres in which authorities were to be transferred. Sub-article 7(a), concerning the transfer of legal administration, indicated that among the issues included in this sphere is the registration of Patents and Trade Marks.³²⁸

³²⁷Israel – Palestine Liberation Organization Agreement on the Gaza Strip and the Jerich Area, 33 I.L.M. 622 (1994), available at <http://www.jmcc.org/peace/agreements/gazajericho.htm> last visited November 23, 2003.

³²⁸ Ibid, Article II (B) (7) (a); the sub article reads: “This sphere includes, inter alia, administration of the Palestinian judiciary system in the Gaza Strip and the Jericho Area, licensing of lawyers, registration of companies and registration of patents and trademarks in these areas.”

A year later, it was further made clear in Appendix 1 to Annex III of the agreement concerning the transfer of authorities in the West Bank and Gaza, concluded on September 28, 1995 in Washington,³²⁹ that the issues transferred included Intellectual Property Rights in general, rather than being limited only to Patents and Trade Marks, as the previous agreement had done:³³⁰

Article 23- Legal Administration

1. Powers and responsibilities in the sphere of legal administration shall be transferred from the military government and its Civil Administration to the Palestinian Side.

2. This sphere includes, *inter alia*:

a-b....

e. registration of companies and intellectual property rights, including, but not limited to, patents and trademarks.

The stipulations in this Appendix went further than just regulating the transfer of authorities and responsibilities in the Legal Administration field. It also included a substantive provision pertaining to the expected form and scope of protection to be granted to IPRs in the areas to be administered by the Palestinian Authority, something which the Israelis had never done during almost three decades of occupation. Article 23 (4) states the following:

4. Intellectual Property Rights:

a. Intellectual property rights include, *inter alia*, patents, industrial designs, trademarks, copyright and related rights, geographical indications and undisclosed information.

³²⁹ Israel – Palestine Liberation Organization: Interim Agreement on the West Bank and the Gaza Strip, 36 I.L.M. 551 (1997), available at <http://www.jmcc.org/peace/agreements/oslo2.htm>, last visited November 6, 2003.

³³⁰ *Ibid*, Appendix 1, article 23(2)(e)

- b. (1) Each side shall use its best efforts to adopt in its legislation standards of protection of intellectual property compatible with those in the GATT Agreement on Trade Related Aspects of Intellectual Property (hereinafter "GATT-TRIPS").
- (2) Each side will strive to establish an adequate system for the examination of applications for registration of intellectual property rights compatible with those in GATT-TRIPS.
- c. Each side will recognize the copyright and related rights in original "literary and artistic works", including in particular, musical works, computer programs and audio and visual recordings, legally originating in the areas under the jurisdiction of the other side.
- d. Each side will recognize the undisclosed information rights originating in the areas under the jurisdiction of the other side.
- e. (1) In view of the free movement of industrial goods between Israel on the one hand and the West Bank and Gaza Strip on the other, each side when processing applications submitted by any resident or legal entity of the other side for the registration of patents, industrial designs, trade marks and geographic indications (hereinafter "Registered Rights"), shall expedite the examination process including publication for objections, for Registered Rights existing and in force in both areas, on the date of the transfer of powers and responsibilities in the sphere of legal administration.
- (2) In the event of a dispute between the registration of Registered Rights in Israel and their registration in the West Bank and Gaza Strip the registration of each side will apply in the areas under its jurisdiction.
- f. In the interest of promoting investment in the region, and in order to facilitate the protection by registration of intellectual property rights, the Palestinian side will, when processing applications for registration, take account of the fact that a particular right has been examined elsewhere.
- g. Without prejudice to the provisions contained in Annex IV (Protocol concerning Legal Affairs), each side will extend its administrative and judicial protection to intellectual property right-holders of the other side. The purpose of this protection is to permit effective action against any act of infringement of intellectual property rights under this Agreement, including expeditious remedies to prevent infringements, and remedies which constitute a deterrent to future infringements.
- h. The two sides will provide each other on a case-by-case basis with information regarding the registration of Registered Rights held by their respective Registrars of intellectual property rights.

- i. Both sides shall ensure that their Registers are open to the public.

It is quite surprising to find such a substantive issue -- one that incorporates a whole body of international obligations in the field of IP -- introduced by means of an appendix to an annex to the main agreement, especially when the annex primarily concerns a procedural issue (i.e., the spheres of authorities to be transferred), and nowhere in the main agreement is there any indication that such substantive issues will be included in the scope of the annex and its appendix. The following excerpt from the main agreement makes this clear:

Article I: Transfer of Authority

1. - 3....

4. As regards the transfer and assumption of authority in civil spheres, powers and responsibilities shall be transferred and assumed as set out in the Protocol Concerning Civil Affairs attached as Annex III to this Agreement (hereinafter "Annex III").

5. - 7....

There is no record whatsoever that details the manner in which this provision was negotiated and later agreed upon by both sides. Another surprise is why was this set of provisions concerning IP not included in Annex 5 concerning Economic Relations³³¹ or, at least, in Annex 6 concerning issues of Israeli-Palestinian Cooperation,³³² when article VI (e) of Annex 6 discusses the possible means of cooperation in issues of IP. The preamble to article VI and sub-article (e) reads as follows:

³³¹ Ibid, ibid.

³³² Ibid, ibid.

ARTICLE VI - Scientific and Technological Cooperation

The two sides shall promote cooperation in scientific research and technological development, and shall devote special attention to the following:

a. – d.....

e. development of an environment conducive to research, application of new technologies and adequate protection of intellectual property rights for the results of such research.

In light of the obligations in the field of IP that the Palestinian side has taken upon itself in Annex III concerning Civil Affairs, it would seem that subsection (e) would be unnecessary, or that it would have made more sense to have included those obligations in sub-section (e) itself, rather than buried in an appendix to Annex III.

C. The TRIPS Agreement

C.1. In general

The TRIPS Agreement is probably the most important agreement on Intellectual Property Rights since the Berne and Paris Convention. Its main purpose is to set minimum substantive IPR protection standards to which Member states applying the TRIPS Agreement must adhere to. Its importance lies mainly in its obligatory nature, which allows for cross retaliation, when cases of breach are proved, against other products, not necessarily IPRs, of the Member state in breach. The TRIPS Agreement was not the result of a balanced series of negotiations but rather the result of continual pressure from

the rich, industrialized countries, mainly the U.S., against the developing countries.³³³

This pressure was not merely trade related, as can be learnt from the following statement of one of the insiders to the TRIPS negotiations:³³⁴

The success of U.S. negotiations on TRIPS could also be attributed to factors outside the immediate context of trade, such as the collapse of the Berlin wall, the breaking up of the former USSR and US victory in the Gulf war. These factors certainly made it more difficult, psychologically, for developing countries to oppose the US, which was by the end of 1991 a formidable and the only global super power.

Before the Palestinian Authority attempts to amend its IPR laws in order to adhere with the international IPR agreements, the most obvious of which is the TRIPS, it is of the utmost importance that it consult with the different sectors of the society that will potentially be affected by such an adherence and to calculate carefully the gains and losses from such adhesion. In discussing some of the lessons learnt from the negotiation process that led to the TRIPS agreement, Professor Watal states that: “Unlike some developed countries, most developing countries did not develop adequate mechanisms for consulting with civil society and business interest groups during the negotiating process, leading to subsequent difficulties in TRIPS implementation. This also made for secrecy and inability to coordinate their positions with other like-minded countries.”³³⁵

We are not claiming here, nor are we proposing, that the Palestinian Authority should attempt to re-negotiate the TRIPS Agreement and, if and when it joins the WTO, it will most probably have to accept the TRIPS Agreement as a *fait-acompli*. As Watal correctly points out: “Developing countries should now move forward to implement their

³³³ Many books and reviews have been written on the negotiations process that led to TRIPS, see e.g. Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries*,

³³⁴ *Ibid*, p. 41

³³⁵ Watal, p. 46

TRIPS obligations and learn to play by the new rules of the game, defending the hard-won negotiating victories in future dispute settlement battles in the WTO.”³³⁶

The TRIPS Agreement is made up of 73 articles divided into seven parts in addition to the Preamble. The first Part, Articles 1 through 8, contains the General Provisions and Basic Principles. It is important to mention here that Article 2 incorporates major parts of the Paris Convention (1967)³³⁷ and states that abiding by the TRIPS Agreement will not derogate from the existing obligations that Member states might have to each other under different intellectual property conventions such as the Paris, Berne and Rome Conventions.³³⁸ Other important articles are Article 3, National Treatment, a principle already found in the Paris Convention³³⁹ and Article 4, the principle of Most-Favored-Nation Treatment, taken from GATT 1947³⁴⁰ and according to which, subject to certain limitations, any 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 second Part, Articles 9 through 40, contains the standards concerning the availability, scope and use of intellectual property rights. We shall address this Part in further detail below. The third Part, Articles 41 through 61, addresses the problematic issue of enforcement of intellectual property rights. This Part describes in quite some detail the legal measures that the Member countries shall make available to assure the enforcement and protection addressing such issues as evidence,³⁴¹ injunctions,³⁴²

³³⁶ Watal, p. 47

³³⁷ TRIPS, article 2(1)

³³⁸ TRIPS, article 2(2)

³³⁹ Paris Convention, article 2.

³⁴⁰ Article 1, available at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

³⁴¹ TRIPS, article 43

³⁴² Ibid, article 44

damages,³⁴³ provisional measures,³⁴⁴ and border measures.³⁴⁵ These provisions are quite complex and detailed, and are beyond the scope of this paper, but it is worthwhile mentioning here the general principle, as stated in Article 41, is to make these measures available so as to permit effective action against any act of infringement of IP rights covered by the TRIPS Agreement³⁴⁶ and that the procedures “concerning the enforcement of intellectual property rights shall be fair and equitable.”³⁴⁷ In addition they “shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.”³⁴⁸

The fourth Part, Articles 63 through 64, addresses dispute prevention and settlement between Member states. Article 63 obliges Member states to publish their laws and regulations and court decisions relevant to the subject matter of the TRIPS Agreement, or at least to make them publicly available so as to allow the governments of the other Member states and the right holders to become acquainted with them.³⁴⁹ In addition, Members are required to notify the Council for TRIPS of these pertinent laws and regulations.³⁵⁰ In addition, Member states may require in writing from other Member states information about these laws and regulations or court decisions, and the Member so requested must supply this information.³⁵¹ Article 64, which in my opinion is probably the heart of the TRIPS Agreement, makes the provisions of Articles XXII and XXIII of GATT 1994 and the Dispute Settlement Understanding applicable to the TRIPS

³⁴³ Ibid, article 45

³⁴⁴ Ibid, article 50

³⁴⁵ Ibid, article 51 through 59.

³⁴⁶ Ibid, article 41(1).

³⁴⁷ Ibid, article 41(2)

³⁴⁸ Ibid, article 41(2)

³⁴⁹ Ibid, article 63(1)

³⁵⁰ Ibid, article 63(2)

Agreement, which in effect creates an obligatory dispute settlement procedure and enforceable retaliation measures against Member states found to be in breach.

The sixth Part, Articles 65 through 67, deals with transitional arrangements until the final application of the TRIPS Agreement on all Member states. The importance of these arrangements is that they give Developing country Member³⁵² states a four-year delay from the date of general application of the Agreement,³⁵³ and add an extra five years for the Least-Developed Member states.³⁵⁴ Developing countries get also an additional five years in order to extend patent protection in certain fields of technology that were not protected in their areas upon the application of the TRIPS Agreement.³⁵⁵

The seventh and final Part of the TRIPS Agreement, Articles 68 through 73, provides for some administrative and procedural arrangements, such as the role of the TRIPS Council³⁵⁶ or the review and amendment of the Agreement.³⁵⁷ In addition, this Part includes some additional substantive issues. For example, despite the fact that Developing country Members received an additional period to comply with the provisions of the TRIPS Agreement, as mentioned above, these countries are nevertheless required to provide for an application procedure for pharmaceutical and agricultural chemical products immediately upon the general application of the Agreement³⁵⁸ and to apply to this application procedure the same criteria as if the Agreement were generally

³⁵¹ Ibid, article 63(3). Some developing countries have had to face extensive inquiries by such countries like the U.S., see Watal, pp. 55-57

³⁵² Ibid, article 65(2)

³⁵³ January 1, 1995.

³⁵⁴ Ibid, article 66(1)

³⁵⁵ Ibid, article 65(4), see below the part discussing Patents.

³⁵⁶ Ibid, article 68

³⁵⁷ Ibid, article 71

³⁵⁸ Ibid, article 70(8)(a)

applicable on the date of the filing.³⁵⁹ In addition, when such a pharmaceutical or agricultural chemical product application is filed, those Member states must, upon the fulfillment of certain requirements, provide the applicant with exclusive marketing rights for a period of five years or until the patent is granted or rejected, whichever period is shorter.³⁶⁰

C.2. Part II of the TRIPS Agreement

As explained in the previous section, Part II of the TRIPS Agreement³⁶¹ discusses the “Standards Concerning the Availability, Scope and Use of Intellectual Property Rights.” Part II includes seven categories of intellectual property rights (IPRs), addressed in sections one through seven.³⁶²

In the following three sub-sections we will try to address three different categories of IPRs recognized by the TRIPS Agreement and compare some of the standards relevant to these categories set by this Agreement with some of the provisions of the existing Palestinian laws concerning IPRs. The categories to be addressed are Copyright, Trademarks and Patents.³⁶³ This is by no means an attempt to explain the intricacies of TRIPS or to interpret its provisions, but merely to capture the more obvious differences.

³⁵⁹ Ibid, article 70(8)(b)

³⁶⁰ Ibid, article 70(9); see below the part discussing Patents for an analysis of this article.

³⁶¹ Articles 9 to 40

³⁶² The seven categories are: 1. Copyright and Related Rights, articles 9 through 14; 2. Trademarks, articles 15 through 21; 3. Geographical Indications, articles 22 through 24; 4. Industrial Designs, articles 25 through 26; 5. Patents, articles 27 through 34; 6. Layout-designs (Topographies) of Integrated Circuits, articles 35 through 38; 7. Protection of Undisclosed Information, article 39.

³⁶³ We have confined ourselves to these three categories in the hope that we will address the other categories in another paper in the near future.

C.2.i. Copyright.

Section 1 of the TRIPS Agreement, Articles 9 through 14, deals with Copyright and Related Rights. At the outset of the section, Article 9, entitled “Relations to the Berne Convention,” incorporates most of the substantive provisions of the Berne Convention into the TRIPS Agreement by making it clear that “Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto...” except for Article 6bis that guarantees to the author moral rights in his authorship independent from the economic rights,³⁶⁴ which was explicitly excluded from the TRIPS.³⁶⁵

The pertinent law in the Palestinian Territories, the Copyright Act, 1911, is quite a long and complicated law and, as we have attempted to give a summary of its main provisions in a previous chapter, it is sufficient here to state that in general it complies with the provisions of the Berne Convention as they stood on the time this Act came into force in the UK on the 1 of July, 1912.³⁶⁶ The Order-in-Council extending the protection of the Act to foreign countries that were members of the Union established under the Berne Convention took into consideration the Rome revision to the convention of 1928.³⁶⁷ The U.K. International Copyright Act of 1886 was passed as part of the preparations for the Conference of Powers that resulted in the Berne Convention.³⁶⁸ Among the things that the Act introduced, in line with the provisions of the Berne Convention,³⁶⁹ was the abolishment of the requirement to register foreign works and the

³⁶⁴ see article 6bis Berne Convention

³⁶⁵ at the time when the TRIPS Agreement was concluded the U.S. had not yet adhered to the Berne Convention and did not recognize in its law of Copyright Moral Rights, it was not until ...when the U.S. amended its Copyright Law and became a signatory to the Berne Convention in

³⁶⁶ See The UK Patent Office, available at <http://www.patent.gov.uk/copy/history> last visited June 9, 2003.

³⁶⁷ See above, chapter 3 the part discussing the Copyright Act, 1911

³⁶⁸ Ibid.

³⁶⁹ Ibid (The UK ratified the Convention with effect from 5 December 1887)

introduction of the exclusive right to import or produce translations.³⁷⁰ A historical survey of the copyright laws of the UK appearing on the web page of the British Patents Office describes the Copyright Act, 1911 thus:

It brought provisions on copyright into one Act for the first time by revising and repealing most earlier Acts. Amendments included the introduction of a further extension of the term of protection, together with a new arrangement for calculating the term of copyright. Records, perforated rolls, sound recordings and works of architecture also gained protection. The Act also abolished the requirement to register copyright with Stationers Hall - a fundamental principle of the Berne Convention. The Act abolished common law copyright protection in unpublished works, apart from unpublished paintings drawings and photographs.³⁷¹

However, a number of changes will have to be introduced to the Copyright Act, 1911 in order to bring it up-to-date. These changes include the following:

- The protection of computer programs as literary works under the Berne Convention (1971).³⁷²
- The eligibility for copyright protection in certain cases of compilations of data.³⁷³
- The introduction of “Rental Rights” in, at least, computer programs and cinematographic works that would allow the holders of the copyright to “prohibit the commercial rental to the public of originals or copies of their copyright works.”³⁷⁴

³⁷⁰ Ibid. But compare with the amendment of the Berne Convention of 1971 that allowed for exceptions to this rule for developing countries: Appendix, Article II.

³⁷¹ Ibid.

³⁷² TRIPS, article 10(1).

³⁷³ A re introduction of the “Sweat of the Brow” theorem which has been rejected in the U.S. and runs counter the Feist decision of the U.S. Supreme court that decided upon the uncopyrightability of data compilations.

³⁷⁴ TRIPS, article 11.

- The recognition of copyright in certain neighboring rights: Performers,³⁷⁵ Producers of phonograms³⁷⁶ and Broadcasting organizations.³⁷⁷

C.2.ii. Trademarks

Section 2, Articles 15 through 21, deals with Trademarks. In addition to the provisions in the TRIPS Agreement itself dealing with Trademarks, Article 2 of the TRIPS Agreement also provides that Member States “shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967),”³⁷⁸ thereby incorporating most of the substantive provisions of the Paris Convention³⁷⁹ into the TRIPS Agreement. This means that the Palestinian Authority has committed itself, indirectly, to these provisions as well.

Some examples of the main provisions of the Paris Convention include National Treatment,³⁸⁰ which principally guarantees that nationals of any member country of the Union³⁸¹ “enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals.”³⁸² This principal now appears also in the TRIPS Agreement.³⁸³ It is important to recall that The Palestinian Authority is still not a Member state of the TRIPS Agreement or part of the Union of the Paris Convention,³⁸⁴ and until it becomes such a member, is free from this requirement.

³⁷⁵ TRIPS, article 14(1)

³⁷⁶ Ibid, article 14(2)

³⁷⁷ Ibid, article 14(3).

³⁷⁸ TRIPS article 2(1)

³⁷⁹ Paris Convention for the Protection of Industrial Property, signed March 20, 1883 and later revised several times. The last revision of the Paris Convention before the end of the British Mandate over Palestine was at London on June 2, 1934.

³⁸⁰ Paris Convention, article 2

³⁸¹ Article 1(1) of the Paris Convention constituted a Union formed of the countries to which the Convention applies.

³⁸² Article 2(1)

³⁸³ TRIPS, article 3.

³⁸⁴ But see above the part that discusses the British Mandate legislation on Trademarks and Patents.

Another principle introduced by the Paris Convention is the Right of Priority.³⁸⁵ This guarantees to any person who filed an application to register a Trademark in one of the countries of the Union a right of priority³⁸⁶ for a period of six months³⁸⁷ for the purpose of filing in the other countries of the Union. Both the Palestinian Trademarks Ordinance of 1938 and the Jordanian Trademark Law of 1952³⁸⁸ recognized the Right of Priority,³⁸⁹ allowing the government³⁹⁰ to enter into agreements with other foreign countries for the mutual protection of trademarks that would allow for a six-month priority period.³⁹¹

The Paris Convention introduced a new category of marks, referred to as “Well-Known Marks,”³⁹² that are not recognized in the trademark laws in force in the Palestinian Territories. Basically the countries of the Union undertake and, should it become a member of TRIPS, Palestine will have to undertake:

[T]o refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods....³⁹³

The obligation to refuse or to cancel registration and prohibit use requires, as is clear from the Article quoted above, that the mark is well know in the country and not

³⁸⁵ Paris Convention, article 4.

³⁸⁶ Ibid, article 4(A)(1)

³⁸⁷ Ibid, article 4(c)(1)

³⁸⁸ The Jordanian Trademarks Law, No. 33 of 1952, in force in the West Bank, is for all practical reasons here an almost exact translation of the British Mandate Ordinance in force in the Gaza Strip, thus the reference to the Trademark Ordinance

³⁸⁹ Articles 41-43

³⁹⁰ In the language of the ordinance it is actually “His Majesty on behalf of the Administration of Palestine”, article 41(1).

³⁹¹ Article 41(a), and as we have seen above the Government of the British Mandate already committed Palestine to respect reciprocity with a number of countries.

³⁹² Article 6bis. See also TRIPS Agreement Articles 16 (2), (3).

³⁹³ Article 6bis(1).

elsewhere, that the infringing mark is liable to create confusion, and that it is used for identical or similar goods. The TRIPS Agreement stretched this category yet further, first applying article 6bis to services as well as goods³⁹⁴ and, in addition, no longer requiring that the infringing mark be used for identical or similar goods³⁹⁵ if two conditions are met. The first condition is that the “use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark.”³⁹⁶ The second is that “the interests of the owner of the registered trademark are likely to be damaged by such use.”³⁹⁷ One other thing worth mentioning in the context of Well-Known Marks is that, while Article 6bis of the Paris Convention did not include any guidance as to what the factors are that should be considered in determining if a mark is well known, the TRIPS Agreement stated that in “determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.”³⁹⁸

Finally, while the Palestinian law does not contain any provisions limiting the nature of the goods to which a mark may be applied -- in line with Article 7 of the Paris Convention³⁹⁹ -- nevertheless the definition of trademark as it appears in Article 2 refers

³⁹⁴ TRIPS Agreement, article 16(2).

³⁹⁵ Ibid, article 16(3).

³⁹⁶ Ibid.

³⁹⁷ Ibid.

³⁹⁸ Ibid, article 16(2).

³⁹⁹ See also TRIPS Article 15(4).

only to “goods;”⁴⁰⁰ thus “services” are excluded and are not a protectable subject in Palestine as they are under the TRIPS Agreement.⁴⁰¹

C.2.iii. Patents

Section 5 of the TRIPS Agreement, Articles 27 through 34, deals with Patents. According to Article 2(g) of the Patents and Designs Ordinance, an “Invention” means “a new product or commercial commodity or the application in some new manner for any purpose of industry or manufacture of any means already discovered, known or used.”

Article 27(1) of TRIPS makes it clear that “patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application....” It is clear from the definition in the Patents Ordinance that an invention complies with the requirement of being “new” and “capable of industrial application” as stated in TRIPS, but it is not clear from the definition in the Ordinance whether an “inventive step” (or its synonym, “non-obviousness”) is required. Therefore, the Palestinian law should be amended accordingly, even though there is a chance that the current law might be interpreted as including this requirement if such a requirement is found in the English Common Law by means of article 46 of the Order-in-Council of 1922.⁴⁰²

⁴⁰⁰ In accordance with article 2 a “trademark” means a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with or offering for sale.

⁴⁰¹ TRIPS, Article 15(1): “Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking.....”

⁴⁰² *See above* Chapter 2, the discussion concerning article 46.

In addition, the Ordinance should be amended to make it clear that patents are available not only to “products”⁴⁰³ but also to “processes”⁴⁰⁴ and that these could be “in all fields of technology.”⁴⁰⁵

The Patent Ordinance does not exclude any specific field of technology from the grant of a patent, but at the same time the Ordinance gives the registrar a very wide authority to⁴⁰⁶ “refuse to accept any application and specification for an invention the use of which would be in his opinion contrary to law or to morality or to public policy.” Because the Ordinance does not define these expressions, it is left completely to the discretion of the registrar and the courts that would be hearing appeals against the registrar’s decision. In contrast, the TRIPS Agreement does not allow for an exclusion from patentability merely because the use is prohibited by law. Rather, while recognizing *ordre public* and morality as reasons to exclude an application from patentability, the TRIPS Agreement provides that such an exclusion can only take place when the member country also prevents the commercial exploitation of such an invention, thus preventing that country from making such an invention available to all under the excuse of non-patentability.⁴⁰⁷

⁴⁰³ In comparison to the Patents Ordinance TRIPS is silent about the patentability of new uses of known substances and it is not clear if it was meant to be excluded from TRIPS or can it be part of the term “process”, see Watal p. 104-105 for an interesting discussion of this point giving also as an example the question whether the novel therapeutic use of certain known substances or medicines can qualify for patentability or are they methods of treatment that thought patentable may be excluded under TRIPS 27(3)(a).

⁴⁰⁴ though indirectly from the reading of article 21(5)(b) it becomes apparent that the Ordinance does recognize the patenting of processes.

⁴⁰⁵ In accordance with article 65(4) of TRIPS developing countries may delay the recognition of product patents in areas of technology that were not protectable in their territory on the general date of application of TRIPS for a period of nine years from the date of general application.

⁴⁰⁶ Article 8(5)

⁴⁰⁷ The TRIPS Agreement allowed for additional categories that may be excluded under Article 27(3). Sub article “a” allows the exclusion of “diagnostic, therapeutic and surgical methods for the treatment of humans or animals”, but note that it did not exclude pharmaceuticals that have proven since TRIPS entered into force to have been one of the most problematic fields for developing countries to adhere with, see.....

The TRIPS Agreement included special arrangements for the highly-charged issue of pharmaceuticals and agricultural chemical products. This has basically created a situation in which developing countries -- despite the fact that they have four years from the date of application of this Agreement to comply with its provisions as provided by Article 65(2) – are nevertheless required by Article 70(8) to provide “means by which applications for patents for such inventions can be filed.”⁴⁰⁸ In addition, they are required to apply to these applications from the date of application of the Agreement “the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member”⁴⁰⁹ and when a patent is granted the term will be counted as from the filing date.⁴¹⁰ In order to avoid a situation in which a Member can use this interim period in which no such patents are granted to allow for local use of such products that are subject to a patent application, “exclusive marketing rights shall be granted...for a period of five years,”⁴¹¹ subject to certain conditions.⁴¹² As a practical matter, these provisions in Article 70(8) give patent-like protection starting in 1995 as a result of this “pipeline” protection.⁴¹³ In light of this, it is clear why the infant pharmaceutical industry in the Palestinian Territories has to be consulted before any agreement is made to adhere to the TRIPS Agreement and its obligations..

In addition Sub article “b” provides allows the exclusion of “plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes”, but plant varieties were excluded from this exclusion requiring from member states to protect them “by patents or by an effective sui generis system or by any combination thereof”. Sub paragraph “b” was supposed to be reviewed in 1999, but...??

⁴⁰⁸ Article 70(8)(a)

⁴⁰⁹ 70(8)(b)

⁴¹⁰ 70(8)(c)

⁴¹¹ article 70(9)

⁴¹² Article 70(9), and see Watal p. 119 for a discussion of these conditions and the implementation in different countries.

⁴¹³ As Watal explains: “In the negotiations, the US demanded ‘pipeline’ protection for these sectors for patents filed within 10 of 1995, so that effectively protection would be available from 1995 on the market” p. 119

Article 21 of the Patent Ordinance allows for compulsory licensing and even the revocation of the Patent in certain circumstances. The main reason for the grant of a compulsory license is that the “reasonable requirements of the public with respect to a patented invention have not been satisfied”⁴¹⁴ as judged in accordance with Article 21(5):

- (a) If, by reason of the default of the patentee to manufacture to an adequate extent and supply on reasonable terms a patented article, any trade or industry or the establishment of any new trade or industry in Palestine is unfairly prejudiced or the demand for the patented article or the articles produced by the patented process is not reasonably met;
- (b) If any trade or industry in Palestine is unfairly prejudiced by conditions attached by the patentee to the purchase or use of the patented article or to the working of the patented process.

The registrar and the district courts are in charge of deciding if these conditions have been met,⁴¹⁵ and therefore have great flexibility in limiting the power of the patentee based on the needs of the society and the local economic conditions. The Paris Convention has also granted the member states broad discretion on the grant and revocation of patents “to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.”⁴¹⁶ The Paris Convention does put some limitations on the power of the state, requiring for example that no “proceeding for the forfeiture or revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory license”⁴¹⁷ and no compulsory license may be applied for “on the ground of failure to work or insufficient working before the expiration of four years from the date of filing of the patent application or three years from the date of the grant of the patent.”⁴¹⁸ No such limitations

⁴¹⁴ article 21(1)

⁴¹⁵ article 21(3), 21(4)

⁴¹⁶ Paris Convention, article 5(A)(2)

⁴¹⁷ article 5(A)(3)

⁴¹⁸ article 5(A)(4)

are found in the Palestine Patent Ordinance, except perhaps for the condition that no revocation order shall be given “before the expiration date of the grant of the patent”⁴¹⁹ which is clearly not in compliance with the Paris Convention.

The discretion to grant compulsory licenses that is provided in the Patent Ordinance would be further restricted by the provisions of the TRIPS Agreement as provided in Article 31. For example, sub-article (b) requires that the “proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non commercial use”, but sub-article (f) stipulates that “any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use.” Thus, for example, under the terms of the TRIPS Agreement, if a poor AIDS-stricken African country is in need of certain patented drugs, its only solution is to license its production in its own country, which might not be a feasible option because of technological or financial constraints; while, on the other hand, another Member having the necessary technology cannot license such production to supply the demand of that African country because of the condition stipulated in sub-article (f) that it should only be for the supply of the domestic market. In addition, sub-article (h) provides that “the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization.”

⁴¹⁹ article 21(3). The original requirement as it appeared in the original text of 1924 read: “*shall not be made before the expiration of three years from the date of the patent...*” and compare with the Jordanian Patent Law of 1953 that still uses the original language of the Mandate Ordinance before its 1930 amendment.

The TRIPS Agreement does not define the date in which novelty is determined.⁴²⁰ It appears that the Palestinian Patents Ordinance determines novelty not on the date of invention, but on the date of application, as becomes clear from Article 11(d), which provides that one of the grounds for opposing the grant of a patent is “[t]hat the invention has been made available to the public by publication in any document published in Palestine prior to the application.” The TRIPS agreement also does not define whether the novelty of the invention is to be determined on a territorial basis or worldwide basis. Neither does the Palestine Ordinance, but from the language of Article 11(d), which refers to the “publication in any document published in Palestine,” it seems that the search to determine novelty is done solely in Palestine; however, it would be better if this issue were clarified clearly in the law.⁴²¹

Article 4(1) of the Ordinance specifies the rights conferred by the grant of a patent, namely “the exclusive right to use, exploit, make, manufacture, produce, supply and sell the said invention or to grant license therefore.” Such rights are in conformity with the Rights Conferred as specified in Article 28 of TRIPS, except that Article 28 specifically includes among the rights conferred not only selling, but also offering for sale and the importation⁴²² of such a product. In addition, Article 28 made it clear that when the subject matter of the patent is a process,⁴²³ the patent shall confer also the

⁴²⁰ In the US it is the date of invention with a one-year time limit prior to filing while in most other jurisdictions it is the date of filing, Watal, p. 91.

⁴²¹ In the US the Novelty is tested on a worldwide basis for published matters but confines the search to the US if the knowledge is oral, while the EU makes a worldwide search for both Oral and written material; see Watal p. 90.

⁴²² Some have tried to claim that this right also grants the patentee the right to exclude parallel imports, but this contradicts article 6 of TRIPS that clearly states that “nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights”, leaving it for each member to regulate this field as suits its national interests, and see discussion in Watal p. 110.

⁴²³ Article 28(2)

exclusive right to prevent the “using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.”

The term of the patent in Palestine is 16 years⁴²⁴ as of the date of the application.⁴²⁵ This term has to be increased to 20 years in accordance with article 33 of TRIPS, and this requirement should have retroactive effect on any patents whose term has not lapsed on the date the Agreement is to be applied to Palestine.⁴²⁶

Finally, as is the case for Trademarks, the Paris Convention guarantees a Right of Priority⁴²⁷ to any person who files an application to register a Patent in one of the countries of the Union.⁴²⁸ However, whereas in trademarks the period is six months, in patent applications it is a twelve-month priority period.⁴²⁹ The Palestinian Patents and Designs Ordinance of 1924, as well as the Jordanian Patents and Designs Law of 1953,⁴³⁰ recognized the Right of Priority,⁴³¹ allowing the government to enter into agreements with other foreign countries for the mutual protection of patents that would allow for a twelve-month priority period.⁴³²

⁴²⁴ article 15(1)

⁴²⁵ article 13: “Except as otherwise expressly provided by this Ordinance a patent shall be dated and sealed as of the date of application”

⁴²⁶ article 70(2) that has general application states that “this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of the Agreement...”; and see Watal p. 115.

⁴²⁷ Paris Convention, article 4.

⁴²⁸ Ibid, article 4(A)(1)

⁴²⁹ Ibid, article 4(c)(1)

⁴³⁰ As aforementioned, the Jordanian Patents and Designs Law, No. 22 of 1953, in force in the West Bank, just as the Trademarks Law is for all practical reasons here an almost exact translation of the British Mandate Ordinance in force in the Gaza Strip, thus the reference to the Patents and Design Ordinance.

⁴³¹ Article 52

⁴³² Article 52(1)(a). We have already seen above that Palestine during the Mandate adhered to this convention and Orders were issued to implement them towards certain countries of the Union. It is a completely different question if these arrangements and orders have survived the consecutive changes of powers over Palestine after the end of the Mandate.

CHAPTER 6

CONCLUSION:

THE PAST, THE PRESENT, AND THE FUTURE

The previous chapter has shown us that complying with the TRIPS Agreement will require that the Palestinian Authority and the future Palestinian State amend its IP laws. In general, these needed amendments might not be as drastic as one might have thought from first impression, as the laws as they currently exist are generally in line with the substantive provisions of the TRIPS Agreement and other related agreements such as the Paris and Berne Conventions. Yet, some amendments have to be introduced to bring these laws up to date especially to introduce new categories of subject matter that qualify for protection under copyright, such as computer software and neighboring rights, under patent, such as pharmaceutical inventions or plant variation; and under trademarks, such as well known marks. In addition we have to remember that we did not address all the categories of IP present in the TRIPS Agreement, some of which will force upon the Palestinian legislature to introduce completely new categories previously not found in Palestine, such as geographical indications or layout-designs of integrated circuits.⁴³³

⁴³³ One question that we have not attempted to address in this paper is the question of enforcement. We have seen that there are indeed IP laws in the Palestinian Territories. While these might be outdated in certain respects, they are nevertheless current laws that set at least some basic standard standards. The next obvious question is whether these laws are actually enforced. The TRIPS Agreement does not satisfy itself merely with defining the above-mentioned categories; it goes beyond that into the question of enforcement of these rights, requiring full compliance from all Member states under the threat of sanctions.

In light of the above, if the Palestinian state opts to become a member of the WTO, its current IP laws clearly need to be either amended or even replaced altogether by new laws designed with the TRIPS Agreement in mind. The question at this stage then becomes what approach would be most beneficial for a newly established Palestinian state. In my opinion, there are probably three options:

The first option is an immediate compliance with international demands by adopting new or amended maximalist enforcement IP laws that will satisfy the TRIPS Agreement and ascede to U.S. and international pressure.

The second option is simply not to give in to any international pressure and to defer the adherence to any international IP requirements as long as possible under the pretext of providing the people of this new state with cheap products and an access to education. The rationale behind this possible approach is that if the Palestinian state wants economic development and to be part of the global economy, it must adopt a liberal economic approach. Such a “liberal economic approach” is described by Thomas Friedman: “The driving idea behind globalization is free-market capitalism....globalization has its own set of economic rules – rules that revolve around opening, deregulating and privatizing your economy, in order to make it more competitive and attractive to foreign investment.”⁴³⁴

According to Fidler and Harb, three principles characterize this liberal approach:⁴³⁵ (1) national market liberalization; (2) integration with global markets; and (3) market-supportive legal rules and political institutions.⁴³⁶ The Global economy

⁴³⁴ As quoted by Fidler and Harb, *The Palestine Economy*, in *Palestine and international law: essays on politics and economics*, edited by Sanford R. Silverburg (2002) at 336.

⁴³⁵ *Ibid, Ibid.*

⁴³⁶ *Ibid, Ibid.*

approach undermines the sovereignty of the state, because the new economic system is increasingly non-territorial. This creates challenges for states, specially developing states, which want to pursue economic development.⁴³⁷ If Palestine desires free-market capitalism and “recognizes the rules of free market in today’s global economy, and decided to abide by them, it puts on what I call the Golden Straight Jacket,”⁴³⁸ which requires that a state adopt, or at least to be seen as moving toward, a set of rules that would guarantee the opening of its markets. Thus, under the second option, Palestine simply cannot adopt the rules of the global market unless the Palestinian state is ready to pay the economic and political price entailed.

The third option, advocated by people such as Professor Reichman,⁴³⁹ is what is described as a proactive adoption of the TRIPS Agreement; that is, adopting it in such a manner that it will take into consideration the social and economic needs of the developing country, in this case the Palestinian state-to-be, rather than blindly copying the laws and policies of the developed world which had different needs and aspirations.

Because of the importance of this approach and its relevance to the Palestinian context, we will explain it in more detail.

Professor Reichman is quite aware that developed and developing countries seem to be heading in opposite directions when it comes to the question of compliance with the TRIPS Agreement:

A growing, worldwide commitment to the competitive ethos should then facilitate the implementation process and help to reduce friction by

⁴³⁷ Ibid, at 334 (and see their reference to the description of Martin Khor that Globalization as a new form of colonization)

⁴³⁸ *Ibid*, at 351 referring to the opinions of Thomas Friedman.

⁴³⁹ J.H. Reichman, *From Free Riders to Fair Followers: Global Competition under the TRIPS Agreement*, 29 N.Y.U.J.Int’l L. & Pol. 11 (1997), see also Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, upcoming (in file with the author).

providing some common ground in contentious cases. In practice, however, any given state's approach to compliance with this Agreement will vary with its own national innovation strategy and with the formal and informal industrial policies chosen to effectuate it. In this context, the developed and developing countries seem to be heading in opposite directions, and the tensions engendered by their conflicting interests complicate the process of consolidating the TRIPS Agreement for the immediate future.⁴⁴⁰

As an example of this trend, Professor Reichman mentions the growing tendency of developed countries to adopt anti-competitive protectionist legislation that expands established intellectual property rights and relaxes anti-trust laws. This is leading to a situation in which “virtually all products sold on the general products market come freighted with some form of exclusive property right.”⁴⁴¹ According to Professor Reichman :

[B]ehind these high-protectionist trends there usually lies a defensive mentality that tends to view national innovation policy in terms of preserving the dominant position of existing technology exporting firms. Such policies are rooted in fears that leakage and spillovers will facilitate valuable applications of research results outside the originating countries and, ever more frequently, in newly industrialized or developing countries. By combining the market power of natural competitors with strengthened international intellectual property protection, oligopolists in developed countries seek to make it harder for firms in developing countries to gain access to the most valuable technologies or otherwise to catch up with the leaders in the global market for higher-tech products.⁴⁴²

Professor Reichman argues that this approach might “backfire in the medium or long term” suffocating small and medium-sized firms that are often the real engines of

⁴⁴⁰ *Ibid*, p. 14

⁴⁴¹ *Ibid*, p. 20.

⁴⁴² *Ibid*, p. 21.

economic growth.⁴⁴³ In addition, developed countries should not take for granted the existing levels of innovative strength. The fear, according to Professor Reichman, is that:

[When] the regulatory balance tips too far in favor of innovators at the expense of users and competitors, it tends to misallocate the scarce resources devoted to research and development and to reduce the efficiencies that flow from reverse-engineering and from cumulative, sequential innovation generally. The legal barriers to entry that result from overly protectionist measures may also weaken the overall competitiveness of national innovation systems with respect to other systems that permit entrepreneurs to operate in less protectionist environments.⁴⁴⁴

On the other hand, according to Professor Reichman, developing countries and least developed countries suffer from inadequate investment and insufficient development of human resources; thus:

[D]eveloping countries and countries in transition are striving to rationalize their national systems of innovation, to maximize their ability to acquire and absorb scientific and technical knowledge, and to improve their competitive capabilities in the emerging global marketplace, notwithstanding the legal and non legal barriers elsewhere devised to frustrate this objective. In so doing, adherence to the TRIPS Agreement requires these same countries to reconcile their own economic development goals with its international intellectual property norms.⁴⁴⁵

Professor Reichman concludes that “the logical course of action for the developing countries in implementing their obligations under the TRIPS Agreement is to shoulder the pro-competitive mantle that the developed countries have increasingly abandoned.”⁴⁴⁶

In doing so:

[The] developing countries should seek to maintain the maximum amount of competition in their domestic markets that is consistent with a good faith implementation of the international minimum standards of

⁴⁴³ Ibid, p. 23.

⁴⁴⁴ Ibid, p. 24.

⁴⁴⁵ Ibid, Ibid.

⁴⁴⁶ Ibid, p. 25.

intellectual property protection. In carrying out this task, they will find much room to maneuver from within the international conventions themselves, which leave wide and crucial issues, especially scope of protection issues, to the vagaries of the WTO Member States' domestic laws.⁴⁴⁷

Professor Paul Heald, in his article “Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game,”⁴⁴⁸ took a similar approach. He argued that the developing countries have to maneuver within the TRIPS Agreement, but he went a step further than Professor Reichman in challenging the almost universal assumption that maximum enforcement of IPRs is a key factor for attracting foreign investment and economic development,⁴⁴⁹ making it clear that “each country must consider its own unique economic situation in crafting an intellectual property policy that complies with the TRIPS Agreement.”⁴⁵⁰ According to Professor Heald, the answer to two important questions should preoccupy a developing country.⁴⁵¹ The first is, “Will the costs of enforcing intellectual property rights be offset by a stimulus to local creativity?”⁴⁵² A clear answer to this question is not available.⁴⁵³ The second question is, “Will those costs be offset by increased foreign direct investment and technology

⁴⁴⁷ Ibid, p. 26. However one must note here that even if it is true that there is space for maneuvering from within the TRIPS Agreement Prof. Reichman ignores here the pressures that the U.S. as a main player in the field of IP in the world can impose on developing countries and on other countries in general by throwing its weight around, requiring sometimes countries to implement protections that go beyond the minimum standards required in the TRIPS Agreement, see, e.g., Timothy Bickham, Protecting U.S. Intellectual Property Rights Abroad with Special 301, 23 AIPLA Q.J. 195, (1995) or Seung Wha Chang, Taming Unilateralism Under the Multilateral Trading System: Unfinished Job in the WTO Panel Ruling on U.S. Sections 301-310 of the Trade Act of 1974, 31 LAW & POL'Y INT'L BUS. 1151 (2000) stating that it was “generally understood that one of the most important reasons why the U.S. trading partners agreed to improve the WTO dispute settlement process and to make it more judicial was to impose restrictions on the use of section 301. To the contrary, United States' officials declared on several occasions that section 301, far from being weakened, became more “effective” with the DSU”, Id. at 1154. .

⁴⁴⁸ Above fn....

⁴⁴⁹ Ibid, p. 4 : “This paper challenges the economic logic of the maximum enforcement claim and suggests that a rational, self-interested approach taken by a developing country would seek to minimize the costs of complying with TRIPS while maximizing the potential for necessary technological development”, at p. 4.

⁴⁵⁰ Ibid, p. 5.

⁴⁵¹ Ibid, p. 6.

⁴⁵² Ibid, p. 6.

transfer?” According to Heald, most commentators have answered this question in the affirmative, relying principally on the work of Edwin Mansfield.⁴⁵⁴ Professor Heald argues, however, that the conclusions reached by Mansfield that strong protection of IPRs is a prerequisite for foreign investment in developing countries are not necessarily supported by his research, and that a closer look at the questions asked by Mansfield will show that he did not differentiate between the different types of IPR:⁴⁵⁵

“Mansfield did not ask firms about the relevance of each category of intellectual property separately. He did not question the distinct relevance of the enforcement of patents, trademarks, copyrights, trade secrets, publicity rights, or other sui generis design rights, but only asked generically about “intellectual property rights” as a group.”⁴⁵⁶

Professor Heald also argues that the comments of those interviewed by Mansfield:

“[S]upport the logical inference that the disclosure fears – driven by inadequate trade secret or contract law – affect decisions to invest in manufacturing facilities or to transfer technology to the developing world. There is little support, on the other hand, for the proposition that levels of patent, copyright and trademark protection are relevant on foreign direct investment decisions.”⁴⁵⁷

Instead, Professor Heald proposes that developing countries should not adopt Mansfield’s research blindly but rather should develop a strategy that would take into consideration both the costs and benefits of protection in “the context of their unique economic situation.”⁴⁵⁸ He urges developing and least developed countries to consider “minimal compliance”⁴⁵⁹ and states that “under no circumstances should a developing country

⁴⁵³ Ibid, p.6.

⁴⁵⁴ Ibid, p. 7, referring to the work of Edwin Mansfield, Intellectual Property Protection, Foreign Direct Investment, and Technology Transfer, INTERNAT’L FIN. CORP. DISCUSSION PAPER #19 (1994), and see the works of other commentators mentioned by Heald relying on Mansfield at p. 7 fn. 17 – 19.

⁴⁵⁵ Ibid, p. 10.

⁴⁵⁶ Ibid, *ibid*.

⁴⁵⁷ Ibid, p. 15.

⁴⁵⁸ Ibid, p. 17

⁴⁵⁹ Ibid, *ibid*. It is worth mentioning here that despite the fact that Heald proposes a minimalist approach, he however suggests certain areas where “strict enforcement of rights may be welfare-enhancing.” *Id*, p. 21. In

accept the confident assertions made by some commentators that adopting a maximalist posture towards all protection will stimulate foreign investment. A law-by-law analysis is always necessary.”⁴⁶⁰

In light of the above, Professor Heald suggests a rational approach in the implementation of the TRIPS Agreement obligations in the developing world: “Rational, self-interested policymakers in the developing world must take a hard look at each potential legal option in the context of their own economies in order to choose how best to comply with the TRIPS Agreement.”⁴⁶¹ In order to achieve his minimum compliance policy. Professor Heald demands a concerted effort between the three branches of government; the legislative branch to implement a rational minimal compliance strategy,⁴⁶² the judiciary to be qualified enough to understand its role in implementing a rational judicial policy,⁴⁶³ and the executive branch to implement a rational agenda.⁴⁶⁴

The fine details of how to actually implement either the proposals of Professor Reichman or Professor Heald in Palestine are beyond the scope of this paper. They would

this context Heald proposes the following categories. Trade Secrets, *Id.*, p22, Sui Generis Protection of Local Special Innovations, *Id.*, p. 25, Traditional Knowledge about Plant Genetic Resources *Id.*, p. 26 and Local Plant Races. *Id.*, p. 29. For example according to Heald strong protection of Trade Secrets will promote the transfer of technology through licensing by guaranteeing to the foreign investors that the licensee will not misappropriate the technology (*Id.*, p. 22) while on the other hand the administrative costs are low given that the TRIPS Agreement does not require the establishment of special offices in which to register confidential information (*Id.*, p. 23) and on the other hand the TRIPS Agreement requires from the trade secret owner to take reasonable steps to protect its information secret thus the cost of the enforcement “is borne privately and, in the case of outside investors, by the foreign firm.”(*Id.*, p.24). In addition according to Heald a “vigorous and enthusiastic enforcement of trade secret law is a cheap way for a developing country to signal to outsiders that it takes its obligations under the TRIPS Agreement seriously.” (*Id.*, p. 24). This being said Heald however is quite aware that effective enforcement does not only entail the creation of the cause of action by the legislature, but also a “judiciary competent to effectively administer the law. Unfortunately, in developing nations, a weak judiciary is a common problem”, *Ibid.*, p. 25.

⁴⁶⁰ *Ibid.*, *ibid.* Prof. Heald supports his approach with the works of those who question the link between strong IP protection and foreign direct investments in the developing world the likes of Keith Maskus, Assafa Endeshaw, Carlos A. Primo Braga and Carsten Fink, see p. 17 – 18 fn. 48 and 54 for the citations.

⁴⁶¹ *Ibid.*, p. 21.

⁴⁶² *Ibid.*, p. 30.

⁴⁶³ *Ibid.*, p. 46.

require a fine reading of each of the existing IP laws in Palestine, followed by line-by-line amendment of them in line with the advice of both Professors Reichman and Heald. This hopefully would be the theme of a future paper. However, Professor Reichman has provided us with a brief summary of the issues that should be tackled when revising the IP policy of a developing country in accordance with his pro-competitive strategy in implementing the TRIPS Agreement. This summary can shed some light as to the issues that developing countries have to take into consideration. His strategy consists of at least five component factors:⁴⁶⁵

First, the developing countries may tilt their domestic patent, copyright and related intellectual property laws to favor second-comers, especially local competitors, rather than distant proprietary rights holders, to the full extent that good faith compliance with both national treatment and the relevant TRIPS standards still permits. **Second**, and closely related, the developing countries should distance themselves from protectionist measures being adopted in developed countries, and they may use tailor-made applications of competition law to curb the adverse effects of these measures on their domestic economies and to limit the abusive exercise of market power in general. **Third**, developing countries may institute incentive structures likely to stimulate subpatentable innovation at the local level with fewer anti-competitive effects than the hybrid regimes of exclusive property rights proliferating in the developed countries. **Fourth**, the developing countries may resist any further elevation of international intellectual property standards beyond the levels set in the TRIPS Agreement unless they are offered countervailing trade concessions or until their own technological prowess justifies the social costs of such regimes. **Fifth**, the developing countries may exploit new means of acquiring and disseminating scientific and technical knowledge by resorting to the global information infrastructure, and they should potentiate both their physical capacity to access such knowledge and the intellectual skills to process the information conveyed.⁴⁶⁶

⁴⁶⁴ Ibid, p. 59.

⁴⁶⁵ Reichman, *supra*, p. 26.

⁴⁶⁶ Ibid, *ibid*. Few of the examples given by Prof. Reichman are the following: In the field of patents he gives as an example a higher standard of the nonobviousness requirement or a stricter application of the doctrine of equivalents and he does not encourage the extension of patent protection to software that should be limited to copyright only. In the field of copyright developing countries can make use of the widely accepted limitations on author's exclusive rights for purposes of classroom teaching, research and private study for example in addition to the broadly interpreted, especially in the United States, fair use defense making also reference to article 13 of TRIPS Agreement arguing that nothing in the legislative history of

This option assumes that the state has adopted free-market capitalism but has to maneuver within the rules of free-market global economy. I have my doubts if this option is actually feasible in the case of Palestine, due to the fact that it would require finely tailored laws to the exact needs of Palestine, which pre-supposes a level of know-how that at the moment is non-existent.

Finally, it is still not clear which of the three options the Palestinian Authority will adopt,⁴⁶⁷ despite the rumors of a new draft law in process. However, one thing is abundantly clear: it should be an open process discussed in public and involving representatives of all the representative groups that will possibly be affected and understanding all the ramifications of any such choice. Adopting new laws based on an imported model is an easy option -- the more difficult, but in the end wiser option, is to determine what your own needs are and to tailor your domestic law to meet your own specific needs. The consequences of adopting an imported model of IP laws without considering the ramifications of such laws are severe. Especially if based upon models from developed countries that have a completely different developmental agenda than that prevailing in Palestine, such laws might prove devastating to the fragile Palestinian economy. In light of what has been discussed above, it is clear that the implementation of a well-considered IP policy requires financial resources and the human knowledge that

this article can be construed to limit developing countries from applying limitations and exceptions already recognized in state practice such as fair-use or use for research and learning. Also taking advantage of the international exhaustion theory in order to import cheap but genuine products.

⁴⁶⁷ In his inauguration speech in the Palestinian Legislative Council on April 29, 2003 as Palestinian Prime Minister, Mahmoud Abbas, otherwise known as Abu Mazen, made it clear that his government will opt for a free market economy stating that: "...the government is keen to continue working with the private sector in order to enact and enforce legislation and regulations that will strengthen the market economy and develop the national economy and provide protection to investments and investors." Available at <http://www.nad-plo.org/speeches/abumazen5.html> last visited November, 4 2003.

probably are not available at this time, especially when whatever resources and human capacity that are available might better be channelled into other, more pressing issues than intellectual property rights. As a result, the better policy might be not to attempt to join the WTO at the moment, and to delay the enforcement of international IP rights until such time when the economic and social benefits to be gained by Palestine will offset the cost of the concessions required upon joining the WTO. This time will come only when the resources and the capacities are available to implement the strategies discussed above, as advocated by Professors Reichman and Heald.⁴⁶⁸

⁴⁶⁸ Already in 1998 a draft Copyright Law was presented to the Palestine Legislative Council (PLC) by Legislative Council Member Dr. Azmi Shuaibi, but has still not been approved as a law. It is not clear who assisted Dr. Shuaibi in the preparation of this text and what were the reasons that brought about the introduction of a completely new Copyright Law and not the amendment of the existing Copyright Act (1911). An analysis of this draft text is beyond the scope of this paper, but the PLC should be warned not to pass this law before it has made sure that it is of Palestine's best interest to introduce it. Note for example that despite the fact that Palestine is still not a part of the WTO Article 3(3)(xi) of the draft law recognizes Software Programs and Data Bases as works of authorship entitled for copyright protection. To the best of the knowledge of this author no study was made measuring the possible detriment to the Palestinian economy from enforcing this provision. To put things into proportion, the day after this draft law becomes law all the Palestinians will have to use original microsoft copies each costing a few hundred dollars. To

guarantee compliance with the law Article 63(1) makes the unauthorized copy a crime punishable by a fine not less than US\$ 3,000 and/or an imprisonment of not less than one month (in file with the author).

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