

Misapplying Globalization

Misapplying Globalization:
Jordan and the Intellectual
Property Policy Challenge

By

Faris K. Nesheiwat

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P U B L I S H I N G

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by Faris K. Nesheiwat

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To my family

Karim, Jacqueline, Mara, Fadi, Reem, Manar, Owen and Karim

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LIST OF ABBREVIATIONS

ACTA	Anti-Counterfeiting Trade Agreement
ARPO	Author's Right Protection Office at the National Library
ASEZA	Aqaba Special Economic Zone Authority
CBJ	Central Bank of Jordan
CCPA	United States Court of Customs and Patent Appeals
CIF	Cost, Insurance and Freight
CRC	United Nation's Committee on the Rights of the Child
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EFTA	European Free Trade Area
EU	European Union
FAO	UN Food and Agriculture Organization
FCIA	Federal Courts Improvement Act
FDI	Foreign Direct Investment
FOB	Free on Board
FTA	Free Trade Agreements
GAO	United States Government Accountability Office
GATS	General Agreement in Trade in Services
GCC	Gulf Cooperation Council
GCR	Global Competitiveness Report
GDP	Gross Domestic Product
GSD	General Statistics Department
ILO	International Labour Organization
IMF	International Monetary Fund
IP	Intellectual Property
IPIC	Treaty on Intellectual Property in Respect of Integrated Circuits
IPPD	Industrial Property Protection Directorate
IPRs	Intellectual Property Rights
IPRS	Intellectual Property Rights Section within the Jordanian Customs
JAPM	Jordanian Association of Manufacturers of Pharmaceuticals and Medical Appliances
JIB	Jordan Investment Board
JD	Jordanian Dinars
JEUAA	Jordan-European Union Association Agreement

JFDA	Jordanian Food and Drug Administration
JIPA	Jordan Intellectual Property Association
JISM	Jordan Institute of Standards and Metrology
JUSFTA	Jordan–US Free Trade Agreement
MCA	Millennium Challenge Account
MENA	Middle East and North Africa
MERCOSUR	Mercado Comun del Sur
MNC	Multi-national Corporation
MoIT	Ministry of Industry and Trade
NAFTA	North America Free Trade Agreement
NGO	Non-governmental Organizations
NL	National Library
OECD	Organization for Economic Cooperation and Development
OHCHR	United Nations Office of the High Commissioner for Human Rights
PCT	Patent Cooperation Treaty
PhRMA	Pharmaceutical Manufacturers Association
QIZ	Qualified Industrial Zones
QIZA	Qualified Industrial Zones Agreement
RBT	Regional and Bilateral Treaty
R&D	Research and Development
SPLT	Substantive Patent Law Treaty
TRIPS	Agreement on Trade Related Aspects of Intellectual Property
TRRM	Trade Policy Review Mechanism
UPOV	International Convention of the Protection of New Varieties of Plants
USAID	United States Agency for International Development
USTR	United States Trade Representative
WCO	World Customs Organization
WCT	WIPO Copyright Treaty
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Performance and Phonograms Treaty
WTO	World Trade Organization

PREFACE

The advent of the twenty-first century brought dramatic changes to the global governance of intellectual property (IP). The seeds of this change were sown in the 1980s and 1990s, as the United States and the European Union championed the establishment of universal rules to govern IP practices. Their goal was and remains the globalization of OECD-style IP regimes, which emphasize greater protection of intellectual property rights (IPRs) at the expense of more public access to those rights. The most significant milestone towards harmonizing national IP standards with OECD standards was the inclusion of TRIPS in the World Trade Organization (WTO), which was the result of intense lobbying by corporate executives, backed by the trade negotiators of the developed countries.

Studies had concluded that, notwithstanding the limitations on setting national IPRs policies imposed by TRIPS, countries could still exhibit diminished variations in their IP laws in accordance with their specific economic and social conditions. Such early assessments, however, did not take into account the advent of regional and bilateral treaties (RBTs), which pushed the compliance pendulum towards higher IPRs protection. RBTs were introduced by the United States and the European Union as they realized that the ultimate goal of IPRs harmonization was not being fully achieved through TRIPS, and because they were increasingly aware of the blocking power that developing countries enjoyed by virtue of the requirement of consensus for any amendment to TRIPS. As a result, the United States and the European Union moved to an RBT approach, aimed at achieving IPRs harmonization outside the multilateral approach of the WTO.

RBTs were presented to developing countries as yet another piece of the contemporary landscape of trade agreements intended to provide them with a heightened degree of integration into the international economy. Specifically, they offered developing countries the trade-off of exclusive entry conditions to the US and EU markets in return for amending the legal and administrative frameworks governing IPRs such that they became similar to those in the United States and the European Union. Thus, the price to be paid for increased market access under RBTs was the relinquishing of many of the very tools that historically were used by

developing countries to attain the developmental benefits of integration in the international economy.

Although many scholars have been critical both of TRIPS and the increasing integration of intellectual property into RBTs, little of that criticism is country-specific; rather, it is focused on general rules and legal provisions.¹ While the criticism of the increased integration of IP into RBTs has at times been based on the RBTs' threat to eliminate the national capacity to tailor IP management to national conditions, it has not progressed into an analysis of country-specific local political and cultural frameworks. I argue that without such an analysis, it is not possible to understand the tensions between the technologically advanced countries' push for higher rights protections and the less-developed countries' resistance to the resulting increased cost of regulation. What is at stake is the impact that IP policies and laws can have on country-specific human development programmes and allocation of limited resources.

Jordan has attached its strategies for IPRs integration to the multilateral framework of the WTO, and the RBTs it has entered into with the United States and the European Union. This is having a range of effects on Jordanian law, institutions, and cultural attitudes. However, one should not consider this shift towards greater IPRs as the final word in the overall historical discussion of IPRs, because the tension between the desire for maximum exclusivity and the desire for maximum access cannot be resolved for the benefit of one over the other. Such a one-sided approach

¹ There are some notable exceptions. An analysis of the effect of RBTs on the Arab world in general, but without a specific focus on Jordan, is provided in Hamed El Said and Mohammed El Said, "The European TRIPS-Plus Model and the Arab World: From Co-Operation to Association—A New Era in the Global IPRS Regime?" *Liverpool Law Review* 28, no. 1 (2007): 143–174; Mohammed El Said, "The Implementation Paradox: Intellectual Property Regulation in the Arab World," *Journal of International Trade Law and Policy* 9, no. 3 (2010): 221–235. Malkawi has provided an analysis of the JUSFTA, but only in the context of deciding whether its terms can serve as a template for a proposed US–Middle East FTA, not to examine the local context of those terms. See Bashar H. Malkawi, "The Intellectual Property Provisions of the United States–Jordan Free Trade Agreement: Template or Not Template," *The Journal of World Intellectual Property* 9, no. 2 (March 1, 2006): 213–229. El Said and El Said have also examined the terms of the JUSFTA, cautioning against the negative effects of TRIPS with respect to access to medicines, but not looking at the larger picture of compliance and enforcement. See H. El-Said and M. El-Said, "TRIPS-Plus Implications for Access to Medicines in Developing Countries: Lessons from Jordan–United States Free Trade Agreement," *The Journal of World Intellectual Property* 10, no. 6 (2007): 438–475.

will result in either severely restricting access to knowledge or eroding the economic incentive to innovate. The discussion over IPRs must inevitably address the tension between the interests of rights holders, who want to maximize the control they exert over their works in hopes of maximizing the profits gained thereby, and the interests of those who are not right-holders but need access to these works with the aim of using them to create other innovations.

We need a fair and balanced system of IP laws that provides for a suitable degree of exclusivity while also allowing a level of access consistent with the broader public interest. A balanced system should be dynamic and adaptive to new technologies, as well as to economic shifts and global developments. Importantly, an adaptive system is an open system that is able to alter its behaviour according to changes in its socio-legal environment precisely because it is closely linked to that environment. For IP, creating such a system requires that governments and legislators have a better understanding of the specific nature and local needs of the societies in which those IP systems are implemented. This book attempts to provide such understanding for the specific case of Jordan.

CHAPTER ONE

INTRODUCTION

It is justifiable to wonder why any developing country – or any developed country, such as Canada, that is a net intellectual property importer – would agree to join TRIPS. After all, the World Bank estimated in 2002 that TRIPS implementation would cause annual losses of \$530 million for Brazil, \$5.1 billion for China, \$903 million for India, and \$15.3 billion for South Korea. Proponents of TRIPS have argued that stronger IP protection is a prerequisite for technology transfer, yet this is belied by the work of various scholars, and indeed the subsequent history of TRIPS vindicates the concerns of developing countries that they do not stand to gain much from implementing higher intellectual property standards. Nevertheless, as the promises of global trade and economic empowerment through globalization took root in the collective political consciousness, TRIPS became a reality, and, despite any misgivings they might have entertained, developing countries within the WTO embarked on IP reforms of varying magnitude and scope.¹

¹ There is a great deal of literature which criticizes TRIPS and the increasing integration of intellectual property into RBTs, but most of it concerns general rules and legal provisions as opposed to country-specific analysis. See, for example, Peter Drahos, “Information Feudalism in the Information Society,” *The Information Society* 11, no. 3 (July 1995): 209–222; Christopher May and Susan K. Sell, *Intellectual Property Rights: A Critical History* (Lynne Rienner, 2005); Susan K. Sell, *Private Power, Public Law* (Cambridge University Press, 2003); Keith Eugene Maskus, *Intellectual Property Rights in the Global Economy* (Washington, DC: Peterson Institute, 2000); C. M. Correa, *Intellectual Property Rights, the WTO, and Developing Countries: The TRIPS Agreement and Policy Options* (New York: Zed Books, 2000); Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPS Agreement* (London: Routledge, 2002); Kenneth C. Shadlen, “Exchanging Development for Market Access? Deep Integration and Industrial Policy Under Multilateral and Regional-Bilateral Trade Agreements,” *Review of International Political Economy* 12, no. 5 (2005): 750–775. For a discussion of the danger that RBTs would undermine the national capacity to tailor IP management to national conditions, see, for example, Kenneth C. Shadlen, “Intellectual

Jordan's accession to TRIPS and the various amendments it made to its IP laws can be attributed to two major and broad drivers. First, the perception that Jordan's attempt to shift to a knowledge-based economy could not have gone far without input from the multinational companies who are the purveyors of knowledge and innovation, and who in turn requested tighter and more stringent protections for their IP assets. Jordan did not have much negotiating power to deny such requests. The economic bubble of the first decade of the twenty-first century meant that there were many countries standing in line to comply with multi-national companies' requests for IP asset protection in return for their investment in the local economy. Thus, the promises of attracting greater flows of foreign investment played a significant role in Jordan's accession to TRIPS, for all that the data cast doubt that such promises would be fulfilled.

Second, Jordan is heavily dependent on foreign aid, and the provision of such aid became increasingly linked to meeting the commercial and legal demands of the donors. Policies relating to IP protection have become infused into the aid culture within Jordan. Whole programs and projects are now vetted for their compliance with the IP politics of the developed countries, including TRIPS and TRIPS-plus standards. In general terms, "capacity development" is the new gateway for the penetration into developing countries' decision-making circles, and the creation of a monolithic point of view, mainly that of the donor country, as regards the role and importance of IP.² For example, US Government-financed technical assistance programs were designed explicitly to implement IP standards that in fact exceeded the obligations under TRIPS.³

In practice, these two dynamics were expressed in terms of requirements that Jordan meet certain goals and so-called growth and development criteria, mainly focused on the existence of sufficient IP laws, the

Property, Trade, and Development: Can Foes Be Friends?" *Global Governance* 13 (2007): 171.

² See Benjamin Fordham and Victor Asal, "Billiard Balls or Snowflakes? Major Power Prestige and the International Diffusion of Institutions and Practices," *International Studies Quarterly* 51, no. 1 (2007): 31–52; Kristian Skrede Gleditsch and Michael D. Ward, "Diffusion and the International Context of Democratization," *International Organization* 60, no. 4 (2006): 911–933; Beth Simmons and Zachary Elkins, "The Globalization of Liberalization: Policy Diffusion in the International Political Economy," *American Political Science Review* 98, no. 1 (2004): 171–189.

³ See Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford: Oxford University Press, 2008).

availability of enforcement agencies, and the compilation of a statistical indicator of the minimum number of raids and confiscations of pirated and counterfeit products. Within all this, little attention was paid to the actual compatibility of those measures and indicators with Jordan's local economic, social, and developmental needs.

The new IP laws were introduced into the Jordanian legal framework with remarkable haste. Parliament was suspended for the period when the new IP laws were enacted, and the process was deprived of a full debate by the legislative branch. The laws enabling WTO accession and the entering into a free trade treaty with the United States were passed under the executive authority of the king while parliament was dissolved, without much public debate or involvement. Additionally, civil-society organizations were not involved in their enactment, which limited the consideration of the economic and social costs associated with their implementation. Jordan now has thirteen laws that deal directly or indirectly with IP, some of which contain drafting mistakes. As chapter five will show, the administrative agencies charged with enforcement are marked by overlapping and confused responsibilities, and Jordan is under constant pressure to take on new enforcement roles geared towards defending the interests of multinational corporations. Meanwhile, the Jordanian private sector and public are increasingly disaffected with the strengthened IP regime, from which they have seen few benefits.

An account of the forces at work here which treats either the donors, or the recipient country, as monolithic, will miss a crucial layer of rich analysis. It is important to examine the domestic politics and setup of the enforcement agencies, as well as the socio-economic factors which impacted upon Jordan's decision to accede to TRIPS and other associated treaties. Without understanding those factors, one will not be able to suggest ways either to reform or better enforce those laws. This book attempts to take on this task.

The book is structured as follows. The remainder of the present chapter provides a general background on TRIPS and an overview of pertinent aspects of Jordanian society, while chapter two introduces the Jordanian legal system particularly as regards to IP. Chapter three examines those pressures on Jordan to reform its IP legislation which stem from the international legal and political framework, looking first at those which are rooted in the WTO, and then at those bound up with the regional and bilateral treaties (RBTs) to which Jordan is a signatory. We will see that the relatively minor flexibilities allowed under TRIPS are largely foreclosed under the RBT system. Chapter four looks at the wider ideational and economic pressures which were brought to bear to persuade

Jordan to join the TRIPS and TRIPS-plus frameworks. Chapter five discusses the effects of the heightened standards on economic development in Jordan, as well as the impacts on the administrative institutions charged with enforcing Jordan's new laws. Chapter six reflects on ways forward.

TRIPS and the developing world

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is a multilateral agreement on the regulation of intellectual property rights, negotiated through and administered by the World Trade Organization (WTO). Historically this issue has been dominated by the developed countries, and they included their proposal for TRIPS in the Uruguay Round (1986–1994) as a means to regulate IP protection within the GATT rules.⁴ As such, TRIPS represents one particular view of IPRs; but it is a view that came to be marketed by developed countries as the *only* acceptable form – excluding from consideration the various processes by which IPRs have been developed and formulated at national levels throughout the history of IP. Jordan was not a party to TRIPS negotiations, as it was not yet a member of the WTO, and its acceptance of TRIPS was a *fait accompli* within the WTO accession process, as opposed to a debated and properly negotiated agreement. It also marked Jordan's sliding from a centrist approach to IP regulation and enforcement, dating from the Ottoman era, which balanced the public and private interests, to the more monopolistic end of the IP enforcement spectrum, where right-holders are given precedence over public interest.

Prior to Jordan's amending its laws in preparation for its accession to the WTO on April 11, 2000, it possessed no substantive legal body that focused on issues of IP. IP was marginalized for the majority of the period from the creation of the Jordanian state in 1921 until the 1990s, but that changed with the increased prominence of IP in the early 1990s resulting from a major overhaul of laws and regulations. The main two catalysts for that overhaul were Jordan's goal of securing membership in the WTO, and

⁴ For an examination of the lobbying by the corporate interests of developed countries in the process of including TRIPS in the WTO, see, for example, P. Drahos, "Global Property Rights in Information: The Story of TRIPS at the GATT," *Prometheus* 13, no. 1 (1995): 6–19; Matthews, *Globalising Intellectual Property Rights*; Sell, *Private Power, Public Law*; C. May, *The World Intellectual Property Organization: Resurgence and the Development Agenda* (Abingdon: Taylor & Francis, 2007).

the new liberalized economic outlook, which focused on market liberalization, economic openness, and the attraction of foreign investments.

Pursuing WTO membership was mainly a political rather than an economic decision, and it was an outlook influenced by the principles advocated by the International Monetary Fund (IMF) during its program of support for the Jordanian economy and currency, which began in 1989 and ended in 2004. The economic impact and value of such decisions were not evaluated beyond the promises made by the developing countries of more access to world markets, increased foreign direct investment (FDI), and the improvement of the Jordanian standard of living.⁵

Shortly after the WTO accession, Jordan embarked on negotiations with the United States to conclude the Jordan–US Free Trade Agreement (JUSFTA), and with the European Union to conclude the Jordan–EU Association Agreement (JEUAA). The JUSFTA was signed on October 24, 2000 and entered into force on December 17, 2001, and the JEUAA entered into force on May 1, 2002. Both treaties have a strong IP component which extends the requirements on Jordan beyond those incorporated in TRIPS. It is common to refer to such standards, which lack a unified institutional basis such as the WTO but are no less potent, as “TRIPS-plus” standards. While the TRIPS regime allowed developing countries to retain a certain degree of flexibility in how they established their IP laws, these flexibilities are being removed by these new agreements.⁶ These regional and bilateral treaties (RBTs), which drove Jordan into the TRIPS-plus era, are also having corrosive effect on the multilateral trade system, as will be discussed in chapter five.

A brief review of the situation with patents and copyright illustrates themes that this book will study more closely. The first Jordanian patent law No. 22 (1953) provided for process patents but did not allow for product patents (art. 4). It further allowed for a sixteen-year protection

⁵ On this point I am indebted to various members of Jordanian public and private institutions who agreed to be interviewed for the purposes of this study. For more information on these interviews, see appendix one.

⁶ See, for example, C. Correa, “Intellectual Property Rights and the Use of Compulsory Licenses: Options for Developing Countries,” Trade-Related Agenda, Development and Equity (T.R.A.D.E.) Working Papers 5 (South Centre, October 2001); The Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (London: CIPR, 2002); Kenneth Shadlen, “Exchanging Development for Market Access? Deep Integration and Industrial Policy Under Multilateral and Regional-Bilateral Trade Agreements,” *Review of International Political Economy* 12, no. 5 (2005): 750–775.

period, which would not be extended in the event of any modifications or amendments made to the original patent (art. 16). While the law allowed the patent registrar at the Ministry of Industry and Trade (MoIT)⁷ to approve a patent, it placed the responsibility for the veracity of the patent's information on the applicant rather than the registrar (art. 4(2)), effectively ensuring that Jordan never developed patent examination expertise. A new Patent Law granting twenty years of protection was enacted in 1999, incorporating TRIPS-consistent standards into its language (Patent Law No. 32). The language of the 1999 law presented a significant departure from the language in the previous law; it clarified the criteria for awarding a patent, listed the areas outside patentability domain, detailed the rights and obligations of a patent holder, and outlined specific sanctions that can be requested by a patent holder in the event of a patent infringement. The law was amended twice, in 2001 and 2007, to reflect other concepts and to put it in line with Jordan's obligations and international best practices.

Under the new patent law, product patents were allowed, an examination process was required, and several ways to extend the life of a patent were provided, including marketing exclusivity periods for data protection. The law puts forth the following patentability conditions that must be met for a patent to be issued: novelty, non-disclosure, non-obviousness, and industrial utility (art. 3). These requirements restrict the universe of what can be patented under Jordanian law. The new patent law was modelled after similar laws in developed countries; thus, it was not suitable for a country which, for historical reasons, had a virtually non-existent patent law practice, and whose patent examination duties were delegated to the WIPO. By expanding the terms of patentability and enlarging the sphere of patent protection, the patent law of 1999 drastically limited imitation and therefore failed to address the needs of the Jordanian people for technological and innovation incentives. This is shown by the patent ownership numbers in Jordan, which are predominantly foreign-based, and by the negligible rate of technology transfer. Up until mid-2010, around 80% of patents granted were for foreign holders, and 87% of the patent applications were by foreigners.⁸ The patent law of 1999 also failed to encourage foreign companies to transfer their technologies to their Jordanian counterparts, although those

⁷ In April 2013 the Ministry of Industry and Trade was renamed the Ministry for Industry and Trade and Supply.

⁸ Data until March 2010. See "MoIT Department of Industrial Property," <http://www.mit.gov.jo>. The researcher relied on the data within the tables and not the totals provided, as the numbers within the tables do not add up to the totals provided by the tables.

foreign companies had benefited from the protections granted to them under the Patent Law. Similarly, Jordan's levels of research and development are less than half a percentage point of the GDP, and much of that amount is allocated to the military.⁹ The net result so far is that Jordanian industry is not benefiting from any significant levels of technology transfer, is still dependent on importing technology products, and must pay high prices for those products.

Similar observations can be made with regards copyright laws. Prior to the 1992 law on copyright, Jordan used the Ottoman-era copyright law, and the Supreme Administrative Court confirmed such usage in opinions (for example, Opinion No. 76/81). The older copyright law's denial of any protection for copyrighted material that was not registered with the National Library was an acceptable compromise for Jordanian citizens, as intellectual works by local individuals had not played an important role in the cultural or educational development of the economy. Material that would otherwise be considered copyrighted material, such as books and audio-visual works, were produced by non-Jordanians; thus, because they were not usually registered with the National Library, they were not offered protection under the older copyright law. Conversely, the 1992 copyright law (sec. 45) granted automatic copyright protection to any published work whether or not it was registered by the Jordanian National Library (henceforth NL).¹⁰ In addition to expanding the level of protection granted, it clarified as exclusive to the author rights that were previously thought to also belong to publishers, editors, and the public at large (sec. 8).

The 1992 law improving copyright protection, corresponding to the concerns of the major donors, brought mostly Western standards for protection and significantly improved protection in areas mostly dominated by Western products, such as sound recordings, audio-visual products, and computer software. Considering the lack of any local products or substitutes in those areas, as well as the lack of any alternative pricing scheme for original products in the local markets, those products were placed out of the reach of the vast majority of the local population. That helps to explain the proliferation of pirated audio-visual products and other copyrightable material.¹¹

⁹ Jomana Amara, "Military Industrialization and Economic Development: Jordan's Defense Industry," *Review of Financial Economics* 17, no. 2 (2008): 130–145.

¹⁰ The National Library is the governmental agency in charge of registering copyrightable material.

¹¹ Naseem Tarawnah, "Steal This Article!," *Jordan Business*, May 2008.

Because the idea of copyright is not fully compatible with the Jordanian society's economic realities and the Jordanian culture, which considers knowledge-sharing and pursuit of education rather than author's rights to be paramount, it will continue to prove extremely difficult to enforce. Significantly, the law's value in improving creativity in Jordan is in doubt. The Jordanian audio-visual industry, for example, which was in reasonably respectable shape in the late twentieth century, is on the verge of collapse, with the number of its productions greatly reduced. This situation might not be solely related to IPRs, but it proves that the promises of increased copyright innovation with the enforcement of tighter copyright protections were greatly exaggerated if not unfounded.¹² Any enforcement activity in the copyright area will impact low-income citizens, operators of kiosks, and street vendors depending on such products for economic survival.

For Jordan, as indeed for any developing country, enforcement is a balancing act between three competing concerns. On the one hand, there is the need to show ample and sufficient compliance with obligations and commitments resulting from the international agreements and treaties it has signed. On the other hand, there is the significant challenge of limited resources and ever-increasing economic pressures, which makes it difficult to allocate limited financial and economic resources to enforcement. Third, there is the government's own assessment of the legitimate needs of the population, and how these are to be respected in the face of demands stemming from a different cultural and political milieu, such as the WTO. This balancing act is thus further complicated by the governmental realization that lax enforcement, especially in the copyright field, may represent the only financially feasible way for an important segment of the population to access those works. Our understanding of the legal aspects of IPRs therefore needs to be complemented by an account of relevant socio-economic aspects of local culture.

Jordanian culture and IPR

Historically and culturally, Jordanian society is anchored to traditional communal values that favour collective effort and knowledge over individual ownership and monopoly. These values were sustained by the agrarian nature of Jordanian society for the majority of the twentieth

¹² Nedal Burqan, "Ministry of Culture Conference: Jordanian Drama in Danger," *Addustour Daily Newspaper*, March 5, 2010.

century. Jordan's religious background also supports such a position, as reflected in the absence of any developed sense of IPRs during the history of the Islamic state, which lasted until the fall of the Ottoman Empire at the end of World War I. Sophisticated IP concepts, therefore, do not originate from within Jordanian society; rather, these concepts were introduced by interaction with developed countries through colonialism.

According to the cultural indicators developed by Hofstede,¹³ Jordan and the Arab world can be described as conservative, masculine, power-distant, and collective. On this schema, "masculine" cultures are seen as more assertive than "feminine" cultures, and value achievement and materialism. In power-distant cultures, the authority of superiors is accepted, inequalities among people are both expected and desired, less powerful people are dependent on the more powerful, and the hierarchy in organizations reflects the inequality between higher-ups and lower-downs.¹⁴ Collective countries have little personal freedom, because the groups and organizations to which one belongs invade one's private life.

Hofstede's power distance index measures the extent to which the less powerful members of organizations and institutions (like the family) accept and expect that power is distributed unequally, resulting in inequality (those who have more versus those who have less). Hofstede suggests that the followers endorse a society's level of inequality as much as the leaders do. For example, Germany is positioned at 35 on Hofstede's scale. Compared to Arab countries where the power distance is very high (80) and Austria where it is very low (11), Germany falls somewhat in the middle. German society does not have a large gap between the wealthy and the poor, and German citizens have a strong belief in equality. German citizens have the opportunity to rise in society. By contrast, the Arab world has a large gap between the wealthy and the poor, and its residents do not have a strong belief in equality.

¹³ Hofstede developed a typology of cultural attributes by analyzing data obtained from surveys conducted among individuals in fifty-three nations in 1968 and 1972. Since all 116,000 respondents were employees of the same firm, IBM, Hofstede was able to hold constant the influence of industry and corporate culture. Based on the data obtained, he classified countries along four dimensions: power distance, uncertainty avoidance, individualism/collectivism, and masculinity/femininity. Hofstede rated each of the fifty-three countries in his study by these cultural dimensions. See "Power Distance Index," n.d., <http://www.clearlycultural.com/geert-hofstede-cultural-dimensions/power-distance-index/>.

¹⁴ S. S. Robbins and A. C. Stylianou, "A Study of Cultural Differences in Global Corporate Web Sites," *Journal of Computer Information Systems* 42, no. 2 (2002): 3–9.

The strong collectivist culture of the Arab world, of which Jordan is part, results in little personal freedom, which leads to a weak individual assumption of responsibility. This collectivist orientation is expressed in ideals that scholars associate with Arab culture, such as solidarity, cooperation, commitment, mutual trust, support, and a sense of belonging.¹⁵ The literature suggests that collectivist cultures place strong cultural restrictions on the self, resulting in a low need for uniqueness and a strong motivation not to break away from the aforementioned values.¹⁶ In a society where individuals sacrifice their personal ambitions for the good of the collective, the spread of IP piracy is more likely, as individuals motivated by solidarity, cooperation, trust, and support are likely to share property with others and expect them to do the same, without much regard for the notion of IPRs.¹⁷ A survey of Jordanian students conducted by this author and detailed in appendix two of this book, bears out these expectations: 89.9% of the respondents had knowingly engaged in buying counterfeit products or using cracked software on at least one occasion, and 71.9% of the respondents asserted that buying counterfeit products was not unethical, since counterfeit products provide people with access to goods, software, and books that they otherwise could not afford.

IP piracy is also related to power distance, which is high in Arab countries.¹⁸ The greater a culture's power distance (i.e., the further individuals feel from their superiors, such as law enforcement officials), the greater the propensity to pirate IP products.¹⁹ Arab culture, therefore, scores high on collectivism and power distance, both of which have been

¹⁵ A. Cohen, "The Relationship Between Multiple Commitments and Organizational Citizenship Behavior in Arab and Jewish Culture," *Journal of Vocational Behavior* 69, no. 1 (2006): 105–118.

¹⁶ J. Kurman, "Why is Self-Enhancement Low in Certain Collectivist Cultures?" *Journal of Cross-Cultural Psychology* 34, no. 5 (2003): 496–510.

¹⁷ Donald B. Marron and David G. Steel, "Which Countries Protect Intellectual Property? The Case of Software Piracy," *Economic Inquiry* 38, no. 2 (2000): 159–74. Trevor T. Moores and Jasbir Dhaliwal, "A Reversed Context Analysis of Software Piracy Issues in Singapore," *Inf. Manage.* 41, no. 8 (November 2004): 1037–1042; Jia Lu, "Chinese Culture and Software Copyright," *New Media & Society* 11, no. 8 (December 1, 2009): 1372–1393; Fang Wang et al., "Purchasing Pirated Software: An Initial Examination of Chinese Consumers," *Journal of Consumer Marketing* 22, no. 6 (January 10, 2005): 340–351.

¹⁸ Bryan Husted, "The Impact of National Culture on Software Piracy," *Journal of Business Ethics* 26, no. 3 (2000): 197–211.

¹⁹ C. A. Depken and L. C. Simmons, "Social Construct and the Propensity for Software Piracy," *Applied Economics Letters* 11, no. 2 (February 10, 2004): 97–100.

correlated in the literature with increased piracy rates and low enforcement of IPRs. Notably, 75.1% of respondents to the student survey said that they believed that counterfeit products infringe on the rights of companies, while 63.5% indicated that they personally did not care about the companies' losses.

Religious factors and IPR

Religion is an important moral and cultural force in Jordan, where 95% of the population is Muslim.²⁰ However, although religion directs citizens' behaviour in Islamic countries, it is difficult to ascertain a clear position in Islamic jurisprudence towards IP concepts.²¹ On the one hand, those who adhere to the position of classical scholars reject the idea of intellectual property, arguing that knowledge should be available for all humans to use and share with each other and that no one should be deprived access to it.²² On the other hand, some Islamic scholars have accepted the premise that ideas and/or methods can be owned under the rubric of IP but have based their prohibition of copying on the need to have a "legitimate ruler" approve such a prohibition.²³ The issue of who is a legitimate ruler under Islamic law is not a clear one; sharia, which is considered God's law and to supersede the laws of the state, is expected to be the sole criterion of behaviour, and the authority of the temporal ruler as the representative of God is derived from and designed by that law.²⁴

Jordan, like all Arab countries, has adopted a hybrid legal system that takes sharia into account only in certain areas. This is a key factor in leading observant Muslims to believe that laws pertaining to IPRs should

²⁰ Quintan Wiktorowicz, *The Management of Islamic Activism: Salafis, the Muslim Brotherhood, and State Power in Jordan* (New York: SUNY Press, 2001).

²¹ Salah Al-Fadhli, "The Ethical Dilemma of Software Piracy in Islamic Societies: The Case of Kuwait," *The Electronic Journal of Information Systems in Developing Countries* 39 (2009).

²² The main principles here do not constitute a complete negation of IPRs, rather (i) the rejection of plagiarism, and (ii) the permissiveness of personal use. See, for example, "ويب إسلام - لأصحابها محفوظة والابتكار والاختراع التآليف حقوق", n.d., <http://www.islamweb.net/fatwa/index.php?page=showfatwa&Option=Fatwald&Id=161059> (a fatwa stating that one should not claim for themselves that which they did not produce, but that personal use of knowledge is permissible).

²³ "www.Sistani.org," n.d., <http://www.sistani.org/local.php?modules=nav&nid=5&cid=131>.

²⁴ N. J. Coulson, "The State and the Individual in Islamic Law," *The International and Comparative Law Quarterly* 6, no. 1 (January 1, 1957): 49–60.

not be observed from a religious point of view – since the ruler who approved them is not technically a “legitimate ruler” according to Islam because he is not applying sharia in *all* areas.

Since there is no single unified Islamic position on IP, any claims that Islam supports the enforcement of TRIPS-style IP are questionable. The problem of establishing a unified religious position on IP is further complicated by the fact that Islam does not acknowledge the role of a universal legal authority with the power and right to make laws applicable to *all* Muslims; rather, the authority of even a legitimate ruler is no greater than that of any other qualified *mujtahid* (one who possesses the power of *ijtihad* – the interpretation of problems not precisely covered by the Qur’an, *hadith* (traditions concerning the Prophet’s life and utterances), and *ijmā* (scholarly consensus)).²⁵ Therefore, since the default position under Islamic jurisprudence is to allow an activity unless it is specifically prohibited, the position of one legal scholar opposed to piracy is considered only that scholar’s personal opinion and cannot be given any more weight than another scholar’s opinion which might contradict it. IPRs is not addressed under the Qur’an, *hadith*, or *ijmā*; thus, it is an area that will likely never be treated uniformly by legal scholars, resulting in inconsistent approaches that allow for individual interpretation on whether a Muslim should observe IP laws. Those studies which suggest that Muslims will abide by IPRs laws if piracy is prohibited by Islam²⁶ should be interpreted in the light of this lack of treatment of IPRs under Islamic law, always bearing in mind that any Islamic legal opinion on piracy will be limited in impact and is unlikely to have a universal jurisprudential weight.

The complexity of the role of Islam and sharia with respect to Jordanian attitudes to IPR is reflected in the results from the survey of students. A majority of respondents (65.9%) believed that counterfeit products are not prohibited by religion, while only 28.6% thought that religion prohibited them. A larger majority of respondents (81.1%) indicated that they would stop buying counterfeit products if prohibited by religion, while a smaller majority (64.8%) indicated that they would stop buying counterfeit products if prohibited by state law. However, these results require a nuanced interpretation. In follow-up questions, only 52.8% said they would always follow the guidance of their main religious authority on the prohibition of counterfeit products, while 46.7% said they would either never or only sometimes follow such guidance, indicating that the effect of religion on the respondents’ choice to use counterfeit

²⁵ Coulson, “The State and the Individual.”

²⁶ Al-Fadhli, “The Ethical Dilemma.”

products may not be as strong as first appears, and underscoring the complexity of the relation between sharia and the laws protecting IPR. (For more details of the survey, see appendix two.)

Another potential rationalization for disregarding IPRs is that counterfeiting data provided by multinational companies is accused of being heavily overestimated, with some research concluding that piracy is an externality to multinational corporations (MNCs) – meaning that it has little to no negative monetary impact on MNCs.²⁷ MNCs have been accused of making false claims of massive economic losses in order to divert attention from the real harms of counterfeiting, such as the use of IP piracy to fund organized crime, and the MNCs' role in perpetuating these harms by aggressively marketing their expensive brands as status symbols.²⁸ The literature points out that people look for ways to rationalize their behaviour when considering decisions such as whether to make pirate copies of software.²⁹ A monetary rationalization posits that most IP companies are large corporations that make large profits and can therefore afford the loss of pirated copies. A religious one might be based on any of the religious positions under Islamic law that oppose the enforcement of IPRs.

A note on the empirical data

This book is concerned with the implementation and enforcement of IP laws. Laws do not exist in a vacuum; rather, they derive their value and significance from the impact they have on their environment and surroundings. One of the guiding themes of this book is the idea that a law that does not have such an impact is destined to be no more than a passive text. To this end, this book draws on empirical data as part of the analysis to gauge the impact of IP laws. However, obtaining data in Jordan is difficult for the following reasons.

²⁷ See, for example, Simon Mackenzie, "Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity," *Crime, Law and Social Change* 54, no. 1 (July 2010): 21–38. Daniel Chow, "Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries," *Virginia Journal of International Law* 51, no. 4 (2011).

²⁸ Chow, "Counterfeiting as an Externality."

²⁹ Robert A. Strikwerda and John Minor Ross, "Software and Ethical Softness," *Collegiate Microcomputer* 10, no. 3 (1992): 129–36; C. A. Depken and L. C. Simmons, "Social Construct and the Propensity for Software Piracy," *Applied Economics Letters* 11, no. 2 (February 10, 2004): 97–100.

First, there is no unified repository of information on most issues, including legal topics. In addition, statistics have not been made publicly available in all areas (including important economic information like FDI, as has been noted by the US Government accountability office),³⁰ and available information is usually lacking in detail. Even though Jordan has a General Statistics Department (GSD), statistics and data on several areas are compiled by other agencies and sources (e.g., GDP and FDI numbers are compiled by the Central Bank of Jordan (CBJ)). Similarly, data on court activities are compiled and published by the Ministry of Justice and the Judicial Council, and data on specific enforcement agencies like the Customs Department and the MoIT are available almost exclusively through those agencies. This problem is not unique to the economic or legal sector and even extends to social sectors. For example, there are three different figures for the percentage of individuals with disabilities in Jordan,³¹ and unemployment numbers are similarly disputed. The end result is that in order to secure data or statistics on almost any social, legal, or economic area, one must perform a great deal of research to determine the source of those figures and to reconcile their disparate values, often by examining their differing definitions, areas of measurement, and measurement mechanisms.

Second, the quality of the available data is not uniform. For example, the imports and exports numbers compiled and published by the CBJ are usually presented in the form of a press release that states the relative breakdown of a few major categories of imports and exports but stops well short of a detailed analysis or even a complete listing. FDI numbers as presented by the CBJ represent another major problem because they are not broken down by category, which meant that this researcher could not find a specific number for the IP component of FDI figures and instead had to deduce that component from other numbers pertaining to the sources of the FDI and the areas to which the FDI was targeted. In some instances, as with the numbers pertaining to investments benefiting from incentives by the investment promotion laws, which are compiled by the Jordan Investment Board (JIB), it was found that projects were counted more than once in order to artificially increase the value of projects

³⁰ US Government Accountability Office, *International Trade: Four Free Trade Agreements GAO Reviewed Have Resulted in Commercial Benefits, but Challenges on Labor and Environment Remain*, 2009, <http://www.gao.gov/products/GAO-09-439>.

³¹ The GSD estimates the percentage of disabled persons on Jordan to be 1.2% (GSD 2004 census), the Higher Council for Handicapped Persons puts it at 4%, and the World Bank estimates that 4–6% of the population is disabled.

benefiting from those incentives.³² This researcher therefore relied on CBJ data rather than JIB data when examining the impact of IP laws on economic development and investment. This lack of uniformity, which continues to be perpetuated by the many competing sources of data and the absence of full statistical analysis, is particularly dangerous because the public tends to be easily manipulated by statistics. An old adage describing the persuasive power of numbers rings true in the case of obtaining data in Jordan: “There are three types of lies – lies, damned lies, and statistics.”

Third, the various agencies and departments are largely reluctant to offer figures related to their work, especially if those numbers pertain to areas that are considered problematic or in which the official data could be used in potentially unflattering ways, such as IP laws.³³ Jordan does have a law (Access to Information Law No. 47, 2007) which stipulates that citizens have the right to access written, recorded, and photographed governmental information and basic government records. Actual access, however, is restricted by agencies’ obfuscation and by other laws like the Press and Publication Law and the Government Secrets Law, in addition to ten exceptions within the Access to Information law itself that place certain data outside its purview. It is worth noting that these agencies’ reluctance seems to disappear when communicating with foreign governmental officials or local staff of foreign embassies. Correspondence between the Jordanian Government and foreign agencies and information released through Wikileaks demonstrates that Jordanian officials are very willing to share information with foreign agencies.³⁴ The Access to Information Law Request Form also demands that the seeker explain why the information is needed, thus allowing the request to be refused if the reviewer does not approve the intended use. There are no mechanisms to force the government to explain its denial of the request; while the law states that each denied request must be justified, the refusal to provide an

³² Hiba Issawi, “Values of Projects Benefitting from Investment Promotion Laws Do Not Reflect Improvement in Data,” *Alghad Daily Newspaper*, April 8, 2010, sec. Markets & Finance.

³³ “The Center for Defending the Freedom of Journalists (CDFJ) issue[d] a statement to the Jordanian government, calling for wider support of freedom of the press and its right of access to information. The statement comes after a news report posted on the Amman news website, which included a copy of a circular signed by Prime Minister Nader Dahabi warning public employees against handing over copies of documents to the media related to alleged administrative and financial corruption.” *Jordan: 2009* (Global Integrity, 2009).

³⁴ Wikileaks website, n.d., http://wikileaks.org/origin/187_0.html.

answer to a request is considered an implied denial under the law which does not require justification (art. 9). It is not clear how would one exercise a judicial review option under such a *de facto* denial, as the requester is not provided with any reasons to include in its claim before a court of law. On the other hand, Jordan's willingness to provide information to international agencies was clearly indicated by considerable data often found by this researcher in filings by the Jordanian government to the WTO, or to the US Trade Representative (USTR) and the US Congress, when attempts to obtain similar data from the local sources were futile.