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HOW COPYRIGHT PROVISIONS OF TRIPS AND ACTA CAN AFFECT A DEVELOPING COUNTRY LIKE PAKISTAN?

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ABSTRACT

Stringent provisions and too strict application of TRIPs and ACTA has twofold legal consequences for developing countries like Pakistan. On one hand, these developing countries are required to overhaul their domestic laws to conform to the international treaties and on the other hand they fear that stand to lose at least initially in this world of integrated economies due to curbs on counterfeit goods, which can lead to limiting the technology transfer from the developed to the developing countries. There has been so much attention to the issues of patents leading to limiting the technology transfer; access to medicine; safeguarding the agriculture sector and the biodiversity, that the Copyright provisions which have serious implications for developing countries have eclipsed. Developing countries, which are not only disadvantaged in technology but have very low levels of literacy, stand to lose due to harsh Copyright provisions. The problem of Geographic Indications (GIs) is no less significant, and the manufacturers and growers of these GI specified products are the underprivileged artisans and farmers of meager resources whose not just commercial interests are jeopardized but livelihoods too, due to scant vigilance of their own governments. The human rights aspect of these provisions is hard to be ignored that how they can be an on onslaught on the human rights of those affected.

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I. INTRODUCTION

There is a growing influence of the international trade organizations in the formulation of the economic and trade policy of a country. As a result of this globalization amendments are made in the local laws too in order to conform to these international conventions and agreements. This process is taking initiative away from the political governments and thus people. Free markets do not always promote welfare therefore this trend can have threats for the countries of the global South and allegedly can cause market distortions as too high stakes of the big corporations are involved. The protections afforded to these countries of the South under Trade Related Intellectual Property rights (TRIPs) were meant to expire in 2005. Anti-Counterfeiting Trade Agreement (ACTA) is under fire too for its secrecy and alleged insensitivity to the developing and the least developed countries (LDCs). Pakistan which is already on the US “301 watch list” for not enforcing the copyrights effectively will further be disadvantaged by ACTA. Countries like Pakistan who do not have the legal expertise to benefit from the flexibilities of the IP laws, like those afforded under TRIPs, tend to lose more than they can gain from them. The more the regulations get complex, more the developing countries are likely to lose. Pakistan which has already lagged behind in the industrialization of Asia so much that it is panting to catch up with the other countries of the region. This country is now at the risk of losing the race of developing its knowledge based economy too. Strict enforcement of copyright laws is not
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a small reason to be ignored in this context. Pricey books and expensive software will not only move the goal of developing knowledge based economy but will further aggravate the poor-rich divide within the country as knowledge will become the domain of those who can afford. This will have far reaching socio-economic consequences.

In this paper the effect of the Copyright laws of TRIPs on the developing countries by taking the example of Pakistan is discussed that how it can limit the access to modern knowledge and can erode the traditional knowledge. In Pakistan Geographic Indications (GI) are dealt with under the Copy Rights Ordinance and hence no detailed and comprehensive strategy is in place to counter the problem of GI encroachment. Pakistan still has to establish a GI registry. Therefore both the enforcement and the absence of the IP laws in general and the Copyright laws in particular bear great significance in terms of the socio-economic reasons and the fundamental rights of its people.

II. CAN THERE BE HUMAN RIGHTS SENSITIVE IP LAWS?

The human rights activists and the advocates of stringent Intellectual Property rights seem to be at odds. While the former are apprehensive of the IP laws for their prospective impact on access to medicines, restrictions on the transfer of technology, access to knowledge, corporatization of traditional knowledge etc, the latter invoke UDHR\(^2\), adopted by the UN General Assembly on December 10\(^{th}\) 1948, to insist on the interpretation

\(^2\) Article 27 says,

1. Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancements and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

If we can only reconcile both coexisting parts of the same article perhaps we will be able to reconcile the human rights of the consumers and those of the innovators. Though the UDHR is not binding legally and only a recommendation but in 1966 UN General Assembly adopted two more treaties, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Majority of the members of UN have ratified these two later treaties. The former Treaty can be regarded as pointing to the rights which are negative in nature and stops governments from making any interference in the political, and civil rights of their citizens whereas the latter Treaty is viewed as positive in nature as it requires an active government participation for the actualization of these rights. These three documents together are known as International Bill of Rights.
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that the property right of the inventors and innovators are no less sacred and too are firmly grounded in the human rights. We see a same shift to making the human rights as indivisible in the Second World Conference on Human Rights 1993 where it was declared civil, political, economical, social and cultural rights are interdependent and you cannot take one and ignore the other. However in the final declaration of the Conference it did make room for the cultural relativism and maintained that the interpretation of human rights cannot be uniform and the historical, cultural, and religious position of each country needs to be taken into account. Therefore it distinguished universality from uniformity. Now the question rises that can the Intellectual Property Rights too be interpreted according to the unique situation of each country? The future of knowledge based economy and the protection of traditional knowledge hinges upon the answer of this question.

It is often maintained that human rights are universal whereas the intellectual property rights are individualistic. How to balance protection to intellectual property and access to medicines and knowledge is the question. Similarly the human rights activists are also concerned that the too strict application of the intellectual property rights will further polarize the world along economical knowledge based technology lines and the intensive labor based industries and both poles are already distrustful of each other. Whether it was the Paris Convention of 1883 on Industrial property law or the Berne Convention of 1886 on copyright law, the forerunners of modern legislation to protect intellectual property internationally, the primary purpose was to protect the innovator and no mention of the consumer is made. However TRIPs was an agreement which showed a modicum of concern for the consumer countries.

If we trace the history of Copyright laws we come to know that they started as privileges which were granted to an author or publisher for the exclusive right of dissemination of his work. But the purpose was not to protect the author or to promote competition but was to bring the work into the domain of censorship by censoring it before granting the privilege. This was meant to control communication and thus was against the freedom of speech. However along with so many other things this also changed with

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3 Articles 65 and 66 appear to afford some breathing space to the developing countries and the LDCs but arguably the grace periods allowed for the implementation were too insufficient. Secondly the developed countries were made to extend the technology transfers to the LDCs, again no mention of the developing countries, but without delineating the mechanism to ensure this technology transfer.
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the invention of printing press. The first Copy Right Act was the “Statute of Queen Anne(1709)” and thus copyright law took the place of privileges and this idea gradually spread in the rest of the world. Therefore even in the origin of the Intellectual Property Laws we find an element of desire to control and coerce.

Intellectual Property Rights were made part of the GATT-WTO system in the Uruguay Round. TRIPs provide for the protection of the IPR holder without much mention to the rights of the users of IPs. Developing countries are not a monolith and each one of them has their own problems in conforming to the provisions of TRIPs. TRIPs ignore the socio-economic backgrounds and the difference of the purchasing power among various developing countries. Resultantly, this agreement does not take into account that how access to knowledge of these developing countries will be affected by enforcing the copyright provisions without any consideration for the consumers. This also means restricting growth of knowledge based economies in these developing countries. The developing countries have one hope in the knowledge based economies to come out of the mire of poverty as they lack technology and capital to catch up with the developed countries. For example in 2009 only India’s export of the computer software was of $ 35.76 Billion. Pakistan is also aspiring to raise the revenues from the Information Technology sector, but legal or technical barriers of the TRIPs provisions in general and those of the Copyright articles in particular can hinder the growth of this sector.

III. TRIPs AND ACTA SERVE TO RAISE THE NONTARIFF BARRIERS

World Trade Organization (WTO) was meant to bring down the tariff barriers but application of sanitary and pytosanitary measures and environmental standards have become new non-tariff barriers for the countries in the South. Wish to conform to these standards is one thing, but to have the capability to do so is quite another. Moreover, there is the additional threat to biodiversity of these developing countries by the strict application of gene patents. These gene patents would allow the big corporations to make proliferation in the agricultural markets of the South by providing the genetically engineered seed. This genetically engineered seed has the capability to erode the traditional methods of farming.

4 http://www.state.gov/r/pa/ei/bgn/3454.htm (last visited Jan 13th 2010)
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employed by the farmers over the years and to destroy the seed developed by generations of farmers by gradually replacing it. In the process of modern farming by the seed provided by these big corporations, the farmers will lose their traditional methods of seed supply and pest control. It has a strong potential to undermine the food security of a country in the long run.

As if the already put in place measures as stipulated under TRIPs were not enough, ACTA\(^5\) allows the customs authorities to automatically seize the goods suspected of infringing on IPRs\(^6\). TRIPs put the burden of proof of the violation of IPRs on the IPR holder before taking an action, but there is no such condition in the ACTA. Part III of TRIPs deals with the enforcement of intellectual property rights. This part makes it the obligation of the members of WTO to provide administrative and legal channels to an IPR holder to report violation. The IPR holder has to prove the infringement of his rights before any action can be taken. TRIPs also provide for the seizure etc of goods but only after the IPR holder has provided adequate evidence to the authorities. The article 41 of the TRIPs at the same time however stipulate that the “procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse”\(^7\). But no such consideration is shown in ACTA. Therefore, ACTA would favor the IPR holders against the consumers by saving them the costs of the protection of their rights and moreover there is no safe guard against its potential misuse. ACTA has explicitly mentioned that trademarks, copyrights, and GIs cannot be put outside the scope of the Border Measures, even if the parties decide to do so\(^8\). This means that not just books but even the software which is treated under the Copyrights provisions can be seized on the customs entry points even before the IPR holder has established his claim\(^9\). In the case of


\(^6\) Anti-Counterfeiting Trade Agreement, Public Predecisional/Deliberative Draft: April 2010, art. 2.11, 2.15 & 2.16 (hereinafter ACTA draft – Apr.21 2010).


\(^8\) ACTA draft – Apr.21 2010, Ibid, Article 2.X

\(^9\) See e.g., Sean Flynn & Amy Kapczynski, Counterfeit Versus “Confusingly Similar”
computer software where it is not rare that software differs only in development of certain new features from another and its success hinges on being first to hit the market, will keep lying on the customs ports until the dispute is settled. Such confiscated software will face the threat of losing its commercial worth in the meanwhile. However, no remedy is afforded to the party against whom the IPR holder/applicant has abused the process except for the denial, suspension or making void the application. There is just a line and a half mention in the article 2.X that the rights of the defendants and the third parties shall be defended and duly protected, without delineating any mechanism for doing so or a deterrent penalty for failure to establish claim by an IPR holder.

Another too vague a provision found in Article 2.15(2) which makes for criminal liability and penalties for inciting, aiding, and abetting the offences mentioned in the Article 2.14. Article 2.14 deals with the trademarks and copyrights and by bringing in the net the third party, without defining it, virtually anyone whose facility has been used to distribute some printed material or software. The enforcement of

Products, PIJIP BLOG (May 7, 2010),
http://www.wcl.american.edu/pijip/go/pijip05072010, that how in the case of medicines “confusingly similar” pharmaceutical products can be wrongfully confiscated or seized. See also Peter Maybarduke, ACTA and Public Health. (PIJIP Research Paper No. 9, American Univ. Washington College of Law, Sept. 2010) available at http://www.wcl.american.edu/pijip/go/blog-post/pijip-research-paper-no-9-acta-and-public-health, where the author has argued that how this third party liability can have chilling effects on the medicine trade. It needs a little imagination to understand that how imposing the proposed third party liability can have similar chilling effects on the access to knowledge and expanding knowledge based economy.

10 ACTA draft – Apr. 21, 2010, ibid, art. 2.6
11 Id. art. 2.15.2
intermediary liability can have ominous consequences for access-to-knowledge as the apprehension has been expressed.13

The key operative term, “intermediaries,” was undefined in the April Predecisional Draft, as was the alternative term “infringing intermediary.” Likewise, what constituted “services” used by another to infringe an intellectual property right was also unclear. Previously, the concept “intermediary services” had been analyzed most closely with respect to internet service providers (ISPs). In these circumstances, an ISP that merely provided facilities that were used by others for an infringement, i.e. to download a digital copy of a song, book or movie, might be interdicted. Given the lack of definition, access-to-knowledge activists were concerned that the terms “intermediaries” or “infringing intermediaries” might not only be applied to ISPs but might also be extended to libraries, cultural institutions, and educational institutions, although their application to mail or telecommunications providers were deemed unlikely. Internet and copyright activists were also concerned that providing for injunctions might create incentives for ISPs and other intermediaries to take on new roles as extra-judicial enforcement arms of the courts and, most especially, of rights holders”.

IV. STRONGER PROTECTION OF GIs IS REQUIRED

Not just the genetically engineered seed, which is finding its way to the markets of the developing countries, is a threat to the traditional farming, but there is an additional threat by the big corporations of getting patented the successful indigenous varieties. The classic example is of Basmati rice. Rice Tech was successful in getting Basmati rice patented in the US. Basmati is the name of long grain aromatic rice, which grows in the alluvial soil of Punjab (a part of which is in Pakistan and the other in India). It is a classic example of trying to monopolize a plant variety which is no less than

ch, for the hazards of the inclusion of third party responsibility and how it will affect the transport of necessary medicines worldwide.

13 *Id.* Baker. Pp 5-7
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A Geographic Indication like Champagne or Scotch and excluding the small farmers in those developing countries who have been growing it for centuries. India and Pakistan are the biggest exporters of basmati rice across the globe. Saudi Arabia is the biggest importer of the Basamti rice and they have specified that Basamti rice originates only in India and Pakistan. Even then granting an American company the GI is an example of making a simple case confusingly complex. It also points to the impending danger of losing the indigenous products to big corporations. Similarly Neem, Turmeric, and other locally grown plant varieties, which have been used since ages for topical remedies, are not only part of the biodiversity but also of the traditional wisdom. These parallel medication and curative methods must not be exploited for commercial benefits by some multinational corporation for its exclusive profits. The case of Rice Tech should be a wakeup call that without active protection of the interests of local people and growers of indigenous plant varieties, these developing countries can gradually lose much of their heritage to big corporations. However, it is mentionable here that India has been successful in protecting the GI Basmati against the American company. But at the same time it has also gained rights over this GI Basmati with the exclusion of Pakistan thus showing that how a country like Pakistan who is not vigilant enough or lack the required expertise to protect its legitimate interests can lose at the international forums.

Pakistan has still not promulgated a law to secure its geographic indications first within Pakistan and then to defend them internationally. The poor vigilance of the government of Pakistan can be gauged by the fact that in order to protect the local produce, crafts and products, there is no GI registry.. GIs in Pakistan are dealt under the Copyrights Ordinance 2001 which is inadequate to grapple with the problem. Pakistan has the additional problem of sharing much of the claimed traditional medicines and GIs with India as Pakistan was carved out of the Indian sub-continent only in 1947. There should be some special mechanism to settle such disputes where both the countries appear to have more or less equal claim on the GIs due to a shared past or ongoing territorial conflicts. Kashmiri Pashmina shawls are one important example. As geographic borders keep changing so those countries will be facing this problem who has gained independence through secession or separation from some other country. Pakistan’s case is special as people of Pakistan are not different ethnically from those of their neighbor Indians and they gained a country as a homeland for the Muslims of the Indian sub-continent. Therefore the efforts of the present day
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Pakistanis’ ancestors have gone into enriching the indigenous culture and products. But who, India or Pakistan, will have rightful claim to those products is a big question mark. In Pakistan’s context it is a very important question because much of the cottage industries like phulwari embroidery, Sindhi ajrak shawl, Multani clay pottery, employ skilled but low paid labor. These GIs need to be protected so that these mostly self employed laborers making these traditional goods can be protected. It is a matter of protecting their livelihoods and thereby of protecting the indigenous culture and saving it from an invasive corporatization.

V. GIs historically shared between neighbors

The world map keep changing as new states emerge and the earlier states merge with each other. The history of sub-continent is no different. Pakistan gained independence from the British colonizers in 1947 and as a result a new country appeared on the world map. Unlike other countries who gained independence from the colonizers but had a distinct existence before colonization, Pakistan did not only came into being by throwing off the yoke of colonization but by taking a simultaneous birth from the womb of India. It does not mean that the people who came to be called Pakistanis have not been inhabiting that land before, in fact they have not only been populating that region but claim proudly oldest civilizations of the world like Indus Basin Civilization, Mohenjadaro, and the oldest Buddhist dynasty Gandhara. Now, the dilemma is that the new nation-state had to claim everything for itself from the scratch as the bigger country, India, from which it parted its ways, inherited automatically not only the history and culture along with the name India, but virtually everything which can be an offshoot of these two nouns. The greater majority of the Muslims of the undivided India were those Indians who had turned Muslim but had their roots in the Indian soil. Pakistan was meant to be a homeland for the Indian Muslims and was the political solution of the problems originating due to difference of religion between the majority Hindus and a big minority of Muslims. Therefore, the Pakistanis not only share a long history with the Indians but also development of many crafts and the cultural manifestations.

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like literature, dance and music, to name a few among a long list of common heritage. This raises the problem of shared Geographic Indications (GIs). Pakistan has already lost the case of Basmati rice at the forum of WTO and India is adjudicated to use the nomenclature of Basmati. This means a tremendous loss to Pakistani growers of Basmati rice who have been growing it for a long time. This is an example of the countries that cannot protect their interests on the international forums due to lack of expertise and legal acumen.

Like Basamti rice, there are several other products which are grown, produced, manufactured or shared by both the Indians and Pakistanis by virtue of having inhabiting the same land until 1947, but the ownership of the GI is never tried to be made clear, as it can be very complex. Therefore, by the following example of Kasmiri Pashmina Shawl, it is suggested that Pakistan and India should establish a joint registry for such products and articles which are joint and shared by virtue of history or geography, and get them registered together internationally. These two countries should contemplate some method of protecting their GIs instead of leaving the matter unsettled until the incidents like Rice Tech happens.

A. Case of Kashmiri Pashmina Shawls

The problem of shared GIs is further complicated by the existence of disputed territories between the two countries of India and Pakistan. The State of Jammu and Kashmir (henceforth called Kashmir only) is the most notable among these disputed territories. The result is that as none of these countries is in a position to claim exclusively the GIs belonging to this region, it is the craftsmen of this region who are suffering as a result.

GIs are protected under the Article 22.1 of TRIPs agreement. GIs are constituted to prevent two wrongs, first, misleading the public as to the geographical origin of the good and, second, unfair competition arising out of such use by a third party. Markets all around the world are flooded with different kinds of shawls made with the woolen or the synthetic fiber containing the label of Pashmina. Wool in many different colors is available in the market and is sold by the name of Cashmere wool. Traditionally, Pashmina shawls are those kinds of shawls which are made with the wool of the goats bred in the high altitudes of Himalaya. Therefore the artisans making this kind of shawl belonged to the Himalayan region of Pakistan and India, mostly comprising the region of Kashmir. Pashmina shawls are hand spun and embroidered since centuries by the skilled artisans of
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Kashmir. Even the word Pashmina is derived from Persian word “Pashm” meaning wool and is turned linguistically into an Urdu word by calling it Pashmina meaning made of wool. The name for the wool is Cashmere, which is the old name of Kashmir thus once again referring to the geographic origin of the wool and the shawls. The difference between the original Cashemere and Pashmina shawls is of the micron fiber and the Pashmina fibre is of a finer quality. The original Pashmina shawls are known for their softness and warmth; however warm shawls known as Cashmere are made not only in Kashmir but in Nepal too. However, Kashmir has been the cradle of the best quality Pashmina shawls where it has been a cottage industry since centuries. In the Indian subcontinent where several castes are based on guilds of skilled workers, traders or wage earners, the caste of shawlbaaf (shawlmakers) is concentrated in the region of Kashmir. These are the people who have been weaving Pashmina shawls generation after generation and it is their only means of livelihoods. As Cashmere wool obtained from the Changthangi goats bring good revenues due to the popularity of the Pashmina shawl, these goats which were once raised in the Himalayan regions of Kashmir and Nepal only are now being reared in the Gobi desert too because the climatic conditions in the Outer and Inner Mongolia are similar to those of the Hiamalayan region. This wool taken from the goats raised commercially in the Gobi desert has become a fierce competitor of the age old original Cashmere wool, as both come from the same species of goats though form different geographic regions.

Another disadvantage being faced by the local Kashmiri manufacturers of the Cashmere wool and the Pashmina shawl is that their region Kashmir is economically backward due to different historic reasons. It had long been a princely state where the Dogra prince was not much interested in the well-being of its subject. After the partition of the subcontinent of India, Kashmir became an epicenter of several armed conflicts between the neighboring countries of India and Pakistan and the last but not the least reason is that the ongoing political imbroglio has rendered it an economically neglected region. All these political and economical misfortunes of the people of Kashmir have taken their toll on the Pashmina shawl weavers too. One of the hardships being faced by the Kashmiri shawl artisans is that the Cashmere being produced in the Gobi desert is costing low to the farmers due to Chinese technological advances and lower cost of grazing in the desert, whereas there is no such mentionable technological or economic support available to the Kashmiri artisans, therefore they are lagging behind
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in the international market.

Nepal, which is another historic producer of Cashmere wool and Pashmina shawls has been more vigilant in protecting its commercial interests. The Nepal Pashmina Industries Association has registered Changra Pashmina all around the world in order to distinguish its Pashmina from the Kashmiri Pashmina. Both Kashmir and Nepal are located in the Himalayan region and are home to the Pashmina goats. These Himalayan tracts are the real habitat of these goats. Therefore Pashmina shawls produced elsewhere should not be called by this name, no matter even if these same goats are raised in regions other than Himalaya commercially for the purpose of the shawl making\(^\text{15}\). On the same hand, there is no justification for calling shawls made of silk or synthetic fiber Pashmina.

The solution of the Kashmir problem is nowhere in sight but it should not be a reason for not protecting the economic interests of the Kashmiri shawl makers. It is not only a matter of commercial benefits but also of cultural interests.

One solution to the problem is that both India and Pakistan should reach some kind of agreement that both of these countries will share the GI Pashmina with the exclusion of any third country who cannot establish its claim rightfully at the Arbitration Forums until the settlement of the Kashmir problem. This means that whichever country gets full control over the territory will have right over the GI too, but until then both countries should have equal right over the use of this GI. The purpose of this proposal is to safeguard the rights of the poor shawlmakers of Kashmir whose trade has suffered tremendously due to the misuse of this GI. This is not an idea without any precedent in the history of the subcontinent. For example when Pakistan settled its borders with China along the territory of Kashmir, it was mentioned in the agreement that the settlement of the borders is subject to the settlement of the Kashmir problem. If such an agreement can be reached to protect the territorial interests then why not a similar agreement be done to protect the commercial interests attached to those territories?

\(^{15}\) Article 22 (2) (b) clearly says that members of WTO are required to provide the legal means to prevent any use of a geographic indication “which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967)”.

By every meaning of the article 22, Cashmere wool can only be the wool produced in the region of Kashmir.
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VI. COPYRIGHT PROVISIONS AND THE ACCESS TO KNOWLEDGE:

Under the compulsory licensing provisions of the TRIPs as enumerated in the Article 31, the member countries are allowed to produce the pharmaceuticals in case of national emergencies. In case they are unable to manufacture themselves, they were allowed in 2003 to import its copies from another country. Though, twenty three countries, all of which are developed have committed that they will not import the pharmaceuticals\textsuperscript{16}. This once again highlights the difference of development between the developed and the developing countries that one provision which is a necessity and not a luxury for the developing countries, can be waived off by the developed countries. However, compulsory licensing cannot correct the market failure in pharmaceuticals and these medicines are sold at exorbitant prices in the developing countries. Article 31, allows the use of this provision only in case of national emergency, if the proposes user fails to negotiate a price with the patent holder. On comparing prices of the same medicine, produced under the same label, but in different countries of comparable purchasing power, huge price difference becomes visible. For example pharmaceuticals in Pakistan are costlier than in India and Bangladesh, two other countries of the same region with comparable purchasing power. The volume of illegal trade between India and Pakistan is many folds bigger than the legal trade\textsuperscript{17}. The second biggest item of this illegal trade is pharmaceuticals. This example of pharmaceuticals is given in order to illustrate that market failures are not adequately dealt with in the TRIPs. The case of books is not much different either. Pakistani book stores are flooded with the books printed in India as they are cheap. Many of them are pirated too. The point here is that if there can be compulsory licensing for pharmaceuticals then there should be a serious deliberation to introduce

\footnotesize{\textsuperscript{16} See \url{http://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm}, for the list of countries which have waived voluntarily the permission and the developing countries which have announced that this provision of import will be used in case of national emergencies only. There is no LDC country in the list, and all the developing countries too are the fast growing economies like China, Turkey etc.}

\footnotesize{\textsuperscript{17} See, Shaheen Rafi Khan, Can Illegal Trade Between Pakistan and India be Eliminated? (May 2005) available at, \url{http://www.sdpi.org/help/research_and_news_bulletin/may_june_05/canIllegal_trade%20.htm}}
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a similar mechanism in the realm of books and software. The purpose of this proposal, like compulsory licensing of pharmaceuticals, is to help developing countries. Those countries whose more than fifty percent of the population is illiterate and the purchasing power is very low, hence the reading public is unable to buy books, should be assisted in access to knowledge through special provisions. If one goes through the news items in the Pakistani daily newspapers carrying the details of the raids made on the pirated books, it turns out that the overwhelming majority of books is educational books and not the books read for entertainment\(^{18}\).

By admitting the right of compulsory licensing in the pharmaceuticals but denying the same right for books and the educational software we implicitly say that only the right to life is important and the right to improve the quality of life is of no value.

The low level of literacy is a factor which contributes to making the publishing of famous titles legally very expensive. Pakistan has introduced a provision similar to compulsory licensing in its Copyright Ordinance 2000, which amended the copyright laws of 1962. According to the newly inserted section government can allow the publishing of any book in the public interest\(^{19}\). This is worth mentioning here that the amendments were made in the existing copyright law in order to bring it into conformity with the TRIPs. But when it was realized that following TRIPs letter and spirit can jeopardize the interests of the people of Pakistan, this above mentioned provision was made in the amended law.

The introduction of this provision to safeguard the right of access to knowledge of the people of Pakistan has been fiercely challenged by

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\(^{18}\)See, a news item available at, http://www.dailytimes.com.pk/default.asp?page=20100119story_19-1-2010Pg13_5. The huge number of books confiscated point towards the public demand of educational books in English language.

\(^{19}\)The new amendment made in 2000 to the Copyright Ordinance 1962 reads as follows:

**Amendment of section 36, Ordinance XXXIV of 1962:**

In the said Ordinance, in section 36, after sub-section (2), the following new sub-section shall be added namely:-

"(3) The Federal Government or the Board may, upon an application by any governmental or statutory institution, in the public interest, grant a license to reprint, translate, adapt or publish any text book on non-profit basis".
International Intellectual Property Alliance (IIPA)\textsuperscript{20} and has been termed as one of the reasons to keep Pakistan on 301 watch list\textsuperscript{21}. According to IIPA itself the “worst offenders” of the copyright provisions of TRIPs and the Berne Convention are the educational institutions and especially colleges and universities in Pakistan\textsuperscript{22}. With the steep rise of inflation, dwindling incomes, reducing purchasing power, increasing poor-rich gap, the only means of upward social mobility in Pakistan is providing cheap education. In countries like Pakistan, where the society is divided along economic class lines, which is not only a social problem anymore but is becoming a factor promoting fundamentalism and intolerance too, there is a dire need to educate people and not to take away the ways to improve their lives. Implementation of copyrights provisions of TRIPs will make education costlier and widen the poor-rich gulf.

At this time in history, exchange of ideas and knowledge is required to keep Pakistani society from spiraling into fundamentalism and poverty which are interrelated in that country’s context. Education has traditionally been the most popular and acknowledged source of social mobility in Pakistan. According to the studies of piracy in Pakistan, most of the piracy takes place in the printing of English books, and the highest level of piracy is found in the printing of the English books for the college and university students as the medium of instruction at the higher education level is English in Pakistan. Not just the economic but the social cost will be too high by making the English educational books inaccessible for the low-income students, and the consequences are not hard to imagine.

Pakistan tried to counter the problem of expensive books by establishing National Book Foundation, which is an educational welfare organization,

\textsuperscript{20} See, for example the replies of the IIPA to the GSP public hearing, which shows that they know the nature of the problem in Pakistan but are not allowed to make concession in the special case of developing countries with low levels of literacy, available at http://www.iipa.com/gsp/Pakistan%20GSP%20Post%20Hearing%20Response%20of%20IIPA%20by%20RIAA%20Dec%202014%202005.pdf

\textsuperscript{21} The stern demands made by IIPA are not incompatible with the Pakistan’s obligations under TRIPs, but the problem is first lack of mechanism to regulate strictly the book markets and second, the concern for the general public for whom the books would become out of reach by the application of IIPA recommendations, available at, http://www.iipa.com/rbc/2010/2010SPEC301PAKISTAN.pdf

\textsuperscript{22} Id. pp256-257.
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created by an act of Parliament, hence a statutory body. It prints foreign titles too by the permission of the copyrights holders. But often the titles it produces are either old editions or gone out of demand. One solution to counter the piracy issue, implement the copyright provisions of TRIPs and to provide books at affordable costs to the reading public can be by activating the National Book Foundation. But again the problem would be resource constraint to publish greater number of titles.

The case of developing countries’ access to knowledge is an example of humanitarian issue that how international regulations of copyright forced on them can condemn them to a circle of vicious poverty. These people for whom education is being made too expensive would be rendered unable to wriggle out of their low income class generation after generation. In September 2002, the Commission on Intellectual Property Rights published its famous report in which it was concluded that weak levels of IPR protection are more likely to stimulate economic development and poverty alleviation than strong levels. Though the major part of the report dealt with the issues of Patents and GIs and its effects on the development policies but it did mention knowledge as an IP in the chapter 5 of the report which deals with the copyrights. Similar is the case of software where it is often hard to determine that whether it is an innovation or just another edition of already existing software. Application of ACTA and TRIPs provision in the software and database industry may make the goal of expanding knowledge based economy elusive for the developing countries. The copyright protection is meant, at least in theory, to the expression of the ideas contained and not the ideas themselves. Commission raised similar apprehension about the potential misuse of the copyright provisions in the international statutes by saying:

By contrast in many industries, and in particular those that are knowledge-based, the process of innovation may be cumulative, and iterative, drawing on a range of prior inventions invented independently, and feeding into further innovations.

\[23\] The Commission was established by DFID and chaired by Professor John Barton, published a report bearing the title, *Integrating Intellectual property Rights and Development Policy*. In this Report a strong case was made for the developing countries that similar treatment to all the developing countries will be detrimental to their development and the interests of the developing countries need to be protected, available at, http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf
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independent research processes by other. Knowledge evolves through the application of many minds, building often incrementally on the work of others. Sir Isaac Newton modestly wrote a long time ago: “If I have seen further it is by standing on the shoulders of giants.” Moreover much research consists of the relatively routine development of existing technologies. For instance, gene sequencing, formerly a labour intensive manual technique, is now a fully automated process, involving little creativity. The development of software is very much a case of building incrementally on what exists already. Indeed, the Open Source Software Movement depends precisely on this characteristic to involve a network of independent programmers in iterative software development on the basis of returning the improved product to the common pool.

VII. PROBLEM OF IMPLEMENTATION

The government of Pakistan is not unaware of its responsibility under TRIPs and has instituted civil and criminal liabilities for the infringement of the provisions of the Copyrights Ordinance as amended in 2000 in the light of TRIPs. Intellectual Property Organization of Pakistan (IPO-Pakistan) has been established with the vision, “To put Pakistan on the IP map of the world as a compliant and responsible country by promoting and protecting intellectual property rights”\textsuperscript{24}. Federal Investigation Agency (FIA) is entrusted with the job of IPR enforcement\textsuperscript{25}. It has carried out raids 14 raids between January 2007 and August 2008 and seized infringing goods and materials. It lodged twenty five cases and the raids were carried out in big urban centers\textsuperscript{26}. Pakistan Customs has instituted Anti-Piracy Cells (APCs)

\textsuperscript{24} See, the official website of IPO-Pakistan at http://www.ipo.gov.pk/, which showcases whatever efforts, though meager, it is making to realize its vision.

\textsuperscript{25} Efforts made by FIA, despite its meager resources and other matters of priority to attend, have been commended by international observers, \textit{for example see}, http://www.ifpi.org/content/library/enforcement-bulletin-27.pdf, where the International Federation of the Phonographic Industry has appreciated the efforts of FIA to crackdown on the pirated optical discs.

\textsuperscript{26} See, a trade summary between US and Pakistan in the year 2008, in which
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at the major airports to check the movement of pirated objects. In the past several years Police carried out 4000 raids to confiscate pirated and counterfeited goods\textsuperscript{27}.

The developing countries are certainly not a monolith and treating them like one will certainly be a mistake. Some developing countries like India will benefit from stronger copyright protections as they are the net exporters of software and movies. On the other hand countries like Pakistan which are the net importers of knowledge-based products fear to lose, at least initially. Pakistan will have to pay higher prices for the knowledge based products before it can reach the level where it can produce indigenously at least the required software and databases to be used in its educational and commercial sectors. Obviously, the IPR holder has a right to gain advantage from his IP, but it should be kept in mind that the protection of IPRs should be according to the development level and the requirement of the user country. Once the knowledge based goods are made popular in the developing countries, it will give rise to their heightened demands which will eventually benefit the IPR holder. But the exclusion of a large population of the developing countries can have the opposite effect. One proposal is that there should be more incentives like budget editions of books and similar incentives like budget software can be introduced. If the multinationals can have different price of the same item of daily use like soap, toothpaste etc in different regions of the world depending on the purchase capacity, then why the Copyright holders cannot introduce similar mechanisms. This will make the knowledge based products affordable for the people and at the same time the IPR holders will not be deprived of their revenues.

The administrative costs of implementing the IPRs are also high. Pakistani courts are already bogged down with cases and are known for Pakistan’s efforts to curb piracy have been acknowledged, as it is mostly the books and the software originated in US which is pirated in Pakistan, available at http://ustraderep.gov/assets/Document_Library/Reports_Publications/2009/2009_National_Trade_Estimate_Report_on_Foreign_Trade_Barriers/asset_upload_file282_15496.pdf

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delay in handing down the decisions. Similarly, in the present war on terror, the same law enforcement agencies are involved which are required to check piracy, which is an additional burden on them. Therefore it is proposes that the IPR holders should bear the costs of the implementation of IPRs as it is mostly in their own benefit.

By implementing the IPRs, developing countries can benefit in the long run by providing an investor friendly environment where there is rule of law. But the implementation should be considerate to the consumers too.

VIII. CONCLUSION

There are far reaching social and economic effects of the IP regime and the stakes are getting higher with the probable introduction of new legal regimes like ACTA. The corporatization of every aspect of life has threatened the human beings of turning virtually every facility to be a private good. The touted purpose of the IP regimes has been to correct market failures, but in fact they are leading to the market distortions by restricting the use of once public goods like knowledge and biodiversity. But not everything is lost, as long as there is consciousness and debate on the issue of interrelationship of IPRs and the Human Rights. Developing countries and the LDCs far outnumber the developed countries and they should put their united point of view on the IP forums. Copyright provisions of IP statutes have the potential to bar access to knowledge, and it cannot be corrected by knee-jerk responses by the governments of developing countries and constant rather fierce vigilance of interests is required.
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