Intellectual Property Law

Criminal Enforcement of Intellectual Property and its Effect on Human Right (Analytical Comparative Examination of TRIPs and Human Rights): A UK and Jordan Case-study

by

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Dedication

My eternal gratitude to my family; for endlessly supporting me as a son and brother: ‘in particular to my father and mother for their sustaining belief in my abilities and their understanding patience, combined with supportive firmness at appropriate times.’ Without them I certainly would not been at this position.

Abstract

The aims of substantive intellectual property laws and a balance between interested parties can only be achieved through appropriate procedures. Most miscarriages of justice occur procedurally. However the literature on the role of criminal IP procedures is comprehensively slight.

The thesis, by a former judge assistant at both the Court of First Instance and the Court of Appeal in Irbid, Jordan, tackles issues related to enforcement of intellectual property rights and their connection to human rights. It considers the rights of the immediate parties involved, third parties, and the general public interest. It examines the role of Euro-Med Association Agreements in general and that between the EU, its member states and Jordan relevant to intellectual property and human rights.

Despite the narrow interpretation of WTO/TRIPs by some commentators, it is argued that TRIPs requires that criminal as well as civil procedures be fair and equitable.

The elements of a fair trial are analysed in the context of IP proceedings, comparisons being made between procedural safeguards available in Jordan and the UK (especially England and Wales) jurisdictions which have historical ties.

Obligations between states at the international and regional level are analysed, along with their implications at the national level in the UK and Jordan, linked to the EU through the Euro-Med Association Agreement with Jordan. The international human rights instruments provide a common framework in accordance with TRIPs provisions interpreted could bridge the gaps that may arise between the British and Jordanian Jurisdictions.

The thesis uses doctrinal comparative and qualitative methods to examine these issues and also the relation between criminal and other methods of enforcement - civil and administrative. Use of criminal procedures may significantly reduce the costs of lengthy civil litigation, and be in the public interest and the interest of all parties. Finally, recommendations are made for Jordan mainly.

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- DS434 Australia- Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant Ukraine)
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- United Nations Committee on Economic, Social and Cultural Rights "*Protection of Intellectual Property under the TRIPs Agreement*" E/C.12/2000/18, p.2, 29 November 2000 (Other Treaty- related document)

Glossary of Abbreviations and Terms

- UDHR 1948: Universal Declaration on Human Rights 1948
- ECHR 1950: European Convention on Human Rights 1950
- ICCPR 1966: International Covenant on Civil and Political Rights 1966
- ICSER 1966: International Covenant on Social and Economic Rights 1966
- TRIPs: World Trade Organisation Agreement on Trade Related Intellectual Property Aspects 1994
- Member States: to be used in relation to the EU/EC and ECHR stated and the related contents of the agreements related
- Contracting Parties or signatories: WTO, TRIPs and other treaties
- Partnering Parties: used in regard to the Euro-Med Partnership Agreement between the EU and Jordan
- WIPO: World Intellectual Property Organisation
- EMP: The Euro-Mediterranean Partnership
- EMAA EU-Jordan: The Euro-Med Association Agreement between the EU-Jordan

- EMFTA, FTA: EU-Med Free Trade Area
- JCPA 1961: Jordanian Criminal Procedures Act 1961
- JCPA 1988: Jordanian Civil Procedures Act 1988
- JCA 1960: Jordanian Criminal Act 1960
- JCA 1976: Jordanian Civil Act 1976
- JCACC: Jordanian Court of Appeal Criminal/Civil Chamber
- JCCCC: Jordanian Court of Cassation Criminal Chamber/Civil

Chapter 1 Introduction

I. Legal Background of the Research Philosophy

Human rights of individuals (whether an accused, owner of the intellectual property or a third party) may be compromised in the course of enforcing intellectual property laws. The thesis deals with critical issues related to criminal/civil/administrative judicial procedures and remedies, with respect mainly to infringements of intellectual property rights (IPRs). These inter-related issues raise questions at national, regional and international levels. While much emphasis has been placed on intellectual property in terms of regulation, protection, and academic research, it seems that the impact of intellectual property *enforcement procedures* upon human rights and vice versa has not been sufficiently examined. The subject of human rights and intellectual property issues has been unevenly treated in the literature there is plentiful material on IP as part of the HR regime on the individual level as it relates to the interests of society, yet certain aspects of the relationship, procedural elements, dialogue need to be addressed. There is considerable treatment of limitations on freedom of expression and IPRs under Articles 10 and 8 of the European Convention on Human Rights 1950 (hereinafter ECHR). In addition, Article 15 International Covenant on Economic, Social and Cultural Rights 1966 (hereinafter ICECR) and Article 27 Universal Declaration Human Rights 1948 (hereinafter UDHR) are relevant. There is very limited literature on the procedural aspect of human rights in the context of IP, especially on criminal matters. However, these issues are of importance to the parties with an interest in the resolution of IP disputes: the accused/defendant, the complainant/plaintiff, and society in general. This thesis seeks to address this gap in the literature.

The study compares two World Trade Organisation (hereinafter WTO) member states [UK and Jordan] which are also connected through the medium of UK's membership of the EU and Jordan's Euro-Med Association Agreement, both of which impose obligations to protect HR and IP. In addition, as a territory once governed under the British mandate Jordan is a country with mixed judicial heritage, containing European and commercial dimensions within a Jordanian context. England & Wales, with a common law judicial heritage and bound in union with Scotland and N Ireland,

and the EU with many civil law states also display contrasting legal contexts within which to protect Human Rights and IP.

The comparative approach taken examines research on the procedural and conceptual aspects of the research on the different levels: national and international law, including EU law. The aim is to examine IP and HR in the context of civil and criminal proceedings and the administrative arrangements that accompany them.

The intention is to study diverse and contradictory elements of doctrinal and qualitative rather than quantitative methods of research,[1] in order to create a more comprehensive understanding of Intellectual Property enforcement and its connection to human rights on all levels.

In order to supplement the doctrinal comparisons and to compensate for the limited availability of documentary material in Jordan, semi-structured meetings were conducted.

II. The Research Problem

The proposed research takes into account two main policies. First, there should be adequate regulation and protection of intellectual property rights to protect the proprietor and any relevant economic policies. Second, the rights of the individual (others, besides the owner) should be protected as well, in accordance with the conceptual aspects that could arise during the enforcement process and the rights of parties involved.

Since intellectual property rights are often considered part of the human rights system, both sets of rights are related at source. This situation is recognized as a significant element of the Euro-Med Association Agreement between the EU and its member states and Jordan.[2] Both fundamental human rights and protection of IPRs are essential components of the agreement.

[1] Kaplan, A 'Positivism' *Encyclopaedia of Social Sciences* (1968) Random House p.390

[2] Articles 2 and 56 of the Euro-Mediterranean Agreement establishing an Association between European Communities and their Member States, of the one part, and Hashemite Kingdom of Jordan, of the other part. Official Journal of the European Communities L 129/3 EN 15.5.2002

Furthermore, the research will explore the kinds of obstacles that may hinder law enforcement in respect of the protection of intellectual property rights. The powers and performance of law-enforcement bodies will be assessed.

Thus, the thesis aims at answering a major question. What does an adequate regime of intellectual property enforcement involve, and how can one implement it while preserving the rights of the individual?

Though two principles are equally asserted in theory, the enforcement of one of them may well be in conflict with the other in certain circumstances. Either the rights of the IP holder take precedence, if the legislation privileges the economic aspects at the forefront on the one hand, or the rights of others involved in the process are prioritized, and the rights of the complainant IP holder are undermined.

In seeking a convincing solution to this problem, the proposed research will examine the issue of criminalising intellectual property infringements. This will in turn involve an assessment of the civil remedies available for the proprietor so as to determine whether criminal punishment is necessary.[3]

All these issues are to be critically studied in light of judicial precedent and relevant legislation.

III. Research Questions

1. Do the general rules of enforcement stated in Art 41 TRIPs apply to the criminal enforcement measures mentioned in Art 61 TRIPs as well to civil measures?

2. Given the seeming lack of clear procedural safeguards in WTO/TRIPs, do international human rights instruments provide for the fair trial procedure for intellectual property offences and infringements in Jordan and the UK?

3. Are there observable trends, groupings or gaps in the literature on the interface between intellectual property and human rights and can these be used or filled to cast light on that interface?

[3] The argument for the comparative approach taken in the research is given in the methodology section of the thesis (1.1 Methodology).

IV. Propositions

The proposed research starts from the following propositions:

1. An adequate regime for the protection of intellectual property rights requires criminal penalties for only severe infringements thereof; and punishment must be proportionate to the severity of the wrongful act committed by the accused.

2. The privacy of the individual may be compromised for the sake of protecting intellectual property rights; but do stronger intellectual property rights mean reducing or weakening the individual's private rights?

3. The extent of the powers of law enforcement bodies should depend on whether the suspect infringer acts in the course of business or not and on the need for appropriate balance between the rights of the parties involved in the intellectual property infringement and criminal enforcement process. Also important to consider are the rights of the intellectual property right holders and the rights of the accused, and the possible effect of the enforcement process on third parties.

4. While relevant Jordanian legislation provides for sufficient protection of intellectual property, the enforcement falls short of being satisfactory because of social, legal, judicial and economic obstacles.[4] To identify problems in Jordan, in order to further analyse the situation, a comparative law approach can.[5] The examination of similarities and differences will lead to solving problems, the successful application of foreign law and providing those who are under subjection to legal rules the ability to choose between different legal systems.[6]

[4] This has been discussed in further detail in chapters to come; such as Chapter 3 in the sub-section related the Jordanian judicial system and British system analysed.

[5] Dannemann G; Comparative Law: Study Of Similarities Or Differences?, in Reimann, M and Zimmermann, R (eds.)*"The Oxford Handbook Of Comparative Law"*; (Oxford, OUP, 1st ed.,2006)

[6] Schlesinger, R B; and others; "*Comparative Law, Cases-Text- Materials"* (New York, Foundation Press, 6th ed., 1998) Pp.37-38. In the same meaning, Dannemann G; Comparative Law: Study of Similarities or Differences? In Reimann, M and Zimmermann, R (eds.) *"The Oxford Handbook of Comparative Law"*; (Oxford, OUP, 1st ed., 2006), Pp. 404-406.

The comparison of different legal systems should take into account the historical background of each, and their evolution, along with their characteristics, distinctive institutions, sources and ideology.[7]

Jordan, as the starting point for the research, can usefully be compared with the UK, especially England and Wales. These jurisdictions are not from the same legal and judicial system or family: England and Wales, part of the EU, is considered a leading country in the Common Law family. Jordan follows the Roman Law system, yet not completely as it is influenced by Islamic law and also by English law via the British mandate for Jordan prior to her independence.

Their characteristics, distinctive institutions, legal sources and ideology will be examined.[8] It is hoped that the distinctive backgrounds of each legal system will uncover a cornerstone that relates them. The comparison between various legal families should focus on the why and wherefore of differences and similarities.[9]

Such study is essential, in order to have a clearer and more comprehensive understanding.[10] This leads us to the main purpose of comparative enquiries related to understanding, changing and applying or using the law. A comparative approach is valuable not only in assessing what to take but also what not to take.[11] The possible sources of law are various: legislation, custom, judicial decisions, doctrinal writings and equity. Discovering the differences and similarities between various legal systems involves analysing the aspects of their different sources. Such study and examination enables analysis of both contradictory and unitary factors of the legal systems under examination.

Comparison is also required at the international level between international intellectual property law and human rights law: the international treaties and

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[7] De Cruz, P.; "*Comparative Law In A Changing World"*, (London, Cavendish Publishing Limited, 1999) pp.35-36. Dannemann, G.; *"Comparative Law: Study Of Similarities Or Differences?* Pp.401-403.

[8] De Cruz, P.; "*Comparative Law In A Changing World"*, (London, Cavendish Publishing Limited, 1999) pp.35-36 Schlesinger, R B; and others; "*Comparative Law, Cases-Text- Materials"* (New York, Foundation Press,6th ed.,1998) Pp.37-38. In the same meaning , Dannemann, G.; *"Comparative Law: Study Of Similarities Or Differences?"* in Reimann, M and Zimmermann, R (eds.) *"The Oxford Handbook Of Comparative Law"* ; (Oxford, OUP, 1st ed., 2006),Pp. 404-406

[9] Dannemann, G.; *"Comparative Law: Study Of Similarities Or Differences?" Ibid* , p.384.

[10] See pages 9-10 from this thesis.

[11] *n (9)* Dannemann G; *Comparative Law: Study Of Similarities Or Differences?* Pp.401-403.

agreements related to each set of laws and rights. These will be examined in a more detailed fashion below.[12] At a regional level there is a need to consider the possible impact of EU laws and external relations, mainly represented in the Euro-Med Association Agreement between the EU and Jordan, but also the EU's membership of TRIPs, in an attempt to create a more comprehensive overview of human rights, IPRs and linking factors. The Association Agreement between the European Union and their Member States and Jordan ["Euro-Med Association Agreement"] contains important human rights and IP clauses, and this plays a role in providing a common legal background that will connect both legal systems to human rights treaties that are binding for both countries according to the agreement: The Universal Declaration of Human Rights date and the International Covenant on Civil and Political Rights 1966 [the UN Human Rights Bill] [Article 2 of the Association Agreement].[13]

V. The essential contributions the thesis makes to the literature are the following

1. The role of the Association Agreement [Euro-Med] between EU and Jordan from the human rights perspective [human rights clause] and the direct impact the UDHR 1948 and the UN human rights bill has on the relation between Jordan and EU and the indirect connection it creates to the UK and Jordan IP-Human Rights relationship.

2. The comparative approach applied at variously i.e. as between IP and human rights and at national, regional and international levels.

3. The argument that the international requirement of "***fair and equitable"*** measures for IP enforcement in TRIPs extends to criminal enforcement, due to the connection between Art 41 [general rules] and Art 61 [criminal enforcement].

[12] As it has been detailed in Chapter 2 and the diagrams explaining the approach of the research dealing with this issue.

[13] Art 2 of the Euro-Med Association Agreement between the European Union and their Member States and Jordan,
"*Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect of democratic principles and fundamental human rights as set out in the Universal Declaration on Human Rights which guides their internal and international policy and constitutes an essential element of this Agreement*."

4. The argument that the WTO TRIPs agreement may, paradoxically, be regarded as the human rights guardian of the IP treaties.

5. Identification of conceptual groupings in the literature on intellectual property and human rights – Coexistence, Conflation, Collision and Convergence - and their application in the area of the right to fair trial.

6. Identification of the right to fair trial as an under-researched area in the context of intellectual property and human rights; analysis of this area and identification of another conceptual relationship –Complementarity.

1.1. Methodology [International and Comparative Doctrinal Analysis]: some further comments

My starting point is Jordan. The Jordanian Constitution which dates back to 1952 has a number of fundamental human rights and basic rights that governs the balance between the executive and judiciary authorities and the National Assembly. [14] The Jordanian legal system, as with many legal systems, has been affected by Roman law with a consequent influence on the role of the judiciary. Art 2 of Jordan's Civil Act of 1976 places case law in a secondary level in relation to other sources. In this the Jordanian system is related to the Civil law system, while, historically, Jordan prior to independence was connected for a time to English law and the Common law system. Furthermore the Jordanian legal and judicial system has been influenced by the Islamic legal culture, most notably in the codification of the Islamic legal principles of Al-*hunafi* school of *fiqh* under the rule of the Ottoman Empire the *Majallah*, which was drafted and enacted between the years 1869-1876 with the help of French legal scholars.[15] The Jordanian Civil Act of 1976 has, as have many other modern civil acts or codes in Arab regions and the Middle East, been deeply influenced by the *Majallah* at least as regards civil litigation transactions. It has to be mentioned that

[14] Jordanian Constitution Chapter Two: Rights and Duties of Jordanians [includes rights such as freedom of speech, freedom of Congregations and equality before the law]. Chapter Three: Powers General Provisions [Executive branch, etc...]

[15] D Rene' and C. Brierley, John E; *Ibid* pp.102-103. Egypt, Lebanon mainly were influenced, and countries such as Bahrain, Syria and Jordan in the Trade law aspect.

many of the civil codes in the region have been drafted and influenced by the Jordanian Civil Act 1976.[16]

The legal comparative approach will be conducted on three levels: first, the international law approach,[17] second, the regional or EU on the second level. Third there will be comparison between the national legal and judicial systems under consideration.

The Human Rights perspective will be examined with regard to the treaties and conventions that connect Intellectual Property Rights and Human Rights, referring to treaties that are obligatory or not for both the UK and the Jordanian legal systems, as summarised in Table no (1) in the appendix below.

At the second level, could the human rights clause of the EU-Jordan Euro-Med Agreement be legally related and applied to the intellectual property clause protection?[18] It is argued that these two provisions have equal standing and their presence in the agreement provides a common legal background that connects both legal systems to fundamental human rights principles. The agreement uses text closely similar to that used in the UDHR 1948 and makes it binding on both countries. Also relevant to these obligations are those conferred on both countries by the International Covenant on Civil and Political Rights 1966[19] and ICSECR which, together with the UDHR, make up the UN "Human Rights Bill".[20]

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[16] L Saqqaf Does it float in the United Arab Emirates? [1998] JIBL 26 at n 7-9.

[17] In addition to the mentioned above, international instruments will be considered in a more detailed fashion in order to ascertain the 'international standard' of protection of intellectual property. The international instruments of the World Trade Organisation [WTO] and of the World Intellectual Property Organisation [WIPO] will be examined. The Human Rights perspective and aspects related to the subject-matter under study shall be examined as well under the provisions and rules of the related international instruments.

[18] Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part entered into force on 1 May 2002 2002/357/EC, ECSC OJ of the European Communities L129 Vol. 45 15 May 2002

[19] International Covenant on Civil and Political Rights ICCPR 1966Adobted at16 December 1966, New York, Date of Entry into Force 23 March 1976 999 UNTS 171.

[20] Nowak. M; *Introduction to the International Human Rights Regime*, (Leiden: Martinus Nijhoff, 2003) p.1. The modern structure of international human rights evolved prior to the end of the Second World War and the drafting of the UDHR 1948 and later on the ECHR 1950 based the background for the build-up for IPR's as a main section of the human rights system. These instruments were the international human rights that began to recognise intellectual property as an individual economic section of human rights as has been mentioned in a more detailed manner in other sections in the thesis.

Again at the regional level, it is important to note the implications of the EU's accession to ECHR and the EU Charter for its external ties, including those with Jordan through the Association Agreement.

Whatever effect the Association Agreement may have on intellectual property rights enforcement for both legal systems under examination can be noted in Article 56 and Annex VII, which state,

> 1. Pursuant to the provisions of this Article and of Annex VII, the Parties shall grant and ensure adequate and effective protection of intellectual, industrial and commercial property rights in accordance with the highest international standards, including effective means of enforcing such rights.
>
> 2. The implementation of this Article and of Annex VII shall be regularly reviewed by the Parties. If problems in the area of intellectual, industrial and commercial property affecting trading conditions were to occur, urgent consultation shall be undertaken at the request of either Party, with a view to reaching mutually satisfactory solutions.[21]

This may create the basic foundation for a common legal background for the English and Jordanian legal systems. Thereby more comprehensive and harmonized standards for the protection of IPRs in Jordan and England may be created via EU rules and regulations.

The EU's accession to WTO and to WIPO treaties provides an additional link between the international and regional levels as regards IPRs, as these treaties are among the treaties and agreements where the EU can stand or act independently of its members.[22] The agreements are subject to the rules of the Competence and the

[21] Art 56 from Euro-Med Association Agreement between EU and Jordan and
Annex VII of the agreement states the main international IP protection treaties shall be taken under consideration of the involved parties [Berne Convention, the Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome 1961); …] the Annex goes to indicate the obligations upon the parties mainly Jordan to provide adequate and effective protection that should take place in relation with the provisions of Articles 27 and 34 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPs 1994]. The provisions of Annex VII of Euro-Med Association Agreement is similar to the continent of Article (2) from TRIPs Agreement. It has to be mentioned that Euro-Med Association Agreement entered into force 01/05/2002

[22] Szysczak E; Cygan A; *Understanding EU Law* , (London, Sweet & Maxwell, 2008), pp.313-317. Also see *n* 111 Ahmed, T; Butler. I, De, J *'The European Union and human rights: an international law perspective'* European Journal of International Law, 2005. Pp.2-4 Westlaw UK

Common Commercial Policy of the EU [CCP] The type of treaty or agreement related to the EU and the member countries individually members in the agreement is decided according to EU policies and regulations. The TRIPs agreement and WTO are considered "*mixed agreement*", due to the EU and member states individually being bound. It has been held that this renders the provisions of such treaties part of the EU legal order. [23] This conclusion puts EU law on a par with Jordan, where Articles 33(ii), 91, 92 and 93 of the constitution makes international agreements part of the Jordanian legal order after accession.

The Euro-Med Association Agreement between EU and Jordan is also concluded as mixed agreement.[24]

Turning to the third, national level of comparison, it should be noted that TRIPs sets the general standard of protection and enforcement measures required as a minimum set of guidelines.

Yet the agreement gives each member state the liberty to apply these guidelines according to their national legal and judicial system.[25] In relation to that mentioned previously, the differences in the legal and judicial systems at national level will lead to various applications depending on the legal provisions applied by the national judiciary.[26]

What impact do the distinct legal and judicial systems in the UK and Jordan have on the court's role in IP protection and judiciary practice?

The first primary difference in the matter of intellectual property enforcement lies in the criminal or civil courts for handling infringements. The Jordanian approach appears to favour criminalised IP infringements in that there are many provisions

[23] Case C-135/10 *Società Consortile Fonografici (SCF) v Del Corso* [2012] ECDR 16 at [56].

[24] The Euro-Med Association Agreement with Jordan falls in this category of agreements as Article 1.1 from the agreement states *"An Association is hereby established between the Community and its Member States, of the one part, and Jordan, of the other part,"*

[25] TRIPs Agreement; Part 3 [Enforcement of Intellectual Property Rights] Section 1. General obligations Art 41(5) mainly, which provides member states with freedom of choice regarding IP enforcement procedures on the national level. According to the provisions of the agreement [TRIPs] every member state has to apply certain IPRs enforcement procedures, which it prefers as long as it fair and equitable as seen in Art 41(2), Articles 42 and 61 in relation the Civil and Criminal methods of enforcement.

[26] *n* (18)

dealing with the matter in the various IP statutes.[27] Due to the comparatively swift and costless procedures of criminal enforcement, it is the IP holder's favoured method of protection. A criminal conviction results in briefer civil litigation proceedings. Even a verdict in which infringement is found to have occurred yet for technical reasons the accused is not guilty will not harm the prospects of a subsequent civil claim. In England and Wales civil proceedings dominate IP enforcement.

Why has the qualitative empirical study been used as a method of research ?

The qualitative approach of the research takes an empirical study with the judiciary and qualified scholars and staff at the ministry of trade and industry, and the department of the national library in Jordan and the role played by these departments in the enforcement measures and methods of IPRs. The other main inquiry relates to why such measures and interviews have not been conducted on the UK level. The empirical examination studies the qualitative approach and the reasoning of the interviews, and how the meetings were conducted and the qualities and standards of the interviewees. The empirical research acts as solution and a direct outcome of the shortcomings and lack of depth in the IP Jordanian doctrinal research.

1.2. The Empirical Studies under Examination

What was the reason for the meetings conducted ?

The purpose of the meetings was to obtain a more comprehensive understanding of the main issues affecting intellectual property enforcement at various levels in Jordan including legal, economic and social factors IP bear on that enforcement in practice. Finalized cases below the Court of Cassation are not reported in Jordan. The interviews acted as a means to gain information and data related to IP case law on every level of the trial proceedings especially as regards criminal prosecution. Quantitative information, such as percentage of acquittals or numbers of search orders conducted, though it can be significant, was not of relevance to this thesis.

[27] Intellectual Property Acts in Jordan impose criminal sanctions upon IP infringements Article (38) Jordanian Trademarks Law no.33 (1952) and its latest amendments, Articles (46, 47) Jordanian Copyright Law no.22 (1992) and its amendments, Jordanian Criminal Law (1960) and its latest amendments.

Those interviewed included lawyers, judges, officials and members of private institutes and those who represent the official stand towards intellectual property enforcement. The standpoint of both private institutions dealing with intellectual property rights issues and that of the public sector were investigated, in the latter case especially the view of related the judicial/public library copyright protection office staff on procedures of enforcement.

How were the interviewees chosen?

During the masters course that preceded my PhD studies, I was introduced to Judge El Hussban, the sole judge at Amman Court of First Instance (hereinafter CFI), who dealt with IP infringement cases. Her court hears most of Jordan's IP cases. Thus she was the main source in Jordan regarding judicial procedures for handling of IP enforcement for both the criminal prosecution process and civil proceedings. The initial interviews for this research were held with her. She was able to suggest and introduce other experts who were able to provide relevant insights and information, and/or recommend others to interview. This approach may be regarded as a form of the 'snowball' technique discussed by many experts.[28]

The interviewees were chosen on the basis of their knowledge of the subject matter of the research and their expertise in both the fields of intellectual property and criminal process and its relation to IPRs enforcement and the possible effect on human rights.[29]

What was the subject-matter of the interviews? Where were the interviews conducted and with whom? What practical, legal experience and standing did the interviewees did have?

[28]Silver. C "*Participatory Approaches to Social Research*" in Gilbert, N (ed.) '*Researching Social Life*' (Sage, 2008) Pp. 101-125. Wilson I "Some Practical Sampling Procedures For Development Research" p16 available at:< *www.reading.ac.uk/ssc/n/.../Some_practical_sampling_procedures.pdf* > last accessed on 10/09/2012

[29] The list of interviewees included judges, such as Judge Nehad AL-Husban who is the only judge who dealt with IP infringements cases, either criminal or civil the Court of First Instance. She only held IP cases and she holds a LLM in intellectual property law. There are also official civil servants such as Mrs. Manal El-Sauob, who is an employee in the Trademarks, Patents and Industrial Design Registration department at the Ministry of Industry and Trade, she headed the judicial section at the trademarks, patents and industrial design registration office, and she was completing her PhD in IP law. There is an Appendix at the end of the thesis that includes a list of an author's translation of the meetings held at Jordan.

The subject-matter of the interviews was the legal and judicial practice of IP enforcement of IP infringements in Jordan and the legal, economic and social obstacles that may undermine it.

Meeting judge El-Husban was essential in giving a more comprehensive understanding of the judiciary's standpoint towards criminal/civil enforcement of copyright piracy and trademarks counterfeiting during the trial process and the main obstacles facing the enforcement procedures. The interview held with Judge El-Husban had significance for the outcomes of the research due to the fact that IP infringements that could be under criminal prosecution are considered misdemeanours, which according to (Criminal Procedures Act 1961) (hereinafter CPA 1961) are only applicable to an appeal application to the Court of Appeal (hereinafter CA) and could not be directed to the Court of Cassation. This leads to lack of publication of CFI and CA cases on a wide scale and a level beyond the parties involved. Therefore meeting her was almost the only source to obtain any relevant case law for IP-related topics.

Another significant interviewee was the legal advisor of the National Library, who is in charge of the Copyright Protection Office (hereinafter CPO), which instigates search orders which are considered the primary means to counterattack piracy and copyright infringements that qualify for prosecution on a criminal level. The interview in this case was conducted by e-mail, in the form of a questionnaire centered focusing on the powers of the CPO officers, and how they conducted the search orders on copyright piracy, the legal basis of their duties, and the legal status of the officers conducting search orders.[30] An actual meeting was arranged to discuss her response to the questionnaire.

The third interviewee was Ms. Hayja Abu El-Hayja who is the copyright and piracy enforcement expert at Talal Abu Gazaleh Legal (hereinafter TAGLegal), considered to be one of the leading IP private institutes in the Middle East. She is considered to be an expert in the field of IP enforcement and protection. She had comprehensive insight into the legal judicial elements of IP protection, the role of the CPO and its enforcement officers, and their impact on the enforcement of copyright piracy, The

[30] The e-mail was sent to the General Director of the National Library, the response was sent on behalf of the general director by the national library legal advisor.

meeting was the main source of information on the standpoint of the private sector towards intellectual property enforcement, the issues encountered on the local level, and the role of departments in charge of copyright piracy and trademarks counterfeiting. It explored in particular the questions 'Where do the private sector and IP right-holders stand towards the process of enforcement?' and 'Could alternative solutions be available as a replacement to judicial procedures in general and criminal prosecution enforcement?' the meetings took place at the official work place of the interviewees: with Jude El-Husban at the Palace of Justice (Court of First Instance) and with Ms. Abu Al-Hayja'a at the Amman headquarters of the Talal Abu Gazaleh Legal.[31] The ethical standards of research have been taken into consideration and upheld,[32] and the empirical studies conducted accordingly. In view of the distance involved, the researcher's limited time in Jordan and the interviewees' requests to view transcripts of material to be cited, their written final consents were obtained subsequently by email. In one case consent was given to use written responses to the questionnaire but not material from the follow up interview.

The difficulty the researcher faced over the interviews was the sensitivity of the issues concerning the manner in which the judiciary works and the defaults of the system among working judges. Thus tape-recording was not always permitted, and the researcher had to be scrupulous over maintaining the academic nature of the meetings so as to make the interviewee comfortable about being questioned.[33]

It was essential to maintain accuracy of information and citations fromthe scripted meeting and to reassure the interviewees that none of the data would be misused or taken out of context. They were sent translated quotations for approval or revision. The public image of certain institutions and their position as agents of enforcement

[31] Hayja'a M. Abu Al-Hayja'a; she holds the post of Jordan Manager (Legal Consultant) at the Talal Abu Ghazaleh Legal which is a member of Talal Abu-Ghazaleh Organization [The Arab Organization for Global Professional Services]

[32]Available at :< http://www.ncl.ac.uk/business-directorate/ethics/toolkit/consent/consent_form.php> the standards set by the University of Newcastle has been applied. The consent form on this page was sent via email to the interviewees. The consent form was been modified to meet the needs of the research, the meetings and the interviewees and comprises Appendices .

[33] In most meetings conducted formal approval had to be taken, the first meeting conducted with Judge Nehad EL-Husban had to be arranged via a meeting with the head of the Amman Court of First Instance [CFI]. While meeting an official at the Ministry of Trade and Industry needed approval by her superior the head of intellectual and industrial property division /department.

led to cautious position being taken on the subject of public and private intellectual property enforcement methods.[34]

Most of the official personnel had a positive understanding of the objective motives of the researcher and approved in advance the proposed interviews with the personnel in the related departments.[35]

The meetings were organized as semi-structured interviews, the set of questions in most cases having been sent via e-mail or delivered in hand to the interviewees' superiors in advance.[36] The answers submitted were summarised and translated and sent back for approval, and were not used by the researcher until after the final consent of the interviewee. In one case the outcome of the meeting was abandoned because the general director refused to authorise the use of the translated version of the meeting. All of the interviewees consented to be identified, subject to this review of the material to be used. Usually their remarks were based on general issues and problems relating to anonymous cases. Some non-confidential case decisions were supplied.

Why were interviews conducted in Jordan, and meetings of a similar nature not conducted in the United Kingdom?

The reason for conducting and interviews with Jordanian judiciary personnel and not with similar personnel in the UK:the lack of Jordanian case law and of specialised in depth published studies in Jordan, which was in contrast to the wealth of resources in UK.

[34] Further details on this topic are thoroughly examined in the following section.

[35] The majority of the meetings held have been approved by the head of the departments and courts where the interviews took place.

[36] Both approaches have been used, emails have been sent to legal advisor and the General Director of the National Library and the legal advisor kindly responded. While at the case of Ministry of Justice I met the General Deputy of the Ministry and handed him written questions explained the nature of my research and made the arrangements needed to meet Judge Nehad El-Husban. The same has been the case at the Ministry of Industry and Trade – the Trademarks, Patents and Industrial Design department or registrar. The head of the department had to have a clear understanding of the research's concept before his final approval for me to meet the judicial staff at the department.

1.3. Constraints

What were the main obstacles to the empirical research process and the gathering of information? Why did they occur?

The main obstacles that occurred during the research process varied concerning different levels and requirements of enforcement in order to obtain the most efficient method of legal and judicial implementation of IP.

The empirical research was the most complicated in regard to the interviews held in Jordan. The main difficulty over the meetings, despite prior arrangements, was the mind-set of the interviewees either during or after the meetings and the requirement to send a primary scripted translation of the meetings and afterwards a translated version for notes and comments. One interviewee had a change of heart and requested the exclusion of the main portion of the meeting due to the objections raised by the general director of the department. Officials stated concerns over the nature of the information requested, the purpose of the interviews, and the nature of the organisation that may view the interviews,[37] despite the author's clarifications and guarantees regarding the content, aims and scope of the research.

Another difficulty was presented by the translation of related texts and literature from Arabic to English and the effort involved in reaching a true and accurate understanding of the spirit and structure of the provisions of the pertinent Acts, laws and regulations. Thus some of the officially translated versions of some laws could not be used because the word for word translations from Arabic to English or French misrepresented the original text had, and betraying the intentions of the drafters of the provisions. However, other English versions of certain laws were used, if they were accurate to represent the original meaning of the Arabic version.[38]Another

[37] The General Director of the National Library-Amman, Jordan, and after approving a meeting to be held with the legal advisor of the department and permitting the legal advisor to answer an e-mailed questioner requested to amend and withdraw the contents of the meetings held with the legal advisor claiming that it does not represent the opinion of the department [National Library]. And even though they might be representing the views of the legal advisor it could indicate [the meeting] that they are her views in an official capacity.

[38] The English version of the Jordanian Constitution of 1952 has been a major example of a legislative text was the translated version has been a truthful representation of the original. I held a discussion with Prof. Abdel-Mahdi Massadeh, who is a professor of constitutional and administrative law in Jordan, concerning the accuracy of the English version of the constitution. After fully examining the text he verified the accuracy of the text. As mentioned some English version of Jordanian legislation

problematic issue was the lack of case law on the subject matter under investigation [the fair trial intellectual property enforcement mainly the interaction between TRIPs enforcement provisions Art 41, 42 and Art 61 of the agreement]. This has showed in the decisions of the WTO dispute resolutions panel, where there is only one resolution dealing with criminal enforcement measures, the threshold of criminal IP infringements procedures and penalties WT/DS362/R 26 January 2009.[39] In the concept of the threshold was discussed but the context was not explored in depth.

In relation to the difficulties arising from the lack of jurisprudence and case law in subject-matter of IP enforcement and fair trial, there has been an attempt to show the possible application of non-IP cases and situations on IP infringements. the legal judicial perspective could be said to be the similar in IP and non IP provisions dealing with certain issues; such as the Rule 39.2 General rule that a hearing should be in public (Civil Procedures Rules 1998/3132 and Art 10(1) *bis* Paris Convention.[40]

1.4. Definitions

Definitions and Types of Intellectual Property

It has never been a simple task to define a topic in law and the difficulty increases greatly when defining intellectual property. This difficulty arises from the nature of intellectual property, which may entail questions about the legal nature of intellectual property rights, and the legal background for protection. This means that it is not only essential to study the meaning of intellectual property in its different types, but also to examine the scope of protection collectively and individually for each type . Besides this it is necessary to understand the nature of intellectual property as a human right and the legal basis for the protection provided. The purpose of IP protection and its relation to other aspects of law may provide a clearer understanding of the laws and

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were of high quality, the author has used such translations as they are according to his personal academic view in addition to advice from experts in the field, otherwise it has been the author's translation's efforts. Some of the English versions of Jordanian IP laws at the WIPO website have been a fine example of accuracy, while some other versions have not been.

[39] WT/DS362/R CHINA – Measures Affecting The Protection And Enforcement Of Intellectual Property Rights

[40] *HM Attorney General v British Broadcasting Corporation* [2007] EWCA Civ 280. 2007 WL 711467. *32Red Plc (a Gibraltar Company) v WHG (International) Limited (a Gibraltar Company), WHG Trading Limited (a Gibraltar Company), William Hill Plc* [2011] EWHC 665 (Ch). *Al Rawi and others v Security Service and others* (JUSTICE and others intervening) [2011] UKSC 34[2012] 1 AC 531 *Pink Floyd Music Limited, Pink Floyd Limited v EMI Records Limited* [2010] EWCA Civ 1429 . *Giggs v News Group Newspapers* [2012] EWHC 431 (QB) at[67] and at [104]

provisions constituting the IPR system and how these relate to the Human Rights system. What sort of material is covered under protection?

Definitions of Intellectual Property [41]

I adopted a simple yet explicit definition of intellectual property "Legal rights which may be asserted in respect of the product of the human intellect".[42]

This definition provides a usefully comprehensive understanding of intellectual property than alternative definitions. It does not include the fields of study that constitute intellectual property, since such fields fall outside the focus of a definition. But it cites the basic foundation of protection for intellectual property and in doing so provides the legal background for the IP holder. In other words the owner or creator has the legal right to prevent others from using the product of his/her creation in any manner without his or her consent. This means that the law provides the IP right holder the legal privilege or the dominant position that gives him the right to prevent others from using the creation without the permission of the right holder for a certain period of time. It bases the legal protection of the IP holder on the fact that the product is exclusively the creation of his/her mind. In a few words it presents the essential factors that require legal protection and the justification for such protection. The recognition of the law of offering such protection, according to its provisions explicitly or implicitly, is another vital element of the definition.

This definition has the virtue of describing in precise words what a trademark is. It states the purpose of the sign as being to show the public a distinctive sign or mark, enabling recognition of the product as being from a certain enterprise and distinguishing it from similar products. And the definition does not describe what may

[41]There are many definitions for IPR by many scholars however there has been need to reach a working definition or identify with that could act the most accurate Al-Dian S, '*Introduction to Intellectual Property'*, (Amman, Dar Al-Thaqafa "House of Culture",1st ed.,2004), p 25. [Arabic, an author's translation]; J. Davis, "*Intellectual Property Law, Butterworth's Core Text Series 2003"* (London Reed Elsevier,2003); Art71 of the Jordanian Civil Act no 43 1976 and its amendments [Arabic, author's translation]. Colin R. Davies, Protection Of Intellectual Property A Myth? A Consideration Of Current Criminal Protection and Law Commission Proposals, JCL, 2004, 68, P. 398

[41]Torremans P, *'Holyoak & Torremans Intellectual Property Law',(*Oxford, OUP,7th ed., 2013), p. 11

be included in a trademark and what may not, or the different types and shapes of signs.

Types of Intellectual Property and method of protection in Jordan

1. Trademarks

A. Scope and Method of Protection

Trademarks protection provided by law diverges into two systems: the criminal prosecution process and civil litigation proceedings.

The second method is called 'administrative' but, as will be demonstrated, it is not entirely an administrative process. The TRIPs agreement, in the section dealing with enforcement, has given member states a minimum standard for protection.[43] However, it gives the states the freedom to apply any method of protection as long as it is effective against acts of infringement and does not obstruct fair and legitimate trade, and as long as the parties amend their judicial systems in a manner that does not contradict the rules and provisions of the agreement, and apply a criminal process as a method of protection against copyright and trademark infringements according to the provisions of Art 61 TRIPs. The administrative method of protection could be considered an individual method of enforcement even though it might clos and more related to the judicial process and as part of the process itself.

B. The Judicial Method

a) Civil Law Litigation Procedures

The trademark holder whose trademark has been infringed is given the power to bring the accused infringer to trial according to civil procedures or litigation, including all the legal means or tools provided by law, such as applying for immediate injunctions to prevent any further damage caused by any future infringement. And if litigant is proven righteous in his accusation regarding his rights as a sole benefactor from the infringed trademark, then claims for legal remedies for all the lost profit and damage caused can be applied.[44]

[43] Art 41 and 61 TRIPs Agreement

[44] Articles 35, 36 and 37 Jordanian Trademarks Act (no 33) 1952 and its amendments. And also articles 48 Jordanian Civil Procedures Act no.24 1988 according to its latest amendments in Act no.14 2001.

b) Criminal Law Prosecution

The trademark owner may choose to apply the criminal law process to prevent any infringement of the trademark of his products (goods or services).[45] This process may be applied either under criminal law or code provisions, or under the rules of trademark law. Criminal law may be the applicable if the infringement of a trademark is a punishable crime according to its provisions, such as the forgery of a trademark. Trademark law may be the law that should apply if the infringement is considered a crime according to its provisions. This infringement is considered a crime according to the provisions of the Jordanian Criminal Act 1960, and such infringements could be included in the provisions of the Trademarks Act in general view of the Act's text.

c) The Civil and Criminal Joint Procedures

The judicial method provides the trademark owner a third judicial option to prevent any infringement of his trademark: a joint judicial procedure that enables the owner of the infringed trademark to gain the advantages of both the criminal law process and the civil law procedures at once.[46] This course may be more profitable for the trademark owner, due to the fact that such a joint procedure is far cheaper and less time consuming than a civil litigation since the court can rule for the owner of the infringed trademark both civil remedies and criminal fines in once decision, involving less time and less money. Even so, this procedure is not used on a regular basis.

The main reason for the lack of popularity among trademark holders and law practitioners is the high risks that lie in the outcome. The owner risks losing everything if the outcome of such a joint case is not in his favour; he/she will lose all methods provided according to law, because the use of the joint procedure will render him unable him to use any other judicial procedure, and even any other method. As explained below, judicial and administrative methods are closely related.

C. The Administrative Method

The administrative method for enforcement of intellectual property, in our case concerning trademarks counterfeiting, is not totally an administrative process. It is a

[45] Article 38 Jordanian Trademarks Law no.33 1952. And also in section two of Jordanian Criminal Procedures Law no.9 1961 and its amendments. Also see Khsroom A, *"An Abstract in Industrial and Commercial Property"* (Amman, Dar Wael for Publications,1st ed., 2005)., Pp208-210 [An author's translation]

[46] Art 6 Jordanian Criminal Procedures Law (no 9 1961) and its amendments.

mixed procedure, semi-judicial and semi-administrative procedure,[47] at least on the levels related to combating trademark counterfeited goods from entering the borders. The applicant[48] must submit an application to a judge who is a member of the Court of First Instance. The application is submitted to the judge of highest rank who usually is the chief judge of the court. It is then sent to another judge who decides if the application is. If it is considered to be urgent, the judge grants the applicant (in our case the trademark holder or owner) an injunction to prevent any further damage being caused by the infringer. But before that the applicant must present a bank statement to prove his financial substance, and also submit a sum of money decided by the judge in the court's financial department, that will be compensate the court if the right-holder fails to provide evidence to support his case. In addition there is a time limit: the trademark owner must file a civil law case in a limited period of time after which the injunction will be disposable. Thus it can be argued that the whole process is judicial, and the procedures mentioned above should lead to a judicial procedure. Otherwise the whole process is invalid and illegal, and the accused will be able to demand remedies at the court of law for the damages caused by the trademark holder. In addition to that the accused may have the right to criminally prosecute the applicant if misuse of powers granted by law to the right holder can be proved.

It must be mentioned that there are no provisions either in civil law or border regulations that prevent the trademark owner from submitting an application directly to the concerned department, without permission of the judicial authorities. Yet everyday legal experience has proven such course not to be helpful. And the main motive for such an action may be to give the concerned department a motivation to request a judicial authorization in order to issue such a legal action.[49]

Thus it would seem that this method of protection or enforcement of intellectual property is not entirely an administrative procedure after all.

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[47]Khsroom A, *"An Abstract in Industrial and Commercial Property",* (Amman, Dar Wael for Publications "House of Wael for Publications", 1st ed., 2005) Pp. 188-190 [Arabic An author's translation]. Art 39 Jordanian Trademarks Law (no 33) 1952 and its amendments. And Art 39(2) which states that if the owner of the counterfeited trademark who has applied for an injunction did not file a criminal law or a civil law case during eight days from the grant of the injunction, such legal administrative action is considered invalid. [Ar. An author's translation]

[48] The applicant is mainly the owner of the intellectual property, legal representative of the IP holder; the administrative usually acts as facilitator and administrator of the administrative action.

[49] Most officials in the related administrative departments would prefer a judicial application or authorisation in order to commence an administrative action.

Notwithstanding the above, there are administrative measures of enforcement that could be considered solely administrative, most obviously in relation to applications to reject or object the registration of trademarks. Issues that form part of the registration -opposing the process of enlisting a trademark by others, or owners of existing marks applying for the refusal/rejection of the registration of a trademark- are all part of an administrative process. The above mentioned procedures form part of the duties of the registrar of trademark, patents and industrial design at the Ministry of Industry and Trade, Amman, Jordan. The judicial department at the trademarks registry deals with applications of registrations or opposing requests from right-holders of existing marks.

2. Copyright

A. Scope and Method of Protection

There are two legal paths whereby a copyright holder can take measures to prevent any infringement of his copyright or the compromising of his position as the sole beneficiary of his work protected by copyright laws and regulations. The first is the judicial method, which includes the civil law procedures, criminal prosecution and joint measures. The second consists of the administrative procedures.

Both the civil law procedures and the joint law measures are almost identical to those that are used as measures of enforcement of trademark infringement, except that the law on the criminal side of joint procedures is criminal law being applied in addition to copyright Act.[50] The civil law measures do not differ whatsoever, as the same condition apply to requesting an urgent application for an injunction to prevent any further infringement or damage.[51] Again administrative procedures dealing with intellectual property protection and enforcement are based upon judicial authorization and supervision, with the procedures commencing through an application presented to the judge or the head of CFI.

The major difference between enforcement of copyright and trademark lies in the role of the owner of the copyright and the role played by the enforcement officers in the

[50] Articles 46, 47 Jordanian Copyright Act (no 22) 1992 and its amendments. It should be mentioned that the latest amendments according to Act (no 9) 2005

[51] *Ibid*, articles 46, 47. It is stated in those articles the same provisions and rules applied according to trademarks law provisions that deals the administrative procedures of enforcement of counterfeited trademarks

criminal prosecution of the copyright infringer. The copyright holder, according to criminal law, cannot seek the prosecution of the infringer directly without sending his request for prosecution to the Attorney General through his assistants, the enforcement officers. Their role will be discussed in further detail below. The role of the copyright holder differs from that of the trademark owner in one respect, the court is obliged to take action in the piracy of copyright.[52] This means criminal cases of copyright infringement can only be tried at the Court of First Instance in accordance with the provisions of Jordanian law of criminal procedures and copyright law, and the accusation must first of all go through an investigation stage before coming to court.[53] Therefore the role of the copyright holder ends when his accusation is delivered to the attorney general's office, where a new phase begins. There may be one exception to this rule, and that is if the copyright holder files a joint measures case, Even so, the whole process does not alter much: the legal process is the same except that copyright right holder's advocate can attend the investigation stage and play an important role at this stage under the supervision of the attorney general.

The second main difference between criminal prosecution of copyright infringement and trademark infringement lies in the role that enforcement officers play in the investigation and prosecution phases. These officers play a vital role in the criminal prosecution process as a whole. It is in fact the foundation of the criminal process from the legal point of view, because every legal procedure relies upon their findings and the primary investigation they conduct. All the measures within the prosecution process from collecting evidence of studying the findings during the investigation at the attorney general's department until the trial is over is totally dependent upon the officers' findings.

The Copyright Act and the Criminal Procedures Act has given these officers, who are actually government civil servants, the role of a judge's assistant or in other words an attorney general's assistant in criminal prosecution of copyright infringements.[54] In addition, according to the laws mentioned above, the enforcement officers conducting duties related to copyright infringements are considered part of the legal and judicial

[52] This issue is related to the court that the criminal procedures is held according to law
[53] Articles 9, 10 and section Four, CPA (no9) 1961 according to the latest amendments. [Ar. Author's translation] CPO officers are assistants to the attorney general according to the law
[54] Art 36 Jordanian Copyright Act (no22) 1992 and its amendments. There have been five amendments upon the law the latest has been according to the Law no.9 2005.

aide of the attorney general and are therefore authorized to perform their duties freely according to the authorization of power granted to them. This may lead to undesirable consequences from the legal point of view, because the extensive authorization granted to these officers by the attorney general's department actually gives some of the most important duties of the attorney general to civil servants who may not be legally qualified. The enforcement officers may undertake some of the most delicate duties on their own in cases of great urgency, involving vast searches and compensations without the need for authorization from the attorney general. It is stated in the regulations outlining their duties that they are *"enforcement officers"* aiding the judicial system and can operate vast searches in the course of their duties.

The difference that distinguishes criminal prosecution of copyright piracy than that of trademark counterfeiting, lies in the following: the difference in gathering evidence via search orders conducted by the enforcement officers at the CPO. This provides the evidence gathering process in criminal copyright piracy cases more needed urgncey and speed needed in IP enforcement process. While this is a positive aspect of copyright piracy enforcement it may as well be of negative impact, due to the urgent need to help the attorney general with what may sometimes not be of specialized aid, and as an outcome relieving him of a most important part of his duties and granting it to staff that may be unqualified legally. There is the fact that criminal enforcement in particular and IP infringements that are considered a crime have additional requirements- which may escape enforcement officers during their searches- to the legal and materialistic factors of a criminal offence as has been shown in the Jordanian CFI'.[55] The judge actually took an accurate standpoint in applying the letter of the law regarding "effective technological measures" of protection. In a proper manner I think she also defended the criminal justice principle of burden of proof and that the complainant must prove the accused guilt and not the accused providing evidence of innocence. The Public prosecutor attorney general (hereinafter AG), the complainant, should have provided evidence that in this case, I think, legal and materialistic factors of the crime, were available as the piracy of copyright was committed, have two additional requirements: 1- the effective technical measure of protection. 2- The accused's ability to circumvent such measures. The mentioned provisions are an exact translation and even a more transparent to me, a legal and

[55] CFI Criminal Chamber case No [1022/2009] *ART v. Khatar Restaurants Co.*

judicial application of the provisions of WCT, WPPT to be more exact.[56] It has to be mentioned that Art 18 of WPPT established that adequate legal protection technical measures and remedies should be provided by contracting parties. The WIPO Copyright Treaty [hereinafter WCT] as well has mentioned the technological prevention measures in Art 11 of the treaty. Yet as in the related provisions of the WPPT, it does not elaborate or provide further details concerning the matter.

3. Unfair Competition

A. Scope and Method of Protection

There are two main methods of protection provided by law against acts of unfair competition: the judicial and the administrative.

a) The Judicial Method

The scope of protection provided by law to prevent any actions of unfair competition lies in the range of civil law procedures. Whoever suspects a competitor's practices to be using unfair or unjust methods of competition in the course of trade or industry may use the procedures applied in civil law and procedures to prevent any act that may harm his commercial reputation and which may be considered an act of unfair competition.[57]

b) The Administrative Method[58]

The protection offered by law through administrative measures is not much different from the protection provided to both trademark and copyright holders except that in this context it is less effective. The procedures are exactly the same, but the results are not.

Whoever suspects that there are acts of unfair competition files an urgent application to the CFI, where the assigned judge will study the application will usually refuse the

[56] Art 18 WIPO Performances and Phonograms Treaty 1996 [WPPT] " Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise…" as seen at:< http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html#P141_21174 > last accessed on 12/03/2011.

[57] *Ibid*, pp.83-96. also see El-husban. N, *"Unfair Competition and Trade Secrets (A Judicial Review)"* a Paper presented at the Trademarks and Unfair Competition Conference held in Cooperation between the Jordanian Ministry of Industry and Commerce and WIPO from the 20th-30th August 2007 Amman. Pp.14-19. [Author's translation from the Arabic original]

[58] *Ibid*, p.15; supports the author's concept that administrative method of protection is closer to be part of judicial protection than an individual method of protection.

application. The rare situation in which the application may is not refused is when the act of unfair competition is connected with trademark infringement. This ineffectiveness of administrative measures is due to the unclear nature of unfair competition in certain cases: a certain action may seem to be unfair competition when it affects one's trade or industry, when it is actually be a legitimate act of trade. Therefore the judge will be reluctant to give the applicant an injunction against someone who may well be a legitimate business man.

4. Trade Secrets

A. Scope and Method of Protection

The scope of protection is a little different the orthodox method of protection. At the start the process is internal to the business, consisting of measures of protection such as making employees sign contracts that ban them from working with competitor organizations after departure and from working in the same business in the same area or region for a certain period of time. When this system fails, e.g. with breach of contract, legal protection starts. At that point the owner of the secret can seek the protection of law through judicial system or administrative procedures, of the sort to enforce intellectual property infringements. I should mention that trade secrets are criminalized in the Jordanian legal system according to the provisions of criminal Act Art 355 JCA and according to trade secrets and unfair competition law.[59]

[59]JCA 1960 and its latest amendments. Also El-Husban. N, *"Unfair Competition and Trade Secrets (A Judicial Review)"* a Paper presented at the Trademarks and Unfair Competition Conference held in Cooperation between the Jordanian Ministry of Industry and Commerce and WIPO from the 20th-30th August 2007, Amman,p.57 . It should be stated that criminalization of trade secrets has not been mentioned at all in the provisions of unfair competition and Trade Secrets Act.

Chapter 2. National and International Legal Framework of the Research

2.1. Introduction

This thesis has international and comparative components. At the domestic level, it compares the laws and jurisprudence of England and Jordan. 61 England (England & Wales being a jurisdiction within the UK) and Jordan both have regional and international obligations relating to Intellectual Property (IP) and to Human Rights. The UK's regional obligations arise from the EU treaty, EU subordinate legislation (such as IP enforcement directive 2004/48/EC) and the European Convention on Human Rights, while Jordan's arise from its 'Euro-Med' agreement with the EU. Both the UK and Jordan are contracting states to the major international IP and Human Rights treaties.

In addition to the already mentioned international instruments, contributions to IPR protection has been made by international associations, such as INTA (International Trademarks Association) Another intuitive the Anti-Counterfeiting Trademarks Association (hereinafter ACTA),[60] of which Jordan is a signatory. The European Parliament, however, has rejected ACTA Agreement due to fears of limitation and censorship of online privacy.[61]

This chapter intends to explore the international legal framework of the research and its connection to both English and Jordanian legal and judicial jurisdictions on the domestic level,[62] while also bridging the seeming gap between Human Rights and

[60] Anti-Counterfeiting Public Policy Update- an in-house perspective from Europe and beyond; a presentation held by Heath R. D, at the ITMA International Conference –London 24th-26th March 2010. Jordan is an full member of ACTA available at:< www.iipa.com/acta.html > last accessed on 23 April 2013

[61] The European Parliament voted against the bill to implement the ACTA agreement on 04 July 2012 as available at:< http://www.guardian.co.uk/technology/2012/jul/04/acta-european-parliament-votes-against > accessed on 09 May 2013 Also found at: < http://www.europarl.europa.eu/news/en/headlines/content/20120220FCS38611/9/html/What-you-should-know-about-ACTA > accessed on 09 May 2013

[62] Jordan's foreign trade policy is based on the norms of economic openness and integration into the rapidly globalizing world economy. It incorporates the country's vision and positive in viewing economic partnerships as necessarily achieving both mutual interests and fair dividends. Jordan has made steps towards on the path of economic and trade liberalization in addition to reinforcing mechanisms and functioning of a market-oriented economy that is built on an active role of the private sector in managing economic activities. This was made possible through an intensive reform process bringing about a modern and conducive regulatory environment for business and investment. Available at: <http://www.mit.gov.jo/tabid/475/Jordan%20Foreign%20Trade%20Policy.aspx> last accessed on 18/10/10.

Intellectual Property on national and international, substance and structural legal [substantive(textual), procedural and administrative], judicial levels of the study. There is individuality in stand-points toward the provisions mentioned previously, which could lead to a certain view on the examination of these rights, putting into account the connection between what may be called fundamental rights as whole and intellectual property as part of this set of rights.[63] The various legal background of the rights shed light on both differences and similarities.[64] The approach applied in this chapter of the research intends to create the legal framework that links the aspects of human rights under examination with intellectual property enforcement. The link will be scrutinised between intellectual property rights protection via international human rights and IP enforcement measures that are both acceptable and applicable to both jurisdictions under study.

The significance of this approach leads to the creation of the international legal application of procedural human rights safeguards that could be applied on IPR enforcement on the national level. The international human rights instruments, including the procedural fair trial safeguards, could relate to IP enforcement measures mentioned in TRIPs agreement in general and mainly in criminally connected provisions, such as those procedural safeguards that are related to the right to a fair trial and its possible application in IP enforcement procedures that are most clearly mentioned in the provisions of articles 41 and 61 of the agreement.

Intellectual property rights are considered to be economic rights. IPRs and TRIPs are based on economic value and profit-making and the legal economic monopoly granted to the right-holders to make economic gain from the products of their intellect. This would seem to differentiate the of protection intellectual property mainstream of the human rights provisions aimed at protecting human rights which are not of an economic nature, such as freedom of expression, and right to a fair

[63] Griffiths, J; Criminal liability for intellectual property infringement in Europe- the role of fundamental rights electronic copy found at:< http://ssm.com/abstract =1777029> accessed on 01/08/2012. Also Geiger. C*; "Constitutionalising' Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property"* [2006] 36, IIC 371

[64] As seen in *n (14) (15),* cited on 09/05/10 at <http://www.lob.gov.jo/ui/laws/search_no.jsp?no=26&year=1952>. Transjordan as it used to be called was under the British mandate from the year 1921 and until independence in 1946. Laws of the country echoed laws and legislation of the British Empire. Also, found in El Said, M; The Evolution of the Jordanian TRIPS-Plus Model: Multilateralism Versus Bilateralism and the Implications for the Jordanian IPRs Regime [2006] 37 (5) International Review of Intellectual Property and Competition Law Pp. 501-502.

trial.[65] Freedom of Expression falls under 'Freedom Rights', while the Right to a Fair Trial is procedural right which falls under the rules of criminal administration of justice.[66] The economic basis of intellectual property protection encourages our attention to be drawn to the difference between these sectors but looking at the background of the sets of rights will enable us to appreciate the connection between them.[67]

This chapter provides the main arguments for the reasoning behind the methodological approach of this thesis. The literature on Intellectual Property from a human rights perspective has varied in how it tackled the subject and there is conspicuously little on the procedural aspects of human rights and IP enforcement procedures. There are three main strands of legal literature on the link between HRs and IPRs. Chapter 3 surveys the literature on these links, but a preview is included here to inform what follows in this chapter as well.

2.2. A Preview of Literature Current IP Human Rights Approaches

The most abundant literature produced, deals with IPRs from a human rights perspective, and attempts to include intellectual property as an aspect of the human rights regime.[68] Thus, the literature review has been based on human rights instruments provisions and how these tackle IPRs.[69]

A second approach tends to examine IP from a human rights stand-point or HRs in IP room. The main interest of commentators/documents delivered by

[65] Afori. O, Human Rights And Copyright: The Introduction Of Natural Law Consideration Into American Copyright Law, (2004) XIV; Fordham Intellectual Property, Media & Entertainment Law Journal, 2004, p.503. Also in, Drimmer. J; Hate Property: A Substantive Limitation for America's Cultural Property Laws; (1998); TENN. Law Rev. 691, Pp.728-731

[66] *n* (82)

[67] The final outcome of intellectual property which aims to protect the economic and commercial rights of the owner of IP assist and the creation of their minds, via a legal monopoly that restricts others usage of the protected copyright, trademark or patent...etc.

[68] International Covenant on Economic Social and Cultural Rights 1966 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICESCR) art 15 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 27(/2)

[69] As in the articles mentioned in the first part of *Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights*, Torremans P (ed.), (The Hague, Kluwer Law International, 2008). Pp. 1-217. Gervais J D Intellectual Property and Human Rights: Learning to Live Together in Torremans P (ed.), in *Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights*, (The Hague, Kluwer Law International, 2008) Pp. 4-6. Yu. K P 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' [2007] 40 University of California, Davis; :1039. Pp.1042-1046 and beyond, Chapman A. R., A Human Rights Perspective On Intellectual Property, Scientific, And Access To The Benefits Of Science ,P. 1

institutions/organisations was that provisions be related to IP exclusive economic nature on the one hand, and to the right to free, fair use and freedom of expression on the other hand. How have such rights been under examination in the various international human rights instruments? How have they affected intellectual property?

The third approach to the relationship between intellectual property and human rights has taken the stand-point of examining HRs within IPR enforcement. The human rights intellectual property dimensional issues have been, related to health and medical patents, the realization of IP and HRs being exemplified in the crisis of HIV/AIDS medications.[70]

And what impact has IP had on human rights and human rights effecting IP and vice versa? As mentioned, the adaptation of the previous approach by intellectual property scholars in creating the legal background of the IP human rights link was based on the instruments.[71]

Since most IP and human rights lacks the procedural human rights aspects therefore the focus this research is related to the procedural elements of human rights (the right to a fair trial, the right to a speedy trial etc…).[72]

Therefore the subject-matter of this thesis will mainly be centered on this approach the procedural aspect of human rights and its impact on IP enforcement especially during criminal trial procedures, and how it affects the safeguards granted to the parties involved in the trial process. This is in addition to the scientific, social rights, public order issues related to intellectual property, which could be a more highly structured discourse in connection with UN Human Rights Council Guidelines Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. The role of the state-judiciary mechanisms are essential to access the core remedy as an outcome the judicial proceedings,[73] notwithstanding the fact that they could have an impact on the procedural elements of

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[70] Cullet. P. Human Rights and Intellectual Property Protection in the TRIPS Era[2007] Human Rights Quarterly 'Vol. 29 , Pp.403-430. Pp.403-404.

[71] As has been seen in '*Intellectual Property and International Trade: The TRIPS Agreement'* edited by Correa C M. and Yusuf A. A. (The Netherlands, Kluwer Law International, 2nd ed,2008) in overall all articles included have dealt with issues related intellectual property and some had dealt with the connection with human rights from the perspective international human rights instruments mentioned in the previous *n* (68). "*Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights"*, Torremans P (ed.), (The Hague, Kluwer, 2008)

[72] Gervais D *'The TRIPS Agreement: Drafting History And Analysis'* (London, Sweet & Maxwell, Thomson Reuters, 3rd ed., 2008). Pp 491-492.

[73] UN Human Rights Council Report of Special Representative of Secretary General on the issues of human rights and transitional corporations and other business enterprises, by John Ruggie. Pp. 23-24 at: < *www.icj.org/IMG/report_of_sr_on_hrds_to_ga.pdf* > accessed on 08/07/12

fair trial. The effect such rules have on both the business practices, the role of the judiciary and trial proceedings for the related enterprises is to create a more connected legal/judicial common ground on IP enforcement and human rights.

However, the procedural aspect of human rights, the right to a fair trial, its connection to IPR criminal and civil enforcement, its relationship with the public order's interests in just, fair outcomes of the trial is essential, even though it has not been examined in depth.[74] In addition to the rights of IP holders and its connection to third parties rights, fair use exemption and public order[75] and freedom of expression.

2.3. The National Law Comparative Common Background of the Research

Jordanian Constitutional Standpoint

The Jordanian Constitution 1952 is divided into chapters of basic and fundamental rights relating to the rights and duties of individuals the relationship between them and the powers of the various state authorities , creating a bill of rights that rules the judiciary, legislative and executive, relationship to each other and to individuals.

Chapter Two: Rights and Duties of Jordanians[76]

Art 6 "(i) Jordanians shall be equal before the law. There shall be no discrimination between them as regards to their rights and duties on grounds of race, language or religion. (ii) The Government shall ensure work and education within the limits of its possibilities, and it shall ensure a state of tranquility and equal opportunities to all Jordanians."

Art 8 "No person may be detained or imprisoned except in accordance with the provisions of the law."

[74] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 14 as a standing-point for the build-up of procedural human rights that could be implemented upon criminal enforcement of IPRs

[75]Human Rights General Comment 17 (2005), ICESCR-Article (15), Para (2,3). Yu. P. K Reconceptualizing Intellectual Property Interests in a Human Rights Framework University of California, Davis, 2007 Vol. 40, Pp. 1039. Pp. 1042-1043

[76]An English version of Jordanian Constitution 1952 available at:< www.law.yale.edu/rcw/rcw/.../jordan/jordan_const_eng.pdf > accessed on 19 April 2013

Chapter Six: The Judiciary

Art 97 "Judges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the law."

Art 101 "(i) The courts shall be open to all and shall be free from any interference in their affairs. (ii) The sittings of the courts shall be public unless the court considers that it should sit in camera in the interest of public order or morals."

Art 102 "*[77] The Civil Courts in the Hashemite Kingdom of Jordan shall have jurisdiction over all persons in all matters, civil and criminal, including cases brought by or against the Government, except those matters in respect of which jurisdiction is vested in Religious or Special Courts in accordance with the provisions of the present Constitution ** or any other"

Chapter Three: Powers General Provisions

Art 33 "(i) ** The King declares war, concludes peace and ratifies treaties and agreements. (ii) Treaties and agreements which involve financial commitments to the Treasury or affect the public or private rights of Jordanians shall not be valid unless approved by the National Assembly. In no circumstances shall any secret terms contained in any treaty or agreement be contrary to their overt terms."

These are some of the provisions of the general rules of the Constitution, which constitute a bill of fundamental rights safeguarded by the provisions of the Constitution that sets a high standard of protection in the structure of Jordanian legislation. In this context and relating to Art 33 of the Constitution and the measures to adapt draft Acts according to Art 92 under the title of Chapter Five: The Legislative Power states

> "Should either House twice reject any draft law and the other accept it, whether or not amended, both the Senate and the Chamber shall hold a joint meeting under the chairmanship of the Speaker of the Senate to discuss the matters in dispute. Acceptance of the draft law shall be conditional upon the

[77] The * is an indication of the latest modifications and amendments of a certain article; and date of the modification of such article of the constitution as seen in the constitution at:
< www.law.yale.edu/rcw/rcw/.../jordan/jordan_const_eng.pdf > one * mean one modification and ** two modifications

passing of a resolution by a two-thirds majority of the members of both Houses present. If the draft law is rejected as described above, it shall not be placed again before the House during the same session."

Art 93 completes the process in cases lack of agreement between the chambers of the National Assembly states the following

> "(iii) If the King does not see fit to ratify a law, He may, within six months from the date on which the law was submitted to him, refer it back to the House coupled with a statement showing the reasons for withholding his ratification.
>
> (iv) If any draft law (other than the Constitution) is referred back within the period specified in the preceding paragraph and is passed for the second time by two-thirds of the members of each of the Senate and the Chamber of Deputies, it shall be promulgated. If the law is not returned with the Royal ratification within the period prescribed in paragraph (iii) above, it shall be considered as promulgated and effective. If any draft law fails to obtain the two-thirds majority of votes, it cannot be reconsidered during the same session, provided that the National Assembly may reconsider the draft during its next ordinary session."

Such provisions provide an insight into the balancing act during the ratification of proposed drafts of Acts and the legislative process. It has to be mentioned that adapting treaties and agreements has to take the form of draft Act proposed by the government and has laid the legal practice for ratification of international treaties and agreements. International treaties/agreements are sent to the national assembly in the shape of any draft of a national Act to be ratified by members of parliament (hereinafter MP's) of both chambers respectively or in a joint session of the chambers as previously mentioned. This provides a set of legal provisions that creates a bill of rights that provide minimum standards of safeguards for individuals and all parties involved in the process of enforcement.

2.4. The International Comparative ground of the Research

The international aspects of the research intend to deal within to *shed light on the international aspects of the comparative* approach used that may lead to bridge the gap. This will be done on several levels. The first level will tackle the substantive parts of the research, which are the different aspects of human rights and intellectual property and how they may affect the related national laws under study. The second level is the international law aspect that could provide the common background that links two legal jurisdictions of diverse origins.

The Euro-Med Association Agreement between the European Union and its member countries and Jordan has a significant role in driving the English and Jordanian legal systems closer. The provisions of the agreement impose an obligation on State Parties to protect both intellectual property as well as human rights, as enshrined in Art 2 (the human rights clause) and in Art 56 on the protection of intellectual property rights. The possible implementation of such treaties related to WTO, WIPO and other WIPO other human rights treaties.

As mentioned both set of rights (Human Rights and Intellectual Property) linking their legal background may draw both sets of rights closer. Yet, the differences in the purposes and outcomes - according to some - of both sets of rights may lead to the apparent collision between them. Will the dissimilarity between the contradicting aspects of human rights and intellectual property eventually lead to diverging paths in the methods used to achieve the intended results due to their diverse nature and goals?

The connection between all of these previously mentioned international instruments or national laws shall be examined.

Adopting the provisions of the related international treaties in national laws differs from one jurisdiction to another. The difference in such application of these treaties, on the national level of each jurisdiction, is due to the implementation of courts and the role of judges in the application of the treaties.[78] this theory relates to the fact that

[78] TRIPs Agreement 1994 Part III Section 1:[General Obligations] Article 41.5
"It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any

TRIPs provides general and clear-cut minimum standards of protection and leaves the detailed method of protection and penalties applied to each member state in relation to the corresponding gravity of crimes.[79]

The research uses various forms of comparisons. The first is the comparison between IP enforcement procedures in the UK and Jordan with specific emphasis on human rights as seen in the diagram in the figure (1).[80]

The rules in both jurisdictions (UK and Jordan) are subject to common IP international influences [C], and substantive and procedural laws of Jordan and the UK have been influenced by EU/EC law [D], the UK (directly via membership of the EU) and Jordan indirectly virtue of the Association Agreement, as well as the EU's alignment to WTO/TRIPs conformity obligations to the EU, Jordan's IP laws have a family relationship with that of the UK and EU, as the IP laws of the UK have with the EU as analysed in figure 1 below.

Superimposed as this international and comparative picture of IP is, that of human rights is as well. Both the UK and Jordan are UN members and hereafter subscribers to the Universal declaration and are signatories of the 1966 international covenants ICCPR/ICSCER. This is seen and explained in the direct connection between both jurisdictions in the diagram in [A], [B], [E] and [F], which draws the international human rights legal common ground linking the human rights elements in both the UK and Jordan.

Furthermore, the provisions of Article (2) of the Euro-Med Association Agreement between the EU and its members and Jordan imposes obligations upon the related parties, therefore leading to respecting these fundamental rights during the practices and application of the agreement in all its elements and follow up progress reports.

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obligation with respect to the distribution of resources as between enforcement of intellectual *property rights and the enforcement of law in general."*

[79] TRIPs Agreement 1994 Article 61.

[80] The diagram at page 40 of this thesis

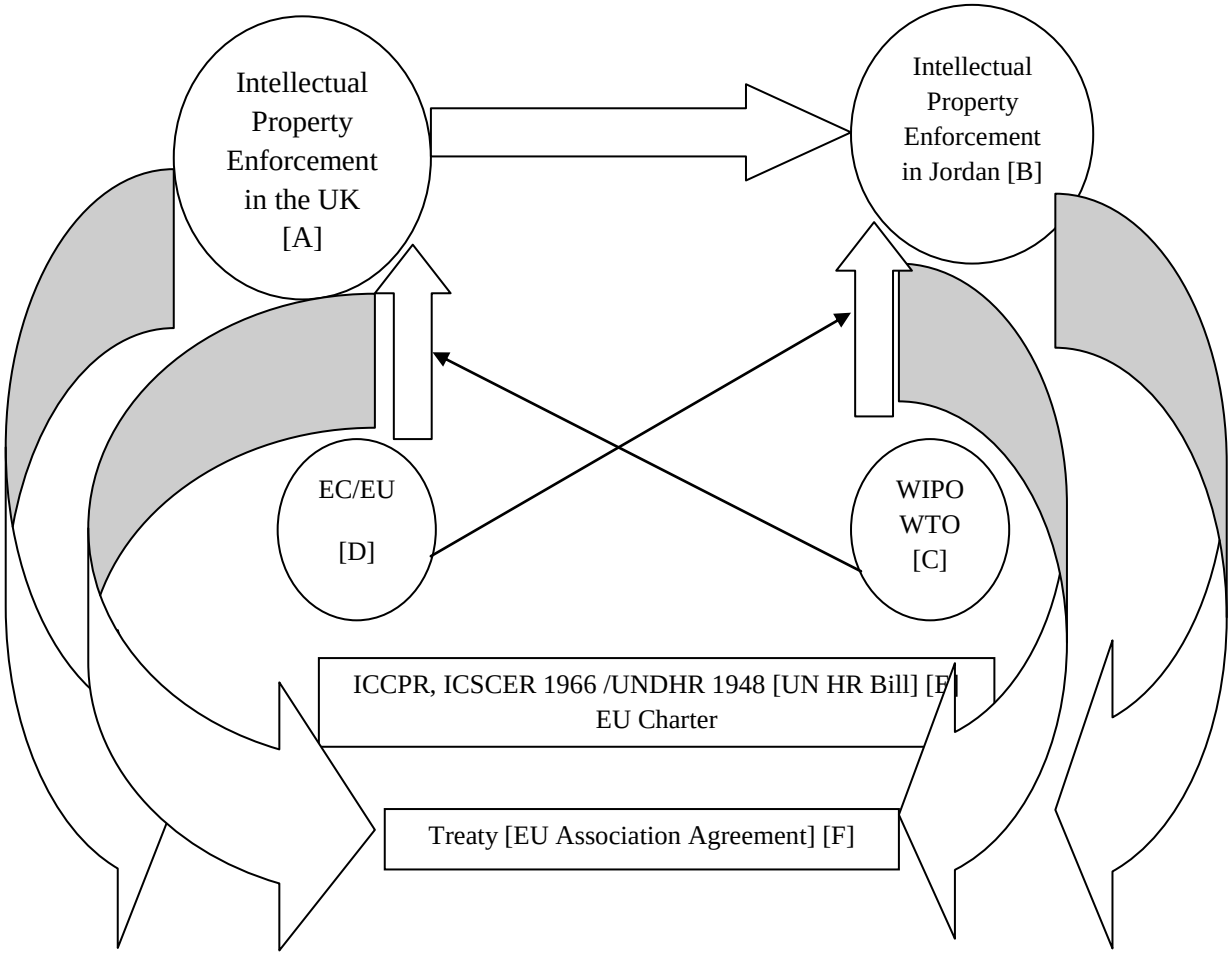

Figure (1)

The comparative approach between the various aspects of the research could be noted on international and national (substantive and structural) levels. That could be the build-up for the combination between human rights and intellectual property. The comparison of the international and national legal instruments, and the structural and substantive aspects of law, will lead to the appropriate methods needed to provide answers for the research inquiries mentioned previously. The conceptual and structural levels of comparison could comprehensively shed light upon the common background and differences among the subject matter of study.

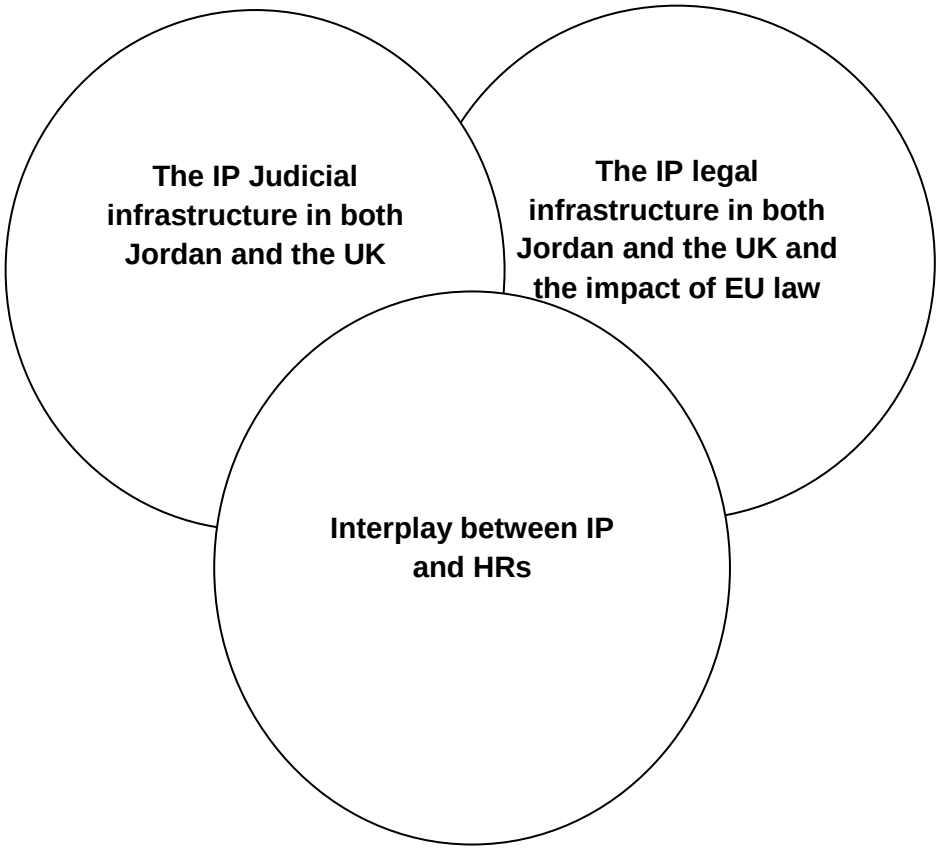

Figure (2)

The diagrams shown above, figures (1, 2), elaborate on the comparative concept of the thesis.

2.5. The "Euro-Med" Agreement between the European Union and its Member States, and the Hashemite Kingdom of Jordan Human Rights and its Intellectual Property Rights Clauses

This Agreement between the European Union and Jordan is part of the foreign policy to foster and develop the EU's political and economic relationship with its neighboring regions.

The agreement between the European Union and its member states on one side and Jordan on the other side is considered a mixed agreement. This is because both the EU and one or more of the member states is a party due to the shared competence between the Member States and the EU.[81] Furthermore, the partnership between the

[81]Szysczak. E; Cygan. A; "*Understanding EU Law",* (London; Sweet & Maxwell, 2008),p.317.

European Union and Jordan and the progress reports that followed in the years 2004 and 2008 respectively strengthens the ties bridging the gap between the different legal systems.[82]

The agreements related to the topic of the study have to be examined in relation to the Competence and the Common Commercial Policy (CCP) of the EU provisions and rules. Such policies have been administered accordingly in Articles (206) and (207) respectively in connection with the text of Art 28-32.[83] The type of treaty or agreement is related to the EU and the member countries membership in the agreement. Therefore the WTO, WIPO, TRIPs and EURO-MED Association Agreement between the EU and Jordan depend upon the members in the agreement are considered mixed agreements. In this case the CJEU had a significant opportunity to examine the possibility of EU law application in connection with WTO agreements and the jurisdiction of the Court and its direct effect on the TRIPs agreement.[84] In which the court approved the application of the wordings of Article 50 TRIPs agreement in measures of protection provided by the agreement

> "judicial authorities of the Member States are required by virtue of Community Law as Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, in light of the wording and purpose of Article 50 TRIPs Agreement, in a field which in which the Community has not yet legislated".[85] The decision included as well that the WTO has been approved by the representatives of both the Community and Member States.[86]

It has to be said that the driving force of the Jordanian foreign policy from the International trade perspective has been its openness, and providing an attractive environment for foreign investments. In order to assist the economic growth process,

[82]Commission Staff Working Paper, European Neighbourhood Policy, Country Report, Jordan, Brussels, 12.5.2004 SEC(2004) 564. There is the [Implementation of the European Neighbourhood Policy in 2008] progress report of the same country of 2008 and issued Brussels, 23/04/09 SEC(2009) 517/2

[83] Consolidated version of the Treaty on European Union the Lisbon Treaty 2009 it entered into force on 1 December 2009.

[84] *Joined Cases C-300, 392/98 Parfums Christian Dior SA v Tuk Consultancy BV* [2000] E.C.R. I-11307. Also in the same meaning see Szysczak. E; Cygan. A; "*Understanding EU Law"* , (London; Sweet & Maxwell, 2008), pp.313-317.

[85] *Joined Cases C-300, 392/98 Parfums Christian Dior SA v Tuk Consultancy BV* [2000] ECR I-11307. H10 in the same meaning at [33] of the same case

[86] *Ibid*[2000] E.C.R. I-11307 at [7] at[33] and at [34]

reduce the debit deficiency and the unemployment percentage, the Jordanian state and government adopted a foreign trade policy of openness and transparency. This up-front policy on the international commercial level had a significant effect on the Jordanian stage on both legal international obligations and the legislative and judicial aspects locally.[87]

2.5.1. Country progress reports concerning IP reform and procedural fair trial

This Agreement led to major alterations to the legal aspects on the national level. Mainly concerning intellectual property Acts, regulations have been amended in light of the related international protection of IP international treaties. The European Neighborhood Reports on Jordan have periodically[88] recorded the reforms that occurred on the various legal, judicial, economic and social fronts, mainly on the Jordanian front locally and the effect the foreign economic policy and its obligations has had on these aspects. The 2004 ENP country report confirmed the IP laws amendments and reforms related to Acts, governmental departments

> Key a legislation in the area of intellectual and industrial property is the 1992 Copyright Law, which was amended in 1998 and 1999 to reflect international IPR standards, including the Berne Agreement for the Protection of Literary and Artistic Works, the WTO TRIPS Agreement, and the World Intellectual Property Organization (WIPO) Copyright and Performances and Phonograms Treaties; (WCT) and (WPPT). The Ministry of Industry and Trade's Industrial Property Protection Directorate is responsible for registering trademarks, patents, and industrial designs and models. This includes the registration and transfer of ownership, mortgage rights, and any objections.[89]

[87] Jordan has also signed a Free Trade Agreement with the United States, the JO-US FTA, on October 24, 2000, which laid even more obligations then required on international level according to TRIPs. The National Assembly of Jordan [both houses the Senates and the representatives, The Parliament] ratified the US-JO FTA by acclamation in May 2001. The US House of Representative approved the US-JO FTA Implementing legislation in July 2001. The US Senate approved FTA Implementing legislation in September 2001. President Bush signed the FTA into a law on September 28, 2001. See United States-Jordan Free Trade Agreement Implementation Act of 2001, 19 USC §2112 n

[88] There are so far two reports in 2004 and 2008 respectively. And then there are two futuristic report plans aimed to the years 2013 as seen in *n* 112 from this section of the thesis.

[89]European Neighbourhood Policy, Country Report-Jordan {COM(2004)373 final} Brussels, 12.5.2004, SEC(2004) 564, p.20. The Euro-Med Association Agreement between the EU and Jordan is the bases for progress reports and its monitoring system to assure the accurate application of the provisions of the agreement concerning the progress of protecting procedural rights related to judiciary

2.5.2. The Human Rights Clause

The EURO-MED Association Agreement between the EU and Jordan includes a Human Rights Clause as do the other major European Association Agreements, which is modeled upon the human rights clause in the Fourth Lome' Convention,[90] concluded by the EC Council Decision 1991/1, which entered into force on 1st September 1991. Art 5(1) of the Lome' Convention explicitly recognises the respect and promotion of human rights to be a major factor of development and cooperation. The second subsection of the same article confirms the concept and takes it to a wider level of understanding. Art 5(2) states,

> 2. Hence the Parties reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. The rights in question are all human rights, the various categories thereof being indivisible and inter-related, each having its own legitimacy: non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights.

The Lome' Convention IV of 1995 later on included; influenced by the EU the latest version of the human rights clauses and served as a model included in the treaties and agreements of the EU and third parties.[91] The standard human rights clause approved as a proposal and later on adopted by both the Commission and Council, has a more universal dimension. The European Court of Justice concluded that respect for human rights is therefore a precondition of the lawfulness of the European Union acts. Accession to the union would, however, entail a substantial change in the present community system. Even though in the recognition of human rights the CJEU has not explicitly stated whether human rights were or not an objective of the EU,[92] yet this

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process and economic rights. There are further two ENP progress reports Implementation of the European Neighbourhood Policy in 2008 *Progress Report Jordan*, Brussels, 23/04/09, SEC(2009) 517/2 the latest ENP Country Progress Report 2012 – Jordan Reference: MEMO/13/248 Event Date: 20/03/2013 available at:< http://europa.eu/rapid/press-release_MEMO-13-248_en.htm > accessed on 15 May 2013

[90] Fourth convention concluded between the African, Caribbean and Pacific States (ACP) and the European Economic Community, signed at Lomé on 15 December 1989 (approved by Decision of the Council and the Commission of 25 February 1991 on the conclusion of the fourth ACP-EEC Convention (OJ 1991 L 229, p. 1), as amended by the agreement signed in Mauritius on 4 November 1995 (OJ 1998 L 156, p. 3). Case C-214/08 P Guigard v Commission as well

[91] Art 5(1) Lome' Convention as previously cited in *n (94)* Riedel, E. Martin W,; Human Rights Clauses in External Agreements *in* Alston P (ed.) *"The EU and Human Rights"* ; (Oxford, OUP, 1st ed., 1999). Pp.730-732.

[92] *Bayonne v. Dorca Marina* [1982] ECR

opinion was stated prior to Amsterdam, and even though human rights have not been explicitly presented it has been a significant aspect of the external relations of the EU foreign policy and the Barcelona Declaration for the Euro-Mediterranean Partnership.[93] Yet the negative approach towards the Euro-Med Association Agreement with Jordan taken by some scholars[94] has not been totally convincing or accurate at least on the economic investments level and its connection to the strengthening of IP system. The pharmaceutical sector in Jordan has been a valid demonstration that successful industries can flourish and prosper under a solid IP protection system evolved under the EU-Med Jordan Association Agreement.[95]

2.5.3. Charter of fundamental Rights, Article 53- Level of protection96 Connection to the ECHR

"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

"*Article 53 of the Charter makes it clear that the level of protection provided by the Charter must be at least as high as that of the Convention*." Often, it will go beyond.[97]

The Joint Communications from the Presidents of ECtHR and CJEU confirmed such a statement: "Thus the Charter has become the reference text and the starting point for

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[93] *Walid Abu-Dalbouh*, Jordan and The Euro-Mediterranean Partnership in Amirah H Youngs F R (eds.) *"The Euro-Mediterranean Partnership: Assessing the First Decade"*
'; found at: <http://www.realinstitutoelcano.org/publicaciones/libros/Barcelona10_eng.pdf ▹ last accessed on 01/03/2011. Pp.136-142. The author claims the imbalance trade relationship between EU – Jordan had a visible decline after the establishment of the Euro-Med Free Trade Area and had negative side effects upon the private sector. Even though, the research conducted various meetings with political, trade, commerce and industrial figures to support his stand-point; concerning the negative side-effects of the Barcelona declaration and the follow-up Euro-Med agreement.

[94] Such as Abu-Dalbouh in *n (93)*.

[95] Evolving Toward IP-Fuelled Innovation: Case study Jordan Pharmaceuticals industry; World Intellectual Property Organisation (WIPO), World Trade Organisation (WTO) and OECD. Pp. 1-3. The study available at: < http://www.wipo.int/ipadvantage/en/details.jsp?id=2647> last accessed 23/09/2011

[96] Charter of Fundamental Rights Article (53) 18/12/2000 C364/3 Official Journal of the European Communities

[97] The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe, Hearing of the European Parliament's Constitutional Affairs Committee Brussels, 18 March 2010, A Speech held by Viviane Reding,

the CJEU's assessment of the fundamental rights which that legal instrument recognises. It is thus important to ensure that there is the greatest coherence between the Convention and the Charter insofar as the Charter contains rights which correspond to those guaranteed by the Convention. Article 52(3) of the Charter provides moreover that, in that case, the meaning and scope of the rights under the Convention and the Charter are to be the same".[98]

It could be said that even though the ECHR 1950 is not binding on the EU as a legal international entity. The process of accession into the EU is from the range of legal protection of fundamental human rights, which would at least be in the same context of rights protected according to the provisions of the ECHR, which made the convention part of EU legal system.

It is thus important to ensure that there is the greatest coherence between the Convention and the Charter insofar as the Charter contains rights which correspond to those guaranteed by the Convention. Art 52(3) of the Charter provides moreover that, in that case, the meaning and scope of the rights under the Convention and the Charter are to be the same. In that connection, a "parallel interpretation" of the two instruments could prove useful.[99] This discourse leading to the significant connection between fundamental rights and Intellectual Property and should be explored in a range of national and international legal contexts.[100]

The Draft Accession Agreement indicates that the joint preferred settlement of the presidents of both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (hereinafter CJEU) will be accepted as the procedural basis governing the working relationship between both courts post accession.[101]

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[98] Joint Communications from Presidents of CJEU and ECtHR , January 27 2011

[99] Joint Communications from Presidents of CJEU and ECtHR , January 27 2011

[100] J Griffiths and L McDonagh, 'Fundamental Rights and European IP Law – the case of Art 17(2) of the EU Charter' Electronic copy available at:< http://ssrn.com/abstract=1904507> accessed at 23 January 2013 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWCA Civ 1740; [2013] 2 CMLR 27.

[101] The official Draft legal instruments on the accession of the European Union to the European Convention on Human Rights Strasbourg Monday 20 June –Friday 24 June 2011 found at: <http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/default_en.asp > last accessed 30/09/2012
Draft legal instruments on the accession of the European Union to the European Convention on Human Rights Strasbourg, Monday 20 June (9.30 a.m.) – Friday 24 June 2011 (4.00 p.m.) found at: <www.statewatch.org/news/2011/jul/**eu**-coe-echr-final.pdf> last accessed on 20/01/2012. O'Meara N, A More Secure Europe of Rights? The European Court of Human Rights, the Court of Justice of the

The recently more frequent joint cases between the CJEU and ECtHR are an implicit indication of the future judiciary/legal practice direction. The convergence of approach could be materialised in the jurisprudence of ECtHR in Mathews v. UK, in which the latter consisted of the possible contradiction between obligations based on EU law and guaranteed rights granted by the ECHR.[102] In this case the ECtHR took the responsibility to examine the breach of EU primary law. The individual challenged the alleged violation indirectly by taking the application to Strasbourg against an EU member State instead of the EU.[103] The approach taken by the ECtHR in Mathews was taken forward and influenced the verdict in *Bosphorus v. Ireland*.[104]

However, the significance of the accession of the European Union to the European Convention on Human Rights lies in the impact it has on Jordan, either in trade or human rights, through the Euro-Med association agreement between the EU and its member states and Jordan. This could influence such relationships by allowing Jordan to be influenced by and influence these ties based on the association agreement and therefore also its ability take action based on the ECHR to the ECtHR as part of the solution for the human rights through Euro-Med agreements. This could become a tool whereby non-European member states could be influenced by the European human rights system. Therefore, it could be said, for its credibility as a defender of human rights, which the EU has to be prepared to also submit its own legal order and legal action to external supervision.[105]

This could be drawn from the ENP presented as the logical development of the EU's duties 'not only towards its citizens and those of the new member states, but also towards its present and future neighbours to ensure continuing social cohesion and economic dynamism. The EU must act to promote the regional and sub-regional cooperation and integration that are preconditions for political stability, economic

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European Union and EU Accession to the ECHR, (2011) 12(10), German Law Journal p. 1814. Joint Communications from Presidents of CJEU and ECtHR

[102] *Matthews v The United Kingdom* (24833/94) 26-01-1998 at: <http://sim.law.uu.nl/SIM/CaseLaw/Hof.nsf/e4ca7ef017f8c045c1256849004787f5/c56c342bd91ff04bc125672700468398?OpenDocument >

[103] O'Meara N, "A More Secure Europe of Rights?" The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR";(2011) 12(10) German Law Journal, p.1816, Matthews v. The United Kingdom 24833/94 26-01-1998 as cited previously

[104] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, 2005-VI Eur. ECtHR (2005)

[105] Mahoney P, The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights from the perspective of the European Convention, [2002] HRLJ p. 303

development and the reduction of poverty and social divisions in our shared environment'.[106]

2.5.4. The effect the EU-Med Jordan Association Agreement has on the requirements for procedural fairness in Jordan

The role invested in the EU-Med Association Agreement between the EU and Jordan has had a significant impact in widening elements of IP protection and its connection with human rights protection. The fact that both IP and human rights clauses are included provides a new aspect of protection that affects both Jordan and the UK in a manner that is entirely distinguished from the sort of protection provided in TRIPs and other international human rights instruments. [107] Therefore, the country progress reports dealing with the evolving judiciary sector, independence and efficiency of courts are all factors that affect and relate to the procedural elements of judicial enforcement of IP. It is the role of the progress report that sheds light on the legal, legislative, economic and judicial evolvement that occurs on the national level. Such reports could be utilized as tools to related IP protection to elements of fair trial and procedural safeguards of courts and trial sessions. As long as the various sections of the reports dealing with procedural trial, courts safeguards and IP protection are dealt with in convergence understanding rather than dealing with sector as individual unit as it is at the moment.[108]

2.5.5. The role of EU external trade regulations has on criminal enforcement of IP

The Human Rights clause included in the EU-Mediterranean Association Agreements and bilateral trade and cooperation agreements with third countries have been modelled to provide a basic level of consistency in text and applicability of the clauses.[109] The Treaty on the European Union in the third paragraph of its preamble

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[106]Gil-Bazo M, The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited [2006] 18 (3-4) IJRL 571. This is adopted in 'New International Approaches to Asylum Processing and Protection'. Letter from the UK Government to the Greek Presidency of the EU available at: <www.statewatch.org/ news/2003/apr/blair-simitis-asile.pdf > last accessed at 23/09/2011

[107] There are so far two reports in 2004 and 2008 respectively. And then there are two futuristic report plans aimed to the years 2013 as seen in *n* 118 from this thesis Implementation of the European Neighbourhood Policy in 2008 *Progress Report Jordan*, Brussels, 23/04/09, SEC(2009) 517/2

[108] *n (107)*

[109] Brandtnder B, Rosas A, Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice, [1998] 9, European Journal of International Law 468 P. 473. The Single European Act

states, "*CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,"*

The Single European Act states "DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice".[110] The Commission has argued the EU should support the inclusion of social clauses in multilateral trade agreements.[111] Equivalent provisions on human rights as 'essential elements' have been included in the EU provisions at the Regulation on financial and technical measures accompanying the [MEDA] reform of the economic and social structures in the framework of the Euro-Mediterranean partnership.[112] The Common Foreign and Security Policy (CFSP) had a significant role in developing and consolidating democracy and the rule of law and respect for human rights and fundamental freedoms.[113] The approach towards both clauses in the Euro-Med with Jordan has been explicit in dealing with and reporting the application of the agreement and the protection of intellectual property rights, human rights and procedural rights of judicial nature.[114] Yet the progress in both sectors relates indirectly to the enhancement of the administration of justice and judge training will support the enforcement of intellectual property rights. That stand has

[110] The Single European Act, Luxembourg, 17 February 1986.
[111] As in *n (104)* and n *(95).* Also Justice Nwobike C, The Application of Human Rights in African Caribbean and Pacific–European Union Development and Trade Partnership (2006) 10 GLJ. Pp. 1383-87
[112] COUNCIL REGULATION (EC) No 1488/96, of 23 July 1996, on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership (OJ L 189, 30.7.1996, p. 1). Amended by: Council Regulation (EC) No 780/98 of 7 April 1998 Official Journal No. I. 113 15/04/1998.
[113] Art 11(1) TEU in regard to the foreign policy security "1. The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:" ... in its fourth subsection and after enshrining international cooperation it states that Union "...to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms."
[114] European Neighbourhood and Partnership Instrument, Jordan, National Indicative Programme 2011-2013 dealt with matters related the judiciary and justice under the subtitle "2.3. Sub-Priority 2: Justice, Home Affairs and Security", which described the role of the EU and the influence it has on enhancing the effectiveness and capacity of the judiciary and training judges. Pp.9-10. While Priority Area Two: Trade, Enterprise And Investment Development related providing an investment environment. Pp11-12. At:< http://eeas.europa.eu/jordan/index_en.htm> accessed on 15/01/2011

been previously confirmed in Jordan's endorsement of most of the UN human rights conventions.[115]

It has to be mentioned that Jordan is a member of Anti-Counterfeiting Trade Agreement "hereinafter ACTA" which has been rejected by the EU.[116]

2.6. TRIPs Agreement: Human Rights under the Provisions of TRIPs

The drafters of the TRIPs Agreement, in contrast of the previously mentioned human rights instruments,[117] did not have explicit human rights protection and safeguards as their primary goal. Study of the Agreement's provisions sheds light on its intention. The economic and trade nature of TRIPs can be deduced from the Agreement's title (Agreement on Trade Related Aspects of Intellectual Property Rights). Essentially it is an international economic agreement mainly relevant for its member states and right-holders of intellectual property in member states. From this economic perspective TRIPs could be considered a one-dimensional agreement focusing on the right-holders interests. The ability to enforce IP in various ways both at the domestic and at the international level are a major part of the Agreement, with its main aim being to efficiently protect the IP holders' rights in the member states. General human rights are not explicitly mentioned, except in a limited and indirect manner in the enforcement section of the agreement.

2.6.1. The link between intellectual property rights enforcement, human rights generally and the right to a fair trial specifically

What distinguishes TRIPs from the previously mentioned international human rights instruments[118] is that TRIPs has a purely economic aspect (it does not deal with moral rights) and is designated a sole purpose, with severely limited reference to non-commercial or non-economic human rights have been limited to minimum standards.

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[115]European Neighbourhood and Partnership Instrument-Jordan Strategy Paper 2007-2013 and National Indicative Programme 2007-2010. Pp4-5 cited at: < http://eeas.europa.eu/jordan/index_en.htm > accessed on 16/01/2011. Which asserted as in the NIP 2011-2013 the progress in the evolving role concerning the efficiency and independence of the judiciary. Also there is the European Neighbourhood Policy, Country Report, Jordan {COM(2004)373 final} Brussels, 12.5.2004, SEC(2004) 564, p.20, and Implementation of the European Neighbourhood Policy in 2008 *Progress Report Jordan*, Brussels, 23/04/09, SEC(2009) 517/2.

[116] Jordan is part of the available at:< www.iipa.com/acta.html > last accessed on 23 April 2013 as in

[117] The International human Rights instruments such as those mentioned in *n (111)*

[118] Mainly intended to mention the agreements are the UDHR 1948, ICCPR 1966, ICSECR 1966 or [the UN Human Rights Bill] and the ECHR 1950.

Thus the marginal connection between TRIPs's nature and the rest of the mainstream human rights regime is the enforcement section of TRIPs.[119]

This section compares between the IP enforcement instruments in the TRIPs Agreement (the third chapter), and human rights procedural safeguards and fair trial. The concept of human rights and intellectual property enforcement in general, and criminal enforcement measures do co-subsist in the provisions of the TRIPs Agreement.

2.6.2. The First Option: The Connection between Art 61 and Art 41 TRIPs

The enforcement procedures of Intellectual Property on an international level that are connected to the national level of enforcement by member parties can be identified in the third chapter of the TRIPs agreement Articles 41-61.

The general rules of intellectual property rights enforcement are based on the provisions stated in part three of the TRIPs Agreement Article 41, and deal with the basic principles the member states should implement in their enforcement measures locally in the national laws of each member state. It must be noted from Article 41.1 that the main purpose is to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These 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.

So the intention of the drafters was to persuade the member parties to provide efficient protection for intellectual property in a manner that prevents any infringement and discourages any possible future violations, but yet does not affect the freedom of trade and legitimate transactions. The provisions in sub-paragraph (1) mainly concentrate upon minimizing the effect of IP infringements in a manner that does not place any requirements upon IP holders or any fetters upon international trade.[120] Although apparently anomalous, it is argued that in the enforcement

[119] TRIPs Agreement 1994, Chapter 3 Articles [41-61].Mainly Articles 41 and 61 in addition to Art 7
[120] X Seuba Human Rights and Intellectual Property Rights in Correa M. C and Yusuf A. A. (eds.) *'Intellectual Property and International Trade: The TRIPS Agreement'*. (The Netherlands, Kluwer Law

provisions at the core of an IP treaty lie the most important procedural safeguards. By contrast the other multilateral IP treaties have not been firm enough in exploring any connection with the human rights system at least regarding the procedural aspects of enforcement related to the right to a fair trial *per se* and from a criminal aspect.[121] And even though, as will be mentioned below in subsection 2 from Art 41, the TRIPs Agreement does recognise the importance of fair and equitable procedures during the enforcement process in general, yet the ability to implement these principles (i.e. being fair and equitable) under Article 61 TRIPs is not necessarily clear or accepted by commentators.[122] However, that there is an exception to this direction.[123] This is the issue neglected in the literature: commentators on WIPO either fail to recognise the possibility that procedural safeguards applies to criminal enforcement measures in the agreement or dismiss its significance. The general principles of enforcement in Art 41 TRIPs and their connection and relation to Art 61 have not been mentioned by the commentators or the drafters of the agreement because as stated the main purpose

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International, 2nd ed,2007) p.287. *"This agreement linked the regime of intellectual property protection with that of international trade, …"*

[121] TRIPs Agreement 1994 Chapter 3 Art 61 The Article concentrates upon enforcement measures and the required protection procedures member countries should apply and when criminal punishments should be implemented, but nothing is said about the procedural rules applied to ensure the accuracy of application. In the same meaning in *'Concise International and European IP Law: TRIPS, Paris Convention, European Enforcement and Transfer of Technology'* in Cottier T, Ve'ron P (eds.), (The Netherlands, Kluwer Law International, 2008). Pp.149-150. It is the matter that all those who have studied TRIPs have not dealt criminal enforcement and the connection between the general rules of enforcement in Art 41 and Art 61, due to the fact that there is no elaboration of any safeguards or measures of precaution of criminal enforcement application. As in administrative and civil IP enforcement procedures mentioned in TRIPs provisions.

[122]During a presentation at *Ius Commune* Conference-Intellectual Property Rights Workshop held at Maastricht –Holland, November 26-27, 2009 in which I presented a PowerPoint presentation expressing this argument. Professor. Gervais expressed interest in the argument connection between Art 41/1/2 and 5 and Art 61 TRIPs the implementation general rules of enforcement mainly (***fair* and *equitable***) on criminal enforcement. And to a matter of fact the rest of the mentioned established commentators in the previous and following *n* (124) and *n* (126) in their well identified publications such as; Gervais, Correa, Sebua and Cottier, [books] have all not mentioned/identified the possible connection between Art 41 and Art 61 TRIPs. There have been journal searches of TRIPs "Art 41"/s "Art 61" resulting into no hits. Searches of TRIPs "Art 41" /p "Art 61" which resulted with no hits as well. While searches of TRIPs "Art 41" "Art 61" ended up with 13 hits none of them commenting or discussing the application of Art 41 in a manner out the general rules or its possible application/connection with Art 61. Ruse-Khan H G, Jaeger T, Policing patents worldwide? EC border measures against transiting generic drugs under EC and WTO intellectual property regimes [2009], IIC 502. Hilty R M., Kur A, Peukert A, Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the Proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (2006) IIC 970. And Wooldridge F The enforcement of the TRIPs Agreement in Germany [1997] IPQ 210. Kessler. M The internationalisation of intellectual property rights [1994] IBLJ 805.

[123] J Griffiths, Criminal Liability for Intellectual Property Infringement in Europe – the role of Fundamental Rights [2012] electronic copy available at: < http://ssm.com/abstract=1777029> accessed on 26/03/13. It has to be said also that this article could be found in *'Criminal Enforcement of Intellectual Property'* (ed.) C Giger 2012

of the agreement is to create a mechanism to realise the economic and instrumental benefits of protecting intellectual property products across national borders.[124] Mentioning the main reasoning of intellectual property enforcement in the first part of Art 41 of the TRIPs agreement was a reminder of the importance of the aims and goals of enforcement. Art 41.2 goes on to indicate the methods of enforcement and the procedures implemented and employed by the member states. Later on, it offers reassurance concerning the importance of fair and equitable procedures.[125] Art 41 in its remaining sub-paragraphs states the importance of certain safeguards to ensure the accuracy and stability of the enforcement procedures, such as written decisions and a record of the evidence and the reasoning behind the decisions. This could be laid under the fair and equitable requirements in Article 41.2,[126] the parties' ability to review the cases judicially.[127]

Thus it could be said that generally the minimum connection between intellectual property enforcement according to TRIPs and the human rights background is restricted to the provisions of Articles 41(2, 3, 4) and 42 in relation to the required enforcement procedures that members should apply, within the context of fair trial.

Art 41(5) from the TRIPs agreement is the only possible linking point between the application of rules of fair trial to procedures for intellectual property and criminal

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[124] X Seuba, Human Rights and Intellectual Property Rights *in* Correa C M. and Yusuf A. A. (eds.) *'Intellectual Property and International Trade: The TRIPS Agreement'*, (The Netherlands, Kluwer, 2nd ed.,) Pp.389-390.
It states the importance of practical enforcement of intellectual property and the enforcement procedures and that they should be fair and equitable in connection the procedures are not unnecessarily costly or involve unreasonable time limits or unwarranted delays. Art 41(2) TRIPs deals as well with the general function of the judicial, administrative authorities of enforcement systems in light of Article 41.5 according to Gervais D, '*The TRIPs Agreement: Drafting History And Analysis'*, (London, Sweet & Maxwell, 3rd ed., 2008). Pp. 440-442. Or to that extent any connection between Art 41 and Art 61 TRIPs or the possible connection between the provisions of the text or during the drafting process of TRIPs, which has not set a link between the provisions of the previously mentioned related the general text of enforcement and enforcement on a criminal level.

[126] Art 41(2) and (3) The TRIPs Agreement 1994. In the same meaning in Cottier T, Ve'ron P (eds.) *"Concise International and European IP Law: TRIPS, Paris Convention, European Enforcement and Transfer of Technology"*, (The Netherlands, Kluwer, 2008) Pp.120-121.

[127] Art 41(4) TRIPs Agreement 1994. It has to be mentioned that the enforcement procedures in the TRIPs agreement did not impose additional requirements upon member states concerning any amendments or changes on the existing judicial systems concerning intellectual property enforcement Art 41(5) *"It is understood that this Part does not create any obligation to put in place a judicial system for*
the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general …"

enforcement under Art 61.[128] The threshold criminal enforcement is based on the wilful infringements and commercial circulation of the infringed goods.[129]

The provisions of Art 41(5) do not oblige members to apply a certain judicial system to implement for intellectual property violations. Therefore it could be said that this is the common background of equitable procedures of enforcement measures, and could be considered the leading point for employing fair trial rules and their application in the criminal enforcement of intellectual property under the provisions of Art 61 TRIPs Agreement. Criminal enforcement is necessary for more severe infringements of IP rights which could not be dealt with via civil and administrative enforcement measures.

Thus the question can be posed: ***on what basis could the rules of Article 41 TRIPs be implemented on Article 61?***

In particular do the principles of fairness and equitable procedures mentioned in Article 41.2 apply to criminal enforcement procedures under Article 61and are they applicable according to Article 41 (5) TRIPs.

Even though there is no direct connection between Art 41(2) TRIPs and its implications upon Art 61 concerning the applicability of the rules of *(fair and equitable procedures)* on criminal enforcement of intellectual property, yet Art 41(5) gives member states the freedom to obtain the judicial and administrative systems that suit their local jurisdictions and best interest.[130]

The general rules of Art 41 TRIPs and its connection with Art 61 and the application of the provisions on criminal enforcement on the one hand, and the lack of sufficient commentary on the matter (applying the provisions of Art 41 on Art 61) on the other hand may suggest lack of compatibility. What is the possible application of Art 42 and could it be implemented on Art 61, will be examined below.

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[128] TRIPs Agreement 1994, Section 5: Criminal Procedures, Art 61 also *n (116)* and *n (117)*

[129] JUDr. Z Hraba, Mgr. V Abraham 'Enforcement of Intellectual Property Rights: Teaching materials' VOLUME II Book 2, 2007 This publication is a basic teaching aid for the purposes of the project educational System Support to Enforcement of Intellectual Property Rights project (Transition Facility 2005). Pp. 16-17. < www.dusevnivlastnictvi.cz/assets/vyukove-materialy/vol2book2.pdf > accessed on 23/02/13

[130] The linkage between TRIPs and human rights is under study in a more detailed manner in Chapter 5.2 from the thesis

2.6.3. The Second Option: The Connection between Art 61 and Art 42

However, there is another more direct connection between criminal enforcement according to the provisions of TRIPs Art (61) and procedural measures of protection and the other judicial human rights related procedural safeguards provided in other IP enforcement measures the **"*Fair and equitable"*** [Civil and Administrative] in Art 42 TRIPs. Even though the provisions are under the provisions of Art 42 as its title state is strictly directed to procedures related to civil and administrative procedures mentioned in Articles (42-60) and the safeguards mentioned are to ensure the legitimacy of the enforcement procedures. As these ***'fair and equitable'*** procedures could be applied on criminal enforcement measures stated in Art 61 TRIPs if Art 41is interpreted as a general requirements and safeguards provisions

The approach of implementing the provisions of Art 42 on criminal enforcement procedures under Art 61, which may be seen below, is applied in certain cases of wilful infringements on a commercial scale. The provisions of Art 61 TRIPs are applied to the same infringements of IP in general with additional elements of wilfulness and a commercial context that give the infringements a higher level of seriousness. Thus it could be said that the rules of **"*fair and equitable"*** procedures apply as they would for infringements of a less serious. Safeguards should be applicable for the more severe levels of the offence that have harsher criminal enforcement measures and outcomes in terms of penalties and remedies for the accused.

Later on in the provisions of Art 61 it mentions that criminal penalties could be applied to the rest of the IP infringements if they were committed wilfully and on a commercial scale as well.

Art 61 provides the impression and structure of criminal enforcement as a supportive instrument of safeguards against IP infringements that are so severe that civil/administrative methods of enforcement cannot effectively deal with them. Thus the infringements dealt with on a criminal scale are subject to civil methods of enforcement mentioned in Art 42 TRIPs and the measures and safeguards of that Article and its clauses ensure the accused and the parties' right to "***Fair and equitable***" measures of enforcement.

Thus safeguards mentioned in the Articles related to civil/administrative measures of enforcement of IP infringements and are to be applied in the more extreme measures of enforcement under the provisions of Art 61, and taking into consideration the criminal enforcement procedures in TRIPs, are actually an additional requirement to deal with matters that are taken to a higher level of wrongdoings than IPRs infringements.[131] The safeguard measures mentioned in Art 43 regarding gathering evidence, and the significance of the procedures followed, are not restricted to civil/administrative measures of enforcement. They can also be applied to criminal enforcement according to Art 61 and the position in the ranking order.

Thus the measures of protection and safeguards related to civil/administrative enforcement could be implemented for the additional criminal enforcement measures and procedures stated in Art 61 and the connection with the rest of the related Articles, such as Art 41, 42.

2.7. UN Human Rights Bill [The UDHR 1948 and the ICCPR 1966, ICSCER 1966]

The comparative approach of this thesis to the international human rights instruments, requires an examination of the connection between IPRs and the UDHR 1948. The latter is significant as it can be seen as the most significant international instrument from the human rights perspective, at least theoretically.[132] Of equal significance for the intellectual property it created a common basis for HRs and IP.[133] Also relevant here is *Chappell v United Kingdom* (1990) 12 EHRR 1 in which a search order (Anton Piller Order) was claimed to have infringed the rights of privacy and fair trial of the plaintiff Mr. Chappell, who claimed invasion of the privacy of his home and family Art 8 and obstruction of his right to fair trial for lack of sufficient

[131] Art 42 TRIPs handles the judicial procedures related intellectual property rights enforcement in the agreement. The rights provided to the defendant which, contains a detailed, timely written notice

[132]Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) Art 10 "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."* [even though it is not binding] *The Human Rights Committee* at [9.8] *of María Cristina Lagunas Castedo v. Spain CCPR/C/94/D/1122/2002. Also Mclnnes v HM Advocate*[2010] UKSC 7[2010] HRLR 409 *in which the court stated that "the prosecution's non-disclosure of witnesses police statements was incompatible with ECHR Art 6, but there was no miscarriage of justice"* there is as well *Allison v HM Advocate* [2010] UKSC 6[2010] HRLR

[133] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) Art 27 (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"*

legal presentation Art 6.[134] Though the court found no breach of either Article the case was one of the rare indications of the connection between freedom of expression and fair trial in an intellectual property rights context.

In addition to the fact that the UDHR 1948 is the main and first fundamental Human Rights international instrument of the modern era, its magnitude lies in the Euro-Med Association Agreement between the European Communities and their member states, on the one part, and Jordan on the other part.

The provisions of the Association Agreement between the EU and its member states and Jordan are explicit in asserting the importance of protecting human rights and respecting democratic principles, stating that the Universal Declaration should act as a guiding instrument for the parties.[135]

Yet the UDHR 1948 was only the starting point of international human rights and set no specific obligations upon the nations involved. What need to follow was a set of rules that establish humanitarian rule on a firm set of principles, thus providing common legal ground between the UK and Jordan.

The International Covenant on Civil and Political Rights and the International Covenant on Social Cultural Economic Rights[136]- of the year 1966- which created the UN Human Rights Bill, are the main international instrument that created obligations upon both parties under study.[137]

Art 15 of the 1966 [ICSCER], and before it Art 27 of the UDHR 1948, are considered the first and main attempt to create a balance between human rights in general and intellectual property as a major element of such rights.[138]

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[134] *Chappell v United Kingdom* (1990) 12 E.H.R.R. 1 at [50] and [37]

[135] Art 2 of the Association Agreement states "*Relations between the parties, as well as all the provisions of Agreement itself, shall be based on respect of democratic principles and fundamental human rights as set in the universal declaration on human rights, which guides their internal and international policy and consists an essential element of this Agreement."*

[136] Adopted on December 16, 1966 and entered into force from January 3 1976 993 UNTS 3

[137] Both the United Kingdom and Jordan have signed and reified the UN Human Rights Bill. The United Kingdom signed the ICCPR on 16 Sep. 1968 and reified it on 20 May 1976. While Jordan signed the Covenant at 30 May 1972 and reified it on 28 May 1975.

[138] A Chapman. R., A Human Rights Perspective On Intellectual Property, Scientific, And Access To The Benefits Of Science ,P. 1, Cited At: <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/word/chapman.doc>. Accessed 10/10/2010

Art 27(2) from the UDHR[139] had granted everyone free participation in the cultural activities in society and the right to enjoy the arts and share the benefits of scientific advancements.[140] These texts were the main provisions in modern human rights international instruments to adopt intellectual property as an important sector of the human rights system. It seems that the drafters of both texts were influenced by the United States of America's constitution.[141] The significance of Art 15 ICESR and the impact it has on the member nations relates to the legally binding status the covenant has as a treaty.

Thus the rest of the subsections of Article 15 (2-4) and the obligations there imposed upon member states have much greater effect than Art 27 UDHR 1948, which is the theoretical infrastructure of intellectual property/copyright as a main component of the human rights statutory regime. The Universal Declaration could be considered the philosophical and theoretical justification of the basic human rights.[142] Intellectual Property has always been justified from an economic and social perspective; the theoretical legal background of intellectual property justification has always been based upon the labour theory and the personality theory.[143] Art 19 ICCPR 1966 also made and still makes a significant contribution to the connection between human rights the Freedom of Expression and intellectual property. [144]

The paramount significance of the UDHR provisions is that it set the true philosophical background for statutory human rights on an international level and paved the way for further human rights international instruments.[145]Hence the spirit of

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Also J W Nickel, 'Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights', (Berkeley, UCP, 1987). Pp.178-179.

[139] As in *n*(90)

[140] Article 27(1) of the UDHR 1948.

[141]Art 1, Paragraph. 8, Section 8, *The Constitution of the United States of America " To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respectful Writings and Discoveries."* It has to be mentioned that Art 27 from the UDHR has been strongly related to misuse of science and inventions during World War II and how it affected humanity. In this meaning see A. R. Chapman, "A Human Rights Perspective On Intellectual Property, Scientific, And Access To The Benefits Of Science" ,P.6,Cited At <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/word/chapman.doc> accessed 10/10/2010

[142] J Waldron, From Authors to Copiers: Individual Rights and Social Values in Intellectual Property68 CHI.-KENT Law Rev. Pp. 869-870. 1993. also O. F, Afori,; Human Rights and Copyright: The Introduction of Natural Law Considerations Into American Copyright Law Fordham Intellectual Property, Media & Entertainment Law Journal, Vol. XIV 2004 No. 2 p. 507.

[143] Becker, L C. Deserving to Own Intellectual Property 68 CHI.-KENT L. Rev. 609

[144] Chapter 4 section 3.4 from this thesis.

[145] Such as the (European Convention on Human Rights ECHR 1950, the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS

the Declaration inspires in the provisions of the related articles of these subsequent conventions and covenants. A thorough study of such articles in the diverse instruments under examination for example Art 10 (Freedom of Expression) from the ECHR 1950, Article 19 (Freedom of Opinion), and Art 14 from the ICCPR 1966 and Article 6 from the ECHR 1950 all consider the protection of the right to a fair trial. Likewise, provisions such as in Art 15 from the ICSCER 1966 for the protection of economic rights follow the lead given by the provisions of the UDHR 1948.

The aforementioned Articles give more effective protection of the rights mentioned in the UDHR 1948 since the covenants in which they appear constrain the signatory member states to abide by their provisions.

2.8. The European Convention on Human Rights 1950 [ECHR 1950][146]

The European Convention is another significant international instrument that provides common ground between the legal and judicial jurisdictions of the UK and Jordan, and has enhanced the position of human rights and intellectual property in mainstream statutory international law. It too was the outcome of the extreme conditions that influenced the establishment of the UDHR 1948. This can be seen in the Convention's preamble, which states its main purpose as preserving the principles of ***"personal freedom and political liberty, the constitutional traditions and the rule of law"*** **as "*the form basis of genuine democracy".*** [147] The Convention acknowledge the significance of the UDHR and the rights enumerated in it, which demonstrates the influence the Declaration had upon international human rights instruments, an influence replicated by the ECHR 1950. The UDHR influence can be seen in the concept and method of approaching and dealing with the set of rights under examination, e.g. Articles 6, 'Right to a fair Trial', and 10 'Freedom of expression'. The Convention sets the standards, providing protection for procedural and economic individualist sets of rights. Article 6 sets out the standards for the minimum measures of protection and safeguards during trials. The Covenants that created the UN Human

171 (ICCPR) and the International Covenant Social, Cultural and Economic Rights(adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171) ICSCER 1966.

[146] It has to be mentioned that rearrangement of ECHR as the last section of this chapter even though it was established at a date prior to the covenants is based that on the fact the covenants are binding to both UK and Jordan which the convention is only binding to UK directly

[147] European Convention on Human Rights ECHR 1950.

Rights Bill (ICCPR 1966, ICSCER 1966)[148] followed to the Convention to letter, with some expansion in the case of fair trial. Art 10 the ECHR 1950 was modeled on Art 27 of the UDHR 1948.[149] Art 10 of the ECHR 1950 combines the general concept of Art 19 UDHR 1948 of freedom to import and access information explicitly and freely in its first sub-section and adopts the same phrase of Art 19 of the Declaration - "*regardless of frontiers"*- and the provisions of the 1966 ICCPR have followed suit. The Convention in a similar manner to Art 27(2) placed in its second sub-section the formalities for using the previously mentioned rights in Art 10(1), conditions and restrictions upon individuals practising their rights according to the first sub-section and the laws regulating such practice in a "*democratic society*". The conditions of practice of the rights mentioned in Art 10(1) ECHR 1950 and limitations of the second sub-section is a safeguard against the abuse of the rights granted to protect the rights of other individuals, groups, or even the public order.

The Convention sets a standard of protection measures to safeguard the involved parties' rights during the judicial process (during the criminal trials and procedures) in Art 6 *Right to a fair trial,* following the path approached in Articles 10, 11 and Art 7 from the UDHR 1948. Art 6 ECHR 1950 has adopted the basic concepts of procedural justice, aspects that involves criminal law and criminal procedures to safeguard the fundamental aspects of the final outcome of the trial represented in a just and fair judgment.

In conclusion we have seen that the ECHR 1950 following the example of the UDHR 1948, paved the path for the major rules and guidelines of protecting both sets of

[148] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) International Covenant Social, Cultural and Economic Rights(adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171) ICSCER 1966

[149] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Art 19 *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."* Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) Art 27 *"(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*

individual, collective, social and procedural human rights on the one hand, while on the other hand protecting the economic rights of the individual. Articles 6 and 10 ECHR are included in the main body of the Convention's text. The drafters kept their faith in creating a linkage point between human rights in general and creations of artists/scientists. In doing so, the ECHR 1950 established the standard legal standpoint on IP as a main section of statutory international human rights.

It could be said that this has emphasized the relationship between IP and HR and resulted in of IPR as a major part of the modern international human rights law regime. Even though the ECHR is not binding for the EU as a legal unity and institution yet "***Protecting fundamental rights is about upholding human dignity and the full enjoyment of rights***." In view of the strength of the EU Charter – which is in many instances more ambitious than the Convention – the European Union will not find it difficult to meet the standards required by the Convention.[150] However, the implications of the European Convention's application in the legal norms of EU rules is essential in the eventual outcomes of EU law influence on human rights adaptation, its connection with intellectual property in general or in aspects of EU law. The possibility to interpret IP enforcement from a human rights perspective in connection with understanding intellectual property and human rights as linked to EU regulations. It is the matter of applying the EU related regulations and directives on IP enforcement and human rights safeguards that could affect the procedural aspect of trial and impact on the subject-matter of this thesis.

[150] The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe, Hearing of the European Parliament's Constitutional Affairs Committee Brussels, 18 March 2010, A Speech held by Viviane Reding

Chapter 3. Interrelation of Intellectual Property and Human Rights (Jurisprudence and Commentary)

3.1. Introduction

Chapter 2 introduced the international legal framework and identified obligations, principles and statutory law that influences the UK and Jordan in the field of intellectual property and human rights. This chapter examines the connection between both sets of rights under study. Some commentators traditionally view human rights and intellectual property as in collision[151] or as conflicting.[152] Although this may sometimes be true, it is submitted that (more often than commonly acknowledged) these systems of rights act in a convergent manner.

There are actually four approaches to described parallels or links between human rights and IP:

a) "Co-existence", where the two sets of rights operate in their separate spheres without interacting. In earlier phases of development of IP and human rights they could be regarded as occupying "separate legal worlds".[153]

b) "Conflation", where IP is seen as an integral part of the human rights system; it is argued in Chapter 2 and 5 that HR may also be recognised as present in IP instruments, such as WTO TRIPs.

c) "Conflict" or "Collision" (see above): this approach can be seen as part of a more extensive school of thought, exemplified by the work of Tuebner and Fischer-Lescano,[154] which takes the view that collision between different legal regimes cannot be solved within the law but is symptomatic fragmentation of society. Thus aspirations of a normative unity of global law thus are doomed to failure from the outset. The standpoint even belittles the possibility that compatibility could be achieved. However, the International Law Commission, in its 2006 study of

[151] The term collision has been used in Jehoram H C; "*Copyright and freedom of expression, abuse of rights and standard chicanery: American and Dutch Approaches"* (2004) E.I.P.R, 26(7) P.276

[152] e.g. Part I of J Griffiths and U Suthersanen, eds., "Copyright and Free Speech" (OUP, 2005) is entitled "Mapping the Conflict".

[153] e.g. Barendt E, writing of copyright prior to the 1970s in "*Copyright and Free Speech Theory*", Ch. 2 in Griffiths J and Suthersanen U, eds., "Copyright and Free Speech" (Oxford, OUP, 2005).

[154] Lescano A F; Tebubner G, translated by Everson M; "Regime-Collisions: The Vain Search for Legal unity In The Fragmentation Of Global Law" [2004] 24 Mich. Journal of International Law. 24. Pp.999-1045, p. 1004

fragmentation, recognised the importance of specialised international law-making and urged that treaty partners approach potentially conflicting treaty obligation "with a view to mutual accommodation". [155]

d) "Convergence": this could be human rights adapting to move nearer to the trajectory of IP, or IP moving towards human rights, or each moving towards a common path of development ("dual convergence").[156] This author feels that "convergence" could be the most accurate characterisation of the IP//HR connection. It is explored further in Chapter 5 as between intellectual property and the right to a fair trial.

These approaches have each been deployed out at three different levels:

1. At the level of *theoretical* discourse

2. At the level of *substantive* rules of HR and IP treaty texts and their interpretation

3. At the level of *procedural* rules and safeguards. This thesis argues that more attention should be paid to the relationship between IP and HR at the procedural level, since even papers by judges and practitioners tend to ignore the procedural in favour of theoretical and substantive analysis.[157]

3.2. 'The Theoretical Debates'

Authors such as Helfer, Gervais, Torremans and various other scholars take theoretical perspectives on the connection between HR and IP. They have mainly taken the approaches of co-existence or conflation of the sets of rights, or of conflict

[155] International Law Commission, Study Group Report A/CN.4/L.682 (finalised by Martti Koskenniemi) 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' 13 April 2006, p 140

[156]L Helfer, , has suggested that WTO dispute resolution process could learn from the progressive interpretation jurisprudence of ECtHR, possibly a dual convergence argument L R. Helfer, Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking,[2004] 29 Yale Int'l LJ1, 26-45

[157]Murshed, M; Curbing Software Piracy In Ecommerce: Compatibility with Human Rights: Challenges and Possible Solutions in Sinjela M (ed.) *"Human Rights and Intellectual Property: Tensions and Convergences"* (Leiden, Martinus Nijhoff Publishers, 2007), Pp.1-29. There is as well in the same publication Dahlberg A; Are Stronger Intellectual Property Rights An Obstacle Or Condition For International Technology Transfer? An Analysis on the Effects of the Trips Agreement Pp.31-68

between Human Rights and IP, based on human rights instruments that arguably have IP provisions.

3.2.1. Co-existence

This increasingly popular approach has its roots in the compatibility model and posits a relationship between two individual sets of rights which draws some elements together. However, even though Gervais shares Torremans view that there are factors that draw IP to Human Rights and vice versa, yet he differs fore fronting the relationship between intellectual property and trade law.[158] Thus Gervais stresses the linking as well as the conflicting elements of the relationship by recognising the influence of trade law on intellectual property, leading to a possible divergence from human rights. This approach elucidates the role of trade law as it relates with intellectual property, and how this may influence its relationship with human rights. His standpoint is reflected in many influential national and international instruments of trade law.[159] On the subject of IP seen from a trade law perspective Gervais writes:

> This has at least two important consequences. First, unlike human rights, trade law is essentially pragmatic and results-based, something illustrated by such fuzzy notions under WTO law of 'nullification or impairment' of benefits or doctrine of 'reasonable expectations'. Secondly, trade remedies are generally predicated on a showing of actual adverse impact on trade. [160]

3.2.2. Conflation

The second approach that of conflation theorists enthusiastic views intellectual property as part of the human rights regime. Its main proponent is Torremans, who states:

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[158] Gervais. D; Intellectual Property and Human Rights: Learning to Live Together *in* Torremans P. (ed.) *"Intellectual Property And Human Rights Enhanced Edition of Copyright and Human Rights"* (The Hague, Kluwer, 2008)Pp.3-7

[159] Uruguay Round of Multilateral Trade Negotiations leading to The Marrakesh Agreement Establishing The World Trade Organisation Affecting TRIPs it is well documented in the positions of the United States, European Commission and the Japanese delegations in the negotiations leading to the drafting of TRIPs it could be examined in the works Gervais D "*The TRIPs Agreement: Drafting History And Analysis"* (London, Sweet & Maxwell, 3rd ed., 2008) 17-19

[160] Gervais D; Intellectual Property and Human Rights: Learning to Live Together *in* Torremans P. (ed.) *"Intellectual Property And Human Rights Enhanced Edition of Copyright and Human Rights"* (The Hague, Kluwer , 3rd ed., 2008) 7

> Copyright really has a claim to human rights status. We have shown that there clearly is a basis for such a claim in the international human rights instruments, but it has also become clear that the provisions in these instruments that could be said to be the copyright clauses do not define the substance of copyright in any detail. Instead one is left with a series of conclusions and implications for copyright and its substance as a result of its human rights status.[161]

The approach details the reaction of the IP governing bodies such as WIPO, which has to operate towards a human rights approach to IP, as noted by Chapman.[162] This may be seen mainly in areas related to copyright/privacy and freedom of expression, patents/access to knowledge and medical patents, especially in regard to high public interest priorities such as medications for HIV/AIDS in most underdeveloped countries. IP right-holders actually depends on human rights instruments as a tool to create a foundation for the relationship between both sets of rights.[163] This approach gives scant recognition to the possible collision approach,[164] focusing on the non-economic elements of IP rather than the theoretical legal/ economic justification elsewhere encountered in the analysis of the IP and Human Rights relationship.[165] This element of the study has not been approached on the theoretical aspect of the discourse of procedural human rights safeguards. Such as; fair trial and its connection to IP.

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[161]Torremans P; Copyright (and other Intellectual Property Rights) as a Human Right in P Torremans . (ed.) "*Intellectual Property And Human Rights Enhanced Edition of Copyright and Human Rights"* (The Hague, Kluwer , 3rd ed., 2008)214-215

[162] Reiss W J, Commercializing Human Rights: Trademarks in Europe After Anheuser Busch v. Portugal *n*170. Such as the WIPO, Intellectual Property and Human Rights: A Panel Discussion to Commemorate the 50th Anniversary of Universal Declaration of Human Rights' WIPO Publication No. 762 (E) 1999 available at: http://www.wipo.int/mdocsarchives/WIPO_UNHCR_IP_PNL_98/WIPO_UNHCR_IP_PNL_98_INF%204_E.pdf cited at 27 May 2013

[163] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)Art27 International Covenant on Economic Social Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Art (15)

[164] Torremans P; Copyright (and other Intellectual Property Rights) as a Human Right" as in *n (161)* Pp.196-197 he refers to Lawrence Helfer's works such "*Human Rights and Intellectual Property: conflict or Coexistence?*2003

[165] As mentioned in *n (161)*

3.2.3. Collision

This approach posits some sort of separation between the theoretical foundation of IP and human rights, due to the trade law methods of protection of IP. This is demonstrated in the profound connection between the TRIPs agreement drafting and WTO instruments, and the structure of GATT Uruguay round had on the negotiation process and developing the final draft of the agreement at Marrakesh April 15 1994. Excluding moral rights has been another characteristic of the argument. Such scepticism/pessimism is based on the diverse background of human rights and intellectual property respectively. This debate is based on the role of IP. "Individuals and groups who consume those products are allocated the (implicitly) inferior status of users. A human rights approach to intellectual property, by contrast, grants the users a status conceptually equal to owners and producers", according to Helfer's opinion regarding TRIPs provisions.[166] In fact conceptual fairness between the consumers and the owners/producers is not entirely as straightforward a situation as it may seem. According to the trade law approach of, related instruments have taken a more favorable direction towards IP owners on behalf of the consumers according to TRIPs. This theoretical approach has adopted a more distant standpoint concerning the relationship between IP and human rights, yet is not totally neglectful of the growing connection between human rights and IP, as can be seen in the ECtHR verdict in *Anheuser-Busch Inc. v Portugal,* which is considered by some as a landmark step of the ECtHR in an IP context as a human rights element by a human rights judicial instrument.[167]

Nevertheless there has been growing optimism over the outcome the *Anheuser-Busch v Portugal* case has in providing connection between IPRs and a human rights co-existence approach via Art 1 of Protocol 1 concerning peaceful enjoyment of possession, and trademark and IP as a part of the property possession. The ECtHR as

[166] L Helfer, Human Rights and Intellectual Property: Conflict or Coexistence? (2003) Minn. Intell. Prop.Rev. p.58. also in the same meaning Reiss W J, Commercializing Human Rights: Trademarks in Europe After Anheuser Busch v. Portugal [2011] WIPO J 14 176

[167] L Helfer,. The New Innovation Frontier? Intellectual Property and the European Court of Human Rights in P. Torremans (ed.), '*Intellectual Property And Human Rights Enhanced Edition of Copyright and Human Rights' (*Kluwer Law International, The Hague 2008) P.27. P Torremans Copyright (and other Intellectual Property Rights) as a Human Right in Torremans P (ed.) '*Intellectual Property And Human Rights Enhanced Edition of Copyright and Human Rights'* (Kluwer Law International The Hague, 2008) Pp. 205. *Anheuser-Busch Inc. v. Portugal* (73049/01) (2007) 45 EHRR 36 (Grand Chamber) 11/01/2007

a main human rights instrument could have a role in being involved in IP registration and infringement. In a manner this influenced related provisions of the concept; as in Art 17(2) of EU Charter the similarities could be noted in the general principle of IP protection and its connection with protocol 1 of ECHR.[168] This celebrated convergence drew IP and human rights together and indicated the valuable role the ECtHR could play.[169]

Notwithstanding, this does not mean that the verdict in *Anheuser-Busch v Portugal* has satisfied the different views of commentators, researchers or even the IP owners. The decision provides a wider interpretation of enjoyment of property possession in IP content and therefore aspects of intellectual property could be understood according to the provisions of Art 1 of the 1st protocol of ECHR. But such an understanding of the provisions of TRIPs could lead to undermining intellectual property protection in favour of human rights,[170] in which regard the resemblance of Art 17(1) of the EU Charter and Art 1, Protocol 1 is evident.[171]

The downside of the court's (the Grand Chamber's) verdict, according to a more pessimistic approach towards the decision, is the interpretation of an IP related subject-matter. Some commentators thought that the significance of the ruling, even though it was connected to enjoyment of possession and property, lies in the fact that IP as part of the right to property has been interpreted in a wider human rights context.[172] This however provides the IP owners with a more restricted range of protection than if IP is interpreted according to the provisions of IP related instruments. It may provide additional restrictions/limitations on the rights, or exclude them altogether, in a manner not be grounded in the IP dominion. The human rights understanding of property could create a misguided interpretation of IP assets from a human rights perspective.

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[168] Griffiths J and McDonagh L; *"Fundamental Rights and European IP Law-the case of Art 17(2) of EU Charter"*, Pp.5-6 at:< http://ssm.com/abstract=1904507 >accessed 20/07/2012 . Case C□70/10, *Scarlet v Sabam* Judgment Of The Court (Third Chamber) could be found at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0070:EN:HTML> accessed on 20/07/2012

[169] Helfer The Innovation Frontier? Intellectual Property and the European Court of Human Rights as Pp 27-28

[170] See Reiss W J *n* (169) Pp.195-196. Also Helfer L The New Innovation Frontier? Intellectual Property and the European Court of Human Rights

[171] Griffiths J and McDonagh L; *"Fundamental Rights and European IP Law-the case of Art 17(2) of EU Charter"*, Pp.5-6 at:< http://ssm.com/abstract=1904507 >accessed 20/07/2012

[172] Reiss W J in *n* (169)

3.2.4. Convergence

There is the final theoretical approach, which that has not been widely examined in the literature by commentators on the link between IP and Human Rights. However, in an international trade sphere the balance between human rights and IP is actually essential for the wider picture. It is especially significant when considering procedural human rights, safeguards given the emphasis in WTO TRIPS on enforcement and procedural obligations.

3.2.5. Correlation, Interaction and Overlaps

The interplay of the rights and their overlapping nature is emphasised by the four approaches just described. The approaches have varied and evolved in time. A human rights attitude to the WTO described it as a *"veritable nightmare"*.[173] It has been argued that a side-effect of WTO TRIPs is to implicitly encourage human rights infringements.[174]

The human rights perspective on the IP normative sphere has addressed legal judicial factor for some time for example in fundamental rights documents such as the French Revolution "Declaration of Rights of Man and Citizen" and the American Constitution.

There has been what may be considered as a negative connection between human rights and IP the attempt by three European governments to ban the biotechnology directive (98/44/EC) on the basis of violation of human dignity.[175] Yet there has been a more comprehensive understanding that is closer to the co-existence/harmonious approach between human rights and IP in which human rights character has been

[173] Geiger C, The Constitutional Dimension of Intellectual Property *in* P. Torremans (ed.) '*Intellectual Property and Human Rights'* (The Hague, Kluwer, 3rd ed., 2008) 103. See as well Drano's P Developing Countries and International Intellectual Property Standard-Setting, (2002)5 WIPO J , p. 789

[174] UN-ECOSOC (2000) at [15] Also Papadopulou. F, TRIPS and human rights *in* A. Kurr and M. Levin (eds.) '*Intellectual Property Rights In a Fair World Trade System Proposals for Reform of TRIPS*' (Edward Elgar Publishing, 2011)262-263. Yu P K Reconceptualizing Intellectual Property Interests in a Human Rights Framework UC Davis, 2007 40, Pp. 1039. Pp. 1042-1043 in *n* (79)

[175] *Netherlands v European Parliament and Council of the European Union* (2001) ECR I-7079

applied on IP,[176] and how the situation might have changed or evolved through time as it can be noted in the approach taken by WTO and WIPO respectively.[177]

However, despite all good intentions concerning a positive approach towards a harmonious integrating relationship between IP and HR most of the relevant literature has been directed towards aspects such as cultural, economic, social, medical,[178] etc…. For example under the WTO dispute settlement (even though there is no mention of any relation to human rights) it has dealt with a public health issue in the packaging of Tobacco in a manner contradicting its obligations according to TRIPs Agreement provisions.[179] The studies avoid an essential element of the human rights dimension, which is the procedural factor of human rights safeguards presented in right to a fair trial. For example in the statement of ESCOC (2000) at [15] which states that there is more need to take into account the fundamental aspect and nature of all human rights and precisely everybody's right to benefit from the outcomes of scientific progress on all levels and rights; such as health, education, food, and even the right to self-determination. However it does not mention the right to a fair trial at any level.[180] This issue is discussed later in this thesis.[181]

Do we see the different approaches according to which aspects of IP/Human Rights are under consideration (e.g. Property, Privacy, Freedom of Expression or Fair Trial)?

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[176] UN Sub-Commission on the Promotion and Protection of Human Rights Res 2000/7, "Intellectual Property and Human Rights" 17 August 2000.

[177] WIPO, Intellectual Property and Human Rights: A Panel Discussion to Commemorate the 50th Anniversary of Universal Declaration of Human Rights' WIPO Publication No. 762 (E) 1999

[178] WTO Dispute Settlement Resolution DS441 Australia Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging Dominican Republic. Found at:< http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm> accessed on 01 May 2013

[179] The provisions under study in DS441 were Art 2.1, 3.1, 15.4, 16.1, 20, 22.2(b), 24. (3)TRIPs. It has be mentioned that there has been other Dispute Settlements in the subject-matter of Australia Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging See also DS434 as found at:< http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm > accessed on 02 April 2013 and DS435 as found at:< http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm > accessed on 02 April 2013

[180] UN Economic and Social Council ESCOC, *Preliminary Report on "Globalization and its Impact on the Full Enjoyment of Human Rights"*, ESCOC document E/CN.4 2/2000/12 of June 2000. *Para* 15. Also the UN Economic and Social Council ESCOC, Sub-Commission on the promotion and protection of Human Rights, *Economic Social and Cultural Rights: The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner*, ESCOC Document. E/CN.4/Sub.2/2001/13 of 17 June 2001, available at: http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a.5300fa0238025668700518ca4/590516104caa8191/$FILE/G0114345.pdf

[181] Procedural Rules from this chapter

There does seem to be a correlation, which this chapter intends to demonstrate. In particular, it will be argued that literature since 1970s shows plenty of sources that demonstrate collision and conflation approaches in the area of Freedom of Expression.

3.3. Substantive Rules and Their Judicial Application

The substantive Human Rights rules are the basis for much of the theoretical literature and yet the theoretical scholars have not considered whether there are equivalents in IP treaty language, although the balances within copyright are seen as achieving HR outcomes in terms of freedom of expression, etc.

3.3.1. Interplay of theoretical approaches and substantive rules

This is the interactive connection between the substantive texts on IP/HR aspects and the theoretical approaches to IP and human rights legal framework, focusing variously on co-existence, collision, conflation and convergence.

3.3.2. Substantive Related Content

At the level of substantive rules, such as the jurisprudence of Art 27 and 28 UDHR or qualifications in Art 10(1/2) ECHR, Art 15(1/c) ICESCR and their enforcement (cases where IP and Human Rights are both pleaded), exemplify the interplay of the rights of privacy, freedom of expression on one hand, and the exclusive rights in copyright, patents or trademarks on the other. The focus on the relationship between IP and human rights has been based on the above mentioned provisions.

Human Rights has a connection with the principles of *fair dealing* and *the three-step test* and how they influence each other, the rights of the owner and others (e.g. consumers) who would like to benefit from the outcomes of the creation of intellectual property. The *three-step test* is considered a more dependable tool to create the needed balance to establish a fair formula between the IP right-holders and others. It facilitated the establishment of the concept of *fair dealing* to mediate between the general rules of IP protection and the restrictions applied to the owners'

rights and/or conditions of granting exemptions.[182] The test of *fair dealing* in relation to Art 10 ECHR may have both positive aspects and flaws. It examines the flexibilities of exceptions, limitations of the exclusive rights in copyright law in creating the balance between the *normal exploitation* it provides a human rights element to the basics of the three-step test and the limitations of the exceptions of exclusive rights granted to copyright/IP owners. The three elements of the three-step test can be encompassed in a general human rights perspective. Such elements are based in the provisions of international IP and copyright instruments. This is noted in Art 2 of the Berne Convention 1886[183] and evolved in copyright WIPO treaties (WCT, WPPT) and the TRIPs Agreement before that could be considered the starting point for the exceptions and limitations on the exclusive rights of the copyright owners. The appropriate scope and function of the limitations and exceptions in copyright law has been and still is a controversial issue.[184]

3.4. Right to Property/Fruits of Creation and Convergence

Probably the most obvious recantations related to intellectual property and the human rights to property are protocol 1 ECHR or Art 15 ICESR. This convergence is reinforced by the justification theories of IP. Before analysing them it should be noted that IP has to take its place in national systems of property ownership, which differ subtly in Jordan and the UK that is England, Wales and Northern Ireland. Intellectual Property does not always fit easily into national legal systems. Such interaction with convergence in judiciary substantive application could be noted in ECtHR verdict in *Anheuser-Busch Inc. v. Portugal*, in addition to the substantive textual provisions as in Art 1 of the additional protocol of ECHR.[185]

According to Mattei,

> Property rights can be described as formalised powers to rule over commodities. Property law is the body of legal rules that grants such power

[182] Geiger C The three-step test, a threat to a balanced copyright law? [2006] IIC37(6), 683 P 685
[183]Berne Convention for the Protection of Literary and Artistic Works as it was amended on 1979 Paris Act
[184]Art 10 WIPO Copyright Treaty 1996 [WCT] [adopted in Geneva on December 20 1996], WO033EN Art 16 WIPO Performances and Phonograms Treaty [WPPT]1996 [adopted in Geneva on December 20,1996] WO034EN
[185] *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWCA Civ 1740; [2013] 2 C.M.L.R. 27. Also J Griffiths and L McDonagh *n(168)*

> and limits it. This body of law deals with the social decision about who owns what.[186]

He goes on to elaborate on the differences between common law and civil law perspectives:

> The law of property in common law countries is organised around the main technical dichotomy between real property and personal property. The division originates the development of different remedies to assist in the protection of two different kinds of property.[187]

According to civil law, the fundamental distinction is between two types of action, real action protection and personal action protection. Civil law focuses on the connection with a physical thing that is the object of property right. The common law, on the other hand, focuses not on one thing itself, but rather on utilities that can be captured from it.[188]

The UK statutes consider IP as a form of personal property:

> Even though intellectual property may be intangible, once in existence they have much in common with rights associated with real property.[189]

Ghidini emphasises the exclusive protection that enables the industrial and commercial exploitation of intellectual property assets.[190]

In Jordan, in general terms, property is based on personal ownership, possession and desert. This brings it, on the basic level, closer to the principles of Lockean theory on property. *The Majallah* defined property in Art 124 as follows: "property is what a human being owns, whether it is a service, items tangible or intangible" (*The Majallah 1869-1876 only entered into force concerning Jordan in 1900).*[191] Art 1018

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[186] Mattei U, '*Basic Principles Of Property Law: A Comparative Legal and Economic Introduction'* (London, Greenwood Press, 2000) 3

[187] Mattei U; "*Basic Principles Of Property Law: A Comparative Legal and Economic Introduction"* (London Greenwood Press, 2000) 8 Posner R Economic Analysis of Law *in* Ackerman. B A(ed.); '*Economic Foundations of Property Law'(*Canada, Little, Brown & Company, 1975) 12-13

[188] Mattei U; "*Basic Principles Of Property Law: A Comparative Legal and Economic Introduction"* (London Greenwood Press, 2000) P.9. Also in the same meaning Posner R; "*Economic Analysis of Law" in* Ackerman. B A*; "Economic Foundations of Property Law"* (Canada Little, Brown & Company,, 1975). Pp.12-13

[189] Davis. J; "*Intellectual Property Law"* (Oxford, Oxford University Press,3rd edition, 2008). P.2

[190] Ghidini G; "*Intellectual Property and Competition Law"* (Chelteman Edward Elgar Publishing Limited, 2006). Pp.1-2

[191]It has to be mentioned that the l Article before last 1448 of the Jordanian Civil Act 1976 states to delete the provisions of Al Majallah that contradict with the provisions of this Act. It has to be

of the Civil Jordanian Act 1976 states, "Property right is the owner's ability to use an entity that belongs to him in an absolute manner. This includes the usage of its outcomes, fruits, products and gains as long as those actions are legitimate and according to law".[192] However, even though the definitions exemplify the personality theory in its extreme, there are exemptions related to public facilities and public interest. It can be seen that what integrates these definitions is a number of joint criteria. Ownership has to be approved by the legislator/law in order to be recognised as property; that is, it has to have a legitimate basis. Despite the various differences in terminology, the definitions identify ownership as a relationship approved by the legislator between the human being and the property assets.

3.4.1. The main theories of IPRs

The justification for IPRs can be either utilitarian considerations/theories,[193] which consider the public interest as their main goal, or philosophical and moral theories that centre on the individual.[194] It could be said that the TRIPs Agreement has aspects of both.[195] The provisions of TRIPs Art 7 aimed to balance rights and obligations to the mutual advantage of both producers and users.

Thus creators are rewarded with sufficient compensation and business interests protected, whilst maintaining the balance with the public needs at large to access culture as stated in the provisions of the Agreement [the preamble, Art 7, 13, 30 and 66]. In a manner, these (promotion of business while maintaining public needs) are under the interpretation of Art 7 TRIPs[196] and even though Gervais in *TRIPS*

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mentioned that the basis of the Civil Act is based on The Majallah. It has to be mentioned that the Civil Act interpretation includes the provisions of The Majallah.

[192] An Author's translation of the original Arabic text. Also As seen in Abu-Furha M; "*Property in Islam"* cited by the author at: < www.kantakji.com/fiqh/Files/Economics/204.doc > accessed 14/04/2012. Also in the same meaning Al-Khyaat, A *'Maqased Al-Sahria' wa Isoal Al-Fiqeh'* or *The Proposes of Sahria' and Origins of Fiqeh'* (Amman, Jordanian Islamic Bank), p.50 [Arabic: An author's translation]

[193] TRIPs Agreement preamble states such principle in para 5 *"Recognising also the special needs of the least-developed country Members…"* also Art 7 of the same agreement

[194] Fischman A O, Human Rights and Copyright: The Introduction Of Natural Law Considerations Into American Copyright Law Fordham Intell Prop Media & Ent L. J Vol. 14, 497. Pp.502-503.

[195] It mentioned in the provisions of Art 7 TRIPs or in the draft issued on Dec. 20th 1991 the "DUNKL DRAFT" Doc. MTN.TNC/W/FA Art 7 of the draft which adopts the terms and language of Art 7 TRIPs. The agreement has as well the interests of private parties and right-holders as the centre-point of its provisions. Yusuf A. A., TRIPS: Background, Principles and General Provisions *in* Correa. C. M and Yusuf A. A (eds.) in *'Intellectual Property and International Trade: The TRIPS Agreement'* (The Netherlands, Kluwer, 2nd ed., 2008). Pp. 5-10.

[196] Gervais D, '*TRIPS Agreement: Drafting History And Analysis'* (The Netherlands, Sweet & Maxwell, 3rd ed., 2008). Pp. 202-207.

Agreement: Drafting History And Analysis did not express or explicitly adopt a conceptual meaning of Art 7 he did indicate several implications that identified the objection of TRIPs via the context of Art 7 and the preamble of TRIPs. These provisions included the Doha Ministerial Conference that adopted the Art 7 reference of social indication in the balancing of public needs and the rights of IP right-holders.[197]

The basic concept of individual-based theories is that human beings have fundamental needs and interests, which should not be undermined in favour of public interests. The connection between ownership/property and the outcome/fruit of creation relates to either labour theory or personality theory.[198]

The labour theory is based upon the natural control a person has over his/her body and hence also over the fruits or outcome of their labour. The concept of the product of a person's labour is most commonly based on the writings of John Locke.[199] Locke states:

> This nobody has any right to but himself. The "labour" of his body and the "work" of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed *his labour with it, and joined to it something that is his own, and thereby* makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this "labour" being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.*[200]*

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[197] Doha Ministerial Conference section B 2001

[198] Becker C L Deserving to Own Intellectual Property [1992-1993] 68 Chi.-Kent L Rev. 609-630. P.610. Also Fischman A O Human Rights and Copyright: The Introduction Of Natural Law Considerations Into American Copyright Law Fordham Intell Prop Media & Ent L. J Vol. 14, 497 Pp.502-504.

[199] Cairns H, *"Legal Philosophy From Plato To Heggel'* (John Hopkins Univ. Press, 1949) Pp.35-36. Also Fischman A O, Human Rights and Copyright: The Introduction Of Natural Law Considerations Into American Copyright LawFordham Intell Prop Media & Ent L. J Vol. 14, 497-565. Pp

[200] Locke J, '*Two Treaties On Government'* BOOK II: An Essay Concerning the True Original, Extent and End of Civil Government [The "Second Essay"], CHAPTER 5 On Property (London, Routledge' 1884) last cited at:< http://www.lonang.com/exlibris/locke/ > accessed on 05/03/2012

How does this relate to a common understanding of utilitarian theories on the overall good of society? It provides the labourer with ownership over what has been the product of his labour, yet it is not unconditional; the exemptions relate to the general good of others.

The personality theory concentrates on the natural justification of ownership of assets.[201] Hegel's writings influenced the basis of this theory and its connecting of property to inner will and ownership, which are essential to realise the autonomy of freedom and confidence.[202] Personality theory has been urged as the more suitable theoretical justification for intellectual property[203] yet it still does not provide an overall justification.

Yet both theories also provide an understanding of the economic aspects of intellectual property and the monopoly provided to the owner/creator or right holder of the IP assets, whilst not providing an explanation of the full exemptions to the rights of the owner.

Therefore, it could be said that a combined understanding of both public interest theories and individual based theories could create a more comprehensive justification of intellectual property rights. This concept relates to Fisher's paper *Theories of intellectual property*, in which he argues that four theoretical approaches could be the background for IP justification.[204] The first of the four is based on a utilitarian guideline that lawmakers apply to property rights to maximise social welfare aspects. The second argues that a person who labours upon resources that are either un-owned or "held in common" has a natural property right to the fruits of his or her efforts and that the state has a duty to respect and enforce that natural right. This approach is based on the writings of Locke. The content of the third approach is derived loosely from Kant and Hegel and is based on private property's importance in satisfying some crucial human needs. The final approach is rooted in the proposition that property rights in general and intellectual-property rights in particular can and should be

[201] L C Becker, Deserving to Own Intellectual Property (1993) 68 Chi.-Kent L. Rev. 609 . Pp.629-630.
[202] LC Becker '*Property Rights: Philosophic Foundations'* (London, Routledge, 1977).Pp.29-30
[203] H Cairns, 'Legal *Philosophy from Plato to Hegal'* (Baltimore, John Hopkins Press, 1949) Pp522-523. In the same meaning Fisher W; *"Theories of Intellectual Property" in New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) also cited at: <www.cyber.law.harvard.edu/people/tfisher/iptheory.pdf > p.4 accessed on 12/03/2012
[204] W Fisher Theories of intellectual property p.4 accessed at: <www.cyber.law.harvard.edu/people/tfisher/iptheory.pdf> on 12 March 2013

shaped so as to help foster the achievement of a just and attractive culture. He admits that each has shortcomings.[205]

Thus intellectual property's connection with natural law, economic theory of trade and trade law helps to elucidate its relationship with human rights in general and freedom of expression in particular.[206] Intellectual property (copyright) could exist alongside human rights, despite co-existing conflicts in matters of invasion of privacy and freedom of expression as the balance between conflicting interests is managed; as in allowing legitimate access, without undermining the right-holders ownership of their creations has a solid justification in the human rights system. This results in human rights inspired limitations leading to a balance between dignified authors' economic exploitation of their creations and reasonable exceptions to other rights granted to fair users/third parties.

However such a relationship between IP and owners/right-holders on one side and other human rights in general and between Copyright and Freedom of Expression should be based on legitimate standpoints of the parties concerned. Valle' comments on the tension between copyright as a force for freedom of expression (FE) through controlled support of the infrastructure and the possibility of excessive control. The legitimacy of the different practices' standpoints can be expressed in appropriate rights and limitations. He continues that there is no immediate conflict between copyright and freedom of expression; it depends, as he proclaims, on the recipe writer (legislator) and whether the cooks (judges) use it properly or not. Valle' states that even though there might be tension between Freedom of Expression and copyright the tension is not essential, and it has been exaggerated. He elaborates by mentioning that copyright is not immune from freedom of expression and the latter possesses higher value than copyright yet it is not however an absolute value. The required balance between Freedom of Expression and copyright could be arranged in a manner that takes into account the application of the recipe by the judge but eventually the diners (society) will have their say as well and modifications to certain elements of the

[205] *Ibid*; Pp.2-5

[206] Gervais D Intellectual Property and Human Rights: Learning to Live Together in P Torremans. (ed.), *'Intellectual Property And Human Rights Enhanced Edition of Copyright and Human* Rights' (The Hague, Kluwer, 2008) Pp. 3-7

finished recipe will be applied.[207] In principle, I would tend to agree with Valle on the role of both judiciary and legislation as an essential starting-point for an analysis of the relationship between Freedom of Expression and copyright. Yet the concept of Freedom of Expression having a higher standing than copyright in the balance of tension in general terms might owe its alluring image to the theoretical analysis of the relationship between Freedom of Expression and copyright, as against the legal standpoint of various intellectual property instruments, and even human rights instruments. That reduces freedom of expression versus copyright/IP protection as a general rule in the overall perception of the relationship and has created a collision image of the relationship due to the various judicial applications of the Freedom of Expression copyright link according to the facts and legal interpretations in individual cases.[208] It is the fact that from a functional conceptional standpoint rules of IP/copyright protection are of a general concept ruling Freedom of Expression and IP relationship.

The nature of copyright and Freedom of Expression and their possible interaction has been examined, in connection with the provisions of s. 30(1/2) of the Copyright Act. In this act the court cited the Vice-Chancellor of the Chancery Court on the issues of restrictions on copyright and its relation to public interest and Art 10 of the Convention.[209]

The court stated that:

> The Vice-Chancellor drew attention to the fact that it is possible to identify circumstances in which copying material does not infringe copyright.
>
> He concluded that each of these reflected circumstances in which freedom of expression was recognised and confirmed. In effect they were circumstances where freedom of expression trumped copyright protection. Two of these call for particular consideration in the circumstances of this case. The first is the defence of fair dealing that is provided by section 30 of the Copyright Act[210]

[207]R.C. Valle'; Copyright: "Engine" Or "Obstacle" Of Free Speech*?* in Proceedings of the ALAI Study days Copyright and Freedom of Expression, 19-20 June 2006 Barcelona; (Barcelona Huygens Editorial, ,2008). Pp.230-238.
[208] As in *Ashdown v. Telegraph Group Ltd* [2002]
[209]Copyright, Patent and Design Act 1988 (c.48) s 30 *Ashdown v. Telegraph Group Ltd* [2002] AC RPC 5 at [32] [35]
[210]*Ashdown v. Telegraph Group Ltd* [2001] Ch WL at.[15] *Ashdown v. Telegraph Group Ltd* [2002] AC RPC 5 at [32]

Even so, the proclaimed legitimacy may take an approach that leads to an extension of the term of protection ahead of freedom of expression.[211] It is supported that freedom of expression is more or less linked with the exemptions of copyright exclusive rights granted to the IP right-holders. This connection can be seen in the link between *fair dealing* and Freedom of Expression with public interest; the judicial approach adopted the point of view that Freedom of Expression could prevail over copyright exclusivity if the public interest was in the exposure of the information that is under copyright protection. The court analysed the elements of copyright exclusive rights of IP holders, Art 10 Freedom of Expression and the public interest concept that embodies the limitation of the Freedom of Expression system.[212]

This shows the court's recognition of the link between copyright and its limitations in face human rights elements established in the Human Rights Act 1998, the ECHR 1950 and Freedom of Expression. It studied the exemptions on copyright as mentioned in section 30, such as criticism, review, and reporting. However, even though the court identified the legitimate usage of non- infringing free press.

3.4.2. Access to Science and the Arts and Information

The "right to know/access to information" is considered an essential part of human rights. This was noted in the various provisions of the related international instruments, such as UDHR 1948 Art 27, ECHR 1950 Art 10 and ICESCR 1966 Art 15 which stated in their first subsection the right to enjoy and receive the benefits and fruits of knowledge.[213]

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[211]U Suthersanen.; *Copyright As An Engine Of Free Expression: An English Perspective* in Proceedings of the ALAI Study days Copyright and Freedom of Expression, 19-20 June 2006 Barcelona; (Huygens Editorial, Barcelona, 2008). Pp.167-168.

[212] *Ashdown v Telegraph Group Ltd* [2002] AC RPC 5, at [1] [2] and at [24] [27

[213] Griffiths J, Recapturing Liberated Information: The Relationship Between the United Kingdom's Freedom of Information Act 2000 and Private Law Restraints on Disclosure in P Torremans (ed.), '*Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights'*, (The Hague Kluwer Law International, *2008*), P. 399 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 27 European Convention on Human Rights (ECHR) art10 International Covenant on Economic Social and Cultural Rights 1966 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICESCR) art 15

The right of access to the results of scientific and artistic creation is served by what I call the public interest aspect of intellectual property. That is connected to its role as an incentive for creation and innovation, giving third parties the ability to access that knowledge. Dissemination generates knowledge and IP may contribute to the public good, and towards the ability to use the outcomes or results of different types of IP right-holders interest and other incentives.

3.4.3. A balance struck between the information rights of IP right-holders and third parties

Griffiths highlights[214] the relationship between statutory rights leading to access to information under the UK Freedom Act and the privacy law restraints on such disclosure. It shows the court's attempt to balance these statutory provisions. Where copyright and other IP rights are concerned it is advisable to locate the balance within IP laws. There is to the careful balance created between the latter public interest based theory and the individualist economic based theory, either the personality or the labour version. The narrow scope given to copyright in "informational" works such as maps or supposedly historical works exemplifies how the general knowledge aspect limit the copyright protection safeguards in favour of rights to gain access to information.

The tension between public interest in authentic information, the privacy rights of subjects and exclusive copyright interests is also evident in the sphere of biographies. In such cases the information rights predominant and the power of the concept of substantiality is demonstrated; the courts ability to overthrow exclusive rights in order to accommodate the public interest in access to and use of information has been undermined. These cases can be linked especially to authentic theories but it could also be said that authors' personal contribution is less obvious in informational works (as in Locke's theory).

Not surprisingly it could be noted that both Articles are connected to the basic human rights and IP theories. Art 27 has been acknowledged in the European Convention and the Covenant regarding economic, social and cultural rights.

[214] *Ibid*. Griffiths. J, "Recapturing Liberated Information: The Relationship Between the United Kingdom's Freedom of Information Act 2000 and Private Law Restraints on Disclosure pp. 399-400

3.4.4. The Reverse of Fortunes (Copyright Limitations) Collision/Co-existence

This can be seen in situations related to the access of information from historical and geographical sources.[215] It is the application of copyright in a manner where the public interest of others in information based on copyright-protected work has predominated over the exclusive rights of the IP/copyright-holder. The concepts of Collision and Co-existence grown out of the relationship between copyright-holders and third parties who benefit from copyright limitations and exemptions. The rights of the copyright-holder have been reduced to an exception in favour of the original limitations which could a clear example of co-existence approach. Works that are based on factual and actual works have a significant criterion approach towards copyright and the advancement of the publications based on true facts, be they historical, geographical[216] or biographical. It is the related to the crux of authentic informational copyright-protected works. In works of a biographical nature the main factors are the privacy rights of the subjects and the protection of reputation (the dignity factor) of the subject of the biography.[217] However, the concept of copyright protected works that are based on historical is slightly different with regard to others' right/ability to access such protected material. This concerns the nature of the protected work and the advancement of the literature based on actual authentic historic and geographic works demanding modification of the copyright exclusivity rather than limitations on copyright in general. The limitations turned into the overall general rule of the right of access to information in works based on geography and history, while the range of copyright protection granted to the original owner was reduced. The judiciary direction has been significant, most memorably in *Baigent v Random House Group Ltd.*[218] The High Court decided that the author of the *Da Vinci Code,* a fictional work, and the book's publisher had not infringed the non-fictional work of the complainants- the authors entitled *The Holy Blood and the Holy Grail* (hereinafter *HBHG*). The court decided that despite the recognition of the author of the *Da Vinci Code* that he had referred to *HBHG* at some time during writing his novel and the admission of his wife that she had studied the complainants' work,

[215] *Geographia Limited v Penguin Books Limited and Others* [1985] F.S.R. 206 (Ch), *Baigent v Random House Group Ltd* [2007] EWCA Civ 247
[216] *Geographia Limited v Penguin Books Limited and Others* [1985] F.S.R. 206 (Ch)
[217] J Griffiths, Lives and works-biography and the law of copyright [2000] 20 Legal Stud Pp. 497- 504
[218] *Baigent v Random House Group Ltd* [2006] EWHC 719 (Ch) *Baigent v Random House Group Ltd* [2007] EWCA Civ 247

nevertheless this did not constitute immediate infringement of copyright. The judge held that none of the central themes of *HBHG* had been copied in plot of *The Da Vinci Code* and the suspect material no more than "an expression of a number of facts and ideas at a very general level". The overall decision of the court was that the infringement action should be dismissed because the claimants had not established that the *Da Vinci Code* had infringed literary copyright.[219]

The Court of Appeal stated that it "would not normally regard a list of individual assertions of actual or virtual history contained in *HBHG* (such as that the Roman Empire under Constantine adopted Pauline Christianity as the officially sanctioned religion or as to the creation of the Knights Templar as an arm of the Priory of Sion) as themes or as theme points". The court declared that the claimants had not provided enough evidence of substantial copying of the original work.[220] Such application on copyright protection concerning geographic works/maps can arise. In other words, whether or not there is an infringement of copyright depends on the same requirements held in respect of historic works, which is the substantiality of the usage of the original copyrighted work. Similarity to previous works/maps conducted by the same cartographer with a different employer is not a sign of infringement of copyright or even intended to be so.[221] In this regard the court relied on an expert report to decide whether the third defendant infringed a copyright of the plaintiff, his former employer. The report stated:

> An individual cartographer working on his own with very limited resources to call on will draw heavily on his experience and individual skills if he attempts to compile a new map. If the end result is in many results similar to previous maps he has produced, this could be regarded as a plus factor and not one which he should take deliberate steps to distort or in some way change to ensure that he is not infringing copyright.[222]

The cartographer may use another map or maps but he will definitely use other non-map sources such as census reports, economic reports, transport development, political and administrative boundary changes, and place name lists. Accordingly, the

[219] *Baigent v Random House Group Ltd* [2006] EWHC 719 (Ch) *para 332-338*
[220] *Baigent v Random House Group Ltd* [2007] EWCA Civ 247 *para 138*
[221] *Geographia Limited v Penguin Books Limited and Others* [1985] F.S.R. 206 (Ch)
[222] *Ibid*

resulting possible similarities either in colour or with other elements in previous work he has done during his tenure of employment with the claimant do not infringe any copyright.

3.5. Freedom of Expression Art 10 ECHR 1950 and Provisions of the ICESCR 1966 Collision/Convergence Approaches

As noted previously the UDHR is applicable in Jordan but not in terms that refer to the right of freedom of expression, even though Art 27 appears to balance the interests of creators and users. Art 10 ECHR sets forward freedom of expression and its limits in clear terms, but applies only indirectly to Jordan. The preamble of the Jordanian constitution mentions Freedom of Expression due to the relative closeness in language and jurisprudence on the interpretation and application of Art 10, as it is binding to the United Kingdom as well and would be of interest to Jordan. Art 15 ICSECR elaborates on Art 27 UDHR and is directly effective in Jordan.

The relationship between intellectual property and freedom of expression has been explored above more fully and explicitly in judicial decisions and commentary on freedom of expression. This literature establishes the emergence of what I have called the "***collision***" and "***convergence***" approaches. The principles of freedom of expression and its connection to IP copyright could mainly be demonstrated in the provisions of the human rights international instruments as could be noted in the provisions of Art 27 UDHR, Art 10 ECHR and Art 15 ICESCR respectively.

3.5.1. The Interplay between Freedom of Expression, Fair dealings and A Healthy Copyright Industry- Collision/Convergence in Human Rights Context

There are two main approaches to the relationship between copyright and human rights, under consideration, Collision and Convergence. The nature of the Convergence approach is reflected in the phrase "*fair balance*", when it comes to the interests and rights of copyright holders against those of third parties.[223]

[223]J Griffiths, Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law [2013] EL Rev 65,

Those who have supported the Collision model regard the copyright system as being in fundamental conflict with human rights.[224] This approach is based upon cultural, economic and social aspects, and maintains that intellectual property as a whole regime undermines human rights as currently defined.[225]

However, the latter approach dealt with the whole issue from a totally different perspective. It depends upon what those who support this approach see as taking an entirely larger overall understanding of the whole picture in which both intellectual property and human rights deal with the same fundamental equilibrium.[226]

Art 27(2) UDHR 1948[227] is particularly important for the convergence school of thought. Indeed the legal background of Intellectual Property Rights and its origins first came about as a result of basic human rights and public interest in the French revolution 1789 Declaration of the Rights of Man and of the Citizen.[228]

The supporters of this approach state that mentioning intellectual property (represented by copyright) in the declaration meant that copyright is part of the human rights regime.[229] However the convergence supporters gave less weight to the first subsection of the same article, which gives everyone the right to enjoy and share the profits and advancements of arts and the scientific results of such creations. The text of Art 27(1) or (2) does not explicitly favour any part of the article over the others but tries to give equal weight towards both parts of the article. It endorses the role of intellectual property in society and '*"Everyone's*" right to enjoy the benefits of *"scientific advancement"'*. The use of such terminology, even though a bit general,

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[224]P Torremans, Copyright (and Other Intellectual Property Rights) as a Human Right, in P Torremans (ed.), *'Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights'*, (The Hague, Kluwer, 2008), p.196. The Bill of Rights 1688 c.2.1 and the Magna Carta prior to it has laid the legal bases for basic rights. At: <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1518621 > accessed on 20/05/10.

[225] Anderson R. The Draft IP Enforcement Directive- A Threat to Competition and to Liberty p.2 at: <http://www.cl.cam.ac.uk/> accessed on 28/10/2007

[226] P Torremans, Copyright (and Other Intellectual Property Rights) as a Human Right, in P Torremans. (ed.), *'Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights'*, (The Hague, Kluwer, 2008), Pp. 196-197.

[227]Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art (27) "*(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"* Berne Convention Art 10

[228]United Nations Committee on Economic, Social And Cultural Rights "*Protection of Intellectual Property under the TRIPs Agreement*" E/C.12/2000/18, p.2, 29 November 2000, (Other Treaty-Related Document) found at: < http://www.unchr.ch/tbs/doc.nsf > accessed at 09/05/2008.

[229] Torremans. P, "*Copyright (and Other Intellectual Property Rights)* Pp198 -201. As referred to previously in *n* (212)

provides a sense of balance in the manner in which both sides are protected. In this context it could be also said that Art 27 of UDHR with its general terms and both subsections 1 and 2 are a basic balanced equilibrium between the rights of IP holders/owners and third parties. So why give IP right-owners metaphorically speaking, the best seat in the theater? This may reflect the fact that exceptions and limitations to copyright are often mere freedoms from infringement rather than rights. However, freedom of expression prevails mainly in the public domain over unprotected works, arts, copyright protected works, and insubstantial protected works, where freedom of expression may be seen as rights and has the "best seat".[230] This is confirmed in the first amendment of the American Constitution[231], which reads in part "…Congress shall make no law… prohibiting the free exercise or abridging the freedom of speech or press…" The phrase "abridging the freedom of speech" and the affirmative language used by the drafters gives a sound and clear indication to Congress not to set laws that have a negative impact on freedom of speech as a right. Yet a different section of the constitution urges congress to provide IPR protection on the basis of public interest, in order "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries". Here the public interest is used as the cornerstone of protection for intellectual property. It is submitted that the balance seen in the US Constitution, in Art 27 UDHR and Art 15 ICESCR, may be represented in the metaphor employed earlier to indicate "convenience of balance". In the public domain, freedom of expression is a dominant principle. The enrichment of the public domain by the creation of works serves that principle. The dominance of the exclusive rights of owners of IP in a non-public domain provides the owners generally with the 'best seat' and the exceptions and limitations, including freedom of expression can be implemented or occasionally applied. Art 15 ICESCR and Art 19 ICCPR exemplify such a balance. The balance is seen in the manner in which in these articles there is a

[230] This could be based on the concept of convergence previously mentioned in the beginning of this Chapter.

[231]Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) Art 27 Also see United Nations Committee on Economic, Social and Cultural Rights "*Protection of Intellectual Property under the TRIPs Agreement*" E/C.12/2000/18, p.2, 29 November 2000, (Other Treaty- Related Document) cited at: <http://www.unchr.ch/tbs/doc.nsf > accessed at 19/06/2010. Other previous and later on legislations supported the idea intellectual property protection; such as the United States Constitution. Angelopoulos, C.J, Freedom of expression and copyright: the double balancing act [2008] IPQ p.1. Also in the same meaning see Loughlan, P; Looking at the Matrix: Intellectual Property and Expressive Freedom [2002] EIPR, Pp.30-39, p.31.

compromise between both ends of the equilibrium: Art 15 is a supplement of Art 27, providing more balance between freedom of expression and the exclusive rights of copyright owners. The other part of the same Article 27 provides the protection required for the authors and grants them the right to gain the benefits of their creations.[232] Also the same Article specified that member states should encourage the right of everyone to share and enjoy the benefits of "scientific progress and its applications".[233]

Those who supported this approach could have mentioned Art 15 of ICESCR in favour of their stance, which states in subsection four that member states should *recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.*[234]

In regard to the previously mentioned enquiries, both sets of rights of IP right-holders, or third parties/others are administrated and practised according to the legal lawful norms of society and related laws.[235]

Torremans also acknowledges the importance of Art 15 of ICESCR and that its role is vital in order to have a more comprehensive understanding of Article (27) of the UDHR.[236] Chapman states that, "*The human rights framework in which copyright is placed does however put in place a number of imperative guidelines".*[237] According to those who support the concept of the togetherness of the intellectual property system and the human rights regime,[238] which is based on the overall understanding of the TRIPs agreement principles laid down in its provisions,[239] it could be quite

[232] Art 15(1) (c) ICESCR. *"to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"*
[233]International Covenant on Economic Social Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ICESCR art 15/1/b. Also see A. R Chapman , A Human Rights Perspective On Intellectual Property, Scientific
Progress, And Access To The Benefits Of Science, PP. 1-5. As cited previously At: < Gowers Review Of Intellectual Property At: <http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf>
[234] International Covenant on Economic Social and Cultural Rights 1966 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICESCR) art 15(4).
[235]V. Nabhan. The Welcoming Speech at the Copyright and Freedom of Expression; the Proceedings of the ALAI Study Days from 19-20 June 2006 Barcelona. P. 36 published as "Copyright and Freedom of Expression" (Barcelona ALAI, 2008)
[236] P Torremans, "*Copyright (and Other Intellectual Property Rights)* Pp. 201-202 *n* (212)
[237]A. R Chapman., A Human Rights Perspective On Intellectual Property, Scientific
Progress, And Access To The Benefits Of Science, Pp. 1-5. As cited previously also see P Torremans, Copyright (and Other Intellectual Property Rights) Pp.202-203
[238] *Ibid*
[239] Art 7 from TRIPs Agreement (1994)

useful to shed some light upon the theoretical legal background for intellectual property's basis of protection.[240] This concept based on Art 27(1) (2) sheds light upon the differences between both intellectual property and various sectors of human rights.[241]

Yet it draws attention to the link between IP right-holders right to benefit from the outcomes of their assets and to recognise the interests of the public/third parties to access knowledge and information. The text of Art 7 TRIPs is an embodiment of the Convergence concept.

Even though the main objectives of TRIPs lie in trade and the economic growth of member states via the role of IPRs protection, yet such goals should be achieved in a manner that ensures the willingness to recognise member countries' rights to essential public interests, and the needs of developing and the least developed countries to share in the benefits of international trade and the basic needs for their economic development.[242]

3.5.2. Freedom of Expression and Intellectual Property, boundaries between the private rights of the IP right-holders and public/third parties free enjoyment of information

Copyright as a crucial element of intellectual property is closely related to freedom of speech/freedom of expression as a major issue of human rights or civil liberties. As discussed above the legal status given to copyright in the human rights system lies in both international human rights documents drafted under the supervision of the United Nations, the UDHR and the ICESCR the UN Human Rights Bill.[243] It is

[240] O. Afori, Human Rights And Copyright: The Introduction OF Natural Law Consideration Into American Copyright Law, [2004] XIV; FORD. INTE. PROP, MEDIA & ENTER LAW JO, 2004, p.503.
[241] As in *n* (186)
[242] United Nations Committee on Economic, Social And Cultural Rights "*Protection of Intellectual Property under the TRIPs Agreement*" E/C.12/2000/18, pp.2-3, 29 November 2000, (Other Treaty-Related Document) cited at: < http://www.unchr.ch/tbs/doc.nsf > accessed at 09/05/2008
[243] Art 27(2) of the UDHR, and Art 15(1/c) of the ICESCR. Also see United Nations Committee on Economic, Social And Cultural Rights "*Protection of Intellectual Property under the TRIPs Agreement*" E/C.12/2000/18, p.2, 29 November 2000, (Other Treaty- Related Document) cited at <http://www.unchr.ch/tbs/doc.nsf at 09/05/2008>. also see, Y. Gendreu Copyright and Freedom of

submitted by scholars and in other places and sections in this thesis that the type and nature of this relationship and common background creates the link between various types of human rights in general.

However, it is not a matter of contradicting aspects within Articles 15 ICESCR or 27 UDHR and 10 ECHR between the authors/owners of intellectual property and freedom of expression for others/the public. It is more related to the balance between the general rule granted to the IP right-holders and the exceptions to the exclusivity of the owners' rights represented in *"fair dealing"*. The role of originality and the nature of the work in other boundaries/territories of exclusive rights has been discussed above. Freedom of speech plays a significant role in the creation and application of the exceptions and limitations (permitted in CDPA). This helps resolve the paradox identified by Hettinger; due to its economic and social incentives it provides the creators the social freedom of enjoyment and expression of the resulting outcomes. Yet the public are restrained from the free usage of the IP out-comes.[244] The importance of freedom of expression lies in the role it has as a basic safeguard to the normal person's right to impart and collect or receive information.[245] Copyright may have a significant role in promoting the "self-development of authors, but it restricts meaningful public access to author's expression."[246]

Yet the principle of fair balance as mentioned in regard copyright and freedom of expression is based on the restrictions and rules of the related laws and Acts. This relationship has been based on facts of law as noted when the ECtHR confirmed that the exercise of Art 10 ECHR is subject to duties and responsibilities and may be also

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Expression in Canada, in P Torremans (ed.) '*Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights'* (The Hague, Kluwer, 2008) Pp. 219-221.

[244] E. C Hettinger, Justifying Intellectual Property [1989] Philosophy & Public Affairs, 18, Pp.31-32.

[245] Masiyakurima P The Free Speech Benefits of Fair Dealing Defences, in P. Torremans (ed.) in "*Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights",* , (The Hague, Kluwer , 2008), Pp.235-236

[246] *Ibid*, Pp.236-237, so in other words copyright is an incentive for author's to express their thoughts and ideas, but in the same time limits the public's freedom of expression. Therefore, the need is urgent to find a compromise between both the rights of the authors and the public as well. The ability to offer the public their right access information in a manner that takes into consideration the right-holders exclusive monopoly and protection for their intellectual property rights is essential.

The author [Masiyakurima.] in his latest version published in the enhanced edition, states almost the same argument in different words in the pages referred to earlier. But he goes on to express the importance of both copyright and its exception under study in his article [fair dealing] and their role in the creation socially useful expressions in the first part of his article found in "*Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights"* (Pp.237-244).

subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.[247]

3.5.3. The concept of fair dealing

UK law allows the use of substantial parts of copyright works for certain specific purposes, as long as the dealing is fair. It has been argued recently that the scope of fair dealing has been undermined for the sake of establishing stronger protection system for copyright-holders'.[248] Usually copyright protection overshadows and limits the area of free speech, and is in turn by the exceptions provided to the copyright legal system. Freedom of expression is narrowed in certain specific exceptions, such as that of *"**fair dealing**"*. The economic concept of this argument vividly examined intellectual property according to Hettinger's stand-point towards the paradoxical concept of IP protection. The legal concept of *"fair dealing"* has been limited to published works. The publisher as a right-holder of a published work is part of the balance between copyright and freedom of expression by withholding to academic, cultural and educational. A reasonable Freedom of expression is assured according to the main elements of *"**fair dealing**"*. Publishing industries are not affected aggressively or harmed from an economic perspective.

However the situation of unpublished works is different. Issues of copyright and freedom of expression entangle with privacy, access to information and the fair method of obtaining it. This distinction between published and unpublished works is reflected in Art 10(1) Berne:

> *It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by*

[247] Ashby Donald v France is not available in English yet it has been discussed at: http://ipkitten.blogspot.co.uk/2013/01/are-fashion-photographs-human-right.html last accessed on June 30, 2013

[248] Anderson. R, "*The Draft IP Enforcement Directive- A Threat to Competition and to Liberty*", p 2, cited at:< http://www.cl.cam.ac.uk/~rja14/draftdir.html > at 28/10/2007. Universities, libraries, the disabled and the press industry are the main groups that will be hit by any restrictions upon "*fair use*" and "*fair dealings*". Also Masiyakurima. P, *"The Free Speech Benefits of Fair Dealing Defences"*, in Torremans. P (ed.), in "*Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights",* (The Hague, Kluwer , 2008), p235

the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

Art 10(1) actually established a statutory mandatory permitted act, arguably creating a legitimate "user's right", but only under balanced circumstances of fair practice and appropriate consent. Prior to the implementation of the Info Soc directive 2001/29/EC, it was theoretically possible to have any kind of "*fair dealing"* with unpublished works, although in practice it was unlikely that dealing with an unpublished work would be fair. The concept was embodied in the *British Oxygen Co. Ltd,* the court declared that, "The publication of the letter by rival manufacturers, together with a covering letter of criticism, is not "fair dealing" due to which the plaintiff has been granted an injunction of the publication and reproduction of the letter. [249] This was such an important factor in the cases *Ashdown*[250] and *HRH Prince of Wales*[251] both exemplifying issues of freedom of expression and copyright in unpublished works according to s 30 CDPA fair *dealing* for the purposes mentioned.

This approach could be identified in Art 19 ICCPR which in paragraph (2) details the elements of freedom of expression, and is entitled "Freedom of Opinion, Expression and Information". This Article details these various aspects, and differs slightly from the articles mentioned above despite general resemblance. Its terminology resembles that of the provisions of Art 10(1) ECHR in each of their main titles and the entitlement of individuals involved.[252] The second sub-section of Art 19 as mentioned provides the right to freedom of expression in the same manner mentioned in other international human rights instruments, and the third sub-section states the various responsibilities and duties and limitations/restrictions mainly other people's reputations and public order.[253]

[249] *British Oxygen Co. Ltd v Liquid Air Ltd* [1925] Ch. 383
[250] *Ashdown v Telegraph Group* [2001] EWCA Civ 1142; [2002] R.P.C 5
[251] *Associated Newspapers Ltd v HRH the Prince of Wales* [2006] EWCA Civ 1776
[252] *European Convention on Human Rights, as amended (ECHR) Art 10* Also Nowak, M, *"U.N Covenant on Civil and Political Rights CCPR Commentary"* (Engel, Kehl, 2nd revised ed., 2005)
[253] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art (19)

3.6. Freedom of Expression and Copyright: A Different Approach towards Ashdown v Telegraph Group Ltd,[254] and HRH Prince of Wales v Associated Newspapers Ltd[255]

The criterion of fair dealing review how widely its applied on works which have been available to the public [as defined in s (30/A1)][256] is debatable.

3.6.1. Ashdown v. Telegraph Group Ltd

In Ashdown the documents are a "a secret record" of a meeting with the leader of the labour Party, then PM, which were "leaked" and quoted by the defendant's Sunday Telegraph newspaper (including one-fifth of the subject of the meeting being quoted voluntarily). These documents revealed that the prime minister had planned to work with the Liberal Democrats to form a coalition government in exchange for reduced opposition from the MP following the Liberal Democrats initial participation and limited inclusion of Labour members in the government. Mr. Ashdown sued for indirect breach of confidence and copyright infringement and obtained Summary judgment. The Telegraph group appealed on the basis of public interest needs, basically on the basis of fair dealing under s.30 CDPA 1988, and argued that freedom of expression prevails over Ashdown's rights. The court disagreed with the arguments of the defendant. These issues were handled vividly in *Ashdown v Telegraph Group Ltd,* and *HRH Prince of Wales v Associated Newspapers Ltd.* These cases, even though not involving a clear-cut right to freedom of expression and the banning of such a right in favour of the economic monopoly of the authors/right-holders, yet address both sides of the formula of co-existence of such rights.

The court took into consideration the method of obtaining the access to information which was used to gain such knowledge by the newspapers under inquiry. The judges were not against free press, but were tackling the unfair method of obtaining unauthorised copyright protected works. The judgments of the court not only aimed to protect copyright but to discourage illegal access to information by the accused parties.

[254] *Ashdown v Telegraph Group* [2001] EWCA Civ 1142; [2002] R.P.C 5
[255] *Associated Newspapers Ltd v HRH the Prince of Wales* [2006] EWCA Civ
[256] Copyright, Design and Patents Act 1988 (s.30 c.48)

However, the court held that there were cases where the defence could have some merit and public interest would allow freedom of expression to prevail over copyright under s. 171 (3) (which covers a different infringement). The court also confirmed that "criticism and/or review" in s.30 should be interpreted widely and that here the input was a public interest defense of the publication of the information part.

In "*Ashdown v Telegraph Group Ltd"*[257] and *"HRH Prince of Wales v Associated Newspapers Ltd*"[258], the newspapers championed a "*Freedom of expression and public interest"* standpoint within copyright law. The manner of gaining the information was not in my view dealt with in an appropriate manner. The text showed that a copy of "the record" had been obtained without proper authorisation from the author, yet the court created an in-depth discourse about freedom of expression and copyright.

Should information that has been accessed wrongfully be provided with legitimate protection of free speech/expression? The *Telegraph* was in a position similar to the receiver of stolen goods, who should not be allowed benefit from them.[259]

Here the article at "Le Canard Enchaine" – at the center of *Fressoz and Roire v France* – is essential. It resulted in the applicants being charged with theft and unlawful removal of documents or deeds.[260]

The investigative judge held that proceedings on these charges should be discontinued. However, the applicants were committed to the criminal court on the charge of handling confidential information, due to handling stolen photocopies of the tax slip. The Paris Criminal Court acquitted the applicants. The Court of Appeal reversed the verdict and fined the applicants. Both applicants appealed on points of law to the Court of Cassation, which dismissed their appeal.[261] It was found that their good faith had been called into question. Furthermore the information[262] was not available through other means and was considered confidential. In the court's view, a reasonable relationship of proportionality between the legitimate aim pursued by the

[257]*Ashdown v Telegraph Group* [2001] EWCA Civ 1142 [2002] R.P.C *5*
[258] *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776
[259] Section 22 Theft Act 1968 c 60
[260] *Fressoz and Roire v France* (2001) 31 EHRR 2
[261] *Ibid Fressoz and Roire v France* at [18] and [20]
[262]*Fressoz and Roire v France* (2001) 31 EHRR2, *also HRH Prince of Wales v. Associated Newspapers Ltd* [2006] EWCA Civ 1776

journalists' conviction and the means deployed to achieve that aim, given the interest a democratic society has in ensuring and preserving freedom of the press must be applied by journalists during conducting their duties.[263] Therefore, there had been a breach of Art 10 ECHR and furthermore there was a breach of Art 6(2) (presumption of innocence, at [60].

3.6.2. HRH Prince of Wales v. Associated Newspapers Ltd

In *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, the evidence showed that an aide in the Prince of Wales's private office had supplied typescripts of travel diaries in breach of clear contractual obligations of confidence. The Court of Appeal upheld the Summary judgment for breach of confidence and infringement of copyright, holding that public interest in disclosure of private information was not a valid defence.

The court should have analysed the wrongdoings in obtaining the information in a thorough manner and applied it in the final judgment, i.e. the ruling bench should have dismissed the claim for freedom of expression based on the dishonest manner in which the copyright protected material was gathered. Otherwise the judgment provides legality to illegally obtained information. Freedom of information and illegal access are incapable in saving time expenses and costs in regard to wrongdoings that may not be serious or of danger to individuals and public order.

However, if a more focused approach of the facts and methods applied by the accused parties gained the information in accordance to Art 10(2) in connection with the provisions of HRA 1998 in a copyright perspective. The court should have analysed the facts from a standpoint based on sub-paragraph (2) alone rather than going into lengthy analysis of Art 10(1) to eventually dismiss the applicability of the right to free speech by the accused in both cases.

It has been examined thoroughly within the copyright and freedom of expression legal concept in both verdicts. It placed an in depth discourse on the issue of the right to criticism of a copyright work by the free press. Yet the rulings declined to examine

[263] *Fressoz and Roire v France at [56]*

the illegitimate method/source of the so claimed freedom of expression defended by the accused parties.[264] Should the court in both cases have examined the concept of "*fair dealing"* and freedom of expression, while the information gathered by the media was originally unauthorised by the author and access to the information was illegal?[265]

The facts of each case show the amount of effort employed by the authors to protect the work and keep it behind closed doors. Such facts indicate the intentions of both the copyright-holders and the accused parties. The court provided in the course of the trials an incentive for illegitimate access of information by not handling the issue of misguided use of freedom of expression. The court could have provided a judicial approach towards illegitimate claims of freedom of expression and created a deterrent of copyright infringements.

3.7. Other Aspects of the Concept of Fair Dealing and Freedom of Expression

Fair dealing is a major exception in balancing freedom of expression and copyright in practice, as well as giving effect to the Berne Convention right of quotations. Even assuming the work to be published and believing the use is made and its acquisition legitimate, the manner of dealing or use must still be "*fair*". What does this mean, at least in the field of exceptions of copyright protection?[266] It should be said that there is no precise definition of the term "fairness", but its effect upon free speech or freedom of expression criterion has been greatly noticed. It could be defined by saying that what makes a certain dealing or action fair, or not, depends upon how much this use or action affects the right-holders' and the rights of third parties as well as the users.

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[264] *Ashdown v. Telegraph Group Ltd*, [2001] EWCA Civ 1142; [2002] R.P.C. 5 and *HRH Prince of Wales v. Associated Newspapers Ltd* [2006] EWCA Civ 1776

[265] *n* (185)

[266] J Griffiths "Not Such a 'Timid Thing': The UK's Integrity Right and Freedom of Expression" in J Griffiths and U Suthersanen (eds.) "Copyright and Free Speech" (Oxford, OUP, 2005) Pp. 211-213
Berne Convention for the Protection of Literary and Artistic Works Art 10 (1) WIPO Database of Intellectual Property Legislative Text

The fair dealing exceptions are not the same as the US "fair use" doctrine, which is more specific and more limited.[267] However, the US doctrine can help the fair dealing defences. This can be seen in the work of Masiyakurima, a source which may be paraphrased as follows:

1. The manner of obtaining the work.

2. The amount and quality of work taken by the accused.

3. Commercial Fair Competition (or in other words, whether or not the accused made any commercial profit and the effects on the IPRs holders profit-making commercially).

4. The Motives of the dealings[268]

The first dealt with the process of obtaining the work as previously mentioned. The second reflects the Berne requirements that the extent of quotation should not exceed the amount/quantity and quality justified by the purpose. As seen in *Lion Laboratories* (reproduction of the entire report could be justified), and *Geographia v. Penguin*. Although repeated insubstantial reproduction of a work protected by copyright does not seem to amount to infringement of copyright (Laddie J), it may be that a course of dealing may be unfair, even if isolated instances would be correct by a general understanding of fair dealing, such as photocopying an entire book one chapter at a time. Could such incidents be dealt with in the same manner by referring to the concept of substantial amount/quality of the quotation?

Finally the intertwined connection between quality and the nature of the work used as in [Penguin, Da Vinci?] is essential in the determination of whether or not there has been an infringement and the applicability of this requirement.

The third condition under examination is the relationship between commercial use and its fairness, which reflects Berne's "fair practice" requirement in Art 10 (1). The second and third elements of the three-step test in Berne Art 10 (2) in addition to Art (13) may also be compared with Article IV *bis* and Art V of UCC, which connects

[267]P. Masiyakurima, *"The Free Speech Benefits of Fair Dealing Defences"*, *Ibid* Pp.238-39
[268]H. Jehoram. ; "*Copyright and freedom of expression, abuse of rights and standard chicanery: American and Dutch approaches"* [2004] EIPR 26(7). In this meaning P. Masiyakurima, "The Free Speech Benefits of Fair Dealing Defences", *Ibid*

objectives of fair standards of the dealing subjective fairness but also perhaps that relationship with freedom of expression is at its strongest "*Ashdown, Yelland*" often the public interest is involved as a motive as seen in *Ashdown, Yellend* and *Campbell*. This is clearly related to another element of CDPA's fair dealing purposes, of sufficient acknowledgement, which is required for but not available, can be relevant to the user's sincerity as well as the author's interest in ownership of the work. Although it has not been argued by [Jehoram], copyright and freedom of expression are on a different linking level, protecting the expression of certain information and not its informational content; that is, copyright protects thoughts of the author which become free, yet it safeguards the words and the expressed thoughts in print.[269] It is submitted that freedom of expression has its clear place in the fair dealing criteria, as noted by the CA in *Ashdown*. In relation to the third point, the commercial impact may sever freedom of expression because under Art 10 ECHR individuals have the right to receive information as part of their right of freedom of expression in a manner that prevents public authorities from any interference, but also requires healthy press, media and publishing industries. Such a broad interpretation of Art 10 may of course be subject to scrutiny.[270] We now turn the emphasis around to Art 10 and its possible exceptions in the context of copyright and fair dealing, and freedom of expression:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. [271]

As mentioned earlier, the concept of freedom of expression is broad and includes the freedom to receive and hold information and opinions as well as to impart ideas and information without interference through appropriate media.[272] However, is the condition "regardless of frontiers" violated by the territorial nature of copyright? The territoriality of copyright and its expansion has been seen as contradicting in the EU

[269] H Jehoram.; *Ibid*
[270] J. G Merrills. and Robertson A. H., *Human rights in Europe* "*A study of the European Convention on Human Rights*", (Manchester, Manchester University Press, 4th ed., 2001). p. 168.
[271] European convention on Human Rights [ECHR] article. 10
[272] Merrills J. G. and A. H. Robertson*, "Human rights in Europe* "*A study of the European Convention on Human Rights*" p. 170.

with completion of internal market and free movement of goods and services [Consten and Grundis v Commission; *Dcursdie Geramnaphia v Metro*] [*FA PL v QC leisure, Murphy*] and has led to much harmonisation of copyright laws.[273]

The ECHR impacts on Jordan through the provisions of the EUROMED Association agreement;[274] its provisions are related to Art 15 ICESCR, which is binding on Jordan. There are as well the provisions of Art 19 of the ICCPR of 1966, which follows the footsteps of both the provisions of the UDHR 1948 and the ECHR 1950 in recognising the significance of freedom of expression. The connection to IP is even more vivid in the ICCPR; Art 19 states under the heading 'Freedom of Opinion, Expression and Information', *"1. Everyone shall have the right to hold opinions without interference."* And it goes on to say,

> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[275]

In practice, with the EU, this aspect of freedom of expression has been supported by economic freedom at the wider international level by reducing copyright. International copyright treaties are serving a similar role in reducing impediments to cross-border expression. Art 10 (1) allows state licensing of TV, etc., yet the main permissible restrictions of freedom of expression are included in Art 10 (2) which states,

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of

[273] *FA PL v QC Leisure* [2008] EWHC 1411 (Ch)
[274] 2.5.4. The effect the EU-Med Jordan Association Agreement has on the requirements for procedural fairness in Jordan of this thesis
[275] This clearly refers to the subjectivity of copyright.

information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Working backwards from the end, the authority and impartiality of the judiciary in the context of Art 6 ECHR [right to a fair trial] and the enforcement provisions of TRIPs are discussed.[276]

However, copyright as well as freedom of expression may be abandoned in favour of a judicial process and the course of justice. For example, s.45 CPDA allows the use of copyright works freely for judicial, parliamentary [i.e. democratic] proceedings. Despite this, there is no equal provision in the Jordanian copyright Act, but Art 100 105 CPA 1988[277] provides a solution in allowing judges the right to use any relevant documents. The first article is a general term provision while the latter is specific to requests by parties to order bank statements needed during the sessions or merchants' records through a court's written permission. These provisions could relate in some aspects with Art 8 Jordanian copyright Act which allows the partial quotation of a work protected by copyright as long as the author is recognised and mentioned. The interesting link between Art 8 copyright Act and the provisions of articles 100 105, even though the copyright Act has not been mentioned in any shape or form in the courts, trials or prosecution process, is that it provides the right to use a work protected by copyright in general, which could be applied to the use of such work by a court as long it is recognised by the author. The interaction of freedom of expression and confidence/privacy is considered in the next section. The protection of reputation and the rights of others is relevant to copyright. The moral rights of authors [paternity s 77, false attribution s 84 CPDA][278] and integrity [s 80 CPDA and in the same meaning Art 8(d) Jordanian copyright Act] are valuable for authors' reputation and dignity and can often outweigh freedom of expression.[279]

Exercise of economic rights under copyright may also provide an exception to freedom of expression under Art 10(2). This would be a representation of copyright as

[276] Art 41, Art 42 and Art 61 TRIPs Agreement
[277] Civil Procedures Act 1988
[278] Article 8(a/d) and (19) Copyright Act no(22) 1992 and it amendments refers to the use of a work protected by copyright in lectures/talks, etc… as long as the work and its author is mentioned accurately
[279] J Griffiths *"Not Such a 'Timid Thing': The UK's Integrity Right and Freedom of Expression"* in J Griffiths and U Suthersanen (eds.) Copyright and Free Speech (Oxford, Oxford University Press, 2005) Pp. 211-213.

property. Further support is available in Art 1 of the 1st optional protocol ECHR,[280] which establishes that the protection of property is recognised under the convention. Art 19(3) (4) ICCPR uses very similar terms to Art 10(2) ECHR, but place the rights of others before public concerns. It states,

> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights and reputations of others;
>
> (b) for the protection of national security or of public order (ordre public), or of public health or morals.

Another form of protection of reputation lies in the action for defamation, which could be defined as 'The publication to a third party of a statement which tends to lower another person in the eyes of right-thinking members of society'.[281] The relationship between defamation and freedom of expression is difficult.[282] It will not be considered further save to note that proving defamation [as a criminal offence] is considered very difficult in Jordan, due to the lack of ability to provide evidence of a wrongdoing that is based on the element of malicious intent in the criminal offence. Trademarks rights also have a role in protection of reputation in the commercial sphere [see section 3-3-6].

3.8. Privacy/ Trade secrets/ Breach of confidence and Freedom of Expression

Art 8 ECHR and its counterparts Art 19 ICCPR and Art 15 ICSER It should be mentioned that these were strongly influenced by Art 12 of the Universal declaration of Human Rights.[283] However, freedom from authority attach on privacy, have a

[280] PART II THE FIRST PROTOCOL European Convention of Human Rights[ECHR]art(1) *PROTECTION OF PROPERTY*
[281] Marett. P, *"Information Law in Practice"* (London, Ashagate, 2nd ed., 2002) , p . 165
[282] Derbyshire County Council v. Times News papers, (1993). Marett. P, *"Information Law in Practice"* 165- 166.
[283] J.G. Merrills. and A. H Robertson., "*Human Rights in Europe* "A study of the European Convention on Human Rights", p. 137. Also see Article 12 of the Universal Declaration of Human Rights which states "No one shall be subjected to arbitrary interference with his privacy, family, home or

correspondence evolved with the right to respect for these values, coupled with a second promoting public authority interference or speech conditions of legality and necessity. However, resistance to interference with privacy by authorities in the name of public good has been accompanied by the promotion of such interference or limitations on free speech in the name of legality and necessity.

The possible removal of public interference into privacy sub-paragraph (2) highlights the probability of the horizontal effect of Art 8(1) and shows that other concerns (public but also private rights and freedoms) may outweigh privacy interests.

ECHR was implemented into UK domestic law through the Human Rights Act 1998. There was a period of uncertainty over whether English law provided or did not provide legal protection for those who have been victims of privacy invasion.[284] However, the outcome of the Lords in *Campbell v MGN*[285] confirmed that the action for breach of confidence was aimed to protect privacy rights under Art 8. The Court of Appeal in *Douglas v Hello* confirmed that privacy is protected where rights of access to a family event have been sold commercially [the rights of the magazine *OBG v. Allen*].[286] "…The resolution of the conflict between Article 10 and Article 8 cannot be dependent on narrowly defined exceptions to the law of confidentiality appropriate for a more restricted concept and inapt for so greatly extended a protection."[287]

Art 8 protects privacy in its various shapes and forms private life (as in *Campbell*, *Moseley*); family life (as in *Douglas v. Hello*); home (*Chappell v. UK*); correspondences (*HRH Prince of Wales v. Associated Newspapers Ltd*). Although "everyone" usually refers to individuals, Art 8 has been held to apply to an individual's office calls (Halfords v. UK [1997] 24 EHRR at [44]). In *Niemiert v Germany* [1992] 16 EHRR 97 at [30] "home" was held to cover an individual's

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correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

[284] Jaffey P, *"Rights of Privacy, Confidentiality, and Publicity, and Related Rights"*, in P. Torremans (ed.), *"Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights"*, (The Hague ,Kluwer Law International,2008) p. 447-450

[285] *Campbell v. MGN*

[286] Jaffey. P, *"Rights of Privacy, Confidentiality, and Publicity, and Related Rights"*, in P. Torremans "Intellectual Property And Human Rights, Enhanced Edition of Copyright And Human Rights", (ed.), (The Hague Kluwer Law International, , 2008) p. 447-448. European Convention on Human Rights Articles. (8, 10)

[287] *Theakston* [2002] EMLR 22.

office/premises and this extended in Sallinen v. Finland [2009][288] to a previous business premises. A company must usually show interest to protect its business or trade secrets, which can be protected by breach of confidence (i) if the information has the necessary quality of confidence (including "special attention" or measures by the "owner" to prevent its disclosure). (ii) Is impaired in circumstances imposing an obligation of confidence [somewhat a relaxed approach in privacy cases as in *Campbell*, *Moseley*]. (iii) Unauthorised use or disclosure to the "owners". Jaffey and Aplin T have discussed the extent to which case law on breach of confidence in privacy cases applies to commercial secrets.[289] Breach of confidence also protects government and judicial documents [i.e. of docs in Ministry of Justice] its main example being the responsibility laid on clerks -in civil/commercial cases- or criminal [CFI] joint procedures cases have concerning the material of interest of the parties involved.

In Jordan, privacy is protected by two means a complaint by the victim to the region's governor if it has not been resolved between the parties (mainly the parties are individuals who are not linked to the public) in which case it will take the shape of an administrative affair, though the action could still be appealed by the administrative court [Court of High Justice]. The issues of invading privacy could be dealt with through judiciary means in either civil/criminal or a combined procedural prosecution. Privacy interests may also be protected in related legislations such as the Data Protection Act.

As discussed in the previous sub-sections the defense of public interest enables the court to balance confidentiality against freedom of expression.

3.8.1. Freedom of Expression and Trademarks

Another area of IP that falls under the "freedom of expression" spotlight is trademarks law. The application of freedom of expression in regard to the enforcement of

[288]*Sallinen v. Finland* [2009] located at:< http://www.echr.coe.int/echr/database> accessed on 16/07/12

[289]Jaffey. P, Rights of Privacy, Confidentiality, and Publicity, and Related Rights, in Torremans. P (ed.) "*Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights"* (The Hague, Kluwer Law International, 2008). Pp. 459. And more recently Aplin T The development of the action for breach of confidence in a post HRA era [2007] 1 IPO, p.41

trademarks has the potential to create the most obdurate conflict between human rights and intellectual property protection.[290] Trademark law is an area where the interest of third parties consumers is often significant. The consumer who may be confused or deceived has a "front seat" in the proceedings even though the consumers are rarely a party to infringement proceedings and the evidence may be related to the consumers. Freedom of expression has a significant impact in allowing protected marks to be used for purposes of comment.[291] Freedom of expression has to be balanced against economic interests and reputation of the owner/right-holder in the trademark. Another conflict can occur when the trademark is considered to be endangering public order and morality. As with unregistered IP rights there is an argument that the court should not enforce an immoral trademark. For example in the "FCUK" case, the court refused to grant a trademark to French connection (UK) on the grounds that the mark resembled an immoral word too closely. However, this was overruled at the court of appeal. Freedom of expression as a human right could also be as issue when it comes to the legal registration of trademarks, a situation, which we will consider next.

3.8.2. Freedom of Expression, Immorality and Public Order in Trademark Registration

This argument leads us to discuss an issue that may seem irrelevant to the main theme of the research at this point, yet which cannot be ignored, and leads us back to study the basics of trademarks registration, namely that marks should not be in contradiction with public order or morality and the connection this might have with freedom of expression and Art 10 ECHR 1950.

Art 8(6) Jordanian Trademarks Act no (33) 1952 (entitled "Marks which May not be Registered as Trademarks") prohibits registration of "6. Marks which are contrary to the public order or morality or which may lead to deceiving the public, or marks

[290] A. Rahmatian, Trade Marks and Human Rights in P Torremans (ed.), *"Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights"*, (The Hague, Kluwer Law International, 2008) p.347. i.e. of "Mars"- "*Galaxy" v Al-Mejara* which is a look-like bar in which the trademarks register in which the accused of the infringed mark used an exact Arabic translation of the phrase "Galaxy" and the packaging was quite similar to the English brand.

[291] *Couture Tech Ltd.'s Application* Case R 1509/2008-2 [2010] ETMR 45

which encourage unfair trading competition or contain false indications as to their real origin."[292]

The UK Trade Marks Act 1994 s. (3/3/a) states "A trade mark shall not be registered if it is "(a) contrary to public policy or to accepted principles of morality".[293]

The similarity of language and concept of the provisions of the different texts belonging to separate legal systems is noteworthy; the legislator in both provisions meant to establish firm understanding of the limits to what can or cannot be registered as a trademark.

The drafters of both legal texts made their intentions an explicit statement in the titles of the Articles mentioned above; the Trade Marks Act of 1994 referred to in Art 3 to *"Absolute grounds for refusal of registration"*.

Although the heading in the 1994 Trade Marks Act is more imposing (*"absolute"*), the text, too sends a clear and solid message about the connection between morality, public order and trademarks.[294] The similarity may be due to the influence of European drafts of trademark legislation on "Dunkel draft" of TRIPs's draft was amended post-TRIPs and how closely the UK and Jordanian text resemble TRIPs. These texts closely resemble the language of Art 19 (3/b) ICCPR which although it has some restrictions on freedom of expression according to the law such as are necessary "for the protection of public order *(order pubilque)* or public health or morals" – yet Art 10(2) ECHR refers to the prevention of disorder or for the protection of health and morals.

Thus could an assessment of immoral marks be seen as balancing the freedom of expression of the right-owner with the public order and morality interests of society? This depends on whether Art 10 ECHR and Art 19 ICCPR apply to commercial as

[292]The mentioned Act has been amended in the year 1999 and the whole Act is called the Trademarks Act for the year 1999, yet it is widely recognised as the Trademarks Act no.33 1952. An English electronic version could be found at: < http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=2618

[293]Found at :< http://www.opsi.gov.uk/acts/acts1994/ukpga_19940026_en_2#pt1-pb1-l1g2_> last accessed at 23/12/09. There is also the provisions of the Trade Marks Directive 89/104 December 1988 Article (3/1/f): " The following shall not be registered or if registered shall be liable to be declared invalid; (f) trademarks which are contrary to public policy or to accepted principles of morality;"

[294] J Griffiths; Is There a Right to an Immoral Trade Mark? in P Torremans (ed.), *"Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights",* (The Hague, Kluwer Law International, 2008) 309-311.

well as political and other speech? It has been said that.[295] Thus it is legitimate to refer to Art 8(6) ECHR as a case where protection of commercial speech could relate to a trademark applicant being restricted by the refusal of a mark due to safeguards on the interests of the public, as regards public order or offence to strongly held moral attitudes. "*Public order*" has been interpreted to include public health in connection with trademarks, as in the case of happy Smoker in Jordan, when a health dimension of public order was used as a basis for the refusal to register.

In Ghazilian's Trade Mark Application, 2002, RPC 28 November 2001, "Tiny Penis"), the appointed person declares the objective and legal and social reasoning for section 3(3)(a) from the trademarks Act 1994:[296] "*The dividing line for the purposes of section 3(3) of the Trade Marks Act 1994 was to be drawn between offence which amounted only to distaste and offence which would justifiably cause outrage or would be the subject of justifiable censure as being likely to significantly undermine current religious, family or social values. The outrage or censure had to be amongst an identifiable section of the public and a higher degree of outrage or censure amongst a small section of the community would suffice just as lesser outrage or censure amongst a more widespread section of the public would also suffice."*

These judicial statements are interesting in that they refute the role of judge as being representative of society as well as being the arbiter between parties.

This approach has been followed in other appeals on trademark registration. The proposed word mark "JESUS" was found to create greater offence to a significant section of the general public. The use of the term would be regarded as troubling of the public interest. The refusal of registration of the mark does not contradict Art 10 from ECHR, but reflects, in the careful balancing of interests, the ethos of Art 10(2). That is to say, the applicant's freedom of expression has not been undermined; the

[295]Fenwick H and others *Ibid* Pp.671-673

[296]Ghazilian's Trade Mark Application, The Appointed Person 2002, RPC 28 November 2001 stated in *para* 50 *"Accordingly, I have reached the conclusion that the registrar was justified in refusing registration on the basis that registration would be contrary to an accepted principle of morality. This appeal will be dismissed. In accordance with the usual practice there will be no order as to costs of the appeal."*

refusal of registration has been appropriately practised under section 3(3) (a) of the 1994 Act.[297]

The Trademarks' application to human rights in general and freedom of expression in particular could be realised in the enforcement of intellectual property and its effect upon others [defendant, third parties and the public order] using two methods. The first relates to the economy and the monetary loss or benefit the owner/right-holder derives from the other's expression of opinion or commercial speech i.e. the trade mark owner could benefit from favourable appraisal of the branded products by a magazine or website; conversely their business could be negatively affected by a substandard imitation] an example negative effect is the Pepsi v Coke banned commercial advertisement.[298] The second is the role the trademark itself could have in affecting the freedom of expression granted to others.

This second approach of trademarks could be enforced against a third party user by state using criminal procedures or of a third party using the administrative method of enforcement by revoking the trademark registration.

3.8.3. Public Morality/Order and Intellectual Property Rights

The main requirements when registering trademarks relate to morality, public order, and the linkage between human rights (in this case freedom of expression). The question under examination is there any restriction on the right to freely express opinions (Art 10 ECHR 1950) in relation to protecting a trademark considered a violation of Art 3 from the Trade Marks Act 1994, and Art 8 of the Jordanian Trademarks Act concerning morality and public order aspects of registration? It could be said that such provisions as those mentioned in the previous paragraphs could be implemented as a safeguard and for the protection of rights related to others, either the defendant or third parties, and their right to express opinions freely. Art 8 Jordanian Trademarks Act and Art 3 Trade Marks Act 1994 respectively lay out the legal structure of trademark registration requirements and the validity of the application in relation to morality and public order. In connection to the Articles and understanding

[297] Basic Trademark SA, Appointed Person, 2005 WL 1459185 18 January 2005 para's 39 and 40.
[298] As seen at http://www.youtube.com/watch?v=DijFob8vxgI accessed on March 5, 2014

the concept of morality and public order in a human rights context in general and its connection with the provisions set in Art 10 of ECHR 1950 (Freedom of Expression) can relate to morality and public order. Thus denying freedom of expression can be a reason to dismiss the registration of the trademark.

Morality and Public Order Its Connection to Trademarks

The concepts of morality and public order could be applied in connection with the implementation of Art 10 ECHR and the provisions of other related Articles in other human rights instruments. Moreover, it could be possible to apply freedom of expression texts upon the related trademarks Articles. There is another aspect to the relationship between trademarks and public order and morality, in which the concepts may contradict and public order and morality may hinder the registration of a mark on the basis of a violation of principles of public order. In such situations public order and morality could be instrumental in undermining both freedom of expression and trademark registration.

The Judicial Legal Perspective

The provisions of both articles mentioned above could be interpreted in a manner that is contrary to the above mentioned understanding.[299] Trademarks and freedom of expression could be held on parallel levels with public order and morality without a joining point of connection to build up for a joint legal background. The provisions of Art 3 and from both countries' legislations adopt Art 7(1) (f) from the Trade Marks Directive (89/104) of December 1988 which states, "*The following shall not be registered or if registered shall be liable to be declared invalid… (f) trade marks which are contrary to public policy or to accepted principles of morality;"*[300]

[299] Art 3 Trade Marks Act 1994 and Article 8 Jordanian Trademarks Act 1952
[300] Directive 2008/95/EC Art 3(1) (f)

3.9. Interplay of Rights between Fair Trial and Freedom of Expression (Judicial Remedies for IP)

The relationship between human rights and intellectual property is not a recent one related to the Human Rights Act 1998,[301] when the UK legal system adapted the European Human Rights Convention. The relationship between both sectors lacked harmonization because scholars could not agree on the interpretation of this relationship. Is copyright part of the human rights system? Or part of a wholly different legal system?

There are two approaches to interpreting the relationship between copyright and human rights, as mentioned above, Conflict and Convergence. Those who have supported the Conflict model regard the copyright system as being in fundamental conflict with human rights. [302]

Those who defended such an opinion as an approach that leads to some sort of harmonisation between human rights and copyright (as the latter is part of the former) supported what ideas they had with Art 27(2) of the UDHR 1948.[303]

That stated, as can be seen below, that everyone may enjoy the benefits of any artistic, scientific or literary work, providing that he/she is the creator. The supporters of this approach stated that mentioning intellectual property represented by copyright in the declaration meant that copyright is part of the human rights regime.[304]

Thus those supporters ignored the first subsection of the same Article, which gave everyone the right to enjoy and share the profits and advancements of arts and the scientific results of such creations.[305] Yet the legal background of Intellectual

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[301] P. Torremans "*Copyright(and Other Intellectual Property Rights) as a Human Right*, in P.Torremans (ed.) *"Copyright And Human Rights Enhanced Edition of Copyright and Human Rights",* (The Hague, Kluwer Law International 2008), Pp.195-196.

[302] *Ibid*, p196 Anderson. R, "*The Draft IP Enforcement Directive- A Threat to Competition and to Liberty*", p 2, at:< http://www.cl.cam.ac.uk/~rja14/draftdir.html> accessed at the 28/10/2007. Also P Torremans, "Copyright (and Other Intellectual Property Rights) as a Human Right, Pp. 196-197

[303] *(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*

[304] P. Torremans, Copyright (and Other Intellectual Property Rights) as a Human Right, *in* P Torremans (ed.), "*Copyright and Human Rights Enhanced Edition of Copyright and Human Rights*", (The Hague, Kluwer Law International, 2008), Pp. 198-201.

[305] Art 27(1) Universal Declaration of Human Rights Also see United Nations Committee on Economic, Social and Cultural Rights "*Protection of Intellectual Property under the TRIPs Agreement*" E/C.12/2000/18, p.2, 29 November 2000, (Other Treaty- Related Document) found at: < http://www.unchr.ch/tbs/doc.nsf> accessed at 09/05/2008. Other legislations later on supported the idea intellectual property protection; such as the United States Constitution argues the congress to

Property Rights and its origins lie in the interest in human rights expressed in 1789 (the French Revolution) in the Declaration of the Rights of Man and of the Citizen.[306] This part of Art 27 causes some sort of misunderstanding and confusion due to its contradictory meaning compared with the second subsection. The first on one hand calls all to participate in cultural life and share the benefits of the results of artistic works, while the second gives the author a monopoly upon the artistic work that he/she has created. However, those who supported this approach could have mentioned Art 15 of ICESCR, in favour of their stance, which states in subsection four that member states should "*recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.*"[307] Furthermore, the other part of the same article provides the protection required for the authors and grants them the right to gain the benefits of their creations.[308] Also, in the same article it is stated that member states should encourage the right of everyone to share and enjoy the benefits of "scientific progress and its applications."[309] Torremans also acknowledges the importance of Art 15 of ICESCR and its vital role in gaining a comprehensive understanding of Art 27 of the UDHR.[310] He goes to state that, "*The human rights framework in which copyright is placed does however put in place a number of imperative guidelines".*[311] According to those who support the concept of convergence of the intellectual property system and the human rights regime, this is based on the overall understanding of the TRIPs agreement principles laid down in its provisions.[312] The main objectives of the agreement concern trade and the economic growth of member states, yet such goals should be achieved in a manner that ensures the willingness and recognition by member countries of the essential public interests, and the needs of the

provide IPRs protection on the bases of public interest "*to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries*" The United States Constitution 1787

[306]United Nations Committee on Economic, Social and Cultural Rights "*Protection of Intellectual Property under the TRIPs Agreement*" E/C.12/2000/18, p.2, 29 November 2000, (Other Treaty-Related Document) found at:< http://www.unchr.ch/tbs/doc.nsf> accessed at 09/05/2008.

[307] Article. 15(4) International Covenant on Economic, Social and Cultural Rights adopted in 1966 and entered into force in 1976.

[308] Article. 15(1/c) ICESCR. *"to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"*

[309]Chapman R. A, A Human Rights Perspective On Intellectual Property, Scientific Progress, And Access to the Benefits of Science, PP. 1-5. At: <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/word/chapman.doc> AS Cited Previously ART (15/1/b) ICESCR

[310] P. Torremans, Copyright (and Other Intellectual Property Rights*)* Pp.201-202

[311] *Ibid*, pp. 202-203.

[312] Art 7 from TRIPs Agreement (1994)

developing and least developed countries to share in the benefits of international trade and fulfil their basic needs for economic development.[313]

3.9.1. The Established Link between IP, Freedom of Expression and the Right to a Fair Trial

Copyright as a crucial element of intellectual property is closely related to freedom of speech or what may be called freedom of expression, which is a major issue of human rights or civil liberties. This is evidenced in the legal status given to copyright in the human rights system that is, in the international human rights documents drafted under the supervision of the United Nations (notably UDHR, ICESCR and ICCPR).[314]

The interplay between other sets of human rights and IP is observable in the different approach taken towards TRIPs as a solely economic agreement and taking an opposite approach from commentators towards TRIPs principles.[315]

Therefore, such approach could improve the possibility of implementing non-IP human rights provisions that has a procedural human rights context [Fair Trial] to criminal enforcement of IP. However, the connection between HR and IPRs in the academic and policy-making field has been restricted to the concept of Freedom of Expression and IP/copyright. The IP relation with procedural human rights has been almost non-existent.

There has not been any detailed examination of the possible connection between IP enforcement on all levels -criminal, civil or administrative- and the procedural safeguards that could be related to the judicial enforcement process of IP infringements and fair trial. The most problematic aspect to the issues of fair trial and freedom of expression Articles 10 ECHR and 15 ICSECR [Freedom of Expression]

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[313] United Nations Committee on Economic, Social And Cultural Rights "*Protection of Intellectual Property under the TRIPs Agreement*" E/C.12/2000/18, pp.2-3, 29 November 2000, (Other Treaty-Related Document) found at:< http://www.unchr.ch/tbs/doc.nsf> last accessed at 09/05/2010

[314] Art 27(2) UDHR and Article. 15(1/c) ICESCR. Also, Y Gendreu , *Copyright and Freedom of Expression in Canada*, in P Torremans (ed.),*"Copyright And Human Rights Enhanced Edition of Copyright and Human Rights*", (The Hague, Kluwer, 2008) , Pp. 220-221. Also see United Nations Committee on Economic, Social And Cultural Rights "*Protection of Intellectual Property under the TRIPs Agreement*" E/C.12/2000/18, p.2, 29 November 2000, (Other Treaty- Related Document) cited at:< http://www.unchr.ch/tbs/doc.nsf > accessed at 11/09/2008

[315] As in *n* (282) and *n* (283)

on the one hand, and to Articles 6 ECHR and 14 ICCPR [Fair Trial] on the other, is that there have not been any joint studies on the possible link between the provisions of each set of rights for an IP related infringement.

Articles dealing with freedom of expression praise the right to this and require member states to recognise individuals' right to express their opinions freely. It is also stated individuals have the right to receive information as part of their right of freedom of expression. 'Freedom of expression' is widely, defined which has given an unhelpfully broad interpretation of the whole concept.[316]

The only restrictions according to the second part of Articles 10 and 15 are those based upon the need to prevent crime, public disorder, for the protection of public health, or morals, or all the other exceptions mentioned in sub section (2) of the article.[317] Yet there is an issue of great significance and strongly related to the Articles and their two sub sections (1,2) discussed above, which falls outside of both the scope of freedom of expression and limitations.[318] The whole overall order of Art 10 ECHR actually indicates that what really matters is the freedom of expression.[319]

The latter set of provisions (freedom of expression) is not related to the second set of Articles, Art 6 ECHR and Art 14 ICCPR, (fair trial). a link could be drawn between the right to a fair trial and freedom of expression and its connection to intellectual property.

Thus it could be said that the current approach led by the judicial and legal systems does not express a clear interpretation of Art 10 of ECHR and Art15 ICSECR.

Such a misunderstanding of the overall meaning of Art 6 will eventually lead to a misguided understanding of the entire relationship between intellectual property and human rights in general, of copyright and freedom of expression, in particular, its

[316] J. G. Merrills and A. H. Robertson, *"Human rights in Europe* "*A study of the European Convention on Human Rights*", (Manchester ,Manchester University Press, 4th ed., 2001) p. 168.
[317] EHRC Art 10(2)
[318] ECHR Art 10 and ICSECR Art 15
[319] A. Firth, "'*Holding the Line'- the Relationship between the Public Interest and Remedies Granted or Refused, Be It for Breach of Confidence or Copyright"*, in P Torremans (ed.) *"Copyright And Human Rights Enhanced Edition of Copyright and Human Rights*", (The Hague, Kluwer Law International, 2008). p. 430.

seemingly non-existent ties with procedural judicial safeguards provided via the right to a fair trial.[320]

3.9.2. Procedural rules

On the level of judicial or administrative procedural safeguards such as the right to a fair trial (Art 6 ECHR, Art 14 ICCPR) in the context of intellectual property enforcement (Art 41-61 TRIPs). This aspect of the relationship between intellectual property and human rights has not been examined in as much depth as other aspects. That said, this approach towards the procedural elements of the relationship between human rights and intellectual property, and the role of the enforcement provisions of TRIPs in the literature, are unexplained. The connection between the Civil enforcement and general provisions in TRIPs [Articles 41-42] and its link with the criminal enforcement section in Art 61 could provide procedural safeguards for the right of a fair trial and intellectual property protection on the same level. However, the provisions of TRIPs have not indicated that intellectual property procedural safeguards cannot have a direct connection with the procedural standards of human rights mentioned in the main international human rights instruments. Notwithstanding that, there have been glimpses of actual and factual connection between the general and civil enforcement of TRIPs [Art 41-42] with criminal enforcement provisions of the same agreement [Art 61] in the WTO dispute resolution verdicts. Yet, the problematic issue related to the WTO resolutions is that most are resolved peacefully between the parties involved and the outcomes are sealed.[321]

The interplay of IP and Human Rights should secure the needs of public interest such as the peroration of deception of trademark infringement consumers, or the balance between Confidentiality and disclosure, reinforced by society's interest in upholding human rights.

It is submitted that the public interest perspective can illuminate the relationship between HR and IP. Case law is not always available for illustration, and sometimes

[320].Article. (10) Of the European Convention on Human Rights. Firth. A, "'*Holding the Line'- the Relationship between the Public Interest and Remedies Granted or Refused, Be It for Breach of Confidence or Copyright",* in *"Copyright And Human Rights Enhanced Edition of Copyright and Human Rights "*, Torremans. P (ed.), (The Hague, Kluwer Law International, 2008),. p. 430.
[321] Agreement of Trade Related Intellectual Property Aspects [TRIPs 1994]

the gaps can be filled by looking at non-IP cases or HR and exploiting their findings. TRIPs also is a key source. Yet the original approach towards the procedural aspects of human rights and intellectual property can be identified in TRIPs general rules of IP enforcement. The method of enforcement which has been outlined basically in Art 41(1) (5) TRIPs is a uniquely measured enforcement process among IP treaties that incorporates safeguards into the enforcement procedures.

The notion of TRIPs as a source of procedural elements of human rights in an intellectual property context has yet to be explicitly recognized by commentators.

The resisted or ignored connection between fair trial and freedom of expression is exemplified through intellectual property, and the right to a fair trial is deployed as a protection system of freedom of expression. The right to a fair trial provides an incentive for free speech based on the formula of relying on the public interest in preserving elements of fair trial, freedom of expression, privacy and intellectual property.

The concept of accuracy of trial procedures has been an essential factor of the right to a fair trial and its relation to public interest and the overall standpoint of the outcomes of the judicial process in general and the rights of the parties involved in the trial in particular. It has been the issue of balance between the dimensions under examination: fair trial, freedom of expression and intellectual property. The creation of a balance between the conflicting interests of all parties involved is of substantial importance; however there has not been any discourse on conflicting issues related to all of the following in a comprehensive study: copyright, freedom of expression and fair trial. There has been discourse on IP versus Freedom of Expression alone, yet fair trial has not been involved in a detailed examination of the latter rights.

3.9.3. MGN Limited v. United Kingdom [322]

Introduction:

It has to be mentioned that despite the link in the origin of IP and human rights laws the current nature of the relationship between them is week, as it can be seen in some related enforcement provisions in certain local jurisdictions, judiciaries and bilateral trade agreements.

However, a development on the judicial approach has occurred recently in the *MGN v UK* judgement of the ECtHR.[323] Even though, the section that dealt with Articles 6 and 10 ECHR, these provisions were not the major element of the case dealing with issues of copyright, freedom of expression and privacy this minor section is a significant starting-point of the link between fair trial and freedom of expression.

The court's ruling approved the finding of the House of Lords that the (*Daily Mirror*) applicant had violated the provisions of Articles 10 and 8 ECHR and infringed the rights of freedom of expression and privacy: "*In such circumstances, the Court considers that the finding by the House of Lords that the applicant had acted in breach of confidence did not violate Article 10 of the Convention"*.[324]

However, on another and yet minor issue in connection to the main topic-related matter, the court expenses that were issued were not justifiable nor accurate and led to imbalance in the applicant's right to free speech, access to courts and fair trial due to the wrong calculations of cost, conditional fees arrangement and success [CFA] fees expenses, in which the court was influenced by the outcomes of the *Review of Civil Litigation Costs: Final Report* (December 2009) by Sir Rupert Jackson. The Review aimed to study how the role of civil litigation costs could be disproportionate and impede access to justice.[325]

The significance of the report and its findings lies in the fact that it relates IP litigation and access to justice. It devotes a section to certain IP costs of litigation and to the objectives of the report mentioned in Lord Jackson foreword: *"In some areas of civil*

[322] (39401/04) (2011) 53 EHRR 5
[323] *MGN Limited v The United Kingdom* (39401/04) (2011) 53 E.HRR 5
[324] *MGN Limited v The United Kingdom, at* [156] *as cited above*
[325] Review of Civil Litigation Costs: Final Report in December 2009 by Lord Rupert Jackson

litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice."[326] This acknowledgement sets the path to the three-way dimensional connection between the elements of fair trial, freedom of expression and intellectual property. The European Court in *MGN v United Kingdom* identifies the findings of the *Review* and its linking effect on fair trial and freedom of expression Articles 6, 10 ECHR. The improper application of the costs of trial, according to Chapter 24 of the Jackson *Review*, led to endangering the applicant's access to justice; in connection to the CFAs fees, the Court [ECtHR] relied heavily on the *Review* in *para* 118 which refers to the introduction and *paras*, 2.63-2.92,2.94, 295 and 3.07, 3.09 of the review.[327] The court stated in its judgment that it "*holds unanimously that there has been a violation of Article 10 of the Convention as regards the success fees payable by the applicant;"*

The findings of the court were essential in creating the link between freedom of expression and fair trial. It is the approach taken by ECtHR to implement Art 6 and 10(2) in a manner that shows the possibility of the application of fair trial as a safeguard for freedom of expression in an intellectual property context.

The Court's ruling, in addition to the findings of the Jackson *Review*, has led to an intertwining of IP and human rights on a different level. It has showed the possible connection between IP and human rights for other aspects of human rights outside of the provisions of Art 10 ECHR.[328] Not only did it lead to a novel approach towards procedural elements specified in the Lord Jackson *Review*, but also the significance of the verdict lies in the magnitude and scale taken by the court towards the approach dealing with elements of fair trial and freedom of expression in an IP enforcement context.

[326] Forward by Lord Rupert Jackson, Review of Civil Litigation Costs
[327] *MGN Limited v. The United Kingdom*, at[118]
[328] As in *n* (254)

3.10. Conclusion

In conclusion it has to be said that the general outcome of the analysis of the inter-play between human right/IP approaches of Co-existence, Collision, Conflation and Convergence, are the basic theoretical, substantive correlation on the human rights IP relationship. It showed that there are various understandings and views towards the most reliable examination of the connection. This could be noted in the Convergence approach interaction between the various human rights/IP elements. The significant role this approach has on creating the required balance in the Human Rights/IP connection, the impact it has on human rights/IP substantive texts mainly procedural human rights safeguards. The link between human rights, fair trial and IP that is built on balancing aspects of the relationship

Chapter 4. Intellectual Property Rights and Judicial Infrastructure

4.1. Introduction:

The trial process and judicial proceedings in general should be based upon justice and fairness during the investigation of infringements, the proceedings themselves and the delivery of the sentence.[329]

Therefore, the principles of justice and mercy, though sometimes difficult to reconcile, have long been the core of trials and the essence of the duties of courts. [330] The concluding goal of the court ultimately is justice, whatever legal system the court follows, whether in a Common law system or a Civil law system. The difference in method and approach towards the goal does not create major differences between court proceedings arriving at a fair and a just sentence. The most significant aspect of the trial process and the working system of the judiciary comprise three elements. The first is the pre-trial procedures, including the policing and investigating stages, while the second is the trial process itself on its various levels, but most importantly the commencing of the process and the procedures during the trial in general. Yet all these procedures should lead to the third and final outcome, as the clearance of the procedural rules helps the court of appeal to examine the court's verdict if necessary.

The court's ruling has to be a clear embodiment of principles of fairness, justice and impartiality towards the truthful aspects of the judiciary and its ultimate goal.

The significance of the court's structure and its connection to intellectual property enforcement lies in the nature of miscarriage of justice, which is most often procedural.[331] Examples may be found in judicial review of lower courts' decisions that show misapplication of trial procedural rules, such as the miscalculation of the time limits, lack of recognition of attendance of the accused/legal representation or during the pre-trial [in Jordan, investigation stage is carried out by the attorney general's department]. These issues are procedural aspects of the law, which are

[329] Pannick, D, "*JUDGES"*, (Oxford, OUP, 1987) Pp.169-170

[330] *R v Tokeer Hussein, Munir Hussein* [2010] EWCA 94 at [44] *"Today, as ever, the sentence of the court must address and balance the ancient principles of justice and mercy."* The court has acknowledged the role of justice and the significance of fairness of the trial which has been dealt in a more detailed fashion in Chapter 4.5 of this thesis.

[331] *'Alia/time limits'* as in *n (332)*

apparent more vividly in judicial practices in general and in intellectual property enforcement either during civil proceedings or criminal prosecution procedures. In Jordan, *Alia'/Time Limits* on time limitations in copyright proceedings,[332] and Case (292/1991)[333] represent a clear-cut cases in which the course of justice was undermined due to failure to properly detect procedural mistakes during the trial's civil proceedings/criminal prosecution by either side of justice practices: justice administration authorities or attorneys of the accused or even the victim of the criminal/civil wrongdoings or actions are evident. In (292/1991) which the accused attorney's request to cross-examine the attorney general who gave the order to conduct the search order of the defendant's house and whom the defendant's statement was recorded to confirm the reasons defendant's refusal to sign the search warrant of his house and later on the report, was rejected by the CFI due to unproductivity of the request.

The transparent procedure of the judicial process on various levels requires a coherent linked package, with each section connected to other contents of the procedural aspects of the legitimacy of the judicial process.

All stages of the judicial process are connected to the outcomes of the judiciary's ultimate findings, which is a fair and just verdict.[334]

How does the judiciary infrastructure, the various levels of trial, affect the procedural aspects of fair trial? What impact does it have on IP enforcement?

The judicial structure of any judicial, legal system depends on accuracy of trial proceedings; judicial review of lower courts decisions by higher level courts also relies on accurate procedures. Such reviews usually include substantive aspects of the law, the applicability of facts to the case and procedural elements of the law and trial. The examination of the substantive factors of the law is somehow quite a straight forward matter for the experienced eye of the judges of higher level courts, less so for

[332] Court of Cassation the Civil Chamber Case no. (3687/2006) *Alia Artistic Encyclopaedia case-Copyright infringement and Time limits* 2/4/2007, hereafter *'Alia/time limits'*. Yes it is case number four among the IP cases in annex and is referred to in chapter 5 of this thesis

[333] Court of Cassation Criminal Chamber Case no. (292/1991) *Fair Trial, Criminal Search warrants and Right of defense* it has been included in the Annex in non-IP cases case no 3

[334] Such as publicity and other factors that are considered part of the elements of a fair trial according to the provisions of the related international and national instruments. Pannick. D, "*JUDGES"*, (Oxford, OUP, 1987) Pp.169-170.

general trial courts or (in England), juries. It is the procedural and clear-cut proceedings of the trial that provide insight for true judicial review and provide the ruling bench of the higher court with the tools of observation and examination to test the legitimacy, accuracy, and fulfillment of the rule of law by the lower court in general, that clear-cut procedural rules allows the court of appeal examine the wrongdoings of the lower court on both procedural and substantive levels of law.

Procedural law rules are considered means by the legislator to test legitimacy and examine the application of law. The documentation of sessions, time limitation periods and other procedural safeguards provide higher courts with the testing system of fair trial and of the legitimacy of the judicial process as a whole. Substantive laws provide the sentences, punishments, fines, imprisonment periods, and state what is punishable and what is not. However, they do not provide the inner process of reaching the final outcome of criminal prosecution or civil litigation proceedings.

How do courts reach a verdict? The legitimacy of the procedures, and therefore the validity of the final judgment, is examined thoroughly via rules of procedural aspects of the law. This is apparent in IP cases in time limitation periods, where the procedural elements safeguard dates for commencing the prosecution of an offence, civil litigations of a wrongdoing and where the dates related to the start and end of the civil litigation of a wrongdoing are essential for swift and fair trial procedures concerning Intellectual property infringements. This could be noted vividly in the *Alia Encyclopedia* case as mentioned in this thesis.[335]

In accordance with the provisions of Articles 41(5) and 61 TRIPs the national procedural laws applied on non-IP cases could be applied to IP criminal/civil enforcement judicial proceedings. Thus, although there is little case law on procedural aspects of IP trials, the same principles should apply equally in IP/non-IP cases; this is the useful and practical consequence of Art 41(5) TRIPs.

[335] *Alia/ Time Limits,* see *n* 364 of this thesis.

4.2. UK, Types and Recognised Justifications; International Obligations; Idiosyncrasies

The judicial system in the United Kingdom[336] is divided into two main sections: the civil courts and the criminal courts.[337]

The Civil Courts are divided into County Courts, and the High Court which contains three divisions: Queen's Bench, Family and Chancery. The Court of Appeal's civil division and later on the Supreme Court is the judicial final stage of trial. It has to be said that there are three types of criminal offences in England and Wales. The most minor are summary offences, which are tried 'summarily' in the magistrates' courts. The most serious offences are tried 'on indictment' by judge and jury in the Crown courts after committal from Magistrates' courts. In between are offences triable either way.[338]

The Criminal Courts are divided into the Magistrates and the Crown Court (also the Divisional Court and the Queen's Bench Division). The final Court of Appeal in the criminal division, as in the civil courts, is the Supreme Court, which has the final say on the judicial aspect of the outcome of trial. The trial procedure could be divided into two sections: one that is based on the facts and circumstances of the case and involves the examining of the facts by the jury (or Magistrate). The other is a point of law, which is dealt with by the judge independently who then directs the jury if the trial takes place in Crown Court. The court dealing with the appeal could administrate the *"Question of Law"* a point of law and matters of fact of the verdict of the lower court, or examining an appeal on a point of law or fact such as or *Error of Law* which could be based on the lack of reasons in the verdict of the lower court. A point of law appeal has a binding factor on lower courts verdicts in judicial precedent. This regime contrasts with appeals submitted to the Courts of Appeal in Jordan, which study the verdict of the lower court on levels of law and fact jointly yet differs

[336] The United Kingdom from a legal and judicial perspective consists from three distinctive jurisdictions each has its judiciary and legal profession except for England and Wales. At: <http://www.nyulawglobal.org/Globalex/United_Kingdom.htm > accessed at 20/10/10

[337] Oxford Introduction to the English Legal system, by Holdsworth M Autumn 2006 found at <www.citized.info> accessed at 20/10/10 . Also could be seen at Judicial Statistics, Annual Report 2005 (CM6799) (London, The Stationery Office, 2006)

[338] Ormend, D, " *Smith and Hogan Criminal Law*" (Oxford, OUP, 12th edition 2008). Pp.34-36. Magistrates' Court Act 1980, S 45(1)

in that a jury is not involved in the trial. As for matters of law alone, it could be examined on the highest and last level of trial as it could be seen in the section examining the Jordanian judiciary.

4.2.1. What is the role of judicial procedural aspects of the trial? How do they effect the enforcement of IP? How do they affect HRs and the right to a fair trial?

The House of Lords, according to the provisions of the Constitutional Reform Act 2010, has been replaced by the Supreme Court,[339] as the highest in the UK. The system whereby judges follow the decisions of higher courts is known as the 'doctrine of precedent' and it is this practice that has led to the development of the 'common law'.[340] Which is similar in some extent to the structural judicial system in Jordan aside from the fact that doctrine of precedent is not applicable – at least officially – in Jordan? The role of the judiciary relates to intellectual property enforcement in either criminal or civil aspects.

It needs to be mentioned that the Patents County Court followed County Courts, as it has been outlined above. This court has been recently re-constituted as a specialized list within the Chancery division.

Table 1 in the tables section of the Annex outlines the structure of the judicial system in the United Kingdom,[341] as well as the addition of administrative bodies of a judicial nature that relate to IP enforcement and the approval or rejection of a trademark according to the law.

Are intellectual property infringements considered crimes according to UK law? Criminal prosecutions for intellectual property offences in England and Wales may be brought as a result of complaints to the police, but are not limited to this situation. As

[339] It has to be mentioned that the latest Constitutional Reform altered the shape of the of the diagram table above, the main principle courts on both Civil and Criminal divisions. The Supreme Court has replaced both the House of Lords, as a judicial institute and a court; and the Judicial Committee of the Privy Council. The Constitutional Reform Act 2005, which in decided in part 3 the establishment of the Supreme Court, roles duties and members of the court etc. The Act could be found at <http://www.legislation.gov.uk/ukpga/2005/4/contents > last accessed on 08/11/2010

[340] Holdsworth M *'Oxford Introduction to the English Legal system'* Autumn 2006 found at <www.citized.info > last accessed on 09/11/2012. And also at <www.citized.info/pdf/commarticles/**Oxford Legal**.doc> last accessed 09/11/2012.

[341] Table 1: the judicial system in England and Wales

for the allocation of criminal cases between the crown and Magistrates courts, Criminal intellectual property offences could be considered infringements triable either way (summarily or on indictment) in the case of trademarks offences, and triable either way or summary offences for copyright violations according to Copyright, Designs and Patents Act 1988 (c.48) and the Trade Marks Act of 1994. S 107 (4) of the CDPA 1988 states the range of punishable copyright criminalised infringements of any of the acts mentioned in the previous subsections (1, 2 and 2A) from a "summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both"[342] to conviction "on indictment to a fine or imprisonment for a term not exceeding ten years, or both." The person involved in committing any of the actions mentioned in subsection (2A) of the same section could be convicted by either a summary offence in the range of three months or a fine or both punishments, [343] or an indictment to a fine or imprisonment term not more than two years, or both.[344] Committing any of the actions mentioned in section 92 makes one liable of being convicted either of a summary offence punishable by either not more than six months or a fine(or both); or the infringer could be convicted on an indictment to a fine or an imprisonment term not more than ten years, or both.[345] The jurisdiction of courts on IP offences could be distinguished on either Summary offences tried at the Magistrates Courts. The offences could be prosecuted and be triable summarily before Magistrates or indictable, that could be proceeded at the Crown Court, or.[346]

4.3. Jordan's Judicial Structure as it Relates to IP

The Jordanian Judicial System:

4.3.1. Jordan, Types and Recognised Justifications; International Obligations; Idiosyncrasies, including National Library investigators:

The Jordanian Judiciary system is divided into two main regimes, the first of which is the civil judicial system, which consists of the criminal and civil courts and its various phases, such as courts of first instance, courts of appeal and the Court of Cassation.

[342] Section 107-4(a) CDPA 1988.
[343] Section 107-4(b) CDPA 1988.
[344] Section 107-4A (a,b) 1988.
[345] Section 92-6(a,b) 1994.
[346] Interpretation Act 1978 Schedule 1. More details on this topic in Chapter.5-4 pages 133 and beyond.

The second system is administrative and consists of the Court of High Justice as a solitary administrative tribunal.[347] It is considered a first and final stage of trial concerning administrative decisions. Whether the case should be submitted to either the civil or administrative system depends entirely upon the parties involved in the judicial process, whether they are considered public entities or private and whether or not the administration is involved as a party of the litigation as a public body and represents the public interest.

What is the role of the judicial procedural aspects of the trial? How does it effect the enforcement of IP? How does it affect HRs and the right to a fair trial?

As mentioned above, procedural aspects of the trial are essential for fair trial in an IP framework and are related to the nature of the trial and cases of miscarriage of justice. Procedural aspects of the right to a fair trial could shed light on the shortcomings of the judicial process, and on illegal practices of the parties involved in the judicial application of the law. The provisions of various Acts and laws from a theoretical perspective are similar in concept, yet the approach of courts and the procedural elements related to their enforcement in addition to the legal system of each national jurisdiction can lead to different rulings. The ruling of the ECtHR in *MGN Limited v. United Kingdom*[348] and the *Alia'/Time limits* before the Jordanian Court of Cassation[349] are prime examples of procedural elements of fair trial acting as a safeguard of intellectual property and the accused's rights. The first dealt with cost, conditional fees arrangement and success [CFI] and its connection to access to justice, while the latter dealt with time limits and their role as a safeguard against prolonging criminal prosecution in copyright infringement.

[347] As it is seen in the table 2 in the Annex section of the thesis
[348] *MGN Limited v. The United Kingdom as in n 252*
[349] *Alia/ Time Limits n* 364 from this thesis

4.3.2. The Civil Judicial System[350]

The civil judicial system in Jordan, according to the stages of trial, contains three types of courts, whether these courts are civil or criminal courts. The courts according to stage are the following:

1. Courts of First Instance:

Which are considered the main courts - by number of cases ruled by the judges and most related in type and range of sentence and monetary value - to handle IP infringements. The ruling bench at these courts consists of one judge unless mentioned otherwise in the law.[351] The CFI is the chief judicial institute that tackles intellectual property infringements that are considered criminal offences. Due to the monetary fines and imprisonment time period sentences and the type of offence, criminal IP infringements are considered misdemeanors. This means that very few IP cases reach the Court of Cassation for a definitive ruling.

2. Courts of Appeal:[352]

These are courts of second phase, and are considered courts of law and fact. This means in other words that they examines the accuracy of facts of the case and investigate the implementation of law and legal procedures upon the facts of the case by the lower court (The Court of First Instance). The Court of Appeal consists of a bench of three judges but in certain cases the court could be held by a bench of five judges.

3. Court of Cassation:

This court is considered the third and final stage of trial in the Jordanian judicial system. There is one solitary such court in the whole region of Jordan. The headquarters of this court is in Amman. Unlike the other courts mentioned, such as courts of first instance and courts of appeal, it is a court of law exclusively. This means that it only examines the legal aspect of the case and whether the lower court

[350] The judicial system that includes both criminal and civil courts is usually called the civil judicial system according to those involved in the judicial process; in order to separate these courts which have a different process of work from other courts mentioned in Article (99) from the Jordanian Constitution 1952, which states "The courts shall be divided into three categories: (i) Civil Courts, (ii) Religious Courts, (iii) Special Courts"

[351] In criminal cases that could be punishable in the range of three years and above at least the ruling bench at the court mentioned turns into a three member judge bench instead of one judge in the normal situation.

[352] It should be mentioned that there are three Courts of Appeal in Jordan distributed on regional bases in: Amman, Irbid and Ma'an.

implementation of law during the procedures of trial was accurate. The court of cassation consists of a ruling bench of five judges, though that is not always the case and sometimes the ruling bench can increase the number of judges to a seven judges bench.

4.3.3. The Administrative Judicial System[353]

In this approach the Civil Chamber of the Jordanian Court of Cassation performed the duties of administrative justice from the establishment of the court in 1950 until 1989 – The Court of High Justice temporary Act, 1989 was drafted establishing the Court– 1989 in total disregard of the constitution.[354] In that period the judicial system applied a single judicial approach to deal with administrative decisions where an appeal was made to the civil courts regime, represented by the Court of Cassation. Even though the Act mentioned in Art 100 from constitution entered into force in 1952, the Act was called Civil Courts Structure Act (no. 26) 1952.[355]

It could be noted that Article 10 did not mention anything in relation to the Court of Cassation taking the jurisdiction of the Court of High Justice. And that means that article 10 was in clear breach of constitutional law and Article 100 of the constitution, yet this breach did not last for long because the Civil Structure Act was amended in the same year in order to allow the court of cassation the authority to deal with the

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[353] Art no 100 from the Jordanian Constitution (1952) states that *"The establishment of the various courts, their categories, their divisions, that such law provides for the establishment of a High Court of Justice."*
The Court of High Justice was founded according to the provisional Act no. (12) 1989 "The Court of High Justice Act" and was amended in 1992 according to "The Court of High Justice" no. (12) 1992. Before those two dates the Court of Cassation played the role of the court of high justice until 1989. Massadeh. A,; A draft paper under the title *"Judicial Review of upon the administration's actions in the Jordanian Legal System – A Comparative Study";* Pp15-19; Al-Balqa Journal for Research and Studies Vol.(1) no. 2, May 1992, Pp.81 and beyond .. Yet it has to be stated that the author mentions that provisions of the Civil Courts Structure no. 62, 1952 did implement the provisions of the constitution in establishing a Court of high Justice to review the administration's actions , but created a legal solution in transferring the jurisdictions of the to be established court to the Court of Cassation. The Court of high justice was established in 1993. Before this date the Court of Cassation used to implement the role of the Court of High Justice. It has to be mentioned that there has been Constitutional Reforms in Jordan in the end of September and the early days of this month. These reforms will affect Articles 100/101 of the Constitution which will require amendments on the administrative section of the judiciary.

[354] A. Massadeh; A draft paper under the title *"Judicial Review of upon the administration's actions in the Jordanian Legal System – A Comparative Study";* Pp15-19; Al-Balqa Journal for Research and Studies Vol.(1) no. 2, May 1992, Pp.81 and beyond .

[355] Article 10 of this Act states "*A Court of High Justice shall be established in Amman according to a specialized Act; shall define its jurisdiction and procedures of trial; and the Act will enter into force from the date it has been ratified by the council of ministers."*

jurisdiction of the court of high justice. Art 3 of the amended Civil Courts Structure Act (no 26) 1952 gave the Court of Cassation the constitutional legitimacy to take the role of an administrative court until the establishment of the High Court of Justice in 1989. The Civil Courts Structure Act played a role in bridging the legislative gap until the establishment of the High Justice Court in 1989.

The Administrative judicial system in Jordan consists of a first and final stage of trial combined all together. The Court of High Justice is the sole authority that deals with cases concerning administrative decisions, including those that are related to the Intellectual Property department at the Ministry of Industry and Trade concerning trademarks and patents.

The Court deals with two main types of intellectual property decisions. The IP holder can apply for a law suit at the court or appeal from a decision of the head of the IP department concerning a trademark or a patent.[356] The two actions the owner can take to the court are first of all the right to oppose or file an application of opposition against the decision of the IP department, and the second is that the trademark owner/holder can file an application to cancel or annul an infringing trademark.

It has to be mentioned that decisions concerning search orders in relation to copyright piracy, issued by the national library and the copyright protection office, are not appealed to the Court of High Justice because these decisions are not administrative. This is due to the fact that the library enforcement officers are considered assistants to the Attorney General while they conduct the search orders concerning copyright piracy. And like any decision of a judicial aspect its appeal application shall be submitted to the authorised judiciary panel. In the case of "copyright piracy", the search orders are either issued by the Attorney General, or the search order file and its attachments are sent to the attorney general office for approval by the general director of the national library. In both methods the procedure is considered part of the criminal prosecution process. It is not considered an administrative decision or an administrative procedure, because even though the general director and the officers at

[356] Art 34 of The Trade Marks Rules No. 1, 1952. The Rules Made Under Article 44 of the Trade Marks Law, 1952. Articles 34 -45 deal with objections others may have concerning a registered trademark. Articles 69- 75 deal with the procedures applied to rectify or remove a trade mark from the register. It should be mentioned that English translation found at:< www.wipo.int >at electronic Access of laws accessed at 6/11/2008.

the national library are considered civil servants and follow the government pay roll, they are considered assistants to the judicial process and the prosecution of copyright piracy and are considered judicial officers according to the function they perform.[357] Therefore for search orders concerning copyright infringements, even though the copyright protection enforcement officers are civil servants, they are (in relation to the search orders) under the supervision of the attorney general and his duties and so are considered assistants of the attorney general department. Therefore, from this perspective the search orders are eligible for appeal at the Court of Appeal.

4.4. Comparisons

The previous sections examined the judiciary system in both the UK and Jordan, and their connection to intellectual property enforcement and the various stages of trial on both levels, of either criminal prosecutions or civil proceedings.

The role of courts in general and the judicial system in both countries, despite the various functions and duties and the different legal structure and the distinct legal systems or families[358] that they follow, are yet united in the ultimate outcome of the judicial and trial process justice and a fair trial for the parties involved and society in the wider general sense. That is, even though the concept and the structure of the judicial systems are drawn from different legal backgrounds, the final findings and goals and aims of any judiciary are similar. It could be said that the subject-matter of this research relates the judicial systems under scrutiny in light of the international legal harmonisation efforts concerning intellectual property and the minimum standardised general enforcement measures. Although there is no real special set-up for IP that links both jurisdictions, yet TRIPs could have a role in relating the enforcement procedures, mainly regarding the administrative aspects of IP infringements.

[357] Art 36 of the Copyright Act 1992, which states "a) The employees of the copyright office at the national library department authorised by the minister are considered judiciary officers during their implementation of the law."

[358] Pages 19-20 from this thesis in the subsection "The differences Between Different Legal Systems" paragraphs (5) p.19 and (2) p20.

The TRIPs Agreement 1994 established a set of minimum requirements of IP enforcement measures that member states have to apply.[359] The basic principles of the enforcement procedures are according to the provisions of Article 41/2) [Part (3), [section 1. General Obligations] and Art 42 in relation to civil and administrative enforcement measures.[360] The provisions of Article 41 TRIPs provides member states with freedom of choice regarding the enforcement procedures on the national level, as long as such measures of IP enforcement are "***equitable and fair***" and follow the general provisions mentioned in the more detailed articles related to civil and administrative procedures and remedies, and the criminal enforcement article.

The provisions of TRIPs, in relation to the judicial system of IP enforcement, are a linking point for disconnected concepts between both judicial systems. This is in addition to the distinct legal background of both the UK and Jordan which leads to various intellectual property enforcement measures in the judiciary's implementation of intellectual property in daily legal and judicial enforcement practices and judges' and legal practitioners' understandings during court sessions . Yet, there are other issues that could constitute resemblances between both systems, such as the historical and legal factors. The similarities between both judicial systems are generally related to the concepts of fair trial and the ultimate outcome of the trial process in a true and just sentence.

The comparable concept between the UK and the Jordanian judiciary administrative system is the role of "The Appointed Person", which is applied in the judicial department at the Trademarks, Patents and Industrial Design Registrar in the Jordanian Ministry of Industry and Trade (hereinafter JMIT) in regard to the validity of the trademark intended to be registered. And the applicant's ability to appeal the decision of either the appointed person or the judicial department to the judiciary, the court of appeal in the case of the appointed person, or the court of high justice regarding the decisions of the judicial department at the trademarks registrar.[361] Beside the other intertwining elements, the administrative enforcement link via "the

[359] TRIPs Agreement 1994; Chapter 3 [Enforcement of Intellectual Property Rights, as it is stated in Art 41(5) of the agreement.
[360] Art 42 TRIPs, [Section 2:Civil and Administrative Procedures and Remedies]
[361] It has to be mentioned that single person reviews of trademarks at the judicial department, and the decision of the person is considered an administrative act of a judicial nature.

Appointed Person" and the judicial department at the trademarks and patents registrar at the JMIT is the point of closest resemblance between the UK and Jordan.[362]

What is the main concept drawn from both judicial systems and the provisions of Art 41 TRIPs (in relation to IPRs) and what might be considered a joining point between both systems? Are the measures of enforcement fair and equitable? Another significant linking point, even though it might not be direct, is the Euro-Med AA between the EU and Jordan and the major role Human Rights and Intellectual Property Rights have as a point of linkage between both sets of rights and the legal and judicial systems under study. The ability to relate the Jordanian legal and judicial system to the UK could exist via the Jordanian international obligations either through joining the WTO, and/or its follow-up agreements and treaties, or the Association Agreement with the EU and the country reports monitoring progress in Jordanian aspects of life (economic, social, legal and judicial) that has had the greater impact on the judiciary. There have been many reforms and amendments upon the judiciary and IP laws and Acts that could lead to more comparisons and corresponding elements in the enforcement measures, and cooperation among the judiciaries concerning judges' training and the trial process in general and IP enforcement specifically.

Therefore, in conclusion it could be said from a general examination of both judicial systems that there is more that is distinct or divides between the UK and Jordanian systems. However, that being mentioned, the basic general aspects of a fair trial and the concept of true outcomes of the judicial process, either in civil proceedings or criminal prosecution, draws together the disparate elements between both systems into a more correlated understanding of the similar aspects of the systems under scrutiny. The international obligations on both sides relate Human Rights and Intellectual Property to a more comprehensive understanding of the common legal background, such as in the legal international obligations resulting from the Euro-Med AA between EU and Jordan, the membership in the WTO and the WIPO and its agreements and treaties and the TRIPs Agreement.

However, despite the brief influence the British laws had on Jordan during the prior to independence era. The above mentioned leading to varied judiciary proceedings, yet in the IP enforcement process there are different elements that affect the judicial

[362] As in *n* (233) and (234) in Chapter three of this thesis. To check

enforcement procedures that could create a common background for connection between the systems. The first element is the membership in IP, trade and human rights international instruments such as WTO, TRIPs and ICCPR, ICSECR 1966. The Euro-Med Association Agreement between Jordan and the EU and its member states.

Chapter 5. Right to a Fair Trial – its Elements and Application in IP Situations

5.1. Introduction

The right to a fair trial is an important human right, whether the trial procedures is in the shape of criminal prosecution or civil litigation. As mentioned and as will be explored, the principle of fair trial should be regarded as an extending to judicial process as a whole. It is a cornerstone of effective and fair enforcement intellectual property required by TRIPs and the human rights Conventions.

Just as the theoretical approaches of Collision, Conflation, Co-existence, and Convergence posited in Chapter 3 apply between IP and substantive Human Rights, so also they can shed light on the relationship with fair trial as procedural human rights. The international human rights instruments and conventions have highly the right to a fair trial, especially on the criminal level. Conversely, TRIPs place much more emphasis and detail on civil and administrative procedures; these provisions could be used as an interpretative instrument to redress the comparative lack of commentary and treaty text on criminal enforcement.

There have been various commentaries and literature on the human rights versus intellectual property prospective in general. Even though the trajectories between IPR and human rights being discussed on various occasions in general and in depth, the relationship has been vague on certain levels.[363] Despite the massive quantity of research on the subject-matter however the quality, interest and direction of research the depth and comprehensive understanding has been lacking on some areas of IP and human rights interactive relationship.

In criminal proceedings, the state is enforcing IP against the accused/defendant.

This in the first instance may wrongfully lead to the misconception that there is ***collision*** between the two sets of rights.[364] A number of arguments militate against the collision approach. Firstly, the human rights of others may be involved in the enforcement of IP – rights of the complainant IP owner, or of third parties, such as

[363]P Frantzeska, 'TRIPS and human rights' in Kur, A & Levin, M (eds.), *Intellectual Property Rights In a Fair World Trade System: Proposals for Reforms of TRIPS* (Edward Elgar Publishing,2011)
[364] As seen in Chapter 3.2 Theoretical Debate under subheading Collision

citizens who might be mislead by counterfeit products. Secondly, the right to a fair trial applies to the process as a whole, and both sides may claim protection, for example in relation to time limits. Thirdly, in Jordan, criminal proceedings may be combined with civil claims, to compensation and other remedies, by the complainant IP owner.[365] Could the two sets of rights under examination in this chapter (human right to a fair trial and intellectual property rights) be considered two unrelated legal systems ***i.e. Co-existence***?[366] Some considered the two subjects to have developed in virtual isolation from each other.[367] But over the years, international standard setting activities have begun to cover previously uncharted intersections between intellectual property law on the one hand and procedural human rights.[368] The concept that relates the various human rights parts, in this case our main interest being economic and procedural rights, are linked to human dignity but also have social and economic consequences. That provides the connection between fair trial as part of the procedural set of human rights and intellectual property as a main part of the economic set of rights. This strengthens the ties and possible common background between intellectual property rights and procedural human rights, such as the right to a fair trial. Procedural rights, including the right to a fair trial, have an economic aspect along with their humanitarian aspects. This is especially so in compensation claims and the existence in Jordan of mixed criminal civil suits in IP cases, in which the complainant plays the role of a private enforcer.[369]

The fact that, prior to TRIPs, both IP and the right to a fair trial were mentioned in human rights treaties but not IP ones, might suggest that there has been ***Conflation*** on this issue, within the Human Rights paradigm. However, if this were previously the

[365] As seen in Chapter5.2.2. Fairness of Criminal Trial Procedures [Balance of Resources among Parties] which is an embodiment of the Convergence Approach as seen in Chapter 3.2. Theoretical Debate of this thesis

[366] As seen in Chapter 3.2. Theoretical Debate

[367] Lescano A F Tebubner G, translated by Everson M *'Regime-Collisions: The Vain Search For Legal unity In The Fragmantation Of Global Law'* as seen in Chapter 3.1. Introduction of this thesis

[368] L R Helfer, Human Rights and Intellectual Property: Conflict or Coexistence? (2003) 5 Minnesota Intellectual Property Review p.47. Also G. Dworkin & R. Taylor; "Blackstone's Guide To The Copyright, Designs & Patents Act 1988" at 3 discussing UDHR Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A Art 27

[369] As seen in Chapter 1.4. Definitions page under scope and method of trademarks judicial protection

case, TRIPs has restored the balance by including measures related to fairness of proceedings in Art 41 onwards.[370]

Another 'C' may be evident here – that the regimes of fair trial, intellectual property and enforcement of IP are ***Complementary***. TRIPs may have made the relationship express at the international level, but it is submitted that the right to a fair trial has long been embedded in the procedures for enforcing IP in Jordan and the UK. This part of the research will examine both sets of rights and will try to figure out the common background that relates these rights to each other, as well as what the aspects might be that differ. Despite the connections and differences between procedural human rights and intellectual property, the connection between both rights in the international treaties has apparently been estranged.[371] It has to be indicated that TRIPs as an international instrument of IP protection is as well a trade driven agreement and its motives and outcomes are trade and commercial gain, and that in general drives perception of the agreement and its objectives further apart from the main human rights objectives. Moreover, this concept of intellectual property has two main differences from human rights in consequences. Firstly, unlike human rights, trade law is essentially pragmatic and results-based. Secondly, trade remedies are generally predicted on a showing of actual adverse impact on trade.[372]

However, there has been very limited literature on the procedural elements of human rights including fair trial and its link to criminal enforcement of intellectual property.

The aspect of the relationship between IP and HR that has not been examined in depth is the applicability of fair trial provisions of the main human rights instruments to the '*fair and equitable'* procedures mentioned in Art 41(2) of the TRIPs text. The threshold for criminal enforcement of IP in Art 61 TRIPs has come under scrutiny, but has not been fully defined even in the World Trade Organisation Dispute Settlement Arbitration Panel resolutions/decisions [hereinafter 'WTO D S P']. The main standpoints of criminalisation of IP infringements are the commercial scale and

[370] Convergence approach as seen in Chapter 3.2 of this thesis. Also in 5.2.3. The Right to a Fair Trial concerning IP Criminal Enforcement According to the Provisions of TRIPs of this thesis

[371] Human Rights international treaties have clauses that protect intellectual property rights and the rights of its owners. While intellectual property treaties such as Berne Convention, Paris and then TRIPs agreement has not dealt with human rights among its provisions in general. Ibid;p.50

[372] Gervais D; Intellectual Property and Human Rights: Learning to Live Together *in* P. Torremans (ed.) *'Intellectual Property And Human Rights, Enhanced Edition of Copyright and Human Rights'*, (The Hague, Kluwer, 2008), 6-7.

intentionality or 'wilfulness' of copyright piracy and trademark counterfeiting according to Art 61. Thus Thresholds for mandatory criminal enforcement of counterfeiting and piracy are based on the commercial scale and wilfulness of the infringement. This is related to the gravity of the infringement and therefore the penalties applied. These may provide an additional layer of protection for the right-holders and thresholds should be in line with Art 41(1) TRIPs that the procedures are to be to deterrent to prevent future infringements, but also Art 41(2). This could be seen in the WTO DSP findings in WT/DS362/R CHINA – Measures Affecting the Protection and Enforcement of Intellectual Property Rights resolution.[373] The severity is higher than that based on which are based the civil enforcement procedures [Art 42]. The commercial scale for criminal enforcement was mentioned in the USA China dispute panel citation of the threshold of IP criminal liability; stating that it should be assessed against "the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market".

The right to a fair trial appears prominently in the provisions of the main human rights instruments such as the UDHR, ECHR and the ICCPR. This thesis will examine the right to a fair trial as it has been detailed in Art 14 ICCPR and Art 6 ECHR in connection with the concept of ***"fair and equitable"*** procedures according to TRIPs. This approach will enable the judicial application of fair trial in IP situations, and will test the compatibility of the ***"fair and equitable"*** in the context of the safeguards granted in Art 14 ICCPR.

It has to be mentioned that the various elements of the right to a fair trial are related and will interact with each other. The relation between the right to a fair trial and intellectual property shall be studied and whether and how the rules of fair trial and public hearing should be applied to the rules of enforcement of intellectual property rights,[374] since both are considered important parts of the human rights system. The provisions mentioned indicate that the role of both sets of rights are to be respected and protected, so it could be said that the common legal background of the connection

[373] WT/DS362/R Complainant United States Respondent China at 2. Summary of Key Panel Findings (TRIPS Art 61(boarder measures-remedies) at [1]
[374] Agreement On Trade-Related Aspects Of Intellectual Property Rights ("TRIPs Agreement") Part III: Enforcement Of Intellectual Property Rights, Articles [41-61]

between the right to a fair trial and IPRs has its roots in the basic principles of international human rights treaties.[375]

5.2. Intellectual Property and the Right to a Fair Trial

5.2.1. Fair Trial

The International Covenant on Civil and Political Rights [ICCPR] and the International Covenant on Social and Economic Rights [ICSER] in 1966 plays an important and instrumental role in elaborating the set of rules stated in the Universal Declaration of Human Rights [UDHR] 1948 and making them binding and to be applied in member states' national laws.[376] Along with their predecessor, The European Convention on Human Rights [ECHR] 1950, they were intended to provide a standardised statement of fundamental rights and freedoms.

These treaties set out the minimum standards and safeguards to protect an individual's rights and his/her free enjoyment of these rights, in a manner that could be implemented locally on a national level for each individual member state. And the co UK laid international obligations upon contracting states[377]

Under the UK Human Rights Act 1998, UK courts and tribunals must conduct proceedings in a manner that compatible with the European Convention of Human Rights,[378] the right to a fair trial is mentioned in Art 6 of the Convention and is an

[375] UDHR1948 Arts 7,10 and 27, the ECHR 1950 Arts 6, 10; ICCPR 1966 Arts 14, 15 and ICESCR 1966 Art 15. These provisions could be said to provide a common legal background between the right to a fair trial and IPRs.

[376] M. Nowak; *"Introduction to the International Human Rights Regime"*, (Leiden: Martinus Nijhoff Publishers, 2003), p.79.

[377] J. Ulph; *'Commercial Fraud, Civil Liability, Human Rights, and Money Laundering'* (Oxford, OUP , 2006) , p. 37

[378] Human Rights Act 1998 c.42 section 1"(1) *In this Act "the Convention rights" means the rights and fundamental freedoms set out in- (a) Articles 2 to 12 and 14 of the Convention, (b) Articles 1 to 3 of the First Protocol, and (c) Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the Convention*" In regard with purpose of the Act and the sections the deals with the interpretation of the Convention rights and legislation and the role of courts. It has to be mentioned that the UK courts implemented the provisions and rules of the European Convention of Human Rights long before the Human Rights Act 1998. A Law Commission Consultation paper states " …, *but it ratified the Convention as long ago as 1951, and thus undertaken obligations in international law that it will conform in its domestic practice with the terms and principles of the Convention."* Law Commission Consultation Paper No 138 Evidence In Criminal Proceedings: Hearsay And Related Topics',(1995) at

essential part of the Convention's the minimum requirements. Yet the right of fair trial is not considered unqualified is subject to public policy objectives.

It is submitted that the concept of fair trial is not limited to the trial papers and formal exchanges in court, but has a more general application in pre-trial rules and procedures, and also to post-trial issues of compensation and sentencing. It applies to rules about collecting evidence and the protection of scenes-of-crime. Fair trial applies equally to civil litigation proceedings or criminal prosecutions, whether such procedures are trial-connected or leading to the trial, especially the investigation phase. The principle of fair trial contains the general set of rules and provisions that deal with equality, fairness and balance among the involved parties at courts. Most of the provisions dealing with fair trial create a non-exclusive list of minimum required standards. These provisions mentioned in the international instruments are generally related to criminal trials. Yet there are no explicit restrictions that prevent courts from applying the rules on the right to a fair trial to civil litigation.[379].

5.2.2. Fairness of Criminal Trial Procedures and the Balance of Resources among Parties

The topic of fair trial shall be examined from different perspectives: international, regional and national, to understand its connection with intellectual property enforcement in general and criminal in particular. However, the right of a fair trial is connected with the IP holders' interests the public interest as well as the private rights of the defendant. The public has the right to justice, to have the truth revealed in relation to crimes committed or civil wrongdoings.[380] And to be protected from damage that may be caused by counterfeiting and other serious IP offences.

This suggests a principle of publication of the outcomes of the cases in a manner that shall not negatively affect the parties involved in the trial (the accused, the victim and

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[5.1], p.60. Also Ulph J; *"Commercial Fraud, Civil Liability, Human Rights, and Money Laundering"* (Oxford, OUP, 2006), p. 38.

[379] Art 6 ECHR 1950 and Art 14(3) of the ICCPR 1966.

[380] K. Starmer "Public prosecution service annual lecture - the role of the prosecutor in a modern democracy"21/10/2009 available at: <http://www.cps.gov.uk/news/articles/public_prosecution_service_annual_lecture_-_the_role_of_the_prosecutor_in_a_modern_democracy/> accessed at 11 June 2013

the public represented by the attorney general), such that all these parties shall be on an equal.

Safeguarding the interests of the parties involved – the public, the victim and the accused – requires that a balance should be carefully maintained.[381]

This balancing act appears in the concept of convergence (and complementarity) and is supported by the principle of fair balance adopted by the European Court of Justice in *Scarlet Extended*

> the injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of freedom to conduct business enjoyed by operators such as ISPs.*[382]*

Conditions that are fair and unbiased sets of rules ensure that the rights of society (represented in criminal trials by the attorney general) and the accused/defendant are protected.

The public order is more interested in justice than convicting the accused/defendant especially if the course of the trial does not reveal significant evidence of guilt.[383] The main concept of the right to a fair trial is based upon the possibility of the abuse of power by governmental officials during the judicial process and avoiding such risk.[384] That is related to the fact that the attorney general usually has more resources and facilities to accomplish his duties than the accused.

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[381]M Al- Tarawneh "*The Right to a Fair Trial: A comparative Study of the Jordanian Jurisprudence and the international and regional conventions related to Human Rights and Fundamental Freedoms"*; (Amman, Amman Center for Human Rights Studies; The People's Print; 2007). P 116. The balance mentioned could be created among the parties in explicit safeguards between the rights of the accused/defendant and the public order represented by the Attorney General's department or office. The related procedural and conceptual Acts have to create an atmosphere of fairness and equality among the parties involved.

[382]*Scarlet Extended SA v Societe Belge des Auteurs, Compositeurs et Editeurs SCRL (SABAM)* (C-70/10) [2012] ECDR 4 at [49]

[383]W. M Janis, S. R Kay& W A Bradley; "*European Human Rights Law: Texts And Materials"*;(Oxford, OUP; 3rd ed., 2008), p. 718; M Al- Tarawneh *"The Right to a Fair Trial: A comparative Study of the Jordanian Jurisprudence and the international and regional conventions related to Human Rights and Fundamental Freedoms"*; Pp. 116-117.

[384] W. M Janis, S. R Kay& W. A. Bradley; *"European Human Rights Law: Texts And Materials"*; Pp. 718-719.

Therefore, after the accusation of the defendant, it is essential to create just and fair conditions during the trial for all involved parties. This promotes an equal legal status for the defendant and is significant not only for the accused/defendant or the prosecution authority and public interest but for the judicial process and its outcomes.[385]

Fair trial rights, can be regarded as a manifestation of human dignity, a concept "providing the nucleus around which a number of other rights have been created, such as freedom rights, equality rights, political rights economic rights, and procedural rights".[386]

The criminal administration of justice, which includes the right to a fair trial, is part of the procedural rights, while intellectual property rights are part of the rights of economic life. Intellectual property has been part of the human rights regime, even though this inclusion has been regarded is based upon the individual's right of property and the justification of intellectual property and the ownership of the property and the right holder's (owner, author, etc..) to utilise his/her property and exclusiveness and the legal monopoly granted to them according to the related laws. Human rights instruments attempted to create a balance between the rights of the authors and those of the public.[387] How could the discourse on existential rights and economic elements of human rights affect the nature of the study of the connection between Human Rights and IP?

In order to have an understanding of the concept of a fair trial as a fundamental part of the human rights system, the minimum standards in the major international treaties concerning the right of a fair trial that are relevant and binding for UK and Jordan legal systems shall be analysed.[388]

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[385] M. Al- Aouagi, "*Human Rights in the Criminal Prosecution 'Accompanied with an Introduction in Human Rights"* ;(Beirut, Nofal Publications , 1989,1st enhanced ed. 1989), pp.106-107. "even though the prosecution process in a certain society is meant to protect the right of individuals yet it must be used to ensure that rights of the parties involved such as; the accused (defendant) to keep such procedures under the legal provisions of the law and legitimacy"

[386] M. Nowak, *'Introduction to the International Human Rights Regime' p.2*

[387] G. Dworkin, & R.Taylor, *'Blackstone's Guide To The Copyright, Designs & Patents Act 1988'*, (London, Blackstone Press, 1989), p. 3.

[388] UDHR 1948 is not legally binding, but could create the common legal background for both legal systems under study; for the Protection of Human Rights and Fundamental Freedoms [hereinafter ECHR 1950] as amended by Protocols Nos. 11 and 14 binding in the UK alone; also the ICCPR 1966 and the ICESR 1966 which create what is called the UN Human Rights Bill. And also the legal

The provisions relating to the right of a fair trial in the international and regional human rights treaties and the provisions of national laws under study shall be compared in order to shed light upon the effect that these treaties have on the national laws under examination – and whether the provisions of the national legislations meet or fulfil the requirements.

Could the same concept apply if the tables have been turned? As been mentioned previously (applying human rights in IP treaties) has not been implemented explicitly in the texts of intellectual property international instruments, at least prior to TRIPs.

5.2.3. The Right to a Fair Trial concerning IP Criminal Enforcement According to the Provisions of TRIPs

It is submitted (as noted in this Chapter and Ch3) that the link between IP and human rights is best regarded as a complementary one; the theoretical approaches mentioned in Ch3 have their roots in both human rights and IPRs. The enforcement procedures of intellectual property on an international level. Can be identified in the third chapter of TRIPs agreement Articles, 41-61.

Articles 41 and 42 TRIPs deal with the basic principles the member states should implement in their enforcement measures locally in the national laws of each member state. The Article confirms their importance and the objectives they should achieve.[389] It could be noted from Article 41(1) that the main purpose is to

> Permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade...

connection that has been created and draws a closer understanding of both legal systems and EU law presented in the Association Agreement between European Communities and its members and Jordan. And the fact both Jordan and the England are members in the WTO and its related intellectual property treaties and agreements.

[389] Art 41 TRIPs

The provisions in sub-paragraph (1) mainly concentrate upon minimising the effect of IP infringements in the interest of IP holders and international trade.[390] With regard to mainstream enforcement instruments of IPRs, TRIPs has not been firm enough in identifying the connection with the human rights system – at least with the right to a fair trial *per se* and from a criminal aspect.[391] And this is even though – as mentioned later in Art 41(2) – the TRIPs does recognise the importance of fair and equitable procedures during the enforcement process in general. These principles of being ***fair and equitable*** should apply to Art 61 TRIPs, due to the fact that the main goal of the agreement is to create a mechanism to realise the economic and instrumental benefits of protecting intellectual property products across national borders.[392] Art 41(2) goes on to indicate the methods of civil enforcement, stresses again the importance and meaning of 'fair and equitable' procedures that they should be fair and equitable in connection with the procedures and not be unnecessarily costly or involve unreasonable time limits or unwarranted delays. Art 41(2) TRIPs also with the functioning of the judicial, administrative authorities of enforcement systems in the light of Art 41(5).[393] Art 41 in its remaining sub-paragraphs states the importance of safeguards to ensure the accuracy and stability of the enforcement procedures, such as written decisions and their reasoning and the evidence taken into consideration, which could be regarded as an expression of 'fair and equitable' in Article 41(2),[394] including the parties' ability to seek judicial review. It has to be mentioned that the enforcement procedures in the TRIPs agreement do not impose additional

[390] Xavier S Human Rights and Intellectual Property Rights in *M.C* Correa and A.Yusuf (eds.)*'Intellectual Property and International Trade: The TRIPS Agreement'* , (Kluwer , 2nd ed., 2008) p.287.;*"This agreement linked the regime of intellectual property protection with that of international trade, …"*

[391] Art 61 concentrates upon enforcement measures and the required protection procedures member countries should apply and when criminal punishments should be implemented, but nothing is said about the procedural rules applied to ensure the accuracy of the application of provisions mentioned in the Article.

[392]X Seuba, Human Rights and Intellectual Property Rights in *Correa* M. C and Abdulqawi A. Yusuf (eds.) *'Intellectual Property and International Trade: The TRIPS Agreement'*, (Kluwer, 2nd ed., 2008). Pp.389-390.

[393] According to D. Gervais; '*The Trips Agreement: Drafting History And Analysis';* (London, Sweet & Maxwell,3rd ed.,2008). Pp. 440-442.

[394] Art 41(2) and 3 TRIPs Agreement 1994. Give general rules of enforcement procedures of IP connects with some of the main rules of fair trial even though it is not mentioned explicitly that these rules are to be applied in civil and criminal trial procedures. Yet it is mentioned in the provisions on civil and administrative measures of enforcement in Art 42

requirements upon member states concerning any amendments or changes to the existing judicial systems concerning intellectual property enforcement.[395]

Art 41(5) from the TRIPs agreement is a linking point between the application of rules of fair trial on procedures of intellectual property and the enforcement of Art 61. As the provisions of 41(1) and (5) laid the foundation of enforcement by constricting on 'fair and equitable' procedures as stated in Art 41(1) while granting the member states the freedom to apply their own judicial system to enforce IP infringements as long as it meets the general obligations. Thus the application of Art 61 has to be in line with the provisions of Art 41.[396] Even though the texts and general provisions dealing with enforcement do not state explicitly any rules or requirements that could be applied to criminal enforcement, there are no provisions that declare that the general principles of enforcement should not be implemented in relation to Art 61. It is the possibility of applying the general measures of enforcement upon criminal enforcement procedures that lacks clarity in the main text of the agreement.

Furthermore, it has to be said that the above understanding of the related provisions of TRIPs does not contradict the provisions of Art 31(1) (2) of the Vienna Convention on the Law of Treaties, which highlight the need to interpret the provisions of a treaty in good faith and in light of the context and purposes of the treaty or agreement.[397]

It is also argued that the provisions of Art 41(5),

> It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

This does not displace obligations under human rights.

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[395] Art 41(4) and 5 TRIPs Agreement 1994.
[396] TRIPs Agreement 1994, Section 5: Criminal Procedures, Article 61
[397] Art 31(1,2) "*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes*:" as in *n* (124) of this thesis.

However, it should be remembered that Art 61 TRIPs and criminal enforcement is an additional safeguard measure against wilful copyright and trademarks infringements on a commercial level. It could be said that criminal enforcement according to TRIPs is not to be applied to ordinary offences. Therefore, Art 61 is applicable as an extra measure of enforcement in cases of extreme infringements of IP where civil and administrative methods may not create the deterrent effect on IP infringements that have additional seriousness. The general safeguard measures of Art 41 have been spelled out in more detail for 'ordinary' and should be applied to the extra layer of criminal enforcement.[398]

Both TRIPs and Art 14 ICCPR lack any explicit safeguards that cover the final elements of verdict delivered and the sentence granted. The concluding aspects of the enforcement as a judicial procedure are vague due the lack of clear-cut provisions dealing with finality of judicial process in both instruments.

5.2.4. How Could IP enforcement proceedings apply the provisions of ICCPR and ECHR?

Before analysing applicability of TRIPs/ICCPR/ECHR in the courts of UK and Jordan a few brief notes on the effect of these treaties in jurisdictions:

1. Jordan: TRIPs (also WCT and WPPT) has been introduced into national legislation among the IP set of Acts and regulations. Jordanian courts and lawyers refer to TRIPs freely in IP litigation.[399]

2. The courts in Jordan (in my personal experience) are less ready to refer explicitly to ICCPR provisions even though it has been implemented it into the Jordanian national legislation (e.g. that procedures are void if AG fails to remind the accused of his right remain silent according to Art 63 (1) of the Criminal Procedures Act

[398] *n* (126) chapter two of this thesis
[399] The Jordanian Copyright Act no 22 1992 has been amended four times since 1992 and especially during Jordan's process of joining the WTO and implementing the TRIPs Agreement

('CPA 1961'[400]) Elements of fair trial would be implemented without any reference to ICCPR.

3. In the UK the ECHR has been introduced into the legislation and applicable at courts via the HRA. As for IP, even though the Enforcement Directive incorporates TRIPs obligations, TRIPs and the other international agreements are not given direct effect. They are used to interpret national and regional legislation.

Jordan's relationship with EU is ruled by the Association Agreement (as mentioned in chapter 2). The impact the EU legal order on Jordan is indirect and may be likened to the effect on a person of being in a dentist's waiting room.

5.3. Elements of the Right to a Fair Trial According to the Provisions in International Human Rights Treaties and their applicability to Intellectual Property

5.3.1. Introduction

It is noted that the rights and minimum standards of protection in Art 14 ICCPR 1966 are more detailed than those in Art 6 ECHR 1950. Yet there is no conflict between the main concepts of the Articles of both the covenant and the convention. The most important elements of IP enforcement will be examined using the ICCPR as a checklist. In each case the relevance to IP will be posted, the content examined and an attempt will be made to identify its relationship with the theoretical approaches mentioned in chapter 3 (Coexistence, Conflation Collision, Convergence) Therefore the structure of the chapter has been based on the checklist of Art 14, aside from "Search Orders" and "Time Limits" which are set out in individual sections. The text of Art 14 ICCPR 1966 is set out in the Annex of the thesis.

This approach will draw links between fair trial and IP enforcement and attempt to disconnect or remove unrelated provisions, which will make it easier to track of identifying any aspects of fair trial which is necessary for IP enforcement.

[400] Author's translation from Arabic

5.3.2. Equality before Courts

Equality between the parties at court also means that people must have equal access to the courts, and that any attempt to deny such ability or frustrate the individual's ability to raise his/her cases at a court of law is a violation of Article 14 (1).

As previously argued, there is an important public interest in the proper outcomes of IP trials therefore the importance of equality -balance- between the parties, the victim/prosecutor, the accused and the interest of any third parties.

The principle is supported by detailed arguments, such as the right to representation[401] and the right to understand the accusation. Clear violations have been found in which the accused has been denied the ability to personally attend the court's proceedings, or he has been denied the opportunity to instruct his provided legal representative with information that could be significant for his defence.[402] This is illustrated by a decision of the Lebanese Court of Cassation which decided that "the lower court relied in its decision upon technical reports composed in a foreign language (French) and the expert who drafted them was French. The reports must have been translated to Arabic, which is the official national language of the court by a translator that has taken oath at the court. And the Arabic translation of the reports shall be read to the court and the defendant and discussed openly in order to preserve the defendant's right in a fair and public trial."[403] This supports what has been stated in article 148(1) JCPA 1961: "The judge could not rely upon any evidence that has not been presented during the trial and has not been discussed publicly and openly by the parties involved."[404] Equality is also served by the next requirements of a fair trial, discussed in section 5.3.3.

The components of the principle of equality, access to courts and the impartiality & competence of the courts (discussed below), have their impact on the course of justice

[401] Al- Tarawneh M n *(385)*

[402] Bailey. S; "Rights in the Administration of Justice"; in Harris. D And Joseph, S (ed.)"*The International Covenant on Civil and Political Rights and United Kingdom Law"*; (Oxford; Clarendon Press, 1995). pp.216-217

[403] Lebanese Court of Cassation Criminal Chamber Case no(42) on 09/02/1952 (Translator's absence, principle of public hearing)

[404] This concept could be demonstrated in *Lebanese Court of Cassation Criminal Chamber Case no(42) on 09/02/1952 (Translator's absence, principle of public hearing)* "The Committee decided in *Van Meurs v. The Netherlands 215/1986* that there has been breach of Article 14. (1) If the trial has been held in a room with one seat for a member of the public. And also as well in The Jordanian *Court of Cassation Criminal Chamber Case no. (1143/2008), fair trial, Right of defence and the absences of the translator* as mentioned in more detail

and trial settings. The proper implementation of the principle of equality is of great significance to IP enforcement as it provides the parties – the IP holder and the accused - with a sense of fairness in procedural justice. The convergence approach could be seen here. It can also be noted in the complainant's ease of access to the Jordanian court in IP criminal infringement cases if he has solid evidence of infringement, the IP holder acting somewhat as a private prosecutor. Such simplicity is seen, as well, in mixed Civil/Criminal IP law suits.

As far as the second element - the impartiality and competence of the court- is concerned, this may appear, at first glance, to be more a case of co-existence. This impression is reinforced by. The provisions of Art 41(5) TRIPs. However, consideration of judicial practice shows that this is not co-existence. The judge ultimately has to maintain a balance between the severity of the punishment of an IP crime and the complainant's right for a just redress for his infringed IP. This suggests that the principle of equality before courts is an implementation of the convergence approach in the relationship between IP and the right to a fair trial.

5.3.3. Hearing by a Competent, Independent and Impartial Tribunal Established By Law

The 'competent court' relates to the later phrase in the same sub-paragraph (1) "established by law", which in other words means that the court is formed according to the legitimate regulations and laws concerning courts.[405]

The right to equality before courts and tribunals dictates that all parties involved should be on the same level as equivalent parties. This includes the neutral ruling bench as a whole or any of its members.[406] The court has to preserve the same distance between the complainant and the accused. This means that the ruling bench has to maintain a level of fairness and equality in its dealings with the parties involved in the trials. This includes the composure and conduct of the judges'.[407] The concept

[405] *Ibid*, p.217. A delay in proceedings is considered a miscarriage of justice and the implementation of principles of a fair trial. This term in other words could mean the court has been created prior to the offence/ wrongdoing committed.

[406] *of María Cristina Lagunas Castedo v. Spain* CCPR/C/94/D/1122/2002 at [9.5] The Human Rights Committee 3 November 2008

[407] Human Rights Committee, General Comment No. 32, Article 14, Right to equality before Courts and Tribunals and to a f air trial 27 of July 2007 paragraph, 18 as found at: <http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/3b4ae2c98fe8b54dc12568870055fbbd/177d6404e42d30d7c125736100432793?OpenDocument > last accessed at 23/03/2011. , at [2]. Also Art 147 of

of objective judges has been adopted by the Jordanian legislator to ensure that court holds the same distance between parties involved in the trial.[408] Dealing with impartiality is considered as important for IP cases as for any other. The judges, as members on the ruling bench, must be impartial to both sides during the trial, and judges should not act or react in a manner that could promote the interests of either party involved in the trial process. The Human Rights Committee clarified the concept of a judge's impartiality in *María Cristina Lagunas Castedo v. Spain in* No. *1122/2002*.[409] The Committee went on in a different paragraph[410] of its decision to state that a member judge of the ruling bench should not have any interest in the case under examination by the court as such joint interests could undermine the impartiality of the judge and the court.[411] That means the court must remove any element of distinctions of any kind and basis whatsoever, such as wealth or race. The committee states, "*A hostile court environment can seriously undermine the fairness of proceedings*". [412]

This supported by the decisions of the European Court of Human Rights on Impartiality and Independence of the under Art 6(1) ECHR:

In *Moore and Gordon v. The United Kingdom, Application No. 36529/97, 37393/97* the Court concluded:

> Accordingly, and for the reasons expressed in detail in the judgment of the Court in Mr. Findlay's case, the Court concluded that the courts-martial which dealt with the applicants' case were not independent and impartial within the

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JCPA 1961 "1. the defendant is considered innocent until he is convicted" The text of Article (14) does not include any explanation of the concept of a competent trial.

[408] Art 39 Jordanian Independence of the Judiciary Act 2001. It states the manner in which a judge is dismissed on bases of kinship, relationship or commercial ties with any of the parties of the trial.

[409] *The Human Rights Committee Para 9.5 of María Cristina Lagunas Castedo v. Spain CCPR/C/94/D/1122/2002* 3 November 2008 "The Committee recalls its general comment No. 32, Jordanian Constitution (1952) Article 97

[410] *The Human Rights Committee Para 9.8 of María Cristina Lagunas Castedo v. Spain CCPR/C/94/D/1122/2002* 3 November 2008. In the same meaning the Jordanian Constitution (1952) Article 101 (i)

[411] *María Cristina Lagunas Castedo v. Spain CCPR/C/94/D/1122/2002* at [9.8] The Human Rights Committee M. Aouagi, "Human Rights in the Criminal Prosecution 'Accompanied with an Introduction in Human Rights' ; (Nofal Publications Beirut; Nofal Publications Beirut , 1989,1st and enhanced edition)[Arabic Author's translation],. pp.513-514. Jordanian Constitution 1952 Article 101 (ii) "The sittings of the courts shall be public unless the court considers that it should sit in camera in the interest of public order or morals"

Angel N. Oló Bahamonde v. Equatorial Guinea, 468/1991; CCPR/C/49/D/468/1991; The Human Rights Committee, Forty-ninth session, cited:< http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/ > accessed on 24/02/2009

meaning of Article 6(1). The Court was further of the opinion that, since the applicants' courts-martial have been found to lack independence and impartiality, they could not guarantee either of the applicants a fair trial.[413]

5.3.4. How could this concept be applied in an IP situation?

This could arise if "A" was a judge/trademark or patent registrar and "B" was an applicant for the registration of a trademark, who was as well a partner in business with "C" who is related to "A" (his brother-in-law). In such a situation, the registrar/judge should decline from seeing the case to ensure equality and impartiality of the department or court. "A" should inform his superior of his/her involvement with "C" and of the possible conflict of interest that could affect his decision-making in this particular incident. This example is a hypothetical situation that has its basis in the law.[414] There may be the appearance of impartiality and breach of Art 6 where the judge calls advocates of a certain party to the judge's corridor, even if to urge them to seek a settlement.[415] Fairness of trial may be made impossible by a conflict of interest involving counsel, as happened in *Ex p Aston Manor Brewery*.[416]

The proper implementation of this principle is of great significance to IP enforcement as it provides the parties – i.e. the IP holder and the accused- with a sense of fairness and seriousness of the trial and procedural justice. These qualities resemble the nature of the convergence approach.

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[413] *Moore and Gordon v. The United Kingdom, Application No. 36529/97, 37393/97* at: <http://sim.law.uu.nl/sim/caselaw/Hof.nsf/e4ca7ef017f8c045c1256849004787f5/22c196d329893a9cc125681000484edf?OpenDocument > accessed at 21/11/11 There is also *Human Rights Committee Mariam, Philippe, Auguste and Thomas Sankara v. Burkina Faso Communication No. 1159/2003 Para 12.5* "considers that the Supreme Court failed to comply with the obligation to respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, of the Covenant and the principles of impartiality, fairness and equality of arms implicit in this guarantee." As found at: <http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/160f6e7f0fb318e8c1256d410033e0a1/9dfe5fd75006889bc125719a0032f288?OpenDocument > accessed 21/11/11.

[414] An author's translation of Art 39 Judiciary Independence Act 2001 "It is not allowed that two judges who are related in blood or affinity to the fourth degree be stationed in the same bench, or have been a representative of the prosecutor or a representative of one the litigants or experts who may be affiliated with one of the same judges who examine the case" as seen in Arabic at: http://jc.jo/rules_and_regulations last accessed February 8, 2014.

[415] *Hart v Relentless Records Ltd* [2002] EWHC 1984 (Ch) at [37]

[416] Times January 8, 1997 [1997] 94(5) L.S.G. 32, as summarised at; http://www.ipo.gov.uk/ipcass-aston.htm last accessed 8 February 2014

5.3.5. Competence of Courts and IP

The accused has the right to be treated equally and on a level ground with his opponents at the various stages and types of judicial court/tribunal or board of adjudicators. So it is an element of the court's impartiality that is significant in IP cases, where law and subject of matter of rights may have a uniquely technical feature. This requires especial competence of the tribunal, and suggests that criminal IP cases may be unsuitable for jury trial.[417]

Notwithstanding Art 41(5), it may be necessary for courts either to have -specialised judges to deal with IP cases or to call on experts including the expertise of the IP office; as in cases related to border measures. Very often a technical expert assists the court this could be noted in the guidance given on expert evidence in patent cases.[418]

An expert witness's ultimate duty, even if called by a party, is to assist the court in administering justice.[419] It is submitted that the expert in an IP case is assisting the process of convergence.

Last, but not least, expertise of prosecutors and police will be required to ensure fairness of the trial process in intellectual property cases.[420] It has to be mentioned that An Intellectual Property Crime Unit was established at the City of London Police in September 2013.[421]

5.3.6. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law

This citation makes clear that the requirements of impartiality and equal treatment apply to all kinds of trials and hearings, whether judicial, semi-judicial administrative panels, criminal/civil or even mixed-trials. This concept I reflected in the provisions of Art 41(2&5), 42 and Art 61 TRIPs agreement respectively**.** Careful drafting of

[417] Smith, J and Montagnon 'Case comment: *R v Gilham'* [2010] EIPR N20 at N22, *R v Higgs* [2008] EWCA Crim 1324 *R v Gilham* [2009] EWCA Crim 2293

[418] Arnold J in *Medimmune Ltd v Novartis Pharmaceuticals UK* [2011] EWHC 1669 (Pat), mentioned by Jackson LJ in a lecture 'Focusing Expert Evidence and Controlling Costs', delivered at University College London on 22nd November 2011

[419] HM Courts and Tribunals Service The Chancery Guide, October 2013 edition, para 4.10, available at: www.justice.gov.uk/downloads/courts/chancery-court/chancery-guide.doc last accessed 10, February, 2014

[420] Ch. 1.4. Definitions 2 Copyright A. Scope and Method of Protection page 26 of this thesis

[421] http://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages /default.aspx last accessed on February 10, 2014

charges not only protects the accused but also assists the complainant fairy to claim civil remedies for IP infringements based on criminal convictions [the proceedings could be joint or mixed in Jordan]. Understanding this concept shows the range of courts and judicial panels that the safeguards provide interest -to the complainant, the accused and the public audience. ICCPR 14(1) has a general merit for a public hearing (considered next) but recognises important exceptions.

5.3.7. A Fair and Public Hearing

The Jordanian legislation, Constitution and JCPA 1961 all apply the same general approach to the principle of open or public proceedings.[422]

The Jordanian judiciary has a similar stand point.[423] One important reason for public hearings is to ensure other rights such as impartiality and independence.

This relates to the Jordanian Constitution's assurance in Article 101(1)

> that courts are open to all and free from any interference in how judicial matters are arranged besides governing of rules of law.[424]

By adhering as in Jordan with UDHR instruments state the importance of equality in front of courts and judges and later on in more detailed legislations to fair trial and the

[422] Jordanian Constitution 1952 Art 101 "(i) The courts shall be open to all and shall be free from any interference in their affairs. (ii) The sittings of the courts shall be public unless the court considers that it should sit in camera in the interest of public order or morals." And also Art 171 of JCPA 1961 states "The trial shall be public unless the court decides otherwise due to reasons related to public order or moral…" However, there may be exceptions, as in the UK case *Attorney General v BBC* [2007] EWCA Civ 280, where it was discussed how justice could be served by prohibiting publication of documentary material in advance of a hearing. It has been argued that it might be " in the interests of justice for the legal argument, which went further than the subject matter of the document, to remain private" Emmerson. B, Ashworth. A, Macdonald. A 'Aspects Of Criminal Procedures', Ch 14 in Human Rights and Criminal Justice (London, Sweet & Maxwell 2nd ed, 2012). p506

[423]Jordanian Constitution (1952) Article 101 (ii) "The sittings of the courts shall be public unless the court considers that it should sit in camera in the interest of public order or morals." Also *Lebanese Court of Cassation Criminal Chamber Case no (42) on 09/02/1952 (Translator's absence, principle of public hearing)* what the *Lebanese Court of Cassation* influences what has been stated in Article (148/1) of JCPA 1961 "The judge could not rely upon any evidence that has not been presented during the trial and has not been discussed publicly and openly by the parties involved". The Committee decided in *Van Meurs v The Netherlands 215/1986* that there has been breach of Art 14 (1) If the trial has been held in a room with only one seat for a member of the public.

[424] *Ibid*, Human Rights Committee, General Comment No. 32, Article 14, Right to equality before Courts and Tribunals and to a f air trial 27 of July 2007 at [9]

related provisions and how this might affect the criminal process of intellectual property enforcement. [425]

This is as important in IP cases as in others. One could contrast the first stage of criminal prosecution of primary investigation conducted by the Jordanian Attorney General's office and the privacy in which it is performed, or the *Anton Piller* order in UK civil proceedings; which could be considered exceptions to the concept of a public hearing.[426] Yet there has to be a clear distinction between the accused's right to a public hearing and publicity that could create a risk that the course of justice may be impeded or prejudiced.[427] Art 14(1) recognises trial press/public hearings even though the public may be excluded entirely or in part due to morals, public order, national security or interests of justice.

Likewise in Jordan the public nature of the court's hearings, or sittings (according to the term mentioned in the constitution), is guaranteed unless the nature of a certain case requires otherwise.[428]

It could be noted that in the Jordanian approach the terminology uses the exact terms implemented in Art 14(1) in the exemptions on the main rule of public hearing:

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[425] The Jordanian Constitution 1952 state in Article 101 "(i) The courts shall be open to all and shall be free from any interference in their affairs." and left the detailed information of fair trial issues to JCPA 1961. And the phrase "open" mentioned earlier in Article 101 it is submitted that meant to all parties to get involved in the judicial process and their ability to sue and be sued. I think in addition to the previous meaning mentioned "open" could as well mean the public are free to attend trials. The phrase has a two dimensional meaning the first related to the parties involved and both parties ability to be connected to the trial process and file cases freely in front of judicial authorities. While the second related to the public's right to freely attend trials generally. I suppose it means both open accesses to justice and public justice [trial] as sub-paragraph (ii) of the same article states "The sittings of the courts shall be public unless the court considers that it should sit in camera in the interest of public order or morals."

[426] *n (399) Attorney General v BBC*

[427] M. Al- Aouagi , Human Rights in the Criminal Prosecution 'Accompanied with an Introduction in Human Rights' ; (Beirut; Nofal Publications,1st and enhanced , ed. 1989), pp514-515. Art 8 of the Majalah Al-Ahkam Al-Adleah which has been operational in Jordan from the year 1900. The Article states "the presumption of innocence is the origin of things". The closest translation of the title of this Act could be the Judicial Gazette. An Arabic electronic version could be found at: <http://www.lob.gov.jo/ui/laws/search_no.jsp?no=100&year=1900> it was last accessed at 02/01/2011. innocence could be related to the burden of proof in civil proceedings and criminal procedures. See also Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Art also Article (11/1) states "(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." Art (147/1) JCPA no.9 1961 "1- The defendant is innocent until proven guilty."

[428] Jordanian Constitution 1952 Art 101(i)

The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society."

Situations may include family sensitive cases and those involving juvenile trials(e.g. for illegal computer downloading) or if the publication of the court sessions would endanger the course of justice, or any other circumstances containing confidential matter justified to the court or judge.[429] That may require holding the sessions behind closed doors. As Cook and Garcia point out, disclosure of trade secrets and other "sensitive information is commonplace in disputes involving IP"; disclosure may need to be limited as between the parties as well as the public.[430]

The significance of the public hearing criterion is related to the parties' ability - whether the accused or the complainant or the public authority - to discuss and cross-examine their opponent's evidence freely and without any pressure.

5.3.8. Presumption of Innocence

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"

This provision, Art 14(2) ICCPR gives attention to a most fundamental right of every accused, which is the presumption of innocence;[431] the accused is presumed innocent until proven otherwise by the prosecution.[432] The burden of proving the guilt of the accused is upon the prosecution system and the accused is free from guilt until enough solid and binding evidence is delivered through legitimate sources that the accused or defendant is guilty beyond reasonable doubt. The accused is not under the burden of gathering information to prove his/her innocence until the prosecutor provides enough evidence to file a criminal suit against the offender that could secure

[429] Jordanian Constitution 1952 (101/ii) the Constitution stated out the general rules and the related Act [in the case it was the Criminal Procedures Act of 1961] dealt with the exemptions of a public trial in a more detailed fashion.

[430] Cook, T and Garcia, AI, *'International Intellectual Property Arbitration'* (Kluwer Law International, 2010), p259

[431]ICCPR) Art 14(2). The equivalent provision ofECHR Art 6 (2) states "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

[432] Article 147 of JCPA 1961 "1. the defendant is considered innocent until he is convicted"

conviction. Under Article 6(2) of the ECHR,[433] the presumption of innocence is a given right to the accused who is under prosecution and it is a right that has legal, moral and cultural roots.[434] *R v. Johnstone*[435] involved interpreting the criminal provisions of the UK Trade Marks Act 1994 to require evidence of civil infringement before convicting of an offence – the defendant had submitted in defence that his conduct does not constitute a civil infringement. It is submitted that this ruling served the presumption of innocence well and the use of civil provision to interpret the criminal provisions is consistent with the approach to Art 61 TRIPs proposed in this thesis.

Jordan also requires the complainant or the public prosecutor to provide evidence of the accused/defendant's guilt concerning the criminal act/civil wrongdoing committed and mentioned in the accusation list. Until recently there have been no clear-cut examples of IP cases in Jordan. However, a case from 2009 involved much-amended provisions of Art 55 of the Jordanian Copyright (no.22) 1992 concerning technical measures of protection which broadcasting and cable TV stations sought to enforce.[436]

The second complainant was the exclusive licensee to broadcast Sky sporting events in the Middle East; who filed a criminal suit for breach of copyright based on a search order conducted by the CPO. The officers reported that the accused was broadcasting sports events illegally. The AG became the main prosecutor; the complainant submitted the search report, a certificate of licence and a list of clients to prove the infringement and the existence of the license. However, even though the evidence did show that the accused did obtain the protected work without license it did not establish the offence, is in this case the ability to circumvent effective measures of protection. The Public prosecutor [A-G] should have provided enough evidence of the committed crime according to the law, but it was held that they did not: firstly, as

[433] Art 6 ECHR 1950
[434] *Fressoz and Roire v France* (2001) 31 EHRR 2
[435] *R v. Jhonstone,* [2003] UKHL 28; [2003] 1 WLR 1736 (HL).
[436] yet the Court of First Instance Criminal Chamber/Amman case No.(1022/2009) [A-G, ART "Arabic Radio and Television Co and Showtime. v Khatar Restaurants Co. It has to be mentioned that SHOWTIME was the previous owner of the license of Sky sports in the Middle East [Copyright infringement- Ruling Bench Judge Nehad Al-Hussban Case no. (1022/2009) (hereinafter CFI) It has to be mentioned that article (55) in this form was included in the Act in the latest amendment entitled Amended Copyright Act (No 9) 2005 which entered into force in the Official Gazette No 4702 31/03/2005. An Arabic version of the text could be found at:<http://www.wipo.int/wipolex/en/details.jsp?id=9387>unfortunately there is no available English version of the latest amendments.

to effective technical measures of protection, and secondly as to the accused's ability to circumvent such measures.

Eventually the court dismissed the accusation. The burden of proof was on the complainant/A-G to prove the accused's guilt and not the other way around. The attorney general department as the main representative of the prosecution, in addition to the initial prosecutor (the most encouraged right-holder in IP cases), should fulfil their duties in providing sufficient evidence that the previously mentioned conditions of the offence have been satisfied.[437] The significance of the CFI-Amman ruling lies in its examination of the burden of proof, and what would be legally sufficient evidence of the accused's guilt according to the provisions of Art 55 Copyright Act 1992 and Art 8 of *Al-Majalah*.[438] The judge weighed the evidence, facts and the legal provisions under study, and interpreted and applied the structural and conceptual aspects of the law. The court applied the basic rules of presumption of innocence by ordering the complainant party to prove their accusation; and due to their failure to discharge the burden, the court's decision was to dismiss the charges.

It is submitted that the judge in CFI-Amman case actually took an accurate standpoint in applying the letter of the law concerning *"**effective technological measures**"* of protection in a proper manner and also she defended the criminal justice principle of burden of proof.

This was the first judicial application of the Act's latest amendment; it was essential that the court [CFI] reached a verdict that dealt with the tangled set of rights in question, ensured fair trial and created a proper balance in the IP context. It is

[437] Art 55 Copyright Act No.22 1992 and its amendments which was included in its current form in the amendments of the Copyright amended Act (No 9) 2005. Which could be found in its Arabic version at:< www.wipo.org > last accessed 18/09/2012 the amended Act which include article 55 in its current text was published in the Jordanian Official Journal [this term is used and found at:< www.wipo.org > page 1101 issue no. 4702 on 31/03/2005. Any Act or regulation enters into force after 30 days its publication in the Official Gazette. The thesis is using the latter due its utilization among commentators in Jordan.

[438] Art 8 Majalah Al-Ahkam Al-Adleah which has been operational in Jordan from the year 1900; states "the presumption of innocence is the origin of things". The closest translation of the title of this Act could be the Judicial Gazette. An Arabic electronic version could be found at <http://www.lob.gov.jo/ui/laws/search_no.jsp?no=100&year=1900> last accessed at 02/01/2010 [Arabic author's translation]. UDHR Art 11(1) states "(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial …" Art 147(1) JCPA no.9 1961 " As mentioned in CFI Criminal Chamber case No. (1022/2009) in *n* 412] of this chapter.

submitted that the judge was applying a sense of convergence to preserve the delicate balance between intellectual property protection and human rights safeguards.

In the European Case *Fressoz and Roire v. France* (Appl No. 29183/95) [1999] *ECHR 1*[439]

The investigative judge had held that proceedings on charges of theft and breach of confidence should be discontinued. However, the applicants were committed to the criminal court on charges of handling stolen photocopies of confidential information in the form of extracts of tax slips. The Paris Criminal Court acquitted the applicants. The Court of Appeal reversed the verdict and fined the applicants. Both applicants appealed on points of law to the Court of Cassation, which dismissed their appeal.[440] However, their good faith had not been called into question. Furthermore the information[441] was not available through other means and was considered confidential. In the court's view, a reasonable relationship of proportionality between the legitimate aim pursued by the journalists' conviction and the means deployed to achieve that aim, given the interest a democratic society has in ensuring and preserving freedom of the press must be applied by journalists during conducting their duties.[442] Before the European Court of Human Rights there was held therefore, there had to have been a breach of Art 10 ECHR in that the conviction was disproportionate. The decision is usually cited for its ruling on Art 10. However, there was a further complaint of there was a breach of Art 6(2) (presumption of innocence. The Court declared at [60] that given its finding on Art 10. There was no separate breach of Art 6(2), a view also taken by a majority of the Commission. However, it is interesting that, in a partly dissenting judgment, a minority of the Commission took the view that the courts' use of presumptions of fact had been excessive, holding that Art 6(2) ECHR "obliges States to confine factual presumptions within reasonable limits taking into consideration the importance of the matter and preserving the rights of the defence".[443]

Does the presumption of innocence demonstrate collision between human rights and intellectual property? It may appear so- as a tool for the accused to escape prosecution and infringement of IP. However, the wider picture and the public interest in a just

[439] *Fressoz and Roire v. France* (Appl No. 29183/95) [1999] ECHR 1
[440] *Ibid Fressoz And Roire v. France* (Appl No. 29183/95)[1999] ECHR 1, *at 18 and 20* .
[441]*Fressoz and Roire v France* (2001) 31 E.H.R.R. 2, *also* HRH Prince of Wales v. Associated Newspapers Ltd [2006] EWCA Civ 1776.
[442]*Fressoz and Roire v France at 56.*
[443] (2001) 31 EHRR 2 at CO-I12, citing *Salabiaku v. France* (1991) 13 EHRR 379 at [28]

and fair trial as well as in IP enforcement. It is submitted that it should be regarded as an application of convergence approach between the requirements and needs of IP enforcement and procedural human rights.

5.4. Analysing Article 14 (3) [Minimum Required Standards during Trial and Prosecution]

The third sub-section of Article 14 of ICCPR sets out certain rights and safeguards of the accused/defendant during the trial and prosecution process. According to the Article, such rights are the lowest degree of protection to be granted to any person who finds him/herself charged with a criminal offence or wrongdoing, i.e. minimum standards.[444]

5.4.1. Analysis of Art 14 (3) (a) and Art 6(3) (a) ECHR

> *"(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him"*[445]

This is closely related to Art 14 (3) (f) -the accused/defendant's right to the assistance of an interpreter

> To have the free assistance of an interpreter if he cannot understand or speak the language used in court

The latter right relates to the ability to understand the charge posed against him, but in this case it is solely connected to the accused's inability to understand the language used by the court.[446] In other words, this is his/her right to have an interpreter or translator (of documents) free of charge if needed during the trial.[447] The accused's ability to understand the concept of the wrongdoing he/she is being charged of is essential and this right involves receiving any aid needed to understand the accusation

[444] ICCPR Art 14 (3). it has to mentioned that the rights relate to what has been mentioned as standard minimum rights that should be provided to a person criminally accused of a crime or a criminal wrongdoing in the Jordanian related legislation is mentioned in various places, as will be demonstrated throughout the paper as Article 14 (3) and its sub-sections shall be studied and analysed during this chapter.

[445] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 14 (3) Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) art11.

[446] Art 6(3/e) of The European Convention on Human Rights 1950 "*(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court"*

[447] Laurens Van Puyenbroeck and Gert Vermeulen 'Towards minimum procedural guarantees for the defence in criminal proceedings in the EU' [2011] ICLQ 1017

list whether because the accused does not understand the language of the court or cannot read the written accusation he charged with.[448] Any other rights provided by law to the accused are meaningless if he/she cannot understand the procedures of the trial and has not been offered the opportunity to ask the court to appoint an interpreter (or translator) who understands the language of the court. Paragraph 14(3) (a) deals with the accused's right to understand the concept of the accusation file more generally and to able to reply to the accusation with accuracy and have a fair opportunity to provide evidence needed to prove his innocence and analyse the accusation list/indictment.

This can be illustrated in a criminal (non-IP) case from the Jordanian Court of Cassation Criminal Chamber.[449] This case is still yet unpublished where the Court stated:

> *"...From the facts of the case it could be noticed that the defendant is Chinese and does not understand Arabic language. The court appointed a translator who assisted the defendant in the first couple of sessions from (14/02/2008 - 26/02/2008) and then the translator did not accompany the defendant from the above mentioned date until the end of the trial. And at the time the ruling bench asked the defendant if he had anything to add or a defence statement or witnesses and explained the concept of Art 232 but the appointed translator was absent."*

The higher court dismissed the lower court's sentence due to the absence of a translator or accurate translations of foreign documents, as did the.

Lebanese Court of Cassation[450] in another case

> *"The court decided that the lower court relied in its ruling on technical reports composed in a foreign language (French) the expert was French. The report should have been translated to Arabic, which is the official national*

[448] Bailey. B; *Rights in the Administration of Justice; in* Harris D and Joseph S (eds.) *'The International Covenant on Civil and Political Rights and United Kingdom Law'*, (Oxford; Clarendon Press, 1995). pp.228-229.

[449] Jordanian Court of Cassation Criminal Chamber Case no. (1143/2008) the case is still unpublished, fair trial, right of defence and the absence of the translator

[450] *Lebanese Court of Cassation Case No.* (42) On 09/02/1952 (Translator's absence, principle of public hearing)

language of the court by a translator who has taken oath at the court…"[451]
"…Information provided in the original language did not give the defendant enough insight into the nature of the accusation. The costs of translation are usually laid upon the party who requested the documents to be translated."

The right under discussion means the accused's ability to have the written material during the trial translated and the oral exchange evidence as well, in the case of not understanding the language used. The Jordanian court recognises the obligation in such cases to provide the accused with the assistance of an interpreter free of charge.[452] The course of action taken by the Jordanian judiciary is a clear application of the legislation.[453]

Understanding the charge is what matters; the accused must be able to understand and be aware of the nature of the charge in order to enjoy a fair trial. That means the accused should be informed of the details of the nature of the accusation not only in his/her language but also in a manner that uses simple and understandable language. This may be difficult to achieve in IP cases as the offences and subject-matter may be complex. Furthermore international filing treaties such as (the Patent Cooperation Treaty) and Madrid Agreement and Protocol use a limited number of official languages.

Proper interpretation and translation are crucial not only for the defence but also for the prosecution and rights-owner to be able to secure enforcement, especially in cross-border disputes. Their importance for mutual recognition of judgments within the EU has been recognised by Directive 2010/64/EU of the European Parliament and of the

[451] *Ibid Lebanese Court of Cassation Criminal Chamb*er Case no. (42). Likewise Jordanian *Court of Cassation Criminal Chamber Case no. (1143/2008) (Fair trial, Right of defense and the absences of the translato*r. Art 232 JCPA 1961). This case is also unpublished
[452] *Court of Cassation Criminal Chamber Case no. (1143/2008) the case is still unpublished, fair trial, Right of defense and the absences of the translator*.
[453] JCPA no. 9 1961, Article 227 "1- if the defendant or the witnesses or one of them does not understand Arabic language the judge must appoint a translator who is 18 year at least after he swears an oath to translate between them and the court honestly and truthfully.
2- If the court does not follow the provisions of this Article the procedures are considered invalid." .
It could be said that Article (6/3/e) from the ECHR 1950 could be implemented in English law according to the provisions of the Human Rights Act 1998, ss.1, 2, 3, 4. 1- The Convention Rights "1) In this Act 'the Convention rights' means the rights and fundamental freedoms set out in- (a) Articles 2 to 12 and 14 of the Convention …" The Act in [b, c] mentions the related Articles of the first and sixth Protocols. Yet s. 2from the Act states "2. Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation."

Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

It is submitted that, again, this right is best regarded as an instance where human rights and intellectual property interests converge.

The need for the accused to understand the charges are further reinforced In Art 215 JCPA 1961

> "2. The highest ranking judge of the ruling bench must remind the defendant to listen with care to everything that will be read and said in front of him, then [the judge] orders the court clerk to read the accusation list and decision and the list of witnesses and any other documents, 3. After that judge summarises the accusation to the defendant and reminds the defendant to be aware of the charge and evidence that will be delivered against him"

This concept is also implemented in English Law in a satisfactory manner. For a trial verdict of indictment to be delivered each charge should be set on a separate account, and each count must include a statement of the offence.[454]

5.4.2. Art 14 (3) (b) ICCPR and Art 6(3) (b) ECHR

> *"To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing"*

It could be noted from the provisions of this sub-section that there are two connected rights: the right to enough time to prepare his defence and the right to choose and meet his counsel. As with the court, it may be necessary that counsel to have sufficient understanding and know how in IP.

A brief glimpse of the definition of IP in general or any of the IP branches in particular could provide an insight into the complex and technical elements of IPRs. Subject-matter of such a nature will essentially require a more detailed safeguard protection system for the accused. The parties involved in the criminal prosecution of an IP criminal offence, due to the nature of the infringement, would need expert

[454]Article 215 of JCPA 1961.

knowledge to understand the nature of the accusation and the charging list. The rights mentioned, either the right to a translator or to adequate legal assistance are especially significant here – as has been mentioned above and in the introduction to this thesis.

There is as well the approach taken by the Amman CFI,[455] who insists that either criminal or civil IP trials that any delivered applications or requests shall be written and delivered by legal representatives rather than the parties themselves. Judge El-Husban has made the point that IP cases have different and complex elements, either from the legal and technical perspective, and the parties involved (complainant or accused) are not always able to comprehend.

The concept of natural justice in the United Kingdom Law and requires that defendants are given notice if a case has been charged against them, given effective time or opportunity to make representations and a reasonable time to prepare their cases.[456] The Jordanian legislation does not ignore this principle either and states in many provisions that the accused should be provided with the essential requirements needed to prepare his defence, for example.

> *"The defendant's attorney could copy all the needed documents that could benefit the defence".*[457]

Meetings between the accused and his attorney are private and any evidence that could be a direct outcome of such meetings shall be disallowed.[458] These provisions of the Jordanian legislation correlate with the rights granted to the defendants under custody to have access to their lawyers, or risk of miscarriage of justice.[459] This section of the Act is connected to two aspects of the right to a fair trial that are inseparable enough time to prepare the defence and the freedom of choice to pick this defence.

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[455] This has been a result of the researcher's previous experience as a judge assistant at the CFI-Irbid and the Court of Appeal- Irbid, and a meeting with judge El-Husban.

[456] Bailey. S; Rights in the Administration of Justice; in Harris D and Joseph S (eds.) '*The International Covenant on Civil and Political Rights and United Kingdom Law'*; (Oxford; Clarendon Press, 1995). Pp.223-224.

[457] Article 209 of JCPA 1961. Reflected by the doctrine of legal professional privilege in the UK.

[458] Article 66 of JCPA 1961 "1. The attorney general could prevent any contacts with the arrested accused for a period of time that does not exceed 10 days. 2. This ban will not include any meetings between the accused and his attorney". Article 152 "any evidence that is collected due letters between the accused/defendant and his attorney are to be dismissed".

[459] ICCPR 14 (3/b) Bailey. S; "Rights in the Administration of Justice"; p.223.

The defendant or accused cannot make the best use of each right on a separate basis. The person charged of a criminal offence or a wrongdoing will not be able to benefit from adequate time and open access to documents without the proper advice that he needs.[460]

Conversely, if the accused was given the ability to appoint an attorney of his choice but he or his attorney were not given freedom to access the documents needed, the benefit of the attorney will be greatly diminished.

Likewise if the accused were given the right to appoint an attorney with free access to documents needed, yet they were not given enough time to prepare for his defence, or not given the privacy needed to prepare for the standard requirements of defence.[461] These rights are related to trial and the environment of pre-trial procedures, yet connected closely to the legitimacy and accuracy of the outcomes of the trial, because these rights give the accused/defendant or his representative the opportunity to prepare their case in a proper manner.[462]

In my opinion, in relation to procedural criminal laws in the Jordanian legislation the Jordanian legislator has dealt with the nature of fair trial in a manner that falls within the provisions of Art 14(/3(b).[463]

-*What responsibility could be laid upon the prosecution authorities to ensure the proper applicability of these rights?*

There is an obligation upon the prosecution to disclose any information related to the case.[464] It is essential that the prosecution ensures a safe environment that allows the accused enough time to prepare his defence in all possible aspects, including the confidentiality of lawyer-client communications. However this right may contradict with the next.

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[460] In Intellectual Property cases this aspect could be even more significant due to the nature of IPR and the novelty of the procedures and technical aspects of law at least in Jordan.

[461] S. Bailey; *'Rights in the Administration of Justice'*; p.223.

[462] M. Al- Aouagi, *'Human Rights in the Criminal Prosecution 'Accompanied with an Introduction in Human Rights'* ; (Beirut Nofal Publications; 1st and advanced edition ; 1989,), Pp.127-129.

[463] There is indication of its importance in the Jordanian legislation in Articles (66, 209 and 152) of JCPA 1961 mentioned in the previous page n (440) and n(441) respectively.

[464] M. Al- Aouagi, "*Human Rights in the Criminal Prosecution" 'Accompanied with an Introduction in Human Rights'* ; p.693

5.4.3. Analysis of Article 14 (3/c) and Art 6(3/c)

"*To be tried without undue delay"*

This subsection entitles the defendant to the right of speedy trial in a manner that prevents any delay in the procedures that could undermine his position during the prosecution or trial process. Such right not only relates to the time in which the trial should commence, but also the time by which the trial should end and the verdict be rendered. The longer the procedures are the more difficult it becomes to establish. Furthermore, its submitted that overlong procedures may lead to frustration of the defendant and the complainant.

The Jordanian application of Art 14(3/c) explicitly ensures the importance of this right, reflecting its urgency to the accused/defendant's defence and his right to obtain a fair trial.[465] This relates to the concept that delayed justice is not justice. The process of seeking justice should not take so long that the final aim or goal of the trial process is undermined or put at risk.

Art 61 of Civil Procedures Act 1988 states:

> 1. The date to attend sessions at magistrate's courts, courts of first instance and the court of appeal is within 15 days and could in the case of necessity be decreased to seven days. 2. The date to attend in extremely urgent cases is 24 hours unless it is an emergency in which case a date could be arranged within an hour if the opponent approves.

Another application of trial without delay could be noted in the *Jordanian Court of Cassation Civil Chamber Alia /Time Limits.*[466] In this case the Court of Cassation dismissed the case of the appellant on the basis of the expiry of the time limit period for claiming civil compensation. This case is a clear application of procedural safeguards to protect the role of the law and the judiciary as guardians of the fairness of the trial.

Speedy prosecution and trial procedures serve to ensure the stability of procedures, freshness of evidence and safety of the state of mind of the accused/defendant. Delay

[465] Art 61 CPA 1988

[466] Jordanian Court of Cassation Civil Chamber *Alia /Time Limits* as in the Time Limits section of this Chapter

of procedures of trial and prosecution could relate to the delivery of judicial papers, absence of witnesses or the need for special expertise that could delay delivery of reports. The use of procedural time limits is considered in greater detail below.[467]

The judge or the ruling bench could promote disciplinary measures towards the party or court official that causes delay.

There is a new department in the Palace of Justice in Amman called 'The Administration of Cases' or 'Law suits (management of cases)'. The department is headed by a judge from the Amman CFI, and cases that are probably insignificant are sent to the department to determine the value of the case [mainly monetary terms] in all aspects including time management issues.

There is as well the ruling bench's role in minimising unnecessary delays during the trials, such as banning the use of the same reason twice when asking for an extension of the trial sessions. The parties do not have the ability to extend the period between each session to more than 14 days without proper reasoning accepted by the court.[468]

The application by the court has generally been relaxed, preferring to apply such rules as warnings to parties involved in any unwarranted delays.[469] But this rule could be used by the court as a tool to reduce any attempts to delay the sessions unfairly, since the court could impose a fine on the party responsible for such an attempt.

Such procedural rules ensure a swift trial without delay in a manner that benefits the process of IP criminal enforcement. There have been many attempts to increase the efficiency of trial procedures in general, and in relation to IP judicial enforcement, which will be beneficial for all parties involved, whether the complainant or the accused.

[467] Ch.5.5- Time Limits- Jordan
[468] [JCPA 1988 and the JCPA 1961] time between sessions could be implemented upon criminal trial/prosecution procedures. Both Criminal and Civil procedures are related in shortening the process of trials.
[469] This is based on my personal practice as a former lawyer and Judge assistant

In the UK the need for speedy criminal trials IP cases is reinforced by the attention given to speed and due process in civil cases; courts may punish lawyers as well as parties as seen in *Media CAT v. Adams Patent County Court*.[470]

In this case, the claimant had asserted (incorrectly) that they were a copyright protection society and exclusive licensee of copyright in pornographic films. In fact they had entered into an agreement with producers of the films, whereby the claimant could sue for infringement by unauthorized downloads and file-sharing. They had obtained a list of Internet Protocol addresses connected with downloads on Peer to Peer (P2P) networks and a Norwich Pharmacal or disclosure order had been made against internet service providers to identify individuals behind the addresses. The claimant's solicitors, ACS Law had written to tens of thousands of these individuals, enclosing the Norwich Pharmacal orders and inviting them to pay £495 by way of compensation. The claimant brought separate proceedings for copyright infringement against 27 of the individuals. They attempted to obtain default judgments against the defendants without giving notice.[471] The Patents County Court refused the applications for summary judgment and made some criticisms of the claimant's cases. Shortly before the cases were due to come on for trial, the claimants purported to serve notices of discontinuance, with the intention of re-starting those cases which had not settled.

On February 8, 2011 the Court gave directions for the cases to continue and struck out the notices of discontinuance, holding that their issuance was an abuse of process.[472] The claimant was directed to join the owners of the copyright work(s) relied on by 16.00 on February 22, 2011, as required by the Copyright, Designs and Patents Act 1988, s102. The claimant made no attempt to join the copyright owners and on March 16, 2011 the actions were struck out and the claimant was ordered to pay the defendants' costs on an indemnity basis.

The court also directed that the (lower) scale costs provisions generally applicable to proceedings in the Patents County Court should not apply. The defendants successfully applied for a wasted costs order and for an order that ACS Law and an individual solicitor of the firm Mr. Crossley be joined as a party to the action for the

[470] [2011] EWPCC 10
[471] *Media CAT v A* [2010] EWPCC 017
[472] *Media CAT Ltd v Adams & Ors* [2011] EWPCC 6

purposes of seeking an order for costs against them.[473] The defendants argued that the 'Basic Agreements'(under which proceedings had been conducted at least to the stage of writing the letters and which entitled the solicitors to a majority share of the proceeds) were in breach of r.2.04 of the Solicitors Code of Conduct 2007.

In its analysis of the proceedings to date, the court focused on the ways in which the legal representative had provided assistance for abuse of court processes, in that they

> use[d] litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings [i.e. serving Notices of Discontinuance] for reasons unconnected with success in the litigation [474]

In a leading case on wasted costs orders, the Court of Appeal had considered abuse of process in the context of pursuing a hopeless case. The court stated:

> It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. [475]

The Court in *Media CAT Ltd v Adams* followed the Court of Appeal's approach in Ridehalgh towards abuse of process and its link to a hopeless case.[476] However, the significance of the findings of the court in relation to this thesis is not in the wasted costs element, despite its importance, but in the manner in which the court reached such findings based on the improper course of actions performed by the claimant's

[473] *Media CAT Ltd v Adams Patents County Court* [2011] EWPCC 10 at, [2]-[5]
[474]*Media CAT Ltd v Adams Patents County Court* [2011] EWPCC 10 at , at [68], applying *Ridehalgh v Horsefield* at [234].
[475] *Ridehalgh v Horsefield* [1994] Ch 205 *at* [234]]; approved by the House of Lords in *Medcalf v Mardell* [2003] 1 AC 120.
[476] *Media CAT Ltd v Adams Patents* County Court 18 April 2011, and *Ridehalgh v Horsefield* [1994] Ch. 205, *Pp23-24.*

representatives – namely the failure to join the copyright owners, the hopeless case and the abuse of the judicial process, resulting in serving unwarranted orders on the defendants. The attempted use of the default judgment procedure arguably infringed the next provision of ICCPR and ECHR.

5.4.4. Analysis of Art 14(3) (d) and Art 6(3) (d)

> *"To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing"*

This part of Art 14 of the Covenant and its counterpart Art 6 ECHR deals with various inter-connected rights related to the trial and prosecution process and the accused's right to defend himself. The UDHR 1948 does not mention this right in an explicit manner, nevertheless it states the right of the person charged with a criminal offence, namely the right to have a public hearing that secures his/her ability to defend the case.

The accused has the right to be present at the trial, and to be able to present his defence in a proper manner. This entitles the defendant to rights that support his or her right to a defence: to the right of legal assistance; and to have such assistance assigned if his interest or justice requires without payment, if he or she does not have the sufficient funds to appoint one. "It is a right exercisable by the accused; it should never be interpreted as a means to deprive a person of the assistance of legal counsel."[477]

Therefore it could be said that this sub section of Art 14(3) do have an aspect of convergence between the interests of parties involved either the IP holder or the accused. This could be noted in *HM Advocate v P* in which preventing the accused the ability to meet his attorney was a considered a violation of Art 6 ECHR.[478]

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[477] UNDP POGAR WORKSHOP: JORDAN 2007; "Session (iii): Minimum standards for the rights of the accused during trial"; p.8, as cited previously. [Text of the workshop is Arabic translated to English by the author].

[478] *HM Advocate v P* [2011] UKSC at [44] " … the Strasbourg court has not suggested that leading evidence of the fruits of questioning that is inadmissible because the accused did not have access to a lawyer when he was being interviewed will always and automatically violate the accused's rights under article 6(1) and 6(3)(c) [ECHR]"

However, there are restrictions on the accused's right. The Jordanian legislator has adopted this concept as seen in Art 169 of the JCPA 1961 where as trial in the absence of the accused is possible, albeit the last option "if the accused did not attend at court despite being delivered the judicial papers according to the provision of the law, the court could proceed in the trial procedures in his absence…." This could as well be noted in the dealings between the accused and his attorney in Art 66 (1, 2) JCPA 1961 and the privacy provided for such connections during the pre-trial phase at the AG's department.

The right to defend means that the accused or his attorney must have the right to act without fear in pursuing all available defences and to challenge any conduct or procedure (either by other parties or the court) which they consider to be unfair.[479] It expands its impact to the meetings between the accused and his/her attorney, who shall not be denied this contact or have it monitored in any manner against the law.[480]

-The Jordanian Application of this Rule in an IP Situation

Judges in IP cases prefer that any application submitted on behalf of the accused should be signed and delivered by their legal representative or attorney. This is in coordination with the provisions of the various intellectual property Acts, which consider IP criminalised infringements misdemeanors under the jurisdiction of the CFI. Trademarks counterfeiting and forgery according to the law, are considered minor misdemeanors and prosecuted under the jurisdiction of the MCA 2008. Usually in cases of misdemeanors the accused may appear at court without a representative. However, as outlined previously, judge EL-Husban considers that any form or request submitted to the court and relate to IP should be signed and delivered through the party's attorney she preferred that every request should be through the parties' legal representatives.[481]

This may lead to the assumption that there are unnecessary limitations concerning the approach and manner in which the accused has to manage the requests and applications presented to the judge at the CFI. But that is not the case – these rules of

[479] M. Al- Aouagi, *Human Rights in the Criminal Prosecution 'Accompanied with an Introduction in Human Rights'* ; (Beirut; Nofal Publications , 1989,1st enhanced ed. 1989); Pp127-128

[480] *Ibid*, 703-708

[481] From the meeting held with Judge Nehad EL-Husban at Amman's Court of First Instance on 17/07/2008. It has to be said that judge EL-Husban has given me her approval to use the information she has given me during the meeting

guidance in fact help the court perform their duties in the best possible manner. The best interest of the client or the accused. The whole idea of such rules of conduct is closely connected to the overall outcome of the judicial process. It also provides the judges and the court's staff some[482] On the contrary these provisions organise the accused's right to defend his case in a more efficient and proper manner; this is the view of the research. The accused at the court of first instance (CFI) is not allowed to personally represent himself at the ruling bench without a lawyer, and is not allowed to approach the court for any required document without his attorney or the document being signed by the attorney.

The accused is allowed to ask for documents in the absence of his/her legal representative if the enquiries take a certain formality and the request is written and signed by his attorney. And this usually occurs while sessions are not being held. This could not be supported on paper, mainly due to the fact that these matters belong slightly more to the administrative aspect of the judicial process.

The researcher during his time at the Ministry of Justice as a Judge Assistant (in his time at the CFI, Magistrates' Court or the Court of Appeal) observed that the judges dealt with applications from all parties as long as the application was signed by their attorney. During such situations, the applicant would submit his/her written request and the author would as part of his duties as the judge assistant take the responsibility to ensure that these requests or applications were fulfilled or dismissed according to the provisions of the law, which was only a minor part of his duties.[483] This is due to the fact that the personal connection may lead to wasted time and delay in sessions of the trial, and another reason relates to the lack of legal knowledge the person may obtain, and that may result in confusion at the court for the person who presented the application.

It could be noted that trial in the absence of the accused is the exception and the law and courts in theory and practice refer to such a method as a final option. This could be noted in the different applications of the courts in the various stages of the trial process (Magistrates or CFI, the Court of Appeal and the Court of Cassation). Judicial papers are a means to provide the parties – mainly the accused – with proper

[482] From the meetings held with Judge Nehad El-Husban, at her chambers in the Place of Justice-Amman. See Appendix of the thesis
[483] This is considered common daily practice that aims to ease the matters on the public.

information concerning the legal actions or accusation he/she has been charged with.[484]

Therefore the accurate delivery of judicial papers is considered a procedural application of the right of defence and there will be a miscarriage of justice if the absence of the accused was based on illegal delivery of the judicial papers. .[485] Judicial papers include all formal papers issued by the courts or any department connected to the judiciary such as the CFI, AG department or the judge assistants (who are called legal researchers) sent to parties involved in the trial process or the prosecution in general.[486]

However (as noted above) the defendant's ability to defend himself personally in IP cases, without an attorney, is limited to cases within the jurisdiction of the Magistrates' court, which is restricted to trademark forgery, or to minor administrative applications signed by their legal representative – as at the Court of First Instance where they are delivered to judges by hand via the accused.

Violations of Art 14(3) (d) and Art 6(3) (d) were found in the case of an accused being tried in his absence. However, that does not mean a trial in the absence of the accused may not be permissible if the situation was in the interest of the administration of justice.

> to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it

This section of Art 14(3) (d) ICCPR and 6(3) (d) ECHR follows up the previous section (the accused's right to have an appointed counsel, and not to be tried in his absence).[487]

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[484] Jordanian Court of Cassation Civil Chamber Case no (379/91) (judicial papers delivery, procedural requirements) - Judicial Jurisprudence Gazette Vol5, 1993; p779

[485] Jordanian Court of Cassation Civil Chamber Case no (139/92) (judicial papers delivery, procedural requirements) -Judicial Jurisprudence Gazette, Vol.5; 1994, p.2540

[486] [An author's translation from the original Arabic text of Acts and cases].

[487] Bailey. S; "*Rights in the Administration of Justice"; in* Harris D And Joseph S (eds.)"*The International Covenant on Civil and Political Rights and United Kingdom Law"*; (Oxford; Clarendon Press, 1995) p.225; *"it is uncertain if the court could impose the appointment of counsels in all*

As for the accused's right to have an attorney, if he cannot appoint one on his own due to financial reasons, the court appoints one on his behalf. This requires the accused's to provide evidence that she/he could not provide enough financial resources to appoint an attorney.[488] In such cases, including IP Civil/Criminal related infringements, held at the CFI, the accused or other party (the complainant) has to apply for the delay of judicial fees to the highest ranking judge at the CFI and present two witnesses at least to confirm that he is unable to pay the fees. And as a result the fees will be delayed until the trial procedures are over. The attorney's fees are usually delayed in such a situation as well, but in a different arrangement that is not related to the delay of the judicial fees.

These rules of conduct laid upon the parties at the CFI could be a restriction on the accused's rights to benefit from much needed assistance that many could not afford, and the court taking a negative stance towards the needs of a financially unable accused. If the impecunious party succeeds he does not have to pay the fees as it falls on behalf of the losing party.

The session is usually held in the judge's chambers. The applicant's witnesses state under oath the financial status of the accused in general or answer detailed enquires from the judge concerning the applicant's ability to pay the required fees. Such sessions usually do not take more than 20 minutes and mostly the accused is granted his wish. Yet such procedures do not involve the court providing direct assistance to the accused in appointing an attorney if he lacks the ability to do so on his own. [489]

Such practices are especially important in IP cases held at the CFI, where the accused cannot represent himself. In view of the technical aspects of IP criminal offences and civil wrongdoings, judges would most likely approve requests to delay the trial costs/fees, including attorney's fees.

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criminal trials, even contrary to the defendant's wishes". Article (215/1) from the JCPA 1961 *"1. The head judge of the bench shall remind the defendant's representative, if there is one, to defend his client and perform his duties in a manner that does not contradict the law."*

[488] This right is not absolute in all cases and all courts. If the accused was charged of a capital crime and could not appoint any attorney the head judge of the ruling bench would appoint an attorney to act as his legal representative, even if the accused is not able to appoint an attorney

[489]This process enables the accused to obtain legal assistance needed to strengthen his position and right of defence. The accused have to provide evidence that he/she could not afford to pay for the legal cost including fees for an attorney ahead of the trial.

In England, the Jackson report in 2010 dealt with legal aid and conditional court costs; the proportionality of the costs was examined. The views of Woolf's "Access to Justice" enquiry on the issue in relation to civil procedure were taken into consideration.[490] The rules proposed by the final Woolf report on proportionality elements had examined the amounts involved, the importance or complexity of the topic and the financial position of the parties. This shows the interest in providing a path for equal standing among parties involved in civil litigation trial proceedings. Principles of proportionality are based on the importance of the case, its value and the financial situation of parties. The provisions of rule CPR 44.5 (1) confirm that the court will have regard to all the circumstances when deciding whether costs were (i) proportionately and reasonably incurred and (ii) proportionate and reasonable in amount. Rule 44.5(3) details the requirements the court must take into consideration during the trial and proportionality of costs.[491]

Again, the need for specialist knowledge is an important factor. The accused's right that he should not be accused in his absences and without legal counsel of his choosing is one of the cornerstones of the right to a fair trial. The aim of this right is, seemingly, in the sole interest of the accused. It gives the indication that this element of the right to a fair trial may be an embodiment of the collision approach of the IP /human rights link.

However, one may argue, there is another manner to view this right - as for the public good and in the complainant's interests as well as the accused's. This is noted in the Court of Appeal's dismissal of lower court verdicts taken in the absence of the accused or his attorney.[492] Such verdicts look, at first glance, as in favour of the accused, due to giving the accused the opportunity for retrial of a verdict taken in his absence. However, such dismissal by courts of appeal is, also, an incentive for the complainant or prosecutor to prepare his claim properly according to the law and his

[490] Jackson R, "*Review of Civil Litigation Costs: Final Report"* December 2009 published in 2010, Pp30-31.
[491] Rule 44.5(3) including: the conduct of parties, the value of the subject-matter involved, the importance of the matter, the complexity of the matter, skill, effort or specialised knowledge involved, time spent on the case and finally place and circumstances
[492] Jordanian Court of Cassation Civil Chamber Case no. 1656/2000 [Absence of the accused] [Arabic, author translation as cited by the author at: http://www.lob.gov.jo/ui/laws/principlesarticle_descr.jsp?no=24&year=1988&article_no=9&article_no_s=0 on 17th of Dec. 2013. It has to be said that there were 40 cases on one element of the absentees at court 25 cases that were dismissed due to failure to deliver the applicants the judicial papers properly

best interests when the claim is to be entertained again before the CFI. Therefore, one should say, that this right has a vivid connection with the convergence approach regarding the IP and human rights relationship.

5.4.5. Analysis of Art 14(3/e) and Art 6(3/e)

> To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him

This entails that the accused is able to participate fully in his/her trial. It is important for his attorney to develop a defence plan and question the accuracy of statements presented by the witnesses against him.[493] In order to benefit from this right, there should be an opportunity to examining the statements of the witnesses in advance as to the alleged infringements committed. The accused's right to call witnesses or examine them should be at least on an equal basis with the Attorney General's right to do so.

Cross-examinations should not be abusive and advocates are bound to treat the witnesses courteously and restrict their line of questioning to relevant matters of the case.[494] The attendance of witnesses at court sessions in criminal procedures is essential at the magistrates' courts and is secured via summons issued by the court according to law. For instance in England and Wales section 97 of Magistrates' Act states,

> *(1) Where a justice of the peace for [any commission area. . .] is satisfied that any person in England or Wales is likely to be able to give material evidence, or produce any document or thing likely to be material evidence,. . . at the summary trial of an information or hearing of a complaint by [a magistrates' court for that commission area] and that person will not voluntarily attend as a witness or will not voluntarily produce the document or thing, the justice shall issue a summons directed to that person requiring him to attend before*

[493]M. Al- Aouagi, *Human Rights in the Criminal Prosecution 'Accompanied with an Introduction in Human* Rights' ; (Beirut ;Nofal Publications , 1989,1st and enhanced ed.); Pp.694-695.
[494] Roberts P; Zuckerman A; "*Criminal Evidence*", (Oxford, OUP, 2004, 1st ed.), p.215.

the court at the time and place appointed in the summons to give evidence or to produce the document or thing.

This sub-section gives the judge the authority to produce summons to the witness who may refuse to cooperate with the court by delivering any document that could aid the court in its mission.[495] This standpoint is similar to that taken by the Jordanian concerning hostile or not cooperative or any party's refusal to deliver requested documents by court or other parties.[496]

As mentioned earlier the accused has the general right to cross-examine witnesses of the opponents (especially the prosecution's), yet the questioning and later on the answers have to be relevant to issues related to the topic of the case. That actually gives the judge the ability to direct the questions to relate to the case, and hence to ban any questions that are unnecessary or improper or oppressive in any way.

Cross-examination plays an instrumental role in testing the veracity of the witnesses and the completeness of their testimonies.[497] It is of significant value to maintain the accused's right to a fair trial, and to ensure the public interest in the establishment of truth in IP matters. The right to cross-examination is given to all parties involved in the trial, on equal terms, even though, the article only mentions the accused's right to examine witnesses. Thus the right of cross-examination is not related to the collision approach but to convergence. This is reinforced when that when the public interest is taken into account, e.g. in the authenticity of texts or in correct indication of the commercial origin of products. To conclude, it should be noted, that the link between IP and this aspect of fair trial, is primarily one of convergence.

[495] S.97 of Magistrates Courts Act 1980 c.43 Section 97.2 of the same Act goes further on in relation to an uncooperative witness; the court could issue an arrest warrant unless the witness is the complainant.

[496] Art 72 CPA 1988 which gives the court the right to fine parties who may delay the delivery of requested documents. Also Art 81 of the same Act allows the court to ask for police's assistance to bring a witness who refuses to attend despite being delivered the judicial attendance papers legally.

[497] JCPA 1961 rt 173(1) "1. The court shall here the statements of the witnesses of the prosecution, and witnesses of the personal complainant; the criminal material [evidence] if there is any, the prosecution and the complainant could direct any questions to any witness. It is also allowed to the accused or his representative to ask such questions to the witnesses and discuss them." *Court of Cassation Criminal Chamber Case no. (115/2008) Fair Trial, Appeal Procedures, neglect of basic prosecution procedures]. Jordanian Court of Cassation Civil Chamber [Time Limits Alia Case] Case Number 3687/2006* Roberts P; Zuckerman A; *'Criminal Evidence'*, (Oxford, OUP , 2004), p.216.

Another important evidential rule in securing a fair trial is the rule against hearsay. It could be said that a hearsay statement is when the original witness is not able to attend at the court house and somebody who has been told about the events that occurred by a person who is involved in the case; this person could be the accused, the victim or the complainant.

The Jordanian legislation approach towards hearsay in general terms has been towards the dismissal of evidence obtained through hearsay statements. This stand might be the general rule applied concerning evidence collected in such a manner.

Yet there are exemptions that could legitimise the use of evidence obtained through hearsay statements in certain conditions. Art 156 JCPA 1961 states,

> A statement based on hearsay is approved in the time the criminalised act has been claimed to be committed, or before it was committed or after it has been committed by a short period of time. And was related to facts connected directly to the fact and circumstances of the case. The hearsay statement has to be orally heard from someone who witnessed the crime.

The provisions of the law allow the usage of evidence obtained from hearsay, if two requirements are sustained. The first is the time condition. The second requirement is related to the manner information and facts in the hearsay statement were obtained. Or in other words how did the witness get the detailed facts concerning the statement? It does not permit double hearsay.

Art 156 from the JCPA 1961 uses clear language that leaves no doubt or room for misinterpretation.

However, the text of the provisions fails fully to define the concept of the time requirement. It states that the period of time should be short; either prior to the crime or after the crime was committed. However, the same text does not in any manner clear out the grey area in the Article regarding the period of time; how short it might have to be is left wide open for the judgement of the court. This could have been a gap in text and understanding the intention of the legislator. Yet even though it might not be mentioned explicitly it could be understood from the purpose of the Article and

the overall objective of the provisions and the goal of the prosecuting authorities and the nature of the judicial process.

The IP holder could claim that the time period has not been lengthy and the time between the hearsay statement and the actual crime has been short – but in order to be taken into account as legitimate evidence by the court it has to be a matter of hours or numbered days. The phrase used in the text in Arabic [وجيزة] is used to refer to a period of time that is shorter than the phrase [short قصيرة].

Witnesses' statements based on hearsay have a significant role in the measures of criminal enforcement in general and copyright piracy especially. The nature of detecting piracy and the nature of intellectual property crimes need methods of enforcement that cope with the stealthy nature of piracy and counterfeiting of copyright and trademarks. Speedy procedures of enforcement are needed to enhance the ability of the enforcement authorities and copyright protection office staff to act with efficiency towards piracy and counterfeiting.

5.4.6. Analysis of Art 14 (3/g)

Not to be compelled to testify against himself or to confess guilt

This means that the accused is not to be forced in any manner to mention anything that could undermine his position or claim of innocence. This right has caused conflict with certain search or *Anton Piller* procedures used in IP cases in the UK *Chappell v. UK*[498] *C Plc v P.*[499]

The accused's right not to be forced to testify against himself or to confess guilt is essential for a fair trial. It is a tool to prevent unwarranted and unneeded pressure or incentives that may be offered to the accused to persuade him to admit his guilt Accordingly, this right, one may say, is more connected to the collision approach than any other approach because the right "Not to be compelled to testify against himself or to confess guilt" is an exclusive right given to the accused. That is to say, the proper implementation of this right will be in contradiction with the complainant's

[498] (1990) 12 EHRR 1; see below at *n (499)*
[499] *C Plc v P*, [2007] EWCA Civ 493

best interests. In other words, this right is a clear-cut application of the collision approach concerning the IP and fair trial relationship.

5.4.7. Analysis of Article 14 (5) ICCPR

> *"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law"*

Sub-paragraph five of this article deals with post-trial matters for a convicted accused/defendant at the final stage of the trial at the magistrates' court or the court of first instance. This right is served by the judicial structures discussed in Ch 4.[500] It is exemplified in the IP case of *R v. Johnstone.*

R v. Johnstone [2003] UKHL 28

In this case there was an appeal against the conviction for offences under the Trade Marks Act s.92. The charges related to unauthorised use of the trademark on "bootleg" recordings of well-known bands. The Crown Court had declared that the provisions of s.92 Trade mark Act were a "stand- alone" set of rules concerning criminal enforcement of trade marks, a complete code so far as criminal offences were concerned, and that it was not necessary to prove civil infringement.[501] The court had dismissed argument of the accused's attorney that implementing the criminal element of enforcement required civil infringement of trademark as an essential criterion for the application of s.92 and convicted Johnstone. Johnstone, appealed the verdict; the Criminal Division of the Court of Appeal allowed the appeal, disagreeing with the lower court's ruling. It allowed the appeal because the judge's ruling denied Johnstone the opportunity to lay down his defence on the basis of s. 11(2) b considered by the jury

R v. Johnstone UKHL [2003] *at* [24].[502]

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[500] Criminal Appeal Act 1968 [c.19]; Part I, Appeal to Court of Appeal In Criminal Cases, "Appeal against conviction on indictment" s.1 Right of appeal. Article (260/2) from JCPA n.9, 1961 "2. The right to appeal is granted to; the prosecution, the personal prosecutor, the convicted, and the person who is responsible of compensation". All IP infringements are considered misdemeanours according to the different IP related Acts. . This determined on the minimum and maximum time imprisonment and fine delivered by the court according to the law.

[501] *R v Johnstone* [2003] UKHL 28; [2003] 1 W.L.R. 1736; [2004] E.T.M.R. 2

[502] *Ibid R v. Johnstone* UKHL [2003] at [24]

The Crown based its appeal to the House of Lords on the arguments that the two methods of trademarks protection – civil and criminal – were so distinct that the offence under s92 of unauthorised use of trademarks in relation to goods, did not require proof of civil infringement under

Sections 10-11 of the Act. For Johnstone it was argued that right to a fair trial under Art 6 (2) of the ECHR (presumption of innocence) had been undermined due to

The reverse burden of proof required by s92 (5). The prosecution did not have to show intent to infringe, but under s92 (5) it 'is a defence for a person charged with an offence under this section to show that he believed [that there was no infringement]'. For the defence to succeed, the accused must raise an issue sufficient to require the prosecution to disprove it as part of the burden of proof resting on the prosecution. It is not necessary for the accused person himself to prove the facts set out in section 92(5).[503]

This was argued to offend against Art 6(2) ECHR. As Lord Nicholls pointed out at [49], in balancing the interest of the accused with that of rights-holders and the public "is not as easy as might seem. One is seeking to balance incommensurables. At the heart of the difficulty is the paradox noted by Sachs J in State v Coetzee [1997] 2 LRC 593, 677, para 220: the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important the constitutional protection of the accused becomes. In the face of this paradox all that can be said is that for a reverse burden of proof to be acceptable there must be a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence."

The House of Lords considered the mischief that s92 addressed - counterfeiting or fraudulent trading – to be a 'serious contemporary problem'[504] The difficulties of combating the problem were considered compelling enough reasons to justify the reverse burden of proof in s92(5) as compatible with Art 6(2) ECHR. This verdict highlights the connection between the fair enforcement of intellectual property and fair trial, linking the procedural elements of criminal enforcement to factors mentioned in international human rights instruments.

[503] *R v Johnstone* [2003] UKHL 28 at [44] and [45]
[504] per Lord Nicholls at [52]

It provides an explicit indication of the judicial practice of safeguards related to the criminal enforcement of IP and draws links between IP and human rights. This case demonstrates the approach taken by the English judiciary towards elements of IP criminal enforcement, namely the need for a fair trial but also to ensure that procedures are fair and just for all parties involved, including those affected by counterfeiting and fraudulent trading.

The case of *R v Johnstone*[505] shows the importance of the appeal system in criminal IP cases, where the case reached the highest court in the land.

A similar Jordanian case to the *Johnstone* case shows that the defendant could benefit from the neglect or refusal of other parties in the trial process to exercise their right to appeal the verdict.[506] In 885/2004, the accused was convicted of the offence of exporting counterfeit "Kent" cigarette packages. They appealed to the Court of Appeal of Ma'an, which overturned the conviction. As counterfeiting is considered a misdemeanour, further appeal to the Court of Cassation would not normally be possible. However, the Senior A-G in the Ministry of Justice took the view that the Court of Appeal had made an error of law and made a special application for the Court of Cassation to consider this. The Court of Cassation held that there had indeed been an error of law. However, the time for appeals had expired, so the lower court's verdict and sentence was not reinstated due to the immunity offered by Art 292(d) of CPA Act 1961.[507]

Thus, the Court of Cassation ruling became available as a precedent for other counterfeiting cases; it is submitted that in this situation the CFI's interpretation of the Trademarks Act was accurate in relation to the counterfeit use of "Kent" for cigarettes by the accused. The CFI also made rightful application of the sentence (fine/confiscation). Therefore, the dismissal of the verdict by the CA was a miscarriage of justice, even though it applied the rules more beneficially for the appellant in reducing the original sentence. However, this violated provisions of the

[505] *n (525)* [2003] UKHL 28

[506] *Court of Cassation Criminal Chamber Case no. (885/2004): A Cassation according to an order by the minister of justice [Right to Appeal]*

[507] It has to be said that in this case the District Attorney General have failed to follow the procedure of applying for an appeal opposing the defendant's. in such situation the CA appeal applied the rule that an appellant shall not be harmed from the appeal that has been filed solely by him/her. In such situation the CA can only reduce appealed verdict delivered by the lower court [CFI].

Trademarks Act and reduced the protection afforded to the right-holder and the public.

The right to appeal acts as the last line of defence and ensures stability of the trial procedures and the protection of other elements of the right to a fair trial for the parties involved (the accused among them) from any miscarriages of justice during the trial process as a whole.

As mentioned above, the accused's ability to appeal criminal verdicts of the CFI according to Jordanian law is restricted by the type of criminal offence that intellectual property infringements are considered to be IP wrongdoings according to the Acts are misdemeanours and that means the accused is unable to proceed in the appeal procedures to the highest level of trial, at least in the criminal trial process. Judicial review in Jordan includes both elements of law and fact.

As is the case for civil enforcement proceedings. Thus in Jordan there are reviews of facts and law, and law only based review.

The previously examined case (885/2004) could be considered a breakthrough as the Court of Cassation reversed the verdict of the Court of Appeal on a point of law. Even though it is a step forward in the approach the judiciary in Jordan has taken concerning judicial review of IP cases, this progress is not enough. As it has been submitted in Chapter 4 regarding the judicial structure of courts in Jordan IP, criminal infringements are not reviewed to the highest court; the fact that criminal IP infringements are considered misdemeanours denies the ability to appeal the Court of Cassation.

The application of this Article gives an indication of the concept and its difference from Art 261 which deals with appeal applications to the court of cassation as the highest normal review. Another, maybe more important difference is that appeals to the court of cassation as dealt with in Article 261 deal with matters of law and the wrongful understanding and application of law. But the case does not concern this article, to be specific; this concept deals with neglected facts that have not been dealt

with properly by the court during the different stages of trial, or provisions of law that have not been addressed by the court.[508]

This right is closely connected to the next right (to compensation) in which both are relates both to finalisation of the verdict and the parties' ability to reverse the wrongful application of the law.[509]

The Jordanian legislator applies almost the same provisions of Art 14(6) ICCPR 1966. This may especially be relevant in relation to the actions and powers exercised by the National Library officers (who are part of the Copyright Protection Office) in conducting search orders according to Art (36) CPA), and the legal standing offered to such officers according to the law could lead in some cases to a miscarriage of justice.[510] This is due to the fact that those officers are usually not qualified legally and even though they may have been provided with sufficient training yet they are not familiar with technical experience and knowledge and understanding of the laws and regulations related to copyright and the technical measures of its enforcement.

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[508] Article 213 from CPA no.24, 1988 [Civil Procedures Act] applies the same approach mentioned in the provisions of the CPA 1961 only in civil proceedings and cases. The Court of Cassation in this case (885/2004) used the phrase 'with the intention to sell or make profit'. Articles from copyright Act 1992 and its amendments which the court applied can be found at:< www.wipo.int>

[509] Art 14(6) ICCPR *"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."*

[510] Art 36 the Jordanian Copyright Act (no22), 1992 "*a) the employees of the copyright office at the national library department are authorised by the minister are considered judiciary officers during their implementation of the law.*
b) In the event that there was any suspicion indicating the occurrence of any violation of this law in any place that is in charge of printing the products, copying them, producing or distributing them, employees of the copyright office shall have the right to inspect this place, seize the copies and materials used in committing these infractions and refer them with their perpetrators to the court, and the minister has the right to ask the court to close down the place." From: <http://www.wipo.int/clea/en/text_pdf. > Last accessed on 29/05/12. In regard to the copyright Act I have used in English version found at:< www.wipo.int.> In this part only because the versions at the website mentioned only contains the amendments until 1999 and does not include the amendments of 2001 and 2005. The provisions of Article 36 from the Copyright Act 1992 and following amendments remained unchanged so I preferred to use the English formal version of the translation. Aaccording to follow up emails after a meeting I held with the legal advisor of the National Library in Amman. A search order of itself as a procedure is not amenable to appeal. However the whole criminal prosecution process based on the search could be judicially reviewed while administrative complaints could be filed to the National Library. The meeting took place in Amman on 24/02/2010 from 9:35-10:25 am. The meeting and the outcome related to the interview and the interviewee are not being used yet the e-mail and the information and answers are used.' Empirical side of the research under examination' in *n (24)*

The compensation issue for a wrongful conviction is here related to factors that are not the most simple of tasks, especially if the prosecutor was the attorney general's office in the case of criminal enforcement procedures of copyright infringements. To obtain compensation a person who has been wrongfully accused and convicted in a criminal prosecution process has to prove that malicious conduct caused the wrongful conviction, and that the malicious intention created a direct impact on the court's verdict to convict the accused/defendant wrongfully complex procedure. It becomes even more complicated if the criminal case is forwarded to the court mainly by the public prosecutor (the Attorney General); due to the fact that in general the complainant (the attorney general or the private prosecutor in the cases of IP enforcement) is an honest adversary and he/she are treated in such manner until proven otherwise.

Therefore, providing such evidence is usually based on the provisions and set of rules of the criminal law to prove the malicious intentions of the complainant.[511] It could be noted from the provisions of Art 210(1) from the Criminal Act [JCA no.14,1960] that there has to be some sort fabrication of evidence and claim in order to seek compensation for a wrongful accusation leading to wrongful conviction of the accused.

Even though compensation is not mentioned literally in Art 210(1), it could be imported from other provisions in the law that deal with the right to compensation, as general rules applied in the JCPA 1961.

The approach in England and Wales does not differ from that required by Art 14(6) ICCPR and is reflected in the provisions of s 133 of the Criminal Justice Act 1988 (c.33).[512]

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[511] Art 210(1) "1. whoever submitted a protest or a written acknowledgment to the judicial authority or any authority that must report crimes to the judicial authority, and claimed that a person has committed a misdemeanour or a violation and he knows that he is innocent or fabricated material evidence that such a crime has been committed, is punished according to the grievance of such claim an imprisonment period from 7 days- 3 years." Criminal Act no.16, 1960 and its amendments, cited at :< http://www.lob.gov.jo/ui/laws/search_no.jsp?no=16&year=1960 >last accessed on 03/06/09. The complainant in certain crimes [and IP infringements are some of them] could be a private prosecutor and file a complainant to commence the prosecution. In such cases if the accused has been proven to be innocent from the charges he/she could prosecute the private prosecutor for compensation.

[512] S 133(1) Criminal Justice Act 1988 " Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there

As for the approach of the intellectual property rights system in dealing with this issue, the TRIPs agreement mentions in its third chapter, section two ("Civil and Administrative Procedures and Remedies", Article 48 "Indemnification of the Defendant"), that parties that abuse the use of their requests could be ordered by the judicial authorities to offer the wrongfully accused party adequate compensation for the injury suffered due to the abuse.[513] Art 14(6) is specific to criminal cases but it is argued that it may provide a sort of a code for miscarriages of justice that could apply both to criminal and civil justice, insofar as civil justice is not served by costs orders and the like.

5.4.8. Analysis of Article 14 (7)

Art 14(7) states,

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The article concentrates on the right not to be tried again for a crime that the accused has been punished for or convicted or tried of previously. It means that any defendant who has been convicted or held innocent during trial at a legally recognised court, or spent his/her imprisonment, shall not be tried again for the same crime where the facts and parties of the second trial are the same as those in the previous trial.

It probably has little or no application to IP within a single jurisdiction however it could happen in a case of prosecution in more than one country. For instance a cross-border infringement of Copyright or Trademarks.

A Jordanian/Egyptian conflict of jurisdictions occurred where the action is considered a crime in both legal systems and yet even though the person may have been

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has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted." The practice in the United Kingdom on compensation for wrongful conviction is examined in the Criminal Justice Act 1988 S. 133 which follows in the footsteps of Article (14.6) from ICCPR 1966.

[513] TRIPs Agreement, 1994, Art 48 "*1. The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse…"* Yet TRIPs agreement in the section dealing with criminal enforcement procedures do not mention any provisions dealing with wrongful accusation and conviction, Article 61.

convicted or found innocent it could be possible that the verdict might not be final and have legal effect in the judicial and legal jurisdiction of another state if it does not go through recognition measures. And these procedures could be implemented upon foreign judgements of other jurisdictions.[514] That the legislator proceeds in his attempts to single out the importance of this principle and its connection with the accused's right to a fair trial can be noted in the provisions of Art 58(1) JCA 1960. The Jordanian Court of Cassation (JCC), criminal chamber, has held:

> 1- It is not allowed that a person is prosecuted more than once concerning the same crime according to the provisions of Article 58 of the JCA 1960. Therefore, due to the fact that both defendants have been tried once in Egypt (Al-Azbakeah court of misdemeanours), and by Amman's CFI (the criminal chamber), and due to the facts related the Azbakeah court has delivered the sentence before the court at Amman, so the court in Jordan should have declined to deliver the verdict and stopped the prosecution process against the defendants. 2- And in relation to the jurisdiction of courts according to Article 6 JCPA 1961, that the court which delivers the criminal verdict has the ability to deliver the civil verdict in a compensations sentence connected to criminal prosecution if it was claimed in the same judicial procedures. Therefore the CFI in Amman does not have the jurisdiction to proceed in the compensation claims, due to the fact that the Azbakeah court has prosecuted the defendants. In accordance to what has been mentioned and the facts, both courts of appeal and CFI have violated the provisions of the law and should be annulled. [515]

[514] This section of the Act is called "implementing foreign verdicts" part of the law that deals with such matter Art 12 of the Criminal Act No. 16, 1960 "In exception to the offences mentioned in Article 9 and the crimes committed in the kingdom, any Jordanian or foreigner is not to be prosecuted in the kingdom's territory, if they were tried until the final stage trial, and the case the verdict has been served, or the punishment has fallen out due to time limits has expired or due to pardon." [The Act shall be referred to as JCA 1960].

[515] Art 58(1) of JCA 1960 "1. An action cannot be prosecuted more than once". Court of Cassation Criminal Chamber case no. 311/1999 "the right not to be tried twice-double jeopardy": This case has been found at :< http://www.lob.gov.jo/ui/laws/search > last been accessed at 23 July 2009. This website is a governmental link that provides information about the legislations and regulations operating in Jordan. The laws are listed in the website in the official formation it has been drafted and approved by both houses of the parliament and besides each article of a certain Act there will be two phrases usually [principles and or amendments] if there is any judicial references on the article the word principles will stand for any case and the court that delivered the verdict.

The accused's right to not be tried twice for the same crime in the criminal judicial system is applicable upon intellectual property rights infringements that are criminalised, due to the fact that there is no need to implement any special procedural system to enforce intellectual property violations as seen in Art 41(5) TRIPs Agreement. The enforcement of IP from a criminal procedural perspective at least is identical to tackling crime in general, taking into account the nature of criminalised infringements of intellectual property, despite the particularities that make the criminal aspects of IP violations different from other crimes substantively (but not procedurally).

5.5. Search and Seizure

5.5.1. Search and Seizure Orders

An issue of essential importance to the IP enforcement process and the safeguards mentioned previously is the process or method of gathering evidence and information of infringement through criminal and civil search orders.

The main significance of conducting accurate and fair search orders is there role as tools for gathering and preserving evidence, in enforcement of IP. The nature of IP criminal infringement of being a hit and run type of crime and the need to tackle it with urgency and swift course of justice has laid pressure on practitioners and prosecutors for a higher level accuracy of enforcement procedures. This in sheds light on the balancing act theory or "convergence" concept mentioned in the theoretical element and the procedural rules in chapter 3 of the thesis.

5.5.2. The Nature of Search Orders

The main purpose of and the outcomes of search orders shows the importance of the link between the fair procedures and such a tool of administrative enforcement that could lead to criminal prosecution or civil proceedings.

Evidence and gathering of information related to intellectual property infringements is a matter of great importance. The structure and nature of intellectual property violations, the criminal sphere copyright piracy and trademark counterfeiting, requires effective and swift procedures. Collecting information and evidence of infringing material requires a speedy process that denies the infringers any opportunity of immediate disposal of their products in the market. The major difficulty in the process

is to contain and define the source of counterfeited or pirated goods in order to prevent them reaching the market. This issue raises the significance of measures that may prevent the circulation of the infringing products. The search order must also have the ability to prevent the immediate destruction and alteration of the incriminating documents, moving of machinery, hiding of raw materials or destroying the goods or changing their storage location, which in a matter of hours the infringer could achieve as soon as he/she has been served with the writ.[516] A search order that enables the complainant to search rival's premises without a warning that prevents the infringer from the ability to out-smarting more the lengthy procedures. Such a search order was first presented at the English Court of Appeal in *Anton Piller KG v. Manufacturing Processing Ltd.*[517] It was entered into statute in the Civil Procedure Act 1997 and became one of the models for search orders under Art 7 of Directive 2004/48/EC on the enforcement of intellectual property rights (along with saisie proceedings in civil law states of the EU).

The search order is an '*ex parte* mandatory injunction, made in advance of pleadings, requiring the respondent to permit the supervising solicitor and the plaintiff's solicitor to enter premises controlled by the defendant for the purpose of searching and seizing items listed in the order meant to be used as evidence in civil proceedings between the parties'.[518] The search order by itself is not a deterrent procedure that will prevent the infringers from any further future infringements of the IP holder's rights, either copyright or trademark owners, although it may be supplemented by an interim injunction. This search order itself only gives the IP holder the right to search the premises of the person or organisation that he/she suspects is infringing his/her products or goods, without the ability to prevent the circulation of the infringing goods at a commercial scale on the markets. Therefore such orders may be accompanied with the power to seize the infringing goods and any machinery or documents involved in the production of the infringing products.[519] The significant effect such an order plays in the process of gathering and collecting evidence and

[516] Torremans. P, *"Holyoak & Torremans Intellectual Property Law"* (OUP, 5th edition, 2008). 588
[517] *Anton Piller KG v Manufacturing Processes Ltd. and Others [1976] 1 All ER 779, [1975] EWCA Civ 12, [1976] Ch 55* Torremans 588- 589
[518] Wabwile M *Anton Piller orders revisited* [2000] Journal of Business Law P 2
[519]Dworkin. G & Taylor R D., "Blackstone's Guide To The *"Copyright Designs & Patents Act 1988"*, (London, Blackstone Press Limited, 1989) 115. Also see Torremans. P, "*Holyoak & Torremans 'Intellectual Property Law'* (London, OUP 7th ed., 2013) 692; Colston. C & Middleton. M, *"Modern Intellectual Property Law"* , (Cavendish Publishing Ltd,3rd edition, 2010). P. 672.

information may lead to the accused being incriminated and other legal consequences.[520] Another fact that raised the sensitivity of early 'search orders' was that they only needed the approval of the court that the circumstances of a certain case applies upon the conditions required to issue the order; had a sense of leniency to them in that the judicial approval is enough and there is no need to issue a warrant or a warning that a search will be conducted.[521] In light of all that has been mentioned, the need to specify the conditions required to issue a search order became more important as well as the restrictions upon granting such an order and the guarantees provided to the defendant if any attempts to abuse the order from the complainant arise. The main criteria for such orders to be granted, is that they should contain certain safeguards.[522]

The conditions required to issue a search order are:

- "The order is required to enable justice to be done.
- There is grave danger of the defendant destroying, losing or hiding relevant material if the defendant is put on notice.
- The plaintiff has a very strong prima facie case.
- Inspection would do no harm to the defendant and his case.
- The potential damage to the plaintiff is likely to be very serious."[523]

On the other side some balance was required in order to prevent any injustice or unfairness done to the defendant during the search process. Therefore he/she must be granted some safeguards to avoid any harm being caused to him/her or his/her commercial reputation in the market.

The safeguards granted to the defendant initially were:

- "The order is served by a solicitor, who is an officer of the court.
- The defendant is given an opportunity to consult his solicitor.

[520] The refusal to cooperate with the court's official and the search process, the defendant may end up charged of contempt of court, Ibid, p. 672. Also see Torremans P *"Holyoak & Torremans 'Intellectual Property Law"* (London, OUP, 7th ed., 2013) 691

[521] Ibid, p.691. Also see Dworkin. G & Taylor. R.D, *"Blackstone's Guide To The "Copyright, Designs & Patents ACT 1988*" (London, Blackstone Press, 1989) 115

[522] Civil Jurisdiction and Judgments Act (1982) Section (25/1). Also Gee S, '*Commercial Injunctions'*, , (5th2004). Pp. 168- 169. . Bainbridge. D, "*Intellectual Property"* (Pearson,6th ed., 2007). P .685.

[523] Ibid, pp. 115-116. Also see in the same meaning, Torremans P, *"Holyoak & Torremans 'Intellectual Property Law"* (London, OUP, 7th edition, 2013), 694. Also see *Anton Piller KG v Manufacturing Processing Ltd. and Others*, Court of Appeal 8 December 1975 (1975. A. No. 6292) (1976) Ch. 55

- The defendant is allowed to apply for a discharge of the order.

- The plaintiff should provide an undertaking in damages, possibly supported by a bond."[524]

Such safeguards could become an instrument of extreme importance on occasions when there is suspicion that the search order has been misused.[525] The abuse of the order occurs when the means and outcomes of the search order are expanded and the complainant solicitor carries on the search order and operates as a court official.[526] The main issue that may arise in such a situation is that the solicitor who carries out this mission should be an expert in the field and as neutral and impartial as possible. And the criteria might not all be applicable to the complainant's solicitor, who will have his/her client's interest and benefit in the first place.[527] (Hence the current requirement for an independent supervising solicitor)This contradiction in interests may lead to a more obvious abuse of power in the complainant's use of search orders and could become visible in the court's increasing reluctance to grant search orders which might be turned into a tool of harassment in the will of the complainant.[528]

Therefore the urgency of the circumstances and the main standpoint of the defendant towards the purpose of the order make the judicial process of granting the complainant the order an exception of the general rule.[529] A second major condition that should apply upon the application of the "search order" provided by the plaintiff is what may be called a "full and fair disclosure of all the material facts" presented by the plaintiff's solicitor.[530] Due to the significant role that such orders play in the process of intellectual property infringements and the outcomes they impose upon the

[524]Dworkin G & Taylor D., *"Blackstone's Guide To The "Copyright, Designs & Patents Act 1988"* (London Blackstone Press, 1989). P116. Also see Colston. C & Middleton. K, *"Modern Intellectual Property Law"* (Oxon, Cavendish Publishing Ltd, 3rd ed., 2010). P673

[525] P. Torremans, "*Holyoak & Torremans 'Intellectual Property Law"*, (London, OUP 7th ed. 2013). 695

[526] C. Colston & K. Middleton; *"Modern Intellectual Property Law"* (Oxon, Cavendish Publishing Ltd , 3rd ed. , 2010). Pp 672-674. And also see Torremans.P, "*Holyoak & Torremans 'Intellectual Property Law"*, (London, OUP, 7th ed., 2013). 694-695.

[527] *Ibid*, 696

[528] *Ibid*, 695

[529] S. Gee 'Commercial Injunctions', (5th, 2004). P . 217. Also see Art 6(1) of the European Convention on Human Rights.

[530]S. Gee, *'Commercial Injunctions'*, (5th2004). Pp . 242-244. The misrepresentation of evidence or material documents may lead to deprive the applicant from any advantages acquired by the ex parte order or relief and the immediate discharge of the without notice application. Ibid. Pp . 252-254

defendant and his/her premises without prior notice, a set of new safeguards that guarantees the balance in procedures among the parties evolved.[531]

The additional safeguards granted to the defendant are the following:

I. The execution of the order during business hours.
II. The necessary inclusion of an independent solicitor in the search team.
III. Fixing a mandatory date to report back to the court, shortly after the execution of the order.
IV. Obtaining careful records to be taken of all the material taken from the premises.[532]

Still, despite the amendments to the structure and concept of the safeguards granted to the defendant or accused, questions have been raised in regard to the "search orders" concerning their legitimacy, and whether they violate or infringe upon the basic human right of a fair trial being granted to the accused.[533] And are the safeguards granted to the accused implemented in both theory and practice?[534] Actually such concerns have its legal background that may lead to accuracy of these concerns from a legal perspective, due to the approach of the European Court of Human Rights concerning this aspect.[535] However, the presence of an attorney accompanying the defendant during the conduct of the search is to ensure the fairness of the proceedings.

Therefore the legitimacy of such orders' validity concerns what may seem to be conflict with the basic human rights of the accused to a fair trial and to avoid any breach of private life/privacy in any regard. And the lack of minimum standards of protection and safeguards provided to the accused during the execution of the search order; in the absence of the accused's solicitor, or proceeding to perform the search

[531]Colston. C & Middleton K, *"Modern Intellectual Property Law"* , (Cavendish Publishing Ltd, 3rd ed. 2010). P. 674. See as well *Columbia Pictures Industries and Others v Robinson and Others* [1988] FSR 531

[532] Colston. C & Middleton. K, *"Modern Intellectual Property Law"* , (Oxon, Cavendish Publishing Ltd,, 3rd ed. 2010) 674. Also see the Practice Direction [Mareva Injunctions and Anton Piller Orders] 1994.

[533] European Convention of Human Rights [ECHR] 1950 Art 6(1); Adrian Zuckerman "The privilege against self-incrimination may not confer a right to refuse disclosure of incriminating documents that came into existence independently of the disclosure order", Civil Justice Quarterly, 2007, 26th of October, P395. Also see Colston C & Middleton K *"Modern Intellectual Property Law"* (Cavendish 3rd ed., 2010), 674-675.

[534] Ibid, P673.

[535] *Chappell v. UK* [1990] 12 E H R R 1; also *C Plc v P* [2007] EWCA Civ 493. Also see Colston C & Middleton K, "Modern Intellectual Property Law" (Cavendish, 3rd ed., 2010), 674 – 675.

order with only the plaintiff's solicitor and ignoring the need for the presence of an independent solicitor.[536] In *Chappell v UK* the "*Anton Piller*" order itself was not held to be in contradiction with human rights, as a legal process in itself, by the European Court of Human Rights. What have been considered violations of human rights are the improper procedures related to the searches.[537]

It could be said that the issue is not whether the search order is considered a violation of the accused's human rights, but it is actually the method or process of conducting the order and while the course of action is a vital condition of legitimacy of a certain was omitted this aspect is what create issues concerning the legality or in other words the misuse of the order, and generates questions related to its conflict with the basic human rights of the accused,[538] and the fundamental rights mentioned in the European Convention of Human Rights.[539] Should the legality and legitimacy of search and seizure, and whether it contradicts a human rights perspective or not, be placed under study? But the concept is more of a misunderstanding of an illegal action or procedure, which may cause conflict with fundamental human rights unlike properly formulated search orders under the provisions of the enforcement directive and Civil Procedures Act and the Civil Procedure Rules 1998.[540]

5.5.3. Search and Seizure Orders in the Jordanian Jurisdiction

It should be mentioned in advance that there are no search orders that are specifically designed for intellectual property infringements. The general rules and provisions of the Civil Procedures Act and Criminal Law Procedures Act are the ones that should be applied.[541] Due to this fact, intellectual property enforcement does not require certain proceedings or procedures according to the legal system in Jordan. Therefore, any legal action by which the complainant seeks to secure evidence or prevent the accused from destroying or hiding any material related to the infringing goods will be

[536] Ibid, P675. *Chappell v. UK* (1990) 12 EHRR 1
[537] *Ibid*.
[538] Colston C & Middleton K *"Modern Intellectual Property Law"* (Cavendish, 3rd ed., 2010). Pp. 673-674.
[539] *Chappell v UK* [1990] 12 E H R R 1; also see articles (6,8 and 10) ECHR
[540] 1998 SI 3132; for a full list of current safeguards, form of undertakings, etc., see Practice Direction 25A–Interim Injunctions, available at http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd_part25a#7.1
[541] Jordanian Civil Procedures Act (no 24) (1988) according to the latest amendments in Act no. (14) (2001); Jordanian Criminal Procedures Act (no 9) (1961) according to the latest amendments

governed and ruled according to the main rules and provisions in the related legislation.[542] The search order will eventually give the supervising officer responsible for conducting the order the authority to seize any infringing items, products or any facilitating material that took place in the production process of counterfeited/pirated copyrights or trademarks.[543] Meanwhile the officer in charge of the search and seizure proceedings must write down in detail a list of the confiscated items in the possession of the search team. In Intellectual property rights infringements the complainant/IP holder should play an important role in the criminal prosecution process or the civil proceedings. In order to gain a clearer perspective of the search and seizure process in the Jordanian legal system search orders under the supervision of the attorney general at the investigation stage shall be observed. Search orders under the provisions of the Civil Procedures Act shall be examined. And search orders according to rules of the Copyright Act and the regulations of the National Library (Public Library) will be studied as well.[544]

The legislator dealt with search orders from a criminal prospective in the investigation stage under *Chapter one*[545] of the Fourth Section of CPA (no 9) (1961) Articles (81-87) from sub- section (3) entitled '*Search Orders and Confiscated Items Related to the Crime'*.

A. Criminal Search Warrants

According to the provisions of the Criminal Procedures Act, it is not allowed to enter the houses or premises that are to be searched unless the resident is accused of committing a crime or of being a possible partner in a crime, or if he possesses information related to a crime.[546] The previously mentioned principle states the basic legal background for the search, which is related to the person involved in the process; he/she has to be a possible suspect or be accused of a criminal activity either directly or in an indirect manner and this knowledge occurred to the assistants of the AG and in the provisions of the law. The search order will not be considered

[542] Jordanian Civil Procedures Act no. (24) (1988) according to the latest amendments in Act no. (14) (2001); Jordanian Criminal Procedures Act no. (9) (1961) according to the latest amendments.
[543] WIPO Intellectual Property Handbook: Policy, Law and Use; WIPO Publication No.489 (E); p. 218 Civil Procedures Act no. (24) (1988) according to the latest amendments in Act no. (14) (2001)
[544] Art (36) Jordanian Copyright Act no. (22) (1992) and its amendments; Regulations of the National Public Library Department no. (5) (1994) and its amendments.
[545] Chapter one is under the title "Investigation Procedures"
[546] Art 81 Jordanian Criminal Procedures Act no. (9) (1961) according to its latest amendments.

legitimate if the accused is not present during the initiation of the search,[547] unless he/she knew of the search order and the time and the date and refused to attend. In such cases the AG will proceed with the search in the absence of the accused but with the attendance of two people who may be considered in charge of the neighbourhood, or two of the accused's relatives or two witnesses that the attorney general may make available. The Court of Cassation stated,

> In the case under study it could be understood that the significance of the absence of the accused/his representative – during the search of his premises – is not a secondary procedure that could be dismissed by the court either of first instance or appeal. And the role of the search order accuracy relates to the legitimacy of the investigation and the trial. [548]

Art 7(3) of the Criminal Procedures Act states, "The annulment results could be withdrawn if the party who benefits from the annulment approved such a withdrawal, except in the cases when the annulment is related to a procedure connected with public order."

If the accused is present in the premises during the execution of the search order he must be invited to attend the procedure but there is no obligation to inform him/her in advance about the search order as a process.[549] Art 85 of the Criminal Procedures Act deals with the manner in which a search order may be conducted in a premises that do not belong to the accused – in other words in that of a third party, who may not be involved directly in the enforcement process, but the search of their property may help in the investigation procedures. Art 85 gives the person who is not considered an accused the right to attend the search process and if he/she were absent during the proceedings it would take place in their absence. But there must be some sort of representative present, such as specified in Art 83 of the same Act for searches of the accused's premises: the neighbourhood's first in charge, two of the proprietor's relatives or two witnesses of whom the attorney general demands attendance during the search. The search order as a judicial procedure should be conducted by the

[547] Art 83(1) Jordanian Criminal Procedures Act
[548] Art 83(2) of the Jordanian Criminal Procedures Act. It has to be mentioned that if the search has been conducted in the absence of the accused and or his/her representative according to the provisions of Article 83(1, 2) the search should considered illegal. Court of Cassation Criminal Chamber Case no. (690/2000) [Search warrants].
[549] JCPA Art 84 (1961)

attorney general himself/herself and must be accompanied by his/her assistant who operates as a court officer and who writes down anything found during the search and prepares a list of the items found or confiscated in the process.[550]

The AG's Judicial assistant presence is considered a requirement for the validity of the investigation in general and the search order particularly, and this is due to the need of accuracy in providing a true statement of the events of the investigation and the items confiscated during the search process[551] The attorney general should always be accompanied by his/her assistant during the process of the search, due to the fact that the AG cannot concentrate on the investigation and write down what actually occurs during the process.

This is mainly the process involved in the investigation stage of crimes in general, just a fraction of the process. But such methods of search orders only apply as a part of the criminal prosecution – in general, those that require the interference of the attorney general. Search orders could also be used for IP infringements that are considered a crime, due to the fact that there are no specific procedural methods of enforcement required or applied for IP violations. They may be civil/criminal proceedings: which of the Criminal Procedures Act or the Civil Procedures Act applies depends on the method of enforcement preferred by the owner of IPR. It should be mentioned that these general procedures do not apply fully to copyright piracy, at least not on search orders themselves.[552]

[550] Art 87 JCPA, 1961. Art 35(1) from the same Act deals with how confiscated material treated it states "*the confiscated items shall be preserved in the same manner it was found at, and it shall be locked in a specialised container if there is such need and will be* finally sealed by an official seal"

[551] The structure of Art 87 Jordanian Criminal Procedures Act; and the method of interpretation of the main body of the Article gives the meaning and overall understanding of the word accompany, the verb itself is in the command version. In other words it does not give the attorney general many options he/she must or should have the judicial assistant in their company during the investigation in general and the search particularly.

[552] This method of search and seizure order can apply on trademarks counterfeiting , trade secrets and patent criminal prosecution due to the fact that there are no specific search order mentioned or stated in either the provisions of both criminal Procedures Act and Civil Procedures Act respectively. Therefore due to this fact the general provisions in each Act shall be implemented on prosecution process or civil proceedings as a method of enforcement.

B. Search and Seizure Orders under Jordanian Copyright Act[553]

What is the role of the Copyright Protection Office at the National Library in the enforcement of copyright piracy? What is the legal basis for CPO officers' duties to conduct search orders?

It should be mentioned that search orders under the Copyright Act do not differ much from search orders under the rules and provisions of the Criminal Procedures Act. The only exception that could be noticed is the function of the Copyright Protection Office, which operates under the provisions of the National Library regulations.[554]

The investigation process itself does not vary much from the customary criminal prosecution procedures, beside the role of the copyright enforcement officers. The course of action begins with the owner or holder of the copyright (the licensee) who can either file a complaint to the Copyright Protection Office (CPO) that copyright has been infringed or to the Attorney General Department. In the first case the enforcement officers at the (CPO) conduct a search order of the organisation involved in the complainant's enquiry and they may accordingly confiscate the infringing items. In accordance with the outcome of the search the general director of the National Library will issue a formal letter to the attorney general department with the findings of the search and seizure order attached in order to instigate the criminal prosecution and start the investigation against the accused. The search was conducted then its findings were sent to the attorney general department accompanied by the letter from the general director of the national library requesting the prosecution of the accused according to Art 51 from the Copyright Act.[555] However, in other situations the "Attorney General shall send an official letter to the general director of the National Library asking him/her to issue a search order of the premises of the accused establishment. It should be mentioned that the search has been conducted at the 29th

[553] Jordanian Copyright Act no (22) (1992) according to its latest amendments. It should mentioned that the Act has been modified five times the most recent version was according to Act No (9) (2005)
[554] Article 8(c/9) the National Library [it is called the Public Library as well] Regulation No (5) (1994) and its latest amendments. It should be stated that Art (8) deals with the different departments of the National Library. Subsection (c) in particular defines the sections of the National Library. Art (36) Copyright Act 1992, which gives the copyright protection office enforcement officers the role of attorney general assistant while conducting their duties.
[555] *Case (392/2004) Attorney General Department/Amman* (The accused Ziki Abdul- Al-Fatah Ahmed Al-Hadad). In this case search was conducted and then its findings have been sent to the attorney general department accompanied by the letter from the general director of the national library requesting the prosecution of the accused according to article 51 from Copyright Act.

of January 2004 and the letter of request issued by the general director of the national library was at the 8th of February 2004." The objection filed by the complainant is sent to the attorney general department and an investigation commenced against the accused. But the investigation will not be held until the result of the search conducted by the enforcement officers of the National Library is complete.[556] After the search order is over the investigation proceeds as normal and the criminal prosecution process goes on until the end of the investigation and the whole attorney general is sent to the CFI.

The main distinction between the search orders conducted under the provisions of either the Criminal Procedures Act or the Civil Procedures Act and search orders related to copyright infringement cases is that the former are usually conducted under the direct supervision of the attorney general or the court official. But the search being conducted by the copyright enforcement officers is not due to the fact that there is no direct legal supervision of the search process itself – though this in particular creates some uncertainty in relation to the outcomes of the search order. The lack of legal and judicial supervision creates a situation where the position of the suspect could be undermined. And the lack of legal experience in IP law or specifically copyright could create problematic situations during the enforcement process in general and in the investigation stage and at the court afterwards and waste the court's time and endanger the accused's position legally. According to the CFI "the court decided that the actions even though they may create a criminal offences yet are not considered a crime according to Articles 8 and 51 from the Copyright Act no 22 1992 and therefore the accused could not be liable according to the provisions of the previously mentioned Act and law. This case actually is clear evidence that caused complications in the enforcement procedures due to lack of experience of the enforcement officers."[557]

However, the problematic issue that faces search orders conducted by the Copyright Protection Office (CPO) under the supervision of the national library is decentralization, since the office is located in Amman and has no branches in the other judicial districts.

[556] It arrived at the attorney general department two days later and the first session of the Attorney General/ Amman Case no (392/2004) at the same date the 10th of February 2004.
[557] *Case no. (1367/2004) Court of First Instance/Amman (Copyright Infringement according to Article (51) from Copyright Act)*

- The distribution of personnel

One of the most complex issues facing the enforcement officers in Jordan is the fact that enforcement officers, who follow the National Library, are concentrated in Amman, the capital city of Jordan. There is a single enforcement office and their staff is stationed in the centre of the library building, and yet their geographic jurisdiction covers the entire region of Jordan. There are insufficient numbers to cover the whole of Jordan while still maintaining the prosecutions leading to trials and staying within the time range either for the trial as whole or even between sessions.[558]

However, there have been changes to the situation by recruiting judicial police members to assist the copyright enforcement officers in conducting their duties regarding search orders. Yet the same problem has been repeated, which is centralisation, since this support is based in the Palace of Justice (Amman's Court of First Instance). Such actions and reforms are at the centre city, which still does not solve the problem of vast areas and lack of connection between the center and other regions.

Therefore, the remedial action could involve creating branches of the copyright protection offices in different areas outside the capital city. Properly trained enforcement officers in various places, at least in the main cities containing the three Courts of Appeal in Jordan, would help provide the needed deterrent effect required in the enforcement process.

- Legal training(Competence)

The staff of the copyright protection office at the National library is considered a part of the Attorney General's team of assistants and from this perspective such officers are provided with massive powers, including the ability to conduct search orders, and the seizure and destruction of infringing products and related material to the incident. However, the staff are not qualified legally to have the ability to fulfill and conduct such actions of great legal effect and in practice are without enough training and accuracy when dealing with the search orders. Many of the prosecutions and later on trials have been dismissed during cross-examinations conducted either by the accused's attorney or the court's bench. According to a meeting with Judge Nehad El. Husban at Amman's CFI, she was sure that there was a lack of clarity and legal

[558] According to law the time between each session should not be more than 14 days

knowledge in relation to the how and where of the search reports. Often they showed nothing more than the number of seized infringing products and the names of the report conductors, the name of the establishment and the name of the owner and the manager if they were different persons.[559]

5.5.4. Criminal search orders in the UK jurisdiction

Search warrants and orders related to enforcement procedures of copyright piracy are legally based upon the provisions of s.23 of the Criminal Justice Act 1988.Again there are no special procedures for IP cases.

One may say what is the impact that hearsay rules might have on copyright piracy enforcement and the burden of proof on prosecution?

The headings of hearsay exceptions according to the Criminal Justice Act 1988 come under part 2 "Documentary Evidence in Criminal Proceedings" s.23 'First hand hearsay'. Hearsay evidence has to be a documented statement in order to be admissible in criminal proceedings. What are the conditions and bases on which such evidence could be admissible in criminal proceedings, according to the provisions of CJA 1988?[560]

S. 23 of the previously mentioned Act says that the statement made by any person in order to be admissible has to be in the form of a "document". According to the Law Commission Consultation Paper No. 138 "Evidence in Criminal Proceedings: Hearsay and Related Topics" that "*a statement made by a person in a document"* mentioned in s.23 CJA 1988. Being a document means that it has been issued by the rightful official personnel and the phrase statement refers to the person who signed the document, such as the witness's statement written by the police officer and signed by the witness.[561]

5.5.5. Search and Seizure Orders According to the Provisions of the TRIPs Agreement

The TRIPs agreement dealt with search and seizure orders under the provisions of section two of part three of the treaty under the main title of enforcement and the

[559] The pages and details shall be inserted from the introduction and methodology of this thesis.
[560] S.23 c.33 Criminal Justice Act 1988.
[561] Law Commission Consultation Paper No. 138 "Evidence In Criminal Proceedings: Hearsay and Related Topics. Pp.442-44.

subsection mentioned previously: "Civil and Administrative Procedures and Remedies".[562] Articles "43 and 44"[563] mainly deal with gathering evidence and related information and the means to preserve it and prevent any further infringements of IPRs. Judicial authorities rely on evidence from any party that could prove its claims of infringement of its intellectual property rights; to make use of any enforcement procedure to obtain the required evidence of violation of an IP asset, whether such evidence lies in the controlling hands of the opposing party[564] or is part of the evidence held by the complaining party and its allegations, and if such details are based upon the refusal of the other party to deliver evidence or information or the access of what has been mentioned without any reasonable cause.[565] Art 44 relates to the content of the previous Article and as a direct outcome of the evidence rules mentioned in relation to commencing and concluding of the search conducted in connection to infringed IP assists. And the owner also has the right (the IP holder or owner) to prevent the infringer from benefiting from the entry of the goods to the market, via the various channels of commerce.

5.6. Time Limits: The Role of Time Limitations in Criminal Prosecution

Time limits in intellectual property prosecutions and the right to a fair trial[566]

The European Union has been debating a draft instrument on the criminal enforcement of intellectual property.[567] This was very much weighted towards

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[562] (TRIPS Agreement) 1994; Part III, Section 2

[563] Art 44 TRIPs dealt with an important sector of search and seizure orders and the implications and procedures, requirements and conditions related

[564] Art 43(1) TRIPs Agreement

[565] Article 43(2) TRIPs Agreement

[566] This section of the research was initially intended to be an article prepared for publication jointly with Prof. Alison Firth, yet due to being essential for the core of the procedural safeguards related to the right to a fair trial and intellectual property enforcement, it was included in the thesis instead.

[567] Amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (COM(2006)0168 – C6-0233/2005 –
2005/0127(COD) was debated on its first reading before the European Parliament (25 April 2007) and approved, subject to further amendments. At: <http://register.consilium.europa.eu/pdf/en/07/st08/st08732.en07.pdf > accessed 30 April 2008. Subsequently the legislative resolution was considered in Working Party of the council; see Note of 27 June 2007. The amended draft excluded patents, restricting the ambit of the directive to 'piracy and counterfeiting' on a commercial scale. For a critique of the earlier inclusion of patents, and the failure to define 'intention', see V Lowe *The law of unintended consequences - a perspective on the draft Directive on criminal measures to enforce intellectual property rights* [2006] Crim. Law 3. See also P Treacy & A Wray *IP crimes: the prospect for EU-wide criminal sanctions - a long road ahead?* [2006]

prosecution aspects and may not see the light of day.[568] Be that as it may, in relation to the rights of the accused, it is interesting to note that Art 8 of the draft states,

- Rights of defendants

Member States shall ensure that the rights of defendants are duly protected and guaranteed."

As mentioned in the UK House of Lords' EU Committee,[569] one form of legislative protection for defendants will be the application by UK judges of the Human Rights Act 1998, or implementing the European Convention on Human Rights, especially Art 6(1), which guarantees the right to a "fair and public hearing within a reasonable time".[570]

In the English courts it has been accepted that the various elements of Art 6(1) have independent status; as the House of Lords put it in Attorney-General's Reference (No.2 of 2001):[571]

> …there is a right to a fair and public hearing; a right to a hearing within a reasonable time; a right to a hearing by an independent and impartial tribunal established by law; and (less often referred to) a right to the public pronouncement of judgment. It does not follow that the consequences of a breach, or a threatened or prospective breach, of each of these rights is necessarily the same.

EIPR 1. The European Commission's dossier on the proposal shows no proceedings subsequent to June 2007 at:< http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=193131 > accessed 13 December 2008

[568] A number of bodies have queried the legal basis of the proposal; see e.g. :< http://indemgroup.org/fileadmin/user_upload/groupdocs/Position_papers/IPRED_question_to_JURI.pdf > accessed at 13 December 2008. In case C-440/05, *Commission v Council* [2008] All ER. (EC) 489; [2008] 1 CMLR 22, mentioned in this note as being relevant to the issue, the European Court of Justice, struck down an environmental Framework Decision of the European Council as lacking legal basis under Community competence.

[569] House Of Lords European Union Committee 11th Report of Session 2006–07 'The Criminal Law Competence of the EC: follow-up Report with Evidence' HL Paper 63 13 March 2007.

[570] Recital 12 of the amended draft:-"(12) The rights enshrined in the Charter of Fundamental Rights of the European Union should be fully respected when criminal acts and penalties are defined, during investigations and in the course of judicial proceedings."
See, generally, FG Jacobs *The right to a fair trial in European law* [1999] EHRLR 141.

[571] [2003] UKHL 68 at [12], citing *Porter v Magill* [2002] 2 AC 357, 489, 496, at [87], 108; *Dyer v Watson* [2002] 3 WLR 1488, 1513, 1526, 1528, paras 73, 125, 138; *Mills v HM Advocate* [2002] UKPC D2; [2002] 3 WLR 1597, 1603, paras 12-13; *HM Advocate v R* [2003] 2 WLR 317, 321, para 8

The balance between the liberty of the subject, the right to a fair trial and the interests of victims of crime are addressed not only through substantive laws but also through the medium of procedural laws and practices throughout the prosecution process. As Lord Bingham of Cornhill put it, in R. (on the application of R) v Durham Constabulary:[572]

> For good and understandable reasons, the protection given to criminal defendants by article 6 covers not only the trial itself but extends back to the preparatory and preliminary processes preceding trial and forward to sentence and appeal. But the primary focus of the right is the trial itself, because that is the stage at which guilt is decided with the possibility of condemnation and punishment. I find it hard to see how a criminal charge can be held to endure once a decision has been made that rules out the possibility of any trial, or condemnation, or punishment.

One safeguard for the accused is the presence of a time limit – a limitation or prescription period - after which criminal proceedings may not be instituted or continued after a period of inactivity. Another related safeguard is the right for the criminal proceedings, once instituted, to be concluded within a reasonable time. The application of these time limits needs to reflect the interests of all parties involved – the accused, any victim, and the interests of society in the implementation of justice.

The European draft instrument proposes that maximum sentences of at least 4 years be available for serious intellectual property offences. Unsurprisingly, however, the draft is silent as to time limits, which therefore fall to the application of national rules.

A preliminary point: Are time limitations part of procedural law or substantive law?[573] This seems to depend upon the jurisdiction and the nature of the limitation. In the context of civil claims, English law has traditionally regarded limitation or

[572] [2005] UKHL 21, in the context of reprimands and warnings; on which see I Brownlee *Conditional cautions and fair trial rights in England and Wales: form versus substance in the diversionary agenda?* [2007] Crim LR 129. Juss has argued that the elements of establishing a fair trial are in fact "interconnected and indivisible": S Singh Juss *Constitutionalising rights without a constitution: The British experience under article 6 of the Human Rights Act 1998* [2006] Stat LR 29.

[573] On the significance of this distinction, see J.A. Jolowicz On the nature and purposes of civil procedural law [1990] CJQ 262, commenting upon Sir Jack Jacob' s Hamlyn Lectures *The Fabric of English Civil Justice* (1987).

prescription periods as procedural rather than substantive,[574] although there are decisions from other common law jurisdictions[575] suggesting that limitation rules are substantive. Indeed the European Court of Human Rights has also found it difficult to categorise time limits.[576] Some time limits are clearly procedural, e.g. the 60-day period for adducing new claims in administrative proceedings, which was challenged in *Peterbroek v Belgian State*.[577] Le Seuer has stated,

> National limitation periods cannot be relied upon by a public authority to defeat a claim raising Community rights where what is in issue is the Member State's failure to implement a directive.[578]

However despite the lack of clear-cut exemplified procedural rules concerning fair trial, time limits and the provisions of Art 6 ECHR or Art 14 ICCPR to that matter; it could be assumed that the time limitations are embodied in the provisions of Art 6 even though it might have not been mentioned explicitly, this could be noted in the work of Adrian Zuckerman who stated

> No reasonable interpretation of ECHR, Art 6 can possibly assume that a fair trial is a rule- free trial.

Zuckerman continued to expand on the idea and the context of Art 6 by stating that

> A system of procedure has to strike a balance between three imperatives: the need to determine the truth, the need to do it within a reasonable time and the need to achieve all this within the available resources. The concrete results of this formative balance are expressed in the detailed rules of procedure, which

[574] A McGee *Limitation Periods* (Sweet & Maxwell 5th revised ed., 2008) [ ]; N Andrews, English Civil Procedure: Fundamentals of the New Civil Justice System (OUP, Oxford, 2003) but Foreign Limitation Periods Act 1984.
[575] E.g. *Maxwell v Murphy* (1957) 96 CLR 261 (Aus); *Bournias v Atlantic Maritime Co* 220 F. 2d 152 (2nd Cir. 1955) (US) cited by Hakeem Seriki *Substantive or procedural: an arbitration perspective* [2006] Int ALR 24. However, in *McKain v R.W Miller Co*. (S.A.) Pty. Ltd. (1991) 66 ALJR. 186 the Australian Court found a South Australian civil limitation period (for personal injury claims) to be procedural, by a majority of four to three. Opeskin regards the majority view as inertial, and commends the reasoning of the minority: Brian R Opeskin Choice of law in torts and limitation statutes [1992] LQR 398
[576] as for example in *Stubbings v. United Kingdom* (1997) 23 EHRR 213; see A Le Sueur Access to justice rights in the United Kingdom [2000] EHRLR 457
[577] [1995] E.C.R. I-4599.
[578] A Le Sueur *Access to justice rights in the United Kingdom* [2000] EHRLR 457, citing C-208/90, *Emmott v.Minister for Social Welfare and Attorney General* [1991] IRLR. 387

> thereby define the contours of procedural justice, of a fair trial. Accordingly, the time-limits represent a fair allocation of procedural resources.[579]

The Jordanian Court of Cassation, Civil Chamber, has referred to limitation of actions as procedural.[580]Is the distinction crucial? Probably not, unless there is a conflict of laws. For the purpose of the comparisons made in this article, we shall assume that the time limits are procedural, as criminal proceedings are less often beset by conflict issues than civil proceedings.

This commentary compares the situation to one of the UK jurisdictions[581] – England and Wales – with that in a civil law jurisdiction of the EU – [582] – and with the situation in Jordan, whose procedures have been influenced mainly by civil law (especially French law), but also to a certain extent by common law. The influence of Islamic law is less pronounced in Jordan's criminal procedural system than in its civil system. Jordan has entered into a 'Euro-Med' association agreement with the European Community and its Member States,[583] which has greatly affected Jordan's intellectual property and labour laws. These three countries therefore have a common interest in the protection of defendants and the criminal justice system[584] by means of time limits for intellectual property prosecutions.[585] Their differing national approaches illuminate the problems and benefits of achieving this. In England and Wales, for many intellectual property crimes, the time limits are wholly a matter of the court's discretionary control over its procedures. Jordan has a statutory system of interlocking time limits with a 'long stop' period between commission of the offence and sentence.

[579] Adrian Zuckerman 'Dismissal for disobedience of peremptory orders - an imperative of fair trial' [2001] CJQ 12

[580] See the rules and decisions noted below at *n (619), n (620) n (621) and (322)*

[581] Please note that Scots criminal law and procedure differs from that in England and Wales. These aspects of the law in N Ireland are more similar to England and Wales.

[582] Warm thanks to Dr. Inmaculada Gonzalez Lopez for information on the Spanish system.

[583] Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part [2002] OJ L 129/3.

[584] As Lord Hope of Craighead commented in *Ruddy v Procurator Fiscal* [2006] UKPC D2 at para 8, "Criminal prosecutions are conducted in the public interest." Thus, the interests of justice must be placed in the balance along with the rights of individuals.

[585] These three countries have also ratified two important international instruments in this regards – the UN International Covenant on Economic, Social and Cultural rights and the UN International Covenant on Civil and Political Rights.

- How could the procedural aspect of the right to a fair trial play its role in IP protection and enforcement?

5.6.1. Time limits – England & Wales

Criminal prosecutions for intellectual property offences in England and Wales may be brought as a result of complaints to the police, but are not limited to this situation.[586] Local weights and measures authorities[587] have duties of trade mark enforcement under s93 of the Trade Marks Act 1994 and of copyright enforcement under s107A of the Copyright, Designs and Patents Act 1988.[588]

There are three types of criminal offence in England and Wales. The most minor are summary offences, which are tried 'summarily' in the magistrates' courts. The most serious offences are tried 'on indictment' by judge and jury in the Crown courts after committal from magistrates' courts. In between are offences triable either way.[589] The Review of the Criminal Courts of England and Wales found that in 1999 the magistrates' workload consisted of offences that were 73% summary offences, 26% triable either way, and only 1% indictable-only offences.

At present there are substantive offences relating to the UK copyright and related rights, and trademarks. Under the Copyright Designs and Patents Act 1988, s107, some offences are triable either way, for example s107(1)(a), (b), (d)(iv) and (e), for which a 10 year maximum sentence of imprisonment was introduced,[590] s107(2A),[591] s 296ZB,[592] s297A.[593] Other copyright offences are summary, for example s107 (5)],

[586] Recital 11 of the amended draft states ' To facilitate investigations or criminal proceedings concerning intellectual property offences, these may not be dependent on a report or accusation made by a person subjected to the offence.'

[587] Often referred to as 'Trading Standards': for a range of links to information about trading standards issues, see:< http://www.tradingstandards.gov.uk/links/links.cfm#Legal_Sites > (accessed 29 April 2008).

[588] Brought into force along with s198A on 6 April 2007 by the Criminal Justice and Public Order Act 1994. (Commencement No. 14) Order 2007 SI 2007 No 621. Sections 107A and 198A had previously been inserted into the 1988 Act under section 165 of the Criminal Justice and Public Order Act 1994, but not brought into force.

[589] "Indictable offence", "summary offence" and "offence triable either way" are defined in the Interpretation Act 1978, s5 and Sched 1.

[590] by the Copyright etc. and Trade Marks (Offences and Enforcement) Act 2002, as from 20 November 2002: SI 2002 No 2749.

[591] 2 years maximum

[592] 2 years

[593] 10 years

s201and s297; to these the 6 month period applies.[594] Offences under s 92 of the Trade Marks Act 1994 are triable either way, with a maximum term of imprisonment of 10 years.[595] The European proposal that maximum sentences of at least 4 years be available for serious intellectual property offences places the offences beyond the summary range known to English criminal law.

For summary offences, criminal proceedings must be commenced within 6 months of the offence: Magistrates' Courts Act 1980 s127 (1). This does not apply to indictable offences s127 (2). As Dennis has put it, "a person's security and settled expectations always yield to a well-founded prosecution of him for a serious offence".[596] Nor does the 6 month time limit apply to offences triable either way.[597] Thus under the European proposals, intellectual property defendants in England and Wales would be at the mercy of Courts' application of their discretionary powers. The exercise of the power to stay criminal proceedings has been criticised as unduly restrictive, especially in the context of youth justice.[598] However, it has the advantage of the flexibility to do justice to the circumstances of a particular case. The legislator may have difficulty in setting specific time limits that are short enough to provide adequate "security and settled expectations" to the accused, but long enough to satisfy the public interest in the prosecution of serious offences.

So how is a discretionary approach used to ensure that criminal proceedings are instituted, continued and completed within a reasonable time? The classic English technique is to stay, or perhaps dismiss, proceedings where reasonable passages of time have been exceeded. However, as regards the remedy for breach of the right to a hearing within a reasonable time, the House of Lords[599] has held that a stay of prosecution will not automatically be granted; this remedy depends upon whether the

[594] S107(5) CDPA 1988 was amended according to the 2010 Regulation 5 No.2649 the word 'three' substitute 'six' the offence in discussion under s107(5) becomes a triable either way offence rather than a summary offence as it used to be before the amendment.

[595] Again introduced by the Copyright etc. and Trade Marks (Offences and Enforcement) Act 2002 with effect from 20 November 2002: SI 2002 No 2749.

[596] Ian Dennis Rethinking double jeopardy: justice and finality in criminal process [2000] Crim LR. 933

[597] *Kemp v Leiberr-GB* [1987] 1 All ER 865; see case comment by C.E. Bazell Offences triable either way - time limit for bringing proceedings [1987] 51(3) J Crim L at 225-227.

[598] John Jackson, Jenny Johnstone The reasonable time requirement: an independent and meaningful right? [2005] Crim LR. 3-23

[599] *Attorney-General's Reference (No 2 of 2001)* [2003] UKHL 68. For criticism of this decision, see J Jackson, J Johnstone The reasonable time requirement: an independent and meaningful right? [2005] Crim LR 3

delay had made fair conduct of the trial impossible.[600] It might be possible to cure any unfairness by exercise of the judge's discretion within the trial process itself; in this case a stay would emasculate the right to be tried.[601] In formulating their conclusions, the majority[602] in *Attorney-General's Reference (No 2 of 2001*) referred to case law from Canada, USA and New Zealand.[603] This case also dealt with a second issue: "In the determination of whether, for the purposes of Article 6(1) of the Convention, a criminal charge has been heard within a reasonable time, when does the relevant time period commence?" The Courts answer.[604]

> As a general rule, the relevant period will begin at the earliest time at which a person is officially alerted to the likelihood of criminal proceedings against him.

This formulation was said to give effect to jurisprudence under the European Convention on Human Rights whilst being comparatively easy to apply in England and Wales. The purpose of the reasonable time requirement was invoked: "to ensure that criminal proceedings, once initiated, are prosecuted without undue delay; and to preserve defendants from the trauma of awaiting trial for inordinate periods." The period would ordinarily begin when the accused is formally charged or served with a summons.[605] However, the House of Lords applauded the Court of Appeal for declining to lay down any inflexible rule.

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[600] This criterion may satisfy all interests concurrently – those of the accused, the victim and society.

[601] [2003] UKHL 68 at [20]-[22]; "the right of a criminal defendant is to a hearing".

[602] "(1) Criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in article 6(1) of the Convention only if (a) a fair hearing is no longer possible, or (b) it is for any compelling reason unfair to try the defendant.": [2003] UKHL 68 at [29] per Lord Bingham of Cornhill, with whom Lord Nicholls of Birkenhead, Lord Hobhouse of Woodborough, Lord Millett and Lord Scott of Foscote agreed. Two Scots members of the House dissented. The Scots approach is preferred by J Jackson, J Johnstone *The reasonable time requirement: an independent and meaningful right?* [2005] Crim LR 3. See, also, C Himsworth Jurisdictional divergences over the reasonable time guarantee in criminal trials [2004] Ed. LR 255

[603] "In Canada it has been held that in circumstances such as these a stay should be granted: *Rahey v The Queen* (1987) 39 DLR (4th) 481; *R v Askov* [1990] 2 SCR 1199; *R v Morin* [1992] 1 SCR 771. A similar answer has been given in the United States: *Doggett v United States* (1992) 505 US 647. In the face of a long and unjustified delay by a prosecutor, the New Zealand Court of Appeal has allowed an appeal against refusal of a stay: *Martin v Tauranga District Court* [1995] 2 NZLR 419"

[604] *Attorney-General's Reference (No 2 of 2001*)c[2003] UKHL 68cat [27]-[28]

[605] Thus, arresting or interviewing of a suspect would not start time running, at least until caution were issued. An official warning letter might. Ibid, citing *Fayed v United Kingdom* (1994) 18 EHRR 393, 427-428, para 61; IJL, *GMR and AKP v United Kingdom* (2000) 33 EHRR 225, 258-259, para 131; *Howarth v United Kingdom* (2000) 31 EHRR 861 considered.

The traditional justifications for limitation periods – protecting the defendant and her 'interest in repose', the deleterious effect of the passage of time on the quality of evidence and the speedy resolution of disputes have been criticised as flawed in the context of personal injury claims by Patten.[606] The first two objections are more relevant to the criminal process than the third. In a criminal case the accused's interest in repose is balanced by the right to be tried and also the public interest in detecting and punishing crime – including the interest of the victims of crime. The passage of time may or may not be deleterious to the quality of evidence – this is one of the main factors the court will have to grapple with in deciding whether to proceed with trial or to stay the process. However, in the context of youth crime, Jackson, Johnstone and Shapland have highlighted the especially serious effects on young people of having a potential criminal proceeding hanging over them for prolonged periods.[607] Elsewhere, Jackson and Johnstone[608] argue persuasively that four principles may justify a stay beyond the basic tenet that a stay should be granted when it is no longer possible to guarantee a fair trial – principles of legitimacy,[609] protection,[610] discipline[611] and finality.[612]

Apart from the general remedies of stay or dismissal, how does the passage of time impact on other aspects of prosecuting intellectual property crimes? Would these in turn influence the basic time limits? The remedy of delivery up of infringing articles is not available once the civil limitation period of 6 years has expired.[613] There would probably be reluctance to prosecute after 6 years, when presumably the mischief of putting infringing articles into circulation is seen as spent. We are not aware of a case in which this has been an issue.

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[606] Keith Patten *Limitation periods in personal injury claims - justice obstructed?* [2006] C.J.Q. 349

[607] John Jackson, Jenny Johnstone, Joanna Shapland Delay, Human Rights and the Need for Statutory Time Limits in Youth Cases [2003] Crim LR 510

[608] John Jackson, Jenny Johnstone The reasonable time requirement: an independent and meaningful right? 2005 Crim LR 3-23

[609] E.g. *Darmalingum v Mauritius* [2000] 1 WLR 2303, where proceedings were dismissed in the light of a 15 year delay in …...

[610] Protection of society was exemplified by *Flowers v The Queen* [2000] 1 WLR 2396, albeit a decision now discredited. [further ref needed]

[611] Here Jackson and Johnstone emphasise the need for salutary lessons for tardy prosecutors – they regard *Attorney-General's Reference (No 2 of 2001*) as a lost opportunity to impose such discipline in England and Wales.

[612] Delays detract from the presumption of innocence by prolonging a cloud of suspicion over defendants. Victims of crime also have an interest in finality, sometimes characterised as 'closure'.

[613] Copyright, designs and Patents Act 1988, s108(3)(a) referring to s113(4)

One may also argue that a prosecution should not be brought after the period of limitation for civil proceedings has expired, by analogy with the case of *R v Johnstone*[614] in which it was held that the criminal provisions of the Trade Marks Act 1994 should not be interpreted to allow a criminal offence in circumstances which did not amount to a civil infringement. In England & Wales the civil limitation period is 6 years from commission of the specific tort:[615] Limitation Act 1980

This is despite the fact that criminal and civil proceedings are wholly distinct in England and Wales, being pursued in separate courts. By contrast, as outlined below, in Jordan the possibility exists of civil and criminal aspects of infringement being heard together; this leads to a reduction of the usual 15 year prescription period for civil claims to the relevant 10-year period of criminal procedure.[616]

5.6.2. Time limits - Jordan

In Jordan, intellectual property proceedings can be civil, criminal or mixed proceedings where a claim for personal compensation on behalf of the victim is filed in coordination with the criminal process.

Where a civil claim only is pursued, the limitation period is determined by the Jordanian Civil Act no 43 of 1976 ('JCA 1976'). Article 449 of the JCA 1976 mentions the general provisions that govern time limitations according to the Act, and the nature of civil rights according to the above mentioned Act.[617] Note that this involves prescription of actions rather than extinction of obligation. The limitation period runs from the first moment that the claim could be brought. For example, in a claim based on breach of contract, time begins to run from the breach[618] rather than from the contract date. The 15 year limitation period is called the "long limitation period". This is because, for some substantive claims, shorter limitation periods apply.[619] For example, claims to rental under oral tenancies[620] and claims for

[614] *R v Johnstone* [2003] UKHL 28; [2003] 1 W.L.R. 1736; [2004] E.T.M.R. 2
[615] Also in N Ireland. The limitation period for civil actions in Scotland is 5 years rather than 6.
[616] Jordanian Criminal Procedures Act 1961, Art 338.
[617] Art 449 Civil Act states "The obligations concerning any rights of the applicant do not fall due time, but the law suit concerning any civil rights cannot be filed or heard if fifteen years pass by without any legitimate excuse, with taking in consideration any other special provisions that deal with this matter"
[618] Art 454 Jordanian Civil Act no43, 1976.
[619] According to articles 450, 451, 452 and 453 of JCA 1976.

professional salaries and fees[621] must be brought within 5 years. However, if the relationship on which the claim is based is recorded in a written document, then the long and claims for professional salaries and fees must be brought within 5 years. However, if the relationship on which the claim is based is recorded in a written document, then the long limitation period applies. An even shorter limitation period of 2 years is applicable to certain disputes involving manufacturers and merchants.[622]

The question in intellectual property enforcement from a civil law aspect is: what time limit should be applied? Is it the short limitation period (the two year period as mentioned above) or the long limitation period? It could be said in general terms that the limitation period that is applicable to civil intellectual property claims is the long limitation period. This is because the shorter time periods apply only to the claims specified in JCA1976. Careful perusal of the limitation provisions of this Act, as amended, shows no mention of intellectual property infringement as qualifying for the shorter limitation periods. The period will therefore by 15 years unless there are special provisions elsewhere governing intellectual property enforcement and claims. However, the intellectual property regime in Jordan does not apply a specialised proceeding system in either civil law procedures or criminal prosecution procedures. Therefore the general rules on civil procedure, including limitation periods,[623] will be applied by the court hearing a civil-only dispute concerning intellectual property infringement. It should be noted that the period of limitation could be stopped every time a legitimate excuse is available.[624]

The court cannot decide by itself that the law suit is barred by expiration of the limitation period, but any concerned party can file an application asking for the

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[620] For "repeatable" civil rights such as the rent of house, buildings, agricultural lands and salaries, the limitation period is five years according to article 450(1) JCA1976 as long as this period does not contradict with any specific provisions of other acts.

[621] For the fees of doctors, pharmacies, attorneys, experts, school teachers and book dealers, the limitation period is five years according to article 451(1) JCA1976 as long as this period dose not contradicts with any specific provisions of other acts.

[622]Where the civil law suit is concerning the rights of the merchants and manufacturers and restaurant and hotel owners concerning materials they manufactured for others, it cannot be presented at a court of law after two years in case of denial and the lack of legal evidence: Article (452)JCA1976. This article deals in its second subsection with rights and wages of house servants

[623] The limitation period is counted in days from the day after the first day of the beginning of the period, and the period is considered complete when the last day is over unless this day is an official holiday, in which case the limitation period is extended to next working day: Art 456 JCA1976.

[624] Art 457 JCA 1976.

dismissal of the case.[625] Whoever has such an interest can apply for dismissal of the case at any stage of the law suit, unless the circumstances or conditions of the case prove otherwise and that the party or person has abandoned his/her right to the dismissal of the case.[626]

Time limits in criminal cases or in mixed cases involving a criminal prosecution plus claim to compensation are governed by the Jordanian Criminal Procedures Act no. (9) of 1961. Art 338[627] deals with time limits in terms both of the expiry date by which to file the civil law suit and the public authority's ability to prosecute a capital crime[628] as measured from the day the crime has been committed. This provision is extended to misdemeanors by Art 338(2).[629] According to relevant IP laws in the Jordanian legal system, intellectual property infringements that could be criminalised according to the concerned laws or acts will be considered as misdemeanors. This is due to the fact that the punishment ranges from between not less than one week and not more than 3 years for all violations of IPRs.[630] The Jordanian Criminal Act 1960 sets the rules for what may be considered a misdemeanor from the punishment perspective,[631] and all the IP offences fall within the misdemeanor punishment range.

[625] Art 464 JCA 1976

[626] Article 464(2) JCA 1976.

[627] Art338 (1) Jordanian Criminal Procedures Act no 9 1961 according to its latest amendments 'The public order case and case for personal compensation is considered as invalid if ten years passed by from the day the capital crime has been committed and no prosecution happened at all'

[628] A crime such as murder, abduction, rape for which punishment is the death penalty, or life imprisonment (25 years) article 342 JCPA 1961. There are also lesser capital crimes which attract shorter maximum penalties.

[629] 'The same two suites mentioned above are invalid in ten years from the latest procedure in the whole criminal judicial process'

[630] Art 51(A) of the Jordanian Copyright Act no 22 1992 "The punishment for any person who infringes any rights mentioned in articles 810 and 23 or any actions mentioned in sub sections (1 and 2) from this article is not less than three months and not more than three years and a fine not less than 1000 JD and not more than 3000 JD and either both punishments could be applied or both". And also see Article 32(A) of the Jordanian Patent Act no 3)1999, the punishment is not less than three months and not more than one year and/or fine not less than 100 JD and not more than 3000 JD. Art38(1) of the Jordanian Trademarks Act no 33 1952, states that the punishment for counterfeiting a trademark according to the provisions of this Act is imprisonment for a period not less than three months and more than one year or/and not less than 100 JD and more than a 3000 JD fine. And also article 415 which deal with trade secret breach if it criminalised, from the Jordanian Criminal Act 1960 according to its latest amendments.

[631] Ibid, Chapter (1), Misdemeanors, Articles 21-22

Art 339 of JCPA 1961 deals with matters concerning criminal and civil personal remedies related to private compensation of the victim in misdemeanors.[632] This section gives to the accused the benefit of the shorter time period in relation to the civil as well as criminal liability. However, the victim also gains from the mixed procedure in that generally the state has the burden of proof, albeit to the higher criminal standard. In a civil case this burden would be upon the claimant, but to the lower civil standard. Thus mixed cases and criminal-only proceedings are governed by the criminal time limits, which will be discussed next.

There are two types of time limit concerning prosecution of crimes in general according to the Jordanian Criminal Procedures Act 1961. One type prevents implementation of the punishment,[633] while the other limits the prosecution process as a whole – commencement, any delays and conclusion.[634]

A. Time limits for punishment

This type of time limitation comes into play once the criminalised infringement has been prosecuted through investigation and trial stages and the suspect or the accused has been convicted. The time period starts when the judgment is final and there is no other revision or appeal available and the defendant for whatever reason has not yet been subject to imprisonment, either because he fled from custody or never appeared at court during the prosecution process.[635] In the case of a conviction in the absence of the accused,[636] the time limit begins according to rules and provisions of the JCPA[637] from the day the sentence is delivered.

The time for punishment is calculated by reference to the length of the sentence.

Art 344 JCPA1961 deals with time limits concerning misdemeanors:

[632] Art339 Jordanian Criminal Procedures Act states 'Both criminal and personal compensation in misdemeanor is considered as if it never existed in the same conditions mentioned in the previous article'.
[633] Articles 342-344 Jordanian Criminal Procedures Act no. 9 1961
[634] Articles 338-340 JCPA no. 9 1961
[635] Article 344(1) (2) JCPA no. 9 1961
[636] in which a final verdict is delivered as in Art 338 and 341 or final procedural element of prosecution/trial
[637] Jordanian Criminal Procedures Act no. 9 1961

"1-The time period to prevent the implementation of the punishment of misdemeanors is double the sentence the court has decided, as long as this is not longer than ten years and less than five.

2- The time period that prevents implementation of the punishment for any other misdemeanors are five years."

Once the time expires, the punishment falls. But that does not mean that the civil damages fall as well.[638] If the decision is reached in the absence of the defendant then the limitation period in practice will be double the sentence as long as it does not exceed five years.[639]

B. Time limits that prevent the criminal prosecution process as a whole

Prosecution of crimes in general may not be accessible legally after a certain period of time has passed by, and the complainant will lose his/her right to prosecute the possible accused.[640] Due to the fact that there are no specific provisions that may rule criminal infringements of intellectual property, the normal criminal proceedings under the Criminal Procedures Act jurisdiction shall be implemented. According to what has been mentioned, considering IP infringements that may be a crime are misdemeanors, the prosecution time limit is three years from the date the crime (the IP infringement) occurred, if the prosecution process never commenced.[641] The more obvious situation is, also, if three years passed from the last procedure in the prosecution process.[642] It has to be mentioned that time limits according to the provisions of legislation and judicial practice in the Jordanian legal system are considered a procedural tool. They could be used by either party involved as an instrument to prevent any illegal procedures that may occur and affect the interests of those concerned.[643] Therefore, this time limit is not a tool restricted to the benefit of the accused to prevent the

[638] *Ibid*, Article 341(2)
[639] *Ibid*
[640] Jordanian Court of *Cassation Criminal Chamber Case no. (1345/2007) Time limits Criminal aspect* "The Court of Appeal rightfully decided to dismiss the Attorney General's appeal on the bases that arrest warrants are not legal actions that could bring to an end the time limitation period according to the provisions of the Criminal Procedures Act." it could be understood according to the court of cassation that arrest warrants are applicable to be considered reasons to break the continuity procedures of time limits.
[641] *Time limits/Alia*, Article 339 Jordanian Criminal Procedures Act no. 9 1961
[642] Ibid, 338, 339)
[643] Article 109(1)(d) Jordanian Civil Procedures Act no. 24 1988 according to the latest amendments in Act no. 14 2001

complainant from seeking what may be his/her right to gain profit from his/her assets or to avert any infringement of intellectual property. It is one of various means to assure legitimacy. as the Court of Cassation concluded: "Therefore in conclusion the time limits period applies upon the defendant and the punishment is not applicable upon him, since ten years has passed by from the date of the conclusion of the trial on 30/03/1996"[644] Time limitation is one of five applications the parties involved in the case can apply for before the commencement of the legal procedures according to Art 109 of the Civil Procedures Act, and the party who does not use such a right to file his/her application according to the rules and provisions shall lose such a right. As the above mentioned court stated it elaborated on the significance of time limitations on civil litigation and trial procedures:

> "*Limitation period is a procedural process that has its own conditions and requirements in order to be implemented and the party involved who has legal legitimate cause to apply for time limits procedures must be accordingly that the requirements mentioned in Article (109) from the Civil Procedures Act have been fulfilled; and in this case according to the Act previously mentioned in Chapter five, the Article sub section (1) that the accused has the right before the commencement of the law suit to apply for all the applications as long as he files for them all in one individual application; and due to the fact that the applicant (accused) has not done so and the prosecution did not follow the procedural process, therefore the application can only be dismissed*" [645]

[644] *Jordanian Court of Cassation Criminal Chamber Case no. (1345/2007) [Time limits Criminal aspect]*

[645] *Jordanian Court of Cassation Civil Chamber [Time Limits that prevents Civil Litigation, Applications, Individual applications]* sited at:< http://www.adaleh.info/ > or at:< http://www.adaleh.com > accessed at 02 June 2008; also see decisions (2006/1714) published in 11 July 2007, (2006/618) published in 30/10/2006 and 2304/2005 published in 30/11/2005; Jordanian Court of Cassation Civil Chamber. The website mentioned above is a Jordanian recently formed website that specialises in providing legal and judicial information to the interested legal scholars, judges and solicitors. It provides up to date related information in Jordanian case law and legislation to private users or related ministries and courts.

5.6.3. Conclusion and Findings

In conclusion, the significance of the provisions related to time limitation periods mentioned previously in the legal systems of this study, is related to its role as a safeguard of the judiciary system and trial process. Time limits are a means to assure the objectivity of the trial as a process in general and criminally in particular either in criminal prosecution or the matters related to criminal enforcement of intellectual property. Therefore due to the reasoning of time limits procedures and the aims and goals intended to be achieved in the protection of the parties involved in the trial or prosecution process in general. Time limitations are considered procedural safeguards, the mission of which is to support the main principles required for fair trial – legitimacy, discipline,[646] protection, and finality, as is seen in the following:

> *"The court of cassation found that the lower court did not make sure that the defendant has understood the concept of the crime and its consequences that may affect him. And did not implement Article (232) from the criminal procedures Act and overlooked that the defendant clearly understood the meaning of this Article"*[647]

Another verdict confirmed this approach

> *"And due to the fact that the sentence is finalised and the case has not been appealed to the court of cassation. The rulings of both the lower courts contained misinterpretations of the law that have been dealt with either by the court of first instance and later on by the court of appeal."* [648]

Hence there is a balance of interests of parties involved (the accused, the complainant and the attorney general's department as a representative of the public interest or society) in either legal/judicial system under study.

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[646] Article 291(3) Jordanian Criminal Procedures Act, 1961 states '3- If the court- of cassation- validates the conditions it could annul the decision or procedures, and the personal responsible of the violation could be prosecuted if required.' [This approach has not been active in practice at least on judges] the violations mentioned in in this sub-section is referred to in the previous parts of this article, which deals with the reasoning for judicial review. However even if disciplinary procedures are not activated it could judge could be cautioned on the administrative level [relocation…etc.] One of the reasons is the expiry of appeal due to the finality of the ruling. Such situation mentioned do have an impact on time limitations

[647] *Court of Cassation Criminal Chamber Case no. (1143/2008)*, fair trial, Right of defence and the absences of the translator

[648] *Court of Cassation Criminal Chamber Case no. 885/2004*: [*A Cassation according to an order by the minister of justice]* cited www.adaleh.com on 11/10/2004.

Chapter 6. Conclusions and Recommendations

6.1. Summary

This study has drawn together seemingly conflicting approaches[649] to the relationship between intellectual property rights and human rights. It has been argued that the two seemingly distinct, areas interact (so that their relationship is not one of mere co-existence), that neither engulfs the other (so that there is no conflation or absorption of one set of rights into the other), that they are not inevitably in collision, but often complement each other to serve convergent goals, especially when the wider public interest is taken into account. It has sought to establish a connection between intellectual property and the right to a fair trial and other factors relating to enforcement procedures, as well as the more commonly studied spheres of freedom of expression and privacy.

The rights under examination (intellectual property on the one side and the right to fair trial and freedom of expression on the other hand) share a common legal background and are part of a joint structured legal system. Although this is often seen to be the human rights regime. It is argued that the WTO TRIPs Agreement not only plays an important role in unifying the general rules of intellectual property rights enforcement among member states but also demonstrates that human rights and especially the right to a fair trial, criminal as well as civil, are part of the Intellectual Property regime.

Procedural safeguards of the judicial process are considered from commencement of proceedings (or prosecution) until the closing statements of the final judgement of the highest court (the Supreme Court for England and Wales the Court of Cassation for Jordan). Procedural laws, rules, acts or regulations are considered the main protection measures for the safety of the judicial process and for ensuring that the judiciary, courts, judges, staff and parties involved in the trial process respect the rule of law and the essential procedures. Procedural Acts such as Criminal Procedures Acts and

[649] Chapter three dealt with the various levels the theories involved in the nature of the relationship between HRs and IP

Civil Procedures Acts are the main assurance policy of the true application of the related substantive laws. The Euro-Med Association Agreement between the EU and Jordan and related country reports are significant in providing measures to protect intellectual property to and link it with human rights and the judiciary process – that is, as a parallel linking method for IP enforcement and the protection of procedural judicial related rights.

Article 41(5) of the WTO TRIPs Agreement does not require a special regime for intellectual property, but allows member states to apply their own enforcement procedures, in the form of standard procedures applied to other criminal or civil proceedings, to intellectual property infringements.

This approach of applying normal existing methods of enforcement and their corresponding correlation with intellectual property enforcement is shown in significant cases such as *AG v BBC*.[650] Art 41(5) TRIPs suggests that, where decided IP cases are not available, concepts from non-IP cases can be applied to IP enforcement, for example, procedural aspects of safeguards, administrative methods of protection, or time limits[651]

6.2. Concluding Findings and Remarks

6.2.1. Comments related to the TRIPs Agreement

1. Research question 1 "Do the general rules of enforcement stated in Art 41 TRIPs apply to the criminal enforcement measures mentioned in Art 61 TRIPs as well to civil measures?"

1. TRIPs Art 41(2) requires that procedures be fair and equitable. It has been argued (in answer to Research Question 1) that this applies equally to civil and to criminal procedures, subject to the liberty for member states to implement an enforcement system and procedures suitable for their national and local needs.[652]

[650] As it is explained in previous chapter of this thesis at page
[651] This might relate to the concept of monetary value of the case and the court's status.
[652] Article 41 (2) and (5) TRIPs Agreement

2. Research question 2: "Given the seeming lack of clear procedural safeguards in WTO/TRIPs, do international human rights instruments provide for the fair trial procedure for intellectual property offences and infringements in Jordan and the UK?"

This has been considered in Chapter 5, which argues that the fair trial provisions of the International Covenant on Cultural and Political Rights and of the European Convention on Human Rights (influential in Jordan via the Euro-Med agreement) can and do apply to the criminal enforcement of intellectual property. Sometimes this can be demonstrated by case law directly relating to intellectual property, in other cases by analogy. Ideally, the text or preambles of the WTO TRIPs agreement would reflect this clearly.

2. However an apparently vague and unclear approach has been taken in Article 61 concerning criminal enforcement. The Article has its impact on wrongdoings that are significant enough to be characterised as criminal offences (wilful trademark counterfeiting and copyright piracy on a commercial scale) and outlines what remedies should be available, including imprisonment and/or monetary fines. There is as well in appropriate cases seizure, forfeiture and destruction of the infringing goods and materials and any related instruments used in the infringement process.[653] These actions mentioned have a clear direct affect upon the physical and financial status of the parties involved and yet there are no explicit safeguards from a conventional understanding that protects the person charged of any of the criminal activities mentioned. This may be contrasted with the provisions of the Article under 42[654] which provides essential and explicit safeguards for the civil and administrative enforcement methods.

3. There are two possible solutions to this. The more drastic would be to reform the provisions of TRIPs dealing with criminal enforcement procedures to deal explicitly with the safeguards of the practices and the application of Art 61. This could be in providing a similar provision to Article 42 of the same agreement as an additional sub-section to Article 61, or at least mentioning that the provisions of Article 41(2) apply to criminal enforcement. This is all important due to the fact that the physical and financial outcomes of criminal prosecution are more explicit and severe. In

[653] Article 61 TRIPs
[654] Article 41(5) TRIPs. Section 1. General Obligations, TRIPs *Ibid*

addition, the Article's stress on the deterrent effect of the procedures combined with the criminal nature of the infringement and penalties imposed requires a more evident safeguards system against these measures. Instead, the matter has been referred to by a vague connection to the general obligations of the Article contained in the term "fair and equitable" procedures.

4. However, reforming a multi-lateral treaty is a difficult task. A more straightforward means would be for the WTO dispute settlement bodies to interpret Art 61 as being subject to Art 41(2). However, this would depend upon a suitable dispute being referred.

6.2.2. Comments, Findings and Recommendations related to the role of The Euro-Med Association Agreement between the EU and Jordan and its effect upon IP enforcement and HR protection:

1. The Euro-Med agreement was discussed in Chapter 2. Application of the human rights clause in the Euro-Med AA could have a role in providing essential safeguards of basic and fundamental human rights in intellectual property cases.[655] There is, as well, the IP protection clause in the provisions of the agreement and its effect upon both parties. This agreement is capable of drawing the EU law aspect of IP enforcement and linking it to human rights. To date the EU country reports concerning Jordan deal with both topics distinctly as if they were in totally different documents or reports (i.e. it takes a 'co-existence' approach). Having said that, the reports monitor the accuracy of the application of the agreement and take a futuristic approach towards the development of aims and goals via the application of the Association Agreement. It is possible that future reports may deal with the relationship between IP and Human Rights.

2. There are no such specific rules or regulations concerning this interpretation of the Euro-Med Association Agreement. But it could be related to understanding of the agreement's provisions as a whole body. This justification is presented

[655] Article (2) of the Euro-Med AA between EU and Jordan places great significance on respecting the basic, major and fundamental human rights as in the provisions of the UN UDHR 1948.

and supported by the general rules of interpretation and is stated in the provisions of the Vienna Convention on the Law of Treaties.[656]

It could be said that the Jordan country and progress reports detail in all national aspects of life: economic, social, human rights, and judiciary issues. For instance, the goals achieved require improvement in judicial matters related to speedy trials and efficient and fair procedures and the right to a fair trial.

3. The implementation of the Human Rights clause jointly with the Intellectual Property protection clause, both essential parts of the Euro-Med Association Agreement, could create a wider perspective of intellectual property enforcement and its basic connection to human rights – as long as the agreement itself does not have contradictory provisions and the application of each aspect of the agreement individually does not prevent the collective interpretation of both human rights and intellectual property clauses.

6.2.3. Comments and Recommendations Related to Procedural Measures as a Safeguard to Intellectual Property Rights Enforcement and protection of Human Rights:

Research question 3: "Are there observable trends, groupings or gaps in the literature on the interface between intellectual property and human rights and can these be used or filled to cast light on that interface?"

In Chapter 3 it is argued that four trends or groupings can be observed in the literature, which for convenience were labelled 'co-existence', 'conflation', 'collision' and 'convergence'. The literature to date has concentrated largely on human rights to property, to freedom of expression and to privacy. However, as detailed in Chapter 5, the right to a fair trial has been underplayed in the literature. Examination of the different elements of this right shows that the two sets of rights can be regarded as largely convergent.

1. The procedural safeguards could be noted in the most explicit manner in the time limitation periods justifications.[657] Stability and finality are some of the

[656] As in *n* 263 of this thesis Article (31) of the Convention.
[657] As mentioned in the concluding section of 5.5 time limits f/ns 506-509 pages 168-169 from this thesis. And *n*s 468-471 in the same section of the thesis.

significant factors in a proper judicial process, whether criminal prosecution procedures or civil litigation proceedings. Time limitation periods also provide sufficient guarantees to the parties involved in the trial procedures at all levels. The accused and the claimant, and the personal complainant, have steady time limits that could safeguard their interest in a fair trial. It provides precautionary procedural measures that preserve the rights of the parties involved as well as the public order in just and fair trial proceedings. Time limitation periods' connection with a fair trial is apparent in that they have significant implications upon the outcomes of the trial process as a whole. Time limitation periods as a procedural safeguard to the accuracy of the trial process could be notably under scrutiny during judicial review. Procedural law has a significant function in the implementation of substantive laws and immense value in providing the courts with the ability to perform its duties efficiently. The procedural aspects of time limitations are more explicitly on display in the criminal enforcement procedures in TRIPs, in which the general picture of the enforcement procedures points toward "just and fair" procedures that could be implemented on the criminal enforcement provisions in TRIPs in more tangible and realistic fashion.

2. Time limitation periods are a tool that if applied accurately by the parties involved in the judicial procedures could perform as a safeguard of the complainant, personal complainant (IP right holders or owners), the accused and/or the attorney general's department – thereby preserving the trial process as a whole and intellectual property rights. A more comprehensive examination of the role and longevity of time limitations is essential for an effective judicial enforcement process for IP infringements. Accused and the attorney general have a major interest in legitimate, speedy and limited trial procedures.

Yet the legal provisions related did not live up to the theory of reasoning of the time limitations. The balance between the maximum imprisonment sentence and the time limitation period provided is not stable and should be examined.

6.2.4. Comments, findings and recommendations related to Jordan:

Chapter 4 discussed the courts and procedures available in the two jurisdictions to resolve intellectual property disputes. In the light of this discussion and the finding of chapter 3, some recommendations can be made for Jordan

1. Training:

   There have been many attempts to provide sufficient training to the personnel involved in the enforcement process of intellectual property in Jordan. The training efforts have taken the shape of workshops in cooperation with specialised international organisations such as WIPO, EPO and other organisations. These training workshops and conferences were either held in Jordan or abroad. The problematic issue relating to training workshops is that they have been mainly aimed towards judges and border staff more than any other intellectual property workers. Most of the IP protection workshops are either held in cooperation with the judiciary, or the Ministry of Industry and Trade. Other related enforcement staff are excluded from such events, especially the court's assisting staff. Even though there are training courses for the employees of the copyright protection office at the national library in cooperation with EPO and the EU, still such training does not include the staff of courts, and notably excluding judge's assistants.

2. The culture and mentality:

   One of the main issues facing the criminal enforcement of intellectual property is the legal culture towards copyright piracy and trademark counterfeiting pertaining to the seriousness of the infringement. This is true on both sides of the legal and judicial process – among the consumers, the related working staff and even the judiciary as a whole. The rulings of courts outside of the jurisdiction of the CFI in Amman are dealing with IP infringements as a minor misdemeanour and the sentence is usually in the minimum range of an imprisonment period or fine, which could be replaced by a monetary fine. It is an indication of the position that the enforcement of IP has in the judiciary that systematic infringements and offenders are usually dealt with as if it was a first time infringement.

Annex

I. A Summary of relevant Jordanian Legal Provisions and Texts and Translations and International Relevant Text

- Article 14. ICCPR 1966

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be pre-summed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance,

of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

- Jordanian Constitution (1952) Article 101 (ii) "The sittings of the courts shall be public unless the court considers that it should sit in camera in the interest of public order or morals."
- Majalah Al-Ahkam Al-Adleah which has been operational in Jordan from the year 1900. Article 8 states "the presumption of innocence is the origin of things".
- Criminal Procedures Act no. 9. 1961
- Article 7 states that "1. The procedure is considered annulled if the law states it is annulled or a major misconduct occurred in a manner that the outcome of the procedure will not be achieved, 2. if the annulment was related to a violation of the law's provisions concerning the formality rules of courts and or its jurisdiction to rule in a certain law suit or any formality related to the public order any party has the right to request the cancellation of the procedure at any time or stage of prosecution or trial

without a request from the court, 3. The annulment results could be withdrawn if the party who benefits from the annulment approved such withdrawal, in exception to the cases when the annulment is related to a procedure connected the public order, 4. the annulment of a procedure does not cause the annulment of those procedures prior to the invalid procedure and the latter dose not cancel the later on procedures unless it is basically based upon the invalid procedure"

- Article 147(1) JCPA no.9 1961 "1- The defendant is innocent until proven guilty."
- Article 171 of JCPA 1961 states "The trial shall be public unless the court decides otherwise due to reasons related to public order or moral…"
- Article 215 of JCPA 1961 "2. The highest ranking judge of the ruling bench must remind the defendant to listen with care to everything that will be read and said in front of him, then he orders [the judge] the court's clerk to read the accusation list and decision and the list of witnesses and any other documents, 3. After that judge summarises the accusation to the defendant and reminds the defendant to be aware of the charge and evident that will be delivered against him"
- Article 66 of JCPA 1961 "1. The attorney general could prevent any contacts with the arrested accused for a period of time that does not exceed 10 days. 2. This ban will not include any meetings between the accused and his attorney".
- Article 152 "any evidence that is collected due letters between the accused/defendant and his attorney are to be dismissed".
- Article 215(1) from the JCPA 1961 "1. The head judge of the bench shall remind the defendant's representative; if there is one, to defend his client and perform his duties in manner that does not contradict with the law."
- Article 210(1) "1. whoever submitted a protest or a written acknowledgment to the judicial authority or any authority that must report crimes to the judicial authority, and claimed that a person has committed a misdemeanour or a violation and he knows that he is innocent or fabricated material evidence that such a crime has been

committed, is punished according to the grievance of such claim; an imprisonment period from 7 days- 3 years."

- Article 7(3) of the Criminal Procedures Act "The annulment results could be withdrawn if the party who benefits from the annulment approved such withdrawal, in exception to the cases when the annulment is related to a procedure connected the public order,"
- Civil Procedures Act no. (24) 1988:
- Article 61 of Civil Procedures Act 1988 states "1. The date to attend at magistrate's courts, courts of first instance and the court of appeal is 15 days and could in the case of necessity to decrease this period to seven days. 2. The date to attend in extreme urgency cases is 24 hours unless emergency a date could be arranged in an hour if the opponent approves."
- Article 14 Civil Procedures Act no. (24) 1988 "… if the judicial papers were not delivered due to the neglect of the official responsible it could [the court] deliver a fine upon the official in the range of 20-50 Diners, And the court's verdict is final"

II. Summary of Jordanian IP Related Case Law:

CASE 1:

Court of Cassation Criminal Chamber Case no. (885/2004): A Cassation according to an order by the minister of justice; [Trademark Infringement]

Court of Cassation [Criminal Chamber]

Case No. (885/2004)

Trademark infringement Article (38/1/a) from the trademarks Act no. 33, 1952

The Complainants: 1-The British American Tobacco Co. 2- Da'a Investments Co.

The Accused: Muarad Corporation for Commercial Investments

The Legal Background:

The premier Attorney General applied to our court according to the application number (1/2004/701) according to request of the minister of justice in accordance with the provisions of Article (291) from the criminal procedures Act and in relation

to criminal case no (1296/2002) court of first instance of Aqaba and the appeal case no. (1429/2003) Ma'an's Court of Appeal the Criminal Chamber. And due to the fact that sentence is finalised and the case has not been appealed to the court of cassation. The rulings of both the lower courts contained misinterpretations of the law that has been dealt with either by the CFI and later on by the court of appeal; the minister of justice had to intervene according to the provisions of Article (291).

The facts of the case:

In 16/04/2004 the complainants: 1- the British American Tobacco Inc. 2- Da'a corporation for investments filed the criminal case number (1296/2002) against the accused the owner Muarad corporation for commercial investments claiming that accused infringed forged their trademark and violated Article (38/1/a) from the trademarks Act no. 33, 1952, the accused held forged and counterfeited trademarks in the intention to gain profit in violation of Art (38/2)

The case has been based upon the following:

-The first complainant is an American company that owns the trademark "Kent" which is registered at the trademarks registrar under trademark registration number (34).

-The second complainant is a Jordanian owned company that is registered to perform its operations in Aqba's private economic zonal area and has a partnership with the first complaint to be the sole distributor in the territory of Jordan.

-Eventually the court of Aqaba's of first instance convicted the accused of the charges filed against him and found him guilty of trademarks forgery and owning counterfeited goods in the sake to gain commercial profit according to the provisions of Articles (38/2 and 38/1/a) from the Trademarks Act no. 33, 1952 and ordered that goods related should be confiscated.

-The accused refused to accept the judgment of the court of first instance and appealed the decision to the court of appeal.

- In 08/12/2003 Ma'an's court of appeal declared its ruling in its criminal case no. (1429/2003) and decided in favour of the accused and provoked the earlier judgment of the court of first instance and revealed accused not responsible of the accusations in charge and returning the confiscated products to the accused as long as it has not been distributed and sold on the Jordanian territory.

-The attorney general's department filed an application of appeal for a cassation according to a request by the minister of justice according to the provisions of Article

(291) from the criminal procedures Act. Due to the failings of the district attorney general to fulfill his duties of applying for an opposing appeal against that filed by the defendant.

-According to what have been mentioned in the proposed application it could be recognised that the plaintiff British American Tobacco Brands Inc. is the sole owner of the trademark (Kent) which is a registered trademark in Jordan. The second plaintiff is the solitary distributor and licensee of the trademark in Jordan.

-In the early start of the year 2002 the accused the owner of Muarad commercial investments Co. exported certain products and goods and among them was a container that enclosed in various products at the arrival of the container no. 3/9800924 at the date of 30/03/2002 and during the search (678) boxes of (Kent) cigarettes and each box contained 50 packages. The outcomes of the search that have been conducted under the supervision of customs and borders officers that the exporter is not the main and only supplier or distributor of the products on the territory of Jordan. After further examination of the goods found in the container were forged duplicates of the original product (Kent) which was protected under the provisions of Trademarks Act.

- The products under questioning was produced in China and held a forged trademark (Kent Lights) which was a duplicate of the original goods, and the accused intended to export the products to Iraq.

- The implementation of law upon the mentioned facts of the case Article (38/1) from the Trademarks Act states: (1- Whoever committed with the intention to cheat any of the following deeds shall be penalised ….. a- Whoever counterfeited a trademark registered under this law, imitated in any other way that misleads the public…..). Article (39) from the same Act gave the owner of the trademark when he files a civil law suit to apply for the seizure and capture of the counterfeited goods.

- It could be understood from Article (38/2) trademarks Act that legislator punishes anyone who sells, owns or presents in the intention off cheat- according to the articles phrase[658] - or to sell products that beholds a counterfeited or imitated trademarks. And he (legislator) did not restrict the punishment on the counterfeited goods distributed in the Jordanian market.

[658] The court of cassation in this case used the phrase with the intention to sell or make profit. It has to be mentioned that some Articles from copyright Act 1992 and its amendments have not been mentioned fully in f/ns of this case due to the fact that an English version of the act could be found at www.wipo.int even though the provisions have been translated by the author in various parts of the thesis.

-The accused according to the facts mentioned in the case has exported the subject-matter imitated and counterfeited products (Kent Lights), the original trademark owned by the first complainant British American Tobacco Inc. the products have been found and confiscated at a Jordanian territory even if the accused intention was to send the counterfeited goods to Iraq.

-Therefore the actions committed by the accused is considered a crime according to Article (38/2) from the trademarks Act no. 33, 1952 and amended according to Act 1999.

Concluding Sentence

-Therefore, according to the facts that have been mentioned and reexamination of them in light of the law, it is found that Ma'an's Court of Appeal violated the provisions of the trademarks Act and the ruling should be annulled.

-Due to the facts of the case and considering that the appeal has been filed by the accused alone and that ruling of the court of cassation was not in his favour, the decision has no effect upon the accused according to the provisions of Article (291/4) from the Criminal Procedures Act.

CASE 2:

Jordanian Court of High Justice:

Jordanian Court of High Justice

Case No. (2008/228)

Ruling Bench:

President: Mr. Fouad Sweadan.

Members:

Dr. Mahmoud Al-Rashdan, Fauzi Al-Omari, Abraheem Abu-Taleb, Mohammed Tumah.

Appellant:

Iraqi Chocolate Co. the Owner of the Trade Mark [Majarra].

Legal Representative: Attorneys: Ahmed Obeidat, Abdel-GhffarFrehaat, Thamer Obeidat, Mahmoud Frehaat, Nezar Obeidat, Wared Al-Tarawneh, Mudar Obeidat, Sufyan Al-Khaswneh, Sufyan Obeidat, Zaid Al-Adwan, Hussam Al-Kurd, Sana'a Obeidat and Zena Al-Zoaubi.

Accused:

1-Trade Marks Registrar;

2- Mars American Co. The Owner of the Trademark [Galaxy]-

Legal Representative: Attorney Hussam Al-Dein Abu-Ruman.

Facts:

-In 29/05/2008 the appellant's legal representative applied to appeal the decision to dismiss the trademark to register the trademark entitled [Majarra] under the no. (71607) which dismissed the application to register their trademark in the registrar on 02/04/2008.

Reasons for the Appeal:

1-The appealed verdict was applied by the second accused [owner of the trademark Galaxy] to dismiss/oppose the registration of the trademark [Majarra] due to its infringement of the law and facts. Therefore, the appellant delivers this appeal for the following reasons: 1- The trademarks registrar decision to dismiss the trademark registration of the trademark [Majarra] was a wrongful one, due to the fact that apposition application by the second accused is illegal presented by someone who is not the holder of the claimed trademark in Jordan. Therefore, the applied application by the second accused should be dismissed by the registrar on the procedural aspects due to the fact that accused don't have the right to apply for the dismissal of the trademark.

2- The registrar has misinterpreted the law and procedures in the outcome he has reached and based its decision that the trademark owned by the second accused is "Well-Known" or a "Famous" mark and has "renown/fame in the industry in Jordan". The basis of misunderstanding of the law is the outcome the "fame" of the trademark has not been recognised in any origin in the case file. The sworn statement by the witness Katherine Berg is only a photocopy of the original statement given abroad and has been certified by official local authorities according standard procedures. Which makes it unreliable as evidence; therefore the appealed decision is and should be considered void.

3- The first accused have based its decision on illegal evidence that has not been as in the previous reason obtained legitimacy in Jordan due to the lack rectification of the documented statement of the witness either locally or abroad. The registrar depended entirely on merely photocopies of the statement as legally binding documents breaching the provisions of Civil Evidence Act which should be applied on civil and trade law matters.

4-The registrar has as well misjudged the facts of the case presented and provisions of trademarks Act in relying on the stand-point literature and commentaries to define what a "famous trademark" is; such as the opinions of Prof. Amel Attyeh and Dr. Reda Neasser. Therefore, the appealed decision should be annulled on procedural basis rather than facts, and law matters.

5- The trademarks registrar breached in his decision the provisions of Art (7) Trademarks Act that the trademark owned by the appellant has no distinctive criteria that fluctuate it from the trademark owned by the second accused [Mars Incorporated] the basis of this reason of appeal linked to fact that the first accused reasoning justifying its decision.

In addition the trademark [Majarra] that had an application for final registration for the appellant at the trademarks registrar according to requirements of the previously mentioned article. The mark has distinctive criteria than any trademark including that owned by the second accused. The mark owned by the appellant has and did not cause any confusion to the consumers with any other trademark, including the packaging of the product/goods, which differs completely that that owned by the accused [GALAXY]. Therefore, the registrar should have dismissed the application to annul the appellant's trademark, and as the accused did not such decision should be void according to the law.

6- There has been miscarriage of justice committed by the first accused due to its refusal to register the trademark on basis of Art (8) of the Jordanian trademark Act entitled under [marks that are not to be registered on any ground] on the claim that the intended to be trademark may confuse the consumers, is a misinterpretation of the article under discussion, due to the fact that the trademark owned by the appellant dose not confuse/mislead or deceive the consumers or the public; by providing unified products with the accused. It could be noted that there are no similarities between both products under examination that might deceive and mislead the consumers. Therefore, it could understood that the registrar have misinterpreted the provisions of Art (7) and (8) trademarks Act and previous precedents of the Court of High Justice that the similarities between trademarks should be in the whole appearance of the product/mark and in partial similar aspects between the marks. The registrar has ignored the fact that the trademark owned by the appellant is a creation of the appellant and it's a name driven from an Arabic planet its been written in both Arabic

and Latin alphabets in the same pronunciation. Therefore, the appealed decision should be annulled on this account as well.

7-The trademarks registrar decision to accept the opposition application to refuse the registration of the trademark [Majarra] is illegal and violates the provisions of trademarks Act. The conclusion the registrar reached was inaccurate, due to the fact that the trademark [Majarra] do not have distinctive features than the trademark owned by the second accused [GALAXY]. The outcome of the registrar was based on issues that highlights the differences between both marks were limited; either in shape, writing, pronunciation or even the overall image have been ignored according to the provisions of Art(7) Trademarks Act. Therefore, the decision should be annulled. The registrar wrongfully decided that the trademark [Majarra] may mislead the consumers due to the fact that it is a translation of the famous trademark [GALAXY]. Therefore the trademark owned by the appellant according to the trademarks registration department considered the proposed trademark [Majarra] is in an unfair competition position towards the trademark owned by the second accused despite its contradiction with the logical reasoning and justifications. Therefore, the verdict should be annulled.

8-The trademarks registrar reached a completely inaccurate outcome that the trademark [Majarra] is an exact translation of the trademark [Galaxy] which means Majarra in Arabic. The inaccuracy in definition of the phrase/trademark is a creation of the appellant originated from the Arabic name of certain planet and not a translation of the trademark [Galaxy].

9-The trademarks registrar has breached the provisions of the law and the judicial precedents of the court of high justice due to the fact that decision lacked procedural rules. Therefore, the verdict should be dismissed.

The Verdict:

Therefore, after careful consideration and examination of the case from both legal and factual, the court decided that actual facts of the case are that appellant on 16/07/2003 filed an application to register the trademark [Majarra] for the production of sweets, chocolate, gum liquid sweets, pancakes, biscuits sweet bread, flavoured yogurt, Ice-cream and cakes.

The appellant received a final registration number (71607) on 11/03/2004. In 17/11/2004 the second accused owner of the trademark [Mars Incorporated] applied

for an opposition application to dismiss and remove the trademark under-study from the trademark registration.

The trademark registrar studied the opposition its possible connection to trademark owned by the appellant and after listening to demands and applications of both parties decided in 02/04/2004 the following: "in relation to what have been mentioned in regard the basis of registration of the trademark [Majarra] the topic the opposition of registration has infringed the provisions of Art (7/12) and Art (8/6/12) Trademarks Act. Therefore the opposition on the registration of the trademark [Majarra] no (71607) has been approved and the trademark removed from the trademarks registration."

The appellant contested the decision and filed this appeal.

-in topic and facts:

As for the first reason of appeal that the second accused has cannot file opposition, the examination of the power of attorney provided by Mars Incorporated give to Abu Seta for intellectual property and Co includes the ability to present them at any government department in Jordan and filing any application or oppositions/responding to any application providing evidence, representing us at any department or court in Jordan regardless of type, level concerning the protection of our rights".

In the understanding of the court applying for an opposition to annul a possible infringing trademark falls in the duties granted in line of the power of attorney authorisation. Therefore the first reason of the appeal could be dismissed.

As for the rest of the reasons that fall in the range of whether the decision of the trademark registrar to remove the appellant's trademark from the registration on the basis of Art (8/12) Jordanian trademarks Act no (33) 1952 and its amendments; which the second accused based its opposition and deals with a famous trademark states: Art (8/12):

- The following are not to be registered; "A trademark that is identical is similar or represents a translation a famous or well-known trademark; that could be used to distinguish products or goods that are identical or similar to that it is known to produce. That may cause confusion with the well-known mark or to be used to other products in a manner that may harm the interest of the owner of the well-known trademark or imply that there is a link between the owner and the products…"

- The question in this issue that may arise is the trademark owned by the second accused [Mars American Co.] a well-known mark? And is the mark of the appellant Iraqi Chocolate Co the owner of [Majarra] a translation of the mark owned by the second accused [GALAXY]? Should it be protected under the provisions of Art (8/12) of the Trademarks Act?

Art (2) of Trademarks Act no (33) 1952 defines a famous or a well-known trademark is "The Well-Known Mark is: The mark with a world renown whose repute surpassed the country of origin where it has been registered and acquired a fame in the relevant sector among the consumer public in the Hashemite Kingdom of Jordan."

The analysis of the evidence presented from the second accused the applicant of opposition and applying the definition it could be noted that she [accused] is the owner of the trademark [GALAXY] and the appellant owns the trademark [Majarra] and it's a translation of the second accused trademark. It should be noted as well that the trademark [Galaxy] has been registered in previous dates in various countries prior to the appellant request of registration of the mark [Majarra] in Jordan. The trademark [GALAXY] has been registered in country or origin in the United States of America in 1950 and in the following other countries:

1-The United Kingdom 1978.

2-Ukraine 1972.

3-Russian Union 1992.

4-Poland 1992.

5-Greece 1965.

6-Sudan 1997.

7-Saudia Arabia 1977.

8-Qatar 1981.

9-Lebanon 1995.

10-Egypt 1977.

11-Cyprus 1961.

12-Bahrain 1979.

13-Singapore 1990.

14-Pakistan 1993.

The sales of the second accused in the year 2004 were more 6,800,000 USD, which mean that its repute surpassed the country of origin to many various countries.

-It has to be mentioned that the trademark has been registered in Jordan in 06/09/1977 in a prior date to that of the appellant's registration of its mark.

-The documents provide without a doubt that [GALAXY] has acquired "fame in the relevant sector among the consumer public in the Hashemite Kingdom of Jordan."

-Therefore, the trademark owned by the second accused, has fulfilled the requirements of a well-known trademark according to the definition of Art (2) of Trademarks Act and Art 16 (2) (3) TRIPs Agreement and is worthy of the protection provided by the law under Art 8 (12) from Trademarks Act.

-Therefore, the findings of the trademarks registrar appealed verdict is accurate and implements the spirit of the law and its provisions and the reasons of the appeal are applicable on it; therefore the appeal should be dismissed and fining the appellant a ten JD fine and attorney's fees and expenses.

CASE 3:

Court of First Instance, Criminal Chamber, ***case No. (1022/2009)***[Copyright infringement- Article 55 Copyright Act no.22, 1992 and its amendments: circumventing technical measures of protection enforced by broadcasting cable TV stations and Broadcasters [ART "Arabic Radio and Television Co. Vs. Khatar Restaurants Co.] the broadcasting corporation is the sole licensee to broadcast sporting events broadcast by Sky in the Middle East].

Jordanian Court of First Instance [Criminal Chamber]

Case No. (1022/2009)

Ruling Bench: Judge Nehad El-Hussban

Topic Copyright infringement, Art (55) Copyright Act no.22 1992 and burden of proof [presumption of innocence]

The Complainant: ART [Arabic Radio and Television Co.] [The sole licensee to broadcast sporting events broadcast by Sky in the Middle East].

The Accused: Khatar Restaurants Co.

The judge actually stated[659]: "the court have taken an accurate standpoint in applying the letter of the law "effective technological measures" of protection, in a proper manner I think also she has also defended the criminal justice principle of burden of

[659] It has to be mentioned that judge uses the past tense in a verdict delivered by the same judge is based on the fact that case have been dismissed earlier by the CA due to the absence of the accused and not a legal a conceptual textual background, but more of a procedural safeguard to provide the defendant with the proper ability to his right of fair trial/defence.

proof and that the complainant must prove the accused guilt and not the accused providing evidence of innocence. The Public prosecutor [AG] the complainant should have provided evidence that in this case I think legal and materialistic factors of the crime has two additional requirements; "1- the effective technical measure of protection. 2- The accused ability to circumventing such measures". You made it even more transparent to me and the legal and judicial application of the provisions of WCT, WPPT to be more exact.[660] It has to be mentioned that Art (18) of WPPT has established that adequate legal protection technical measures and remedies should be provided by contracting parties. WIPO Copyright Treaty [WCT] as well has mentioned the technological prevention measures in Art (11) of the treaty. Yet as in the related provisions of the WPPT has not elaborated or provided further details concerning the matter. Therefore, the complainant the owner of the copyright and the prosecution should have provided efficient evidence that the accused have infringed the protected copyright. That includes the defendant's ability overcome the technical protection measures laid by the complainant according to the provisions of Art (55) Copyright Act. Due to the fact it is the prosecutor's duty provide evidence of the defendant's guilt according the principle of burden of proof that lies on the accuser's accusation file.

CASE 4:

Court of Cassation the Civil Chamber Case no. (3687/2006) [Alia Artistic Encyclopedia case- Copyright infringement and Time limits] 2/4/2007.

Court of Cassation [Civil Chamber]

Case No. (3687/2006)

Ruling Bench: N/A

Copyright infringement Art (51) Copyright Act

Alia's Artistic Encyclopedia's representative in Amman

"If the, complaint based its claim for compensation upon the damages and harm that she has suffered from due to wrongdoings committed by the deceased who has

[660] Art 18 WIPO Performances and Phonograms Treaty 1996 [WPPT] " Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of the phonograms concerned or permitted by law" as sited at: <http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html#P141_21174> last accessed on 12/03/2011.

infringed along with others the work owned by the complaint and protected under the provisions of copyright. The accused has printed and distributed the book published by the complaint with her proper authorisation (Alia's Artistic Encyclopedia, second edition). This action is considered a crime according to copyright Act1992 and in violation of Article 51(1) from the same Act. This lead to criminal prosecution process which eventually turned into a criminal cases that took no (95/6533 and 97/299) Amman Criminal Court of First Instance. The criminal case did end up with a judicial decision from the court due to the omission as an outcome of the general pardon or amnesty Act no (6) 1999 considered the act as a not criminalised action. The complainant based her legal argument for civil compensation upon the fact that the act of infringement is continues and the violation of her copyright is still going on therefore her losses are still continues till the time of demand of damages.[661] But since the complainant did not provide any evidence that the accused have kept on infringing her rights as the rightful copyright holder (printing and distributing the complaint work against her will). Therefore the losses and damages are not still happening and the wrongful actions are limited in the contrary to what the court of appeal has claimed. And due to the fact claim of damages were based upon the criminal case no (97/299) which has been disallowed according to the general pardon Act no (6) 1999, the limitation period that prevents the complaint from presenting her claim for compensation is three years from last legal procedure according to Articles 272 and 339 from both civil act and criminal procedures act respectively.[662]

Therefore the civil case for the claim of compensation is not allowed to be presented after three years has passed from the end of the last legal action from courts; and that is the omission of the criminal case no (97/299) according to the general pardon act no 6, 1999, and that is what the court of appeal has failed to notice or consider."

[661] The limitation period that prevents from hearing the law suit is the general term.

[662] Art 272(1) from the Jordanian Civil Act no (43) 1976 states that "the civil case for the claim of compensation due to a wrongful and harmful deed could not be presented at a court of law after three years has passed since the wrongful deed is committed". Subsection two of the same article states that, if this compensation case is based upon a crime and the criminal case is no longer presented the civil law case for compensation is disallowed as well. Article (339) from the Jordanian Criminal Procedures Act no 9, 1961 states that civil and public interest cases could not be presented after three years has passed concerning a misdemeanour.

III. Tables

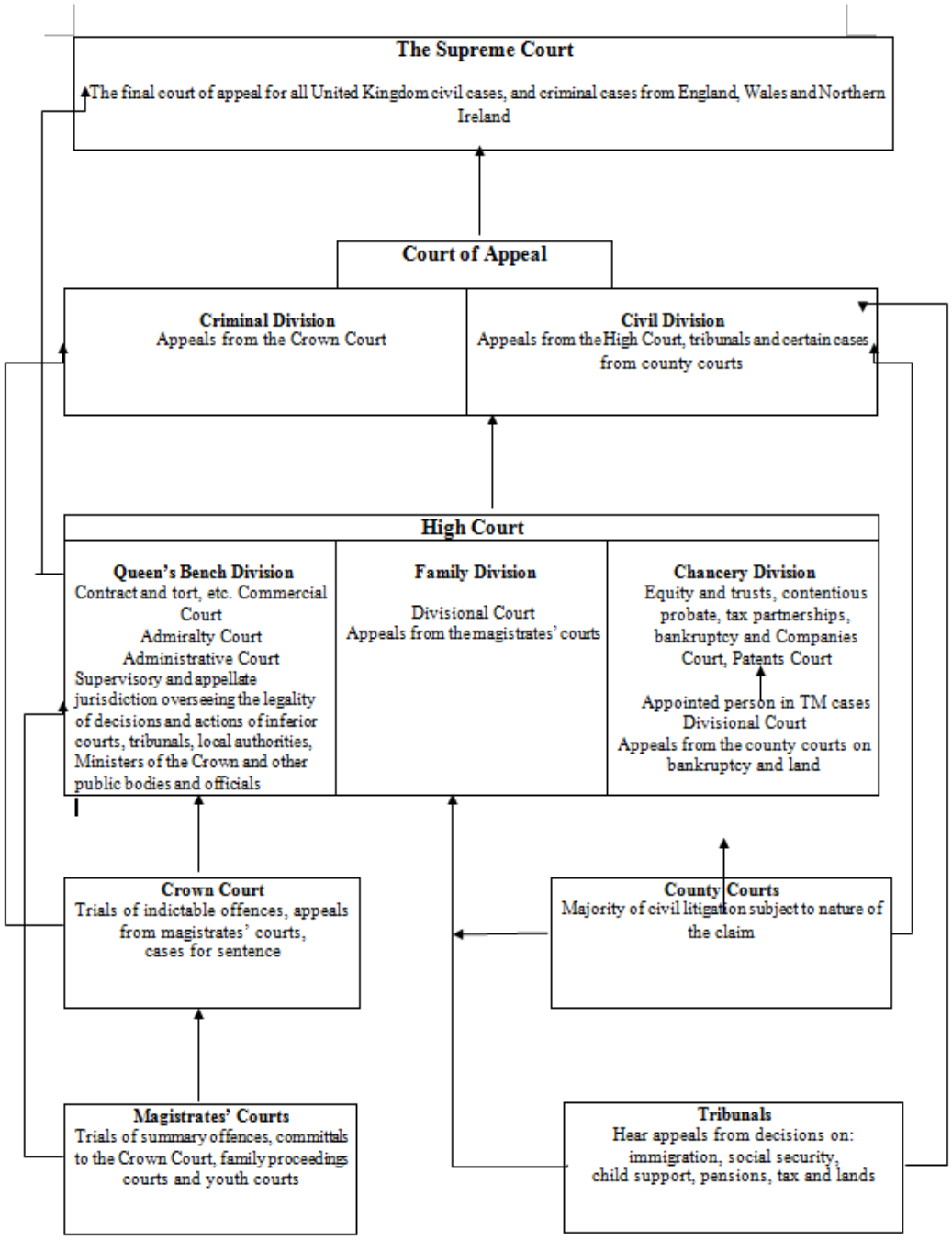
Table -1: International Human Rights Instruments with effect in Jordan and/or the UK

Agreements	**Jordan**	**UK**
UDHR 1948	Not binding but could have a non-obligatory impact and influence	Not binding could have influence not an obligatory impact
ECHR 1950 and EU Charter 2000	Not directly binding but could have an indirect influential impact on Jordan via Euro-Med Association Agreement and its interpretation	Binding impact
ICCPR 1966[663]	Directly binding	Directly binding
ICESCR 1966	Directly binding	Directly Binding
Euro Med Association Agreement with Jordan 2002	Binding	Binding on UK as a member of the EU
TRIPs 1994	Binding	Binding on UK and EU
ACTA	A full membership[664]	Not binding, neither on the UK or the EU has acceded

[663] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 14 as a standing-point for the build-up of procedural human rights that could be implemented upon criminal enforcement of IPRs

[664] Jordan is an full member of ACTA see:< www.iipa.com/acta.html > last accessed on 23 April 2013

Table -2-



Note: the former Patents County Court has recently been reconstituted within the High Court, Chancery Division, as the Intellectual Property Enterprise Court, by the Civil Procedure (Amendment No.7) Rules 2013 (SI 2013/1974)

Table -3: Jordan's administrative and judicial systems relevant to intellectual property

Administrative Judicial System	Civil Judicial System (which includes both criminal and civil courts)
The administrative judicial system in Jordan consists of a first and last instance judiciary. The Court of High justice is the sole judicial authority that deals with appeals concerning administrative decisions including those that are a result of the trademarks and patent departments.[665]	The Judicial system in Jordan is divided into three phases either in civil or criminal courts: 1. Courts of First Instance. 2. Courts of second Instance (Courts of Appeal). 3. Courts of Final Instance (Court of Cassation).
There are two types of decisions the Intellectual property owner (mainly a trademark or a patent or an industrial design holder) can file: 1. An Opposition. 2. An application to delete an infringing trademark.	1. Courts of First Instance: These courts are the vast majority of courts by number and hold the vastest range of cases [topic and monetary value]. The ruling bench of these courts is one judge unless mentioned otherwise in the law. 2. Courts of Appeal:[666] These are considered a second phase court, and are considered courts of law and fact, which means that they examine the accuracy of the facts and if the law has been implemented accurately upon the facts of the case by the court of first instance. The court of appeal consists generally of a bench of three or five judges. 3. Court of Cassation: This is the third and final phase in the Jordanian judicial system. The Court is located in Amman. 4. It is considered a court of law; unlike the courts of appeal it examines the legal aspects of the case, the accuracy of the legal procedures of lower courts.

[665] Article 9(a/11) High Court Act no (12) 1992 states that "Appeals in any administrative orders of a judicial nature…."

[666] It should be noted that there are three Courts of Appeal in Jordan: Amman, Irbid and Ma'an

Appendix

A Summary and translation of the meetings conducted in Jordan:

The interviews held have been used as part of the methodological approach of the thesis and have been used as to obtain data "case law" related IP cases in relation to infringements of intellectual property assets. Clarify the general outcome, reasoning of the interviews conducted. To confirm the results and outcomes the researcher has found due to interpretation, translation of the legal text and judicial rulings.

Meeting 1:

An [author's translation] email sent by the legal Advisor at the National Library-Amman /Jordan[667]:

The inquires:

1. What were the duties of the of the Copyright Protection Office officers concerning copyright piracy?
2. What was the legal text that provided officers with the authority to conduct search orders concerning copyright piracy?
3. What qualifications such officers had to conduct the search orders? How did they obtain the experience to conduct their duties?
4. Did the CPO have any other branches in the various regions of Jordan beside the Amman? How many officers operate in the capacity of the office?
5. What are the main obstacles that face efficient copyright enforcement in Jordan?

In Reference to the e-mail sent by you on the 11.12.2009 related to your inquiries concerning the powers granted to the staff of the Copyright Protection Office [CPO], I hope to highlight the following:

1. The legislature vests the implementation of copyright Act department of the National Library of the Copyright Protection Office established in the department in 2000 as a result of the adjustment carried out on the Copyright Act, which was issued under legal reform Act No. (29/1999), where the added

[667] The person who answered the questions via e-mail preferred to remain anonymous, and refused the use of a follow-up meeting to clarify her response. Instead she gave permission use her e-mail response after sending the translated version to her.

the text of Art (36). Which have also been amended in this article also amended, according to the amended and issued under Act No (8) 2005 to become Article (36) as follows:

"A. The staff of the Copyright Protection Office in the Department of National Library Commissioned by the Minister as part of the Judicial Police, during their conduct of their duties according to the provisions of this law.

2. If there is any indication of a violation of the provisions of this law the staff of the Office are entitled to inspect any place the infringed copyright is, copied, produced or to be produced or distributed, including confiscating the means of transport, and all the materials used in the infringement leading to such offenses and to transmit these items a long with the perpetrators to court, the Minister has the authority to request the Court to shut down the premises.
3. The Bureau [copyright protection office] consists from an eight member staff responsible of the task of law enforcement of copyright through inspection Automatic tours of (*EX Officio*) or tours based on complaints of right holders in the various regions and governorates of the Kingdom. The staff of the Office has as well the authority (law enforcement) to write-down seizure and confiscation reports of infringing works and everything used and leads to an infringing offense and then transfer the report and its annexes to the Public Prosecutor [Attorney General] within the range of the violation and then perform as witness he has to pursue such duty when the case, converted to the court.
4. As you know, copyright infringement suit could be commence in either the following two approaches: the right in pursuing a complaint by the right holder, or without a complaint, and the procedures commence in any of the following:
    a. Complaint from the owner of the claimed infringed right to the Attorney General, where the submission of the complaint activates the proceedings to copyright infringement where the request to the public Prosecutor set works, the premises of the abuse and all materials and tools to provide evidence of the infringement. if the Prosecutor concludes/decides that there is breach of copyright and there is enough evidence to deliver a decision to refer the infringer and the accusation list to the court which according to the Jordanian Copyright Law/jurisdiction is that of the Court

of First Instance, and if he[Attorney General] finds that the act does not constitute an infringement of copyright, or no evidence that defendant committed the infringing action the attorney general must issue a decree banning the trial of the defendant [accused at the pre-trial stage of investigation], thus ending the procedures of the public interest/order litigation.

b. The staff of the Copyright Protection Office - the National Library, according to the provisions of Article 36 of Copyright Protection Act, where the staff of the copyright protection Office at the Department of National Library Commissioned by the Minister of Culture; are considered part of the Judicial Police (they are, law enforcement personnel, authorized by law with the task of searching for the perpetrators of crimes, prosecuting, apprehending them and bringing them to justice, such as employees of public security, the heads of boats and ships, etc.), if the staff finds any reference to commence of any violation of the provisions of the Copyright Protection Act. The CPO staff's right to initiate an inspection on any location of printed, copies, or production or distribution, of infringing goods. Including the seizure of any means of transport and have the book and copies of all materials used in the suspected violations with the perpetrators and to transmit them to the Attorney General's department.

   Then shall the Attorney General commence an investigation after the arrival of the search report file to his office where he registers a case and begin the investigation procedures to hear the statement of the report drafters and issue the skilled proficiency test of the confiscated items to be sure it is not genuine. and the determination of guilt must be attributed to the complainant it is then communicated to ask him about the crime attributed to him are not allowed to moaned it provide any him before Attorney General to defend him, as given by the CPS in this case the complainant and the Attorney General evidence of a crime of copyright infringement.

c. After the completion of the investigation the prosecutor to issue his decision to refer the defendant to the court if it finds that there is an offense and the evidence was otherwise a decision to prevent the trial.

d. As for practical and legal experience enjoyed by the staff of the copyright protection office, which they acquired through regular, continuous training courses deployed and organised in collaboration with WIPO, US Patent Office and US Trademarks Office and other international organisations and bodies.Global, which holds the follow-up of intellectual property where the placement of many specialized courses in their field and through their ongoing work in accordance with the provisions of the law. yours faithfully,

Meeting 2:

[An Author's translation] of the Meeting held with the lady at Talal Abu Gazaleh Legal, Ms. Hayja'a M. Abu Al-Hayja'a at 24/02/10 who holds the position of Legal Consultant at TAG Legal- Jordan, Manager:

The meeting took place at the same date I held the interview with the legal advisor of the national library to discuss some of the issues I talked with the legal advisor at the NL. Matters related to copyright protection and piracy enforcement measures taken by the Copyright Protection Office.

The efficiency of the role conducted by the CPO enforcement officers and the impact they have in reducing the circulation of pirated goods. The social and economic aspects that could affect the enforcement procedures and may undermine or create obstacles in the path of deterrent enforcement.

There it took about an hour of waiting until I was met by Ms. Abu Al-Hayja'a, who was very supporting and yet the working rules of the organisation prevented her from providing with any data or documents except for some flyers and booklets of the activities of TAG Legal –Jordan. This is a summary of my meeting with Ms. Abu Al-Hayja'a[668]:

- She had some interesting ideas concerning the outcomes of enforcement measures and making it more effective. Ms. Abu Al-Hayja'a thought that the punishment has an important impact on the enforcement procedures [mainly the monetary aspect of the punishment]. The fine should be increased in

[668] It must be said it was very difficult to obtain and arrange a meeting with her and even then on the day of the meeting I had to visit the TAG academy, training centre and archive and publication building before being sent to the legal and counselling department

manner that removes the incentive of piracy as commercial advantage as an outcome of infringing copyright.

- The idea of the courts change in heart concerning the period of imprisonment provided some food for thought. But was not the most effective solution presented and that supposedly needed more efforts to be placed by many parties.
- Ms. Abu Al-Hayja'a thought that a deterrent effect of the punishment does not have to be imprisonment, the fine imposed could have more impact upon infringers either present or futuristic. The fine in addition to the compensation ordered by the court will play a better chance of reducing the infringers ability for further coming infringements.
- This concept according to Ms. Abu Al-Hyja'a is more achievable according to the current legislation and the everyday judicial and legal practice in courts. Which, is the joint judicial prosecution [Civil and Criminal proceedings] mentioned in previous pages of this thesis. The court could impose the criminal sanction [the imprisonment/ fine or solely a fine] in addition to the civil compensation ordered to the personal civil complainant/plaintiff. This could create the much needed deterrent effect intended to achieve as a final outcome of the criminal enforcement process according to national related legislations and TRIPS agreement provisions.
- She confirmed with both Judge El-Husban and the legal advisor at the National Library that the main obstacles facing criminal in Jordan enforcement in Jordan are social and economic ones. The social aspect could be the more pressing and urgent to deal with, due to its connection to the social culture and approach towards intellectual property enforcement criminally. The importance of the social factor and the spreading the culture of IP protection builds up at the fact that it affects the two sides of the equation of enforcement. It relates to both the general public and the enforcement authorities on its different levels [judicial 'criminal and civil' and administrative].
- The role given to enforcement officers at CPO during their duties while searching the suspected premises of the accused is part of the enforcement problem. The limited numbers of officers and their ability to cover the jurisdiction of the kingdom as whole should be reviewed. The staff of the

CPO will lack the mobility to cover the different regions of Jordan. She thought that newly founded IP department in the judicial police [An Intellectual Property department at the police in the Palace of Justice-Amman has been established lately] could play a significant role in complementing the role of the enforcement officers at the CPO; in the measures taken to confront copyright piracy.[669] Ms. Abu Al-Hayja'a agreed with Judge El-Husban in spreading the activities over the jurisdiction of the entire kingdom by forming branches of the CPO in the different regions of Jordan.

Meeting 3:

- [An Author's translation] The meeting held with Judge El-Husban Amman at 18/03/2010 at the Court of First Instance:

The meeting toke place in her chambers according to a meeting that was based on a previous email.

The role of the copyright protection office and the difficulties that face proper enforcement procedures during the early stages of the prosecution process from the commencement of the search conducted by the officers of the copyright protection office, which could be based upon a scheduled search as part of their daily activities and duties. Or the search could be a result of a complaint issued by the public or the owner of the copyright who believes his/ her has been infringed. The matters and issues discussed with the advisor of the national library concerning the shortcomings the enforcement process in the different phases.

Judge El-Husban had some ideas concerning the enforcement procedures and what could be done enhance the process of enforcement and overcome the shortcomings:

- The current search forms and reports are not suitable for all copyright infringements, the current forms could not be suitable for all cases of piracy, and different situations of infringement should have different forms and reports.
- The reports submitted by the enforcement officers at the copyright protection office are not complete or detailed enough to describe the research conducted by the officers, which makes later on during the trial harder for the court to decide and deliver a sentence and depend on the report as a solid evidence to

[669] All three interviewees in Jordan agreed that there is too much handle for the CPO officers and that the intellectual property department at the police has positive impact on copyright piracy enforcement measures. The experiment should be wide national level and not only the jurisdiction of Amman' CFI only.

incriminate possible infringers. Inaccuracies related to the report could cause possible doubt concerning the outcomes of the search and the resulting outcomes and in such situation the court could only declare the accused either innocent or nothingness of the accused. The reports only mention how many CD's or DVD's have been found and confiscated and fails to mention anything else.

- Judge El-Husban provided me with several CFI cases dismissed by the court due to failures during the search conducted by the CPO [Copyright Protection Office] due to the lack of detailed search reports held by the enforcement officers.
- The CPO do not have enough staff to cover the whole geographic jurisdiction of the kingdom, even though with the cooperation of the judicial police department, who have created a copyright protection unit in order to assist the copyright protection enforcement officers during their duties. Judge El-Husban suggested that the CPO and the NL should expand their presence in the various districts in order to provide mobility to the enforcement officers during their everyday duties.
- Another matter is the role of the AG department [Attorney General] in the enforcement procedures and the outcome of the prosecution process and the sentence delivered by the ruling bench. Even though there has been a certain AG to commence the prosecution of copyright piracy cases at the attorney general department, the role implemented by the AG is not sufficient in providing the effective deterrent aspect of enforcement towards copyright infringers. The attorney general prefers to approve the procedures taken by the CPO without much examination of the procedural aspects of the search and the report conducted by the officers, this may lead to lengthy trial procedures and more time wasted at the CFI. The AG prefers not to act on the facts delivered in a case the violation of the law that may not be considered a crime of piracy according to the provisions of Article (51) of Copyright Act.
- The main issue facing criminal enforcement is the combination of lack of accuracy concerning some research reports conducted by the enforcement officers and the attorney general mainly relying a bit too much on these reports due to overwhelming duties and responsibilities laid on the shoulders of the AG.

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