

March 2021

What We Don't Know About Intellectual Property: A Comparative Review Of Intellectual Property In The United States And Afghanistan

Zamira Saidi

Follow this and additional works at: <https://scholarship.law.uc.edu/ipclj>



Part of the [International Law Commons](#)

Recommended Citation

Zamira Saidi, *What We Don't Know About Intellectual Property: A Comparative Review Of Intellectual Property In The United States And Afghanistan*, 5 U. Cin. Intell. Prop. & Computer L.J. (2021)
Available at: <https://scholarship.law.uc.edu/ipclj/vol5/iss1/6>

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in The University of Cincinnati Intellectual Property and Computer Law Journal by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

University of Cincinnati
College of Law

**WHAT WE DON'T KNOW ABOUT INTELLECTUAL PROPERTY: A
COMPARATIVE REVIEW OF INTELLECTUAL PROPERTY IN THE UNITED
STATES AND AFGHANISTAN**

Intellectual Property and Computer Law Journal

Zamira Saidi

2021

Table of Contents

I.	INTRODUCTION.....	3
II.	COPYRIGHT AND ACCESS TO INFORMATION.....	4
	A. Overview.....	5
	B. Who is the Author?.....	6
	C. Copyright Subject-matter.....	7
	D. Copyright Terms (How long the Protection lasts?).....	10
	E. The Author’s Exclusive Rights.....	12
	F. The Impact of Copyright in Least Developed Countries.....	13
	1. Access to Technology.....	14
	2. Poverty Challenges to Afford Access to Protected Materials.....	14
	3. Demands (Necessity) to use Protected Materials.....	15
	G. Copyright Limitations.....	15
	H. Conclusion.....	17
III.	PATENT AND ACCESS TO PHARMACEUTICAL PRODUCTS.....	17
	A. Overview.....	17
	B. Patentability.....	18
	C. Patent Terms (Duration of the Protection).....	19
	D. Patenting Pharmaceuticals under TRIPS Agreement.....	19
	1. Obligation of the Signatory Members States.....	20
	2. Patenting Medicine.....	21
	i. Misuse of Big Pharma.....	23
	3. Flexibilities under TRIPS Agreement.....	25
	i. Compulsory Licensing.....	25
	ii. Doha Declaration.....	25
	E. Conclusion.....	26
IV.	TRADEMARKS AND CHALLENGES OF POOR COUNTRIES.....	26
	A. Overview.....	26
	B. Trademark Subject Matters.....	27
	1. Refusal to Register.....	28
	C. Trademark Term (Duration of the Protection).....	29
	D. Challenges of the LDCs.....	30
	E. Conclusion.....	31
V.	CONCLUSION.....	31

I. INTRODUCTION

Intellectual property (IP) has an important role in a country's academic, social, political, and above all, economic development. IP is rising above tangible properties; and creators, inventors, authors along with new technology and access to the internet, are changing the world every day. The activities which seemed impossible a decade ago, are happening frequently with minimum cost in a short amount of time. Hence, the IP right guarantees protection for the new creation, invention, or the work of authorship; and provides an incentive for enhancement of such creations in the future too.

Although, IP is a very developed field in most of the Developed Countries (DCs),¹ especially in the United States. It is a very new, unrecognized field of law in Afghanistan. For instance, according to the World Intellectual Property Organization (WIPO), the United States legal platform in IP is large in that it includes forty-two IP-centered laws and sixty-five IP-related laws.² In contrast, Afghanistan only has three IP-centered laws and eighteen IP-related laws.³ However, Afghanistan has put certain attention on IP laws since 2000, by adopting the three main IP laws, such as the law on Protection of Patent Rights, Trademark Registration Law, and Copyright Law.

Although IP protection and advances, undoubtedly, offer several economic and developmental advantages to a country, it also has its disadvantages, especially in the least Developed Countries (LDCs).⁴ IP works like a double-edged sword, in a way that the rich countries get richer, and the poor countries get poorer. Because the DCs have the resources, technologies, and capital to invest and work on new inventions every day, which results in gaining more profit from protected products or inventions. While LDCs do not

¹ According to the United Nations' (UN) country classification, Developed Countries are the countries which have developed economy and high incomes. While the UN also has three other categories of countries, such as countries in Transition, Developing Countries, and Least developed Countries, determined by the United Nations Economic and Social Council based on the recommendation of by the Committee for Development Policy. United Nations New York, *World Economic Situation and Prospects (2020)*, available at https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_Annex.pdf.

² WIPO IP Portal, *United States of America* (last visited Mar. 3, 2021), available at <http://www.wipo.int/wipolex/en/profile.jsp?code=US>.

³ WIPO IP Portal, *United States of America* (last visited Mar. 3, 2021), available at <http://www.wipo.int/wipolex/en/profile.jsp?code=AF>.

⁴ United Nations New York, *supra* note 1.

have such opportunities, so it makes it harder for them to work on new inventions or gain IP-generated profit.

Indeed, IP can contribute to a country's economical, societal, or even political landscape and rule of law,⁵ but, to get there, every country needs some level of stability or support in the initial stages of building its IP protection system or adopting a legal framework for IP. However, the International institutions, such as WIPO or the World Trade Organization (WTO), have taken some steps to facilitate the Developing or LDCs in terms of adopting IP platforms, or access to Medicines via Trade Related Aspects of Intellectual Property Rights (TRIPS) or Doha Declaration, but those steps been challengeable themselves.

This paper will briefly and comparatively review the IP platform in the United States (as a DC) and Afghanistan (as an LDC) and will discuss the IP rights' advantages and disadvantages, at the same time. To do that, the paper will focus on (I) Copyright and Access to Information, (II) Patent and Access to Pharmaceutical Products, and (III) Trademark and Challenges of LDCs.

II. COPYRIGHT AND ACCESS TO INFORMATION

The difference in legal systems between the United States and Afghanistan has its significance in defining what is Copyright, or what could be protected. The United States as a Common Law Country follows stare decisis (judgments issued by a higher court of the same jurisdiction) as a primary source of law along with the Constitution or Statutes. It gives the courts some legislative power in defining a term or deciding on a dispute.⁶ Afghanistan follows a Civil Law system, meaning the laws are written or codified into collections by a bi-assembly Parliament rather than being determined by judges.⁷ This part will provide

⁵ Shahid Alikhan, *The Role of Copyright in the Cultural and Economic Development of Developing Countries*, J. Intell. Prop. Rights, at 489, 490 (Nov. 2002), available at [http://nopr.niscair.res.in/bitstream/123456789/4938/1/JIPR%207\(6\)%20489-505.pdf](http://nopr.niscair.res.in/bitstream/123456789/4938/1/JIPR%207(6)%20489-505.pdf).

⁶ Toni M. Fine, LexisNexis, *Intro to American Legal System* (last visited Apr. 10, 2021), available at <https://www.lexisnexis.com/en-us/lawschool/pre-law/intro-to-american-legal-system.page>.

⁷ Eli Sugarman et al., *An Introduction to the Laws of Afghanistan: Afghanistan Legal Education Project* (3rd ed. 2011), available at https://www-cdn.law.stanford.edu/wp-content/uploads/2016/03/ALEP-Law-of-Afghanistan-3d-Ed_English.pdf.

an overview of Copyright Laws in the United States and Afghanistan first. Then, it will cover the Access to Information or Technology challenges and Copyright Limitations.

A. Overview

The Constitution provides the ground for IP protection; the language of the Constitution in the United States reads, "the Congress shall have the power to promote the progress of science by securing for limited times to author ... the exclusive right to their ... writing."⁸ The law refers to copyright as promoting the progress of science.⁹ On the other hand, the Constitution of Afghanistan provides the ground toward protecting copyright matter as it states:

“The state shall devise effective programs for fostering knowledge, culture, literature and arts. The state shall guarantee the copyrights of authors, inventors and discoverers, and, shall encourage and protect scientific research in all fields, publicizing their results for effective use in accordance with the provisions of the law.”¹⁰

This definition implies a combination of how the American and European countries define copyright. For instance, the United Kingdom focuses on Copyright as an economic¹¹ and property right¹² that protects the expression of original ideas, which can be literary,¹³ artistic,¹⁴ musical, sound recordings, films, broadcasts, typographical arrangements and published editions.¹⁵ While the European approach focuses more on the literal and artistic sides of the work, the American approach is more on encouraging and promoting scientific research.

Furthermore, the first Article of the copyright law in Afghanistan focuses on the purpose of the copyright law stating that this law is adopted “to protect the economical and moral rights of the works of

⁸ U.S. Const. art. I, § 8, cl. 8.

⁹ *Id.*

¹⁰ Afg. Const. art. 47.

¹¹ Bently et al., *Intellectual Property Law*, 304 (5th ed. 2018).

¹² Copyright Designs and Patent Act 1988, c. 48 (UK), <https://www.legislation.gov.uk/ukpga/1988/48/contents>.

¹³ *Id.* at § 3.

¹⁴ *Id.* at § 4.

¹⁵ *Id.* at § 1(1).

an author, writer, artist and researcher and the way to profit from the work of ownership rights to organize issues pertaining to the copyright.”¹⁶

As Copyright gives an economic value to copyrighted products as a trading subject, it plays an essential part in the development and industrialization of the world, including creative industries.¹⁷ As the creative industry includes broadcasting, film, music, electronic publishing, video/computer games, advertising, and web design,¹⁸ which represent a combination of culture and commerce with the ability to provide a distinctive image of a country, and show cultural diversity.¹⁹ It also limits the creativity opportunities and consumers’ access to copyright-protected materials in LDCs, including Afghanistan which will be discussed in this paper.

B. Who is the Author?

The word “author” is used twenty one times in 17 U.S. Code § 101 to define copyrightable works in U.S. law.²⁰ While the provision does not define who is the author? rather it focuses on determining which work of the author is protectable.²¹ In contrast, the Copyright law in Afghanistan defines the author as the person who creates the work, as it states “[a]uthor, writer, artist and researcher in this law are names as those who create.”²²

Moreover, joint authorship has been discussed similarly in the laws of both countries. Except that in the United States, the courts have the authority to define what could be a joint work. The court in *Lindsay v. TITANIC* defined joined authorship as “the author and joint authors of the work, owns the Copyright over

¹⁶ WIPO IP Portal, *Afghanistan: Law Supporting the Rights of Authors, Composers, Artists and Researchers (Copyright Law)*, art. I, available at <https://wipolex.wipo.int/en/legislation/details/10197>.

¹⁷ WIPO IP Portal, *United States of America* [Guide on Surveying the Economic Contribution of the Copyright Industries] (last visited Apr. 3, 2021), available at https://www.wipo.int/edocs/pubdocs/en/copyright/893/wipo_pub_893.pdf.

¹⁸ Bethany Klein et al, *Understanding Copyright: Intellectual Property in the Digital Age* (2015).

¹⁹ John Newbigin, *What is the creative economy?* (2015), available at <https://creativeeconomy.britishcouncil.org/guide/what-creative-economy/>.

²⁰ 17 U.S.C. § 101 (2011).

²¹ *Id.*

²² Afg. Copyright Law, *supra* note 16, at art. 2.

that work.”²³ Later the court in *Erickson v. Trinity Theatre, Inc.* introduced the two elements of joint authorship: (1) to create joint work, each author must intend respective contributions to be contribution to unitary whole, (2) collaborators are not joint authors unless they intended to be joint authors when work was created and each author’s contributions to works are independently copyrightable.²⁴ Although the court in different cases narrowed down this definition by saying that a consultant to a movie is not a co-author and would not get a copyright for the work,²⁵ or unedited, raw footage is subject to protection.²⁶ Afghanistan’s Copyright law illustrates that if more than one person participates in the creation of a work, each of them will be entitled to the economic rights of the work, as the owners.²⁷ The law does provide any limitation on how each author’s participation shall be. Although, it has different provisions on joint musical works,²⁸ or co-authorship in an audiovisual work.²⁹

Furthermore, the court in *Rouse v. Walter & Assocs., L.L.C.* discussed the concept of work for hire and stated that the employer would own the copyright when: (1) all works by an employee is work for hire, (2) the works prepared by non-employees can be works made for hire if there is an employment agreement between the parties, and if the work falls within the scope of the employee’s work.³⁰ While, in Afghanistan, the employer owns any work created by the employee, unless there is a different agreement between them.³¹

C. Copyright Subject-matter

Section 102 (a) of the Copyright Act in the U.S. defines the extent of copyright protection and subject matters that are copyrightable.³² It states:

“copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine

²³ *Lindsay v. Wrecked & Abandoned Vessel R.M.S. TITANIC*, No. 97 CIV. 9248 (HB), 1999 WL 816163 (S.D.N.Y. Oct. 13, 1999).

²⁴ *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994).

²⁵ *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

²⁶ *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247 (2d Cir. 2015).

²⁷ Afg. Copyright Law, *supra* note 16, art. 23.

²⁸ *Id.* at art. 25.

²⁹ *Id.* at art. 26.

³⁰ *Rouse v. Walter & Assocs., L.L.C.*, 513 F. Supp. 2d 1041 (S.D. Iowa 2007).

³¹ Afg. Copyright Law, *supra* note 16, at art. 11(3).

³² 17 U.S.C. § 102(a).

or device. Such works include: (1) literary works, (2) musical works including accompanying words, (3) dramatic works accompanying any music, (5) pantomimes and choreographic works, (6) pictorial, graphic, and sculptural works, (7) motion picture and other audiovisual works, (8) sound recordings, and (9) architectural works.”³³

Although this section says that any original work of an author fixed in a tangible form could meet the criteria for copyrightability, the law does not define the terms ‘original’ or ‘fixed’,³⁴ it is for the courts to define what is original. The court in *Sarony v. Burrow-Giles Lithographic Co.* determined that photographs could be protected as original works because of creative elements in the picture such as lighting, organizing, shadows, and the nighttime setting,³⁵ while a plain picture which does not have any creative element, or it is not edited, or the photographer did not set up the background, will not be protected.³⁶ Later, the court in *Bleistein v. Donaldson Lithographing Co.* lowered the originality criteria stating that a picture is copyrightable regardless of meeting the *Sarony* test.³⁷

Furthermore, the *Feist Publications, Inc. v. Rural Tel. Serv. Co.* gave general requirement of originality.³⁸ The court ruled that an independent creation with some minimum degree of creativity would be copyrightable, that the author shall independently create the work, and it must possess some minimal degree of creativity.³⁹ The court applied the “sweat of brow” doctrine in its determination that the minimum degree of originality requires the author to show some effort toward creating the work.⁴⁰ Later in *Mannion v. Coors Brewing Co.*, the court gave a three-step test to show the originality of photographs: (1) Rendition (2) Timing, and (3) Creation of the subject (creation of something that did not exist in nature, until the person made the scene for the photograph).⁴¹

³³ *Id.*

³⁴ *Id.*

³⁵ *Sarony v. Burrow-Giles Lithographic Co.*, 17 F. 591 (C.C.S.D.N.Y. 1883), aff'd, 111 U.S. 53 (1884).

³⁶ *Id.*

³⁷ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

³⁸ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444 (S.D.N.Y. 2005).

The idea-expression doctrine is also an important discussion of copyrightability in the United States because the ideas are not protected but the expressions are, and it often raises in Copyright litigations related to the Copyright infringement cases.⁴²

For writings, the court in *Hoehling v. Universal City Studios, Inc.* determined that historical and factual writings are not protectable because the author did not create them, the information already existed.⁴³ The court also discussed the “scene a faire” doctrine which refers to a principle in Copyright law in which certain elements of a creative work are not protected because they existed customary to the genre, or they are clichés.⁴⁴ The Derivative works are protected under 17 U.S.C. § 103 if the author adds some creativity to a work that is already in the public domain.⁴⁵ The protection would only be extended to the additions by the author, while the copied part would remain in the public domain.⁴⁶ However, the author cannot create a derivative from a copyright-protected work, unless the author has the authorization to do so.⁴⁷ Besides, a compilation in the United States is protected if it is a: (1) collection and assembly of preexisting works, (2) selection, coordination, and arranging, and (3) creation of an original work of authorship.⁴⁸ Hence, the databases are protected⁴⁹ because they are a compilation of letters, arranged in a certain way,⁵⁰ as long as the author’s work of compiling results in making something new and original.⁵¹

The Afghanistan Law states:

“the original works of authors shall be protected that are fixed (without considering the value, quality, purpose or the mode of its expression) in one of the tangible mediums of expression that is known now or means that will be developed later, which are perceived, reproduced or communicated in a different way either directly or with the aid of a device.”⁵²

⁴² *Baker v. Selden*, 101 U.S. 99, 25 L. Ed. 841 (1879).

⁴³ *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980).

⁴⁴ *Id.*

⁴⁵ *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976).

⁴⁶ *Id.*

⁴⁷ *Schrock v. Learning Curve Int’l, Inc.*, 2005 WL 2870728 (N.D. Ill.).

⁴⁸ *Id.*

⁴⁹ *Experian Info. Sols., Inc. v. Nationwide Mktg. Servs. Inc.*, 893 F.3d 1176 (9th Cir. 2018).

⁵⁰ *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970).

⁵¹ *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003).

⁵² Afg. Copyright Law, *supra* note 16, at art. 5.

This definition is very close to how American laws define copyrightable subject matters.⁵³ The Afghanistan law also requires the work to be either original or fixed in an intangible medium of expression. Besides, the legislator tried to anticipate that what works could be original or fixed in Art. 6, which lists all the works that could be protected and it includes:

“(1) Book, pamphlet, brochure, essay, play and other academic technical and artistic writings; (2) Poem, melody, song and compose that has been written, recorded or published using any mean; (3) Audiovisual work for the purpose of performance on a movie’s scene or broadcast from radio or television that has been written, recorded or published using any mean;(4) Musical work which has been written recorded or published by any mean; (5) Painting, picture, design, drawing, innovate geographical cartography, linear writings, decorative lines and other decorative and imaginary works which have been created using any simple or combinatory mean or mode; (6) Statuary (sculpture); (7) Photography work that has been created using an innovative mode; (8) Innovative work of handicraft or industrial art (carpet designs, rugs, felt carpet and its attachments etc.); (9) Innovative work which has been created based on the public culture (folklore) or national cultural heritage and art; (10) Technical work with an innovative aspect; (11) Computer programs; and (12) Derivative works.”⁵⁴

Although having everything mapped out in the law makes it easier for the Judges to apply the law, and evaluate what work is protected, or whether the infringement happened. It also has the disadvantage of limiting the Judges to the words of the law, especially when the case is about a situation that is not anticipated by the legislature.

D. Copyright Terms (How long the Protection lasts?)

When it comes to the terms of copyright protection, the United States has very complicated procedures to calculate the protection periods, compared to Afghanistan. According to the United States Copyright Act of 1909, the Copyright protection starts upon publication with formalities, and it will last for twenty eight years with the possibility to renew for another twenty eight years, for a total of fifty six years.⁵⁵ While the Copyright Act of 1978, suggests three types of protection terms.⁵⁶

⁵³ 17 U.S. Code § 102 (a).

⁵⁴ Afg. Copyright Law, *supra* note 16, at art. 5.

⁵⁵ Jane Ginsburg et al., Concepts and Insights, *Copyright Law* (2012), available at <https://subscription.westacademic.com/Book/Detail/20607>.

⁵⁶ *Id.*

First, according to 17 U.S.C. § 302, which discusses the contemporary or modern works, covers all the works which are created on or after 1/1/1978.⁵⁷ The protection term on the works is the author's lifetime, and seventy years after the author's death.⁵⁸ In works of joint authorship, the protection will last for the author's lifetime and seventy years after that.⁵⁹ For works for hire, the period would be ninety five years from the first date of publication or 120 years from the date of creation.⁶⁰ Then, based on 17 U.S.C. § 303, which discusses unpublished manuscripts, the protection term will be the lifetime of the author and seventy years, which will last until 12/31/2002,⁶¹ if the work was published before that, then the copyright will last until 12/31/2047.⁶² Lastly, based on 17 U.S.C. § 304, if a copyright-protected work is in its first term on 1/1/1978 the protection will be for twenty eight years with renewing possibility for another twenty eight and then sixty seven years; which will be a total of ninety six years of protection.⁶³ Moreover, if the work was in its second term on 1/1/1978, and it was validly renewed during its first term, the protection of the second term would last for forty seven years; which gives seventy five years protection in total. However, if the Copyright was still enforced by 1998 (Sonny Bono Act), then the second term will last sixty-seven, giving ninety-five years of protection in total.⁶⁴

While United States law gives the rule and formula to calculate the protection term, the laws in Afghanistan give specific timelines to each of the copyrighted materials mentioned in Article 6 of the Copyright laws.⁶⁵ It suggests as following:

“(1) Author's work- Life of the author and 50 years after the author's death for works published or broadcast.⁶⁶ (2) Joint work- Life of the last author and 50 years after the last author's death for joint-works, if the is works published or broadcast during their life cycle.⁶⁷ (3) Anonymous work- 50 years after the first years of publication for works published or broadcast with metaphorical (pseudonym). If the author is identified, the provisions of clause 1 of this article shall apply.⁶⁸ (4)

⁵⁷ *Id.* at 74-75.

⁵⁸ *Id.*

⁵⁹ *Id.* at 83.

⁶⁰ *Id.* at 102.

⁶¹ *Id.* at 84.

⁶² *Id.*

⁶³ 17 U.S.C. § 304 (2019).

⁶⁴ Ginsburg, *supra* note 55, at 77-83.

⁶⁵ Afg. Copyright Law, *supra* note 16, art. 16.

⁶⁶ *Id.* at art. 16 (1).

⁶⁷ *Id.* at art. 16 (2).

⁶⁸ *Id.* at art. 16 (3).

Works which was not published during the lifetime of the author- 50 years from the first year of publication.⁶⁹ (5) Audiovisual works- 50 years effective from the first year of the publication or broadcast.⁷⁰ And (6) Photography and painting work- 50 years effective from the first year of publication and broadcast.”⁷¹

Although Art. 17 focuses on the point that the protection starts from the date of publication.⁷² Article 19 gives the broadcasting organizations the right to reproduce their publications and have the Copyright for another twenty years from the date of re-publication.⁷³ Furthermore, performers have Copyright over their performance, from the day of performance, for fifty years.⁷⁴

E. The Author’s Exclusive Rights

The 17 U.S.C. § 106 of the United States lists the exclusive rights of Copyright owners in the United States.⁷⁵ The Copyright owner has the right to (1) reproduce the Copyrighted work; (2) to prepare derivative works based upon the Copyrighted work; (3) to distribute copies or phonorecords of the Copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) to perform Copyrighted work; (5) to display Copyrighted works; and (6) to perform the sound recording publicly in case of sound recordings.⁷⁶ However, § 106 (A) recognizes the rights of certain authors to attribution and integrity.⁷⁷

While Art. 9 of the Copyright Law in Afghanistan states “the author has the exclusive copyright to publish, broadcast, present and perform the work and has the right to enjoy economically and morally his name and his work.”⁷⁸ It also protects the author’s moral rights which are non-transferable, and only given to the author, or the employer in case of work for hire.⁷⁹ The moral rights include the author’s choice if they want to mention their name or metaphorical name; it bans on any kind of use from the author’s work that

⁶⁹ *Id.* at art. 16 (4).

⁷⁰ *Id.* at art. 16 (5).

⁷¹ *Id.* at art. 16 (6).

⁷² *Id.* at art. 17.

⁷³ *Id.* at art. 19.

⁷⁴ *Id.* at art. 22.

⁷⁵ 17 U.S.C. § 106 (2019).

⁷⁶ *Id.*

⁷⁷ 17 U.S.C. § 106(a).

⁷⁸ Afg. Copyright Law, *supra* note 16, at art. 9.

⁷⁹ *Id.* at art. 11.

negates the reputation and credibility of the author; and it bans any objection on any kind of alternation, change of form or possession of the work.⁸⁰

F. The Impact of Copyright in Least Developed Countries

Copyright protection is important to encourage creativity and motivate the creation of more content, and it eventually contributes to the development and promotion of a country's economy.⁸¹ However, copyright protection has its risks and challenges for the LDCs. For instance, copyright imposes economic and social costs on society.⁸² Economic as it provides protection for new works while most of the people cannot afford it hence it limits new creations, and social as it limits access to information in LDCs.⁸³ Furthermore, as Christian Handke states that “[i]n the short run, a rational Copyright policy trades off rights holder interests against user interests.”⁸⁴

The WIPO report shows that despite having no doubt that strong Copyright protection would imply a greater level of creativity, the survey shows that consumers are not willing to pay for that product.⁸⁵ Besides discussing the reports of surveys in which the consumers show different levels of willingness or unwillingness toward paying for copyrighted materials, considering their needs in a different jurisdiction,⁸⁶ the author also discusses the main challenges that copyright protection raises in LDCs, such as (a) Access to technology, (b) poverty, and (c) demands.

⁸⁰ *Id.*

⁸¹ Shahid Alikhan, *The Role of Copyright in the Cultural and Economic Development of Developing Countries*, J. Intell. Prop. Rights, at 489, 490 (Nov. 2002), available at [http://nopr.niscair.res.in/bitstream/123456789/4938/1/JIPR%207\(6\)%20489-505.pdf](http://nopr.niscair.res.in/bitstream/123456789/4938/1/JIPR%207(6)%20489-505.pdf).

⁸² Jodie Driffin, Public Knowledge, *The Economic Impact of Copyright*, available at <https://www.publicknowledge.org/files/TPP%20Econ%20Presentation.pdf> (last visited Mar. 19, 2021).

⁸³ *Id.*

⁸⁴ Christian Handke, WIPO, *Economic Effects of Copyright - Commissioned paper prepared for the committee on the impact of copyright policy on innovation in the Digital Era*, available at https://sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/pga_063399.pdf (last visited on Mar. 19, 2021).

⁸⁵ Richard Watt, WIPO, *The Economics of Intellectual Property, An Empirical Analysis of the Economics of Copyright: How Valid Are The Results of Studies In Developed Countries for Developing Countries*, available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1012-chapter3.pdf (last visited Mar. 19, 2021).

⁸⁶ *Id.*

1. Access to Technology

Technology plays a significant part in a country's development and promotion of IP. Technologies that are transferred to other countries on an international level play an important role in the development of the country. The LDCs could copy the technology models and develop them at low costs because they can have access to supplies at lower costs.⁸⁷ However, they are not allowed to copy the models or materials that DCs have; or that they cannot develop or create similar products due to fear of infringing the protected materials, which ties their hand to do anything.⁸⁸

The WIPO paper also relies on the point that the innovation process is cumulative and it needs a starting point.⁸⁹ It implies that the LDCs need exceptional treatment, that they shall be granted authorization to access/use some protected technologies, as a guide or raw material to build their own technologies. Then, these countries can start developing their own products, otherwise, they are trapped in this cycle of poverty and cannot have a starting point to benefit IP or its economy.

2. Poverty Challenges to Afford Access to Protected Materials

Another problem that LDCs face is poverty. These countries have lower incomes and weaker economies.⁹⁰ So, they require different Copyright standards.⁹¹ Applying the same international standards to DCs and LDCs does not help the LDCs, and it also deprives them of having access to certain information, products, or technologies. For instance, access to information, books, media programs, and streaming websites are easily affordable in the United States, but it is not affordable by most people in Afghanistan considering the currency differences and people's net income.⁹² However, numerous people do not even have stable monthly income due to limited employment opportunities.

⁸⁷ Watt, *supra* note 84, at 87.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ United Nations New York, *supra* note 1.

⁹¹ Watt, *supra* note 84, at 89.

⁹² United Nations New York, *supra* note 1.

3. Demands (Necessity) to use Protected Materials

As the DCs have the resources to initiate and afford Copyrighted materials and the facilities for sharing information among each other.⁹³ For instance, the peer-to-peer technologies at schools help the students easily access the materials they need, and later develop new contents, and the cycle goes on. Specifically, when the schools buy the Copyrighted materials and make them available to their students. Although the demand stays the same and considering the international standards the LDCs shall serve the student's similarly as the DCs. While in Afghanistan, the students, schools, and universities do not have access to peer-to-peer sharing technologies that provide information, materials, and resources because they cannot afford such access. Hence, while the demand stays the same, lack of sources and access to Copyrighted materials can harm LDCs more than it can benefit them.

G. Copyright Limitations

The WIPO defines Copyright exceptions as a balancing method between the interests of copyright holders and users of protected works.⁹⁴ It also identifies certain exceptions for economic rights, in which, one can use a protected work without being authorized by right-holder, nor paying compensation.⁹⁵ Although, the copyright's legal framework provides numerous rights for authors, composers, and artists to control exploitation or reproduction of their works,⁹⁶ but, nowadays creators need more exceptions rather than exclusive rights.⁹⁷

The legal forum, addressing the usage of Copyright exceptions is at the national and international level. At the international level, the Berne Convention,⁹⁸ TRIPS Agreement⁹⁹ and Marrakesh Treaty¹⁰⁰

⁹³ Watt, *supra* note 84, at 90.

⁹⁴ SCCR Committee, WIPO, *available at* <https://www.wipo.int/copyright/en/limitations/> (last visited Mar. 15, 2021).

⁹⁵ *Id.*

⁹⁶ Berne Convention for the Protection of Literary and Artistic Works (1886), art. 9, *available at* <https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>.

⁹⁷ Jane C. Ginsburg, *Copyright Control v. Compensation: the Prospects for Exclusive Rights After Grokster and Kazaa" in Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (2009), 110-123; and Enrico Bonadio, *File Sharing, Copyright and Freedom of Speech*, *European IP Rev.* 630 (2011).

⁹⁸ Berne Convention, *supra* note 95, at art. 10.

⁹⁹ TRIPS Agreement (1995), art. 13., *available at*

https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/1_tripsandconventions_e.pdf.

¹⁰⁰ Marrakesh Treaty (2013), art. 11-12, WIPO, *available at* <https://wipolex.wipo.int/en/text/301016>.

facilitate the application of copyright exceptions by allowing beneficiaries and authorizing entities to make accessible copies of protected contents and exchange them across the border, which constitutes legal bases for copyright exceptions.¹⁰¹ Quotation, criticism, and review of protected works are permitted by the Berne Convention¹⁰² and the TRIPS agreement.¹⁰³ Besides, parody is defined as “ridicule, distortion, mockery”¹⁰⁴ is also an exception to copyright infringement.

The United States applies the ‘fair use’ test, to evaluate whether the copy is fair. The Congress made fair use doctrine, a statutory limitation on Copyright protection by adding § 107 into the Copyright Law of 1978. It also considered the application of four factors while evaluating a fair use defense. Such as (1) the purpose and character of the use, if it is a commercial use for nonprofit educational purposes; (2) the nature of the copyrighted work, if it is published or not; (3) the copied amount and whether the copied portion is a substantial part of the protected work; and (4) the effect of the use upon the potential market value of the copyrighted work. In *Sony Corp. of America v. Universal City Studios, Inc.*,¹⁰⁵ the Court found that home videotaping of free broadcast television programs, for more convenient time-shifting purposes, constituted fair use. Although, the Supreme Court in *Harper & Row Publishers, Inc.* held that “fair use is a mixed question of law and fact,”¹⁰⁶ implying that the Court must be free to evaluate the doctrine and apply it on a case-by-case basis. However, § 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge the fair use doctrine in any way.¹⁰⁷

Considering the challenges that the LDCs are dealing with, the application of the fair use doctrine and its factors, will not allow the creator in LDCs to copy a substantial part of the work or make it for

¹⁰¹ Main Provisions and Benefits of the Marrakesh Treaty (2016), WIPO, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_flyer.pdf (last visited Sep. 22, 2019).

¹⁰² Berne Convention, *supra* note 95, at art. 10. Berne Convention, art. 10.

¹⁰³ TRIPS Agreement, *supra* note 95, at art. 10.

¹⁰⁴ Ellen Gredley et al., *Parody: A Fatal Attraction? Part I: The Nature of Parody and its Treatment in Copyright* (1997), 19 Eur. I.P. Rev. 339.

¹⁰⁵ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

¹⁰⁶ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

¹⁰⁷ H.R. Rep. No. 94–1476, at 66 (1976).

commercial purposes. Hence, this could not be considered as a chance to let LDCs start having their own technologies or gaining profit from it.

H. Conclusion

As much Copyright protection would encourage the content creators and authors to produce more creative works, which will lead the country toward the development of creative technology and creative economy. That much it will have disadvantages to the creators in LDCs as their access to technology is limited and the high price of protected material is not affordable for them.

III. PATENT AND ACCESS TO PHARMACEUTICAL PRODUCTS

In this section, the paper will discuss that how patenting pharmaceutical breaches the human right of access to medicine. This first compares the patent laws of the United States and Afghanistan; then, will generally focus on DCs and LDCs to show the impact of patenting pharmaceuticals.

A. Overview

The United States Constitution sets the base for adopting patent laws, as the Constitution states “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.”¹⁰⁸ The promotion of useful art in this section refers to patenting the inventions. A patent is granted to the “inventors” and “discoveries” and it shall only be issued when the invention or process is novel which did not exist before. Similarly, in Afghanistan, the patent law was issued considering the Art. 47 of the Constitution to support the economic and intellectual rights of inventors and discoverers,¹⁰⁹ in order to support the inventors and encourage inventions and discoveries.¹¹⁰ Art. 4 states that the invention and discoveries would be supported by law if they are

¹⁰⁸ U.S. Const. art. I, § 8, cl. 8.

¹⁰⁹ Afg. Const., *supra* note 10, at art. 47.

¹¹⁰ Afg. *Patent Law*. at art. 2.

registered according to the provisions of this law.¹¹¹ This could imply that those inventions which are not registered yet, would not be supported.¹¹²

B. Patentability

Based on Section 102 of the patent statute, the United States has “the first to invent” rule,¹¹³ while Afghanistan has “the first to file” rule.¹¹⁴ First to invent means the first person who invented the invention would be eligible to get the patent on his invention; while first to file means the first person who files to register the patent shall have the patent. The “first to file” rule is mostly used by countries other than the U.S. because the registration formality determines who started the process first, but it is challenging to apply when someone commits fraud and tries to register someone else’s invention. In that case, the first inventor has the burden to prove that the invention was his. The “first to invent” rule also has its own challenges, as the first inventor has to prove that he is the first inventor.

Section 102 of the patent statute also gives some circumstances in which the invention loses its novelty. The first four situations discuss the events that take place after the invention is completed, before the inventor files to register his patent. Most of such situations cause the invention to lose its novelty- which is called “anticipation.”¹¹⁵ While the U.S. Patent Statute explains what constitutes a breach of novelty requirement, such as prior patent, publication, use or knowledge by another,¹¹⁶ single sources with an enabling disclosure,¹¹⁷ prior domestic use or knowledge while foreign use or knowledge would not breach the novelty, the prior use was public,¹¹⁸ prior invention by another person,¹¹⁹ and unclaimed disclosures in U.S. Patents and Applications.¹²⁰

¹¹¹ *Id.* at art. 4.

¹¹² *Id.*

¹¹³ 35 U.S.C. § 102.

¹¹⁴ Afg. *Patent Law.* at art. 2.

¹¹⁵ *Id.* at § 102(a-d).

¹¹⁶ 35 U.S.C. § 102(a).

¹¹⁷ *Hybritech Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367 (Fed Cir. 1986).

¹¹⁸ *Gayler v. Wilder*, 51 U.S. 477 (1850); *Gillman v. Stern*, 114 F.2d 28 (2d Cir. 1940).

¹¹⁹ 35 U.S.C. § 102(g)(2).

¹²⁰ 35 U.S.C. § 102(e), *see also Alexander Milburn Co. v. Davis–Bournoville Co.*, 270 U.S. 390 (1926).

According to Art. 7 of Afghanistan's Patent Law, which discusses ineligibility to get a patent on a financial chart, complementary inventions, and discoveries that are against the public order, morality, public health and environment, or pharmaceutical formulas. Although pharmaceutical patents generate a high income in DCs, Afghanistan's patent law does not grant protection for pharmaceuticals to ensure access to medicine.

C. Patent Terms (Duration of the Protection)

The duration of patent protection in the U.S. is for twenty years, this term could be extended 1 day for each day after the end of three years, which adds another seventeen years to the patent protection.¹²¹ Once a patent is expired, the contract containing payment of royalty fee would be held invalid.¹²² The Patent law of Afghanistan also grants the protection for twenty years, that the inventor or discoverer can have monopoly and exploitation right over the invention.¹²³

D. Patenting Pharmaceuticals under TRIPS Agreement

The Trade Related Aspects of Intellectual Property Rights (TRIPS) came into existence after the Uruguay negotiations, by the WTO member states, as the international community lacked a uniform system to protect IP rights.¹²⁴ The adoption of the TRIPS agreement was to reduce distortion and impediment in international trade, secure legitimate trade in goods and services, and define a minimum standard for IP protection,¹²⁵ which includes protecting pharmaceutical products.¹²⁶ To reach these objectives, all WTO members are obliged to undertake some provision for IP protection in their national legislation and ensure compliance with the TRIPS agreement.¹²⁷ The DCs supported this system, while the LDCs objected, stating

¹²¹ 35 U.S.C. § 154(b)(1)(B).

¹²² *Brulotte v. Thys Co.*, 379 U.S. 29 (1964).

¹²³ Afg. *Patent Law*, at art 14(1) and (2).

¹²⁴ Mart Leesti, *Historical Background, General Provisions and Basic Principle of the TRIPS Agreement and Transitional Agreements*, J. Intell. Prop. Rights (Mar. 1998), available at [http://nopr.niscair.res.in/bitstream/123456789/19551/1/JIPR%20\(2\)%2068-73.pdf](http://nopr.niscair.res.in/bitstream/123456789/19551/1/JIPR%20(2)%2068-73.pdf).

¹²⁵ Peter K. Yu, *The Objective and Principle of the TRIPS Agreement*, Texas A&M School of Law, at 984-985 (2009), available at <https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1456&context=facscholar>.

¹²⁶ TRIPs Agreement, *supra* note 95, at art. 27(2).

¹²⁷ *Id.* at art. 1.

that it would limit access to medicine. However, the TRIPS agreement provides some flexibilities to support the LDCs too.

1. Obligation of the Signatory Members States

When it comes to the implementation of the TRIPS agreement, different countries have different standards depending on their economic status and legal forum. Article 1 of the TRIPS agreement requires the member states to implement this agreement in their national laws, and Article 2 adds more emphasis on the implementation of Art. 1 of the TRIPS agreement and Art. 19 of the Paris Convention 1967.¹²⁸ Therefore, there is an obligation for member states to enforce the minimum standards of the TRIPS agreement. The TRIPS agreement is binding on all WTO member states and they must comply with the TRIPS agreement provisions and establish patent protection standards in their jurisdiction.¹²⁹

Although the TRIPS agreement obliged member states to comply with it after January 1, 1995, it also provided a transition period of four years to developing countries¹³⁰ and ten years for LDC,¹³¹ to bring their national legislation in compliance with the TRIPS agreement. To further ease the burden of LDCs, the WTO designed a Cooperation Agreement to provide technical and financial assistance for LDC.¹³² However, such cooperation is not sufficient as there are no significant changes in the list LDC since 2002¹³³ compared to 2018.¹³⁴ Although this only facilitates the LDCs to bring their legislation in compliance with the TRIPS agreement, it does not guarantee access to medicines.

¹²⁸ *Id.* at art. 2.

¹²⁹ General Assembly of WIPO, Implications of the TRIPS Agreement on Treaties Administered by WIPO: Pub. No. 464 (2012), available at https://www.wipo.int/edocs/pubdocs/en/intproperty/464/wipo_pub_464.pdf.

¹³⁰ TRIPS Agreement, *supra* note 95, at art. 65(2).

¹³¹ *Id.* at art. 66(1).

¹³² WIPO and WTO Launch New Initiative to Help World's Poorest Countries (June 14, 2001), available at https://www.wto.org/english/news_e/pres01_e/pr231_e.htm (last visited January 8, 2021).

¹³³ United Nations New York and Geneva, *Escaping the Poverty Trap*, The Least Developed Countries Report 2002, available at https://unctad.org/en/Docs/ldc2002_en.pdf (last visited on January 8, 2021).

¹³⁴ United Nations: Committee for Development Policy, List of Least Developed Countries (as of 11 February 2021), available at https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf (last visited January 8, 2021).

2. Patenting Medicine

Article 27(1) of the TRIPS agreement sets minimum standards for patenting an invention, stating that “patents shall be available for any invention, whether products or processes, in all fields of technology.”¹³⁵ It adds that patents shall be novel, involve an inventive step, and be capable of industrial applications, regardless of the place of invention, the field of technology, and whether products are imported or locally produced.¹³⁶ This Article applies to all member states of the TRIPS agreement and obligates them to adopt their own IP protection laws for medicines, while it does not provide any recommendation on how much protection is necessary, which enables the member states to define patentability standards in their national legislation or to refuse to grant patents for some subject matters.¹³⁷ Approximately fifty WTO members objected to patenting medicines during the TRIPS agreement negotiations as they did not agree to provide patents for medicines,¹³⁸ as they argued that access to medicines shall be a human right.

Granting patents for pharmaceutical products, allows the pharmaceutical companies to increase the price of medicine, as the generic companies are unable to produce drugs, it limited the availability of the drug and elevated the market demand for patented drugs which led pharmaceutical companies to set a high price over patented drugs.¹³⁹ For instance, Gilead, a pharmaceutical company, decided to sell a drug called Sovaldi for treating Hepatitis C, for 84,000 USD per course of treatment.¹⁴⁰ This was not affordable for most people, especially in LCDs. It is also in contrast with the right to health and well-being under the Universal Declaration of Human Rights,¹⁴¹ while accessibility and availability of drugs are the main

¹³⁵ TRIPS Agreement, *supra* note 95, at art. 27(1).

¹³⁶ *Id.*

¹³⁷ Ellen F.M. ‘t Hoen, *Practical Applications of the Flexibilities of the Agreement on Trade-Related Aspects of Intellectual Property Rights* (2018), University of Groningen, the Netherlands, available at https://medicineslawandpolicy.org/wp-content/uploads/2018/03/EllentHoen_dissertatie_Practical_Implications_2018.pdf.

¹³⁸ Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement*, (2d ed. 2007), at 271.

¹³⁹ Genevieve M. Halpenny, *High Drug Price Hurt Everyone* (May 3, 2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4904249/>.

¹⁴⁰ *Id.*

¹⁴¹ Universal Declaration of Human Rights, art. 25., available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

objectives of public health policy in all countries.¹⁴² It will also give pharmaceutical companies the power to control the export and import of patented drugs.¹⁴³

Granting pharmaceutical patents also allows the Pharma companies to control the availability of medicines in the market, as the patent holders will claim monopoly right upon patented drugs, and it bans generic companies from producing the generic form of patented drugs.¹⁴⁴ It pushes the generic companies out of the market, and the TRIPS agreements became the greatest achievement for the big Pharma companies for granting them monopoly rights over the market and price of the drugs.¹⁴⁵

Although granting a pharmaceutical patent was to encourage the pharmaceutical companies to open up to the public about their drugs; give information to the public, and encourages innovation for the future long-term investigation.¹⁴⁶ The reports show that there has been a significant decrease in the development of innovative drugs and limitations in accessing the data, which causes a lack of transparency and raises concerns about the safety and efficacy of medicines.¹⁴⁷ This shows that patenting drugs would not lead the WTO to reach its objectives.

In addition, pharmaceutical companies conduct R&D on the diseases which affect wealthier people in DC, because they have a profitable market there.¹⁴⁸ They do not invest in diseases affecting poor people in LDCs as poor people cannot afford the drugs.¹⁴⁹ Therefore, R&D would not make any difference in developing and LDCs as long as the patients are not able to receive drugs.¹⁵⁰ A majority of infected people

¹⁴² Ravikant Bhardwaj et al., *The Impact of Patent Linkage on Marketing of Generic Drugs* (2013), J. Int. Intell. Prop. Rights, 316.

¹⁴³ South Africa v. GlaxoSmithKline, (62/CAC/APR06) [2006] ZACAC 6 (Dec. 6, 2006).

¹⁴⁴ Angélique McCall, *Big Pharma, Generics and Trade Related Aspects of Intellectual Property Rights (TRIPS)*, 2018, available at <http://www.ipwatchdog.com/2017/05/17/big-pharma-generics-trade-related-aspects-intellectual-property-rights-trips/id=83178/>.

¹⁴⁵ Olga Gurgula, *Monopoly v. Openness: Two sides of IP coin in the pharmaceutical industry*, J. W. Intell. Prop., Vol. 20, Issue 5-6, at 206-207 (Sept. 28, 2017).

¹⁴⁶ Katri Paas, *Compulsory Licensing Under the TRIPS Agreement; a Cruel Taunt for Developing Countries?*, E.I.P.R. 31 (12), 609-613 (2009).

¹⁴⁷ *Id.*

¹⁴⁸ Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement*, (2d ed. 2007), at 275-276.

¹⁴⁹ Maxwell R. Morgan, *Medicines for the Developing World: Promoting Access and Innovation in the Post-TRIPS Environment* (2006), 64 U.T. Fac. L. Rev. 45 at para. 19.

¹⁵⁰ Paas, *supra* note 145, at 613.

by HIV/AIDS, Malaria, TB, and Hepatitis C are living in developing and LDC countries with no ability to afford medicines.¹⁵¹ For instance, a study shows that 40 million people were infected by HIV in developing countries, out of them, 24.5 million lived in Sub-Saharan Africa and 8,000 people have died for not having access to medicine.¹⁵² The global HIV/AIDS statistic shows that 36.9 million people were infected by HIV in 2017.¹⁵³ Similarly, another source shows that more than 10 million people die due to HIV/AIDS, respiratory infection, malaria, and tuberculosis in Africa, Asia, and South America per year.¹⁵⁴

i. Misuse of Big Pharma

Pharmaceutical companies that enjoyed monopoly rights over their patented drugs for twenty years,¹⁵⁵ tend to keep their monopoly and extend their patents by applying different approaches, to either push the generics companies out of the market,¹⁵⁶ or to stop the issuance of a compulsory license.¹⁵⁷

The pharmaceutical companies apply different methods to keep the generic companies out of the market. Such as, *ever-greening* practices that allow them to extend the protection beyond the term of a basic patent.¹⁵⁸ For example, in the case of *Abbott v. Teva Inc.*, Abbott changed the formulation of its drug called 'TriCor' and obtained a new patent on its new formula for another twenty years.¹⁵⁹ Moreover, the *pay for delay* agreement is another method via which the pharmaceutical companies pay the generic companies to stay out of the market. In 2013, the European Commission fined some pharmaceutical companies for entering into such agreements to delaying the market.¹⁶⁰ For instance, *Lundbeck Company* was the producer

¹⁵¹ 't Hoen, *supra* note 136.

¹⁵² *Id.*

¹⁵³ Global HIV/AIDS Statistics (2017), available at <https://www.avert.org/global-hiv-and-aids-statistics>.

¹⁵⁴ 't Hoen, *supra* note 136, at 39.

¹⁵⁵ TRIPs Agreement, *supra* note 95, at art. 33.

¹⁵⁶ Gurgula, *supra* note 144.

¹⁵⁷ Keith Alcorn, *Abbott Announces Kaletra Price Cut for Lower Middle-income Countries, Makes New Offer to Thailand* (Apr. 10, 2007), available at <https://www.aidsmap.com/news/apr-2007/abbott-announces-kaletra-price-cut-lower-middle-income-countries-makes-new-offer> (last visited Feb. 18, 2021).

¹⁵⁸ Gurgula, *supra* note 144.

¹⁵⁹ *Abbott Laboratories v. Teva Pharmaceuticals USA, Inc.*, 432 F. Supp. 2d 408 (D. Del. 2006).

¹⁶⁰ Duncan Matthews and Olga Gurgula, *Patent Strategy and Competition Law in the Pharmaceutical Sector: Implications for Access to Medicines* (2016), Queen Mary University of London, School of Law, available at <https://poseidon01.ssrn.com/delivery.php?ID=663088101094066109121099093103117006019074041037048078090070014097016006119004007122107117023039103016043126064018065019066014031015032054022023121029004098009016084066009086031106102006094009031120017015074124007019023026103079117091125095025125005101&EXT=pdf&INDEX=TRUE>.

of the ‘citalopram’ and entered into six different agreements with four generic companies to keep them out of the market.¹⁶¹ The European Commission fined it 93.8 million euros, fined Novartis for 16 million euros, and generics company for 98 million euros.¹⁶²

Preventing the issuance of compulsory licenses is another method that pharmaceutical companies apply to prevent generic products from entering the market. In the case of *Big Pharma v. Nelson Mandela*, Nelson Mandela’s government amended the Act, allowing affordable drugs to be available in the market.¹⁶³ Forty pharmaceutical companies sued South Africa’s government for violating the TRIPS agreement and the United States put political pressure on South Africa by setting sanctions and banning trades.¹⁶⁴ In the case of Kaletra, Thailand decided to issue a compulsory license on Kaletra to cure HIV/AIDS-infected people in Thailand.¹⁶⁵ The United States and pharmaceutical companies used their political power to pressure Thailand to stop issuing compulsory licenses.¹⁶⁶ Similarly, India faced pressures when it issued a compulsory license for Bayer’s cancer (Nexavar), as Andrew Jenner, executive director of the International Federation of Pharmaceutical Manufacturers said the “[i]ncreased use of compulsory licensing will reduce the incentive to invest in the R&D of new medicines in India.”¹⁶⁷ Furthermore, the Office of the United States Trade Representative (OUSTR) report also placed Algeria, China, Indonesia, and Thailand on the list for “failing to protect intellectual property rights” for trying to issue compulsory licenses.¹⁶⁸

However, the competition law and patent misuse doctrine exist which “prevent a patentee from using its patent to obtain market benefit beyond the statutory patent right,¹⁶⁹ but such misuses still happen.

¹⁶¹ *Id.*

¹⁶² *Id.* at. 8.

¹⁶³ Ellen F. M. ‘t Hoen, *TRIPS, Pharmaceutical Patents and Access to Essential Medicine: Seattle, Doha and Beyond* (2003), available at <https://www.who.int/intellectualproperty/topics/ip/tHoen.pdf>. See also in Mandisa Mbali, *Pharma v. Mandela: South African Moral Capital in a Global Movement*, 1998- 2001(2013), available at https://link.springer.com/chapter/10.1057%2F9781137312167_6#citeas.

¹⁶⁴ *Id.*

¹⁶⁵ Alcorn, *supra* note 156.

¹⁶⁶ *Id.*

¹⁶⁷ Jacqui Wise, *Patent Wars: Affordable Medicines Versus Intellectual Property Rights* (Mar. 1, 2014), available at <https://www.bmj.com/bmj/section-pdf/752708?path=/bmj/348/7947/Feature.full.pdf>.

¹⁶⁸ *Id.*

¹⁶⁹ Dennis Crouch, *Federal Circuit Holds-Line on Patent Misuse Defense* (August 30, 2010), available at <https://patentlyo.com/patent/doctrine-of-patent-misuse>.

3. Flexibilities under TRIPS Agreement

The Art. 31 of the TRIPS agreement, allows the usage of patented products without authorization,¹⁷⁰ and, Doha Declaration in 2001 added to the importance of health protection rather than IP protection,¹⁷¹ to support the special needs of the LDC.¹⁷²

i. *Compulsory Licensing*

Article 31 of the TRIPS agreement allows compulsory licenses to promote access to medicine and health.¹⁷³ Article 31(a) allows other uses of products without authorization of the right holder,¹⁷⁴ which means compulsory licenses. In 2012, India issued a compulsory license for Bayer's cancer drug sorafenib (Nexavar) as the Indian courts decided that the costs of USD 4,500 a month for sorafenib were unaffordable and the generic version of the drug was available for USD 175 a month.¹⁷⁵ Indonesia also issued compulsory licenses on seven hepatitis B and HIV treatments. In Thailand, compulsory licenses have mainly been issued for HIV drugs.¹⁷⁶ In 2001, South Africa, under the Nelson Mandela government, started importing and producing generic form medicines.¹⁷⁷ However, Art. 31 of the TRIPS agreement only allows the issuance of generic drugs, locally, to supply the needs of the local market.¹⁷⁸ While most of LDCs do not have the capacity and facilities to manufacture generic drugs locally.¹⁷⁹ This was discussed in Doha Declaration.

ii. *Doha Declaration*

¹⁷⁰ TRIPS Agreement, *supra* note 95, at art. 31.

¹⁷¹ Essential Medicines and Health Products Information Portal (2020), World Health Organization, *available at* <https://digicollections.net/medicinedocs/#p/home>.

¹⁷² TRIPS Agreement, Preamble *available at* https://www.wto.org/english/docs_e/legal_e/trips_e.htm#preamble.

¹⁷³ TRIPS Agreement, *supra* note 95, at art. 31.

¹⁷⁴ *Id.* art. 31.

¹⁷⁵ Patent wars: affordable medicines versus intellectual property right (2014) 348, *BMJ*, 15 *available at* <https://www.bmj.com/bmj/section-pdf/752708?path=/bmj/348/7947/Feature.full.pdf>.

¹⁷⁶ Alcorn, *supra* note 156.

¹⁷⁷ Ellen F. M. Thoen, *TRIPS, Pharmaceutical Patents and Access to Essential Medicine: Seattle, Doha and Beyond* (2003), *available at* <https://www.who.int/intellectualproperty/topics/ip/tHoen.pdf>. *See also* in Mandisa Mbali, *Pharma v. Mandela: South African Moral Capital in a Global Movement*, 1998- 2001(2013), *available at* https://link.springer.com/chapter/10.1057%2F9781137312167_6#citeas.

¹⁷⁸ TRIPS Agreement, *supra* note 95, at art. 31(f).

¹⁷⁹ Paas, *supra* note 145.

Doha Ministerial Conference in 2001 recognized the importance of health over new medicines, as well as the concerns about its effects on medicine prices.¹⁸⁰ The Doha Declaration waived the requirement of Art. 31(f) of the TRIPS agreement by allowing the DCs to obtain compulsory licenses and produce generic forms of drugs to export them to developing or LDCs.¹⁸¹ Section 7 of the Doha Declaration allowed the DCs to obtain compulsory licenses and produce generic forms of the drugs to export them to developing or LDCs which do not have the ability to manufacture pharmaceutical drugs.¹⁸²

E. Conclusion

Patenting medicines under the TRIPS agreement is a sign of development with the possibility of encouraging innovation in the future. However, the disadvantage of patenting pharmaceuticals is larger. However, the WTO and the TRIPS agreement council tried to provide more flexibilities to developing and LDCs and efforts to prevent misuse of IP rights by pharmaceutical companies or DCs, but big Pharmas has grown stronger and capable of taking different approaches to monopolize the market. The fact that big pharmaceutical companies have the power to hold the market, legally or illegally, makes it harder for countries themselves.

IV. TRADEMARKS AND CHALLENGES OF POOR COUNTRIES

Trademark is a jurisdictional concept that one countries advancement does not negatively impact the other ones, but this section will focus on how access to the international trading market can negatively impact the LDCs.

A. Overview

The WIPO defines a trademark as a sign that designates the goods and services of one enterprise from those of other enterprises.¹⁸³ A trademark distinguishes one product from another one, rather than

¹⁸⁰ 't Hoen, *supra* note 136.

¹⁸¹ Doha Declaration, Paragraph. 6, *available at* https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

¹⁸² *Id.*

¹⁸³ Trademarks, WIPO, *available at* <https://www.wipo.int/trademarks/en/>.

protecting an invention or a work of authorship, and to avoid confusion about the origin of the goods.¹⁸⁴ Although, in modern times, the function of Trademark extended to indicate the origin of the good, guarantee the quality, serve as a marketing and advertisement device, or respond to the consumer liabilities.¹⁸⁵ The WIPO member states have accepted this definition, and each member state has its own Trademark Office to register trademarks within its country.¹⁸⁶ In addition to the national system that each country has, the WIPO has an international system for registering cross-border trademarks called the “Madrid System” which protects trademarks at the international level.¹⁸⁷

B. Trademark Subject Matters

The WIPO illustrates that “a word, combination of words, letters, and numerals can constitute a trademark, it could also be drawing, symbols, three dimensional features- like shape and packaging of goods, non-visible sign like sounds and fragrances, or color shades used as distinguishable features in limited occasions.”¹⁸⁸ The United States became a member of the WIPO’s Madrid System on November 22, 2003, while Afghanistan became a member of the Madrid System on June 26, 2018.¹⁸⁹

In the United States, a Trademark could be a word¹⁹⁰ or name,¹⁹¹ but to Trademark a name, the applicant must show that the public will associate that name with their products.¹⁹² Moreover, colors¹⁹³ and dressing, which is about multiple color schemes, can also be eligible to register as Trademarks.¹⁹⁴ A product’s design can also be registered as a Trademark if the applicant shows some amount of distinctiveness that people associate that design with the applicant’s products.¹⁹⁵ However, generic words¹⁹⁶

¹⁸⁴ *Time, Inc. v. Motor Publications, Inc.*, 131 F. Supp. 846 (D. Md. 1955).

¹⁸⁵ *Reddy Communications v. Environmental Action Foundation*, 477 F. Supp. 936 (D.D.C. 1979).

¹⁸⁶ Trademarks, WIPO, *supra* note 182.

¹⁸⁷ *Id.*

¹⁸⁸ Trademarks, WIPO, *supra* note 182.

¹⁸⁹ WIPO | Madrid, Madrid – The International Trademark System (2021), *available at* <https://www.wipo.int/madrid/en/>.

¹⁹⁰ *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 4 (2d Cir. 1976).

¹⁹¹ *Int'l Kennel Club of Chicago, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1080 (7th Cir. 1988).

¹⁹² *Findlay v. David B. Findlay, Inc.*, 385 U.S. 930 (1966).

¹⁹³ *Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159 (1995).

¹⁹⁴ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

¹⁹⁵ *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 528 U.S. 808 (1999).

¹⁹⁶ *Elliott v. Google, Inc.*, 138 S. Ct. 362 (2017).

like “Asprin”¹⁹⁷ and words that are functional like “computer programs” are not illegible to register as Trademarks, unless they show secondary meaning- that people will associate that generic word with their products.¹⁹⁸ While, arbitrary words (made up, or imaginative words) are strongly registerable as Trademarks.¹⁹⁹ Trade dress are registerable if they are inherently distinctive, if not, they have to show secondary meaning. Furthermore, a single color and product designs are never inherently distinctive, and the applicant always has to show secondary meaning. Combinations of colors could be distinctive, in which case the applicant does not have to show secondary meaning.

The Afghan laws define trademark similarly as the WIPO, and states “[t]rademarks consist of (one or more) names, words, signatures, letters, figures, drawings, symbols, titles, seals, pictures, inscriptions, advertisements or packs or any other mark or a combination thereof.”²⁰⁰ It adds that ownership of a trademark belongs to the person who used it first.²⁰¹ However, Trademarks in the United States were developed via common law only through commercial use, they could be enforced only within the geographic area in which the commercial activity of the owner was conducted and only between products that were similar enough to be competitive.²⁰² Afghanistan’s Trademark law protects well-known marks, even if they are foreign marks from other countries, and does not allow registration of similar or deceptive marks.²⁰³

1. Refusal to Register

Although the courts will evaluate whether a mark is registerable, considering the common law approaches, the statute law in the United States also lists the absolute and presumed bars for refusal to register a Trademark.²⁰⁴ Sections 2(a)-(d), 2(e)(3), and 2 (e)(5) are absolute bars that the United States Patent and

¹⁹⁷ *Bayer Co. v. United Drug Co.*, 272 F. 505 (S.D.N.Y. 1921).

¹⁹⁸ *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001); *Warner Bros. v. Gay Toys, Inc.*, 658 F.2d 76 (2d Cir. 1981).

¹⁹⁹ *Id.*

²⁰⁰ *Afg. Trademark law*, at art. 2.

²⁰¹ *Id.* art. 19.

²⁰² *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916).

²⁰³ *Id.* art. 7.

²⁰⁴ 15 U.S.C. § 2 (a, b, c, and d), and (e) (1-4).

Trademark Office (USPTO) will not register that mark. For instance; if the mark is immoral,²⁰⁵ or deceptive,²⁰⁶ or scandalous,²⁰⁷ however, the Supreme Court in *Iancu v. Brunetti* decided that USPTO shall not block a trademark only merely because it believed that the proposed mark is offensive;²⁰⁸ or if the mark is disparaging or falsely suggests a connection to the designated goods or services,²⁰⁹ they are not registerable. As well as, if the mark is a geographical indication, it is not registerable.²¹⁰ A functional mark that does not show secondary meaning, is not registerable either.²¹¹

Furthermore, Article 6 of the Trademark Law in Afghanistan, covers fifteen items that are not eligible for trademarks in Afghanistan: (1) national flag; (2) adytum or religious symbols; (3) picture of national figures; (4) words and phrases that could be confused with Governmental departments; (5) marks of an official organization; (6) anything against the morality of public order; (7) common traditional names; (8) geographical names; (9) name, surname, and photo of a third party; (10) misleading marks; (11) imaginary, imitative or forged names; (12) marks related to juristic or legal entities; (13) another person's mark; (14) marks for identical goods: and (15) marks which are used for a specific purpose.²¹²

C. Trademark Term (Duration of the Protection)

The trademark registration would grant an exclusive right to the owner of the mark, to use, sell, or license it to another person.²¹³ Trademarks do not have limited terms for protection, as each registration would give exclusive rights for ten years, with the extension possibility for other 10 years, when the first term comes to an end.²¹⁴ Both the U.S. and Afghan laws similarly suggest that the term of protection is ten years, renewable when the term comes to an end.²¹⁵

²⁰⁵ *Id.* § 2(a).

²⁰⁶ *Id.* § 2(b).

²⁰⁷ *Id.* § 2(c).

²⁰⁸ *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

²⁰⁹ *Id.* § 2(d).

²¹⁰ *Id.* § 2(e).

²¹¹ *Id.* § 2(e)(5).

²¹² *Id.* at art. 6.

²¹³ Trademarks, WIPO, *supra* note 182.

²¹⁴ *Id.*

²¹⁵ *Id.* at art. 18.

D. Challenges of the LDCs

Trademarks are jurisdictional and they indicate the source of a product, rather than protecting an invention or work of authorship. Therefore, Trademarks do not pose challenges to the LDCs, as the Patent and Copyright Protections do. However, it does not mean the LDCs do not face any challenge when it comes to Trademark related matters. Accessing the international market is a significant challenge for LDCs. Article II of the Marrakesh Agreement, establishing the WTO, set out the scope of objectives that the WTO has, which includes instituting the framework to conduct trade relations among member states.²¹⁶ The Marrakesh Agreement also highlights that the WTO will facilitate international transactions, provide a forum for trade negotiations, administer dispute settlements between member states, and administer trade policies and mechanisms.²¹⁷ The LDCs can hardly meet the WTO standards to become members of the WTO, that is why the WTO has 164 members, and only nine of them are LDC, including Afghanistan which is the ninth LDC in the WTO.²¹⁸

Afghanistan is a member of the WTO since July 29, 2016,²¹⁹ while Afghanistan applied for the WTO membership in 2004. It took twelve years for Afghanistan to work on its legal and institutional reforms to improve the country's business, enable the environment, and establish competitiveness with the help of USAID.²²⁰ Although lack of having facilities to process Afghan products inside the country, most of the formers tends to sell their product to the neighboring counties at a very low price.²²¹ Then, the neighboring countries would have to process Afghan products and export them to the international market under their own name and Trademark.²²² For instance, a news report from 2017 shows that Pakistan

²¹⁶ Marrakesh Agreement, Art. 2, WTO, available at https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleXII (last visited April 10, 2021).

²¹⁷ *Id.* at art. 3.

²¹⁸ WTO News, *Afghanistan to Become 164th WTO Member on 29 July 2016*, available at https://www.wto.org/english/news_e/news16_e/acc_afg_29jun16_e.htm#:~:text=Afghanistan%20has%20notified%20the%20WTO,was%20deposited%20at%20the%20WTO (last visited Apr. 10, 2021).

²¹⁹ Afghanistan and the WTO, WTO, available at https://www.wto.org/english/thewto_e/countries_e/afghanistan_e.htm.

²²⁰ USAID Support to Afghanistan's WTO Accession, USAID, available at <https://www.usaid.gov/news-information/fact-sheets/usaid-support-afghanistan%E2%80%99s-wto-accession>.

²²¹ Zabihullah Jahanmal, *Big Part of Afghan Jalghoza Goes to China By Name of Pakistan* (Aug. 13, 2017), Tolo News, available at <https://tolonews.com/business/big-part-afghan-jalghoza-goes-china-name-pakistan>.

²²² *Id.*

imported more than 25,000 tons of Jalghoza from Afghanistan, for the price of 8 USD per kilogram, and then it sells it to China for more than 30 USD per kilogram.²²³

E. Conclusion

Trademark is a jurisdictional matter. While the United States follows common law on determining what could be registerable as Trademark, it follows federal statute in deciding which marks are not registerable or the process of registering a Trademark. The United States also looks at the prior use of the mark, based on which grants the registration. In Afghanistan, the Afghanistan Trademark registration law governs what could be registerable as a mark, or not. As well as, it illustrates the process of the register along with the Afghanistan Canter for Business Registration and Intellectual Property (ACBR-IP). Although, DC's Trademark system would not negatively impact the LDCs' trademark registration or activities but accessing the international market does. As most of the LDCs do not meet the WTO standard to join the WTO, they are less involved in international business-related negotiation, or transaction. Hence, they have to sell their product at a lower price. While the purchasing countries can process those products and export them under their own name and Trademarks.

V. CONCLUSION

The IP protection, indeed, recognized the intellectual work of the author, inventors, and creators. It indeed encourages more people to create novel inventions, work for the advancement of science and technology, or create entertaining content. It also, indeed, contributes to the development of creative industries or the economy of a country, which will eventually promote the country's social, academic, and political situation too. Although, IP does not impact all countries in the same way.

To have a strong IP system, a country needs to have a good economy, better access to technology and resources, so that it can comply with the international standards, or to start benefiting from IP. It will vary considering the countries' economic situation. The DCs can get the most out of the IP framework, the

²²³ *Id.*

developing countries can have some advantages, but the LDCs are the ones that not only cannot benefit from IP protection, but they could be disadvantaged in some manners too.

Although this paper briefly highlighted how IP protection can disadvantage LDCs, this is not a well-detailed paper. Each of the sections pointed out in this paper, is as deep and detailed that one can write a book on it. This paper that broadly compares the United States IP law with the IP laws in Afghanistan, highlights the biggest challenge that LDCs can face in each patent protection, copyright protection, or Trademark related matter.

Copyright protection guarantees the development of creative industries and the creative economy in most European and American countries. At the same time, it limits the creativity in LDCs as they do not have access to information and technology, neither they can afford to have them.

Similarly, patenting inventions guarantee more research, investigation, development, advancement of science and technology. At the same time, it can be disadvantaging most people in LDCs, even breach their human rights. For instance, patenting pharmaceutical that encourages pharmaceutical companies, it also gives them the power to control the market, price, availability, and export/import of medicines.

Trademark is a jurisdictional matter that country's advancement does not negatively impact the other one, but access to the international market matter. The WTO has high standards that most of the LDCs cannot join the WTO, hence they do not have the same trading opportunities as the DCs or developing countries have. Therefore, this matter needs as much attention as the Patent or Copyright.