

Position Paper

Introducing New Intellectual Property Rights Laws and Robust Implementation Mechanisms will bolster Investment Confidence in Information and Communications Technology in Palestine

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I. Introduction

Protection of intellectual property rights (IPRs) is a cornerstone for achieving economic prosperity in a number of sectors, especially the Information and Communications Technology (ICT) sector. By far, the ICT sector is based on new ideas, new products and processes-the protection and commercialization of which are crucial for provoking additional innovation and creativity in the industry, and stimulating profit-making interventions in the field.

The Palestinian legal and commercial landscape includes a handful of statutes and a modest set of case law regulating the protection of IPRs. The IPR legislation governing this dynamic field, however, encompasses a number of defects and shortcomings that are yielding it to be ineffective and inefficient, and therefore incapable of providing the necessary protection and assurances to investors in the ICT business. Laws governing the protection of IPRs in the West Bank are different than those applicable in Gaza. These laws are old and outdated. They are often unclear, and fail to delineate powers between the different relevant Palestinian Authority (PA) agencies. Ministry officials and personnel handling IPR matters, and judges adjudicating related cases, are often unfamiliar with up-to-date IPR matters and terminologies. Those shortcomings in the laws, coupled with the lack of Palestinian control over border crossings, as well as the lack of respect for and adherence to rule of law, are transforming the Palestinian landscape into a safe haven for IPR sharks and counterfeiters.

This position paper argues that the current Palestinian climate is too risky for local and foreign ICT investors to tap resources into the Palestinian ICT sector. Unless the current legal and regulatory landscape and the implemented mechanisms and tools are subjected to a transformative overhaul, the growth of the Palestinian ICT sector will remain modest; the Palestinian economy will continue to lose significant opportunities in the forms of new investments in the sector, job opportunities for professional and talented Palestinian men and women, and substantial revenues for the treasury in the form of direct and indirect taxation.

II. Distinct Laws and Regulations are Applied Throughout the West Bank and Gaza

There are different sets of laws that govern IPR protection throughout the West Bank and Gaza. In the West Bank, for example, the Jordanian-enacted laws on trademarks (1952), goods marks (1953), and patents (1952), regulate matters related to trademarks, good marks and patents, respectively. In Gaza,

these matters are governed by the British Mandate-enacted Trademarks Law (1938), Goods Marks (1929), and Patents (1947), respectively. Efforts to harmonize relevant laws and procedures between West Bank and Gaza have been stalled due to the current political stalemate in Palestine, especially in the legislative branch.

The discrepancy between rules applied in the West Bank and those applied in Gaza results in multiple procedures for registering patents, trademarks, etc throughout the same country, as well as different levels, standards, and criteria of protection in each region. Furthermore, multiple sets of records exist between the two regions, resulting in further confusion among intellectual property owners and the general public, as well as dilution in the extent of protection rendered there under.

Not only does this shortcoming disrupt business between the West Bank and Gaza, but it also presents additional challenges before ICT investors, who are often never sure about the level of protection they possess and the geographic scope thereof under the different legal and regulatory schemes.

III. IPR Laws Applicable in Palestine are Old and Outdated

As noted above, trademark, goods marks, and patent laws applicable in the West Bank and Gaza were enacted in the first half of the last century. Copyright laws, applicable both in the West Bank and in Gaza, even extend beyond that. The Ottoman-enacted Copyright Law of 1911 is still applicable in Palestine, along with the British Mandate-enacted law of 1924. These laws are old and outdated. The protection they provide to IPRs is minimal. In many instances, they fail to provide protection that would cater to new technological developments. In other instances, they fail to address arising matters that characterize the ICT era, or to find solution to problems and issues generated by the sector. Examples of new ICT mediums for which the existing law fail to accommodate include software code and processes protection, software escrow agreements, licensing agreements, cyberspace, new mediums for publications, etc.

In addition to diluted protection and ambiguous applications, this shortcoming is manifesting itself in jurisdictional conflicts among different PA ministries and instrumentalities. The vacuum created by the absence of an appropriate legal framework governing the software industry in Palestine, for example, has resulted in a conflict between the Ministry of National Economy and the Ministry of Culture over the identity of the competent ministry that shall be responsible vis-à-vis the management of software-copyright matters. A new legal structure is needed to clearly define roles and responsibilities of different government agencies in that regard.

As noted above, efforts have been underway to modernize IPR laws in Palestine. However, these efforts have witnessed little progress, due to the prevailing political and security conditions in Palestine, especially the stalemate in the operations of the Palestine Legislative Council. Absent a new set of laws that would elevate protection bars to ensure maximum protection for owners of trademarks, patents, etc, the current legal environment will fail to attract ICT investors to engage in projects in Palestine as the IPR legal environment is not in par with applied legislation in modern industries or those applied in neighboring countries such as Jordan. An IPR leader from the public sector should be identified to be the champion to introduce new laws, to reflect the revolutionary developments in the ICT sector, and introduce mechanisms for protection of ICT-related IPRs.

IV. PA Ministries’ Officials and Judges Lack the Necessary Knowledge and Training in IPRs

PA agencies and instrumentalities managing IPR registration, protection and other IPR-related aspects lack qualified professional cadre that are specialized in IPR field in general, and ICT-related IPRs in particular. Ministry officials are often unfamiliar with matters related to software, cyberspace, and other “twenty first century products and services”. Similarly Palestinian judges and lawyers lack the necessary knowledge and experience in handling IPR-related cases, as the number of IPR disputes submitted before Palestinian courts, especially copyright-related disputes, is modest. Unfamiliarity in the industry is more severe when IPR disputes involve ICT-products or services, as neither the judges nor the lawyers possess any of the necessary exposure to the industry.

Consequently, ICT investors are always skeptical of having their IPR disputes resolved before Palestinian courts, or of running the risk of having any disputes where Palestinian courts could get involved, to begin with. This climate is not conducive for building trust for investment in the Palestinian ICT industry, as investors should always be confident that, in case a dispute arises vis-à-vis any of their transactions or operations, the dispute will be resolved by knowledgeable and competent judges.

Indeed, any multi-national ICT company considering direct investment in Palestine would consider the IPR legal framework and environment. The existence of this infrastructure message the expectation that any innovation spun out Palestine as a result of direct investment in Palestine will be governed best if Palestine applies IPR legal practices that has been the norm in modern industries or at least in par with those IPR laws relevant to ICT applied in regional countries such as Jordan whereby such enactment of laws where pre-requisites to attracting major multinational companies to operate or invest in the ICT sector in Jordan such as Microsoft and Oracle.

V. The Palestinian Authority Lacks Control Over Border Crossings and Has Stopped Short of Maintaining Law and Order and Rule of Law in the West Bank and Gaza

In accordance with the Oslo Accords signed between the Palestine Liberation Organization (PLO) and the Government of Israel (GOI), Israel maintained control over all border crossings between Palestine and neighboring countries, including with Israel itself. To that end, Israel's role encompasses, among other things, collection of custom duties from Palestinians on the border crossings on behalf of the PA. Accordingly, the PA lacks any real control over any of the points of entry or exit of the territories under its jurisdiction. Consequently, the PA is unable to enforce any custom policies it decides to adopt, or to employ mechanisms at the border crossings to fight against entry of counterfeited and other forms of illegal and illicit products. Not surprisingly, the Palestinian market is usually dumped with all kinds of counterfeited products.

Given the current political and security conditions throughout the West Bank and Gaza, the PA has been incapable or unwilling at the time to exercise force to achieve rule of law. IPR Laws are often ignored, and court decisions are only enforced on occasional basis. Many Palestinians are not even aware that it is illegal to knowingly purchase counterfeited products.

The existence of this large scale of counterfeiting industry in Palestine, along with the lack of mechanisms employed to fight against it, or to penalize the violators, is transforming Palestine into a safe haven for counterfeiters and smugglers of counterfeited goods. No multinational investor or company would want to establish an ICT business in such climate. Furthermore, the existing counterfeiting hampers the local development of the existing software industry.

VI. Recommendations and Way Forward

The IPR legal and regulatory framework may not be the panacea to attract multinational investors and companies particularly in the ICT sector, but the Palestinian IPR landscape needs immediate attention in order to make it compatible with the emerging and ever evolving ICT sector. The IPR legal and regulatory framework needs to be updated, modernized, harmonized, and geared towards investment-friendly policies and strategies. The PA should seek to tighten its actions against counterfeiters and IPR violators. In the absence of such immediate developments, the Palestinian landscape will fail to attract investors in the ICT sector. Current investors are seeking more IPR-friendly jurisdictions, where they can get better protection for their rights. Unless immediate action is taken, the capital leakage outside Palestine will continue to grow.

Below are few suggested courses of action that are believed to be needed in order to transform Palestine into an IPR-friendly arena. The list below is not exhaustive, but provides examples of actions that, if implemented, are believed to make a significant shift in the perception of Palestinian and foreign ICT investors towards the Palestinian landscape.

A. The PA Must Harmonize IPR Laws, Regulations and Procedures between the West Bank and Gaza

To that end, the PA should:

- Seek to enact new IPR laws that would harmonize policies, procedures and standards and levels of protection between the West Bank and Gaza
- Establish unified registries for trademarks, goods marks, trade names, et cetera, which would cover both the West Bank and Gaza

B. The PA Should Enact Modern IPR Laws that Provide Protection for New Categories of Products and Processes, Be in Harmony with Relevant International Agreements, and Ensure Delineation of Powers Among Relevant PA Agencies

To that end, the PA must:

- Replace the existing IPR laws with modern laws that provide protection of intellectual property rights embedded in all forms and medias
- Ensure that the new laws are in synch with relevant international treaties
- Work towards Palestine's entry to the relevant IPR international treaties
- Introduce progressive and far reaching levels of protection into the Palestinian legal system in order to stimulate and promote research, innovation, entrepreneurship, and investment in the ICT sector
- Introduce tools within the legal and regulatory framework, and promote mechanisms that facilitate and encourage coordination and discourse between the public and private sectors on ICT-related IPRs
- Stimulate debate within the ICT sector on IPR policies, through organizing and conducting workshops, conferences and similar fora

C. The PA Should Ensure that Government Officials Handling IPR Matters and Judges Resolving IPR Disputes Possess the Necessary Technical Knowledge and Training

To that end, the PA must:

- Provide training for relevant government employees on IPR laws, international standards and protection, as well as on ICT-related IPRs
- Provide training for judges and lawyers on IPR, as well as ICT-related IPRs
- Establish courts that are specialized in IPR laws, with special emphasis on ICT-related IPRs

- Encourage resolving IPR-related disputes through alternative means, such as mediation and arbitration, and support commercial mediation and arbitration centers
- D. The PA Should Promote Principles and Practices of Rule of Law, Enhance Implementation of Relevant Laws, Impose Enforcement of Court Decisions, and Strengthen Controls over Incoming Goods

To that end, the PA should:

- Revisit the existing arrangement on its border crossings, and seek to alter them towards tighter Palestinian control over incoming products
- Coordinate with the Palestinian private sector and Palestinian industries towards identifying and eradicating sources of incoming counterfeited products
- Introduce and implement strategies to promote and maintain rule of law, provide incentives for adhering to IPR laws, and impose severe penalties upon violators
- Inculcate a culture of respect for rule of law, and raise awareness on the importance and benefit for the local population of respecting IPRs.