

The clean slate

Drafting Afghanistan's first copyright laws



Patricia Wick and Jacqueline Klosek, from US firm Goodwin Procter, are members of the legal team developing Afghanistan's first-ever copyright law as part of a project to rebuild the legal framework of the war-torn country. Here, they recount the process and priorities

It is difficult to grasp what is occurring in Afghanistan from today's sound bites. We hear that Bin Laden is still at large. We hear of violence and struggle. We also hear vague reports of "rebuilding." It is easy to imagine the rebuilding of physical entities such as roads, hospitals, schools, government offices. Perhaps a little more difficult to imagine is the rebuilding of a legal system, or in some cases the creation

of what first-world countries would consider to be a legal system.

The creation of a copyright law may seem to be last on the list of urgent laws to have in place. Its importance, however, is twofold. First, establishing the protection of intellectual property rights (IPRs), including copyright laws, can help attract direct foreign investment to Afghanistan. Second, establishing the

protection of literary and artistic works, along with other IPRs, will benefit the Afghan people, providing them with "property" they before have been unable to protect.

These seemingly separate international and national goals are not independent. They serve one circular goal: increased direct foreign investment will encourage innovation, including literary and artistic innovation, and such increased innovation will encourage direct foreign investment.

Establishing a copyright law still may seem minor in comparison with the more urgent needs of the Afghan people. The Transitional Islamic State of Afghanistan (the Afghanistan Government), however, has recognised copyrights importance for its nation.

An overview of the project

The Afghanistan Transitional Commercial Law Project is a joint project of the Center for International Management Education (CIME) and the American Bar Association - Asia Law Initiative (ABA-Asia). The Project is a component of the Private Sector Development Task Force for Afghanistan, which is being coordinated through the Afghan Embassy in Washington, DC.

The goal of this initiative is to contribute towards encouraging foreign direct investment in Afghanistan by assisting

In summary

- The authors are members of the Intellectual Property Working Group of the Afghanistan Transitional Commercial Law Project, a joint initiative by the American Bar Association and Center for International Management Education designed to rebuild the legal foundation for Afghanistan's economy, and particularly, promote international investment
- Having rebuilt the Afghanistan trademark law from existing foundations, the lawyers tasked with protecting copyright were faced with a clean slate – Afghanistan has never had a copyright law. Project members determined a variation of the Qatar/UAE copyright law, with a sprinkling of US copyright law, placed Afghanistan in the best position to join the international copyright community
- Special considerations included the need to respect the foundation of existing law in the Islamic Sharia code, and to balance the urgent need for economic growth with public interest considerations. The controversial issue of folkloric protection was also provided for, due to Afghanistan's rich tradition of folklore

Afghanistan in developing its commercial laws. It is anticipated that the end result of this project will be the implementation of a new "code of commerce" covering the following areas: Law on Domestic and Foreign Private Investment; Contract; Real Property; Personal Property; Intellectual Property; Commercial; Banking; Customs/Trade; Taxation; Corporate; Partnership; Agency; Registration of Business Entities; Bankruptcy; Labor/Employment; Antitrust and Unfair Business Practices; Environmental/Natural Resources; Law of State Enterprises; and Arbitration.

The authors are members of the Intellectual Property Working Group of the Project, a group that is focused on assisting Afghanistan in developing and implementing legislation concerning intellectual property and technology. Specifically, the initial tasks of this working group were to develop new copyright and patent legislation and revise Afghanistan's existing trademark legislation. Since the assignment of initial tasks, the project has been broadened to include the development of new e-commerce and electronic signatures legislation, as well as the provision of assistance on issues related to the protection of Afghanistan's cultural heritage by, among other things, assisting Afghanistan in its efforts to recover certain cultural objects that have been plundered.

While copyright, trademark and patent law are considerably different, we found it useful to develop a common strategy in addressing each of these areas.

First, we spent considerable time researching and reviewing the copyright, patent and trademark legislation of other nations that enjoy certain similarities with Afghanistan. Our goal was to identify existing legislation that could serve as a useful model for Afghanistan. Once we identified such legislation, we presented our recommendations to the Afghanistan Government for its consideration.

Then, upon receipt of the Government's approval of our initial recommendations, we then began to propose revisions to Afghanistan's trademark legislation and to draft new copyright and patent legislation for the country.

In all stages of the project, we were highly cognizant of the need to maintain the continued involvement of the Afghanistan Government. This was fostered through a number of working sessions, as well as regular communication with key officials of the Afghanistan Government.

Because the effectiveness of IP laws is closely tied to the degree to which such laws are administered and enforced, once the draft

legislation is finalised, we will be working with the Afghanistan Government to establish procedures for administering and enforcing intellectual property rights in Afghanistan.

We also expect to advise the Government on the establishment of administrative offices and to provide training to the country's new intellectual property professionals. Afghanistan has not had a patent or copyright system in the past, and its dated trademark legislation has not been administered in a consistent fashion. The country has an intelligent and enthusiastic work force, but proper training on the administration and enforcement of intellectual property rights is desperately needed.

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This article is part of a series of articles on IP initiatives in Afghanistan. In the October issue of *Trademark World*, Intellectual Property Working Group team members reported on the progress that has been made in revising and updating Afghanistan's existing trademark legislation. In this article, we will present information regarding our efforts to develop new copyright legislation for possible implementation in Afghanistan. We will also examine our efforts to develop a system for the administration and enforcement of copyright in Afghanistan.

In the December issue of *Patent World*, other members of the Intellectual Property Working Group will present information on our efforts to develop new patent legislation for possible implementation in Afghanistan.

The clean slate

Our efforts in responding to Afghanistan's need for a system of copyright were different from our work in the area of trademarks because Afghanistan has never had copyright legislation. While commencing with a clean

slate does offer certain advantages, it also presents distinct challenges.

We quickly realised that, in aiding a country with no history of copyright law, our task would consist not only of drafting appropriate legislation but also of assisting Afghanistan to understand the role copyright protection could play. We felt that the best way to work towards accomplishing both goals was to start with model legislation from other countries. We concluded that by presenting the Government officials with appropriate model legislation, we would be able to demonstrate how copyright is administered in other countries and also provide ourselves with an appropriate starting point for the creation of new legislation for Afghanistan. Having reached this conclusion, we set out to locate the most appropriate model legislation for Afghanistan's circumstances.

We commenced our review of model legislation by focusing on the most obvious copyright laws, namely those of the United States and key European countries, including Germany and France. Historically, Afghanistan's and other Middle Eastern Countries' commercial codes, including IP laws, have drawn upon both German and French law. This, coupled with the understanding that Afghanistan is a country in which Islamic traditions are held in great esteem,¹ led us to next examine the copyright legislation of several Islamic and/or Arabic countries including the United Arab Emirates (UAE), Egypt and Qatar.

Further, the working principals and guidelines for the overall Project recommended UAE's and Qatar's laws as models to follow in cases where no Afghanistan law had previously existed, because they represented legal systems that incorporate Islamic, civil and common law traditions. Also, both the UAE and Qatar have successfully attracted direct foreign investment while balancing local traditions and the demands of modernity.

We considered the provisions of these laws, the theories behind them and the procedural aspects of each of these laws in light of Afghanistan's developmental goals. Copyright law, however, enjoys significant harmonisation throughout the world due to strong international treaties. Therefore, our main goal was to find a clear expression of general copyright law principles suitable for Afghanistan's current position. Whether this was more adeptly accomplished by using a highly evolved copyright law, like France or the US, or a more recent Middle Eastern model was considered.

Based upon our review, we concluded that Afghanistan should consider following the

French-type model of copyright protection, as embodied by current copyright laws of Qatar and the UAE, when developing its own copyright legislation. It was determined that these interpretations of the French copyright law provided a pared down expression of copyright from which to start. Notwithstanding our overall recommendation of the French-type model, and as explained in more detail below, we additionally recommended that the US model be followed for the portion pertaining to the “subject matter” of copyright protection.

We concluded that this formulation would help to address Afghanistan’s special needs for the implementation of a copyright system that is not unduly burdensome from an administrative perspective, yet still effective in providing foreign investors and domestic innovators with confidence that their IP will be afforded sufficient protection in Afghanistan.

We recommended to the Government officials that Afghanistan consider the copyright laws of the UAE and of Qatar as two possible models to be used when developing the non-“subject matter” portion of its new copyright legislation. Notably, these models distinguish between the economic and moral rights of authors and also delineate between copyright and “neighboring rights” – those rights at the margin of copyright, thus “related” or “neighboring” rights, eg, performances, recordings, broadcasts.

Although the copyright laws of Qatar and UAE are similar in many respects, we chose both for a variety of reasons. First, we concluded that the copyright law of the UAE² would serve as a useful model for Afghanistan because it is clear and well organised. It also addresses many of the aspects of copyright protection that we would recommend for inclusion in Afghanistan’s copyright law.

Notwithstanding the advantages of the copyright law of the UAE, we concluded that certain of its provisions should not be included in the Afghanistan law. For instance, we recommended the removal of the law’s provisions for collective administration. We also suggested deleting or at least revising some of the anti-circumvention, database protection, and registration provisions of the UAE law. Furthermore, we concluded that certain provisions, including a clarification of the definitions of national treatment and the concept of work made for hire, would need to be added to the UAE law in order to make it more appropriate for Afghanistan.

We also recommended the copyright law of Qatar.³ Like the law of the UAE, it is clear and well organised. Interestingly, Qatar’s law also contains rather detailed provisions regarding

the protection of folklore. While other laws, including the copyright law of the UAE, also address folklore, Qatar’s law addresses such issues in a more extensive fashion. Qatar’s law also contains interesting provisions on national treatment. Specifically, the law provides that a work may be afforded national treatment if published in Qatar within 30 days after first publication in another state.

Although the law of Qatar has a number of positive attributes, it also has a number of provisions that would need to be changed if such law were to serve as an appropriate model for Afghanistan. For instance, we recommended the deletion of some of the anti-circumvention provisions and the modification of some of the administrative procedures.

We concluded that either the copyright law of Qatar or the UAE would represent a good model, as to basic form, from which to commence when drafting new copyright legislation for Afghanistan. In addition to the fact that the copyright laws of these countries are clear, well-organised and legally sound, it is important to note that both of these countries have proven capable of attracting a considerable amount of direct foreign investment. Unique to both countries is their recent implementation/improvement of their IP laws, due in large part to their ascension into various international treaties and organisations.

While focusing on our two model laws, we also incorporated provisions from other copyright laws as necessary. For instance, we recommended the general US “subject matter” provision, which provides for copyright protection upon fixation of the work in any tangible medium. We concluded that such a provision would be less burdensome than the French “work of the mind” requirement which requires no fixation whatsoever.

It is our belief that a variation of the Qatar/UAE copyright law, with a sprinkling of US copyright law, will place Afghanistan in a position to join any of the major copyright treaties.

Important considerations

The Afghanistan Government has not yet determined whether it will join the WTO. As a member of the WTO, even as a least-developed country (LDC), Afghanistan must meet certain international legal standards. For our purposes, we wanted to ensure that if Afghanistan were to join the WTO that the copyright laws would be in compliance. Regardless of whether Afghanistan were to become a signatory to the Berne Convention or Agreement on Trade Related Aspects of Intellectual Property (the TRIPs Agreement), it would be subject to these international instruments through its membership in the WTO.

When a country joins the WTO, it accepts all of the WTO agreements in a single undertaking, including TRIPs.⁴ Under the TRIPs Agreement, WTO member states must comply with the substantive obligations of the main conventions of WIPO, namely the Paris Convention on industrial property, and the Berne Convention on copyright in their most recent versions.⁵ As a LDC though, the WTO agreement allows countries different periods of time to delay application of its provisions. For example, LDCs are granted a longer transition period than developed countries, with a delay until 1 January, 2006 and the possibility of an extension of this date.⁶

The United Nations recognises 49 countries around the world as being LDCs, 19 of which – including Afghanistan – are not yet members of the WTO.⁷ Therefore, we opted to prepare Afghanistan for what could potentially be its ascension to the WTO. Also, because of global copyright law harmonisation, including in the Middle East, to not prepare Afghanistan to comply with WIPO obligations would only hinder the attraction of direct foreign investment. Thus, the inclusion of such provisions to prepare Afghanistan for ascension to the WTO comes at a low cost and sets up Afghanistan for a future in the global copyright community.

Another important consideration in drafting the new law is compatibility with the legal principles already in place. The Islamic foundation of law in Afghanistan is referred to as the “Islamic Sharia.” Although there were no major changes needed to align a simplified French-model copyright law with the Islamic Sharia, there were small, but necessary changes. For example, in defining the term “Year,” which dictates the term of protection for copyright, an Arab member on our team pointed out that to define it as a “calendar” year was inappropriate. Instead, it should be defined as a “Gregorian” year. We are also required to consider and incorporate Islamic principles on the rules of inheritance of author’s rights.

Protection of folklore has been a controversial area of copyright law. For a country like Afghanistan, with over 1,000 years of folklore, such protection was attractive. Our research unearthed no good model to follow. If anything, folklore in the future may be a subject of *sui generis* legislation. However, keeping in mind Afghanistan’s current position, we proposed a simple folklore provision for inclusion into the copyright law.

This provision provides a non-exclusive list of folklore items such as oral expressions, including tales, popular poetry and riddles, architectural forms, and tangible expressions, including items such as jewelry, carpets and textiles. The provision also

dictates that the Transitional Islamic State of Afghanistan is the "Author" of these works, and charges it with protecting such works by all legal means. We are still debating the inclusion of a provision that would provide an automatic license enabling the Afghan people to exercise an author's rights in these folkloric works.

As the Afghanistan Government continues to reinstall government operations in the wake of the Taliban leadership, the opportunity for corruption is palpable. The abuse of a newly-established law is especially possible. In drafting the copyright law, we are attempting to reduce the opportunity for such corruption by limiting any sort of discretionary decisions for protection or registration. For example, as we consider various provisions for preventative measures and sanctions for copyright misuse, we are limiting the amount of judicial or administrative involvement and clearly delineating what is actionable.

There are two interrelated copyright issues unique to Afghanistan as a LDC: fair use and anti-circumvention provisions. Although LDCs certainly produce copyrighted works, they tend to import more works than they produce. Accordingly, while it is important that Afghanistan's copyright law provide sufficient protection for owners of copyrights, it is essential that laws not be so restrictive so as to limit the ability of the local populace to use copyrighted works.

In 2002, the UK Government think tank, the Commission on Intellectual Property Rights, which focuses on IPR policy and developing countries, published a report entitled *Integrating Intellectual Property Rights and Development Policy*.⁸ This sparked a healthy debate on the appropriate strength of IPRs in developing countries, including copyright protection and the level of fair use allowed.⁹ We have attempted to take in to account the various reactions this report produced.

As a result, the draft legislation contains

detailed provisions that describe the permitted types of "fair uses" of copyrighted works. It also contains an incentive for authors to translate their works into local languages and reproduce their works to meet the Afghan people's demands. Borrowing from Qatar's copyright code, if the author is unable to translate or reproduce to meet demand, after varying periods of time, depending on the type of work, the Afghanistan Government can authorise such actions with remuneration paid to the author. No anti-circumvention provision is incorporated into the draft code at present, but is under consideration.

Infrastructure and education

Afghanistan is still considering whether they want to create individualised offices for copyright, trademark and patent governance, or whether they want to create one clearing house governing all areas of IP. For the sake of simplicity and for success, it is our working group's opinion that a clearing house, a sort of "one-stop shop," leverages Afghanistan's limited resources and provides foreign investors with an efficient office with which to correspond. Members of the working group will remain available to consult with Government officials on the establishment and administration of the Copyright Office, irrespective of the precise form that office takes.

Ultimately, when the Intellectual Property Working Group members from the Project have completed their modification of the copyright laws to suit Government officials, they will disengage, and the Government officials will be left to formalise the processes and procedures of forming functional, central and regional copyright offices, whether independent or part of a centralised intellectual property office. Project team members will, however, continue to be available to consult with Government officials as needed.

Even with clear and concise regulations, the

administrative and judicial personnel will have to be properly trained to implement and enforce the copyright laws on a daily basis. Members of the Project and other groups will coordinate with Government officials to organise the training of local Afghans who will be responsible for the administration and enforcement of Afghanistan's copyright system.

The hope is that by providing a large group of both administrative personnel, managers and judicial authorities with comprehensive initial training, local Afghans will be then equipped to train future generations.

Because the actual implementation of the laws and regulations is probably more important than the laws and regulations themselves, training the Afghans who will be working in the central and/or regional copyright offices and in judicial bodies will be critical to the success of the copyright part of the Project.

Equally as critical is educating the Afghan people of their new rights. There is a rich tradition of music, poetry and textile arts in Afghanistan. There are also contemporary filmmakers, photographers, writers, etc who will benefit from a copyright law. It remains to be seen whether an author's autonomy in his work, which we in the developed world may take for granted, will be intuitive to the Afghan people or not.

Our participation in this Project has been extremely interesting and rewarding. We truly believe that the Project is a very important part of efforts to rebuild Afghanistan. While Afghanistan continues to face significant challenges, a steady influx of foreign direct investment is likely to be of substantial assistance to the country's future. Through this Project and our efforts to assist Afghanistan to develop a new "code of commerce," we hope to provide prospective investors with confidence that Afghanistan has an effective and reliable legal system of commercial law. ☼

Notes

- 1 See, US Department of State, Bureau of South Asian Affairs, Background Note: Afghanistan, September 2003, available at: <<http://www.state.gov/r/pa/ei/bgn/5380pf.htm>, noting that "Afghanistan identifies itself as an Islamic State."
- 2 The UAE is a member of the World Trade Organization (WTO) and a contracting party to the World Intellectual Property Organization (WIPO).
- 3 Qatar is a member of the WTO, the Berne Convention and a contracting party to WIPO.
- 4 See "Frequently Asked Questions About TRIPS in the WTO" (<http://www.wto.org>) (last visited 30 August, 2003).
- 5 Id.
- 6 Id.
- 7 Id.
- 8 See http://www.iprcommission.org/graphic/documents/final_report.htm (last visited on 30 August, 2003).
- 9 See, for example, Matt Loney, Rip up that Shrink-Wrap License, <http://comment.zdnet.co.uk/mattloney/0,39020679,2122461,00.htm> (last visited 30 August, 2003); Weak Copyrights Would Kill "Fair Use," <http://zdnet.com.com/2100-1107-963675.html> (last visited 30 August, 2003).

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