

## CRIMINAL PROCEDURE OF TRADEMARK ENFORCEMENT IN PAKISTAN: A COMPARATIVE ANALYSIS WITH MALAYSIA AND USA

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### **Abstract**

*Trademark enforcement criminal procedure operates under distinct legal frameworks across various jurisdictions. In Pakistan, this process is governed under Trade Marks Ordinance 2001, Trade Marks Rules 2004, Pakistan Penal Code 1860, and Code of Criminal Procedure 1898. Malaysia, conversely, relies on specific provisions of Trade Descriptions Act 2011, while criminal issues of trademark in the United States of America (USA) are adjudicated through jury trials. Trademark is a fundamental element of Intellectual Property serves a distinctive and non-descriptive identifier which can be mark, name, sign, smell, or sound differentiates goods and services of one enterprise from those of others. Its distinctiveness is paramount and can be compromised if registered owner fails to take timely action against its infringement. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO) is notable as inaugural and sole international treaty which includes specific provisions for criminal procedure of trademark enforcement in signatory nations. This research employs a qualitative methodology to analyze and compare criminal procedure of trademark enforcement in Pakistan, Malaysia, and the USA. The comparative assessment reveals that Trade Descriptions Act 2011 represents a particularly unique and effective statutory instrument for criminal trademark enforcement in Malaysia. Furthermore, a significant innovation within Trade Descriptions Act 2011 is the concept of Trade Description Order (TDO). This order is a pre-requisite for registered trademark owners seeking to initiate criminal proceedings in cases of infringement involving non-identical trademarks that cause public confusion, obtained from the relevant High Court. Conversely, the TDO is not an obligatory requirement for infringements involving identical trademarks. Consequently, this*

*research advocates for the adoption of distinctive provisions of Trade Descriptions Act 2011, including the concept of TDO in Pakistan's legal framework to enhance effectiveness of its criminal procedure of trademark enforcement.*

**Keywords:** Intellectual Property, Trademark, Enforcement, Trade Marks Ordinance 2001, Customs Act 1969.

## Introduction

Intellectual Property (IP) law encompasses legal rights related to creative endeavors, commercial reputation, and goodwill with trademarks being a key component. A trademark serves to distinguish an undertaking's goods and services through a unique mark, name, sign, smell, or a sound. While not legally mandatory, registration is crucial to leverage all potential benefits and ensure effective enforcement through various civil, administrative, provisional, border, and criminal procedures.

Trademark registration and protection are managed in Pakistan by Intellectual Property Organization of Pakistan (IPO-Pakistan), in Malaysia by Intellectual Property Corporation of Malaysia (MyIPO), and in the USA by United States Patent and Trademark Office (USPTO). A trademark's distinctiveness is paramount; it erodes if registered owner neglects to act promptly against infringement.

Criminal trademark enforcement varies significantly. Pakistan relies on Trade Marks Ordinance 2001, Trade Marks Rules 2004, Pakistan Penal Code 1860, and Code of Criminal Procedure 1898. Malaysia utilizes the special Trade Descriptions Act 2011, while the USA mandates jury trials for criminal cases. The TRIPS Agreement of the WTO stands as the international treaty with specific provisions for criminal trademark enforcement among its members. Article 61 of TRIPS obliges member states to implement criminal procedures for willful, commercial-scale trademark infringement or counterfeiting, ensuring remedies include imprisonment, fine, seizure, forfeiture, and destruction of infringing goods and related materials, with penalties proportionate to analogous crimes.

Reporting infringement also differs in Pakistan, it involves filing a First Information Report (FIR) with the police or a complaint with a local Magistrate. In Malaysia, the Controller or Assistant Controller leads criminal enforcement. In the USA, the Sixth Amendment guarantees jury trials, requiring right holders to present evidence to a grand jury before a petit jury delivers the final verdict.

This qualitative research comparatively analyzes criminal trademark enforcement across these three jurisdictions. The findings highlight Malaysia's Trade Descriptions Act 2011 as a particularly effective statute. Furthermore, the Malaysian concept of Trade Description Order (TDO) is identified as highly advantageous. Consequently, this research recommends that

Pakistan adopt the unique provisions of Malaysia's Trade Descriptions Act 2011 including the concept of TDO to improve its criminal trademark enforcement framework.

### **Criminal Procedure of Trademark Enforcement Under Agreement on Trade Related Aspects Of Intellectual Property Rights (TRIPS)**

Beyond administrative and civil enforcement mechanisms for trademarks in Pakistan, criminal procedure is also an option for an aggrieved party. Globally, member states are compelled to adopt criminal procedure for willful acts of trademark infringement or counterfeiting, particularly when conducted on a commercial scale. This obligation is underscored by Article 61 of TRIPS Agreement. While most jurisdictions apply their general criminal procedures to Intellectual Property (IP) cases, some, like Malaysia, have established specific criminal framework for IP, such as Trade Descriptions Act 2011. Article 61 of TRIPS details the requirements for these criminal procedures, specifying that members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. It further mandates that remedies available shall include imprisonment and monetary fine sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. Additionally, the Article allows seizure, forfeiture and destruction of infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence in appropriate situations, and permits criminal procedure for other willful, commercial-scale IP infringements. Consequently, the criminal remedies for trademark infringement mandated by TRIPS Article 61 must encompass imprisonment, fine, seizure, forfeiture, destruction of infringing goods and related materials with the severity of penalties correlating to comparable crimes (DuBose; 2005).

### **Criminal Procedure of Trademark Enforcement in Pakistan**

In Pakistan, in addition to administrative and civil remedies, trademark infringement can be addressed through criminal proceedings. This typically begins with an aggrieved party filing a First Information Report (FIR) at the relevant police station. The police then conduct an investigation in accordance with Code of Criminal Procedure 1898. Subsequently, the case is brought before an authorized officer, where charges may be formally framed, leading to a trial that concludes with either acquittal or conviction under Pakistan Penal Code 1860 (Khan; 2010). Pakistan Penal Code 1860 distinguishes between trademark which denotes the manufacturer or merchandise of goods, and property mark which signifies a person's property. An individual who uses another's registered trademark to identify his own manufactured or merchandised goods is an infringer and if found guilty awarded imprisonment up to one year, fine, or both, unless he

proves that infringement was innocent and there was no intention to defraud. However, counterfeiting registered trademark in Pakistan carries a harsher penalty of imprisonment up to two years, fine, or both. The counterfeiting of a public servant's trademark, particularly for the purpose of claiming an exemption, is punishable by imprisonment for up to three years, fine, or both (Pakistan Penal Code; 1860, SS 478-482).

Further provisions of Pakistan Penal Code 1860 (SS 483-489) outline penalties for related offenses such as possession of items used for counterfeiting marks or possession of a counterfeit mark itself punishable up to three year imprisonment, fine, or both. Selling, exposing, or possessing goods bearing counterfeiting trademark imprisonment up to one year, fine, or both, unless the individual proves he acted innocently. Additionally, tampering with or removing registered trademark from goods or services constitutes a punishable offense, carrying imprisonment up to one year, fine, or both (Pakistan Penal Code; 1860, SS 478-482).

A person is deemed an infringer if he uses a registered trademark in the course of trade for identical goods and services, or use that registered trademark as their trade name or domain name (or part thereof) without the proprietor's prior consent. Infringement also occurs if a person uses any property under an infringed trademark without the proprietor's or licensee's authorization, or uses a trademark after alteration or obliteration, unless he lacked knowledge of the facts and acted in good faith. Furthermore, a person who sells, offers to sell, exposes, or possesses goods bearing an infringed trademark is considered a party to criminal infringement unless he proves innocent action and a reasonable belief that trademark was genuine (Zaman; 2012).

It is important to note, however, that a person is not considered an infringer if he used the registered trademark in good faith, specifically as his own name, name of his predecessor, or name of place of business or predecessor's place of business, provided such use adheres to restrictions outlined in Trademark Ordinance 2001 (Trade Marks Ordinance; 2001, SS 40-43).

Trademark Ordinance 2001 also designates several actions as criminal offenses leads to criminal procedure for trademark enforcement. These include applying false trade description, making false entry in trademark register, falsely representing trademark as registered, unauthorized use of government emblem, and falsely describing place as trademark registry. Applying false trade description or making false entry in the register is punishable by imprisonment ranging from three months to three years, with a potential fine of fifty thousand rupees. For repeat offenses involving false trade description, imprisonment term extends from six months to three years, accompanied by fine of one hundred thousand rupees. Falsely representing a trademark as registered can lead to imprisonment for one to six months and/or thirty thousand rupees fine (Mukhtar, Zainol, & Jusoh; 2018).

Illegally using a place as Trademark Registry is an offense punishable by imprisonment for up to two years, fine, or both. Up to 15% of any levied fine can be allocated as compensation to aggrieved party for losses incurred due to infringement. Any person abets an infringement can be tried for that offense anywhere in Pakistan as if infringement occurred within Pakistan's borders. In cases where a company commits an Intellectual Property Right (IPR) infringement, company's head is held responsible unless he was unaware of the infringement, in which case other authoritative personnel within the company, such as the secretary or manager, liable for the offense (Trade Marks Ordinance; 2001, SS 98-107).

### **Criminal Procedure of Trademark Enforcement in Malaysia**

In Malaysia, criminal enforcement of trademark law, primarily under Trade Descriptions Act 2011, grants significant investigative powers to an Assistant Controller. If an Assistant Controller reasonably believes false trade description offense has been or is about to be committed, he is authorized to arrest the suspect. The arrested individual must then be transferred to nearest police station for standard criminal procedure to commence without undue delay, with the arrest legally considered as performed by a police officer. Assistant Controllers can search suspected premises to inspect and seize goods. This action aims to ascertain if an offense occurred or to gather evidence crucial for the investigation (Mukhtar, Zainol, & Jusoh; 2017).

Evidence obtained through such searches and seizures is admissible in court. Assistant Controllers also have authority to access suspect person computerized data for investigation under Trade Descriptions Act 2011. Any person, excluding the Assistant Controller and investigative team, discloses information related to an ongoing investigation and thereby obstructs it, commits an offense under Trade Descriptions Act 2011, unless the disclosure is for a legitimate legal purpose (Mohamed; 2012).

Following a search and seizure, the Assistant Controller must compile seized goods' list. A copy of this list is provided to the premises' occupier, agent, or servant. If no such person is available, the list must be conspicuously displayed on the premises. Assistant Controller possesses the same investigative powers as police officers under Criminal Procedure Code 1935. The Controller can delegate his powers under Trade Descriptions Act 2011 to Assistant Controller, though this delegation not preclude the delegating officers from exercising their own powers at any stage. When large quantities of suspected goods with multiple packing or species are found, inspecting merely one percent or five samples is deemed sufficient to presume the remaining material is similar. Market research on goods and related items can be conducted to gauge market participant opinions (SS 39-55, Trade Descriptions Act; 2011).

After the Assistant Controller's investigation, the case proceeds to trial. If the offense is proven, the Court orders the forfeiture of seized goods. Conversely, if not proven, the Court mandates their release (Antons; 2011). If no prosecution arise regarding seized goods, they are automatically forfeited one month after seizure, unless the owner provides a notice of ownership to Assistant Controller. This notice is then referred to the Controller, who determines whether to forfeit or release the property, or may direct the matter to the Court for a decision after due legal process (Mukhtar, Zainol, & Jusoh; 2018).

Forfeited property is transferred to the Assistant Controller and disposed of as per the Controller's directives. Perishable goods, or those incurring unreasonable expenses or inconvenience for storage, can be sold at any point, with the proceeds managed according to the Controller's or Court's decision. If seized goods are released, and the owner believes the seizure caused undue damage, they can seek recourse from the Court against the Controller or the Federal Government of Malaysia if damage resulted from an unreasonable cause (Singh; 2009).

A crucial aspect of Malaysia's criminal trademark enforcement is Trade Description Order (TDO). A registered trademark owner can apply to the High Court for TDO before initiating criminal proceedings against an infringer. This is particularly relevant when a non-identical trademark causes confusion and passes off the owner's registered trademark. The High Court may grant TDO initially for one year, with renewal options. This order is registered and kept by the Registrar, serving as evidence admissible favoring owner of registered trademark in Malaysia (SS 5-9, Trade Descriptions Act; 2011).

TDO, therefore, is a certificate issued by the High Court under Trade Descriptions Act 2011, which must be entered into the trademark register. It is specifically required for infringement cases involving non-identical trademarks that cause confusion, but it is not necessary for infringements involving identical trademarks. Given its utility, it is recommended that Pakistan adopt a similar TDO concept to enhance its criminal procedure for trademark enforcement (Mukhtar, Zainol, & Jusoh; 2019).

A notable case illustrating TDO's impact is Lian Bee Confectionery v/s QAF Limited, where the trial and appellant courts ruled in favor of QAF Company, which had acquired TDO in 2008 for its "Squiggle" trademark (used since 2004), against Lian Bee Confectionery, which had used the same mark since 2007 for bakery items. Gardenia Bakeries, a QAF subsidiary, had been using "Squiggle" since 2003.

Misrepresenting oneself as a registered trademark owner or user is an offense punishable up to two months imprisonment, 500/- ringgit fine, or both. For legal benefits, users of trademark are encouraged to register their marks, though registration is not mandatory for legal claims concerning passing off (SS 81-82; Trade Marks Act; 1976).

False Trade Description is direct or indirect false indication in an advertisement regarding a good's nature, design, dimensions (height, width, area, volume, length, weight, size, capacity, gauge, quantity), production method, composition, strength, fitness, performance, accuracy, other technological characteristics, or expiration date (SS 6-7, Trade Descriptions Act; 2011).

Applying false trade description to goods, possessing, exposing for supply, or supplying such goods is punishable. For a legal entity, the first offense incurs 2,50,000/- ringgit fine, and subsequent offenses, 500,000/- ringgit fine. For natural persons, first offense carries 100,000/- ringgit fine, three years imprisonment, or both; subsequent offenses result 2,50,000/- ringgit fine, imprisonment five years, or both (Jalil et. al.; 2020).

Applying, possessing, exposing, or supplying goods with a false trade description that violates a registered trademark owner's rights is also punishable. For legal entities, the first offense leads to 15,000/- ringgit fine, and subsequent offenses, 30,000/- ringgit fine. For natural persons, first offense is 10,000/- ringgit fine, three years imprisonment, or both; subsequent offenses are twenty thousand ringgit fine, five years imprisonment, or both. Using identical trademark with a registered one is considered applying false trade description and is dealt with accordingly (Nambiar; 2011).

Initiating false entry in trademark register, creating a false document resembling the register, or presenting a false document as evidence can result five thousand ringgit fine, five years imprisonment, or both (S 9; Trade Marks Act; 1976).

When oral or written trade description is made, the person supplying goods is considered to have applied that description. Determining class of goods for a trade description involves considering factors like form, consent, time, place, manner, and other relevant aspects (SS 10-11, Trade Descriptions Act; 2011).

The Minister may exempt certain goods from being classified under false trade description, particularly for export or other specific purposes, via an issued order (S 56, Trade Descriptions Act; 2011).

Any direct or indirect conduct, practice, statement, representation, or indication misleads a person about good's or service's price, supply, or approval constitutes a false and misleading statement. The burden of proof for such statements in advertisements lies with the accused. A convicted offender (corporate body) faces a 500,000/- ringgit fine for the first offense and one million ringgits for subsequent offenses. A natural person faces a two hundred fifty thousand ringgit fine, three years imprisonment, or both for the first offense, and 500,000/- ringgit fine, five years imprisonment, or both for subsequent offenses.

The accused can raise several defenses under Trade Descriptions Act 2011 (SS 22-25). These include proving the offense was due to another person's default and identifying that person with

fourteen days' notice to the prosecutor. A natural person can also argue that the misleading statement or false trade description was for personal or domestic use, or that the offense occurred due to a mistake or unavoidable accident, provided all precautions and due diligence were exercised. Ignorance of a false trade description despite reasonable diligence is another defense for a natural person. Publishers receiving misleading advertisements in the normal course of business can also claim innocence if unaware of the advertisement's illegality. It is therefore recommended that these grounds for defense be incorporated into Pakistan's Trademark Ordinance 2001 to facilitate smoother criminal trademark enforcement (Mukhtar, Zainol, & Jusoh; 2019).

The Minister of Trade can issue definition, certification, or informative marking orders to benefit legitimate importers and exporters. Corporate bodies contravening a definition order face five million ringgit fine for the first offense and ten million ringgits for subsequent offenses. Natural persons face a one million ringgit fine, three years imprisonment, or both for the first offense, and five million ringgits fine, five years imprisonment, or both for subsequent offenses. For contraventions of informative marking and certification orders, corporate bodies are liable for two hundred thousand ringgit fine (first time) and five hundred thousand ringgits (subsequent times). Natural persons face 100,000/- ringgit fine, three years imprisonment, or both for the first time and 200,000/- ringgits fine, five years imprisonment, or both for subsequent times (SS 28-29, Trade Descriptions Act; 2011).

If no specific penalty is outlined in Trade Descriptions Act 2011, corporate bodies face twenty-five thousand ringgit fine for the first offense and up to fifty thousand ringgits for subsequent offenses. Natural persons face 10,000/- ringgit fine, one year imprisonment, or both for the first offense, and 20,000/- ringgit fine, up to three years imprisonment, or both for subsequent offenses (SS 58-64, Trade Descriptions Act; 2011).

A principal is responsible for offenses committed by their agent or servant during the course of employment, unless there is reasonable belief that the offense occurred without the principal's consent. An agent who aids in committing an offense to secure evidence is not considered untrustworthy of credit, and this act is evidence admissible in his favor in court (SS 58-64, Trade Descriptions Act; 2011).

Directors, chief executive officers, chief operating officers, secretaries of MyIPO, or similar designated officers within a corporate body are responsible for offenses committed by the body corporate, unless the offense was committed without their connivance, consent, knowledge and they took precautions necessary to prevent it (SS 65-66, Trade Descriptions Act; 2011).

### **Criminal Procedure of Trademark Enforcement in USA**

As per criminal procedure of trademark enforcement in the United States of America (USA), the affected trademark owner is required to submit victim impact statement which includes description of goods or services effected due to conduct of counterfeiter, description of the owner and the holders of IP right and description of the legal representative of such owners, sellers and holders.

All criminal cases of all types are required to be decided by the jury except an offence whose punishment is less than 6 months or whose punishment is more than 1000/- USD fine or it deals with cancellation of driving license for more than 90 days or offence of an attendance of an alcohol abuse education case in USA but in Vermont and Virginia states, all criminal offences are required to be decided by the jury. The right holder is required to produce evidences against the infringer/counterfeiter before the grand jury then the matter would be put up before the petit jury.

The Director of the US Patent and the Trademark office (USPTO) may require the applicant to submit document in a printed, typewritten or an electronic form. A defective document may be filed at the USPTO with a condition that a correct document may be filed within a prescribed time. A subpoena may be issued by the District Court of USA for taking testimony of a witness residing outside jurisdiction of that court. The Court of Law may authorize a person to take testimony and state date, time and place of giving a testimony. A person who is required to give a testimony may not be guilty of an offence on contempt of court unless he receives fees and travelling expenses and he cannot be pressurized to give a secret information unless the Court of Law requires him to do so and when a false written statement is submitted instead of testimony on oath, the submitter of that written statement would be liable to fine up to \$ 10,000, imprisonment up to five years or both. (SS 23-33, United States Code (Patents); 1925)

Whoever misrepresents himself, before USPTO as a registered trademark owner or an applicant, may be liable up to \$ 1000 fine. Whoever traffics counterfeited trademark goods or services in labels, patches, wrappers, stickers, badges, medallions, emblems, boxes, charms, cans, containers, hangtags, documentation or packaging and that person knows that the counterfeited trademark has been applied thereto, which may cause confusion and which may deceive the general public at large, if that person is natural person would liable to be punished with fine not more than \$ 2,000,000 or imprisoned not more than 10 years for the first time and for the second or subsequent times fine not more than \$ 5,000,000 and imprisonment not more than 20 years or both and if that person is a body corporate liable to be punished with \$ 5,000,000 fine for first time and for second or subsequent times, fine not more than \$ 15,000,000 and the penalty of

selling and attempting to sell counterfeiting goods or services is imprisonment for five years or \$ 250,000 fine or both. (S 2320, United States Code (Stolen Property); 1925)

### **Conclusion and Recommendations**

In Pakistan, the criminal procedure of trademark enforcement can be availed under provisions of Trade Marks Ordinance 2001, Trade Marks Rules 2004, Pakistan Penal Code 1860 and Code of Criminal Procedure 1898, where the registered trademark owner is either required to file a First Information Report at the nearest Police Station or file a complaint application before the Magistrate of the locality at District Courts for an inquiry and determination to ascertain truth and falsehood of the information received.

In Malaysia, the criminal enforcement of trademark runs against infringement of the registered trademark under Trade Description Act 2011. The owner of the registered trademark is required to obtain Trade Description Order in case if infringement is with non-identical trademark but if infringement with identical trademark, then no requirement to attain Trade Description Order prior to start criminal proceedings. The permission of the public prosecutor is required prior to start criminal judicial proceedings and Sessions Court is the court of first instance under Trade Description Act 2011. The Assistant Controller transfers cases after an investigation and inquiry to Sessions Judge for conviction or an acquittal.

In USA, all criminal matters are required to be decided by the jury under the sixth amendment of the US Constitution. All criminal cases of all types are required to be decided by the jury except an offence whose punishment is less than 6 months or whose punishment is more than \$ 1000 fine or it deals with cancellation of driving license for more than 90 days or offence of an attendance of an alcohol abuse education case. In Vermont and Virginia, all criminal offences are required to be decided by the jury. The right holder is required to produce evidences against the infringer/counterfeiter before the grand jury then the matter would be put up before the petit jury. The Trademark Counterfeiting Act was passed in 1984, added provision 2350 in title 18 of the United States Code 1925. It states that a counterfeiting trademark may cause confusion and may deceive the public at large and liable to be punished with fine not more than \$ 2,000,000 or imprisoned not more than 10 years for the first time and for the second or subsequent times fine not more than \$ 5,000,000 and imprisonment not more than 20 years or both and if that person is a body corporate liable to be punished with \$ 5,000,000 to \$ 15,000,000.

After comparative analysis of criminal procedure of trademark enforcement in Pakistan, Malaysia and USA, it is found that criminal procedure of trademark enforcement of Malaysia is good under provisions of Trade Description Act 2011. There is a concept of Trade Description Order under Trade Decryption Act 2011 which is required to be acquired from the concerned

High Court by the registered trademark owner prior to start criminal legal proceedings in case of infringement with non-identical trademarks and in case of infringement with identical trademarks, this is not necessary a requirement. It is therefore recommended that the concept of Trade Description Order should be adopted in Pakistan for better criminal procedure of trademark enforcement.

It is also found in criminal procedure of trademark enforcement of Malaysia that the accused may take defense that infringement has been occurred due to another person and he is required to give that other person's details within fourteen days as well as he may take defense that infringement has been occurred due to accident beyond control, mistake, or unawareness of infringement while printing infringed material. It is therefore recommended that these grounds of defenses should be added in Trademark Ordinance 2001 for smooth implementation of criminal procedure of trademark enforcement in Pakistan.

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