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## **“THE CRUSADES OF 21<sup>ST</sup> CENTURY: JUSTIFICATION OF INTELLECTUAL PROPERTY RIGHTS THROUGH THE PRISM OF SHARI’AH”**

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### **INTRODUCTION**

The globalization of the economy and tremendous development in the field of IPRs, have raised concerns about the future of such rights within Islamic countries.<sup>2</sup> Islamic countries have been criticized of being hotbeds for the unauthorized use and duplication of Intellectual Property Rights during recent years.<sup>3</sup> These concerns are generally based on the belief that IPRs and Islamic law are incompatible with each other and the consequential conflict

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<sup>2</sup> Silvia Beltrametti, *The Legality of Intellectual Property Rights under Islamic Law*, 2009 PRA. Y.B. COMP. L. 55 [hereinafter Silvia]; See also Nora Elbially & Moamen Gouda, *Enforcing IPRs through informal institutions: The possible role of religion in fighting piracy*, Joint Discussion Paper Series in Economics by Universities of Aachen, Gieben, Gottingen, Kassel, Marburg, Siegen, No. 20-2011. [Hereinafter Elbially & Gouda 2011]. Retrieved from [http://www.uni-marburg.de/fb02/makro/forschung/magkspapers/20-2011\\_elbially.pdf](http://www.uni-marburg.de/fb02/makro/forschung/magkspapers/20-2011_elbially.pdf) on 11.06.2012; Afifah Kusumadara, *Problems of enforcing Intellectual Property Laws in Indonesia* [Hereinafter Afifah]. Retrieved from on <http://www.ialsnet.org/meetings/business/KusumadaraAfifah-Indonesia.pdf> 22.05.2012; Also see Heba A. Reslan, *Shari’ah and the protection of Intellectual Property-The Example of Egypt*, IDEA-Intellectual Property Law Review, Vol. 47, No.4 at pp. 497-498. [Hereinafter Heba]; Joseph A. Claypool, *Islamic Law and Modern Patent Law*, 14 CASRIP 2007, available at <http://www.law.washington.edu/Casrip/Newsletter/default.aspx?year=2007&paper=newsv14i2Claypool>. Last assessed on 16.06.2012.

<sup>3</sup> Mohamed R. Hassanien, *Bilateral WTO-Plus Free Trade Agreements in the Middle-East: A Case Study of OFTA in the Post-TRIPS Era*, 8 Wake Forest IPR J. 161, 165-167 (2008); See also Rokiah Alavi, *Technology Transfer and Patents: The impact of TRIPS on Muslim Countries*, 3 J. Eco. Co-op. 20, 33-35 (1999); International Intellectual Property Alliance, 2004 Special 301 Report: Egypt 110, <http://www.iipa.com/rbc/2004/2004SPEC301EGYPT.pdf> [Last assessed on 20.05.2012]; International Intellectual Property Alliance, IIPA 2004 “Special 301” Recommendations: Middle East, [http://www.iipa.com/pdf/2004\\_April\\_08\\_losses\\_mideast.pdf](http://www.iipa.com/pdf/2004_April_08_losses_mideast.pdf) [Last assessed on 20.05.2012]; Also see Afifah *Ibid.* at pp.1-2.

prevents the Islamic state from enforcing IPRs effectively. Similar doubts appear in studies pertaining to economics, finance, and banking in Islamic countries.<sup>4</sup> *Prima facie*, Shari'ah does not provide any express protection to IPRs. Islamic countries are under no religious obligation to provide protection to IPRs or carry out their obligations under International treaties governing the same. In most of these countries, all laws (both secular and non-secular) are required to be in consonance with Shari'ah, and this raises doubts about the future of IPRs in such countries.

Any law in a particular jurisdiction is affected by the social and cultural milieu that exists within that society. On the other hand, international law, which is socially and culturally neutral, requires a nation to follow an agreement ratified by it in good faith.<sup>5</sup> Thus, a country which enters into a treaty is under an obligation not to violate the same. This is where the problem arises. The obligation to satisfy the requirements under a treaty may come in conflict with the laws made keeping in mind the social milieu of a nation. The problem becomes more complicated in cases where the State is a religious state like Pakistan, Saudi Arabia, Afghanistan, and Iran and so on. An intentional and purposeful consequence of the West's dominance of international law over the past century has been to remove cultural, ideological, and religious content from the substantive discussion of transnational issues throughout the world.<sup>6</sup> Even though to a very large extent same has been fulfilled, however, it has not been an absolute wipe-out. In relation to Intellectual Property Rights, a large number of Muslim countries are members of WTO and have signed and ratified the TRIPS agreement. So, under such a set-up where it is assumed that IPR and Islamic law is not compatible, chances are high that a conflict may arise between the international obligation of Islamic nations and its duty to make laws in consonance with Shari'ah.

This article is an endeavour to scrutinize the manner in which Intellectual Property Rights interact with the Islamic law [popularly known as

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<sup>4</sup> William Ballantyne, Introduction: Islamic Law and Financial Transactions in Contemporary Perspective 1-3 Islamic Law and Finance (Chibli Mallat, ed., Graham & Trotman Inc. 1988). [Hereinafter Ballantyne]{Cited in Amir H. Khoury, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A focus on Trademarks*, The Journal of Law and Technology, 2003 at p. 158. [Hereinafter Khoury 2003]}.

<sup>5</sup> This is known as the principle of *pacta sunt servanda*. The international law which governs the treaties is Vienna Convention on Law of Treaties, 1969 and the principle of *pacta sunt servada* has been enshrined in Article 26 of the same.

<sup>6</sup> See John Carroll, "Intellectual Property Rights in the Middle East: A Cultural Perspective" 11 Fordham Intellectual Property, Media, & Environment Law Journal, 2001 at p. 555. [Hereinafter Carroll 2001].

Shari'ah].<sup>7</sup> The purpose of writing this article is to justify the existence and enforcement of intellectual property rights under Islamic law and to nullify the claim that their recognition and enforcement is against the Shari'ah. The article argues that majority of Islamic countries do recognize and enforce IPRs under a mechanism that is in consonance with international standards.

PART I of the article discusses the various sources of Islamic Law. It deals with two important questions. Firstly, the question as to what is the need to study the sources while dealing with IPR and, secondly what are the points at which these sources interact with IPR? PART II of the article pinpoints the arguments which are usually raised against the protection of IPRs under Shari'ah and will try to justify the same. PART III discusses those principles of Shari'ah which are in favour of the grant of IPR protection under Islamic Law. One of the ways by which Islamic countries provide IPR protection is by enacting secular laws regarding the same. However, these laws are required to be in consonance with the Islamic law.<sup>8</sup> PART IV provides a brief analysis of some of the methods and tools as exist in Pakistan to promote and protect the IPRs. Primarily, this part analyzes the IPR system in relation to trademark as a proof to show that these system are as effective as any other IPR regime in the world.

## **1. BRIEF OVERVIEW OF SHARI'AH**

Although intellectual property rights are capable of Islamic theological justification, the question one may ask is why many Muslim countries fail to enforce intellectual property laws following their enactment. One of the primary reasons of concern about IPRs in Islamic countries is the ignorance of the Shari'ah about the same. Therefore, before examining Islam's stance on intellectual property protection and providing a statistical scenario in Muslim countries, it is necessary to understand why consideration should be given to Islamic law in this context. Addressing questions of trademark, copyright and patent protection in Muslim countries, while turning a blind eye to the relevant historical, moral, conceptual, and legal background of Islam, will only afford a distorted view of the topic.

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<sup>7</sup> Shari'ah represents the body of rules derived from the Qur'an and the Sunnah (primary sources) and the Ijma, the Qiyas, and other supplementary sources. Shari'ah is binding on Muslims. See Steven D. Jamar, *The protection of intellectual property under Islamic law* 21 Cap. U. L. Rev. 1079, 1080 (199) [Hereinafter Jamar]. For the purpose of this article I have used "Shari'ah" and "Islamic Law" interchangeably.

<sup>8</sup> See Silvia *Supra n. 1*; See also Article 2, Constitutional Declaration of Egypt, 2011, available at <http://www.egypt.gov.eg/english/laws/constitution/default.aspx> . Last assessed on 23.06.2012; Also see PAKISTAN CONST. art. 2, art. 227-231 pt IX, [Hereinafter Constitution of Pakistan], available at <http://www.pakistani.org/pakistan/constitution/> . Last assessed on 23.06.2012.

Governance in most of the Islamic countries is carried out through the combination of non-secular (Shari'ah based) and secular (non Shari'ah based) law.<sup>9</sup> A large number of scholars believe that one of the primary reasons behind the failure of Western countries to understand the IPR regimes in Islamic countries is because of their ignorance of Shari'ah law.<sup>10</sup> Studying sources of Shari'ah as such becomes a necessity.<sup>11</sup> According to Khoury, addressing questions of IPRs protection in Islamic countries, while turning a blind eye to the relevant historical, moral, conceptual and legal principles of Islam, will only afford a distorted view of the topic.<sup>12</sup> It is from the sources we would come to know about the junctures at which IPRs interacts with the Islamic Law. Islamic Law has a basic hierarchy beginning with codified law, and followed by non-codified law. The jurisprudential concepts like 'property', 'possession', 'ownership', 'transfer', 'right' etc which are vital to understanding IPRs, are all dealt by the sources of Islamic law. Thus, it becomes pertinent for us to deal with these sources at the outset. Muslims are required to conduct their life in accordance with the obligations mentioned under these sources. These sources are the standards upon which all the actions of Muslims [be it in individual capacity or as a group] are to be measured and justified. "Intellectual Property Rights" and the international obligation of Muslim countries to protect the same have to be justified using these standards only.

### **1.1 Codified Law**

#### a. The Qur'an

The Qur'an is Islam's Holy Scripture and the most authoritative source of Islamic law. Indeed, it is "the most central and highest source of Moslem law . . . which is regarded as being of divine origin and as containing God's (Allah's) revelations before Prophet Mohammad." Much has been written regarding the divinity of the Qur'an and its overwhelming impact and influence on the life of Moslems.<sup>13</sup>

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<sup>9</sup> See Jamar *supra n. 6*.

<sup>10</sup> See Khoury 2003, *supra n. 3*; Richard E. Vaughan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Talking Past Each Other When We Say "Property? A Lockean, Confucian, and Islamic Comparison*, 2 ILSA J. of Intl. & Com. L. 307, 351 (1996) [Hereinafter Vaughan 1996]; David J. Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 25 Geo. Wash. J. Intl. L. & Econ., 131, 137-41 (1992) [Hereinafter Karl 1992]; See Heba *supra n. 1*.

<sup>11</sup> See Heba *supra n. 1* at p. 504; Also see Silvia *supra n. 1* at pp. 56-58.

<sup>12</sup> See Khoury 2003, *supra n. 3* at pp. 158-159.

<sup>13</sup> For more on the Quran's status as a holy text of Islam See All'amah Sayyid M.H. Tabataba'i, *The Qur'an in Islam: Its Impact and Influence on the Life of Muslims*, Zahra Publications, 1987.

b. Sunnah

The Sunnah is the collection of recorded sayings ("Hadiths"<sup>14</sup>) and deeds of the Prophet Mohammad [PBUH<sup>15</sup>]. The Sunnah constitutes the accepted holy tradition as dictated by Prophet Mohammad [PBUH]. Consequently, the Sunnah is intended to serve as a model of conduct for all Muslims. In addition to this function, the Sunnah also complements the Qur'an by setting rules for matters that the Qur'an is silent on.<sup>16</sup>

**1.2 Non-Codified Law**

After the Prophet Mohammed's (PBUH) death, the need to continually interpret the Qur'an became more acute. This led to the development of supplemental sources of law to apply whenever the two primary sources were silent on a given question or when they were, or appeared to be, ambiguous or inconsistent.<sup>17</sup>

c. Ijma

The authoritativeness for Ijma is traced directly to the Qur'an<sup>18</sup> and the Sunnah. The main source that is usually cited to confirm the validity of Ijma as a secondary source is the Prophet's saying: "My nation will never agree on something wrong."<sup>19</sup> The doctrine of consensus in Sunni Islam is the unanimous opinion of the Sunnite community in any generation on a religious matter, constituting an authority, and ought to be accepted by all

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<sup>14</sup> The Hadith ("phrase/speech") are the words and teachings of the prophet Mohammad that were passed down (and related) by recognized scholars from one generation to the next.

<sup>15</sup> "PBUH" is a commonly used acronym for the phrase "Peace Be upon Him," which is typically inserted after mention of the name of Prophet Mohammed.

<sup>16</sup> Michael Bogdan, *Comparative Law*, Kluwer L. & Taxn. Publishers, 1994 [Cited in Khoury 2003, *supra n. 3* at p. 160].

<sup>17</sup> M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E.L. 135, 148 (2002) [Hereinafter Bassiouni & Badr].

<sup>18</sup> See Holy Qur'an, Surah [Chapter] Al-Baqarah, at [Verse] 2:143, available at [http://www.islamonline.net/surah/english/ayah.asp?hSurahID=21&hAyahID=1320&hTranslator=\(English translation by Pickthal\)](http://www.islamonline.net/surah/english/ayah.asp?hSurahID=21&hAyahID=1320&hTranslator=(English%20translation%20by%20Pickthal);); Surah Al-Imran, at 3:110, available at [http://www.islamonline.net/surah/english/ayah.asp?hAyahID=110&hSurahID=1&hTranslator=\(English translation by Pickthal\)](http://www.islamonline.net/surah/english/ayah.asp?hAyahID=110&hSurahID=1&hTranslator=(English%20translation%20by%20Pickthal);); Surah of An-Nisaa', at 4:115, available at [http://www.islamonline.net/surah/english/ayah.asp?hSurahID=64&hAyahID=4836&hTranslator=\(English translation by Shakir\)](http://www.islamonline.net/surah/english/ayah.asp?hSurahID=64&hAyahID=4836&hTranslator=(English%20translation%20by%20Shakir);).

<sup>19</sup> For an explanation and further information for that hadith see Mohammad Hashem Kamali, *Principles of Islamic Jurisprudence*, 1–2 (Pelanduk Publications 1989), at 240 [Hereinafter Kamali] [Cited in Heba *Supra n. 1* at p. 508].

Muslims in later times.<sup>20</sup> According to the majority of scholars, the relevant consensus is that of qualified jurists. Those qualified are known as Mujtahideen,<sup>21</sup> and they are deemed capable of undertaking the task of articulating rules for issues for which the Qur'an and the Sunnah do not provide a solution. Given the aforementioned hierarchy of sources, any rule articulated by the efforts ("Ijtihad") of the Mujtahideen must be in compliance with the Qur'an and the Sunnah.

#### **d. Qiyas<sup>22</sup>**

The Qiyas is a strict legal-reasoning method of analogy, which is resorted to only when there is "nothing directly on point in the foregoing sources of Islamic law."<sup>23</sup> Qiyas is resorted to only where a point of departure is clearly established from the Qur'an, Sunnah, or Ijma. In addition, Qiyas does not form a precedent since its rules are applied to the facts in a narrow fashion. In this regard, unlike common law systems, Islam does not have binding precedents. Qiyas is "reasoning based on analogy."<sup>24</sup> When faced with a situation where no rule is found in the first three sources, reason is used to "conclude that an existing rule applies to a new situation because it is similar to the situation regulated by that rule, or to abstain from applying the existing rule to the new situation that is proven dissimilar."<sup>25</sup>

#### **e. Custom (Urf)**

*Urf* generally refers to those pre-Islamic practices existing in the communities that later on became part of the Islamic State. Whenever Muslims conquered a country they only rejected those practices that contradicted the principles of Islam. Thus, many of the pre-Islamic practices were adopted. The term *Urf*

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<sup>20</sup> George F. Hourani, *The Basis of Authority of Consensus in Sunnite Islam*, *Studia Islamica*, No. 21, 13 (1964); Kamali, *Id.* at 230 ("Ijma is the unanimous agreement of the *mujtahidun* of the Muslim community of any period following the demise of the Prophet Muhammad on any matter"); See Vaughan 1996, *supra n. 9*, at 352 (stating that "consensus on a point of law by those authorized to interpret the Koran or the hadith of the Sunna").

<sup>21</sup> See Vaughan 1996, *supra n. 9*, at 352 ("that interpretation of the Koran or Hadith (Tradition) is reserved to *mujtahids*, or those Muslim men whose intellect and integrity have been recognized as being worthy by the religious and legal scholars who have preceded them; See also Kamali, *supra n. 18*, at 469. For a discussion about the requirements of a Mujtahid see Wael B. Hallaq, Was The Gate of Ijtihad Closed?, 16 *INT. J. MIDDLE EAST STUD.* 4, 5-7 (1984).

<sup>22</sup> Qiyas is not considered as a source of law under Shi'ah School of Islamic Jurisprudence.

<sup>23</sup> See Vaughan 1996, *supra n. 9*; See also Karl 1992 at *supra n. 9*.

<sup>24</sup> Hamid M. Khan, Student Author, *Nothing is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law*, 24 *MICH. J. INTL. L.* 273, 291 (2002).

<sup>25</sup> *Supra Note 17* at p. 155.

now also encompasses Islamic customs that have evolved through the years.<sup>26</sup>

**f. Public Interest (Maslaha Mursalah)**

When a situation calls for a new rule and none is to be found in the primary sources, nor in *ijma* or *qiyas*, it becomes permissible to resort to *Maslaha*. Referring to public interest as a supplementary source of rules in *Shari'ah* is based on the premise that “the basic purpose of legislation in Islam is to secure the welfare of the people by promoting their benefits or by protecting them against harm.”<sup>27</sup> As one scholar observed, “[c]onsideration of the common or public good is based on the fact that the law is intended to protect and promote the legitimate interests of the community and its individual members.”<sup>28</sup> Islamic jurists clarify that the public interest of relevance here is that which was not restricted, “*in the sense [that] . . . no textual authority can be found on its validity or otherwise.*”<sup>29</sup> This type of public interest is known as “Maslaha Mursalah.” According to Islamic Jurists, there are “five main goals of Shari’ah”:<sup>30</sup> safeguarding and promoting the individual’s faith; life; intellect; posterity; and wealth. Accordingly, whenever there is an interest that is related to any of these five goals, it should be observed, and the rules necessary to protect it should be articulated; that is, of course, unless there is an existing rule against it.

**1.3 Relationship between Shari’ah and Non-Shari’ah (Secular) Law.**

Even though the codified and the non-codified sources of Islamic Law deal with almost all the aspects of human lives, they do necessarily provide for everything. This is where the secular law fills in the lacunae. These sources deal with those aspects where the primary and secondary sources of Shari’ah are silent. However, it is pertinent to note here that these secular laws have to be consistent with the fundamental tenants of Islamic law.<sup>31</sup> The IPR laws existent in almost all Islamic countries is the Non-Shari’ah law and all these laws as such have to be in consonance with Shari’ah. The subjects of Islamic law can be said to be governed by it under three categories: (1) Areas about which the Shari’ah has spoken with full voice, such as mandatory duties like prayers and regulation of marriage; (2) areas where Shari’ah has provided merely general principles, leaving many gaps and ambiguities such as a

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<sup>26</sup> *Ibid.* at 157–58.

<sup>27</sup> Kamali, *supra n. 18.* at p. 352.

<sup>28</sup> See Bassiouni & Badr, *Supra n. 16.*

<sup>29</sup> *Id.*

<sup>30</sup> “Maqased Al-Shari’ah” also known as “Al-Maqased Al-Shari’ah,” which means the legitimate values or goals.

<sup>31</sup> See Jamar, *supra n. 6* at 1082; See also Khuory 2003, *supra n. 4* at p. 162.

general requirement to fulfil all contractual obligations; and (3) areas where Shari'ah is silent.<sup>32</sup> The latter two areas provide room for the government to step in and institute the Non-Shari'ah laws necessary for the operation of a modern state.

## **2 HINDRANCES UNDER ISLAMIC LAW**

### **2.1 The prohibition of "Mayaser"<sup>33</sup>**

A very interesting concept in Shari'ah which is popularly assumed to be in conflict with the validity of IPRs under an Islamic setup is "Mayaser". Simply put, Shari'ah prohibits 'profit' or 'earning' without effort and labour. So, 'Mayaser' is generally understood as a prohibition against getting something too easily, i.e., without investing adequate effort to attain it--or without working for it.<sup>34</sup> The concept is closely linked to IPRs. For example, the disproportionate amount of money that a pharmaceutical company earns after investing considerably lesser amount of money in the development of a drug may qualify to fall with the ambit of 'Mayaser'; or a singer who releases a new song album that takes the world markets by storms and within no time the singer earns a huge profit compared to the amount of money and energy he/she spent in creating the same. Analysing IPRs in the light of this concept would *prima facie* create a case against the justification of IPR under Shari'ah. However, what we have to understand is that the standards of 'Mayaser' cannot be applied generally. Each case has to be dealt separately and where a balance has been struck between the labour and profit, then the prohibition of "Mayaser" cannot be invoked. Islam acknowledges one's right to benefit from one's property and encourages trade and commerce. On the other hand, Shari'ah also allows one to gain as much as one has suffered, known as the Al-Ghonn Bel Ghorm Rule.<sup>35</sup> This rule reflects the importance of balancing profits with one's exerted efforts and expenses and achievement of same restricts the application of prohibition of "Mayaser". The question of application of "Mayaser" to IPR arises at a stage where the profit of the owner of such right is said to overtake the labour put in.

### **2.2 The prohibition of Indefiniteness ("Gharar")**

Another argument in opposition to the intellectual property rights stems from the Islamic conception of 'Gharar', which prohibits engaging in any activity or transaction that involves improbability or speculative risks.<sup>36</sup> It is pertinent

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<sup>32</sup> *Ibid.* Jamar at 1082.

<sup>33</sup> "Mayaser" is derived from the word "yossr" which means 'easy'.

<sup>34</sup> Jamar, *supra n.6*, at 1089; Vaughan 1996, *supra n.9*, at 358; Khoury 2003, *supra n. 3*, at 188.

<sup>35</sup> Heba, *supra n.1*, at 529.

<sup>36</sup> *Ibid.* Heba at pp. 529-530; See also Chad M. Cullen, *Can TRIPS live in Harmony with Islamic Law: An Investigation of the Relationship between Intellectual Property and*

to note here that since almost every commercial activity involves a certain amount of risk, Shari'ah does allow engaging in such transactions and commercial activities. However, anything involving 'speculation' or 'uncertainty', which are higher in degree and intensity than 'risk', is not allowed.

For a contract to be legally valid under Shari'ah, it is required that the parties must have sufficient knowledge about the contract's subject-matter and its 'value'. It is required of both the parties to disclose everything related to the subject-matter of the contract to the other party. The reason, being, that such disclosure removes any doubt or uncertainty or risk regarding the subject-matter of the contract. The failure to do the same will result in the assumption that one of the parties entered into such contract under uncertainty, rendering the same invalid under Shari'ah. Vogel and Hayes have argued that there is consensus among the scholars about the standards of mutual consent required for a contract. According to them sales must exhibit two features: (1) the parties must have full knowledge of all aspects of the transaction, including the object; and (2) the object of the transaction must either exist or be capable of production; the absence of either of those elements cannot be compensated for by a price change.<sup>37</sup>

This line of argument creates problems for justification of certain intellectual property licensing agreements under Shari'ah law. For example, licensing of 'patents', 'trade-secrets', or 'know-how' under Shari'ah would require the owner to disclose the confidential information about nature of the subject-matter of such licensing agreement. Even though the concept may cause problems in relation to certain licensing agreements, it does not affect them or IPR generally.<sup>38</sup>

### **2.3 The prohibition of Usury or Interest: "Riba"**

Opponents of intellectual property rights have also invoked the concept of 'riba', which is usually understood to mean 'usury' or 'excess on loan' or 'unjustified interest', as a ground to oppose IPR. The Quran<sup>39</sup> and the

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*Islamic Law*. Retrieved from <http://lawlib.wlu.edu/lexopus/works/679-1.pdf> on 03.07.2012.

<sup>37</sup> Frank E. Vogel & Samuel L. Hayes, III, *Islamic Law and Finance: Religion, Risk and Return*, 58, 59 (Kluwer Law Int'l. 1998) [hereinafter Vogel & Hayes]. Cited in Heba, *supra n. 1* at p. 530.

<sup>38</sup> Abd Al-Samee, Abd Al-Wahab & Abu el-kheir, *Economic Rights of Authors in Islamic Jurisprudence and the Egyptian Law 191* (Wahba Library 1988) at p. 142-43. [Cited in Heba, *supra n. 1*, at 530].

<sup>39</sup> The prohibition of Riba appears in the Quran in four different revelations.

- First Stage [Sura al-Rum, Verse 39]
- Second Stage [Sura al-Nisa, Verse 161]
- Third Stage [Sura al-'Imran, Verses 130-2]

Sunnah<sup>40</sup> condemn *riba*. It is argued by a number of contemporary religious scholars that stricter construal of *riba* applies to IPRs as well. Those opposed to IPRs argue that royalty payments from intellectual property licensing agreements are interest payments and should be prohibited as *riba*. However, proponents of intellectual property laws argue that, as long as royalty payments are fair and stem from hard work and effort, intellectual property royalties should be viewed as a fair profit and should not be prohibited as *riba*.<sup>41</sup>

Although there is some merit in many of the above-mentioned arguments against IPRs, the majority of Islamic scholars take the position that there is nothing in Shari'ah that enjoins or contravenes protecting and enforcing intellectual property rights.<sup>42</sup> These scholars urge that Muslims should abide by their contracts and the intellectual property laws applied in their countries.

### **3 PRINCIPLES OF ISLAMIC LAW THAT SUPPORT INTELLECTUAL PROPERTY RIGHTS.**

#### **3.1 The Concept of Property and the Rights thereof**

For legal purposes, Intellectual Property is considered as 'property'<sup>43</sup> and consequently all the legal corollaries attached to property get attached to it.

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- Fourth Stage [Sura al-Baqara, Verses 275-281]

See also Barbara L. Seinawski, Note, *Riba Today: Social Equity, the Economy and Doing Business under Islamic Law*, 39 COLUM. J. TRANSNAT'L L. 701, 709-10 (2001). [Hereinafter Seinawski]; See also Khoury 2003, *supra n. 3* at p. 190 (talking about the reasons about prohibiting Usury in Shari'ah).

<sup>40</sup> Prophet Mohammad [PBUH], also condemned, in the most unambiguous words not only those who take *riba*, but also those who give *riba* and those who record the transaction or act as witnesses to it He even equated the taking of *riba* to committing adultery thirty-six times or being guilty of incest with one's own mother.

See M. Umer Chapra, *The Nature of Riba in Islam*, 2 The J. Islamic Eco & Fin. 7 (2006), Available at [http://www.irti.org/irj/go/km/docs/documents/IDBDevelopments/Internet/English/IRTI/CM/downloads/Distance\\_Learning\\_Files/B4.4b%20The%20Nature%20of%20Riba%20in%20Islam.pdf](http://www.irti.org/irj/go/km/docs/documents/IDBDevelopments/Internet/English/IRTI/CM/downloads/Distance_Learning_Files/B4.4b%20The%20Nature%20of%20Riba%20in%20Islam.pdf).

<sup>41</sup> See Khoury 2003, *supra n. 3*; Also see Heba, *supra n. 1*.

<sup>42</sup> See for example, Jamar, *Supra n. 6*; Also see Khoury 2003, *supra n. 3*.

<sup>43</sup> Peter Drahos, *A Philosophy of Intellectual Property*, Ashgate Dartmouth Publishing Company, 1996; Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo.L.J.287 (December 1988) at 294-95; See also N. Stephan Kinsella, *Against Intellectual Property*, Journal of Libertarian Studies, Volume 15, No. 2, (Spring 2001): 1-53; See also William Fisher, *Theories of Intellectual Property*. Retrieved from <http://cyber.law.harvard.edu/people/ffisher/iptheory.pdf> on 28.06.2012; Dr. Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, Retrieved from <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf> on 28.06.2012; See also Peter S. Menell, *Intellectual Property: General Theories*,

Intellectual Property can broadly be categorized into two parts: One of them can be sensed and is tangible such as a trademark and a book. The second can be sensed but is not tangible such as a scientific theory and an idea of an invention. This raises a very significant question in relation to Shari'ah law. Whether intangible work is considered as a property under Shari'ah law? One of the primary reasons that certain contemporary Islamic scholars are against IPRs is that they believe that intellectual work cannot be treated as 'property' from the Islamic point of view. Their argument, as summarized by Mufti Taki Usmani, is that: "the concept of ownership in Shari'ah is confined to tangible objects only."<sup>44</sup> It is therefore necessary to delve deep in the Qur'anic notion of 'ownership of property' in order to understand how intellectual property rights as a form of intangible property can relate to concepts that apply to real property.<sup>45</sup>

Even though Islamic law does not expressly recognize "Intellectual Property" as "property", it does not say anything otherwise as well. Islam considers property in all things as belonging to God.<sup>46</sup> Such property is granted to man through inheritance.<sup>47</sup> In this regard, the Qur'an "undoubtedly embraces the right to private ownership."<sup>48</sup> Property is considered to be sacred and absolute in scope, against all takers except God himself.<sup>49</sup> Consequently, trespass against another's property constitutes a sin against God and a violation of Shari'ah. Majority of Islamic scholars have taken the position that there is nothing in Shari'ah that enjoins or contravenes protecting and enforcing intellectual property rights<sup>50</sup> and that Muslims should abide by their contracts and the laws applied in their countries. Qur'an acknowledges the concept of personal rights of the

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Berkeley Center for Law and Technology. Retrieved from <http://www.dklevine.org/archive/ittheory.pdf> on 28.06.2012.

<sup>44</sup> Mufti Taki Usmani, *Copyright According to Shari'ah*. Available at <http://www.albalagh.net/qa/copyright.shtml>. Last assessed on 23.06.2012; See also See Hizbut-Tahrir Circular, Protection of Intellectual Property: Its Reality and Its Shar'IRule [Available at <http://www.adduonline.com/papers/intelprop.htm> (Last assessed on 23.06.2012).

<sup>45</sup> See Khoury 2003, *supra n.* 3 at p. 165.

<sup>46</sup> Vaughan 1996, *supra n.* 9 at 356.

<sup>47</sup> Yousuf Ali, Pickthal, Shakir, Holy Quran, English translation. Available at <http://quran.al-shia.org/en/books/quran/holy-quran/7.htm>. [Assessed on 24.03.2012]. See also generally Saba Habachy, *Property Right, and Contract in Muslim Law*, 62 Colum. L. Rev. 450, 453, 453 n. 10 (1962).

<sup>48</sup> It should also be stressed that this property right is not dependent on the identity of the owner or his religious beliefs. Therefore, property rights apply equally to Moslem and non-Moslem, Arab and foreigner alike.

<sup>49</sup> See Jamar, *Supra n.* 6 at 1081-82 (1993); See also Khoury 2003, *supra n.* 3, at. 181.

<sup>50</sup> Mohamed Hossam Loutfi, *The Protection of Intellectual Property Rights: The views of the Pharos, Islamic Jurisprudence and Masters of Poetry and Literature*, 232-233 (BeitragzumIslamischenRecht III, Peter Lang EuropaischerVerlag der Wissenschaften, 2003). [Cited in Heba, *supra n.* 1].

individual. Every Muslim is entitled to these rights subject to the condition that same are exercised in the prescribed manner. Muslim can only acquire, possess and enjoy such properties or rights in the manner as permissible under Islamic law.

In Kuwait, during its fifth session from December 10–15, 1988, the Council of Islamic Fiqh Academy issued its Resolution No.34 (5/5) Regarding Incorporal Rights. The Council resolved that:

First: Business name, corporate name, trade mark, literary production, invention or discovery, are rights belonging to their holders and have, in contemporary times, financial value which can be traded. These rights are recognized by Shari'ah and should not be infringed.

Second: It is permitted to sell a business name, trade mark for a price in the absence of any fraud, swindling or forgery, since it has become a financial right.

Third: Copyrights and patent rights are protected by Shari'ah. Their holders are entitled to freely dispose of them. These rights should not be violated.<sup>51</sup>

Islam allows the right to ownership in order to create an incentive for man to work harder.<sup>52</sup> Accordingly, some conclude that "individual ownership is regarded as legitimate, and there is no limit to the amount of goods or services a person may possess."<sup>53</sup>

### **3.2 International Treaties and Sanctity of Contract.**

Shari'ah speaks extensively about the principles of contracts and commercial business. The Qur'an<sup>54</sup> and the Sunnah<sup>55</sup> direct Muslims to fulfil their contracts. Contracts are considered not only binding but sacred, and fulfilling them is considered part of the faith. The Contract Theory of treaty interpretation provides that international treaties and agreements are like

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<sup>51</sup> See Islamic Fiqh Academy, Resolutions and Recommendations of the Council of Islamic Fiqh Academy 1985–2000, Resolution No. 43. Available at <http://www.irtipms.org/OpenSave.asp?pub=73.pdf>. (Last assessed on 23.06.2012); See also *Intellectual Property Fatwa*, Available at <http://lists.okfn.org/pipermail/fc-uk-discuss/2005-August/000079.html>. [Last assessed on 07.07.2012].

<sup>52</sup> Tuhami Negra, A Delicate Balance: Rights, Responsibilities, Freedom, in *The Different Aspects of Islamic Culture: The Individual and Society in Islam* 61, 73 (A. Bouhdiba & M. Ma'ruf al-Dawalibi, eds., UNESCO Publ. 1998). [Cited in Khoury 2003, *supra n. 3*, at p. 166].

<sup>53</sup> *Ibid.* at p. 73.

<sup>54</sup> See Jamar, *Supra n. 6*, at p. 1087.

<sup>55</sup> See *Ibid.*; See also Kamali, *Supra n. 18* at p.341.

contracts and each party to it is under legal obligation to follow the same.<sup>56</sup> The authority for the primacy of the maxim “*pacta sunt servanda*” in Islamic law is massive. It will be sufficient to mention Prophet Mohammed’s [PBUH] hadith that “Muslims are bound by their Stipulations . . . .”<sup>57</sup>. Furthermore, the duty to observe and enforce contractual obligations is very broad, and it applies to the state as well as to individuals.<sup>58</sup> This flexibility coupled with the freedom of the Muslims to freely define the terms of the contract (within the ambit of Shari’ah) allows us to interpret some of the modern contracts including international agreements to be legally binding. Accordingly, if a Muslim state joins a treaty whereby it agrees to protect and enforce intellectual property rights in its territory, then it is bound to live up to its obligations.

### **3.3 The HALAL and the HARAM: Fairness in Dealings and Commercial Ethics.**

As pointed out earlier, there are certain actions in Islam which are prohibited and are as such ‘haram’. Anything that is not ‘haram’ is ‘halal’. There is nothing under Shari’ah that prevents or prohibits a Muslim for engaging in trade and business. In fact, Islamic law encourages and compliments trade and commerce.<sup>59</sup> The Shari’ah lays down strict rules in relation to conduct of business and requires that all Muslims who engage in the same should do so with utmost honesty and fairness. Merchants are obligated to refrain from any deceitful or fraudulent practices and exploitation of consumers in order to monopolize markets. Clearly, the prohibitions found in the Qur’an and the Sunnah are meant to primarily protect consumers by allowing them to rely on a market where fair competition is observed. Shari’ah realizes that unfair practices deprive consumers from the benefits of competition, such as lower prices, better quality of goods, and higher output.<sup>60</sup> Although the Qur’an and

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<sup>56</sup> Curtis J. Mahoney, *Treaties as Contracts: Textualism, Contract Theory, and Interpretation of Treaties*, (116:824) *The Yale Law Journal*, 2007. This approach is usually taken by the U.S. Supreme Court while interpreting treaties. See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 235-37 (1796);

<sup>57</sup> See Kamali, *Supra n.* 18 at p. 341.

<sup>58</sup> See BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 3 (U. of Ga. Press 1998) [Cited in Heba, *Supra n.* 1 at p. 513.

<sup>59</sup> See Translation of Sahih Bukhari, vol. 3, bk. 34, Sales and Trade, No. 311, <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/034.sbt.html> (Last assessed on 26.06.2012) (“Narrated Ibn ‘Abbas: ‘Ukaz, Majanna and Dhul-Majaz were markets in the Pre-Islamic period. When the people embraced Islam, they considered it a sin to trade there. So, the following Holy Verse came: ‘There is no harm for you if you seek of the bounty of your Lord (God) in the Hajj season.’ Ibn ‘Abbas recited it like this.”).

<sup>60</sup> ROGER E. SCHECTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* § 1.2.1 (Thomson West, 2003) (discussing the embodiment of intangible property within tangible property) [Cited in Heba, *Supra n.* 1 at para. 29.5].

the Sunnah speak about prohibiting deceitful practices in measuring and weighing goods, it is widely accepted that this prohibition could be read broadly to apply to any action amounting to the deliberate deception of the public.

When we see the purpose for protecting Intellectual property in the light of importance of fair dealing in Islam, it can logically be construed that harming anyone's business is strictly against the rules of Shari'ah. Accordingly, it is prohibited to use another person's trademark without his/her prior authorization.<sup>61</sup> Furthermore, it is prohibited to use a similar mark with the intention of confusing the public or free-riding on the good name of the original mark.<sup>62</sup> The same principle applies to other forms of misrepresentations such as lying about the attributes, ingredients, or components of a product. Similarly, making illicit copies of a book, CD, or computer program and presenting these as the original is a prohibited misrepresentation of origin, as well as a transgression of property rights as shown above.

### **3.4 The *Al-Hisbah* System, Regulation of market and its connection to IPR**

The *Al-Hisbah* system developed out of the need to streamline the trade and commerce among Muslims. *Al-Hisbah* is an Islamic legal and commercial body that was entrusted with the task of supervising and enforcing market and public morality. One may inquire about the rationale to study the *Al-Hisbah* system while studying IPR? Some commentators believe that the mark used by 'Mohtaseb', the head of *Al-Hisbah* institution qualifies as a 'living trademark'<sup>63</sup> and shows that even though in crude form, IPR existed in ancient Islamic State as well.<sup>64</sup> One of the trademarks' functions is to

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<sup>61</sup> This conduct is usually referred to as "Passing Off" or "Palming Off." Passing Off is defined as "[t]he act or an instance of falsely representing one's own product as that of another in an attempt to deceive potential buyers." BLACK'S LAW DICTIONARY 517 (2d. 2001).

<sup>62</sup> See WIPO Intellectual Property Handbook: Policy, Law and Use, ¶ 2.506, at 92, available at <http://www.wipo.int/about-ip/en/iprm/pdf/ch2.pdf>. (last assessed on 26.03.2012).

<sup>63</sup> See Khoury 2003, *supra n. 3*, at 178-182. The general reference from Quran that is used to justify the establishment of this system is Sur'ah Al-Imran which states as follows:

"Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong; they are the ones to attain felicity."

See <http://quran.com/3>. Last assessed on 27.06.2012.

<sup>64</sup> For better discussion on the evolution of *Al-Hisbah* system, See Abdul Azim Islahi, 'Works on market supervision and shar'iyah governance (*al-hisbah wa al-siyasah al-shar'iyah*) by the sixteenth century scholars', retrived from [http://mpr.ub.uni-muenchen.de/18445/1/Market\\_Supervision.pdf](http://mpr.ub.uni-muenchen.de/18445/1/Market_Supervision.pdf) on 27.06.2012.

assure the customer of the continued and constant quality of products bearing the trademark. The Mohtaseb, through his continued supervision of the marketplace, ensured that merchants and producers would sell authentic products of quality, hence the similarity between the functions of Hisbah and trademarks.

### **3.5 Prohibition of IPR piracy in Islam: Support from Quran and Sunnah**

Traditional definitions, particularly as embodied in national criminal codes, generally view piracy in the context of acts intentionally committed with the goal of obtaining a commercial advantage of some kind. More modern formulations, however, recognize that the essential element of piracy consists in significant damage to the interests of those right holders whose protection is the aim of intellectual property regimes and that this damage increasingly is sustained by conduct with little or no commercial motivation.<sup>65</sup> Thus, we see that commercial exploitation of someone, or monetary loss to someone is *sine qua non* of committing piracy and most domestic legislation use this as a criterion to provide for punishments and prohibition of piracy. Following is a list of references from Quran, Hadith and Fatwas that prohibit piracy.

#### **3.5.1 Quran**

Following is a list of Quranic verses that point towards the prohibition of IPR piracy:

- a. And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property (Qur'an, Chapter 2: Verse 188).
- b. O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful! (Qur'an, Chapter 4: Verse 29).
- c. Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice (Qur'an, Chapter 4: Verse 58).
- d. Help ye one another in righteousness and piety, but help ye not one another in sin and rancor: fear Allah, for Allah is strict in punishment. (Qur'an, Chapter 5: Verse 2).
- e. Give just measure and weight, nor withhold from the people the things that are their due; and do no mischief on the earth after it has

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<sup>65</sup> Darrell Panethiere, 'The Persistence of Piracy: The Consequences for Creativity For Culture, and for Sustainable Development', e-Copyright Bullitein, July-September 2005, Retrieved from [http://portal.unesco.org/culture/en/files/28696/11513329261panethiere\\_en.pdf/panethiere\\_en.pdf](http://portal.unesco.org/culture/en/files/28696/11513329261panethiere_en.pdf/panethiere_en.pdf) on 27.06.2012.

been set in order: that will be best for you, if ye have Faith. (Qur'an, Chapter 7: Verse 85).

- f. O ye that believe! Betray not the trust of Allah and the Messenger, nor misappropriate knowingly things entrusted to you. (Qur'an, Chapter 8: Verse 27).

### 3.5.2 Hadith

Hadith are also used in presenting the case against IPR piracy in Islam, among hadith used are:

- a. Muslims must abide by their agreements, except an agreement that make Haram (unlawful) what is Halal (lawful) or make Halal what was Haram. (Al-Tirmidhi, Hadith No. 1272).<sup>66</sup>
- b. Whoever precedes others in gaining a Halal (lawful) thing, will be more entitled to own it (than others). (AlQaari, No.492).<sup>67</sup>
- c. He who cheats is not of us (Muslims). Deceitfulness and fraud are things that lead one to Hell. (Ibn Hanbal, No. 4968 ).<sup>68</sup>
- d. Honesty and clarity are blessed for both parties to a sale, while concealment and deceit destroy the blessings of their sale. (Al-Bukhari, No. 1937)<sup>69</sup>
- e. Don't betray he who have betrayed you and (Keep and) pay back the trusts of those who entrust you. (Al-Sanaani, No. 1483).<sup>70</sup>

Moreover, many *fatwas*<sup>71</sup> have been issued by religious scholars asking the Muslims to tackle IPR piracy. An Islamic website (islamweb.net) lists 194

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<sup>66</sup> M. Al-trimidhi, *Al-jami'*, 5 Volumes (in Arabic), Islamweb Hadith Encyclopaedia. Retrieved from <http://www.islamweb.net/hadith/index.php> on 02.07.2012.

<sup>67</sup> A. Alqaari (1985), *Ala'srar almrfoa'ah fi ala'khbar almoudhoua'ah* (in Arabic), Islamweb Hadith Encyclopaedia. Retrieved from <http://www.islamweb.net/hadith/index.php> on 02.07.2012.

<sup>68</sup> A. Ibn Hanbal, A. (d.855), *Al-musnad* (in Arabic), Islamweb hadith Encyclopaedia. Retrieved from <http://www.islamweb.net/hadith/index.php> on 02.07.2012.

<sup>69</sup> M. Al-Bukhari (d. 870), *Sahih al-bukhari* (in Arabic), 6 Volumes, Islamwb Hadith Encyclopaedia. Retrieved from <http://www.islamweb.net/hadith/index.php> on 02.07.2012.

<sup>70</sup> A. Al-Sanaani (1989). *Tafser-al-quran* (Quran Interpretation) (in Arabic), 2 Volumes. Islamweb Hadith Encyclopaedia. Retrieved from <http://www.islamweb.net/hadith/index.php> on 02.07.2012.

<sup>71</sup> Marriam-Webster's Online dictionary (2009) defines *fatwa* as a 'legal opinion or decree handed down by an Islamic religious leader'. Available at <http://www.merriam-webster.com/dictionary/fatwa>. Last assessed on 02.07.2012; For a thorough look on the range of definitions of *fatwa*, see S. Ali, *Resurrecting Siyar through Fatwas? (Re)Constructing 'Islamic International Law' in Post-Iraq Invasion World*, Journal of Conflict & Security Law, Oxford University Press, October 2009. Available at SSRN: <http://ssrn.com/abstract=1496337>. Last assessed on 02.07.2012; Also see Mughees Shaukat, *General Precerption of Fatwa and its Role in Islamic Finance*, INCEIF, 2009.

fatwas that cover IPR from every aspect.<sup>72</sup> The basic consensus in all these fatwas as well as a considerable body of research that investigate how Islam views IPR piracy concludes that such type of piracy is prohibited by Islam.<sup>73</sup>

#### **4 MANIFESTATION OF IPR PROTECTION UNDER ISLAMIC REGIME: TRADEMARK PROTECTION IN PAKISTAN.**

Islam is much more than a faith or religion- It is a complete way of life. It is considered to be an integral and even a dominant component within Islamic nations. As such politics and religion under Islam are intermingled. Islam does not recognise the concept of secular state. In addition, it follows that the modern nation-state does not have any special standing or immunity within Islam; it too is bound by the Shari'ah.<sup>74</sup> The existence of the modern nation-state is secondary to observing the Shari'ah. One commentator observed that, "Islamic law, as communicated by God through His Prophet Mohammad [PBUH], was not a mere collection of metaphysical abstractions, but was transmitted in a context embodying a philosophy for organizing an entire society with a divine purpose."<sup>75</sup> Notwithstanding the opposition against the IPR protection in Islamic countries, majority of these countries have ratified TRIPS Agreement and have upgraded their domestic laws to make them consistent with the same. This is evidence in itself that secular laws governing IPR in Muslim countries are compatible with Shari'ah. Having put forth the standards upon which the validity of IPRs is to be weighed under Shari'ah, this paper now goes to scrutinize the IPR regime in Pakistan especially in relation to protection of trademark. The reason for including this part in the paper is to provide statistical proof of the fact that Shari'ah as followed in Islamic nations does not in any way hinder the progress and development of IPRs.

The Constitution of Pakistan establishes Islam as the state religion, and requires all laws including those governing IP to be in acquiescence with Shari'ah.<sup>76</sup> Moreover, being a member of World Trade Organisation, Pakistan

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Retrieved from <http://instituteofhalalinvesting.org/mughees/general-preception-of-fatwa-and-its-role-in-islamic-finance.pdf> on 02.07.2012.

<sup>72</sup> See <http://www.islamweb.net/emainpage/index.php?page=fatwa&tab=1&vPart=772&startno=20>. Last assessed on 02.07.2012.

<sup>73</sup> See D. Osama Mohammed Othman Khalil, *Intellectual Property in the Islamic Jurisprudence*, Available at <http://www.almeshkat.net/books/open.php?cat=32&book=1621>. Last assessed on 02.07.2012; See also N. Alghamdy, *Protection of Intellectual Property in Islamic Jurisprudence and Its Economic Consequences* (in Arabic), presented at the third international conference for Islamic economics, Umm al-Qura University, Cairo. [Cited in Elbially & Gouda 2011, *supra n. 1* at p. 25].

<sup>74</sup> Vaughan 1996, *supra n. 9*, at p. 351.

<sup>75</sup> *Ibid* at p. 351; See also Ballantyne, *supra n. 3*.

<sup>76</sup> See Constitution of Pakistan, *supra n. 7*.

is under an obligation to upgrade its laws to make them consistent with the TRIPS Agreement. Currently, the IPRs regime is governed by an integrated piece of legislation, called the Intellectual Property Organization (IPO) of Pakistan Ordinance 2005 (Renewed in 2012).<sup>77</sup> The earlier laws governing IPR have been amended to give way to new legislations which includes replacement of Copyright Act, 1914 by Copyright Ordinance, 1962 (amended in 2002) and of Patents Act, 1914 by Patents Ordinance, 2000 (amended in 2002). Moreover, new laws relating to Designs, Geographical Indications, and Integrated Circuits have been enacted.<sup>78</sup> In the field of trademarks, a Trade Marks Ordinance 2001 was enforced in 2004.<sup>79</sup>

The jurisprudence on Trademark in Pakistan is very exhaustive and it is not possible to cover all of it in this paper alone. The relevant statutes in Pakistan relating to trademarks are as follows:

- The Trademark Ordinance 2001 (Civil);
- The Pakistan Penal Code, 1860 (Criminal);
- The Customs Act, 1969; and
- The Drugs Act, 1976 (for drugs/pharmaceuticals only).

These statutes provide a comprehensive web of civil and criminal remedies to the trademark-holder which is consistent with Pakistan's international obligation under TRIPS agreement.

#### **4.1 Criminal Prosecution**

Criminal procedures and penalties are provided for trademark counterfeiting and infringement. The criminal statutes governing trademark counterfeiting and infringements in Pakistan are the Penal Code 1860, the Code of Criminal Procedure 1886 and the Drugs Act 1976 (in relation to drugs/pharmaceuticals only). Actual use of a trademark in Pakistan is a prerequisite for initiating a criminal action for violation of an unregistered

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<sup>77</sup> See Intellectual Property Organization Ordinance 2012, Ordinance No. IV of 2012, Retrieved from <http://www.ipo.gov.pk/UploadedFiles/IPO-Ordinance-2012.pdf>. on 07.07.2012. The earlier regime was fragmented into Ministry of Commerce (for trademarks), Ministry of Education (copyrights) and Ministry of Industries and Production (for patents and designs), has now come under the umbrella of an integrated IP office in Islamabad, called the Intellectual Property Organization, attached to the Cabinet Division and directly reporting to the Prime Minister.

<sup>78</sup> Designs Ordinance, 2000; Registered Layout-Designs of Integrated Circuits Ordinance, 2000; For more information on these legislations see <http://www.ipo.gov.pk/>. Last assessed on 07.07.2012.

<sup>79</sup> The World Intellectual Property Organisation [WIPO] keeps a record of the status of various IPRs as they exist in different countries. In order to see the status of IPRs in Pakistan, refer to [http://www.wipo.int/ipstats/en/statistics/country\\_profile/countries/pk.html](http://www.wipo.int/ipstats/en/statistics/country_profile/countries/pk.html). [Last assessed on 12.07.2012].

trademark; if a trademark is registered, use is preferable. The remedies resulting from a criminal action include imprisonment and monetary fines. However, these are generally insufficient to serve as a deterrent, as the fines are low and imprisonment is seldom ordered. Seizure, forfeiture and destruction of infringing goods are also available. Seizure can be carried out at the time of the raid or as soon as possible thereafter. If not carried out at that time, seizure can be undertaken upon investigation. Forfeiture can be ordered only after completion of a trial and only if the accused is found guilty of the offence. This process usually takes between 12 and 18 months.

#### **4.2 Civil Enforcement**

It is possible to obtain permanent injunctions. In civil infringement proceedings, it is possible to claim damages and/or an account of profits. A plaintiff can claim damages to compensate it for losses suffered as a result of a trademark infringement. There is no limit on the amount of damages obtainable from a defendant for trademark infringement. A plaintiff can claim lost profits, as well as the defendant's profits. It is possible to obtain a temporary injunction to prevent an infringement from occurring and/or to order a party to desist from an infringement. The relevant statutory provisions are the application under Order 39 and Rules 1 and 2, read with Section 151 of the Code of Civil Procedure 1908. Under civil law, a search and seizure order can be obtained to seize the offending goods and to preserve evidence when there is a clear risk of that evidence being destroyed (*Anton Piller* orders). Such orders can be obtained on the same day the action is initiated. To obtain an interlocutory search and seizure order, an application under Section 75, read with Order 39 Rule 7, Order 26 Rule 9 and Section 151 of the Code of Civil Procedure, must be filed.

### **5 CONCLUSION**

There is no denial of the fact that certain principles of Shari'ah may come in conflict with IPRs which may cause problems when it comes to enforcing such rights in Islamic countries. This certainly gives rise to arguments against IPRs under Islamic Law. However, the nature of Islamic Law, with its interconnected web spanning across the realms of faith, governance, finance and economics, does not permit the legality of intellectual property rights to be determined in a vacuum. The first step towards developing these rights in Islamic countries is to familiarize oneself with those principles and the nature in which they interact with IPRs.

There is no express prohibition on IPRs under Shari'ah and neither are there any provisions under Shari'ah which directly govern them. This, along with the international obligation under TRIPS agreement has forced the Islamic nations to develop secular laws to govern the same. Protecting intellectual property rights, although not specifically regulated by Shari'ah, is in accordance with its principles and serves its main objectives. The

principles of personal property, such as, one's right to benefit from the fruits of his work, the sanctity of contracts made by the State or the people, and a just punishment for the transgressors, all serve to support this finding. This finding is also supported by evidence of respect for trademarks and copyrights in the Islamic States like Pakistan and other middle-eastern countries. Intellectual property protection in Islam lacks clear substantive rules; therefore, non-Shari'ah law is accepted as a legal tool for filling the gaps. The Islamic concepts of fair dealing in trade and the prohibition of unjust enrichment clearly support some of the IPRs like trademark. As proposed in various parts of the analysis, non-Shari'ah laws are considered a source of Shari'ah, and Governments have a duty to regulate new issues if they lack sufficient regulation in Shari'ah. There is no real conflict between Shari'ah and intellectual property rights. In fact, Shari'ah calls for a strong protection and a strict adherence to intellectual property laws by the governments and the members of society. The problem does not lie with Shari'ah, but with the failure of the Islamic nations to understand it and effectively enforce it. Scholars, as such, have been blaming the law (which is completely fine) instead of inefficiency of the state machinery to provide effective enforcement mechanism. Several intellectual property experts, who also have an understanding of the societies of the Muslim Middle East countries, maintain that the widespread piracy problem does not originate with the laws, but instead emanates primarily from the lax enforcement along with a belief that it is permissible to engage in such actions.

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