

The Legality of Intellectual Property Rights under Islamic Law

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Abstract

Intellectual property rights are not regulated by Islamic law and jurisprudence per se. The issue is whether the principles of Islamic law can be constructed in a way to provide support for such protection. This paper assesses the extent to which Islamic law and its sophisticated tools have an impact on the protection of intellectual property. First it presents Sharī'a's main sources; the Qur'an, the Sunna, Ijma and Qiyas and explains how many principles derived therefrom can accommodate intellectual property protection. It also sets out hurdles that have the potential to circumscribe such protection. Then it moves on to consider the effect of secondary sources. The following section examines the dynamics of interpretation of Islamic law over history and explores the impact that Sharī'a has on the enactment of legislation of modern governments. The concluding section briefly considers some tensions between the Western and the Islamic view on intellectual property and the role of economics within Islamic law and society. The arguments presented in this paper reveal that a Sharī'a based system is flexible and adaptable and that this flexibility is to be used in order to face economic reality.

Keywords:

Islamic law, legal science, intellectual property

Published as:

Beltrametti, Silvia. The Legality of Intellectual Property Rights under Islamic Law. In: *The Prague Yearbook of Comparative Law 2009*. Mach, T. et al. (Eds). Prague, 2010. pp. 55-94.

"Verily, in the creation of the heavens and of the earth, and the succession of night and day:

and in the ships that speed through the sea with what is useful to man: and in the waters which God sends down from the sky, giving life thereby to the earth after it had been lifeless, and causing all manner of living creatures to multiply thereon: and in the change of the winds, and the clouds that run their appointed courses between sky and earth: [in all this] there are messages indeed for people who use their reason."

Qur'an II:164

I. The evolution of the recognition of intellectual property rights

Intellectual property is an ancient concept. Protection for original authorship in pre-Islamic societies was recognized for poets, who were compensated for the publication and distribution of their work[1]. Fine poetry was deeply regarded in the Arab world and authors enjoyed an enhanced social standing and respect. Lesser poets who plagiarized their work in an attempt to free-ride on their reputation were harshly condemned and cast from cultural society[2]. This shows that copyright protection was a recognized concept dating back to pre-Islamic civilizations. With the advent of the Islamic rule some of the rights pertaining to authorship were further advanced[3]. The state started to commission scholars to write about topics of interest and bought these works back from them once ready; the author would forfeit his rights in the work in exchange for compensation. Although pre-Islamic recognition of intellectual property rights was subsequently strengthened by the Islamic rule this recognition was never explicitly formulated but remained an accepted social norm[4].

In view of this historical development some basic forms of intellectual property rights can hardly be denied a claim under Sharī'a but since the advent of Islam the concept of intellectual property has expanded to include trademarks and patents and more sophisticated forms of copyright. What these intellectual property rights have in common is that they grant limited exclusive rights in exchange for the commercialization of an original creation that benefits society and they allow the owner to stop any unauthorized use by a third party. This expansion of intellectual property and the new challenges associated with new technologies, innovation and globalization render its justification under Sharī'a law more complicated.

Nowadays many predominantly Muslim countries apply secular laws in the protection of intellectual property but at the same time some constitutions of these countries hold Sharī'a as their main source.

Intellectual property protection is not incompatible with Sharī'a, therefore these laws should be accepted and complied with by religious Muslims as well as secular members of the public. However the current laws do not seem to bite, they are enforced laxly and the ongoing infringing activities contribute to conspicuous losses of revenue for major companies relying on such rights[5]. Piracy rages in the Middle East[6] and one major problem seems to be the belief that copying is permissible; many Muslims do think that the concept of intellectual property associated with technological development stems from the West and not from their religious sources and are therefore reluctant to accept it. Lenient intellectual property protection slows down economic development. In order to increase awareness and achieve effective enforcement to ameliorate the market conditions in which these rights operate, this paper will assess the extent to which these rights are compatible with Sharī'a principles.

II. The Sources

Sharī'a does not refer to Islamic legal rules only, it encompasses a full set of associations that culminate with a timeless concept of justice and fairness and is best understood as a higher rule of law with a divine connection[7]. It is important to distinguish this transcendental concept of law with the formulation of legal rules; what jurists have formulated through their reason is not divine law but legal jurisprudence, fiqh. This cognitive process aims to uncover God's will through the intellectual evaluation of Sharī'a's main sources: the Qur'an, the Sunna, Ijma and Qiyas[8]. For the purpose of this paper the term Sharī'a will be used as synonym of Islamic law; both terms will be employed to indicate the law as revealed by the sources and other principles and practices associated with it. It is crucial to understand the pyramidal hierarchy among the sources and the interplay between textual and non-textual legal concepts.

1. The Qur'an

The Qur'an is the primary and most authoritative source of Sharī'a. It is a written document and it has divine origins; it was revealed by God to the Prophet Mohammed over a period of 22 years and it contains the holy teachings that a true Muslim is to follow. It is divided in Meccan and Medinese verses, according to where the Prophet Mohammed was at the point in time of the revelation. For the purpose of this analysis the Medinese verses are of more importance because it was in Medina that the Prophet took up the role of governor as well as of religious leader of his community and therefore the teachings and the rules following from these verses are of more practical effect in view of the chosen topic.

Although the Qur'an is not primarily a legal book, it is the highest source of law. Accordingly any rule contained in the Qur'an cannot be contradicted or modified by rules derived from any other source[9]. About 300 verses contain legal provisions[10] which are specific in matters that are eternal and general in matters that change[11]. Scholars have classified these actions as obligatory, recommended, neutral, reprehensible and forbidden[12]. This demonstrates that Qur'anic principles are not unbending as it might appear on the surface but show a considerable degree of flexibility and pragmatism.

2. The Sunna

The Qur'an is supplemented by reference to Prophet Mohammed's life, by his Sunna, which translates into "path" in the English language. The Sunna is the second most important source of Islamic law. It refers to a collection of recorded sayings that illustrate the established practice and tradition in which the Prophet lived, the Hadith[13]. The Sunna refers to the way the Prophet lived as a guideline for behaviour, whereas the Hadith comprises the actual textual narratives about his life. The importance of the Hadith and Sunna lies in their large size and great detail of legally relevant material. These sources are meant to complement the rules set out in the Qur'an and are often useful as context clarification.

3. Ijma

To establish direct support for a legal proposition it is necessary to point to a verse of the Qur'an, or at least to a Hadith of the Prophet. If this is not possible because both these sources are silent further scope of interpretation is given through Ijma. Ijma is the third source of Islamic law and it refers to the unanimous agreement or consensus of the legal scholars of the Muslim community on a point of law that occurred at a certain point in time and ought apply in the future. The validity of this type of agreement derives from the readings of many Hadith: *"Whatever the Muslims deem to be good is good in the eyes of God"*[14] or *"My community will never agree on error"*[15].

4. Qiyas

The fourth source, Qiyas, can be used to extend what is covered by the sources outlined above by strict analogical reasoning. A clear and undisputed rule that is found or can reasonably be inferred from the Qur'an or the Sunna might be extended to cover new circumstances if a narrow conception of its ratio can be elucidated in such way that it applies to a new situation. The effective cause, also called "illa" is the rationale of a legal proposition and in order to apply it must be common to both cases[16]. Many illas were derived from the legal rules found in the Qur'an and the Sunna and were used in the process for the formulation of further rules[17]. In short, a new scenario can potentially be covered when it resembles a situation expressly regulated by the textual sources discussed above.

5. Interrelations between the sources and Ijtihad

Sharī'a is the expression of God's will for mankind based on his revelation[18] -- it is a unitary concept. Many Muslims view Sharī'a as a way of life and seek to ensure that their actions are in agreement with its principles. This means that the components of Islamic law can not be analysed as individual self-standing concepts because this would result in a more complex and fragmented analytical framework. It is necessary to understand that these four sources work in tandem and that any legal ruling or conclusion should make sense of these sources as read together.

The sources provide the raw material[19], what glues them together is the concept of ijthad, the human struggle for understanding but often simply translated as "effort". The revelation must be processed by human intellect before it can become a cohesive legal system for society. This concept is employed by scholars and judges in order to interpret the sources and also to resolve problems that are not directly covered by the sources. If the Qur'an and the Sunna are silent a scholar can attempt to formulate a rule by way of Ijma or Qiyas by using ijthad. This intellectual exertion in order to find out God's true revelation has to be approached as a science. Whereas Sharī'a comes directly from God and is therefore undisputable, the legal jurisprudence that the jurists have formulated through their reason, fiqh, is law as a human science[20] and therefore contestable.

6. The four Sunni schools and the concept of Talfiq

The fallacies of this human interpretative science are best illustrated by the fact that disagreement on the priority of the sources[21], the complications of the process of authentication of Hadith and linguistic ambiguities saw the development of four main Sunni schools of jurisprudence around the 10th century, each contributing a different interpretation of Sharī'a: the Hanafi, the Shafi, the Maliki and the Hanbali school. These schools have become concentrated in different geographical locations, the Hanbalis becoming predominant in the Arabian peninsula, the Malikis in North and West Africa, the Hanafis in what we call the Middle East today and the Shafi school being a major influence in the East reaching out to Malaysia and Indonesia[22]. The methodologies of these schools are distinct in that they combine different proportions of textual authority and analogical reasoning; the Hanbali's tend to prefer a more literal analysis of the sources than the other schools who would allow wider discretion when interpreting. Although external influences affected the idiosyncratic evolution of each school and this led to significant diversity throughout the Islamic world[23] the most important cohesive factor has always been the need to make law workable[24].

The phenomenon of talfiq coupled together with a more radical extension of ijthad proved important in this respect. Talfiq is a principle according to which a judge belonging to one school is authorized to choose an interpretation from a different school of jurisprudence if it seems to fit the circumstances of a case in a better way. Talfiq allows a systematic comparison of all classical schools of laws and to reach a synthesis that combines their best features[25]. Although this patching process is not universally accepted by all scholars it has the potential to uncover the underlying flexibility within the Islamic legal system; it demonstrates the wide latitude of thinkers to reason appropriately in view of fact-specific contexts.

III. Intellectual Property as unregulated by the sources but not incompatible with Sharī'a

Now that the main legal tools of Islamic law have been considered, the next step involves the examination of the substantive principles contained in these sources. Intellectual property rights are not specifically regulated by any source of Sharī'a but its principles can be construed in a way that provides support for such protection.

1. Personal rights can be gained through effort

Many Hadith emphasize the importance of Muslim people to exert themselves in order to make a living out of their efforts. For example the Prophet has reported to have said: *"Nobody has ever eaten a better meal than that which one has earned by working with one's own hands"*[26]. This type of exertion encompasses mental and physical efforts. As a consequence it can be assumed that individuals spending time and effort by using their intellectual creativity to develop new ideas and inventions that contribute to the state of the art should be legitimately entitled to benefit from those creations. This implies that copyright associated with the original creation of an author, the efforts invested in promoting a trademark and new and useful industrial inventions can be recognized as personal rights gained through effort. In addition to the right to reap the fruits of an individual's own labour and effort the Qur'an recognizes an array of personal rights deriving therefrom, most importantly the right to accumulate wealth and the right to ownership and possession[27].

2. Property rights

It is necessary to delve deep in the Qur'anic notion 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[28]. Private property and ownership are such important concepts that the Prophet himself acknowledged them in his Farewell Sermon: *"Verily your blood, your property are as sacred and inviolable as the sacredness of this day of yours, in this month of yours, in this town of yours"*[29]. In addition the Qur'an provides not to *"knowingly devour a portion of the property of others wrongfully"*[30]. Property is considered sacred and absolute in scope against all takers except God himself [31]; in fact the finder of lost or stolen property won't acquire title in it but merely act as a trustee for the original owner[32].

True ownership of title to property can occur by affirmative appropriation. Islamic law recognizes the right to acquire property by developing vacant or undeveloped land[33]. This has the positive connotation of making something useful and productive to the benefit of the community[34]. Usefulness, improvement and optimal exploitation seem to be the crucial criteria. This has a bearing on intellectual property rights because works of authorship, inventions and the use of trademarks are meant to be useful forms of protection. They do provide benefits to society in the form of original creations, technological inventions and guaranty of source. These materialize with the creation of books, music, medicines and software all marketed through quality brands indicating a reliable source of origin. Given that intangibles can be as useful as tangibles both types of property deserve protection.

The Qur'an also recognizes the divisibility of property rights which is an additional crucial component of the understanding of intellectual property[35]. Islamic law accepts the division of title in ownership, possessory interests and use among others. Ownership of property is conceptually divided from the right to use property in the same way that physicality of an object is distinct from its intellectual value. This concept bears strongly on intellectual property rights, for instance in situations where the owner of an intellectually protected facility wants to retain ownership rights but allow a third party to exploit it economically. This will usually occur through a licensing agreement, which lies at the core of a productive use of intellectual property and involves the authorizing of others to exploit a creation in exchange for some kind of consideration. A licensing agreement is possible under Sharī'a, as long as the object and the mode of exploitation are legitimate and in the public interest. To be legitimate an agreement must be fair, and if a private interest conflicts with a wider public interest the latter one should be given precedence.

It is also important to notice that under the principles of Sharī'a non-use can lead to loss of title[36]. The economic rationale is clear, the community as a whole will suffer from the non-exploitation of potentially valuable property. Intellectual property has a case under this heading because it allows a limited monopoly to come into existence only if creations are commercially valuable to society as a whole. To be commercially valuable such rights have to be used. When monopoly rights expire the previously protected intellectual property will enter the public domain. A further re-elaboration will lead to the commercialization of new inventions which in turn will qualify for intellectual property protection if the level of originality and novelty are complied with and this will overall stimulate innovation.

3. Moral Rights

Sharī'a insists that ideas must be properly attributable to its source and harshly condemns the false attribution of one's work to someone else. The roots of such protection lie in the necessity of passing on trustworthy information: at the Prophet's time religious teachings and many Hadith were transmitted orally, and in order to ensure its exactness and authenticity these sayings needed to be attributed to the correct source[37]. This presupposes that information is not being distorted but preserved in its original form.

Deceit in the form of false attribution and mutilation of someone else's work trace back to the words of the Qur'an:

"Show me what they have created of the earth. Or have they any portion in the heavens? Bring me a scripture before this (Scripture), or some vestige of knowledge in support of what ye say if you are truthful"[38] and the Hadith: *"Truth leads one to Paradise and virtue leads one to Paradise and the person tells the truth until he is recorded as truthful, and lie leads to obscenity and obscenity leads to hell, and the person tells a lie until he is recorded as a liar"[39]*.

The recognition of the moral rights of attribution and integrity are an integral part of intellectual property rights[40]. Besides being tradable commodities original creations can be interpreted as being an extension of the authors personhood[41] and it is this peculiar relationship of a master with its work that justifies the additional layer of protection granted by moral rights. The definition of moral rights entails that copyrightable works have inalienable qualities because they are connected to their authors by an intimate and unique bond[42]. The fundamental moral rights of attribution, the right to claim authorship of someone's work, and integrity, the rights to object to the modification and mutilation of someone's work, are thought to continue to stay with an author even once the copyright is assigned. This requires that the names of inventors are mentioned in patent specifications, it recognizes the exclusive right of a trademark owner to place his trademark on his goods and that the goods deriving from such creations are marketed in the contemplated manner.

4. Copying, counterfeiting and theft

The following proposition in the Qur'an can be read as to prohibit copying and counterfeiting: *"Woe to those who use measure and measure, who when receiving take for themselves a full measure, but when measuring or weighting for others give less"[43]* and *"Woe the fraudsters"[44]*. In addition many Hadith encourage Muslims to stay in places where trade practices are fair and to leave places where the measures are not respected. A wide interpretation of these verses suggests a general prohibition of unjust commercial dealings and deceptive and unscrupulous commercial practices. One can clearly argue that copying or passing off on the efforts of others are encompassed, because the trade won't be fair if a true description of goods, quality and ideas is prevented.

Finally the Qur'an expressly condemns theft: *"as for the man who is a thief and the woman who is a thief cut off their hands in requital for what they have reaped and as a exemplary punishment of God"[45]* and the Prophet's Farewell Sermon reads *"Live together but do not do wrong (...) for taking the property of a man is not permissible except by his finding it good"[46]*. What amounts to unjust enrichment and illegal appropriations is to be held on trust for the legitimate owner and damages are recoverable. This can be read to justify remedies in case of infringement of intellectual property rights[47]. The fact that Sharī'a sees property as sacred should compel governments to provide for remedies for the theft or infringement in connection with people's private property rights. This means that the owner of infringed intellectual property rights is entitled to compensation for any resulting damage caused by the unauthorized appropriation. In some circumstances specific performance might be a better remedy; if the infringing goods are available they shall either be destroyed or returned to the legitimate owner.

5. Laws of Contract

Multiple principles defending the sanctity of contracts and the freedom to contract are enshrined in the Qur'an, the most explicit reads: *"Fulfil your undertakings"[48]*. This notion is emphasized continuously throughout the Qur'an and the Sunna. All schools of jurisprudence agree on the fact that all Muslims are to be bound by their stipulations[49] and that they enjoy a wide discretion as to their contracts as long as the objects are not forbidden under Sharī'a law. The duty to observe contractual obligations and therefore to use property within the scope of the rights granted is unquestionable.

i. Individual Contracts

Islamic thought promotes exchanges when the parties voluntarily agree on how it is going to be performed and the subject matter is sufficiently certain. An exchange may imply a loss or a profit for either party, but this is accepted as long as the prerogatives of the contract are known at the time of entering it. It seems that holders of intellectual property rights are therefore entitled to freely contract them out. The laws of contract give owners the freedom to dispose of their own property as they wish, they can assign intellectual property rights straightaway or retain an interest and allow third parties to use such right in a certain

manner. The form of a contract is not restricted by Qur'anic prescription and it has been argued that customs and practices associated with a particular trade will determine the terms and the modality of the contract[50]. These broad notions of contract law best illustrate the flexibility of Islamic law to meet commercial realities[51].

ii. International treaties

In the same way that individuals are bound by the contracts they decide to enter into one can argue that also the state is bound to honour the contracts to which it is a party, for instance when it becomes a signatory to an international treaty.

"Freedom from obligation from Allah and his messenger toward those of the idolaters with whom ye made a treaty"[52] and "excepting those of the idolaters with whom ye have a treaty, and who have since abated nothing of your right nor have supported anyone against you. Fulfil their treaty to them till their term. Allah loveth those who keep their duty"[53].

Many predominantly Muslim countries are signatories to important international agreements dealing with the protection of intellectual property, the most famous ones being the Berne and Paris Conventions[54]. The Berne Convention is an international agreement on copyright principles, specifically concerned with the protection of literary and artistic works[55] and the Paris Convention is a major international treaty designed to help the people of one country to obtain protection in other signatory countries for patents, trademarks and industrial designs [56]. Also the accession to the TRIPS[57], an agreement that sets down minimum standards for many forms of intellectual property regulation when used in trade[58], was a strong call for attention to intellectual property issues. In order to comply with international obligations under these treaties national legislation concerning the substantive protection of intellectual property rights was enacted. Proper adherence would include the adoption of measures for the effective enforcement of legal provisions.

6. Fairness and Honest Dealings

Commercial ethics have a longstanding history and are highly valued under Islamic law. The society of the Prophet himself was based on trade and commerce and the need to be able to deal honestly with business partners was a prerequisite to any workable transaction. Fair competition was promoted in order to guarantee consumers the benefits of better products and lower prices.

The Prophet is said to have visited markets in order to inspect the business practices adopted by his community. When the community grew a commercial institution called the Muhtasib was given the role of *"commanding the good and forbidding the evil"[59]* when supervising market practices[60]. Its main functions were enforcing justice and fairness in the market place so as to enhance consumer interest. It has also been said that special marks were put on certain products to indicate the conformity with accepted quality standards - this is very contemporary and fully consistent with the role of trademarks as guarantors of quality. These practices might be implied to recognize the value of trademarks as indicators of source and the prohibition of unfair competition associated with trademark infringement.

These basic principles of Islamic law extracted from primary sources encourage the legal protection of intellectual property. The principles of trade and the importance of private property and contracts have can be tied to the rationale for the protection of intellectual property. The strong emphasis on the concept of profitable trade is a strong call for the recognition of intellectual property rights.

IV. Intellectual Property as unacceptable under the Sharī'a

The strictest view against the protection of intellectual property under Sharī'a insists on the fact that nowhere in the Qur'an or the Sunna intangible properties are expressly treated as subject matter of private ownership. Intangible rights can be implied but they are never explicitly mentioned, and this may suggest that property can be uniquely intended as tangible property[61].

1. Indefiniteness

"It is forbidden to sell the fruit on the trees before it is ripe, because the buyer does not know if all the fruit will ripen or what its weight will be"[62]. The concept of indefiniteness or speculative risk, gharar,

commands that any transaction is to be devoid of uncertainty and speculation. This means that both contracting parties must have perfect knowledge of what is being exchanged in their transaction. The precise measures and values are required.

An element of risk seems to be permissible as long as the division of risk is decided in advance and the transaction appears to be fair. Vogel and Hayes[63] explain that as long as the parties have full knowledge of the characteristics and value of the subject matter which is being contracted, the subject matter does exist at the time the transaction is entered into and the parties exert effective control over the property and the execution of the contract -- the transaction will avoid gharar.

Overall this concept has not overly restricted the development of commercial law and some standards have developed that enable the parties to a transaction to avoid gharar[64]: an acceptable degree of clarity will be assumed if licensing agreements occur in writing and are registered with the competent authority. However, even if the parties know how to value an intellectual property resource and have control over it, in some cases licensing such rights may be problematic. There are some instances where the subject matter being contracted is not clear from the outset; usually parties contracting to buy technological know-how and trade secrets do not know the exact parameters of it. Disclosing trade secrets and knowhow before a contract is concluded would deter the parties to conclude the contract[65]. This means that disclosure of full knowledge of what is being contracted might be problematic in some cases when this specific intellectual property subject matter is being licensed. A possible counter-argument might be that because of the effort involved in developing such technologies Sharī'a recognizes its value and the required degree of certainty can be achieved through the contracting between the parties[66].

2. Sharī'a prohibits profit without effort and labour

Although the Qur'an provides that *"there is no fault in you that you should seek bounty (honest profit) from your Lord"*[67] disproportionate profits are held not to be honest: *"Woe to every defamer, slanderer, who amasses wealth and hoards it! He thinks that this wealth is going to make him live forever"*[68]. This verse condemns the accumulation of excessive wealth and this applies in some intellectual property cases when minimal effort can yield extra-ordinary profits. This is clear if we think of novel writers who have extraordinary success and earn enormous amounts of royalties after a limited amount of time input. The same might happen with the development of a new medicine which proves an enormous achievement or advertising of a trademark that immediately becomes famous. In these cases the profit generated will be significantly disproportionate to the time and money invested initially in the development of the idea.

In recognizing the importance of trade and commerce Sharī'a emphasized the notion of balance: gains should be in proportion to the efforts spent in doing something. Gambling is prohibited under this head because it concerns undeserved 'easy' money and because it involves profit without work[69]. It seems that activities that can potentially yield indefinite and extraordinary profits could constitute a form of deceit.

3. Riba

The concept of riba involves the prohibition of interest and usury. Literally riba translates into unjustified increase, which should be avoided according to the Qur'an: *"God has allowed commerce and prohibited interest (riba)"*[70]. The underlying rationale of this prohibition seems to be that wealth needs to be gained through effort and labour and interest involves earnings without such exertion.

Wealth reaped through licensing fees of intellectual property rights can potentially amount to a sub-form of interest collected by the owner of the facility, the licensor. A very strict application of this principle will require the holders of intellectual property rights to recover only the initial investments of their creations because whatever goes beyond that would amount to a form of usury[71]. This literal interpretation could also affect certain clauses in licensing agreements that allow the licensor to charge interest on late license payments. However the better view is that as long as a profit stems from labour and effort and is reasonable in that respect a licence fee should be viewed as a fair profit encouraged under Sharī'a and not as analogous to interest rates[72].

4. Questions of Inheritance

Inheritance rules are regulated in detail by the Qur'an and no derogation is permitted. The property of a deceased is usually left to his heirs, and in the case that there are no heirs it is left to the state. There is a

conflict in the context of joint works - generally if a joint author dies its part of the work is transferred to the other co-authors and not to heirs or to the state[73].

Although nothing can be found that explicitly prohibits the overall legal protection of intellectual property rights, certain principles do affect the nature and scope of the protection that could be afforded. In some circumstances the title to intellectual property seems to be less full than real property title[74]. The best way to read these hurdles is to grant protection to intellectual property up to where the understanding of principles regulating property rights under Sharī'a is unproblematic.

V. Intellectual Property as extension of secondary sources

The analysis above acknowledges some propositions that can be invoked for and against the protection of intellectual property rights, but it also shows how difficult it is to provide a firm answer to the initial quest, because the application of the various principles may lead to inconsistencies with regards to Sharī'a's adaptability to modern economics and more specifically some technicalities of intellectual property rights. The immutable precepts of Sharī'a's primary sources can be interpreted in many ways and although the resulting ambiguities can undermine its practical application in the modern world it has a potential to be rendered adaptable. For some scholars the words of the Qur'an and the Sunna are to be read literally and interpretative leeway is restricted - other scholars try to find coherent Islamic responses to the new challenges posed by progress, rationality and science[75]. Already in the 14th century Shatibi, a widely renowned and respected scholar and jurist emphasised the importance of the purpose of the law. In his perspective Islamic law should be read in light of the purposes it is promoting[76]. The right interpretative balance is to be found between 'the letter and the spirit of the law', literal legalism has to leave some space to more adaptive interpretations focusing on the spirit of Sharī'a[77]. To make a more contemporary sense of these principles and precepts it is therefore useful to consider Sharī'a's imperative promotion of trade and look at other secondary principles of interpretation, such as Maslaha, Istihsan, Darura and Istishab. These principles will provide useful in order to strike the correct balance.

1. Maslaha, Istihsan, Darura and Istishab

Maslaha, generally translated as the general good or public interest, can apply when two rival interpretations of the sources are possible; in this case the one most conducive to human welfare is to be chosen[78]. In more complicated situations, which call for new rules that cannot be clearly traced back to any of the sources a public interest argument is possible on the premise that "the basic purpose of legislation in Islam is to secure the welfare of the people by promoting their benefits or protecting them against harm"[79]. Public good rules are not self-establishing laws, the contents have to relate to Sharī'a. It appears obvious that the laws of every society should aim to protect and advance the legitimate interests of the members of its community; within Islamic law the main goals of Sharī'a are often considered to be the protection of faith, life, intellect, posterity and wealth[80].

Another approach that scholars have utilized is Istihsan. The Istihsan doctrine encourages the development of rules "seeking the best"[81] for the community. It is usually applied for adapting or restricting rules that are based on Qiyas, but in extreme situations it can also be used to produce new rules[82]. Seeking the best is almost always consonant with fairness and fair practices. Darura is another concept used for justifying the introduction of new rules. It is stricter in the sense that it requires "need"[83]. This broader concept of overriding necessity can be traced back to the Qur'an: "necessity permits the forbidden"[84]. Finally there is the concept of Istishab, which means continuity. This concept emphasises the need of conformity in order to maintain the status quo unless there is a compelling reason to change[85].

These doctrines can not be drawn too broadly, because it would open the floodgates to many other claims and they can not be drawn too narrowly otherwise their scope would be undermined[86]. The traditional approach as to the use of such secondary doctrines has been careful. Some factors have emerged that point towards a more cautious analysis of Maslaha, for instance: the public interest must be a genuine one and it must be publicly acknowledged, it must not contradict the sources of Sharī'a and it must be rationally acceptable[87]. It can be assumed that such criteria apply to Darura, Istishan and Istishab as well.

2. The application of secondary principles

This paper has already set out the compatibility of the protection of intellectual property rights with the main sources of Sharī'a, now it will briefly detail the clear benefits that will follow from the protection of intellectual property rights in light of the secondary principles outlined above.

The status quo maintains the common acceptance that property rights are the basis incentive of private economic activity and the starting point for transactions because resources are shifted to their most valuable use. Because the economics of trade have been gradually shifting from industrial to information economies the expansion of intellectual property rights is a natural consequence. The value of intellectual property rights increased in the name of social progress and this means that some level of protection of intellectual properties must be in the public benefit.

Resources are spent in order to develop creations and these investments have to be recouped and additional financial benefits should be added in order to provide the stimulus for further innovation. Ex-ante costs incurred to develop technologies are extremely high in terms of risk, time and money. Just think about the time it takes to write a novel and the financial input in the movie making industry and both efforts combined in the pharmaceutical industry, where years and large amounts of money are invested in medicine researching. Only a few are successful in the end. If the initial costs cannot be recovered, future inventors will be deterred and overall investments will collapse. In addition once on the market such goods can be copied easily and quickly and a flood of pirate versions of the originals will undermine the market for the real items in the absence of protection.

Some scholars argue that society would gain more from unrestricted access to intellectual creations of others[88] because the sharing of knowledge is in the public benefit and should therefore be available to everyone at anytime. This goes contrary to the basic premise of intellectual property protection, where monopoly rights are granted. However such monopolies do not last forever, patent and copyright protection is limited in duration, and only during that time third parties are prohibited of appropriating it, after expiration intellectual property rights will fall in the public domain. Creativity is impossible without a rich public domain, Isaac Newton himself is reported to have said: "If I have seen further it was by standing on the shoulders of giants". Sharing knowledge is crucial to the further development of ideas and this means that there is a natural limit to the expansion of protection which could possibly result in the alignment of inventor's interests with the ones of society, which in turn results in a win - win situation for both.

Furthermore the notions of fair use and compulsory licensing limit the exclusive rights of intellectual property owners and make sure that in certain situations the public interest will have precedence over individual rights. The fair use doctrine sets out a confined number of circumstances in which the appropriation of intellectual property is lawful, for instance educational purposes, satire, comment and criticism and personal use[89]. In the same fashion governments can require the compulsory licensing of copyrights and patents on the basis of an overriding public interest[90]. This will be the case when national security, public health and safety, environmental issues or other emergencies are at stake. Often in both cases the dispossessed owner will be provided with adequate compensation and it is important to note that moral rights will continue to remain relevant and in case of appropriation reference should be made to the lawful owner of the right.

Intellectual property stimulates the flourishing of our culture, it protects the moral entitlement of people to the fruits of their labour. The lack of a working system of intellectual property protection reduces the competitiveness of industry and incentives to innovate. The public at large will greatly suffer from this. Intellectual property protection can be justified according to the principles of the primary sources. Secondary sources further justify its protection and make the initial case for protection even more compelling. Maslaha, Istishan and Darura incarnate Sharī'a's flexibility; these are the tools that allow for social changes that are faced by the Muslim community.

VI. Interpretative role

1. Dynamics over history

The analysis above illustrated Sharī'a 's major legal doctrines, but to understand its full deployment a brief historical perspective setting out the evolution of the application of its principles is necessary to grasp the potential flexibility of the system. Islamic law is not an ahistorical concept of timeless religious principles, since the earliest days it has known adaptation and change[91]. Legal principles as well as institutions evolved over time. Through the development and implementation of the legal principles by competent Islamic authorities, the system maintained its specificity and grew into a multi-dimensional structure still faithful to its original beliefs.

2. Who interprets? The roles of the Mufti, the Qadi and the Ruler.

The ambiguities of the language of the text, the difficulties of contextualization and most importantly the power to interpret the four basic sources in a coherent manner raises the most crucial quest within Islamic law: who has the power to interpret the sources and decide on its application. At the very beginning a group of self-appointed scholars assumed the role of guardians of the law^[92], the Muftis.

The Mufti is a legal academic stating the rule of law through fatwas, legal opinions^[93]. The Mufti's task is to find out what God meant the law to be by consulting the sources and using *ijtihad*. He uses *ijtihad* to derive the legal principle. For the Mufti it was imperative to follow the text because the text comes from God and no one has the power to change the text. Some textual backup was needed in order to produce good jurisprudence. The scholar would try to make the best possible sense out of the wording of the sources but was also allowed to take the contextual specificity of a situation into account. This allowed the Mufti to extract the basic principle from the original sources and apply it in a modern context. Thereby some leeway for interpretation was created.

Traditionally this role was completely independent from governmental authority; Muftis gained authority from their personal status and public recognition of their integrity. In fact they controlled and interpreted the law according to the principles of *Sharī'a* thereby ensuring consistency and predictability in an independent fashion. Since the pre-Ottoman period the Muftis started losing this high virtue of non-partisanship as they became state appointees^[94] and their function changed. Some commentators argue that the Mufti's role became the legitimization of the government's rule^[95]. Economics played a role in this shift as the degree of independence of the Muftis depended in part from their source of income; in the past the Muftis' income relied predominantly on endowments and *zakat* and this allowed them to be more independent, but over time pecuniary survival forced the Muftis to accept government jobs. It goes without saying that this shaded some doubts on the integrity of their fatwas.

The Qadi was the judge who solved conflicts in courts by de facto applying the law. The job of the Qadi was factual, he was responsible for weighting the evidence, examining witnesses and finally evaluating the circumstances of each case^[96]. He usually rendered judgements in accordance with the stipulations that the Mufti had submitted to the court. The Qadis were appointed by the rulers, their authority derived from the state and this might well have meant that they were to a certain extent loyal to the political powers that could depose them^[97].

The ruler had the political role of putting the law into effect. As Albert Hourani puts it: "The ruler, his governors and special deputies, the qadis, dispensed justice and decided disputes, taking into account the existing customs and laws of the various regions"^[98]. When the rules derived by *Sharī'a* were unable to cover the needs of society, the ruler had the political duty to make new rules, that had to be as far as possible in compliance with *Sharī'a*. In the Ottoman period rulers started to increasingly assert their authority over areas that previously belonged to the interpretative realm of the scholars in order to increase the efficiency and usefulness of the law. Legal fictions were created by draping customs to *Sharī'a* in order to issue effective administrative regulations to cope with legal reality. This was a move to strengthen the power of government but at the same time it led to the bureaucratisation of fatwas and to the diminished importance of scholars. It has been argued that this gradual shift of dominance made the law a tool of the ruler, not an authority over him^[99].

The triangular relationship between Muftis, Qadis and rulers has always been a complicated one and the practical effect of a legal interpretation was ultimately dependent on its acceptance by the Muslim community. This play of checks and balances made it possible for *Sharī'a* to be applied in a workable manner and with the public's approval. Even though the Mufti could introduce contextual adaptations of the law through his fatwas and the Qadi had the discretion of evaluating the circumstances of each case a sufficient level of predictability and consistency secured public approval. Over time there was a gradual turn away from traditional Islamic legal scholarship, *Sharī'a* and non-*Sharī'a* elements had to be balanced against each other in judicial practice for the system to survive politically, but it was the social conception of *Sharī'a* that set the limits for the ruler's authority. The legitimacy of the government depended on what society accepted as *Sharī'a* and this was therefore the ultimate check on the ruler^[100]. This shows how since its start Islamic legal thought possessed the innate flexibility to accommodate the needs of an evolving society.

3. Status quo: Governments and the enactment of non-*Sharī'a* law.

Most modern governments of predominantly Muslim countries are secular ones. In a usual scenario an elected legislature passes laws which are enforced by executive powers. The level of incorporation and

influence of Sharī'a of these laws varies. Some modern constitutions[101] describe Sharī'a as their main source of legislation[102] which implies that subsequent legislative actions should be, at least in theory, Sharī'a compliant. It is thought that institutions have incentives to remain faithful to Sharī'a and its principles when passing and enforcing the law, as this might increase its effectiveness. So, even though the resonance and understanding of Sharī'a may vary from country to country, Sharī'a's implied recognition of the laws regulating intellectual property protection provides a stronger motivation to enforce them.

When Sharī'a does not provide a clear direction, the legislature should use its discretion in order to adopt laws that reflect Islamic values. The underlying idea is that God had set the ground rules and impliedly recognized that everyday matters would be regulated by the executive. The result is a number of non-Sharī'a laws, which do not trace back to the Qur'an but do not contradict it. The condition is their compatibility with the principles of Sharī'a. These are generally the positive laws needed to run a modern state pertaining on the basic Qur'anic tenet that economic advancement is needed by the Islamic community. The power of governments to enact and administer such laws for political and economic reasons can be traced back to the beginning of the Caliphates[103].

The lack of specific rules pertaining to intellectual property protection impliedly allows governments to enact such regulations. This has been happening in the past decades, and laws protecting intellectual property have been passed by secular governments in order to fill in the gaps. It is said that governments have a positive duty towards its citizens to enact laws regulating areas that affect its community, and the increasing importance of intellectual property rights coupled with the emphasis the Qur'an puts on the sanctity of property and contracts and the principles of public interest and fairness justifies this action. It is Sharī'a itself that requires the state to secure the protection of personal property, therefore it is imperative that the government makes sure that a body of rules coupled together with an effective enforcement system ensure the protection of intellectual property rights.

VII. Need for approval of the whole Muslim community

1. The West imposing itself?

The public perception of intellectual property protection is problematic. Intellectual property rights are often perceived as a Western idea in the Middle East. The association made with 'the West' is often negative, and this notion spreads over to intellectual property rights. Some take it a step further and argue that it is a new tool of the West to monopolize the economic system of predominantly Muslim countries other simply interpret forms of Western Laws as 'intrusion'.

There are two main reasons for this, first the West has historically oppressed the Middle East in a number of occasions, most notably at the time of the crusades and during colonialism . Second the western culture of doing business is perceived as immoral and corrupt. The resistance to bow to Western commercialism is the reason why in many respects intellectual property rights are often ignored and go largely unenforced.

Copying and counterfeiting are not perceived as legal wrongs, but as a means of extracting revenge from the West's relentless commercial conquest. The best evidence of this is that whereas the copying of Western products occurs all the time, local products are respected[104]. The United States Trade Representative Special 301 report[105] listed many Middle Eastern countries on their priority watch list for intellectual property infringement. In fact pirated compact discs and windows software versions are widely available on Middle Eastern markets. Western books are being translated and resold regardless of copyright issues and television programs continue to be rebroadcasted without permission. Not to mention the widespread phenomenon of counterfeiting of luxury goods, vehicle spare parts and pharmaceutical products. On the other side it appears that there is an underlying policy of fundamental respect for works and ideas of other Middle Easterners. Local software is not being copied, but this might be motivated by the quality - but what is more interesting is that gold merchants appear to respect the integrity of local jewellery designs and not copy them[106]. Is this a an informal code of intellectual property code when there is a local production nexus?

Illegal duplication and piracy are concerns that affect the whole world, but there are specific enforcement issues in predominantly Muslim countries. If governments would put more emphasis on the fact that the protection of intellectual property can be traced back to the fundamental concepts of Sharī'a and is not, as the common perception seems to show, a western phenomenon, they would gain more public support. Some steps in this direction have been taken; Mufti Taqi Usmani of Pakistan publicly stated that there are no express provisions in the basic texts which limit ownership to tangible objects and that copyrights,

patents, and trademarks are legitimate claims to ownership which give their owners the right to profit from these claims[107]. In addition the Council of Islamic Fiqh Academy issued a resolution ruling that "nobody has the right to violate intellectual property claims"[108]. Putting emphasis on the fact that intellectual property rights can be reconciled with Sharī'a will result in an increased general willingness to enforce the laws that combat counterfeiting.

This is not to say that Westerners and Middle Easterners should perceive intellectual property rights, innovation policies and development issues in the same way; while western capitalism will continue to insist on exclusive self-interest and individual freedom, Islam has the potential to construe a notion of intellectual property protection within the broader religious principle that "all wealth belongs to God, who desires that it be owned equitably by all mankind"[109]. A change in terms of protection and enforcement of intellectual property laws in pursuit of economic development can come from within the Islamic culture and is thus not a borrowed concept.

2. Revival or revenge? The example of Saudi Arabia

This desire of juxtaposition towards the West has led to an extraordinary revival of Sharī'a based legislation which in some places has taken the form of fundamentalism and modern imposition of classical standards. Fundamentalism in this context is to be understood as a return to the fundamentals and ideals of the early Islamic Age and its adaptation to modern conditions by the reinterpretation of traditional principles in the light of a modern reality. A quest for authenticity is the underlying basis for this new emphasis on rethinking the law in light of religious reasoning[110].

Saudi Arabia perseveres to maintain a legal system based directly on the Sharī'a, almost resembling the classical system. Sharī'a's principles are being applied in literal fashion and the legal system recreates the classical model with autonomous Muftis and Qadis. When ruling judges will generally follow the fatwas of the Muftis, they can use talfiq and choose whichever school they favour and practice individual ijihad[111]. Saudi scholars tend to strictly and rigorously apply their understanding of Islamic law. Even within this rigor in following the letter of Sharī'a the protection of intellectual property rights finds a way of being recognized because of the support it can draw from the sources. This shows that regardless of whether Islamic law is understood and interpreted in a more modern and reformist way or in a more fundamentalist tradition intellectual property rights can be accorded protection.

3. Economics, trade and financial perspectives

The trade in global economies, modernization and the rise of importance of technology impact the Western as well as the Islamic world. Islamic norms on political and economic matters are crucial to the understanding that trade has to be promoted and that technology is part of it.

Commerce and trade are central to the Qur'anic tradition and positively encouraged by many Hadith. Prophet Mohammed's family was a family of merchants and trade was a highly praised and valued activity. Best proof of this is that the sources of Sharī'a explicitly legitimize private property, business transactions and commercial profit. However the norms regulating trade can be ambiguous and somehow broad if adapted to the modern context, therefore a sensible solution would be an attempt to reunite the spiritual and religious side of life with the political and commercial side. This is possible because, as discussed above, Sharī'a is not to be seen as a specific set of injunctions and rules but as a system that allows for rational thought and interpretation[112].

It is also useful to frame this analysis within a modern financial perspective, as the protection of intellectual property rights also functions to attract investments. The emphasis in Islamic banking is placed on a safer approach to risk and a careful analysis of the real value of an asset. When asked about investment strategies with regards to technology, which per definition involve intangible assets, Tariq Malhance, President of UIB capital, Inc. an Islamic financial institution investing capital in Sharī'a compliant projects, responded without hesitating that intangible assets have real value, depending on the demand. He dismissed any risk of gharar and held that a careful approach is always needed because all assets can turn out to have fluctuant and indefinite values regardless of their tangibility, but his point was steady: technology patents and other intellectual property rights can be freely traded and do not raise special issues within Islamic investment banking.

VIII. Conclusion: the change from within

For most predominantly Muslim societies religion is a major component of life. Many Muslims seek to ensure that everything they do is consistent with Sharī'a. Therefore it is crucial that any law which is to be effective complies with the principles of Islamic law. As the analysis above has shown, an accurate understanding of the principles of Sharī'a can be construed to provide support for the protection of intellectual property law.

Sharī'a is not only what is expressly delineated in the Qur'an and the Sunna, but also what the Muslim community believes it should be. This is why for most of its history Islamic law offered the most liberal and humane legal principles and adaptability to context. The best approach to Islamic principles is combining the letter of the law as set out in religious texts and other sources of jurisprudence with a reasoning that captures the spirit of the law. These are to be inextricably intertwined if a reasoning is to be sound and appealing.

Not providing for the protection of intellectual property rights hinders innovations and fails to stimulate economic development. Economic development is not an imposition of a new commercial western capitalism but as an innate concept in Islamic law. The Qur'an is explicit in the positive approach to economic development and Sharī'a is compatible with modern economic theory.

One question still remains: who is authorized to develop new interpretations? Understanding Sharī'a developed out of a dynamic between religion and state, and as time went by the emphasis shifted in favour of the state, but the state always allowed elements of Sharī'a to be present in various ways partly because it was a way to secure public approval and legitimacy. At the end of the day the effectiveness of a law is ultimately dependent on it being recognized by society. A state may implement laws that can be wholly or partially Sharī'a compliant, but the ultimate judge on the acceptance and effectiveness of such laws is the public at large.

Notes

[1] Amir Khoury - *Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks* - 43 IDEA: The Journal of Law and Technology 151, 2003 at 153

[2] Id. at 154

[3] Knut S. Vikør - *Between God and the Sultan: A History of Islamic Law*, Oxford University Press, 2005 at 166 explains that many rules of law are probably based on ancient custom that has been enshrined into the revelation because it was either accepted by the Prophet or supported by a Hadith; this way customs became 'Islamicized'. Vikør at 20 quoting Joseph Schacht, *Pre-Islamic background and early development of jurisprudence, Law in the Middle East*, Oxford 1955 explains that early Muslim society to a large extent continued the practices of the pre-Islamic period. Also Heba A. Raslan - *Sharī'a and the Protection of Intellectual Property: The Example of Egypt*, 47 IDEA: The Intellectual Property Law Review 497, 2007 - at 510 argues that Urf (custom) is a secondary source of Sharī'a and explains that when Muslims invaded and conquered countries they would disallow only those practices that contradicted the principles of Islam. Therefore the remaining customs were adopted and they evolved over time. The rights to authorship might be viewed as one of these customs.

[4] Amir Khoury - *Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks* - 43 IDEA: The Journal of Law and Technology 151, 2003 at 155

[5] USTR - United States Trade Representative
http://www.ustr.gov/Document_Library/Reports_Publications/2008/2008_Special_301_Report/Section_Index.html

[6] Richard E. Vaughan - *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When we say 'Property?'* A Lockean, Confucian, and Islamic Comparison, 2 *ILSA Journal of International & Comparative Law*, 1996 at 307-308 he explains that although intellectual property dates back to the 13th century piracy became an issue in the last 20 years.

[7] Noah Feldman - *Why Sharī'ah?* - The New York Times March 16th, 2008 at 3

[8] Ibrahim Wade - *Islamic Finance in a Global Economy* - Edinburgh University Press, at 33

- [9] Heba A. Raslan - *Shari'a and the Protection of Intellectual Property: The Example of Egypt* , 47 IDEA: The Intellectual property Law Review 497, 2007 at 506
- [10] Knut S. Vikør - *Between God and the Sultan: A History of Islamic Law*, Oxford University Press, 2005 at 33, however Wael Hallaq - *History of Islamic Legal Theories*, Cambridge University Press, 1997 at 12 argues that about 500 verses in the Qur'an are relevant to the law.
- [11] Knut S. Vikør - *Between God and the Sultan: A History of Islamic Law*, Oxford University Press, 2005 at 33 holds that out of the 350 legally relevant verses only 180 are absolutely certain and not open for debate, the rest are probable or assumed.
- [12] Id. at 37
- [13] The most valued collections of Hadith are the ones of Muhammad b. Ismail Al-Bukhari and Muslim b. Al-Hajjaj.
- [14] Heba A. Raslan - *Shari'a and the Protection of Intellectual Property: The Example of Egypt* , 47 IDEA: The Intellectual property Law Review 497, 2007 at N52 quoting Mohammed Hashem Kamali - *Principles of Islamic Jurisprudence*, Pelanduk Publications 1989 at 240-241
- [15] Ignác Goldziher, Bernard Lewis, Andras Hamori, Ruth Hamori - *Introduction to Islamic Theology and Law*, 1981 at 50
- [16] Knut S. Vikør - *Between God and the Sultan: A History of Islamic Law*, Oxford University Press, 2005 at 56-60
- [17] Bernard G. Weiss, *Spirit of Islamic Law* , University of Georgia Press, 1998 at 68
- [18] Knut S. Vikør - *Between God and the Sultan: A History of Islamic Law*, Oxford University Press, 2005 at 1
- [19] Id. at 31
- [20] Id. at 7
- [21] Although most scholars accept the difference in nature between the Qur'an and the Sunna, some scholars argue that Qur'an and Sunna together are the primary sources of law (see Heba A. Raslan - *Shari'a and the Protection of Intellectual Property: The Example of Egypt* , 47 IDEA: The Intellectual property Law Review 497, 2007 at 505) and others consider the Qur'an as the only primary source of law, (see Knut S. Vikør - *Between God and the Sultan: A History of Islamic Law*, Oxford University Press,2005 at 32). Sometimes Qiyas is considered before Ijma (see again Vikør at 31).
- [22] Knut S. Vikør - *Between God and the Sultan: A History of Islamic Law*, Oxford University Press,2005 at 11
- [23] Ibrahim Wade - *Islamic Finance in a Global Economy* - Edinburgh University Press, at 34
- [24] Knut S. Vikør - *Between God and the Sultan: A History of Islamic Law*, Oxford University Press, 2005 at 106
- [25] Id. at 42
- [26] Translation of Sahih Bukhari - *Sales and Trade* , vol. 3, book 34 at No. 286
- [27] Qur'an at 30:23 "And among His Signs is the sleep that ye take by night and by day, and the quest that ye (make for livelihood) out of His Bounty: verily in that are signs for those who hearken" recognizes profit making motivations.
- [28] Amir H. Khoury - *Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks*, 43 IDEA: The Journal of Law and Technology 151, 2003 at 165
- [29] Translation of Sahih Muslim, Book 7, *The Book of Pilgrimage (Kitab Al-Hajj)* chapter 17 , No: 2803 at

<http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/muslim/007.smt.html>

- [30] Qur'an at 2:188, Frank E. Vogel and Samuel L. Hayes, III - *Islamic Law and Finance: Religion, Risk and Return*, The Hague: Kluwer Law International 1998, at 58-59 explain that "wrongful devouring of property" refers to usury, coercion and stealing are considered and are strongly condemned by Islam.
- [31] Amir H. Khoury - *Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks*, 43 IDEA: The Journal of Law and Technology 151, 2003 at 165
- [32] Joseph Schacht - *An Introduction to Islamic Law*, Oxford: Clarendon Press 1964 at 37
- [33] Steven D. Jamar - *The Protection of Intellectual Property under Islamic Law*, 21 Capital University Law Review 1079, 1992 at 1084 provides a detailed explanation of the concept of appropriation by developing vacant property, also called Mawat.
- [34] John Cummings, Hossein Askani & Ahmad Mustafa - *Islam and Modern Economic Change*, John L. Esposito ed. Syracuse University Press 1980 at 69 "no man can claim virgin resources if he does not use them productively".
- [35] Steven D. Jamar - *The Protection of Intellectual Property under Islamic Law*, 21 Capital University Law Review 1079, 1992 at 1094
- [36] Heba A. Raslan - *Shari'a and the Protection of Intellectual Property: The Example of Egypt*, 47 IDEA: The Intellectual Property Law Review 497, 2007 at 519-520 quoting Mohammed Abd Al-Zaher Hussein - *Copyright from the point of view of Shari'a Legislation* 6 (2003) at 49-50 who explains that maintaining one's creation a secret and refusing to put it out in the public in exchange for gaining exclusive proprietary rights for a specified period of time could be considered a form of monopolization that is strongly condemned in Islam.
- [37] Amir H. Khoury - *Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks*, 43 IDEA: The Journal of Law and Technology 151, 2003 at 183-184
- [38] Qur'an at 46:04
- [39] *Translation of Sahih Muslim, Book 32, The Book of Virtue, Good Manners and Joining of the Ties of Relationship (Kitab Al-Birr was-Salat-I-wa'l-Adab)* chapter 27, No: 6307
- [40] Mainly in Civil Law jurisdiction - in Common Law jurisdictions these right are recognized (see VARA 1998; Visual Arts Rights Act) but are rarely invoked.
- [41] Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights* 5, 2nd ed. 2005 at 587
- [42] Raymond Sarraute, *Current Theory on the Moral Rights of Authors and Artists Under French Law*, 16 American Journal of Comparative Law 465, 1968 at 465 describing moral rights as giving "legal expression to the intimate bond which exists between a literary or artistic work and its author's personality"
- [43] Qur'an at 83:1
- [44] Id.
- [45] Qur'an at 5:38
- [46] Frank E. Vogel and Samuel L. Hayes, III - *Islamic Law and Finance: Religion, Risk and Return*, The Hague: Kluwer Law International 1998, at 60 interpret "by his finding it good" as consent.
- [47] Amir H. Khoury - *Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks*, 43 IDEA: The Journal of Law and Technology 151, 2003 at 175
- [48] Qur'an at 5:1
- [49] Saba Habachy - *Property, Right, and Contract in Muslim Law*, 62 Columbia Law Review 1962 at 450
- [50] Steven D. Jamar - *The Protection of Intellectual Property under Islamic Law*, 21 Capital University Law Review 1079, 1992 at 1088
- [51] Id.

[52] Qur'an at 9:1

[53] Qur'an at 9:4

[54] See [www. Wipo.int/treaties/en](http://www.wipo.int/treaties/en) - other important treaties concerting the protection of intellectual property rights are: the Madrid Treaty, the Madrid Agreement concerning the International Registration of Marks and its Protocol, the Patent Cooperation Treaty and the Trademark Law Treaty .

[55] <http://www.wipo.int/treaties/en/ip/berne>

[56] <http://www.wipo.int/treaties/en/ip/paris>

[57] In order to accede the TRIPS Agreement it is compulsory to become a WTO member. TRIPS specifically regulates standards for intellectual property protection in a trade system: creation, enforcement and the settlement of disputes.

[58] http://www.wto.org/english/tratop_e/TRIPS_e/TRIPS_e.htm

[59] Qur'an at 9:71

[60] Amir H. Khoury - *Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks*, 43 IDEA: The Journal of Law and Technology 151, 2003 at 181

[61] Id. At 172 Khoury explains that this is in fact the view adopted by the Hanafi school. The Shafi and Maliki schools have no objection to possession of intangibles. The Hanbali school requires that the possession of intangibles is somehow linked to tangible items.

[62] Qur'an at 5:90

[63] Frank E. Vogel and Samuel L. Hayes, III - *Islamic Law and Finance: Religion, Risk and Return*, The Hague: Kluwer Law International 1998, at 90

[64] Id. at 151 Vogel and Hayes refer to Mustafa al-Zarqua's - *Nizam al-ta'min*, 1962 "through the law of large numbers, insurance contracts in the aggregate involve very little uncertainty. The parties are transacting in something - coverage for a certain risk - which can be known and valued quite precisely".

[65] Heba A. Raslan - *Shari'a and the Protection of Intellectual Property: The Example of Egypt* , 47 IDEA: The Intellectual property Law Review 497, 2007 at 555

[66] Id.

[67] Qur'an at 3: 194

[68] Qur'an at 104:1-4

[69] Noor Mohammed - *Principles of Islamic Contract Law*, 6 Journal of Law and Religion (1989) at 121 explains that gambling is prohibited because it involves making easy money. The Arabic word maisir literally means getting something too easily, without working for it,

[70] Qur'an at 2:277

[71] Amir H. Khoury - *Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks*, 43 IDEA: The Journal of Law and Technology 151, 2003 at 190

[72] Heba A. Raslan - *Shari'a and the Protection of Intellectual Property: The Example of Egypt* , 47 IDEA: The Intellectual property Law Review 497, 2007 at 532

[73] Id. at 533-535

[74] Steven D. Jamar - *The Protection of Intellectual Property under Islamic Law*, 21 Capital University Law Review 1079, 1992 at 193

- [75] Ibrahim Wade - *Islamic Finance in a Global Economy* - Edinburgh University Press, at 20
- [76] See in general Ahmad al-Raysuni - *Imam al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, translated by Nancy Roberts (Kuala Lumpur: Islamic Book Trust, 2006) and Muhammad Khalid Masud - *Shatibi's Philosophy of Islamic Law* (Kuala Lumpur: Islamic Book Trust, 2000)
- [77] Ibrahim Wade - *Islamic Finance in a Global Economy* - Edinburgh University Press, at 3
- [78] *Id.* at 42
- [79] Mohammad Hashem Kamali - *Principles of Islamic Jurisprudence*, 1-2 Pelanduk Publications 1989 at 352
- [80] Heba A. Raslan - *Shar'ia and the Protection of Intellectual Property: The Example of Egypt*, 47 IDEA: The Intellectual Property Law Review 497, 2007 at 511 quoting M. Cherif Bassiouni & Gamal M. Badr - *The Shari'a: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E.L. 135, 2002 at 158
- [81] Wael B. Hallaq, *History of Islamic Legal Theories*, 2007 at 107-111
- [82] Knut S. Vikør - *Between God and the Sultan: A History of Islamic Law*, Oxford University Press, 2005 at 66-67
- [83] *Id.* at 69
- [84] Qur'an at 2:173 and 2:286
- [85] Knut S. Vikør - *Between God and the Sultan: A History of Islamic Law*, Oxford University Press, 2005 at 70
- [86] Steven D. Jamar - *The Protection of Intellectual Property under Islamic Law*, 21 Capital University Law Review 1079, 1992 at 191
- [87] Heba A. Raslan - *Shar'ia and the Protection of Intellectual Property: The Example of Egypt*, 47 IDEA: The Intellectual Property Law Review 497, 2007 at 511
- [88] The point is emphasized by Steven D. Jamar - *The Protection of Intellectual Property under Islamic Law*, 21 Capital University Law Review 1079, 1992 at 1090 - 1091
- [89] Lionel Bentley and Brad Sherman - *Intellectual Property Law*, 3rd ed. Oxford University Press, 2008 at 199-240
- [90] *Id.* at 270-277 for copyrights and 578-582 for patents
- [91] Ibrahim Wade - *Islamic Finance in a Global Economy* - Edinburgh University Press, at 24
- [92] Noah Feldman - *Why Shar'ah?* - The New York Times March 16th, 2008 at 4
- [93] Knut S. Vikør - *Between God and the Sultan: A History of Islamic Law*, Oxford University Press, 2005 at 141-151 explains that the fatwa only determines the rules that apply in the type of case in question, it does not decide any particular verdict, it is declaration of the state of the law reached through the use of ijthihad. The Mufti can not evaluate the evidence of the case, that authority belongs to the judges.
- [94] *Id.* at 145
- [95] *Id.* at 146
- [96] Knut S. Vikør - *Between God and the Sultan: A History of Islamic Law*, Oxford University Press, 2005 at 172
- [97] *Id.* at 187 (quoting M. Isabel Calero Secal - *Rulers and Qadis: their relationship during the Nasrid Kingdom*, Islamic Law and Society, VII, 2, 2000, 235-255)
- [98] Ibrahim Wade - *Islamic Finance in a Global Economy* - Edinburgh University Press, at 34 quoting Albert Hourani.
- [99] Noah Feldman - *Why Shar'ah?* - The New York Times March 16th, 2008 at 8

[100] Id. at 6

[101] Constitutions and Constitutionalism are discussed in depth by Nathan J. Brown - *Constitutions in a Nonconstitutional World, Arab Basic Laws and the Prospects for Accountable Government*, at 176 he explains that while the codification of Sharī'a is outside the human powers because it derived from God only, but it is possible to make laws that conform with the content of Sharī'a. The better view of modern constitutions is to view Sharī'a's sources as aids for interpretation and not as authoritative and binding sources of God's law.

[102] Up to 1971 Islam was "a" source of law of the Egyptian Constitution, in 1971 the Constitution was amended and Islam became "the" source of law, see Art. 2 of the Egyptian Constitution.

[103] The Caliphs themselves imposed new taxes and created new entitlements such as the Bait Al- Mal and the Hisba system - Heba A. Raslan - *Shari'a and the Protection of Intellectual Property: The Example of Egypt*, 47 IDEA: The Intellectual Property Law Review 497, 2007 at 539

[104] John Carroll - *Intellectual Property Rights in the Middle East: A Cultural Perspective*, 11 Fordham Intellectual Property Media and Entertainment Law Journal 555 - Spring 2001 at 591 argues that original Arabic local software is sold next to pirated versions of foreign software in shops selling pirated material.

[105] The United States Trade Representative (USTR) is a compilation of countries that are perceived to have trade problems and is a generally cited source for IP development. The 2005 Special 301 Report is available at www.ustr.com. Egypt, Kuwait, Saudi Arabia and Lebanon figure prominently as countries in need of increased protection as result of devastating figures of money lost due to infringement. Also the 2001 Index of Economic Freedom, HERITAGE FOUND REPORTS (The Heritage Foundation) analyses piracy rates.

[106] John Carroll - *Intellectual Property Rights in the Middle East: A Cultural Perspective*, 11 Fordham Intellectual Property Media and Entertainment Law Journal 555 - Spring 2001 at 11

[107] Justice Mufti Taqi Usmani - Copyright According to Sharia, at <http://www.central-mosque.com/fiqh/Copyright.htm>

[108] Resolutions and Recommendations of the Council of Islamic Fiqh Academy 1985-2000, Resolution No. 43 at 89 (Research and Training Institute 2000), available at <http://www.irtipms.org/OpenSave.asp?pub=73.pdf>

[109] Amir H. Khoury - *Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks*, 43 IDEA: The Journal of Law and Technology 151, 2003 quoting Syed Nawab Haidar Naqvi - *Islam, Economics, and Society*, 73 Kegan Paul Intl., Ltd. 1994 at 76

[110] Ibrahim Wade - *Islamic Finance in a Global Economy* - Edinburgh University Press, at 37

[111] Knut S. Vikør - *Between God and the Sultan: A History of Islamic Law*, Oxford University Press, 2005 at 264-269

[112] John Carroll - *Intellectual Property Rights in the Middle East: A Cultural Perspective*, 11 Fordham Intellectual property media and Entertainment Law Journal 555 - Spring 2001 at 9