

SHARI'A AND THE PROTECTION OF INTELLECTUAL PROPERTY— THE EXAMPLE OF EGYPT

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INTRODUCTION

This article assesses the position of Islamic Law, known as Shari'a, concerning the protection and enforcement of intellectual property rights. Although intellectual property rights were not regulated by Shari'a, the principles of Shari'a can be construed to provide support for such protection. These principles form the first part of this discussion, while the Egyptian Law for the Protection of Intellectual Property Rights¹ is the focus of the second part of this analysis.

Foreign companies complain each year about losing millions of dollars due to infringing activities in Egypt.² Experts tried to analyze the problem by

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¹ See Protection of Intellectual Property Rights of 2002, Law No. 82, available at <http://www.egypo.gov.eg/> (last visited Jan. 12, 2007).

² See International Intellectual Property Alliance, *2004 Special 301 Report: Egypt 110*, <http://www.iipa.com/rbc/2004/2004SPEC301EGYPT.pdf> (last visited Mar. 29, 2006) (estimating trade losses due to piracy in Egypt); Business Software Alliance (BSA), *Seventh Annual BSA Global Software: Piracy Study*, <http://www.bsa.org/middleeast/events/upload/2002-Global-Software-Piracy-Study.pdf> (last visited Mar. 29, 2006) (reporting a total loss of \$17.663 million due to software piracy activities in Egypt in 2001 as compared to an estimated loss in 1996 of \$18.128 million); see also International Intellectual Property Alliance, *IIPA 2004 "Special 301" Recommendations: Middle East*, http://www.iipa.com/pdf/2004_April_08_losses_mideast.pdf (last visited Mar. 29, 2006) (placing Egypt on the Priority Watch List, estimating \$41.1 million in total losses in 2003—almost \$7 million less than in 2002).

searching for its roots. A natural inquiry was whether Shari'a allows for such infringing actions.³ It was argued that intellectual property is a new concept, certainly not regulated by Shari'a, and that perhaps it is not protected according to its principles. The importance of this study stems from the fact that while the majority of Islamic countries apply secular laws, Shari'a continues to influence Islamic legislation. This is certainly true when it comes to Egypt.

Muslims view Islam as a way of life, therefore, they seek to act in accordance with the rules of Shari'a. Considering this when attempting to increase awareness of the importance of protecting intellectual property rights could enhance these efforts and could help in achieving efficient enforcement results in the region. 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.⁴

Egypt is an ideal country to analyze. I selected Egypt for my analysis because it is one of the few countries in the region to have begun its intellectual property protection scheme early, at the end of the 19th Century. Egypt also continues to struggle with its application. In addition, the Egyptian Constitution holds Shari'a as the main source for legal rules.⁵

³ See 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 J. INT'L & COMP. L. 307, 354–59 (1996) (examining the Islamic concept of property).

⁴ See John Carroll, *Intellectual Property Rights in the Middle East: A Cultural Perspective*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 555, 559–60 (2001). Carroll points out that:

Surprisingly, Middle Eastern intellectual property laws are as pervasive as the inauthentic goods they are intended to control. For example, . . . [I]legal commentators have stated that Egypt's intellectual property laws are 'in keeping with general international standards.' . . . Despite the host of Middle Eastern intellectual property laws, and some reported instances of enforcement, regulations are perceived to be lax and countries throughout the region tend not to enforce intellectual property laws.

Id. He also notes that, "an understanding of the enforcement and recognition of intellectual property rights in the Middle East is incomplete without an understanding of the cultural and religious forces, deeply rooted in Middle Eastern history, that shape the protection of intellectual property in the Middle East today." *Id.* at 557.

⁵ Egypt Const. art. 2, available at <http://www.parliament.gov.eg/EPA/en/itemX.jsp?itemFlag=Strange&categoryID=1§ionID=11&typeID=1&categoryIDX=1&itemID=8&levelid=54&parentlevel=6&levelno=2> (last visited Jan. 12, 2007). Egypt offers fertile ground for study for other reasons as well. First, Egypt is the home of more than 70 million people and is considered one of the biggest markets in the area. Second, Egypt is famous for being at the

Historically, Egyptian laws can be traced to three main sources: Napoleonic Code, Roman law, and Islamic law (Shari'a). Modern Egyptian laws are based on civil law principles and are known to have a French flavor to them. Rules derived from Shari'a are applied only in family cases.⁶ The Egyptian Constitution, however, explicitly provides that "the principal source of legislation is Islamic Jurisprudence (Sharia)."⁷ Accordingly, any legislation must comply with the principles of Islamic Law, otherwise its constitutionality could be challenged before the Egyptian Supreme Court of Constitutionality.

BACKGROUND

The concept of protecting and respecting intellectual property rights is not a new idea to the Middle East. History informs us that intellectual property rights, especially trademarks and copyrights, received some form of acknowledgment in old civilizations.⁸ In the Islamic state, the Caliphs would buy books they considered important and make copies of them after paying an adequate compensation to the author.⁹ They would also hire authors to write books¹⁰ in a way similar to the modern concept of works made for hire.¹¹ Additionally, authorities used to monitor the markets and enjoin unfair practices through market

center of the entertainment industry among the Arab Countries and, like many developing countries, is suffering from the immigration of scientists phenomena. Third, Egypt has just enacted a new law for protecting intellectual property rights; this law deals with various new areas and is hoped to prove to be a successful tool in combating infringing activities exercised on a wide scale. Finally, many legislative bodies in other Arab Muslim Countries are influenced by the acts of the Egyptian Legislature.

⁶ *Id.* at art. 9.

⁷ *Id.* at art. 2.

⁸ See Amir H. Khoury, *The Development of Modern Trademark Legislation and Protection in Arab Countries of the Middle East*, 16 *TRANSNAT'L LAW* 249, 253 (2003) (chronicling the rise of trademark law in the Middle East); see also Benjamin G. Paster, Note, *Trademarks—Their Early History*, 59 *TRADEMARK REP.* 551 (1969) (discussing the global origins of trademark law).

⁹ See Amir H. Khoury, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks*, 43 *IDEA* 151, 183 (2003). Khoury explains how in some cases the Islamic state had resorted to buying the entire production of a scholar and then make use of these productions for the public good, while leaving the scholars' moral rights intact.

¹⁰ *Id.*

¹¹ See *id.*; Mohamed Hossam Loutfi, *The Protection of Intellectual Property Rights: The views of the Pharos, Islamic Jurisprudence and Masters of Poetry and Literature*, 232–233 (*Beitrage zum Islamischen Recht III*, Peter Lang Europaischer Verlag der Wissenschaften, 2003).

inspectors known as Muhtasib.¹² Imitating the seal of the Muhtasib was a serious crime.¹³

International calls for protecting intellectual property rights began in the late 1800's.¹⁴ Since 1883, international conventions provided substantive rules for protecting intellectual property rights on the national level and started to create an international legal framework.¹⁵ Tunisia was the first Muslim state to accede the Berne and Paris Conventions and was followed by Morocco, Lebanon, and Egypt.¹⁶ Each of these states subsequently introduced their own legislations pursuant to their international obligations.¹⁷ It is noteworthy, however,

¹² See Ida Madieha Azmi, Spyros Maniatis & Bankol Sodipo, *Distinctive Signs and Early Markets: Europe, Africa and Islam*, 1 PERSPECTIVES ON INTELLECTUAL PROPERTY SERIES: THE PREHISTORY AND DEVELOPMENT OF INTELLECTUAL PROPERTY SYSTEMS 150 (Alison Firth ed., Sweet & Maxwell 1997).

¹³ See Khoury, *supra* note 9, at 182.

¹⁴ See BANKOLE SODIPO, PIRACY AND COUNTERFEITING: GATT TRIPS AND DEVELOPING COUNTRIES, 21–22 (Int'l Economic Development Law Series); MICHAEL BLAKENEY, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A CONCISE GUIDE ON THE TRIPS AGREEMENT, ¶ 2.30 (Sweet & Maxwell 1996).

¹⁵ The earliest international instrument is the *Paris Convention for the Protection of Industrial Property*, which was adopted in March 20, 1883. The *Paris Convention* was followed by the *Berne Convention for the Protection of Literary and Artistic Works* (“The Berne Convention”), adopted in September 9, 1886. See World Intellectual Property Organization, at <http://www.wipo.int/about-ip/en/iprm/pdf/ch5.pdf#paris> (providing the history and content of the convention); *WIPO Intellectual Property Handbook: Policy, Law and Use*, ¶ 5.166–5.169 and 5.191–5.193, available at <http://www.wipo.int/about-ip/en/iprm/pdf/ch5.pdf#berne> (providing the history and content of The Berne Convention); see also WIPO Treaties, *Major Events 1883–2002*, <http://www.wipo.int/treaties/en/general/> (providing a historical chronology of international protection of intellectual property).

¹⁶ Among the first to join international intellectual property conventions were: Tunisia (Paris 1884 and Berne 1887); Morocco (Paris 1917 and Berne 1917); Lebanon (Paris 1924 and Berne 1947); and Egypt (Paris 1951 and Berne 1977). The new millennium witnessed the accession of many members of the Gulf Cooperation Council (GCC) such as; Qatar, joining Paris and Berne in 2000; Saudi Arabia acceding to Paris and Berne in 2004; and Yemen acceding to Paris in 2007. See World Intellectual Property Organization, *Contracting Parties*, http://www.wipo.int/treaties/en/SearchForm.jsp?search_what=C (containing complete accession details for WIPO administered treaties for each country).

¹⁷ Some argue that the fact that many Muslim states were under occupation, delayed the enactment of national intellectual property laws. In this context, Samiha El-Kaliouby argues that enacting an Egyptian industrial property legislation, entailed imposing criminal sanctions on the infringers of such rights, while Egypt—then subject to British occupation—was not entitled to impose criminal sanctions (other than fines) on foreign nationals in its territory, since they enjoyed immunity from Egyptian courts. See SAMIHA AL-KALUOBY, *INDUSTRIAL PROPERTY*, 17–18 (5th ed., Dar Al-Nahda, 2005).

that the Ottoman Empire, which was in control of vast parts of the MENA region, enacted the first copyright law in 1910.¹⁸

Egypt belongs to the first group of Muslim states to draft intellectual property legislation.¹⁹ After initially resorting to the rules of natural justice to enforce intellectual property rights, the legislature enacted the country's first intellectual property law; the trademark law of 1939.²⁰ Enacting the law did not raise much debate as to its legality under Shari'a Law.²¹ The adoption of the TRIPS Agreement as part of the WTO Agreements made it necessary for member states to either amend their existing intellectual property laws or enact new legislation.²² As Muslim countries struggled to achieve this, the debate began over the legality of intellectual property rights ("IPRs") and the proposed legislative scheme of protection.²³

Islamic contemporary scholars are split into two main groups. The first group, represented by a number of scholars, is against intellectual property rights.²⁴ Their argument, as summarized by Mufti Taki Usmani, who adopts the

¹⁸ See MOHAMED HOSSAM LOUFI, DAVID VAVER & PIERRE SIRINELLI, *PRINCIPLES OF COPYRIGHT CASES AND MATERIALS*, 5 (World Intellectual Property Organization and United Nations Development Program, Geneva 2002).

¹⁹ In 1927 Egypt prepared a draft copyright law, which incorporated the principles of the Berne Convention. *See id.* at 6.

²⁰ *See* Al-Khaluoby, *supra* note 17, at 19.

²¹ Shari'a 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'a is binding on Muslims. *See* Steven D. Jamar, *The Protection of Intellectual Property Under Islamic Law*, 21 CAP. U. L. REV. 1079, 1080 n.5 (1992).

²² *See* BLAKENEY, *supra* note 14, at v.

²³ Besides the debate among scholars, online fatwa banks, such as Islamonline.com, received questions regarding the position of Islam (Shari'a rules) on copyright and making illegal copies of protected materials like books, CDs and computer programs. *See* Islamonline.com, *Fatwa Bank*, http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503545794 (asking for fatwa about copyright in general in Islam) *and* http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503543972 (asking for fatwa on copying protected computer programs and CD) (last visited Jan. 12, 2007).

²⁴ *See* Hizb ut-Tahrir Circular, *Protection of Intellectual Property: Its Reality and Its Shar'i Rule*, <http://www.adduonline.com/articles/intelprop.htm> (visited Jan. 12, 2007) (This circular was originally available at Hizb-ut-Tahrir's website at <http://www.hizb-ut-tahrir.org/english/>, (January 1, 2001)). The circular takes the extreme viewpoint that intellectual property is a tool used and imposed by the West to monopolize and exploit the Muslim Countries. It argues that intellectual property is against Shari'a as long as the laws permit the owner to impose restrictions on the end user after selling the item containing the intellectual creation. It also claims that in Islam knowledge is to be freely available to all.

opposite view, is that: “the concept of ownership in Shari’a is confined to tangible objects only.”²⁵ These scholars contend that there is no precedent in the Holy Qur’an, in the Sunnah, or in the juristic views of the earlier Muslim jurists that an intangible object was subject to private ownership or to sale and purchase.²⁶ They further argue that “knowledge” in Islâm is not the property of an individual, nor can an individual prevent others from acquiring it, whereas the concept of “intellectual property” leads to the monopoly of some individuals’ knowledge, which can never be accepted by Islâm.²⁷

On the other hand, the majority of Islamic scholars took the position that there is nothing in Shari’a that enjoins or contravenes protecting and enforcing intellectual property rights²⁸ and that Muslims should abide by their contracts and the laws applied in their countries.²⁹ 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 Incorporeal 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’a 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’a*. Their holders are entitled to freely dispose of them. These rights should not be violated.³⁰

The latest in a long chain of religious opinions (“fatwa”) came from Al-Azhar, the most respected Sunni authority among Sunni Muslims.³¹ As noted by

²⁵ Mufti Taki Usmani, *Copyright According to Shariah*, available at <http://www.albalagh.net/qa/copyright.shtml> (last visited Jan. 12, 2007).

²⁶ *Id.*

²⁷ See *supra* text accompanying note 24.

²⁸ See Loutfi, *supra* note 11, at 236–237. Loutfi refers to several fatwas issued by religious organizations in a number of countries, among which is a decision issued by the Council of Islamic Fiqh Academy, in its 5th session held in Kuwait in 1988. *Id.* A fatwa by the prominent Saudi sheik Abd Allah Bin Jabreen regarding computer programs; and opinions issued by The Fatwa Committee of the Al-Azhar, in April 2000 and August 2001.

²⁹ See *supra* text accompanying note 25.

³⁰ See Islamic Fiqh Academy, *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.iritpms.org/OpenSave.asp?pub=73.pdf>. (last visited Jan. 12, 2007).

Loutfi, The Fatwa (“Opinion”) Committee of Al-Azhar, in a number of opinions issued on April 20, 2000 and August 16, 2001, clarified that “Islam gives the owner the freedom to dispense of the property owned thereby as he wishes; no other person may dispose of, copy, enjoy, use, or attribute such property thereto without the prior consent of the owner, whether for a compensation or not.”³² More recent fatwas from Sheikh Al-Azhar³³ and the The Fatwa (“Opinion”) Committee of Al-Azhar focused on the prohibition of any violation of the rights to computer software.³⁴

According to Ghada Khalifa, antipiracy manager at Microsoft Egypt, the effect of the fatwa was felt immediately.³⁵ Khalifa describes one example as to why the fatwa might work:

The day after [the fatwa] was issued, a major Egyptian business executive phoned Microsoft’s Cairo offices and asked the company to review all of his software and to remove any illegal copies . . . [w]hen he [the businessman] was told that it was *haram* (Arabic for ‘forbidden’), he called and said ‘I’m not going to keep it for one more minute.’³⁶

Some Egyptians think that piracy and infringement is not wrong. As noted by Vaughan, many copyists see themselves as doing a good thing.³⁷ The traders argue that they offer needed products for a suitable price.³⁸ The consumers believe it is legitimate, since they are only attempting to secure what they

³¹ See Loutfi, *supra* note 11 at 236–237. Also the Majlis Ulama Islam, the biggest religious organization in Indonesia, issued a fatwa against piracy in 2003. See Steven Patrick, *Islam Joins Indonesian Piracy Fight*, Billboard, Mar. 15, 2003, Int’l, Articles, at 55.

³² *Id.* at 236.

³³ See Susan Postlewaite, *A Fatwa on Piracy*, Law.com, May 31, 2002, News Section, available at <http://freerepublic.com/focus/f-news/692758/posts>.

³⁴ The author, Professor Loutfi requested the opinion of the Fatwa (“Opinion”) Committee of Al-Azhar, concerning the position of Shari’a about regarding intellectual property rights in computer programs and their violation from an Islamic perspective. In August 2001, the Committee issued a fatwa confirming two earlier fatwas issued by and the Highest Religious Council “Majlis al-Ifta al-A’ala” and the Council of Islamic Fiqh Academy, *see supra* text accompanying note 30, whereby it stated that “it is to be considered religiously forbidden to violate owners rights in their computer programs, since such programs are considered as falling within the context of “money”—*money* here being used to refer to something that is capable of becoming the subject of proprietary rights- according to relevant Shari’a rules.” See Loutfi, *supra* note 11, at 236–237.

³⁵ See Postlewaite, *supra* note 33.

³⁶ *Id.*

³⁷ Vaughan, *supra* note 3, at 359.

³⁸ See *id.*

need, and they cannot afford paying the price the original owner wants.³⁹ The majority of consumers are not completely sure whether unauthorized copying is permissible.⁴⁰ Although it is true that there is an intellectual property rights law in Egypt, there remains a problem in convincing people that such unauthorized copying is, in fact, illegal and prohibited by the law and by religion. The Egyptian society, like most Middle Eastern societies, remains a religious one. Many people seek to insure that their actions, even when purchasing goods, are approved by Shari'a. When it comes to intellectual property, many people think that it is a new tool for the West to monopolize Islamic countries and prevent them from accessing the technology they need. While many people see the monopolization side, only a few understand the need and benefits that could be achieved by enforcing intellectual property rights.

Egypt has adopted its new intellectual property law not only to comply with its obligations under TRIPS and other relevant agreements but also with an understanding that without adequate protection of intellectual property rights, economic development will be difficult to achieve.

Part one of this article examines the principles in Shari'a that support existing intellectual property regimes and those that might be in conflict with them. Part two is dedicated to assessing the current Egyptian intellectual property law from a Shari'a perspective. This is followed by a conclusion that there is no real conflict between Shari'a and the notion of intellectual property law and that those Shari'a principles, when applied to intellectual property, call for strong protection by the government and the people.

I. SHARI'A PRINCIPLES PROVIDING SUPPORT FOR INTELLECTUAL PROPERTY

A. *Sources of Islamic Law in brief*

It is sufficient for the purpose of this article to explain in brief the sources of rules in Shari'a and their respective hierarchy. Of importance here is to understand the basis of Shari'a principles, which might be seen as in conflict with, or in accord with, the protection of intellectual property rights.

³⁹ See *id.* at 359–60.

⁴⁰ See *id.* at 359.

1. Basic Sources

The basic or primary sources of Shari'a are the Qur'an and the Sunnah. The Qur'an and the Sunnah furnished the principles needed for humanity. Their objectives can be applied at all times and places until the end of time. They are, in short, everlasting principles, and no derogation from them is permitted. The Qur'an is the primary source of rules followed by the Sunnah of the Prophet.

a. *Qur'an*

Muslims believe that Qur'an is the last holy book that God, or Allah as it is in Arabic, has chosen to reveal to humankind, through the last messenger and prophet Mohammed. The Qur'an was revealed to Mohammed over a period of 22 years until his death in 632 C.E. Only a few verses were revealed at a time so that there was room to understand their meaning and to memorize them.⁴¹ The verses are divided into "Meccan" and "Medinese." This is based on whether they were revealed when Mohammed was in Mecca or after he emigrated to Medina, where he escaped with his followers from the torture and persecution they suffered in Mecca. Thus, the Meccan verses largely deal with the principles of the new faith and hardly contain any legal principles. "These [legal principles] were revealed mostly during the Medina period, when Medina became a Muslim city-state with the Prophet acting both as religious leader and as a head of state."⁴²

The text of the Qur'an comprises 114 Suras or chapters. Following the death of the Prophet Mohammed, Abu Bakr, the first Caliph, collected all the existing copies of the Suras, making one full compilation containing all 114 Suras and burning all remaining copies. Originally, the Qur'an was written on several materials available in the surrounding environment. In addition, many of the Prophet's Companions and followers memorized many Suras; some of them even memorized the whole text. Caliph Abu Bakr collected all the existing copies, made a full copy, and entrusted it with the widow of the Prophet. Later, the third Caliph, Othman Ibn Afa'an, decided to make five copies and send them out to the corners of the expanding State of Islam. The Qur'an that

⁴¹ One of the main reasons the Qura'nic verses were not revealed as a bulk at one time or many verses at the same time, is to gradually lay the principles and obligations of the new religion so that those who chose to join it will not suffer a sudden change and be faced with a huge burden.

⁴² M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E.L. 135, 148 (2002).

we have in our hands now is an identical copy of the copies prepared in Othman's time.

The Qur'an is the highest source of Shari'a. Accordingly, any rule that is traced back to the Qur'an cannot be contradicted or even modified by rules derived from any other source of Shari'a. The Qur'an includes some legal provisions, as noted by Bassiouni and Badr, however, those provisions with legal context are few—only 500 verses among a total of 6,239 verses. Since these provisions are traced back to the Qur'an, they are in the highest hierarchy of legal norms.⁴³

b. *Sunnah*

In Arabic, Sunnah refers to an established practice that is to be followed. Sunna is the second source of Shari'a and is the compilation of Prophet Mohammed's practice as expressed in his sayings (Hadiths), his actions, and his concurrence with the actions of others. "Consequently, the Sunnah is intended to serve as a model of conduct for all Moslems."⁴⁴ Sunnah derives its authority directly from the Qur'an. Many verses in the Qur'an expressly direct Muslims to follow and obey the Prophet.⁴⁵ As the second source of Shari'a, Sunnah clarifies and confirms the rules prescribed in the Qur'an. Most importantly, it complements the Qur'an by setting rules for matters about which the Qur'an is silent. Since Qur'an is the primary source of legislation, Sunnah, as discussed *infra*, should not conflict with or change the rules contained in the Qur'an.⁴⁶

⁴³ *Id.* at 148–49. "It should be recalled, however, that the second caliph, Umar ibn al-Khattab, suspended the application of the penalty for theft during . . . the year of famine. He considered someone who stole to feed his family and himself as not subject to that penalty. *This demonstrates that in the true spirit of the Shari'ah, there is no strict rigidity in the application of legal norms.*" *Id.* at 149–50 (emphasis added).

⁴⁴ See Khoury, *supra* note 9, at 160.

⁴⁵ Holy Qur'an at 24:54: "Say: 'OBEY God and obey the Apostle. If you do not, he is still bound to fulfill his duty, as you yourselves are bound to fulfill yours. If you obey him, you shall be rightly guided. The apostle's duty is but to give plain warning.');" Holy Qur'an at 4:59: "Believers, obey God and obey the Apostle and those in authority among you. Should you disagree about anything refer it to God and the Apostle, if you truly believe in God and the Last Day. This will in the end be better and more just."

⁴⁶ A minority of Islamic jurists, however, allow for that based on the argument that God inspired the Prophet in matters related to religion and legislation. The Majority of Jurists refuses such proposition and argues that "it is impossible for the Sunnah to abrogate or contradict the higher Qur'anic rules." See Bassiouni & Badr, *supra* note 42, at 152.

2. Secondary Sources

“After the [Prophet Mohammed’s (PBUH)⁴⁷] death (11 A.H. / 632 C.E.), the need to continually interpret the Qur’an became more acute. This led to the development of supplemental sources of law⁴⁸ to apply whenever the two primary sources were silent on a given question or when they were, or appeared to be, ambiguous or inconsistent.”⁴⁹ Although all four Sunni schools recognize the supplementary sources,⁵⁰ there are differences in the way each school categorizes their authoritative ranking, the contents of each source, and its applicability to particular cases.

⁴⁷ “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.

⁴⁸ The science of “Asul-Al-Fiqh” (or the principles of Islamic jurisprudence) sets forth the principles and methods of deducing the rules from the Qur’an and the Sunnah absent a clear ruling on the issue in them. For a proper definition of “Asul-Al-Fiqh” see Mohammad Hashem Kamali, *Principles of Islamic Jurisprudence*, 1–2 (Pelanduk Publications 1989). “Although the methods of interpretation and deduction are of primary concern to usul al-fiqh, yet the latter is not exclusively devoted to methodology. To say that usul al-fiqh is the science of the sources and methodology of the law is accurate in the sense that the Qur’an and Sunnah constitute the sources as well as the subjectmatter to which the methodology of usul al-fiqh is applied. The Qur’an and the Sunnah themselves, however, contain very little by way of methodology, but they provide the indications from which the rules of Shari’a can be deduced. The methodology of usul al-fiqh refers to methods of reasoning such as analogy (qiyas), juristic preference (istihsan), presumption of continuity (istishab) and the rules of interpretation and deduction. These are all designed as an aid to correct the understanding of the sources of Ijtihad.” Kamali further contends that fiqh is the product of usul al-fiqh, while usul al-fiqh is the method applied to deduce rules from the sources. Thus, the ability to deduce the law requires knowledge about the sources, i.e., it requires “knowledge of the Qur’an and the Sunnah.” *Id.* at 2.

⁴⁹ See Bassiouni & Badr, *supra* note 42, at 139.

⁵⁰ Imam Al-Shafi is credited for introducing the four main sources of Shari’a in a consolidated and coherent form. He is largely viewed as the founder of the science of Islamic jurisprudence. After that, each of the four schools contributed in either developing the four sources or adding new sources. See Kamali, *supra* note 48, at 6.

a. *Consensus (“Ijma”)*

The authoritativeness for Ijma is traced directly to the Qur’an⁵¹ and the Sunnah.⁵² 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.”⁵³ “[T]he [doctrine] of consensus in Sunni Islam is [the] unanimous opinion of the Sunnite community in any generation on a religious matter, constitute[ing] an authority, and ought to be accepted by all Muslims in later times.”⁵⁴ According to the majority of scholars, the relevant consensus is that of qualified jurists.⁵⁵ Those qualified are known as Mujtahideen,⁵⁶ and they

⁵¹ See Holy Qur’an, Surah Al-Baqarah, at 2:143, available at <http://www.islamonline.net/surah/english/ayah.asp?hSurahID=21&hAyahID=1320&hTranslator=> (English translation by Pickthal) (“Thus We have appointed you a middle nation, that ye may be witnesses against mankind, and that the messenger may be a witness against you”); see also Kamali, *supra* note 48, at 237; 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) (“You are the best community that has been raised for mankind. You enjoin right and forbid evil and you believe in God”); 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) (“And whoever acts hostilely to the Messenger after that guidance has become manifest to him, and follows other than the way of the believers, We will turn him to that to which he has (himself) turned and make him enter hell; and it is an evil resort.”)

⁵² See Kamali, *supra* note 48, at 240–44.

⁵³ For an explanation and further information for that hadith see Kamali, *supra* note 48, at 240. Other hadiths used as proof are Prophet Mohammed (PBUH) saying: “Whatever the Muslims deem to be good is good in the eyes of God[.]” “A group of my *ummah* shall continue to remain on the right path. They will be the dominant force and will not be harmed by the opposition of opponents[.]” and “I beseeched Almighty God not to bring my community to the point of agreeing on *dalalah* (error) and He granted me this.” *Id* at 240–41.

⁵⁴ George F. Hourani, *The Basis of Authority of Consensus in Sunnite Islam*, *Studia Islamica*, No. 21, 13 (1964); Kamali, *supra* note 48, at 230 (“*Ijma* is [] the unanimous agreement of the *mujtahidun* of the Muslim community of any period following the demise of the Prophet Muhammed on any matter”); Vaughan, *supra* note 3, at 352 (stating that “consensus on a point of law by those authorized to interpret the Koran or the hadith of the Sunna”).

⁵⁵ Hourani, *supra* note 54, at 13; see also Kamali, *supra* note 48, at 244 (“Since it is the *mujtahidun* whose consensus constitutes *ijma*,”).

⁵⁶ See Vaughan, *supra* note 3, 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. A layman’s attempt to use the Koran or Tradition to advocate a position, therefore, has always been met by condemnation.”) (emphasis in original); see also Kamali, *supra* note 48, at 469 (“And lastly, the definition of *ijtihad* is explicit on the point that only a jurist (*faqih*) may practice *ijtihad*. This is explained by the requirements of *ijtihad*, namely the qualifications

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.

b. Analogy ("Qiyas")

Qiyas is "reasoning based on analogy."⁵⁷ 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."⁵⁸

The authoritativeness of Qiyas is traced back to the Qur'an, where many verses "call for logical thinking" in surrounding matters.⁵⁹ The Sunnah provides support for using Qiyas,⁶⁰ as does Omar's message to Abu Moussa Al-Ashari when he appointed him as a judge in the city of Kufa, Iraq.⁶¹ Among the instructions Omar gave to Al-Ashari regarding the method of reaching decisions in the cases was to urge him to use his mind and draw analogies between similar cases to reach a decision in new situations where there is no rule to be found in the Qur'an and the Sunnah.⁶² Qiyas has been used to articulate rules for various current issues. For example, contemporary jurists prohibited drugs by analogy;

that must be fulfilled for attainment to the rank of *mujtahid*. When these requirements are met, it is inevitable that the *mujtahid* must also be a *faqih*. Thus the definition of *ijtihad* precludes self-exertion by a layman in the inference of *ahkam* (rules).") 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).

⁵⁷ 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).

⁵⁸ Bassiouni & Badr, *supra* note 42, at 155.

⁵⁹ *Id.*

⁶⁰ The support for the validity of Ijtihad in general could be found in the Prophet's conversation with Mou'ath Ibn Gabal. Before leaving to Yemen, where the Prophet as a judge ("Khadi") appointed him, the Prophet asked him how he would go about solving a case. He explained that he will first search in the Qur'an, if there is no rule, in the Sunnah, if no rule he will do his effort to formulate a rule based on the Qur'an and the Sunnah. See Kamali, *supra* note 48, at 288.

⁶¹ *Id.*

⁶² See Bassiouni & Badr, *supra* note 42, at 155 ("With regard to the use of analogy (qiyas), Umar's message states: Use your brain about matters that perplex you and to which neither Qur'an nor sunnah seem to apply. Study similar cases and evaluate the situation through analogy with them").

because drugs have an intoxicating effect on a person like liquors; the same reason (“illa”) that was used to prohibit drinking liquors was used to prohibit partaking in drugs.⁶³

c. 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* now also encompasses Islamic customs that have evolved through the years.⁶⁴

d. 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’a* 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.”⁶⁵ 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.”⁶⁶ 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.*”⁶⁷ This type of public interest is known as “*Maslaha Mursalah*.”⁶⁸

⁶³ *Id.* at 156.

⁶⁴ See generally Bassiouni & Badr, *supra* note 42, at 157–58.

⁶⁵ See Kamali, *supra* note 48, at 352.

⁶⁶ Bassiouni & Badr, *supra* note 42, at 158.

⁶⁷ Kamali, *supra* note 25, at 351.

⁶⁸ Jurists categorize interests based on whether there is a textual authority favoring it or denying it to three categories: (1.) Accredited/Acknowledged Interests (“*masaleh mu’tabarah*”), which are interests for which there is an express or implied rule. *Id.* at 357. The validity of this category is upheld and is not subject to any debate. *Id.* There are numerous examples such as, penalizing theft as a way to defend the right to ownership. *Id.* (2.) Cancelled/Discredited Interests (“*masaleh mulgha*”), which are interests that have been discredited either expressly or impliedly. One example is prohibiting usury. *Id.* (3.) Unrestricted Interests (“*masaleh mursalah*”) which are interests that have neither been upheld as accred-

According to Islamic Jurists, there are “five main goals of Shari’a”:⁶⁹ safeguarding and promoting the individual’s faith; life; intellect; posterity; and wealth.⁷⁰ 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. As pointed out by Bassiouni and Badr, Shari’a presumes that individual interests and those of the community “coincide” with those five goals.⁷¹ They further contend that, in the “rare” occasions when those interests are in conflict, the public interest is to prevail.

To ensure that the doctrine will not turn into a method of arbitrary decision-making to acknowledge or deny a particular interest, the following conditions must be fulfilled:

1. The existence of a genuine—as opposed to probable interest—where there is a reasonable probability that the benefits of enacting a rule to observe it outweighs the harms that might be caused due to its observance.
2. It must be a general interest in the sense that it is a benefit acknowledged, or it is a harm prevented to society as a whole, in contrast to particular persons or a group of persons. This does not mean that it must benefit or protect each individual, but it does mean that a significant number of people are likely to benefit from it.
3. The proposed interest does not contradict or negate a value or principle already upheld, expressly or impliedly, by the Qur’an, the Sunnah, or Consensus.

Imam Malik adds two further conditions:⁷²

4. The proposed interest must be one that could be rationally acceptable.
5. The proposed interest must be one which either prevents or remove hardships from the people.

ited nor discredited by a textual authority, but “have been validated after divine revelation came into an end.” *Id.*

⁶⁹ “Maqased Al-Shari’a” also known as “Al-Maqased Al-Shari’ah,” which means the legitimate values or goals.

⁷⁰ Bassiouni & Badr, *supra* note 42, at 158.

⁷¹ *Id.*

⁷² For a detailed discussion, see Kamali, *supra* note 48, at 359.

This doctrine has been applied in many situations in the past,⁷³ thus, serving as a way to insure the flexibility of the rules of Shari'a by allowing it to respond and deal with the needs of society. This doctrine, in short, preserves the vitality of Shari'a by allowing it to accommodate social changes, thus avoiding stagnation and rigidity of its rules.⁷⁴

In sum, the two main sources of rules in Shari'a are the Qur'an and the Sunnah. If no rule is to be found in either of them, we resort to *Ijtihad*.⁷⁵ In *Ijtihad*, the scholar with sufficient knowledge of the meaning, the formation, the collection, and the interpretation of the Qur'an and the Sunnah, attempts to formulate a rule by way of consensus or analogy, which complies with both the Qur'an and the Sunnah.⁷⁶ Additionally, the custom, which complies with the rules derived from those four sources and the general principles in Islam, is considered as a source of rules.⁷⁷ The need to observe public interest has also proven to be a valuable source that allows Shari'a to deal with new problems and situations.⁷⁸

Non-Shari'a laws refer to the laws which the government enacted to cover situations where no body of rules sufficiently exists in other Shari'a rules. Currently, most of the laws in the Muslim countries are non-Shari'a laws (intellectual property laws are one example); nonetheless, they remain obligatory for the citizens, provided they do not conflict with a rule in the other sources.

3. Hierarchy of Actions under Islamic Law

Islamic schools⁷⁹ classify human actions from a religious point of view into five main categories: mandatory actions ("Wajeb"), non-obligatory but rec-

⁷³ Scholars refer to many actions and laws enacted by the Companions of the Prophet, the succeeding caliphs, such as Abu Bakr's decision to collect the Qur'an in one volume and Omar's decision to suspend the execution of the punishment for theft, which is cutting the hand of the thief during the year of the famine. *Id.* at 354–55.

⁷⁴ See Kamali, *supra* note 48, at 366.

⁷⁵ See *supra* text accompanying note 48.

⁷⁶ See *supra* text accompanying notes 41, 50–64.

⁷⁷ See *supra* text accompanying notes 64–67.

⁷⁸ See *supra* text accompanying notes 68–73.

⁷⁹ There are four main Sunni schools of Law/Jurisprudence (also known as "*Madahib*"): Shafi'i, Malki, Hanafi and Hanbali. The schools are named after the founders and each school was joined by other members how follow the founder's method of thought. The Hanafi and the Shafi'i schools were founded in Bagdad by Abou Hanifa Al-Nu'man and Muhammed Ibn Idris Al-Shafi'I, respectively. Although the Shafi's school started in Bagdad, its founder later on moved to Cairo. In general, the two schools rely more on the use of analogy and the public good to deduce new rules form the primary sources. The Maliki

ommended actions (“Mandoob”), permitted actions that were neither permitted nor prohibited by a rule (“Mobah”), actions that are not prohibited but are recommended against (“Makroh”), and prohibited actions (“Moharam”).⁸⁰

It is worth noting that Shari'a acknowledges the concept that “all things are originally permitted unless they are legally prohibited” (“*Al-asl fel ashi'a al-ebah'a*”). As explained by one author, Hamid Khan: “[I]t is only in regard to [this] category (i.e., those things which are left legally indifferent) that there is

school was formed by Abu Abd Allah Malik Ibn Anas, in Al-Madina, which is now one of the holy cities for Muslims. Al-Madina is the city that offered refuge to the Prophet and his followers and the place where Muslims laid the foundations of their state. It is located in the Kingdom of Saudi Arabia). See BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW 3* (U. of Ga. Press 1998). The Hanbali school was also formed in Bagdad. See Bassiouni & Badr, *supra* note 42, at 161; Vaughan, *supra* note 3, at 353. The Malki and the Hanbali schools place more importance to the textual meanings of the primary sources. As explained by Bassiouni and Badr, there was no uniformity in the opinions of the members of each school. See Bassiouni & Badr, *supra* note 42, at 161. A member could depart from the opinion of the majority, which explains why there is sometimes both a majority and minority opinion for the same legal issue within the same school. Additionally, the local custom and the socio-economical conditions of the city or country wherein the jurist lived played an important role in shaping his opinions. For example, after his move to Cairo, the founder of Shafi'i school is known to have changed some of his earlier opinion he gave in Bagdad. See Bassiouni & Badr, *supra* note 42, at 161 (“some of Shafi'i's rulings while teaching in Cairo differed from his rulings while in Baghdad”). This reflects an understanding that the rulings, while being properly based on and in conformity with the primary sources, should take into consideration the conditions existing at the time and place where the ruling is needed. *Id.* at 162.

⁸⁰ Human actions are classified as follows:

1. Duties (“Wajeb”): These are mandatory actions where not performing them is considered a sin and puts the person subject to religious after life punishment and sometimes subject to punishment in the worldly life by the authorities. This category include, paying the “Zakat,” praying on time, fasting in Ramadan.
2. Recommended (“Mandoob”): Actions that are not obligatory to do but it is advised to do them. This means that if a Muslim does not do them he/she will not be committing any breach of his duties i.e., will not be committing a sin (“Ethm”).
3. Permitted (“Mobah”): These are actions, which are, either expressly permitted or for which there is nor clear rule in Shari'a, neither for nor against them.
4. Advised Against (“Makroh”): These are the actions that are not prohibited so that doing them is not a sin but are strongly recommended against.
5. Prohibited (“Moharam”): These are the actions, which are prohibited by a legal text, such as the prohibition of taking an innocent life, usury, gambling, drinking or dealing in liqueur for Muslims, eating the meat of the pig.

See generally Kamali, *supra* note 48, at 187–88, 194–96; Khan, *supra* note 57, at 294.

in theory any scope for human legislation.”⁸¹ This point is of importance to intellectual property, since the presently suggested framework of protection and enforcement is new, and there is no prior ruling in Shari’a dealing with it. The fact that Shari’a is silent about intellectual property gives the government (being the modern form of the Caliph) the right to step in and regulate this area as long as Shari’a principles are observed.⁸²

B. Principles of Islamic Law supporting, protecting, and enforcing IPRs

1. Permissible accumulation of wealth

Prior to proceeding to the concept of property in Shari’a, it is important to highlight Shari’a’s stand regarding the accumulation of wealth in general. As noted by Amir Khoury, Islam recognizes a wide array of personal rights.⁸³ This includes the right of an individual to accumulate wealth. An individual can own as much property and collect as much money as possible, provided that what he or she collected was generated from a legitimate source.⁸⁴

Several Hadiths by the Prophet encourage people to work to earn their living from their effort.⁸⁵ The Hadiths show that the most honorable, favorable,

⁸¹ See Khan, *supra* note 57, at 294.

⁸² Jamar, *supra* note 21, at 1082. Jamar argues:

In general, one should distinguish among (1) areas about which Islamic law has spoken with a relatively full voice, such as spiritual duties, personal status, and inheritance, (2) areas where Islamic law has provided some general principles, but with many lacunae, as in contract law with its general injunction to fulfill all obligations and its general prohibitions on usury and indefiniteness, and (3) areas where Islamic law is silent, such as in the field of intellectual property. In the latter two areas, and in particular the third area, Allah’s representative among his people, the Caliph, or in more modern terminology, the government, is free to act provided the laws promulgated do not run afoul of *shari’a* prohibitions and are consistent with *shari’a* principles.

Id. (footnote references omitted).

⁸³ See Khoury, *supra* note 9, at 164.

⁸⁴ It should be noted that Islam favors a balance between “unlimited” individual interests and freedom found in Capitalism and “complete” denial of such interests and freedoms found in Socialism. Such balance is achieved by weighing self-interest against public interest and giving preference to the later whenever it out-weights the former. As it is clear from several Qur’anic verses, wealth is considered an ornament of the worldly life, incomparable to good deeds which matters for the after life. For a further discussion on this issue see *id.* at 165.

⁸⁵ See *Translation of Sahih Bukhari*, vol. 3, bk. 34, *Sales and Trade*, at No. 288, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/034.sbt.html>. (“Narrated

and legitimate source of wealth is money earned by one's own work and effort.⁸⁶ Accordingly, those who use their intellectual creativity and spend time and effort to develop unique productions in science, art, and literature should be allowed to reap the fruits of their efforts. The same applies to traders who develop distinct marks to allow their customers to distinguish their goods and services and who work hard to preserve the good name and quality which consumers have come to associate with their marks. Thus, creators of intellectual property have a legitimate right to their creations, thereby allowing them to benefit from those creations.

2. Property (“*Al-Mulk*”)

Intellectual property is characterized as intangible rights granting intellectual creators limited exclusive rights to their creations, allowing them to exclude others from exploiting their creations and to stop any unauthorized use.⁸⁷ Therefore, a sound analysis of Shari'a's position regarding intellectual property protection requires us to address a number of issues, namely the recognition of intangibles as a form of property in Shari'a, methods of acquiring property in Shari'a, and the rights of an owner in Shari'a.

First: Private Property

Although Allah owns everything in Islam, the concept of private property remains fully acknowledged in Islamic Law, and Allah may bestow property rights in whomever he wishes.⁸⁸ Thus, the owner of a property is more like a “trustee” for Allah.⁸⁹ This owner, however, enjoys and enforces “absolute”

Abu Huraira: God's Apostle said, “One would rather cut and carry a bundle of wood on his back than ask somebody who may or may not live him.”; *Id.* at No. 287 (“Narrated Abu Huraira: God's Apostle said, “The Prophet David used not to eat except from the earnings of his manual labor.”); *id.* at No. 286 (“Narrated Al-Miqdam: The Prophet said, “Nobody has ever eaten a better meal than that which one has earned by working with one's own hands. The Prophet of God, David, used to eat from the earnings of his manual labor.”).

⁸⁶ *Id.*

⁸⁷ See Lionel Bently and Brad Sherman, *Intellectual Property Law*, 2 (Oxford, 2 ed., 2004) (“While there are a number of important differences between the various forms of intellectual property, one factor that they share in common is that they establish property protection over intangible things such as ideas, inventions, signs, and information”).

⁸⁸ See Jamar, *supra* note 21, at 1083–84.

⁸⁹ *Id.*

rights over his property against all other individuals.⁹⁰ As explained by one scholar: “That property belongs to Allah and is held by the individual in trusteeship is not problematic; the owner’s title is good against all takers aside from Allah himself. Trespass is a sin against Allah and a violation of Shari’a.”⁹¹

Second: Intangibles as an acceptable form of property

The term “intellectual property rights” refers to proprietary rights in intangibles, intangibles being the intellectual creations embodied in tangible forms⁹² such as books, CDs, or medicine capsules.⁹³ Accordingly, it is important to examine whether the concept of Mulk in Shari’a acknowledges intangibles as a form of property.

The four schools are not in agreement about this issue. This is primarily the result of a disagreement about the proper criterion for what could be consid-

⁹⁰ See Vaughan, *supra* note 3, at 356 (“Under Islam, the individual’s right to property is not only recognized, it is absolute and is considered sacred. All property belongs to Allah but is given to Man in ‘inheritance.’”).

⁹¹ *Id.*; see also Surah Al-Baqarah, 2:188 (“And eat not up your property among yourselves in vanity, nor seek by it to gain the hearing of the judges that ye may knowingly devour a portion of the property of others wrongfully.”). English translation available at Islamonline.com, <http://www.islamonline.net/surah/english/ayah.asp?hSurahID=21&hAyahID=1365&hTranslator=> (translated by Pickthal).

⁹² See World Intellectual Property Convention art. 2, para. viii 1967, available at http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html#P50_1504. The Conventions defines intellectual property as:

(vii) ‘intellectual property’ shall include the rights relating to:

- literary, artistic and scientific works,
- performances of performing artists, phonograms, and broadcasts,
- inventions in all fields of human endeavours,
- scientific discoveries,
- industrial designs,
- trademarks, service marks, and commercial names and designations,
- protection against unfair competition,

and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

Id.

⁹³ See 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).

ered *mal* or money.⁹⁴ One school, the Hanafis, consider “physical possession,” or *Heiaza*, as the only acceptable criterion for *Mal*. They accept only tangibles as *Mal*, and eventually property, and admit intangibles, or *Manfa'a*, as *Mal* only if they become the subject of a contract.⁹⁵ The three remaining schools, the Malki, the Shafie, and the Hanbali all agree that the proper criterion should be “usefulness.”⁹⁶ Thus, these schools accept both tangibles and intangibles as property. They believe that anything that is useful for people will become of value for them and will become the subject of their dealings. They refer to the importance of resorting to prevailing customs or *Urf* to determine what is considered useful and valuable in society.⁹⁷ It follows then, that the majority of scholars accept intangibles as property.⁹⁸

It is clear that since the 1800s, people have increasingly come to value works of intellectual property and deal in them.⁹⁹ This fact highlights a custom of recognizing intellectual intangible creations as a form of property subject to contractual dealings. Therefore, it should be considered as *Mal* and an acceptable form of personal property worthy of the strict protection prescribed under Shari'a for property rights. Accordingly, since the state has a duty in Shari'a to secure the required protection for personal property, it should take the necessary steps for ensuring that intellectual property rights are being respected, through statutes, regulations, and effective enforcement mechanisms.

⁹⁴ The term money is used here to mean something that is capable of becoming the subject of proprietary rights.

⁹⁵ For *Hanafis*, the general rule is that only tangibles are to be considered *Mal*, thus eligible to be property. The exception to this rule is accepting intangibles as *mal*, only when they are the subject of a contract. The basis for this exception is juristic preference (*istihsan*), see Kamali, *supra* note 48, at 1–2, in the sense that consideration to the public interest and avoiding the hardships that people would have to face, if intangibles, which are customarily have been used as objects of contracts and dealings among them, was ruled to not be *mal*. See FATHI AL-DERENY, *THE RIGHT TO CREATE IN CONTEMPORARY ISLAMIC JURISPRUDENCE* 20–21 (3d ed., Al-Resalah 1984).

⁹⁶ *Id.* at 20.

⁹⁷ *Id.* at 23–27.

⁹⁸ *See id.* at 27–29 (arguing that “having a value is dependable on being useful . . . , [and usefulness is an immaterial matter. Thus, whenever there is utility there is value and the thing is considered *Mal* . . .]. [This] broad test extends to include: everything that is useful to people and considered of value among them thus, becomes a customary subject of their contracts and exchanges; except if it is an object that Shari'a does not permit people to deal in. . . . [Moreover], this ‘general test’ extends to cover everything that previously used to be valueless or anything that was forbidden because it is harmful, if people discovered a useful use of it.”). Al-Dereny uses vaccinations as an example, where harmful germs are used to make a useful cure.

⁹⁹ *See supra* text accompanying note 15; *see also* Bently, *supra* note 87, at 2.

Third: Acquiring property

In Shari'a, property could be acquired through various sources such as, inheritance,¹⁰⁰ bequest or legacy,¹⁰¹ or one's work and effort.¹⁰² The latter is of significance bearing upon intellectual property. It is clear that both the Qur'an¹⁰³ and the Sunnah encourage individuals to work.¹⁰⁴ Work is understood to encompass physical or intellectual efforts. Thus, a person who spends time and effort to bring into life a new and useful creation—whether this person is a writer, a scientist, or a trader—should be allowed to have property rights over his creation.

Furthermore, granting property rights to intellectual creators finds support in two concepts relating to real property. The first, improving and developing vacant land ("*Mawat*"), gives the developer the right to acquire land as his own property.¹⁰⁵ The second involves acquiring property rights to movables existing free of title, such as when a person exerts an effort to extract minerals from the ground or catches fish from a river; the minerals and the fish become his own property.¹⁰⁶

Those two concepts reflect an appreciation in Shari'a to an individual's effort in turning something into a useful item. They are usually referred to by modern Islamic scholars as providing support to the protection of intellectual property.¹⁰⁷ Some scholars argue that the concept of *Mawat* has "a bearing on intellectual property protection, since it . . . recognizes that ownership may be acquired . . . where such owner has engaged in a creative act of making some-

¹⁰⁰ Inheritance is strictly governed by express rules in the Qur'an and the Sunnah.

¹⁰¹ See Jeffery Hassan, *Legal and Religious Considerations in Drafting a Muslim Will*, 1J. ISLAMIC L. 187, 200–01 n.90 (1996). Hassan explains that legacies are limited to one third of the estate. The rest of the estate is to be divided according to the rules of inheritance. A legacy could not be granted to an heir, unless all heirs agreed to accept such legacy. And a beneficiary of a legacy or bequest could be a non-Muslim.

¹⁰² *Supra* text accompanying note 85.

¹⁰³ The Qur'an at 9:105: "Say: 'Do as you will. God will behold your works, and so will his apostle and the faithful.'" Other translations available at <http://www.usc.edu/dept/MSA/quran/009.qmt.html>. (last visited Jan. 12, 2007).

¹⁰⁴ *Supra* text accompanying notes 85, 103.

¹⁰⁵ Jamar, *supra* note 21, at 1084–85; see also Vaughan, *supra* note 3, at 355 (deducing that the Islamic concept of *mawat* is similar to the grant of lands to settlers during 1800's westward expansion of America).

¹⁰⁶ Jamar, *supra* note 21, at 1084–85.

¹⁰⁷ "The act of making unproductive land productive, of using something unused, creates ownership. Thus, the creative act of making something useful is recognized as a means of acquiring ownership even of real property." *Id.* at 1084.

thing useful.”¹⁰⁸ They also argue that “[the] concept of obtaining ownership over new or unclaimed objects can logically be applied to concepts of intellectual property regarding ideas for new inventions, new or unused marks, new original works of authorship, or even derivative works. All [involve claiming ownership over the new or unused or improving upon that existing].”¹⁰⁹

These people should all be entitled to the fruits of their efforts: the writer who creates an original work, the inventor who creates a new invention, and the trader who creates a distinct mark for his business and spends money and time to advertise it.

Fourth: Property Rights

Intellectual property laws grant individuals exclusive rights to their creations allowing them to exclude others from unauthorized commercial exploitation of their creations. Additionally, the creators can authorize others to exploit their creations in exchange for consideration. Shari'a recognizes that a rightful owner has the right to use, exploit, or dispose of his property. This right is subject to a number of limitations that are intended to preserve the public interest.¹¹⁰ For example, the owner must recognize certain monetary obligations like Zakat or Alms. Clearly, this limitation applies only to Muslims since the Zakat is a duty imposed on Muslim's. Furthermore, an owner must limit his exploitation to legitimate methods, meaning that usury, coercion, stealing, and other impermissible actions should be avoided at all times.¹¹¹

Another important limitation is that an owner must invest in his property and not just leave it idle; thus, non-use could be considered an abandonment of rights and lead to the loss of title.¹¹² The rationale is that Islam prohibits

¹⁰⁸ See Khoury, *supra* note 9, at 169 (citing Jamar, *supra* note 21, at 1084).

¹⁰⁹ *Id.*

¹¹⁰ As explained by Jamar, while property rights are strong and sacred in Islam, the exercise of such rights is affected by “policy-based tensions and religious injunctions.” Thus, one's exercise of his property rights could be limited by concepts such as encouragement to share with the less fortunate, weighting the harms and permitting a private injury to avoid a greater public harm, and public interest that could necessitate government appropriation of one's property rights. See Jamar, *supra* note 21, at 1092.

¹¹¹ All these actions are considered “wrongful devouring of property” and are strongly condemned by Islam. See FRANK E. VOGEL & SAMUEL L. HAYES, III, *ISLAMIC LAW AND FINANCE: RELIGION, RISK, AND RETURN* 58, 59 (Kluwer Law Int'l. 1998).

¹¹² As explained by Hussein, 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. In this

property hoarding: leaving property idle will eventually lead to a general loss to the economy as a whole. This limitation provides further support for intellectual property regimes since they encourage creators to disclose their ideas to society in exchange for limited exclusive rights. At the end of the exclusionary period, the ideas become available to society without any encumbrances. In addition, enjoying exclusive rights is dependent in most intellectual property laws on continuous use of the creation, especially in the case of patents and trademarks.¹¹³

Finally, an owner must avoid causing harm to any other person as directed by Prophet Mohammed's saying: "[h]arm is neither inflicted nor tolerated in Islam."¹¹⁴ As will be discussed *infra*, some contemporary scholars argue that this latter limitation, coupled with the public interest ("Maslaha") doctrine, supports the case against observing intellectual property rights.¹¹⁵ I will tackle the Maslaha doctrine in a separate section due to its importance. Suffice it to say that this argument ignores that intellectual property laws ensure—through the

case, the state could remedy the situation by granting compulsory licensing. See Hussein, *infra* note 121, at 49–50.

¹¹³ Article 26(5) states:

The rights resulting from the patent shall be terminated, and thus fall in the public domain in the following cases: 5- Non-exploitation of the invention in Egypt within the two years following the grant of the compulsory license, and based upon an application filed by any interested party to the Patent Office."

Additionally, a patent owner could face compulsory licensing under Article 23, which allows:

The Patent Office—after the approval of a Ministerial Committee established by a decree from the Prime Minister—shall grant compulsory licenses for the exploitation of the invention. The committee shall determine the financial rights of the patentee upon the issuance of such licenses, in the following circumstances:

Fourth- If the patentee does not exploit the patent in the Arab Republic of Egypt by himself or upon his approval, or it has not been sufficiently exploited, in spite of the lapse of four years from the date of submitting the patent application, or three years from the date of the grant thereof—whichever is longer—and also if the patentee ceases the exploitation of the invention without an acceptable reason for a period exceeding one year.

Further, Article 91 states:

The court of jurisdiction may, upon request of any interested party, decide to cancel the mark pursuant to a final judgment, if it is established to the court that the mark has not been seriously used for five consecutive years, without reasonable justification.

¹¹⁴ See Kamali, *supra* note 48, at 353 (quoting Ibn Mājah, *Sunan*, Hadīth no. 2340).

¹¹⁵ See *infra* part I. A. 6.

notions of fair use and compulsory licensing—that public interest will be preserved and given precedence over the creators' exclusive rights whenever it is not possible to accommodate both interests.

Fifth: Divisibility of Rights and Licensing

Based on the aforementioned doctrines, absent any limitations, the holder of an intellectual property right has the right to authorize others to use or exploit his creation—a practice generally known as licensing. Shari'a fully recognizes the divisibility of property rights. While the owner maintains his title to the property, he could authorize others to use or exploit the property for a return subject to the conditions and limitations put forth in their agreement. Accordingly, the practice of granting exclusive and non-exclusive licenses is consistent with Shari'a.

Sixth: Theft Grants No Title

Shari'a expressly prohibits wrongful taking of personal property by individuals or the state because a taking of property must be subject to mutual consent.¹¹⁶ In the Farewell Pilgrimage sermon, the Prophet said: “[f]or the property of a man is not permissible except by a willing consent from him.”¹¹⁷ Therefore, stealing property does not affect the owner's title since a thief is considered a trustee of the property. The thief (or any person who has illegally obtained the property) will be forced to return the property and will be held liable for any damage or loss to the property.¹¹⁸

This rule justifies civil and criminal remedies provided for in intellectual property laws.¹¹⁹ The holder of the intellectual property right should be entitled to have any infringing products and instruments seized and destroyed if keeping them would injure his/her rights and interests.¹²⁰ Additionally, the infringer should compensate the property holder for any resulting damages.¹²¹ Furthermore, the state, when fulfilling its duty of protecting intellectual property

¹¹⁶ Property transfers justly and rightfully to another, subject to the existence of a mutual real and intended consent. See VOGEL & HAYES, *supra* note 111, at 60. This prohibition, however, is subject to some exceptions as in the case of public interest but just compensation must be given. See *supra* text accompanying note 110.

¹¹⁷ See VOGEL & HAYES, *supra* note 111, at 58–60.

¹¹⁸ See DERENY, *supra* note 95, at 41.

¹¹⁹ See Khoury, *supra* note 9, at 175.

¹²⁰ *Id.*

¹²¹ See Hussein, *infra* note 231.

rights, is allowed to enact any criminal penalties that are considered reasonable to protect said rights.¹²²

Seventh: Property Rights of Foreigners are Preserved

A final point to be raised in the context of property rights is that in Islam, property rights are acknowledged to Muslims and non-Muslims without discrimination. This point is significant since national treatment is a prevailing concept in all intellectual property treaties, thus obliging member states to provide national protection to the rights of nationals of other member states.

3. Contract (“AL - Aqd”)

A thorough examination of the theory of contracts in Shari’a is well beyond the scope of this paper. This discussion will be limited to two important concepts of contract law that are relevant to other sections of the paper as well: the sanctity of contracts and the freedom to contract.

First: Sanctity of Contracts

The Qur’an¹²³ and the Sunnah¹²⁴ direct Muslims to fulfill their contracts. Contracts are considered not only binding but sacred, and fulfilling them is considered part of the faith. “The authority for the primacy of the maxim *‘pacta sunt servanda’* in Islamic law is massive.”¹²⁵ However, for the purpose of this paper it will be sufficient to mention Prophet Mohammed’s hadith that “Muslims are bound by their Stipulations”¹²⁶ Accordingly, a Muslim who buys a

¹²² See ABD AL-SAMEE’, ABD AL-WAHAB & ABU EL-KHEIR, ECONOMIC RIGHTS OF AUTHORS IN ISLAMIC JURISPRUDENCE AND THE EGYPTIAN LAW 191 (Wahba Library 1988).

¹²³ See Holy Qur’an, Al-Ma’idah [5.1], <http://www.islamonline.net/surah/english/ayah.asp?hSurahID=63&hAyahID=4602&hTranslator=> (visited Jan. 12, 2007) (“O ye who believe! fulfil (all) obligations . . .”).

¹²⁴ See *Sahih Bukhari*, vol. 1, bk. 2, No. 32, <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/002.sbt.html#001.002.032> (visited Jan. 12, 2007) (“Narrated Abu Hearer: The Prophet said, ‘The signs of a hypocrite are three: 1. Whenever he speaks, he tells a lie. 2. Whenever he promises, he always breaks it (his promise[]). 3. If you trust him, he proves to be dishonest. (If you keep something as a trust with him, he will not return it.)’”).

¹²⁵ See Jamar, *supra* note 21, at 1087.

¹²⁶ See *id.*; Kamali, *supra* note 48, at 341 (quoting Abu Dawud, *Sunan* (Hasan’s translation), III, 1020, Hadith no. 3587).

computer program should use it within the scope of the rights granted to him in the contract.¹²⁷

Furthermore, the duty to observe and enforce contractual obligations is very broad, and it applies to the state as well as to individuals.¹²⁸ Thus, the state is directed to honor its treaties with other states and its agreements with individuals, whether they are foreigners or nationals. 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.

Second: Freedom to Contract

Shari'a recognizes the freedom to contract, provided that the object of the contract is legal and the subject matter is not prohibited by Shari'a.¹²⁹ Parties are free to design their agreement in the way that will best protect their rights, as long as the aforementioned limitations are observed. "Indeed, contracts may cover any number of forms and need not be limited to pre-existing categories or forms."¹³⁰ Furthermore, relevant customs and practices among the parties, in a particular trade or within a particular territory, are considered relevant to determining the terms of the contract.¹³¹ This flexibility has allowed

¹²⁷ Some Scholars who are against protecting intellectual property rights argue that such restrictions are not acceptable in Shari'a because the right to the product is fully transferred to the purchaser; therefore, any stipulations restricting the buyer to particular fields of use are impermissible. See *supra* text accompanying note 24. This Fatwa forgoes the fact that intellectual property laws do not touch on the buyer's right on the physical item embodying the creation. The physical item including the intellectual creation becomes the property of the buyer who is free to use it or dispose of it. Since his property, however, does not extend to the ideas embodied in the item, he is not free to exploit those ideas. Allowing the rational of the Fatwa to apply will simply mean that the buyer is transgressing on the creator's own right of reproduction and distribution. I believe that the "Exhaustion" and the "First Sale" Doctrines—as limitations to an owner's exclusive rights—provide an adequate assurance to the buyer's right while preserving the rights of the creator or the holder of intellectual property rights. See Hizb ut-Tahrir, *supra* note 24.

¹²⁸ Even the relationship between the ruler and the citizens is considered contractual. See WEISS *supra* note 79, at 174–76 ("The Sunni view is . . . that the relationship between the ruler and his subjects is contractual."). Weiss explains the electoral process in the Islamic State and recites the duties of the ruler according to Al-Mawardi. *Id.* Among the enumerated duties is the duty to "maintenance of security of life and property and implementation of legal penalties." *Id.*

¹²⁹ This has to do with the prohibition of usury and indefiniteness in contracts, which I will be dealing with in the next section of the paper. *Supra* text accompanying notes 110–116.

¹³⁰ Jamar, *supra* note 21, at 1088.

¹³¹ *Id.*

contemporary scholars to interpret some modern contracts to be legal under Shari'a.¹³²

In summary, Shari'a is very strict when it comes to the sanctity of contracts, whether among individuals or states or between states and individuals. Furthermore, parties are free to stipulate the terms they deem necessary to preserve their rights and achieve their goals from the transaction, as long as they are not in breach of the principles or limitations of Shari'a.

4. Fairness in Dealings and Commercial Ethics

The Qur'an and the Sunnah¹³³ are both very favorable towards trade and commerce. Commercial honesty and fairness in dealings are prerequisites for the legality of any transaction or contract. 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'a realizes that unfair practices deprive consumers from the benefits of competition, such as lower prices, better quality of goods, and higher output.¹³⁴ Although the Qur'an and 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.

Accordingly, it is prohibited to use another person's trademark without his/her prior authorization.¹³⁵ 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.¹³⁶ The same principle applies to other forms of misrepresenta-

¹³² *Id.*

¹³³ 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> (visited Jan. 12, 2007) ("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.'").

¹³⁴ See SCHECTER, *supra* note 93, at § 29.5.

¹³⁵ 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).

¹³⁶ 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 visited Jan. 12, 2007).

tions 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.

5. The Hisbah System and Regulating the Markets

The Prophet used to visit the markets to check on business practices, and the Caliphs followed the same practice. As the state expanded, however, it became impossible for them to personally perform their visits. The strict rules in Shari'a enjoining fair commercial dealings, combined with the state's expansion, led to the establishment of the Hisbah Institution.

The Hisbah enjoyed broad authority and was charged with "commanding the good and forbidding the evil."¹³⁷ Thus, it performed many tasks in society including "supervising the markets and enforcing public morality."¹³⁸ A person who worked in this institution, known as Muhtasib, was responsible for monitoring and inspecting the markets and punishing the violators of Shari'a. As noted by Azmi, during the Abbasid period, the Muhtasib placed a special mark on things such as mints, measures, and scales to indicate conformity with quality standards.¹³⁹ The role of the Hisbah Institution will be discussed in more detail in the second part of this paper.

6. Unrestricted Public Interest ("Maslaha Morsala") Doctrine

The opponents of intellectual property rights and its protection often recite the doctrine of public interest as grounds for their position.¹⁴⁰ They argue, among other things, that the benefits achieved by protecting and enforcing intellectual property rights are minimal compared to the harm that is inflicted on the

¹³⁷ Khoury, *supra* note 9, at 179; see also Azmi et al., *supra* note 12, at 154 (explaining that the jurists formulated the concept of *hisbah*, as an application of the general command in the Qur'an: "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." (quoting *Surah al-Imran* at 104)).

¹³⁸ Khoury, *supra* note 8, at 178–79 (emphasis added).

¹³⁹ See Azmi et al., *supra* note 12, at 150.

¹⁴⁰ Jamar, *supra* note 21, at 1090–91; Khoury, *supra* note 8, at 187 (citing Simon Buckingham, *In Search of Copyright Protection in the Kingdom*, 11 MIDDLE E. EXECUTIVE REP. 5, 11 (1988)).

public in the form of price increases and restrictions on access to knowledge.¹⁴¹ As explained by Jamar:

If public interest is drawn too broadly and too powerfully, it can be abused to remove protections for intellectual property on the grounds that the whole society has need of or could benefit by unrestricted use of the item. On the other hand, too narrow or restrictive a conception of public interest can lead to imbalance in favor of private rights against the public interest or welfare.¹⁴²

As noted by Bassiouni and Badawi, “the evolution of Islamic law in modern times, with all its unregulated novel situations, was based mainly on consideration of the public good.”¹⁴³ It is clear that protecting and enforcing intellectual property rights is a novel situation for which no specific rules in Shari’a are to be found. Thus, the doctrine of public interest has significant bearing on intellectual property. To determine whether the existing mechanism for protecting and enforcing intellectual property rights (i.e. the norm provided for under the current international treaties and conventions as well as national intellectual property laws) is compatible with the principles of Shari’a, an objective weighing of the benefits of the mechanism against its expected harmful effects must be applied. From my point of view, preserving and protecting public interest from a Shari’a perspective calls for observing intellectual property rights.

Most intellectual creations, whether they are inventions, computer programs, books, or trademarks consume significant amounts of effort, time, resources, and money. Those who develop such creations and those who publicly disseminate them deserve some form of compensation for their efforts.¹⁴⁴ They also deserve the right to stop others from free riding on their efforts and from altering their creations in an unintended manner. Thus, they have a legitimate interest in protecting their productions and in earning a profit. Intellectual property laws allow creators to financially benefit from their creations by commercially exploiting them. This right, however, is conditioned on fully disclosing creations to the public. Furthermore, the right is limited in duration so that after

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Bassiouni & Badr, *supra* note 42, at 159.

¹⁴⁴ Islamic scholars permitted charging money for teaching Qur’an, based on Prophet Mohammed’s acceptance of teaching Qur’an as dowry in marriage, noting that accepted dowry in Islam is something that has a monetary value (“*Mal*”). Thus, if it is permissible to charge money for teaching the Qur’an then it is permissible to charge those who wish to benefit from one’s own creations. The rule realizes the need of intellectual creators to have a source of income. See HASSAN H. AL-BARAWI, RIGHTS NEIGHBORING TO COPYRIGHT: A COMPARATIVE STUDY OF ISLAMIC JURISPRUDENCE AND SECULAR LAW 73 (1st ed. 2005).

a specified period of time, the creation becomes public property, and everyone can freely use it. Accordingly, intellectual property laws have society's interest at heart.

The best way to show the inaccuracy of the claim that society suffers a huge loss from strong intellectual property protection is to examine the consequences of weak protection. In a country with lax intellectual property protection, where counterfeiting, imitation, and piracy practices are prevalent, the absence of an incentive to create would eventually destroy the scientific and technical base and lead to the emigration of scientists.¹⁴⁵ This would not only diminish the ability of national businesses and industries to compete efficiently in the local market but also, more importantly in this era of globalization, in foreign markets. Additionally, consumers would end up losing their confidence in a market characterized by unfair competitive practices and a lack of safety standards.¹⁴⁶ The government would be deprived of significant tax revenues on profit from counterfeited and imitated goods.¹⁴⁷ Cultural life would suffer heavily since many writers and artists would become less willing to create original works not only due to the lack of incentive but, more importantly, out of the fear of piracy.¹⁴⁸ Accordingly, the benefits to society from an intellectual property

¹⁴⁵ Many Egyptian scientists end up leaving Egypt for a better future in Europe or the United States. Egypt is severely suffering from this phenomenon and several efforts have been adopted by the government to provide more funds to conduct research and to pay scientists' salaries. Also, the Egyptian Patent Office is facilitating the commercial exploitation of individual inventions. The Office helps industries and businesses locate inventors and compensate them for using their inventions. Additionally, an Egyptian Law for stimulating the software industry was enacted in April, 2004. See Muhamed Hilal, *The Inmates of Patents*, <http://arabi.ahram.org.eg/arabi/Ahram/2004/4/10/HYAH6.HTM> (last visited Dec. 11, 2007) (available in Arabic) (discussing the problems facing Egyptian inventors and the recent efforts by the government to encourage inventors and facilitate obtaining the necessary funds for research).

¹⁴⁶ For instance, allowing sales of imitation products that do not live up to the quality and safety standards of the "legitimate" products has proven harmful and, in some instances, deadly. For example, many fatal car accidents in the United Arab Emirates were traced to poor quality brakes that were carrying imitation trademarks. In Cambodia, dozens of people died when they took ineffective fake malaria drugs. See Nathan Assoc., Inc., *Intellectual Property and Developing Countries: An Overview (2003)*, <http://www.nathaninc.com/NATHAN/files/CCPAGECONTENT/DOCFILENAME/0000503252/Intellectual%20Property%20and%20Developing%20Countries.pdf> (providing examples of deadly injuries caused by fake or imitated products bearing counterfeited trademarks).

¹⁴⁷ Studies have shown that criminal organizations usually sell the counterfeit products. Moreover, the profit from these sales is usually used to fund other criminal activities such as narcotics and terrorism. See Bassiouni & Badr, *supra* note 42, at 159.

¹⁴⁸ See *id.* (discussing the consequences of weak intellectual property protection and the benefits of stronger protection).

system outweigh the benefits expected from a “free shared knowledge for all” system.¹⁴⁹ Therefore, the doctrine of public interest under Shari’a calls for protecting and enforcing intellectual property rights.

The five conditions discussed *supra*¹⁵⁰ for upholding an interest are fully met: (1) owners and holders have a genuine reasonable interest to protect their rights and to exclusively benefit from their creations for a limited time; (2) the general benefits to society of protecting intellectual property rights exceeds the possible negative effects; (3) such protection fits with the strict protection of personal property in Shari’a; (4) the prohibition of unfair practices and deceit occurs; and finally (5) it removes hardship from the people by allowing them to live in a society with a reliable competitive market with a maintained flow of information.¹⁵¹ It should be noted, however, that this finding applies to a balanced intellectual property framework. The exclusive rights of the creators must be limited in time and balanced by specified exceptions and limitations, such as fair use and compulsory licensing, to prevent abuse and to promote the public interest.

C. Possible hurdles to protecting IPRs in Islamic Law

1. The Prohibition of “Mayser”

Shari’a prohibits profit without effort or labor.¹⁵² This is illustrated in the general prohibition of “mayser,” which is derived from the word “yossr,” meaning easy. This prohibition applies to instances where a profit was earned too easily and not through work. One example of mayser is gambling.

Accordingly, the prohibition against mayser may be relevant in intellectual property transactions if the profit generated is significantly disproportionate

¹⁴⁹ Some scholars argue that under Shari’a knowledge is to be shared freely by all members of the community. They usually refer to the Prophet’s warning to those who do not disclose knowledge to people. However, this argument is rebutted by the fact that intellectual property encourages disclosure of original ideas and creations, in accordance with the Prophet’s warning, and recognizes the importance of rewarding an individual for his efforts. See AL-SAMEE’ ET AL., *supra* note 122, at 123.

¹⁵⁰ See Kamali, *supra* note 48, at 14.

¹⁵¹ See Khoury, *supra* note 9, at 176–78 (arguing that the Shari’a principle of “Compassion for the Weaker Members of Society” is applicable to consumers thereby strengthening the argument for intellectual property rights—in particular trademarks—since “[t]rademarks . . . afford[] them [with] relevant undistorted information about products . . . [to] knowingly choose between competing goods [and] services”).

¹⁵² As indicated *supra*, Shari’a encourages and recognizes both manual and intellectual labor and efforts. *Supra* text accompanying notes 83–87.

to the time and money invested in developing and marketing the creation. For example, a pharmaceutical company might spend millions of dollars to develop a single drug. The revenue from merchandising the drug—whether directly to the consumers or indirectly through licensing—may be sufficient to recoup the expenses and make a large profit. This raises the question of whether the company is selling the drug at a higher price than what is needed to cover the expenses and make a reasonable profit. Another example could occur in copyright if a songwriter created a song after only a month of preparation but the song yielded millions of dollars when introduced to the market. Furthermore, a trademark owner could make millions of dollars not only from using the mark on his own products, but also by licensing it to others to use on other products, like t-shirts or mugs. Therefore, the prohibition of easy gain is relevant to intellectual property in cases where the profit made from exploiting the creation is grossly disproportionate to the efforts of developing it.

Islam acknowledges one's right to benefit from one's property and encourages trade and commerce. On the other hand, Shari'a allows one to gain as much as one has suffered, known as the Al-Ghonn Bel Ghorm Rule. This rule reflects the importance of balancing profits with one's exerted efforts and expenses. Many commentators have noted that in Islam, price must be closely related to the improvements introduced to an asset and not to its overall value.¹⁵³ This also relates to the issue of protecting consumers and ensuring the transparency of the markets, since charging excessive prices could constitute a form of deceit.¹⁵⁴

2. The Prohibition of Indefiniteness (“*Gharar*”)

The Qur'anic condemnation of gambling was extended by the Sunnah to a general prohibition of sales and transactions involving indefiniteness or *Gharar*. The prohibition of *Gharar* is one of the main principles of Islamic contract law. While it is acceptable for each transaction to have some element of risk, Shari'a does not allow for transactions involving speculations and uncertainty.¹⁵⁵ As explained by some scholars, this principal reflects the general Is-

¹⁵³ See Khoury, *supra* note 9, at 190; Jamar, *supra* note 21, at 1090.

¹⁵⁴ *Id.* (stating that “[i]n the case where an individual has made improvements on virgin resources, the only price that can be charged must be equivalent to such improvements; to charge a higher price would be illegal, since the owner would be getting paid for the asset's creation, the due for which is God's alone”).

¹⁵⁵ See Jamar, *supra* note 21, at 1090 (noting that the Shari'a “does not apply to ordinary business risks”).

lamic ideas of protecting the weak from exploitation by the strong and of keeping all commercial transactions fair and free of unconscionable practices.¹⁵⁶

In order for a contract to be legally valid from a Shari'a perspective, the parties must have sufficient knowledge of the contract's subject matter and its value and "effective control" over it. Accordingly, sales that are prohibited under Shari'a include: sales of unknown values, sales where the object is too uncertain to be realized, sales where the future benefit is unknowable, and sales with inexactitude. As explained by Vogel and Hayes, scholars insist that to achieve the required mutual consent, 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.¹⁵⁷ Based on this view, several types of modern contracts are considered invalid under Shari'a. One common example would be insurance contracts, where it has been argued that insurance contracts "resemble a bet," since "*one party pays cash premiums in return for the promise of the other party to pay a cash sum on the occurrence of a contingent future event.*"¹⁵⁸

Nevertheless, certain intellectual property licensing arrangements may not be sanctioned under Shari'a. For example, licensing trade secrets or know-how could be problematic when what is being licensed is the information itself. The reason is that allowing the licensee to fully know what is being licensed—as required by Shari'a—would require that the licensor fully disclose the information to the licensee before concluding the contract. But then what value would the information have then? How could the licensor guarantee that the licensee would not simply copy it? Another example is that agreements involving general assignment of future works would be completely void, since the subject matter of the contract is not sufficiently defined, not to mention that its value is unknown to the parties.

In sum, the prohibition against Gharar might prove problematic for certain types of licensing arrangements but will not hinder licensing arrangements in general.¹⁵⁹

¹⁵⁶ *Id.*

¹⁵⁷ VOGEL & HAYES, *supra* note 111, at 90.

¹⁵⁸ *Id.* at 150–53 (discussing jurists opinion regarding insurance). Vogel refers to Mustafa al-Zarqa's opinion in his book *Nizam al-ta'min* that "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." *Id.* at 151 (citing MUSTAFA AHMED AL-ZARQA, *NIZAM AL-TA'MIN* (1962)).

¹⁵⁹ See AL-SAMEE' ET AL., *supra* note 122, at 142–43 (explaining that a contract for publishing a book, for example, is considered legitimate as long as the parties have agreed on the number

3. The Prohibition of Usury: "Riba"¹⁶⁰

The Qur'an and the Sunnah profoundly condemn riba, which is usually understood to mean usury or "excess on loans."¹⁶¹ Many scholars believe, however, that riba includes both exorbitant and moderate interest rates without distinction.¹⁶² Additionally, charging an interest rate for extending a loan is viewed as the prohibited sale of time.¹⁶³

It is explained that the strong prohibition of riba is meant to protect society itself.¹⁶⁴ Riba is viewed as a form of easy gain or mayser: a risk-free guaranteed profit for the creditor. Furthermore, it is a practice that leads to the concentration of money and wealth in the hands of a limited number of people. Additionally, riba encourages greed and selfishness; it eventually erodes the required cooperation and compassion among the members of society.¹⁶⁵

One scholar, Khoury, states that a "stricter interpretation of [r]iba may also apply to intellectual property."¹⁶⁶ He argues that the same reasons for prohibiting riba could also apply to the practice of licensing intellectual property.¹⁶⁷ Khoury explains that if the prohibition of usury and gambling were construed expansively, holders of intellectual property rights would only be allowed to recover their initial investments in their creations through licensing.¹⁶⁸ Thus, rendering any gain beyond the initial investments would be a form of usury.

of copies to be published upon the existence of the book, adding that the contract in this case could be viewed as a contract of sale and also advocating the legitimacy of a distribution contract, where the writer publishes the book but agrees with another to distribute the copies).

¹⁶⁰ The issue of Riba in Shari'a has been and continues to be the center of feuded discussions. This note does not address Riba in a fully fledged manner, but rather deals with it in a limited way and in the context of intellectual property rights.

¹⁶¹ See Barbara L. Seniawski, Note, *Riba Today: Social Equity, the Economy, and Doing Business under Islamic Law*, 39 COLUM. J. TRANSNAT'L L. 701, 709–10 (2001).

¹⁶² See Seniawski, *supra* note 161, at 713–19 (offering an elaborate critique of the classical view among Muslim scholars, that all interest, even minimal interest is *riba*).

¹⁶³ See Vaughan, *supra* note 3, at 358.

¹⁶⁴ Seniawski, *supra* note 161, at 708–09. Seniawski quotes Ziaul Haque on riba, "inequitable social and economic system which destroys unity and solidarity of a community by creating classes of money lenders, usurers, hoarders and merchants who own the basic means or production like land and capital, and exploit the common masses who lack these resources and virtually depend on them for their livelihood and existence." *Id.*, at 708–09 nn.13, 29.

¹⁶⁵ YOUSOF QASSEM, *COMMERCIAL DEALINGS EVALUATED FROM THE POINT OF VIEW OF SHARI'A* 115–17 (2d ed., Dar Al-Nahda Al-Arabeia 1993).

¹⁶⁶ Khoury, *supra* note 9, at 190.

¹⁶⁷ *Id.* at 190–91.

¹⁶⁸ *Id.*

The prohibition of usury is not likely to raise any concerns about the legitimacy of charging licensing fees. As discussed *supra*, intellectual creators have the right to benefit from the fruits of their minds by selling their creations themselves or by licensing them to others.¹⁶⁹ A possible limitation in this context is taking a reasonable profit.¹⁷⁰ Therefore, license fees are not analogous to interest rates, which are prohibited by Shari'a.

Nonetheless, the prohibition against usury could possibly affect certain clauses in licensing agreements, namely those allowing the licensor to charge interest on any late license payments. Additionally, such prohibition, if carried out extensively, could discourage investment in certain intellectual property related projects such as turn-key projects.¹⁷¹ In this regard, some modern scholars argue that the prohibition against usury should be understood in light of the situation in modern times.¹⁷² Some of them allow the charging of interest equal to or slightly lower than the prevailing inflation rate, thus allowing for a consideration of the ever changing value of money.¹⁷³ This means that clauses con-

¹⁶⁹ See *supra* text accompanying notes 145–152.

¹⁷⁰ As noted by one scholar, if an expansive interpretation of usury and gambling is employed, it could mean that any transaction involving excessive profit (charged license fee exceed reasonable amount needed to recoup the expense of developing the creation and making a reasonable profit) would be considered inequitable or unjust, stamping the whole transaction as forbidden usurious. See Khoury, *supra* note 9, at 151, n.221 (citing ADBUR RAHMAN I. DOI, SHARIA: THE ISLAMIC LAW 379 (1984)).

¹⁷¹ Those projects usually require a lot of funds. In most cases the funds will be provided through financial institutions such as banks. The fact that the project will be funded by loans and extended credit subject to interest rates could make it more problematic if the project will be executed in a Muslim country.

¹⁷² See Seniawski, *supra* note 161, at 717–18 (noting the implications created by the prohibition of usury on doing business in Muslim countries). Seniawski points to the case brought before the Egyptian Supreme Constitutional Court, where the Rector of Al-Azhar University (the official Islamic University) challenged the constitutionality of Article 226 of the Egyptian Civil Code under Article 2 of the Egyptian Constitution. *Id.* at 715–16. Al-Azhar argued that it is not liable to pay the charged amount of interest it owes. *Id.* at 716. Al-Azhar claimed that Article 226, which “provides for a fixed interest to be paid at a certain rate for mere delay in fulfillment of an obligation to pay a debt of money” should be held unconstitutional for allowing interest, which is considered *riba*. *Id.* Notably, the Court upheld Al-Azhar’s argument but ordered it to pay the amounts charged prior to the constitutional amendment which brought Article 2. *Id.* at 715–16. In this context, it should be mentioned that Egypt, like many other Arab Muslim countries, allows interest charging and ordinary banks to exist along with Islamic banks. Thus, the prohibition of usury is likely to arise in a few situations. Also, Sheikh Al-Azhar has issued a number of Fatwas allowing for interest rates. Nonetheless, the Fatwas did not close the issue completely as it remains the subject of much debate.

¹⁷³ *Id.* at 714.

cerning price fluctuations and differences in currencies placed in licensing agreements could be permissible.¹⁷⁴

4. Limitations to Transfer of Intellectual Property Rights by Inheritance and Wills

a. Inheritance

Rules on inheritance in Islam are expressly regulated. Therefore, intellectual property laws should be compatible with such rules. Any derogation from the rules of inheritance by the laws is not permissible. This is important since, as will be discussed *infra*, intellectual property laws usually derogate from these rules.

¹⁷⁴ This opinion represents the modern view of riba. *Id.* (discussing the conflict between riba and encouraging lenders to loan money to those that are truly in need).

An over-broad interpretation of riba results in an unfair rule: lenders are essentially penalized and, because they are unable to charge modest interest that maintains the value of the loan, they will make fewer funds available to borrowers in extreme economic need. Consequently, a result contrary to that desired is achieved. . . . [I]f an "equal exchange" incorporates the notion of the purchasing power of money such that the lender does not consistently lose value through loans to borrowers, then interest may be included up to the threshold limit, which is equal to inflation, without it being prohibited riba. Such an approach is in accord with the Hanafī school's wait-and-see approach The requirement that the lender receive its capital sums is satisfied by allowing for adjustments, upward or downward, in the contract price to reflect the real value of what was lent and what was repaid. Thus, amounts charged above the real (not nominal) value of the capital should be adjudged riba. As so defined the prohibition places the borrower and lender on equal footing: it treats all parties fairly, and promotes harmony and goodwill between lender and borrower, or seller and buyer.

Id. at 714–15. She concludes that

[t]he prohibition of riba may prevent usury and still allow room for a modest interest rate to be charged consistent with or less than the rate of inflation. This notion of riba redresses the historical abuse of the economically disadvantaged in matters of borrowing without dampening the incentives for lenders to lend in the first place. Thus, capital would continue to be available to borrowers for necessary consumption, as well as for productive purposes.

Id. at 718. She further refers to the Rousch Power Project in Pakistan: "the company involved expended much energy convincing certain Shari'a scholars of the legitimacy of the usage of a commissioned manufacturing (*istisna'*) facility to finance what amounted to intellectual property." *Id.* at 725. Clearly, the same principal could be used to argue the legitimacy of transfer of technology projects and work for hire contracts.

First: Economic Rights

The majority of scholars agree that the creators' heirs have the right to inherit their intellectual property rights, in particular the financial portion of the rights.¹⁷⁵ Accordingly, exclusive or financial rights are considered part of the estate, and they should be distributed among the heirs according to the rules of inheritance in Shari'a. They also note that the heirs should enjoy their rights for a limited time, usually 60 years.¹⁷⁶ The following is an explanation of how inheritance rules could be applied in different cases of intellectual property rights:

Case One: No Heirs

- Sole Creator: if the deceased is the sole creator and holder of a copyright, patent, or trademark, and the deceased has no heirs (and no will within the prescribed limits in Shari'a), the estate as a whole should be transferred to the state, since under Shari'a, the state is the heir of estates for which there are no heirs.¹⁷⁷
- Collaborative or Joint Works: the same rule applies to cases where there is more than one creator involved. The share of the deceased creator who has no heirs should be transferred to the state. Intellectual property laws apply a different rule that conflicts with Shari'a in this matter.¹⁷⁸

Case Two: Heirs

- One creator: if the deceased creator has heirs, his financial rights will be transferred to the heirs as part of the estate; each heir will get his/her share as prescribed in Shari'a. The heirs continue, however, to be bound by any prior agreements and limitations created during the life of the deceased. For example, in the event that the decedent has exercised his right to grant a third party a legacy, within the proscribed limit of one third of his estate, then in this

¹⁷⁵ See AL-SAMEE' ET AL., *supra* note 122, at 93.

¹⁷⁶ *Id.*

¹⁷⁷ See Hassan, *supra* note 101, at 200.

¹⁷⁸ For instance, in cases where there is no will or heirs, while Article 146 of the Egyptian Law appoints the Ministry of Cultural as responsible for exercising the authors' moral rights, Article 174 specifies that in relation to collective works. Where one of the creators dies without leaving heirs or a will, his monetary rights, which are part of the estate shall be transferred to his co-creators or their heirs. Thus, breaking out of the rule that when there are no heirs or will, the share of the deceased author will be passed to the state just like the other components of his estate, in this case nowadays presented by the Ministry of Culture.

case the heirs are bound by the decedent's wish, to assign by will a maximum of one-third of his estate to the specified beneficiary.¹⁷⁹

- Collaborative or Joint Works: The same rule applies if the deceased shares the right to the creation with other creators. Upon his death, his heirs will replace him as joint owners with the other creators.

b. Wills

As mentioned *supra*, the one-third limitation for transfer of property by wills applies to intellectual property rights and should be observed. This limitation is intended to avoid eliminating rightful heirs from their shares in the estate.¹⁸⁰

Second: Moral Rights

It is not clear whether moral rights—being personal rights—are transferable by inheritance or will. As noted by some scholars, however, since those rights are meant to keep the creation intact, to insure that it is correctly associated to the rightful creator and to prevent any alterations by others to the work, the fact that the work continues to exist and have value after the creator's death shows the need to have someone capable of exercising those rights to protect the work.¹⁸¹ Therefore, the creator could specify a particular heir or a third party to defend his work.¹⁸²

The government or an association could play the same role. It should be noted, however, that there is a debate among modern Muslim scholars concerning the heirs' right to decide to disclose a creation such as a book or an invention, which the creator either did not disclose or intend to disclose before his death.¹⁸³

¹⁷⁹ See Hassan, *supra* note 101, at 200–01.

¹⁸⁰ *Id.*

¹⁸¹ ABD ALLAH MABROUK AL-NAJAR, THE PROSCRIBED PROTECTION OF AUTHORS MORAL RIGHTS IN COMPARATIVE ISLAMIC JURISPRUDENCE: A COMPARATIVE STUDY 56–70 (1990).

¹⁸² See AL-SAMEE' ET AL., *supra* note 122, at 100.

¹⁸³ See DERENY, *supra* note 95, at 170–71.

II. EGYPTIAN IPRS LAW AND ISLAMIC LAW

In June 2002, the Egyptian People's Assembly finally enacted a much-anticipated law for the protection of intellectual property rights.¹⁸⁴ The Law covers the following areas:

1. Patents, utility models;
2. Layout designs of integrated circuits and undisclosed information;
3. Trademarks, commercial data, and geographical indications;
4. Industrial designs and models;
5. Copyrights and neighboring rights;¹⁸⁵ and
6. Plant varieties.

The legislature took into consideration that the Law conforms to the international agreements joined by Egypt. The Law includes some considerable additions. Perhaps the most notable additions are:

1. Express protection of computer program as copyrights;
2. Protecting neighboring rights;
3. Protecting expressions of folklore;
4. Protecting trade secrets and undisclosed information;
5. Protecting plant varieties; and
6. In the area of patents: protecting chemical agricultural products related to foodstuff as well as chemical pharmaceutical products.¹⁸⁶

¹⁸⁴ See Protection of Intellectual Property Rights of 2002, Law No. 82, art. 2. Article 2 states:

The following laws shall hereby be repealed

- A) Law # 57 of 1939 pertaining to Trademarks and Commercial Data.
- B) Law # 132 of 1949 pertaining to Patents of Invention and Industrial Drawings and Designs; with the exception of the provisions of patents of inventions regarding foodstuff—related chemicals and pharmaceutical chemicals, which shall be repealed as of January 1st, 2005.
- C) Law # 354 of 1954 pertaining to Copyright Protection. Any provisions that contradict with the provisions of the attached law shall be hereby repealed.

Id.

¹⁸⁵ This is the first time an Egyptian Law provides a comprehensive protection to neighboring rights, although Egypt has long been the center of the entertainment industry in the Middle East and the Arab World. To date, Egypt is not member to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (The Rome Convention 1961).

¹⁸⁶ The repealed Law # 132 of 1949 excluded chemical products related to foodstuff and pharmaceuticals. See *supra* text accompanying note 117. The Law restricted its protection to the process rather than the products. The current Law wisely removed the ban. The protection provided for under Article 43 will come into effect as of January 1, 2005. See Protection of

The Law in general is not in conflict with the principles of Shari'a. I will first examine the points of agreement with Shari'a in the Law. Then, I will highlight some of my concerns regarding possible points of conflict. My analysis focuses on copyrights, trademarks, and patents. As mentioned *supra*, the Law covers other areas of intellectual property. These areas will not be included in my analysis.

A. *Points of Agreement*

1. **Egypt's Duty to Comply with its Obligations Under International Agreements**

Egypt was one of the first Muslim countries to join intellectual property protection treaties and conventions. For example, Egypt is a party to the Berne Convention¹⁸⁷ and its Union, the Paris Convention,¹⁸⁸ the Madrid Treaty,¹⁸⁹ the

Intellectual Property Rights of 2002, Law No. 82, art. 43. Under Article 44, the Law provided owners of such products the right to be granted exclusive marketing rights in Egypt, pending the application of Article 43. *Id.* at art. 44. This arrangement complies with Article 65(4) of the TRIPs Agreement. See Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm. The Egyptian market is waiting to observe the results of this change by 2005. This issue was much debated and some civil society organizations and local pharmaceutical companies along with the head of the syndicate of Egyptian Doctors claimed that this step will lead to unreasonable prices and will destroy the local pharmaceutical industry for the benefit of multinational pharmaceutical companies. For an excellent opinion overview and discussion of the implications of complying with the TRIPs agreement on pharmaceuticals in Egypt, see The Egyptian Initiative for Personal Rights (EIPR), The Effect of TRIPs Compliance on the Right to Health in Egypt, <http://www.eipr.org/en/reports/trips05/enstud12.htm>. (last visited Jan. 12, 2007). See also Mohamed Abou El Farag Balat & Mohamed Hossam Loutfi, *The TRIPs Agreement and Developing Countries: A Legal Analysis of the Impact of the New Intellectual Property Rights Law on the Pharmaceutical Industry in Egypt*, 2 WEB J. OF CURRENT LEGAL ISSUES ¶5-1 (2004), available at <http://webjcli.ncl.ac.uk/2004/issue2/balat2.html>.

¹⁸⁷ Egypt is a member to the Berne Convention and ratified its revisions. See World Intellectual Property Organization, *Treaties Database—Contracting Parties*, http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=946C (last visited Apr. 6, 2006). It should be noted that, Egypt is also member to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention) since April 23, 1978, but did not join until the WIPO Performances and Phonograms Treaty (Geneva, 1996).

¹⁸⁸ Egypt joined the Paris Convention for the Protection of Industrial Property and its revisions (Paris Union) on July 1, 1951. See *id.*

Madrid Agreement Concerning the International Registration of Marks and became a signatory to its Protocol,¹⁹⁰ the Patent Cooperation Treaty (PCT),¹⁹¹ Trademark Law Treaty,¹⁹² and the TRIPs Agreement.¹⁹³

The principles of contract law in Shari'a require Egypt to live up to its international obligations and perform its duties as a party to these treaties.¹⁹⁴ Therefore, Egypt is obliged to observe the principles and obligations under these agreements when enacting or amending its laws for protecting intellectual property rights. Furthermore, proper adherence requires Egypt to adopt all measures available within its capacity to ensure the effective enforcement of these provisions. Accordingly, Egypt's enactment of new IP laws in the early 1930s, amending its existing laws in the late 1990's, and enactment of a new IP law in the 21st Century (to comply with TRIPs) is not in conflict with Shari'a principles.¹⁹⁵

¹⁸⁹ Egypt became party to the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (supplemented by the Additional Act of Stockholm (1967)), on April 1, 1952. *See id.*

¹⁹⁰ Egypt became a member to the Agreement on July 1, 1952. *See id.* at http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1295C. It became a signatory to the Protocol on June, 28, 1989. *See id.* at http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1677C.

¹⁹¹ Egypt recently ratified the PCT on June 6, 2003. *See id.* at http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1718C.

¹⁹² Egypt joined the Trademark Law Treaty (Geneva, 1994), on July 7, 1999. *See id.* at http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=429C.

Egypt has also been member to the Hague Agreement Concerning the International Deposit of Industrial Designs since March 5, 1951. *See id.* at http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=680C.

¹⁹³ Egypt became a member to the World Trade Organization Agreements, and consequently, adhered to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) on June 30, 1995. *See* World Trade Organization, Understanding the WTO: The Organization, Members and Observers, http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 6, 2006).

¹⁹⁴ *See* Troy S. Thomas, *Jihad's Captives: Prisoners of War in Islam*, 12 J. LEGAL STUD. 87, 94 (2003) ("as derived from the *shari'a* law of contracts, treaty adherence is obligatory for the Muslim nation").

¹⁹⁵ It is worth noting that Islamic Organization for Education, Culture and Sciences prepared a draft in 1994 for an "Islamic Treaty on the Protection of the Rights of Authors." Article Two of the draft reads: "Realizing the importance of having a system for protecting the rights of authors, one that suits all countries, Islamic countries perceived the need to create this treaty." *See* MOHAMED ABD AL-ZAHER HUSSEIN, COPYRIGHT FROM THE POINT OF VIEW OF SHARI'A & LEGISLATION 6 (2003).

2. Egypt's Duty to Regulate IPR Protection as an Area Lacking Sufficient Regulation in Islamic Law

Egypt's government has a duty towards its citizens to step in and regulate the areas of life that need to be regulated. When the Shari'a is silent or lacks a comprehensive body of rules on a particular issue, the government should intervene and fill the gaps by enacting non-Shari'a Laws. This rationale was applied when the government stepped in to regulate criminal law, commercial entities, finance, commercial transactions, and arbitration; it would certainly apply to intellectual property rights as well.¹⁹⁶

As discussed *supra*, the increasing value and importance of intellectual property rights in the past few centuries created a need to regulate its protection and enforcement. Therefore, the principles of personal property, public interest, justice, and fairness in commercial dealings necessitate legislative intervention. Islamic history is full of situations where the Caliphs imposed new taxes or created new entitlements, such as the Bait Al-Mal (Treasury) and Hisba System.¹⁹⁷

Furthermore, when doing so, the government must ensure that the legislation complies with the general principles of Shari'a providing guidance (though there is no complete body of rules in this area) as well as its bilateral and international obligations in this field. It should be noted that, once enacted, the citizens of Egypt are bound by non-Shari'a rules and have the duty to adhere to them.

3. The Role of Governmental and Non-governmental Entities in Protecting and Enforcing IPRs in Egypt and the Hisbah System

a. Governmental Organizations

In order for the Egyptian government to effectively carry out its obligation to protect and enforce intellectual property rights, the government has to establish entities and organizations to carry out this difficult task. The current Egyptian intellectual property law follows the path of previous intellectual property laws and delegates the registration, recordation, and issuance of owner-

¹⁹⁶ See Jamar, *supra* note 21, at 1082–83.

¹⁹⁷ See *id.* at 1082.

ship certificates and their renewal or assignment to the Copyright Office, the Patent Office, and the Trademark Office, respectively.¹⁹⁸

The Copyright Office falls under the authority of the Ministry of Culture, particularly the Supreme Council of Culture's Permanent Office for the Protection of Copyright.¹⁹⁹ The Patent Office²⁰⁰ is subject to the authority of the Academy of Scientific Research & Technology ("ASRT"). Additionally, the Trademark Office falls under the jurisdiction of the Ministry of Supply & Internal Trade.²⁰¹ Domain name registration is handled by the Cabinet IDSC Information & Decision Support Center ("IDSC") and the Supreme Council of Universities ("FRCU") in collaboration with Egypt Telecom.²⁰²

In the area of enforcement, especially for copyright piracy, a special police division for IP crimes exists. There is also the Anti-Piracy Permanent Office, under the jurisdiction of the Supreme Council of Culture.²⁰³ Additionally, the Ministry of Supply and Internal Trade carries out raids on the markets in order to enforce trademarks.

Establishing public entities to enforce intellectual property laws fully complies with Shari'a and represents the government's commitment to enforcing its laws as one of its duties. The functions performed by these entities could be comparable to the function performed centuries ago by the Hisbah Institution. Historically, the Muhtasib, a government employee, had the authority to function independently from the government in order to examine any claim that came to his attention and to pursue violators.²⁰⁴ Furthermore, the mark he used to indicate satisfactory quality (used as a certification mark) is similar to that used by the different ministries presently, such as the ministry of health, supply

¹⁹⁸ Protection of Intellectual Property Rights of 2002, Law No. 82, arts. 5, 12, 21, 64, 84, 73, 89, 184-85.

¹⁹⁹ World Intellectual Property Organization, *Contact Information*, http://www.wipo.int/directory/en/contact.jsp?country_id=53 (last visited Feb. 7, 2007).

²⁰⁰ *See id.*; Egyptian Patent Office, <http://www.egypo.gov.eg/> (last visited Feb. 7, 2007).

²⁰¹ *Id.*

²⁰² The Supreme Council of Universities is the top-level domain authority in Egypt: ".eg." The EUN provides its services for ".edu.eg," ".sci.eg," ".eun.eg," and ".org.eg" subdomains. The Cabinet IDSC Information & Decision Support Center (IDSC/RITSEC) provides its services for the ".gov.eg" domain and ".com.eg" subdomains (".com.eg" is in cooperation with the ISP's). Private sector gateways are providing connectivity services for the commercial sector as well. *See* Raggi El-Dekki & Partners, IPR Law No. 82/2002, <http://www.reldekki.com/lib06.html> (last visited Feb. 7, 2007).

²⁰³ Raggi El-Dekki & Partners, *Copyright*, <http://www.reldekki.com/services.html#Copyright> (last visited Jan. 12, 2007).

²⁰⁴ *See* Khoury, *supra* note 9, at 180.

and internal trade, foreign trade, culture, and agriculture. Similar marks are also used to indicate that the censorship and customs authorities approved the item.

b. Non-Governmental Organizations

There are a number of non-governmental intellectual property related organizations in Egypt established to represent and assist in enforcing the rights and interests of its members. In general, authors, performers, architects, investors, publishers, and the recording industry have syndicates or organizations similar to those found in the United States. Examples of these organizations include the Egyptian Association for Protection of Industrial Property (“AEPPPI”)²⁰⁵ and the Egyptian Society of Authors, Composers and Educators.²⁰⁶ Although there is no clear indication of the legality of such entities in Shari’a, it is likely that since their goal is to facilitate the enforcement of legitimate rights—that is, IPRs—and to help its members collect revenue, they should be welcomed. Such entities also take the burden off the shoulders of the owners who might lack the sufficient expertise to perform this task. Thus, they might fall within the Maslaha doctrine.

4. Exclusive and Moral Rights and Islamic Law

As in typical civil legal systems, Egyptian Law grants two sets of rights, moral and financial rights.

²⁰⁵ AEPPPI was established by a group of patent attorneys, trademark agents, lawyers, university professors and industrialists in 1991. Now it has over 100 members. See Egyptian Association for Protection of Industrial Property (AEPPPI), <http://www.aepi.org/> (last visited Jan. 12, 2007)

²⁰⁶ It is one of 44 national societies represented by the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM). See International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction, <http://www.biem.org/SocietyShow.aspx?CountryId=13> (last visited Feb. 7, 2007).

a. Moral Rights

(i.) Copyrights

Upon creating an original work (regardless of its quality and type)²⁰⁷ and fixing it in a tangible medium of exchange²⁰⁸ (regardless of the form), the creator and his heirs enjoy “permanent moral rights which are not liable for prescription or assignment.”²⁰⁹ Permanent moral rights include the right to claim authorship, the right to object to any amendment which he considers to be a distortion or mutilation to the work, and the right to first make it available for the public.²¹⁰ Additionally, only the author may seek a court ruling to withdraw his work from circulation.²¹¹

²⁰⁷ See Khoury, *supra* note 9, at 183. Khoury states:

Second, music was also protected by the Islamic state, especially in Spain (Andalusia), where works of music and song were protected even in the initial stages of authorship or creation—even before a specific production was publicly performed. This granted composers and songwriters a wide scope of protection similar to that granted by modern copyright laws.

Id.

²⁰⁸ See Protection of Intellectual Property Rights of 2002, Law No. 82, arts. 138, 140.

²⁰⁹ *Id.* at art. 145 (“Any disposal of a moral right provided for in articles 143 and 144 of the law herein shall be deemed absolutely null and void”).

²¹⁰ See *id.* at art. 143. Article 143 states:

The author and his universal successor shall enjoy over the work perpetual imprescriptible and inalienable moral rights. Such rights include the following: 1. The right to make the work available to the public for the first time[;] 2. The right to claim authorship; 3. The right to prevent any modification considered by the author as distortion or mutilation of the work. Mutilation in the course of translation shall not be considered as an infringement unless the translator fails to indicate deletion or changes or if he causes prejudice to the reputation and status of the author.

Id.

²¹¹ See *id.* at art. 144. Article 144 states:

[T]he author alone shall have the right to request the court of first instance to prevent putting the work in circulation, withdraw the work from circulation or allow making substantive modification to the work, notwithstanding his disposal of the economic exploitation rights. In such a case, the author shall, within a delay fixed by the court, pay in advance a fair compensation to the person authorized to exercise the economic rights of exploitation, failing which the court decision shall have no effect.

Id.

Shari'a condemns falsely attributing one's saying to another. The Qur'an and the Sunnah speak of horrific punishment in the after life for those who attribute sayings to Allah or the prophet. This prohibition presumably extends to individuals also. In other words, since Shari'a includes a strong general prohibition of deceit and lying, a person should not attribute another's saying to himself or to a third person. As noted by Khoury, "some commentators explain that such rules . . . stem from the need to protect the written teachings of the Prophet [the Hadiths] . . . [in the sense that] those rules were formulated . . . [to] insure the exactness and authenticity of the [Hadiths]."²¹² Furthermore, as the owner of a right, the author has the ability to object to any alterations to his work since the Shari'a notes that the owner is fully responsible before God for his ideas, and he alone bears the responsibility before society.²¹³ Thus, the owner should be allowed to keep his creation intact in the form he desires, and if he so wishes, to freely change his ideas at a later time. Finally, only the author should have the right to decide to offer his work to the public and bears such responsibility. Therefore, many scholars believe that even their heirs should not be allowed to decide to offer those works that are not already offered to the public or prepared to be offered before the author's death.²¹⁴ According to this

²¹² Khoury, *supra* note 9, at 183–84.

²¹³ As explained by Al-Najar, actions such as failure to reference a work to its creator, falsely referencing it to one's self or to another and changing one's words constitute lying and cheating, which the Qur'an and the Prophet (PBUH) strongly warned against. See AL-NAJAR, *supra* note 181, at 65–66. The necessity of correctly referencing a work to its creator is deduced from this verse: Say (unto them, O Muhammad): Have ye thought on all that ye invoke beside Allah? 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 ye are truthful. *Holy Qur'an* 46:04, available at <http://www.usc.edu/dept/MSA/quran/046.qmt.html> (last visited Feb. 7, 2007).

A strong condemnation of lying in general and how it leads to hell in the after life, could be found in Prophet Mohammed's Sayings:

Abdullah reported Allah's Messenger (may peace be upon him) as saying:
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.

Sahih Muslim, bk. 032, ch. 27, No. 6307, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/032.smt.html> (last visited Feb. 7, 2007). Further, "[f]alsely attributing something to me is not like falsely attributing something to anyone else, let the one who knowingly lies about me take a seat in Hellfire." AL-NAJAR, *supra* note 181, at 66 (citing *Sahih Muslim*).

²¹⁴ As explained by Al-Najar, the author enjoys parenting like right over his work, such right is an ever lasting one that does not cease to exist due to the author's death, just like one's honor and dignity. *Id.* at 58–59. Thus, an author's heirs should protect this parenting right in the same way they should protect their predecessor's honor and dignity. Additionally, this no-

view, the heirs only use moral rights to protect the legacy and the personality of their decedent as expressed in his works. Therefore, the moral rights provided for in the law comply with Shari'a.

(ii.) Patents

Article 6 of the Law gives the inventor, or any person to whom the inventor's rights have been transferred, the right to apply for a patent. Accordingly, given the broad language of Article 6, if the inventor died prior to filing a patent application, his heirs could file the application. Additionally, Article 6 states that in cases where the patent application is filed by someone other than the inventor, the name of the inventor must be mentioned in the patent, and the inventor should receive either an agreed amount as a fee or an adequate compensation. This rule is consistent with the Shari'a's strict direction to properly attribute ideas to its source.

(iii.) Works For Hire

The Law permits works for hire agreements.²¹⁵ As long as the creator retains attribution rights and receives adequate compensation, there is no reason

tion is stressed in the belief that an author bears responsibility before God and society for his creations. *See supra* text accompanying note 213. Dereny adds that when it comes to works that were not published by the author prior to his death, the heirs should follow his will (if available) regarding whether he wished for such works to be published. DERENY, *supra* note 95, at 170–71.

²¹⁵ Protection of Intellectual Property Rights of 2002, Law No. 82, art. 7. Article 7 states:

In case that a person has assigned another to achieve a particular invention, all the rights resulting from such invention shall be granted to the former. The employer shall be entitled to all rights resulting from the inventions that have been achieved by the employee or the worker while being bound by the employment or recruitment relationship; so long as the invention falls within the scope of the contract or the employment or recruitment relationship.

The name of the inventor shall be mentioned in the letters patent. The inventor shall, in all cases, receive fair remuneration for the invention thereof. In case that such remuneration has not been agreed upon, the inventor shall be entitled to fair compensation from the above assignor or employer.

In cases other than those mentioned above, and whenever the invention falls within the field of activity of the public or private establishment, in which the inventor works, the employer shall have the option of either exploiting the invention or purchasing the patent, in return for fair compensation to be paid to the inventor. The choice shall be made within three months beginning from the date of notification of the grant of the patent.

to consider works for hire as void under Shari'a.²¹⁶ Furthermore, this type of agreement is analogous to the commissioned manufacturing ("Istisn'a") contract provided for in Shari'a.

b. Exclusive Rights

The Law grants the creators exclusive monetary rights and permits assigning all or a portion of these rights to others, thereby allowing the creators to profit by commercially exploiting their works through licensing agreements.²¹⁷

In all cases, the invention shall remain attributed to the inventor.

Id.

²¹⁶ See Khoury, *supra* note 9, at 183. Khoury states:

[I]t was commonplace that the Islamic state would hire the services of certain scholars in order to write on various current topics of interest to the state. The state would effectively buy the work from these scholars, who would effectively forfeit all rights to their work. This is very similar to the concept of 'works for hire' recognized today by copyright law. In addition, many modern research institutes worldwide operate in a similar manner with respect to patents developed by employees in the course of their employment. The Islamic state would in other times offer to buy the entire products of a certain scholar or writer and would utilize such works (or the revenue thereof) for the public good, while abstaining from any action that would hamper the authors' private rights (moral rights) in the work.

Id.

²¹⁷ In relation to patents, Article 21 states:

The Patent may be assigned in whole, or in part, with or without compensation, and it may as well be subject of mortgage or usufruct.

Without prejudice to the provisions of selling and mortgaging commercial establishments; patents shall not be assigned, and the mortgage or usufruct thereof shall not be enforceable against others, unless after the date of the recordation thereof in the patents register. The assignment, mortgage or usufruct of a Patent shall be published in accordance with the terms and procedures prescribed by the executive regulations.

Protection of Intellectual Property Rights of 2002, Law No. 82, art. 21. In relation to Trademarks, Article 95 states:

The owner of the mark may grant license to one or more natural or juridical persons to use the mark for some or all of the products in respect of which the mark has been registered. Such licensing shall not prevent the owner of the mark from using same; unless otherwise agreed upon.

The owner of the mark may not terminate or decide not to renew the license agreement; unless for a lawful reason.

Id. at art. 95. In relation to Copyright, see *infra* note 218.

In copyright law, the author, his heirs, a licensee, or an assignee has the right to exclusively reproduce, distribute, rent, publicly communicate, translate, compile, import, and prepare derivative works, authorize others to prepare derivative works, and to enjoin any unauthorized acts.²¹⁸

In patent law, Article 10 provides the patent owner with the right to exclude others from any form of exploitation of the patent.²¹⁹ This includes the right to prevent the manufacturing, sale, offering to sell, marketing, use, and importing of the invention by others.²²⁰

Similarly, a trademark owner enjoys the exclusive right to use the mark on goods and services for which it was placed or upon which it is intended to be used.²²¹ This right includes the right to enjoin others from using the same mark

²¹⁸ See *id.* at art. 149. Article 149 states:

The author shall have the right to transfer to a third party all or some of his economic rights stated in this Law. Such a transfer shall be certified in writing and contain an explicit and detailed indication of each right to be transferred with the extent and purpose of transfer and the duration and place of exploitation. The author shall be the owner of all economic rights other than what he has explicitly assigned. Authorization by the author to exploit any of the economic rights relating to a work shall not mean authorization to exploit other economic rights relating to the same work. Without prejudice to the moral rights of the author provided for in this Law, the author shall refrain from any act that would hamper the exploitation of the rights disposed of.

Id. See also *id.* at art. 150. Article 150 states:

The author shall be entitled to such remuneration, in cash or in kind, as he considers fair for the transfer of one or more of the economic rights of his work to a third party, on the basis of a percentage of the revenue made as a result of exploitation, a lump sum or a combination of both.

Id.

²¹⁹ *Id.* at art. 10. Article 10 states:

The patent shall confer upon the proprietor thereof the right to prevent third parties from exploiting the invention in any manner.

The right of the patentee to prevent third parties from importing, using, selling or distributing the goods shall be exhausted, should the patentee market such goods in any State or grant license to third parties in this respect.”

Id.

²²⁰ *Id.*

²²¹ *Id.* at art 71. Article 71 states:

The right of the trademark owner to prevent third parties from importing, using, selling or distributing goods distinguished by such mark shall be exhausted, if such owner marketed or licensed third parties to market such goods in any State.

Id.

on the same class of goods or services. It also extends to the right to prohibit the importation of goods carrying an identical or similar mark.

The law also extends those rights to the heirs of the creators or the owners and, with variations, to their assignees and licencees.²²² Since these rights are considered a reward that society has agreed to exclusively grant to the creator for his efforts, it is rendered limited in time so that the creation will eventually enter the public domain. Nonetheless, trademark law is an exception, since the owner can continue to enjoy the exclusive rights as long as he maintains the registration of the mark, which is renewable without limitations.

Rendering exclusive rights limited in time is compatible with Shari'a, where monopolies are prohibited. Exclusive rights thus constitute monopolies limited in time and scope, subject to certain restrictions. As for trademark law, it could be argued that the different nature of trademarks makes it acceptable for the owner to enjoy the exclusive rights as long as the registration is maintained. The rationale is that as long as the trademark has a value and as long as the owner continues to use the mark, the trademark maintains its function as an indicator of source to consumers. Thus consumers will benefit more by allowing its registration to be renewed without limiting the number of renewals.

Additionally, the right to dispose of and fully or partially assign all exclusive rights is also compatible with Shari'a, provided usury and indefiniteness are eliminated from the agreements. In this regard, it is noted that the law ordains that licensing agreements be in writing and registered with a competent registry. This condition helps protect both parties as well as third parties. More importantly, it helps to achieve the clarity emphasized by Shari'a.

5. Civil and Criminal Legislative Remedies for Infringement and Shari'a

The fact that property is sacred in Shari'a compels the government to enforce property rights and to provide owners with the legal means necessary to defend their property against any infringing actions by others and to be compensated for any resulting losses.²²³ Thus, providing civil and criminal remedies for intellectual property owners under the law in general is in agreement and even called for by Shari'a.

²²² See *id.* at arts. 21, 87, 89, 146, 174 (pertaining to Patents (Article 21), Copyright (Articles 146 and 174) and Trademarks (Articles 87 and 89)).

²²³ See Khoury, *supra* note 9, at 166 (referring to Hanbali's stance that "protecting property is the most important duty of Islamic state"); see generally VOGEL & HAYES, *supra* note 111, at 58–59.

The primary adequate remedy in Shari'a for the owner is specific performance, where the competent authority destroys the infringing items or materials and informs the public of the infringing activity.²²⁴ This remedy is provided for by the law at the stage of precautionary/preliminary injunctions, which are ordered by the court upon the request of the plaintiff, as well as in the final ruling upon filing the case.²²⁵

In case specific performance is impossible, Shari'a accepts compensation as a remedy. The compensation must cover all resulting injuries, including personal injury, i.e. it must be a complete compensation. Similarly, under the Law,²²⁶ monetary compensation is available mainly as a substitute remedy for specific performance and is, in some situations, related to moral rights infringement as an original remedy.²²⁷ Additionally, trademark owners, and any person who suffered injury, could seek civil remedies in the form of an unfair competition claim against any participant in the infringing action. The broad and strict enjoining of fair trade practices in Shari'a clearly supports such claims.

Additionally, the Law provides for criminal remedies in the form of imprisonment and/or fines.²²⁸ In trademarks, criminal remedies are available only to the trademark owner of a registered mark and only against the infringer.²²⁹

²²⁴ See Hussein, *supra* note 121, at 53 (“Specific performance is an application of the Shari'a rule that the harm must be removed [Al-Darra Uzal]”).

²²⁵ See Protection of Intellectual Property Rights of 2002, Law No. 82, arts. 33, 115, 179, 181.

²²⁶ See Egyptian Civil Code, arts. 163–215.

²²⁷ It is clear that in some cases even if specific performance is available it will not be an adequate remedy for moral rights violations.

²²⁸ See Protection of Intellectual Property Rights of 2002, Law No. 82, arts. 32, 113, 181.

²²⁹ *Id.* at arts. 113, 114. Article 113 states:

Without prejudice to any severer penalty provided for in any other law, the following shall be penalized by imprisonment for a period not less than two months and a fine not less than five thousand pounds and not exceeding twenty thousand pounds, or either of the two penalties:

- 1- Any person forging a trademark that has been lawfully registered or counterfeited such mark in a manner that misleads public.
- 2- Any person using in mala fide a forged or counterfeit mark.
- 3- Any person affixing, in mala fide, on his products a trademark owned by third parties.
- 4- Any person who knowingly sells, offers for sale or circulation or acquires for the purpose of sale or circulation products that bear a forged, counterfeit or unlawfully affixed trademark.

In case of recurrence, the penalty shall be imprisonment for a period not less than two months and a fine not less than ten thousand pounds and not exceeding fifty thousand pounds.

In all cases, the court shall decide to confiscate the products subject of the crime or the amounts of money or articles obtained therefrom, as well as the implements that have been used in the commission of such crime.

On issuing a court ruling of incrimination, the court may decide to close the establishment that has been exploited by the adjudged party in committing the crime for a period not exceeding six months. Such closure shall be obligatory in case of recurrence.

Id. at art. 113. Article 114 states:

Without prejudice to any severer penalty provided for in any other law, a penalty of not more than six-month-imprisonment and a fine not less than two thousand pounds and not more than ten thousand pounds, or either of both penalties, shall be imposed upon the following:

- 1- Any person affixing commercial data contrary to reality, on his products, shops, and warehouses or on the signboards thereof, or on the packages, invoices, letterheads, media means or other means used in displaying the products to the public.
- 2- Any person unlawfully citing data, on his marks or commercial papers, which suggests that the mark has been registered.
- 3- Any person using an unregistered mark in the cases stipulated in paragraphs 2, 3, 5, 7, and 8 of article 67 of the law herein.
- 4- Any person citing any kind of medals, diplomas, rewards or degrees of honor on products not relating thereto or attributing same to trade names or persons who did not acquire same.
- 5- Any person who has jointly displayed products and used for his own products the advantages that have been granted to the jointly displayed - products; unless such person clearly illustrates the source and kind of such advantages.
- 6- Any person affixing geographical indications, on the products in which he trades, in a region well-reputed for producing a particular good, if such affixation is of such a nature as to mislead the public by suggesting that the goods originates in such region.
- 7- Any person using any means for designating or displaying a good, in a manner that misleads the public, by suggesting that such good originates in a well-reputed geographical territory other than the true place of origin thereof.
- 8- Any producer of a good in a region well-reputed for producing such good affixing a geographical indication on the similar goods produced by him in other territories in a manner that falsely represents that the goods originates in the said region.

In case of recurrence, the penalty shall be imprisonment for not less than one month, and a fine not less than four thousand pounds and not exceeding twenty thousand pounds.

Id. at art. 114.

Infringing the rights of a patent owner is also considered a criminal action.²³⁰ As noted *supra*, infringement is considered an act of theft.²³¹ Some have argued that an infringer should be subject to the same severe penalty as the theft of physical property, namely amputating the hands of the thief. Modern scholars argue, however, that it is up to the government to prescribe the appropriate penalties.²³² Accordingly, they see the imposed imprisonment and/or fines in the Law as acceptable by Shari'a.

In sum, examining the general principles of compensation and criminal liability in Shari'a reveals no conflict with the civil and criminal remedies mechanism set up by the Law.

²³⁰ *Id.* at art. 32. Article 32 states:

Without prejudice to the provisions of Article (10) of the law herein, any party which commits any of the following shall be penalized by paying a fine not less than twenty thousand pounds and not exceeding one hundred thousand pounds:-

- 1- Counterfeits with the aim of commercial circulation the object of a patent or a utility model granted a patent in accordance with the provisions of the law herein.
- 2- Sells, offers for sale or for circulation, imports or possesses with the aim of trading imitated products while knowing that they are so, for which, or for the methods of production thereof, a patent of invention or a utility model patent is granted, and valid in the Arab Republic of Egypt.
- 3- Unlawfully places on products, advertisements, trademarks, packaging materials or other matters, data leading to the belief that such party had registered a patent of invention or a utility model patent. In case of recurrence, an imprisonment term of not more than two years and a fine not less than forty thousand pounds and not exceeding two hundred thousand pounds shall apply.

In all cases, the court shall order the confiscation of the counterfeit products subject of the crime and the tools used therein, and the judgment shall be published at the expense of the convicted, in one or more daily newspaper.

Id.

²³¹ See Hussein, *supra* note 121, at 45–50. The author acknowledges the argument that was raised among the scholars of the four schools centuries ago regarding whether the thief of a copy of the Qur'an should be subject to the thief penalty (*Hadd*) of cutting the hand. He also notes that whenever the strict rules of applying the *Hadd* is not applicable to an infringement action it is permissible to apply any further penalties proscribed by the government under its laws. See also AL-SAMEE' ET AL., *supra* note 122, at 191.

²³² *Id.*

6. Compulsory Licensing, Fair Use Limitations, and the Maslaha Doctrine

As noted *supra*,²³³ intellectual property does not constitute a derogation from the public interest or Maslaha doctrine in Shari'a, since the exclusive rights are balanced by particular limitations and exceptions resulting from the observance of the public interest.

a. Fair Use Exception

Like the majority, if not all, of existing intellectual property laws, the Egyptian Law specifies situations where infringing actions are considered acceptable.²³⁴ This is known as the fair use exception/doctrine, which serves as a limitation to the exclusive rights of intellectual property owners.²³⁵ In relation to copyright and neighboring rights, the list includes: family, educational use, comment or criticism, and news reporting.²³⁶ Furthermore, the Law allows making a copy of a legitimately obtained work for personal use.²³⁷ This exemption, from the perspective of the Shari'a, does not raise concerns about its application to copyrighted works in general since the law states, "provided that such reproduction does not contradict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or the holders of copyrights."²³⁸ The application for personal use is questionable when applied to computer programs. The moral rights of the authors shall be noted in fair use cases. Thus, even in situations falling under the fair use limitation to authors rights, in articles 171 and 172, reference should be made to the author as creator of the work being used.

²³³ *Supra* text accompanying notes 110–116.

²³⁴ See Protection of Intellectual Property Rights of 2002, Law No. 82, arts. 171, 172.

²³⁵ Intellectual property rights are subject to various types of limitations. The Fair Use Doctrine is in fact a "limitation by way of permitted acts." See SODIPO, *supra* note 14, at 99, 100. Giving due regard to the public interest, a country could permit unauthorized use of protected materials by third-parties. As highlighted by Sodipo, such limitations are adopted in the realm of copyrights and patents but not trademarks.

²³⁶ See *id.* at art. 171–72.

²³⁷ See *id.* at art. 171.

²³⁸ *Id.*

b. Compulsory Licensing

The Law provides the government with the power to grant limited compulsory licenses on copyrights²³⁹ and a more expansive compulsory license on patents.²⁴⁰ For legitimacy under the Shari'a, the cases warranting this power must clearly emanate from a true public interest. In this regard, the requirement that a decision to grant a compulsory license must include the reasons warranting such grant, is reassuring. The same condition applies to the requirement that an owner must be compensated if the government decides to grant a compulsory license for his intellectual property. Limiting the fee, however, to be paid by the licensee to L.E. 1000 (Egyptian Pounds) in the case of copyrights for example, might raise the concern that the compensation is considerably inadequate.²⁴¹

²³⁹ Compulsory licensing for copyrights is only permitted for reproduction and/or translation. *See id.* at art. 170.

Any person may demand the competent Ministry to grant such person a personal license for reproducing and /or translating any protected work pursuant to the stipulations of the law herein, without having the author's permission, for the purposes set forth in the following paragraph. The grant of such license shall be against payment of fair compensation to the author or his successors. Such license shall not contradict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or the copyright holders. Licenses shall be granted, pursuant to a justified decision in which the time and place limits thereof are specified; and for the purposes of fulfilling the requirements of all kinds and levels of education. The executive regulations of the law herein shall define the conditions and terms stipulated for granting licenses, as well as the categories of the due fees, which shall not exceed one thousand Egyptian pounds for each work.

Id.

²⁴⁰ *Infra* note 240. Although not specifically stated in the Egyptian Intellectual Property Law; granting compulsory licensing for marks is prohibited under Article 21 of the TRIPs Agreement.

²⁴¹ *See* Protection of Intellectual Property Rights of 2002, Law No. 82, art. 170. Article 170 states:

Any person may request from the competent ministry to be granted a personal license for the reproduction or translation, or both, of any work protected under this Law, without the authorization of the author and for the purposes indicated in the next paragraph, against equitable remuneration to the author or his successor, to the extent that such license is not in contradiction with the normal exploitation of the work or does not unduly prejudice the legitimate interests of the author or the copyright holders. The license shall be granted, by a motivated decision, indicating the scope in time and place, for the purpose of meeting teaching requirements of all kinds and levels. The Regulations shall prescribe the terms and conditions for the grant of such a license and the

Compulsory licensing is mostly notable in the area of patents. Like most developing countries, Egypt had its doubts about granting pharmaceutical companies the full bundle of rights demanded by developed countries and provided for under international agreements. Perhaps the fierce debate in Parliament as seen in the media during the law's examination by the Shoura (Advisory Council/Senate) and the People's Assembly (Parliament/House of Representative) helps explain the length of Article 23.²⁴²

According to Article 23, the Patent Office is the competent authority for issuing compulsory licenses upon approval from a ministerial committee.²⁴³ Article 23 specifies the basis for granting a compulsory license. A compulsory license may be granted if the competent minister saw that it is required for "non-commercial public utility; such as national security, health and safety of the environment and food; facing emergencies or cases of extreme urgency"²⁴⁴ and to support national efforts for the development of technology, economy, or society.²⁴⁵ Other bases include: 1) the public need for pharmaceuticals as determined by the minister of health;²⁴⁶ 2) if the patent owner failed to either fully or adequately exploit the patent in Egypt for a) four years subsequent to the date of the application, b) three years from the date the patent was issued, or c) if he

categories of fees due, which shall not exceed one thousand pounds for each work.

Id. The executive regulation for copyrights and neighboring rights is still under preparation. The delay in issuing the much anticipated regulation has raised some criticism by foreign and national experts.

²⁴² See *id.* at art. 23.

²⁴³ The committee is organized by a decision from the prime minister. This committee determines the compensation to be granted to the patent owner. *Id.*

²⁴⁴ In the first two situations, the license could be issued without any prior negotiations with the owner. In all cases, however, the owner must be immediately informed of the decision and is entitled to appeal the decision. *Id.*

²⁴⁵ *Id.*

²⁴⁶ See *id.* at art. 18 (establishing a fund for supporting pharmaceuticals prices). The article states:

A Drug Price Stability Fund, having a legal entity and reporting to the Minister of Health and Population, shall be established to maintain stability in the prices of drugs—other than export drugs—with a view to achieve health development and to guarantee that drug prices are not affected by incidental changes. The organization and resources of the fund shall be determined by a decree to be issued by the President of the Republic. Such resources shall include contributions from donor states and intergovernmental and non-governmental organizations, as agreed by the State.

Id.

ceased to exploit it without an acceptable excuse for more than one year; 3) if the patent is required in lieu of another patent; 4) if the owner refused to grant a voluntary license to another although the terms of the offer were appropriate; 5) abusive or anticompetitive use of the patent; 6) in relation to a technology-related invention (semiconductors), and 7) only for the purposes of the public and non commercial interest or to remedy anticompetitive effects.²⁴⁷

The cases stated by the Law as warranting compulsory licensing fit within the limitation on property rights in the Shari'a.²⁴⁸ As noted *supra*, accumulating and hoarding wealth and property without exploiting it, especially if it entails a benefit to others, is forbidden.²⁴⁹ Additionally, the cases reflect the legislature's intent to circumvent unfair and abusive practices which is an important objective in Shari'a.²⁵⁰ Therefore, as long as the decision to issue a compulsory license was based on a true public need or interest and includes granting the owner adequate compensation, it will help reassure the Shari'a's concerns about wrongful taking of personal property.

Finally, it is important to note that Egypt has witnessed only one case of compulsory licensing when Law No. 132 of 1949 was still in effect.²⁵¹ This shows a reluctance to resort to compulsory licensing. This assumption is based on the fact that, since the mid 1950's, Egypt witnessed difficult economic and political conditions which could have warranted the use of compulsory licensing. Furthermore, Egypt's shift to market economy and its policy of encouraging private businesses and foreign investment since the 1990's, decreased the chances of employing compulsory licensing.

B. *Points of Conflict (commentary)*

I do not believe that there is a serious conflict between the principles and objectives of Shari'a and the current Egyptian Law of Intellectual Property Rights, nor generally the modern mechanism for protecting and enforcing intellectual property as presented in international treaties. Nonetheless, a number of minor issues might create some difficulties unless adequate measures are implemented.

As discussed *supra*, Shari'a requires contracts to be free of usury and indefiniteness. Even if the point of view of some modern scholars who believe

²⁴⁷ *Id.* at art. 32.

²⁴⁸ *Supra* text accompanying notes 107, 116.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ See SAMIHA AL-KALUOBY, INDUSTRIAL PROPERTY 246 (4th ed., Dar Al-Nahda 2003).

in compensating the loss in money value over time, many licensing agreements will not live up to the requirement. Most licensing agreements provide for charging interest on delayed license fees or other applicable payments. Although such a stipulation will not be illegal in the eyes of the legislature, since the Civil Code allows the charging of interest, this stipulation might be challenged as a violation of the prohibition on usury. An Egyptian court faced with such a claim is not likely to render the interest clause void. Still, the Al-Azhar University case²⁵² makes one understand that it is not completely impossible to have such a claim raised.

The Egyptian Law requires any licenses involving intellectual property rights to be in writing, although the agreement could be concluded merely by mutual consent.²⁵³ The law mandates that the agreement be recorded in the relevant registry.²⁵⁴ This requirement helps to achieve the required clarity in Shari'a and helps to protect the rights of the parties, including third parties.

Nonetheless, licensing some forms of intellectual property might prove problematic from a Shari'a perspective, given the difficulty of determining clearly what is being licensed. This concern could be raised in the case of licensing trade secrets or know-how. In principal, if the secret or the knowledge has a value and is a valid subject under Shari'a, its owner has the right to use or exploit it just as any other property. Unless the contract specifies what is being licensed, it will not meet the indefiniteness requirement. Overcoming this problem is not likely to be achieved through the legislation; it is in the hands of the parties concluding the license agreement.

The law organizes the transfer of copyrights upon the owner's death in violation of the rules of inheritance in Shari'a.²⁵⁵ Inheritance is one of the few issues that are dealt with in detail in the Qur'an, thus no derogation is permitted. According to Article 174, if an author of a joint work died without heirs or successors, his share will be transferred to the rest of the authors in the joint

²⁵² See Seniaowski, *supra* note 161, at 715–16.

²⁵³ See Protection of Intellectual Property Rights of 2002, Law No. 82, arts. 21, 89, 149. It is worth noting here that while all three articles state that transfer of rights shall not have effect against third-parties until it has been registered in the relevant registry, Article 149 specifically specifies that in the context of agreements involving authors monetary rights, "writing" shall be a condition for the formation of the contract and not only be used as a method evidencing the existence of the license/transfer agreement.

²⁵⁴ *Id.*

²⁵⁵ See *id.* at arts. 146, 174; Hassan, *supra* note 101, at 200; Jamar, *supra* note 21, at 1099.

work.²⁵⁶ This rule clearly contradicts the Shari'a rule that the property of the deceased who left no heirs is transferred to the State. The legislature followed the rule in the context of moral rights²⁵⁷ but chose not to abide by that stricture in the context of joint-works. Additionally, the law ignores the provisions for one third of the estate's limitation on transferring property by wills, since it allows the willing out of an authors' monetary and moral rights without regard to the one-third of the estate limitation on wills.²⁵⁸

Another important point is that the Law requires that in order for an invention or a trademark to be protected, it must not violate public order or public morality.²⁵⁹ The language of the Law does not refer to compliance with Shari'a, and whether or not it is implied that the condition applies to violations of the principles of Shari'a is not clear, therefore, this issue is very likely to be raised.²⁶⁰ The same point is made by Jamar, when he points out that "there is no guidance [from] cases or regulations regarding what inventions will offend the

²⁵⁶ See Protection of Intellectual Property Rights of 2002, Law No. 82, art. 174 (stating "[w]here a co-author dies without a universal or singular successor, the share of that co-author shall devolve to the other co-authors or their successors, unless otherwise agreed in writing").

²⁵⁷ See *id.* at art. 146 (stating "the competent Ministry shall exercise the moral rights provided for in Articles 143 and 144, after the expiration of the term of protection of the economic rights prescribed in this Law").

²⁵⁸ Jamar, *supra* note 21, at 1099.

²⁵⁹ See Protection of Intellectual Property Rights of 2002, Law No. 82, art. 2 ("Patent shall not be granted for: (1) Inventions whose exploitation is likely to be contrary to public order or morality, or prejudicial to the environment, human, animal or plant life and health"); see also *id.* at art. 67 ("The following shall not be registered as trademark or an element thereof . . . (2) Any mark which is contrary to public order or morality.").

²⁶⁰ Outcries against some artistic productions are to be noted here. Egypt witnessed fierce arguments around certain works, seen by some religious Muslim and Christian extremist as violating or insulting religion and/or morality. Examples include, "The Immigrant/Al-Mouhager," a movie, "Seaweed Feast," a book, and some foreign movies such as "Devil's Advocate" which was opposed by Al-Azhar and the Egyptian Coptic Church and was pulled from theaters as a result. The latest feud involved "The Da Vinci Code" which raised criticism from the Egyptian Coptic Church and Al-Azhar as well. See BBC News, A New Salman Rushdie?, http://news.bbc.co.uk/2/hi/middle_east/741359.stm (May 8, 2000). (providing a detailed account of the escalation of the "Seaweed Feast" feud). See also Joseph Mayton, *Egypt Bans the Da vinci Code*, MIDDLE E. TIMES, May 31, 2006, available at <http://www.metimes.com/storyview.php?StoryID=20060531-084207-3979r>. I do agree with the right of each country to recognize the sensitivity of certain issue to its society and accordingly decide against showing certain works that might entice hatred or violence. I believe, however, it is essential to exercise caution when claiming that a particular work is promoting a negative idea against a particular religion. Otherwise, religion could be abused by some who use it as a tool to oppress and abuse those who do not agree with them.

public morality or the public policy” and when he questions whether a new process for making alcohol would not be patentable.²⁶¹

Finally, in the context of fair use limitation on copyrights, the Law allows for “[ma]king one single copy” with the consent of the legitimate holder, for the purpose of keeping or substitution in case of loss, distortion or invalidation of the original copy.²⁶² From a Shari'a prospective, this exemption might not be legitimate, especially since it is not subject to “absent interference with the normal exploitation and reasonability” conditions discussed *supra*.²⁶³ Additionally, I do not believe the requirement set by the law that: “[t]he original or copy shall be destroyed upon the fulfillment of the holder's reasons,”²⁶⁴ provides a sufficient insurance in this regard.

CONCLUDING REMARKS

Protecting intellectual property rights, although not specifically regulated by Shari'a, 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 State.

Opinions opposing such protection seem to be influenced by an inaccurate understanding of the principles of protecting and enforcing intellectual

²⁶¹ Jamar, *supra* note 21, at 1102.

²⁶² Protection of Intellectual Property Rights of 2002, Law No. 82, art. 171(2)–(3); *see also* text accompanying note 127.

²⁶³ In this context, commenting on a similar exception on author's copyright property interests in the cancelled copyright law, Jamar argues that “this right to copy a published work for one's own personal use is open to criticism in the cases of music, movies, and especially software. Indeed in the field of software, the legitimizing of such piracy could debilitate the market to such a degree as to make sales and development unattractive.” Jamar, *supra* note 21, at 1102. Jamar continues that in such a case this legitimized intrusion to owner's copyright property interests seems inconsistent with traditional owners' rights in real and tangible property. He concludes that “[s]uch free availability of the right to use privately owned property is not recognized under traditional Islamic Law.” *See* Jamar, *supra* note 21, at 1099.

²⁶⁴ In the context of computer programs, while practicability justifies an exception to copyright property rights by allowing the purchaser to make one single copy of a computer program as explained above, in reality it is very difficult to insure that the single copy has been destroyed upon “the fulfillment of the holder's reasons,” as specified by the law. *See* Protection of Intellectual Property Rights of 2002, Law No. 82, art. 171(2)–(3).

property. Most opinions tend to focus their vision on the exclusive rights, seeing them as unlimited and unrestricted monopolies. These opinions ignore the loss incurred by national industries due to the lax enforcement of intellectual property rights and the overall effect on the economy.

This paper does not suggest that an intellectual property law is derived from Shari'a. As proposed in various parts of the analysis, non-Shari'a laws are considered a source of Shari'a, and Governments have a duty to regulate new issues if they lack sufficient regulation in Shari'a. There is no real conflict between Shari'a and intellectual property rights. In fact, Shari'a calls for a strong protection and a strict adherence to intellectual property laws by the governments and the members of society.

Infringing intellectual property rights and applying loose enforcement is a common problem in Muslim countries, including Egypt. These practices contradict Shari'a, which call for strong punishment for transgression of personal property. This point should be exploited when informing the public of the importance of respecting intellectual property. In a society where religion plays a role in everyday life, this proposition could enhance the efforts for protecting intellectual property. The fatwa's discussed *supra* are certainly a good step, but more needs to be done. The following are suggestions on how to enhance efforts for intellectual property protection:

1. The Islamic Treaty for Protecting the Rights of Authors,²⁶⁵ presented in 1994 to the Islamic Organization for Education, Culture and Science, must be amended to include current challenges and must be adopted. The current draft does not deal for example, with computer programs.
2. Similar treaties regulating patent and trademark rights among Muslim countries, should be adopted.
3. Awareness programs should highlight the fact that Shari'a acknowledges intellectual property rights and calls for respecting and enforcing them. It is crucial to highlight the fact that under Shari'a, piracy and infringement are considered a form of theft, thus, falling under the strict condemnation and punishment for theft in the Qur'an. A quick check on Islamic websites shows a considerable number of questions regarding the legality of intellectual property rights (especially computer programs) and whether it is permissible in Shari'a to adhere to secular intellectual property laws.
4. A group of Scholars and intellectual property experts should come together in an attempt to reach a decisive settlement for the points that

²⁶⁵ See AL-SAMEE' ET AL., *supra* note 122, at 55.

represent the gray area and might raise some concerns from the perspective of the Shari'a.

5. Egypt should enact unfair competition and antitrust legislations.²⁶⁶ Additionally, Egypt should consider establishing a number of specialized courts,²⁶⁷ especially for patent infringement cases and computer related crimes including computer program infringement cases.²⁶⁸ This will also require law schools around the country to offer more detailed intellectual property courses.²⁶⁹
6. Non-governmental organizations and entities working in intellectual property related areas should become involved in the process of publicizing intellectual property laws. They could play a significant role in spreading awareness and pointing up the huge losses the community suffers from infringement.

In conclusion, Shari'a does not provide an excuse for denying national and foreign intellectual property owners their rights. Nor does it provide an excuse for implementing lax enforcement of intellectual property laws. To the contrary, the principles of Shari'a enjoin any transgression of these rights and oblige Muslim governments to strongly guard and enforce them. As long as the balance between exclusive rights and the public need is maintained by intellectual property laws, it will be supported by Shari'a.

²⁶⁶ It is worth noting that Egypt has enacted Law No. 3 of 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices. To enforce the Law, the Egyptian Authority for the Protection of Competition and Prohibition of Monopolistic Practices (ECA) has been established. The implications of this Law on intellectual property in Egypt is yet to be seen. See Egyptian Competition Authority, <http://www.eca.org.eg/EgyptianCompetitionAuthority/Main.aspx> (last visited Feb 8, 2007).

²⁶⁷ In its 2007 parliamentary year, the People's Assembly is expected to examine a draft law on Economic Courts, which if passed will result in creating specialized courts for handling business related crimes, including intellectual property crimes.

²⁶⁸ This step is essential to boost Egypt's recent efforts to attract international pharmaceutical companies and software companies.

²⁶⁹ The Law School of Cairo University is currently the only school in the country that offers an intellectual property course. The course is available only to students of the English Section, which is one of three sections of the Law School. The Law School has a general Arabic Section, an English Section and a French Section which offer comparative courses taught in Arabic, English and French. The Law School also offers a specialized intellectual property graduate diploma. It is essential that more law schools offer comprehensive intellectual property courses. Since the law schools in Egypt offer obligatory courses (the students are not free to elect which courses they wish to take), they could offer a general intellectual property course along with specialized courses on the graduate level for those who wish to work in this area.