

Basis of Intellectual Property Protection in Islam and Its Legal Effects

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ABSTRACT

Both in analogy (*fiqh*) and related Islamic legal literature on property here is no specific mention of the term "Intellectual Property". Nevertheless, an analysis of the definitions and classifications of property under principles of Islamic law reveals that the concept of intellectual property is not alien to Islamic law of property; rather it is an integral part of it. General principles extracted from the sources of Islamic law and outlined by Muslim jurists have squarely encompassed it as a usufruct (*manāfi'*) property, which is recognized as object of right (*haqq*) that could be exclusive only to the individual that has right over it. That means all transactions related to intellectual property in terms of assignment and licensing are valid provided the general principles of contract in Islam are met. Copyrights and patent can be dealt in the same manner. For on a trademark to be lawful however, the mark must move to the other party along with the quality it represents or the good will so that misrepresentation and uncertainty are avoided.

1. Introduction:

Intellectual property (IP) is a broad concept that covers several types of legally recognized rights arising from some type of intellectual creation, or that are otherwise related to ideas. IP rights are rights to intangible things—to ideas, as expressed (copyrights), or as embodied in a practical implementation (patents). One author puts it this way: "*Intellectual property rights are rights in ideal objects, which are distinguished from the material substrata in which they are instantiated*".¹

As a special variety of *right* in a presumed property, it is essential for us to determine certain legal issues in Islamic law under which intellectual property can be understood. In order to establish the legality or otherwise of intellectual property, it is necessary for us to know what a property is in Islam and whether or not an intangible composition like intellectual property can qualify to be one.

This paper intends to outline the concept of property in Islamic law and how it covers intellectual property. By citing some relevant maxims of Islamic law, the paper shall conclude by discussing some effects of intellectual property right in terms of its protection and exploitation under the Islamic law.

2. *Māl*: Definition and Classifications

The term *māl* which is the Arabic equivalent of the word Property; and it linguistically refers to anything that man can own.²

Technically, several definitions have been proffered by Islamic jurists. Ibn 'Ābidīn (d. 1252H/1836AD) for example has defined it as anything that is attracted to the mind and can be stored for the time of need.³ This definition is unique in the sense that it links the linguistic definition of *māl* to the technical definition. It does not however encompass all that are recognized as *māl* in Islam. Perishables for instance cannot be kept for future use especially in the past. In addition, there are valuable properties that are not necessarily attractive to the sound mind, such as certain chemicals and poisons; but they are recognized as properties as well. *Māl* has also been defined as anything one possesses.⁴

Imam Al-Shāṭibī (d. 790H/1388C.E.) of the Maliki School defined it as that upon which ownership falls, exclusive to the owner at the expense of anyone who may take it without his leave.⁵ To Ibn Al-'Arabī (d. 543H/1143C.E.) it is that which is being desired and can be enjoyed both legally and conventionally or customarily.⁶

¹ Palmer, T. G. "Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects," in "Symposium: Intellectual Property," *Harvard Journal of Law & Public Policy* 13, no. 3 (Summer 1990): 818.

² Kuwaiti Ministry of Endowment and Religious Affairs, (1417H/1996) *Al-Mausū'ah Al-Fiqhiyyah*, vol. 36, Dār Al-Safwa, p. 31.

³ Ibn 'Ābidīn, M. A. (n.d.), *Hāshiyat Radd Al-Mukhtār 'alā Al-Durr Al-Mukhtār*, vol. 4, Būlāq, p. 3.

⁴ Money and Wealth: An Islamic Perspective on the Siasat Daily siasat.com visited on 24/11/2015.

⁵ Al-Shāṭibī, I. M. M. (1417H/1997) *Al-Muwāfaqāt fī Usūl Al-Sharī'a*, vol. 2 Dār Ibn 'Affān, p. 10.

⁶ Ibn Al-'Arabī, A. M. A. (n.d.), *Ahkām Al-Qur'ān*, vol. 2, Beirut, Dār Al-Fikr, p. 607.

According to AbdulWahhāb Al-Baghdādīyy (d. 422H/1031C.E.) it is that which has been accustomed to be dealt in as well as being legal to exchange for a consideration.⁷ Among the Shafi'is, Al-Zarkashi (d. 794H/1392C.E.) defines *māl* as that which is usable; that is ready to be used or enjoyed.⁸ Imam Al-Suyūṭī (d. 911H/1505C.E.) has also narrated from Imam Shafī'ī (d. 204H/819C.E.) the saying that: the name *māl* cannot refer but to that which has value through which it is sold, obliges liability for damaging regardless of its minuteness; and people do not throw it away.⁹ In the Hanbali school, *māl* is that which is continuously lawful to enjoy, or often. Or it is that which is legal to acquire without need.¹⁰

These definitions are much more inclusive than the earlier definition. They do not, for instance, stipulate that a thing will only be recognised as property if it can be stored for future use. Rather, anything that can be a subject matter of ownership or exclusive control can be described thus. In addition, the elements that have been repeated in these definitions are legality of enjoyment and value which has its root in customs as we can see later.

Generally, based on the opinion of the majority of jurists with the exception of Hanafis, properties are either tangibles (*a'yān*) or usufructs (*manāfi'*).¹¹ *A'yān* is the plural of the word *'ayn* refers to real or physical property that can be perceived through the sense of touch for instance; such as houses, livestock, cars, jewellery, etc. This category can also be *mithlī* (equitable) or *qiyamī* (valuable). A property is said to be equitable (*māl mithlī*) where it has its equal in the market without any differentiation. These include commodities that can be measured or counted. This category also includes gold and silver coins and even contemporary currencies like Naira.¹² A valuable property on the other hand has no similitude in market; or that whose units are different such as handwritten books, clothes sewn for determinate persons and even livestock. In case of tort of usurpation (*ghaṣb*) or damage (*ṭalaf*), restoration of same is more just. But in its absence, restoration of an equal is accepted for *mithlī* as it represents justice for the victim as both the form of the property and its value is assured; while restoration of the value replaces the equal as in the case of *qiyamī* due to necessity.¹³

3. Usufructs (*Manāfi'*) as Properties

Manfa'a (Plural: *manāfi'*) or usufruct is the benefit acquired from using a tangible such as the enjoyment of a house by residing in it or animal by using it as a means of transport.¹⁴ A service rendered by a labourer or employee is also referred to as *manfa'ah*. Others have also described it as the intangible benefit.¹⁵

Hanafis have limited *māl* (property) to tangible things that can be physically perceived. But usufructs and rights are not properties but mere ownership rights.¹⁶ Hanafis are of the opinion that usufructs are not guaranteed by usurpation; whether the usurper has enjoyed it, spoiled it or exploited it. It can only be guaranteed and be subject matter of liability with contract. The Hanafis have relied on the following reasons:

- a. Usufructs are not valuable properties; and they cannot be stored for time of need. The reason is that usufruct cannot exist in two different times. Instead they are consequences (*a'rād*) that fade immediately after coming into existence and as a result cannot be transacted or dealt in.¹⁷
- b. Usufructs are only recognized as valuable in *ijārah* (leasing or contract for service) contrary to analogy (*qiyās*) due to need (*hājah*) of contracting in them. The rule is that whatever that is confirmed to be contrary to analogy, is limited to that which is contained in the text.¹⁸

In the Maliki School, where a usurper usurps a property to enjoy it (i.e. benefits from its usufruct), he is held liable for transgression or exceeding the limit of Shari'a (*ta'addī*).¹⁹ Thus, if a man usurps an animal to use it as a means of transportation or a house to reside in it only, he will be liable for the use even if it is meagre. Under this circumstance, if the property is damaged due to heavenly factor, there shall be no liability upon the usurper.²⁰

Malikis, Shafi'is and Hanbalis are of the view that usufructs are valuable properties by themselves. Therefore, usufructs are protected just like tangibles and any tort against them attracts liability. These jurists have made the following reasoning:

⁷ Al-Baghdādī, A. A. (1420H/1999), *Al-Ishrāf alā Nukat Mas'āl Al-Khilāf*, vol. 2, Dār Ibn Hazm, p. 271.

⁸ Al-Zarkashī, B. M. B. (1421H/2001AD), *Al-Manthūr fī Al-Qawā'id Al-Fiqhiyyah*, vol. 3, Beirut, Dār Al-Kutub, p. 222.

⁹ Al-Suyūṭī, A. A., (1403H/1983), *Al-Ashbāh wa Al-Nazā'ir*, Beirut, Dar Al-Kutub Al-Ilmiyyah, p. 327.

¹⁰ Al-Fattūhī, T. A. (n.d.), *Sharh Muntahā al-Irādāt*, vol. 2, Dār Al-Fikr, p. 142.

¹¹ Cf Al-Zarqa, A. M. (1999/1420H), *Al-Madkhal ilā Nazariyyat al-Itizām al-Āmmah*, Damascus, Dār Al-Qalam, p. 215-220.

¹² Ibid, p. 148-152. So also rupee, dollar, euro, etc.

¹³ Cf *Al-Mausū'ah Al-Fiqhiyyah*, vol. 28, p. 269.

¹⁴ Haidar, A., (n.d.), *Durar al-Hukkām Sharh Majallat Al-Ahkām*, vol. 1, Fahmī Husain ed, Beirut, Dār Al-Kutub Al-Ilmiyyah, p. 100. Al-Zarkashi, ibid, vol. 2, p. 230.

¹⁵ Al-Qalyūbī, S. A. A. S. (n.d.), *Hāshiyat Al-Qalyūbī alā Sharh al-Minhaj al-Tālibīn li Jalāluddīn Al-Mahallī*, vol. 3, Mustafā Al-Halabī, p. 171.

¹⁶ Al-Zuhaili, W. (1428/2007), *Al-Fiqh Al-Islāmīyy wa Adillatuh*, vol. 4, Damascus, Dār Al-Fikr, p. 2877.

¹⁷ Al-Sarakhsī, A. M. A. (1406H), *Al-Mabsūt fīl Fiqh al-Hanafī*, vol. 11, Beirut, Dar al-Ma'rifa, p. 79

¹⁸ Al-Zaīlā'ī, F. U. A. (1313H), *Tabyīn Al-Haqā'iq sharh Kanz Al-Daqā'iq*, vol. 5, Būlāq, p. 234; Al-Mūsīlī, A. M. M. (1426H/2005), *Al-Ikhtiyār li Ta'līl Al-Mukhtār*, vol. 3, Dār Al-Kutub Al-Ilmiyyah, p. 63, 65; Al-Sarakhsī (1983), *Al-Mabsūt*, Ibid, vol. 11, p. 78, 80; Ibn Nujaim, Z. I., *Al-Ashbāh wa Al-Nazā'ir*, Dār Al-Fikr, p. 284, 285.

¹⁹ *Ta'addī* (Transgression) and *Darar* are the two pillars (essentials) of liability in Islamic law. [Al-Zuhaili, W. (1433H/2012), *Nazariyyat al-Damān*, Dār al-Fikr, p. 24.

²⁰ Al-Azhari, S. A. (1999), *Jawāhir al-Iklīl Sharhu Mukhtasar al-Khalīl*, vol. 2, Al-Maktabat al-Thaqāfiyyah, p. 151; Ibn Juzai, M. A. K., (n.d.), *Al-Qawānīn Al-Fiqhiyyah alā Talkhīs Madhhab Al-Mālīkiyyah wa Al-Tanbīhu alā Al-Madhhab Al-Shafī'iyya wa Al-Hanafīyya wa Al-Hanbaliyyah*, Dār al-Ilm li al-Malāyīn, p. 219.

i. Usufructs are the obvious objectives of all properties. Without any use, it will be pointless to acquire a property.

ii. The law has permitted usufruct to be dowry in marriage. This is a reference to the story of Prophet Musa, may peace be upon him, and the old man from Madyan.²¹ This is despite the fact that *Shari'ah* has specifically stipulated that a dowry should be of *māl* (property) in the saying of Allah:

"... provided ye seek (them in marriage) with gifts from your *property*".²²

iii. *Māl* is anything that Allah created for us to attain our interests and objectives. Or, as Imam Al-Shātibī (d. 790H/1388C.E.) puts it, it is what can be owned and exclusively enjoyed. Usufructs whether they emanate from us or other things, obviously had this quality. In addition, things acquire their pecuniary value when they are used by the people and transacted in it. The greatest transaction of sellers and their capital comes from the usufructs (i.e. the value attached to use of properties).²³

4. Basis of Pecuniary Feature of a Property (*Manāṭ al-Māliyyah*):

Hanafis did not make legality of use as an element in determining property; but stipulated tangibility, accustomed usage and transaction as an indicator that certain thing is a property. This has led them to classifying properties into two categories: *māl mutaqaawwim*²⁴ (legally usable property) and *māl ghair mutaqaawwim* (legally unusable property). A property is said to be *mutaqaawwim* if it is legally usable during a state of affluence and choice. On the other hand, property is *ghair mutaqaawwim* where the use and enjoyment of such property is illegal in a state of choice. For instance, alcohol and pork are illegal for a Muslim to enjoy though it is legal for *dhimmi*s (Non-Muslims living in Islamic territory) to enjoy it as they do not recognize its prohibition and deal in it. The *Shari'ah* has directed us to live them in accordance with the dictates of their religions.²⁵

The Hanafis have derived several legal injunctions of properties based on this classification. For instance, any transgression (*i'tidā'*) [or trespass in English Law] against a legally usable property (*māl mutaqaawwim*) creates liability. Likewise, a transgression against legally unusable property is a waste and does not attract any liability. In addition, legally sanctioned dealing with a property is subject to it being *mutaqaawwim*. Therefore, a legally usable property can be dealt in by selling, offering as a gift, bequest, mortgage, etc. On the other hand properties that are classified as *ghair mutaqaawwim* cannot be legally dealt in with any such dispositions.

It should however be noted that there is no correlation between usability (*taqaawwum*) and pecuniary nature (*māliyyah*) in the view of Hanafis.

Therefore, a thing can be legally usable (*mutaqaawwim*) and will not be a property because it does not possess the other element of *māl* mentioned above. Therefore a grain of wheat or a little loaf of bread or sand cannot be recognized as valuable property. Ibn Nujaim (d. 970H/1563C.E.) has narrated that properties achieve pecuniary value by all people or some dealing with it while legal usability is attained by legality of its enjoyment. That which is lawful without being recognized as object of dealing is not *māl* such as piece of grain; while that which is dealt in though its enjoyment is illegal is not legally usable (*ghair mutaqaawwim*) such as alcohol. Thus, in the absence of these two elements, a thing will not be recognized as property such as blood. It is therefore appropriate to conclude that term *māl* is wider legal usability (*taqaawwum*) as *māl* is that which can be stored even if it is unlawful like alcohol; and *mutaqaawwim* is that which can be stored and lawful to use. Alcohol is therefore a legally non-usable property (*māl ghair mutaqaawwim*).²⁶ Hanafis are also of the view that non-usability does not negate ownership; as an ownership of a Muslim can be established over a legally non-usable property such as where a juice has brewed into alcohol or is in possession of an alcohol or swine owned by a non-Muslim who has reverted to Islam and died before getting rid of them; and which can in turn be inherited by a Muslim. The reason is that ownership is confirmed upon *māl* (property) and pecuniary nature of *māl* can be found in legally non-usable properties. Nevertheless, due to legal non-usability, such property can not be a subject matter of a contract whose parties are Muslims²⁷. The term *taqaawwum* is also in some instances referred to a possessed property and *ghair mutaqaawwim* to a lawful thing that is not possessed, such as fish in water, trees in forests, bird in air, and they can only be *mutaqaawwim* when they are acquired through legal causes like hunting or collecting fire woods.²⁸

On the other part, majority of jurists among Shaf'is, Malikis and Hanbalis have recognized lawfulness of enjoyment as one of the elements and determinants of a thing being recognized as property. Therefore, where it is unlawful to enjoy certain thing then it is not *māl* at all. This is the reason why properties are not classified as *mutaqaawwim* and *ghair mutaqaawwim* as proposed by the Hanafis. Thus, whenever the majority of jurists refer to a property as *mutaqaawwim* they mean it is valuable; and where they refer to it as *ghair mutaqaawwim* they mean it such a thing has no value.

²¹ As contained in Qur'an 27:28

²² Qur'an 4:24

²³ Al-Sarakhsī, Ibid, vol. 11, p. 78; Al-Shātibī, Ibid, vol. 2, p. 17.

²⁴ *Mutaqaawwim* in the Hanafi terminology means that which is legally lawful to use and *ghair mutaqaawwim* is that which is unlawful to use under the *Shari'ah*. See: (*Al-Mausū'at al-Fiqhiyyah*, vol. 5, p. 25 as quoted from Takmilat Fath al-Qadīr, vol. 9, p. 31 and Ibn Abidīn in *Al-Durr al-Mukhtār*, vol. 5, p. 289.)

²⁵ Al-Zaila'ī, Ibid, vol. 5, p. 235; Al-Sarakhsī, Ibid, vol. 13, p. 25.

²⁶ Ibn Ābidīn, ibid, p. 3.

²⁷ Ibid., p. 120.

²⁸ Ibid., vol. 1, p. 101.

Legal permission of enjoyment is the main element in recognizing a property as valuable and anything whose enjoyment is illegal then it has no value as the maxim: that which is non-existence in law is also non-existent in fact.²⁹ This is the reason why the majority of jurists among Shafi'is and Hanbalis did not recognize alcohol and pig as properties that can be owned by either a Muslim or *Dhimmī* and they did not oblige liability for damaging them. Hanafis on their parts have recognized it as valuable concerning a *dhimmī* and have obliged liability for damaging it whether the tortfeasor is a Muslim or *dhimmī*.³⁰

Malikis have also agreed with Hanafis in obliging liability upon the person who damages an alcohol that belongs to a *dhimmī* as it is a property in his regard. They did not however agree with the Hanafi classification of property (*māl*) to *mutaqawwim* and *ghair mutaqawwim*.³¹

Besides the legality of use, another important element cited by jurists as the determinant of property is custom. As Imam Al-Suyūfī (d. 911H/1505C.E.) puts it, "*the name māl cannot refer but to that which has value through which it is sold, obliges liability for damaging regardless of its minuteness; and people do not throw it away*"³². This is a reference to *'urf*(customs) as what has value in the eye of the people is that which they have accustomed in transacting in it such that they sale it and buy it.

From the above discussion, we can infer that because Intellectual property right is such a right that is considered legal to enjoy and valuable property (*māl mutaqawwim*) among people and thus it can be owned, sold and protected, it has fulfilled the required elements of property in Islamic Law.

5. Intellectual Properties as Usufructs:

An intellectual innovation of whatever form is the physical consequence of an entrenched ability in one's brain and not the intellect itself. It emerged out of the mind or intellect, and as such, this element must be central in our legal adaptation of intellectual property when extracting out its relevant legal injunctions from the sources of the *Shari'ah*.³³

In addition, as al-Izz (d. 660H/1262C.E.) has put it, usufructs are the obvious purpose of all properties and they would not have had any value without such benefit in them. In addition, just like the usufructs of tangible property which are acquired from using such properties, usufructs of intellectual properties are also acquired from using such property.³⁴ For instance, only if one opens a book and reads it that one can gain something out of it and as a result, one can only benefit from it as one uses it momentarily and thus, they are consequences of such products.

Intellectual Invention (*al-ibtikār al-dhihnī*) as intangible abstract form, an effect of knowledge or ability of its inventor or creator is comparable to the benefits of fruits detached from its source, the inventor or author and settled in a medium: the book or invention. There is however a difference between the benefits that are obtainable from an intellectual creation and tangible property like landed or movable properties. On the source of these benefits, while the source of benefit in tangible properties is the properties themselves, in intellectual property like patent, the source is the creative intellect of the Inventor or Author. However, in both instances the benefits derived from them are intangible. In other words, they are fruits of man's intellectual labour.³⁵

On the effect of these benefits, it is obvious that benefits or usufruct are the evident objectives of acquiring all properties according to Al-Izz bin Abdussalam. In fact, it is the indicator or determinant of valuing their sources.³⁶

The value of the intellect has been under-estimated despite its role in the emergence of remarkable civilization in the last few centuries. It is the level of intellect and practical application of its resulting effect that created disparity between individuals and nations.³⁷ Therefore, benefits enjoyed from knowledge far surpass that which is enjoyed from tangibles as usufruct.

Allah, the Most High said:

"Are those equal, those who know and those who do not know?"³⁸

²⁹ Al-Rassā', M., *Sharh Hudūd Ibn 'Arafah*, vol. 3, Shamela 3.28.

³⁰ Al-Kāsāni, A. M. A., (1327H), *Badā'i' al- Sanā'i'*, vol. 7, Al-Matbū'āt Al-'Ilmiyyah, p. 147; Al-Sarkhasi, A. M. A., (1406H), *Al-Mabsūt fil Fiqh al-Hanafī*, vol. 13, Beirut, Dar al-Ma'rifa, p. 25; Al-Ramlī, M. A. H., (1357H), *Nihāyat al-Muhtāj ilā Sharh al-Muhtāj* vol. 5, Mustafa Al-Halabi, p. 167; Al-Shirbīni, M. A., (n.d.) *Mughnī al-Muhtāj ilā Ma'rifat Ma'ānī al-Fāz al-Minhāj*, vol. 2, Dār Al-Fikr, p. 285, vol. 4, p. 253; Al-Fattūhī, ibid, vol. 2, p. 137.

³¹ Al-Dasūqī, M. A. A. (n.d.), *Al-Hāshiyah Alā Al-Sharh Al-Kabīr*, vol. 3, Dār Al-Fikr, p. 447; Al-Usbuhī, M.A. (n.d.), *Al-Mudawwanah Al-Kubrā*, vol. 5, Beirut, Dār Al-Kutub Al-Ilmiyyah, p. 368.

³² Al-Suyūfī, ibid, p. 327.

³³ ibid, p. 11.

³⁴ Al-Khafīf, A., (n.d.), *Ahkām Al-Mu'āmalāt Al-Shar'iyyah*, Bahrain, Islamic Bank of Bahrain p. 28.

³⁵ Al-Durainī, F., (1401/1981), *Haqq Al-Ibtikār fī Al-Fiqh Al-Islāmī Al-Muqāran*, Mu'assasatu Al-Risālah, p. 12.

³⁶ Abdussalam, I.A., (1421/2000), *Qawā'id al-Ahkām fī Islāh al-Anām*, vol. 2, Hamād, N.K., Dumairiyyah, U.J. eds, Damascus, Dar al-Qalam, p. 172.

³⁷ Al-Durainī, ibid, p. 13.

³⁸ Qur'an 39:9.

Another authority that confirms intellectual creation as a benefit (*manfa'ah*)³⁹ is the saying of the Prophet, peace be upon him:

*"Whenever the son of Adam dies, his deeds terminates with the exception of three: continuous alms, knowledge being benefited from or a righteous child that prays for him."*⁴⁰

In describing the intellectual ability of man, Ibn Qayyim Al-Jauziyyah (d. 751H/1350C.E.) has this to say: *"Allah, the Glorious, gave man the ability of the intellect and directed him to use it in a manner that will be useful for him in this world and in the Hereafter. It is through this process (of deploying the intellectual ability) that man was able to create skills, crafts, sciences, construct cities, residential quarters and agricultural products. If not because of the intellectual ability, man would not have been able to acquire benefits and prevent harms; and this is among the greatest bounties and absolute Divine care."*⁴¹

6. Effect of Intellectual Property in Islam:

As the maxim *Al-Aşlu fī Al-Af'ālī al-Ibāhah* (the norm of Sharī'ah regarding conducts is lawfulness), we can notice the following effects of intellectual property.

On the effect of the conduct of enjoying an intellectual property, there are several legal authorities implying the legality of that which is created by Allah Ta'āla which also covers intellectual property by implication. For instance Allah Ta'āla says:

*"It is He Who hath created for you all things that are on earth."*⁴²

It is apparent that compositions of His servants are creations of Allah Ta'āla; which imply that they are lawful for them to enjoy. This is the meaning of the phrase *"he created for you."*⁴³ As rightly pointed out by Zaidān, the maxim applies to all modern innovations that do not fall under the prohibitions of the Sharī'ah and they are thus lawful.⁴⁴

On the effect of the conduct of protection of intellectual property which is the function of the individual concerned and the state, the maxim: *"Management of citizen's affairs is dependent upon public welfare or interest"* (*At-Taşarruf 'alar ra'iyah manūtun bil maslahah*)⁴⁵ implies that the ruler is under the obligation to carry out his activities based on the benefits and interests of his citizens. In another words, actions of a Ruler (with general or specific authorities) regarding those under his authority should focus on protecting their interests either religious or temporal.⁴⁶

Since intellectual property results from creative effort through the use of human intellect, every conceivable effort must be made to encourage innovative and inventive activity. Effective protection of intellectual property, through creation, use and enforcement of exclusive legal rights over it, provides the necessary incentive for scientific and technological creativity, facilitates the dissemination and use of new technical knowledge, and creates a conducive environment for the orderly exchange of intellectual property based goods and services in the marketplace.⁴⁷

Likewise, as indicated by the maxim (*Al-Aşl fī Al-Amwāl Al-Tahrīm*)⁴⁸ (The Norm of Sharia regarding Properties is Prohibition or Protection) intellectual property enjoys legal protection. Islam does not condone infringing the right of others. In particular, the fact that it is religiously sinful to infringe the right of another one is the strongest indicator for protection of intellectual property. As the Islamic Fiqh Academy (*Mujamma' Al-Fiqh Al-Islāmī*) has resolved that copyrights and patents are protected under Sharī'ah; and the persons that are entitled to them have the right to exploit them. In addition, infringing such right is not permissible.⁴⁹ An author who has wasted his time preparing his work is entitled over this right much more than all other people.⁵⁰

³⁹ Depending on context of use, the term *manfa'a* can either mean benefit or usufruct; as they are both related. Usufruct in the technical sense is the benefit acquired from using a tangible. The online legal dictionary described a usufruct as follows: A civil law term referring to the right of one individual to use and enjoy the property of another, provided its substance is neither impaired nor altered. For example, a usufructuary right would be the right to use water from a stream in order to generate electrical power. Such a right is distinguishable from a claim of legal ownership of the water itself. (legal-dictionary.thefreedictionary.com/usufruct accessed on 4/10/2015).

⁴⁰ Naisābūriy, M. M. A. Q., (n.d.), *Al-Jāmi' Al-Sahīh* known as *Sahīhu Muslim*, vol. 5, Beirut, Dār Ihyā Al-Turāth Al-Arabī, p. 73, Hadīth No. 4310.

⁴¹ Al-Jauziyyah, M. A. Q., (n.d.) *Al-Tibyān fī Aqsām Al-Qur'an*, vol. 1, Dār Al-Fikr, p. 250.

⁴² Qur'an 2:29

⁴³ Cf Ibn AbdulBarr, Y. A. M. Q., (n.d.), *Al-Tamhīd lima fī Al-Muwāṭṭa' min al-Ma'ānī wa Al-Asānīd*, vol. 1, Mu'assasat Al-Risālah, n.d.), p. 250.

⁴⁴ Zaidān, A., (1422H/2001), *Al-Wajīz fī Sharh Al-Qawā'id Al-Fiqhiyyah fī Al-Sharī'ah Al-Islāmiyyah*, Mu'assasat Al-Risālah, p. 180.

⁴⁵ Majalla, Art. 57.

⁴⁶ Al-Dausari, M. M., (1428H / 2007) *Al-Mumtī' fī Qawā'id al-Fiqhiyya*, Riyadh, Dār Zidnī, p. 353.

⁴⁷ Alikhan S., (2000), *Socio-Economic Benefits of Intellectual Property Protection in Developing Countries*, WIPO, p. 2.

⁴⁸ Ibn Al-Subkī, *Al-Ibhāj*, Ibid, vol. 3, p. 180; Al-Zarkashī, B. M. B. A., (1421H=2001), *Al-Bahr Al-Muhīṭ fī Usūl al-Fiqh*, vol. 4, Dār Al-Kutub Al-Ilmiyyah, p. 325.

⁴⁹ Resolutions and Recommendations of Mujamma Al-Fiqh Al-Islāmī, Resolution No. 43 (5/5).

⁵⁰ Al-Zuhailī, W., Ibid, p. 2861.

Regarding trademarks, the Fiqh Academy has further resolved as follows: Business names, business address, trademark, copyright, invention (patent) or innovation are rights exclusively held by its authors. Such right has acquired financial value in modern custom and are recognized rights held by their creators. Such right has acquired financial value in modern customs and because people deal in them as valuable property the law has recognized them⁵¹.

Similarly, as a legally accepted valuable property, intellectual property can be dealt in just like any other property. This is based on the maxim *Al-Aşlu fı Al-Uqūdi al-Şihħah*⁵² (The norm of Sharī'ah regarding contracts is legality). Thus, economic right in Copyright in Patent can be exploited through assignment and licensing as the case may be.

Assignment involves the sale of intellectual property right to another person. Assignments result in all rights to and control over the IPR being transferred from the assignor to the assignee. An assignment, which is similar to a sale or transfer, is usually made in exchange for a lump sum payment and/or a right to enjoy an ongoing royalty stream generated by the assignee's commercialisation activities.⁵³ In other words, assignment has the same effect as selling (*al-bay'*).

On the other hand, licensing allows the IP owner to retain control of the IP while granting particular rights to another person (licensee) based on the licensee's particular skills and needs. The flexibility of licensing can be seen once you start considering how the IP rights in question can be fragmented.⁵⁴ It is similar to the effect of *ijārah*. Whatever the term used for the specific dealing is, the underlying purpose of the transaction determines the legal effect attributed to such dealing. This is based on the maxim "*In Conducts and Contracts, effect is given to intention and meaning and not words and forms*" (*Al-'Ibratu fı 'uqūdi lil-Maqāsidi wal Ma'ānī lā lil-Alfāzi wal-Mabānī*).⁵⁵ The maxim means intentions and objectives have effects on all forms of conducts and dispositions. It also affects the legal position of the conducts: valid or void, permissible or forbidden.⁵⁶

In any Intellectual Property deal, the consideration must be clearly stated. *Iwad* or consideration is a general term used in referring to that which is given in exchange of something. In other words, it is the other part of object of contract or subject matter in exchange contracts. It carries different name depending on the form of contract. It is known as *al-thaman* (price) in contract of sale, *ujra* in contract of lease or labour (*ijārah*) and *mahar* or *sadāq* (dowry) in contract of marriage; *ju'l* in the contract of *Ju'alah*. In intellectual property deals, considerations are referred to as royalties.

Royalties are typically paid over the life of the patent, such as the unexpired 20 year term of a patent.⁵⁷ The amount to be paid as royalty should however be specific and ascertainable. Jurists are in agreement that in a contract of exchange, the consideration must be explicitly stated; it should have a monetary value, owned by the buyer, can be transferred and of known amount and description.⁵⁸ On this last condition, the amount to be paid must be specified as either proceeds acquired from exploiting the patent or a fixed amount to be paid over the period of subsistence of the patent. According to the majority of jurists, where a contract is formed and if either of the parties does not know the specific consideration such a contract is invalid.⁵⁹

In a license, the failure to pay royalties will be a breach of the license contract, and would entitle the licensor to terminate the license. But such failure should not be used as a cause to charge the licensee an excess amount an interest for delay in payment. A condition that stipulates payment of interest for non-timely payment of royalty is therefore invalid under this category.

In dealing with Trade Mark on the other hand, the applicable provisions of Sharī'ah is different. Trade Mark is remarkably different from patent and copyright. It represents the quality of a product or reputation of a business. A trade mark like business name and business address represents distinguishing feature of a product. It is one of the means through which a business man distinguishes his products and services from any other product.

Section 26(1) of the Trade Mark Act provides that:

*"Notwithstanding any rule of law or equity to the contrary, a registered trade mark shall after the commencement of this Act be assignable and transmissible either in connection with the goodwill of a business or not."*⁶⁰

⁵¹ Resolutions Mujamma Al-Fiqh Al-Islāmī, *ibid*.

⁵² Al-Nawawī, Y. S., (n.d.), *Al-Majmū' Sharh Al-Muhadhdhab*, vol. 13, Dar al-Fikr, p. 108; p. 32; vol. 30, p. 159; Ibn Al-Subkī, *ibid*, vol. 1, p. 53.

⁵³ Arete Group, Assignment and licensing of intellectual property, p. 1 Accessed on 29/08/2015 at http://www.aretegroup.com.au/pdf/assignment_licence.pdf

⁵⁴ *ibid*

⁵⁵ Ibn Al-Subkī, T. A. A., (2011), *Al-Ashbāh wa al-Nazā'ir*, vol. 1, Beirut, Dar al-Kutub al-Ilmiyya, p. 347, Al-Zarkashī, B. M. B., (1421/2001), *Al-Manthūr fı Al-Qawā'id Al-Fiqhiyyah*, vol. 2, Ismā'īl, M. H. ed, Beirut, Dār Al-Kutub, p. 371.

⁵⁶ Ibn al-Qayyim, *I'lām*, *ibid*, vol. 3, p. 142.

⁵⁷ Mendes, *Ibid*.

⁵⁸ *Al-Mausū'at Al-Fiqhiyyah*, *ibid*, vol. 15, p. 26.

⁵⁹ Ibn Ābidīn, *ibid*, vol. 4, p. 11-12; Al-Kāsānī, *ibid*, vol. 5, p. 158; Al-Dasūqī, *ibid*, vol. 3, p. 15-16; Al-Nawawī, *ibid*, vol. 9, p. 323-324; Ibn Qudāma, A. A. M., 1(405H), *Al-Mughnī fı Fiqh Al-Imām Ahmad bin Hanbal Al-Shaibāni*, vol. 4, Beirut, Dār Al-Fikr p. 207, 211.

⁶⁰ Trade Mark Act Cap T13 Laws of the Federation of Nigeria 2004

A trade mark is not recognised as a standalone property in itself; rather it is an attachment to the property and as a result it cannot be transferred separately in any matter of contract such as mortgage or contract of sales, etc.⁶¹ As a result dealing with it alone without the underlying goodwill is seen as misrepresentation and *gharar* which is invalid sales in Islamic law.

However, because trade mark is an essential element that determines the popularity of a business or product attracts customers to a business and as a result it is an essential quality of the business. Thus, a transaction concerning the ownership of business or product will also include transfer of the trade mark as stipulated in the maxim: An accessory which is attached to an object in fact is also attached to it in law" (*Al-Tābi'u tābi'un*).⁶²

Therefore, following the effort exerted into the registration of a trade mark and acquisition of certificate as prescribed by the Trade Mark Act, it acquires certain value in accordance with the customs and practice of business men. Thus, if a Trade Mark has been registered and is recognized as a valuable by its holders, it has partly acquired features of a property that has value and can be dealt in. To deal with a trade mark, there are to main conditions nonetheless. These are:

1. The Trade Mark must have been legally registered by the government agency responsible. The reason is that an unregistered mark is not recognized to have any pecuniary value in custom,⁶³ nor does the law protect it.

2. Such transfer or transaction should not mislead consumers or misrepresent customers. As a result, the transferor must declare that his product is not the same product that was previously carrying the mark but instead he will try to make a qualitative product as previous or even better.⁶⁴ This second condition implies that the trade mark does not move alone rather, it moves along with the good will and quality of the previous product or organization that transferred or assigned it.

Conclusion:

Although intellectual property recognition is not to be found in the classical works of *fiqh*, the general principles extracted from the sources of law and outlined by jurists have squarely encompassed it as a legal property that can be protected and exploited with the legal regimes established by Islam. Nevertheless, general principles of Islamic law on property extracted from the sources of law and outlined by Muslim jurists have squarely encompassed it as a legal property (usufruct – *manāfi*) under the Islamic legal regime. *Māl* can either be *a'yān* (tangibles) or *manāfi* (usufructs). Intellectual Properties falls under usufructs that can be exclusively owned, protected enjoyed and exploited. The benefits of intellectual property are exchange of knowledge and technologies as well as expansion of business across several countries. This creates creating greater know how of improving lives especially in the Islamic Countries.

⁶¹ Al-Nashmī, *ibid*, p. 1946.

⁶² Majalla, Art. 47; Al-Zarkashī, *ibid*, vol. 1, p. 238; Ibn Rajab, J.A.A., (1419), *Taqrīr Al-Qawā'id wa Tahrīr Al-Fawā'id*, Abu Ubaidah M. H ed, Dār Ibn Affān, p. 298; Al-Suyūfī, *ibid*, p. 228; Al-Borno, *Wajīz*, *ibid*, p. 331.

⁶³ Al-Nashmī, *ibid*.

⁶⁴ *ibid*