

Intellectual property laws and Islam in Malaysia.

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INTELLECTUAL PROPERTY LAWS AND

ISLAM IN MALAYSIA

BY

IDA MADIEHA BT. ABDUL GHANI AZMI

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**THESIS SUBMITTED TO THE INTELLECTUAL PROPERTY LAW UNIT OF
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REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY.**



ABSTRACT

This study is undertaken on the premise that Islam and Islamic law is to be taken into serious consideration in any future legislative reform of laws in Malaysia. Islam being the religion of the country and the strong religious sentiment of the Muslims (who form the majority in Malaysia) cannot be overlooked or dismissed lightly by the legislators in Malaysia. Reformation of intellectual property laws is timely, as we are now approaching to the dateline set by GATT-Trips agreement which aim is to improve our standard of intellectual property protection. This study seeks to analyze and evaluate the current legislation pertaining to intellectual property in Malaysia in terms of the philosophy and rules governing the existence, ownership and exercise of these rights and their consistency and inconsistency with Islam and Islamic law. The main objective of this study is to prove that a coherent and logical conceptual framework of ownership of intellectual property can be derived from an Islamic perspective which not only offers the basis of rights but also defines the scope of these rights. From the point of ownership of rights, support can be obtained from the normative framework of property rights within the traditional classification of '*mal*' (property) and '*haqq al-milkiyyah*' (ownership rights) under Islamic law. From the point of exercise of rights, the exact scope can be defined from the analysis of fundamental concepts which have been developed by Muslim jurists. It has been established that Islam and Islamic law offers a sound and systematic paradigm, which in deeper analysis, can satisfy both our current obligations under international treaties, as well as our responsibility to practise our religion to the fullest.

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United Kingdom

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Patents Act 1919-1949.

Patents, Designs, and Trade Marks Act, 1883.

Patents, Designs and Trade Marks Act, 46 & 47 Vic c. 57.

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Merchandise Marks (Amendment) Enactment no.6 of 1913.

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Madrid Protocol, 229th. June 1989.

Paris Convention for the Protection of Industrial Property of 20th. March, 1883, as revised at Stockholm on July 14, 1967.

Treaty establishing the European Economic Community (Treaty of Rome).

Universal Declaration of Human Rights, United Nations, 10th. Dec. 1948.

TABLE OF ABBREVIATIONS

A.C	: Appeal Cases.
Atk	: Aitken.
All.E.R	: All England Reports.
A.L.Q	: Arab Law Quarterly.
A.L.R	: Australian Law Reports.
A.M.R	: All Malaysian Report.
B.C	: British Columbia Law Reports.
B.C.L.R	: British Columbia Law Reports.
Burr	: Burrows.
Cal.App	: California Appeal.
Camp	: Campbell.
C.B, N.S	: Common Bench New Series.
Ch.	: Chancery.
C.I.P.R	: Canadian Intellectual Property Reports.
C.L.J	: Current Law Journal.
C.M.L.R	: Common Market Law Reports.
Co. Rep	: Coke.
C.P.R	: Canadian Patent Report.
De GJ	: De Gex & Jones, temp. Granworth, Chelmsford & Campbell.
De GJ & S	: De Gex, Jones & Smith.
D.L.R	: Dominion Law Reports.
E.C.R	: European Common Reports.
E.R	: English Reports.
E.I.P.R	: European Intellectual Property Journal.
E.P.O	: European Patent Office.
E.P.O.R	: European Patent Office Reports.
F	: Federal Reporter.
F.Cas	: Federal Cases.
F.M.S.L.R	: Federated Malay States Law Reports.
F.S.R	: Fleet Street Reports.

F.Supp	: Federal Supplement.
H.L.C	: House of Lords Cases.
I.I.C	: International Review of Industrial Property and Copyright Law.
I.P.D	: Intellectual Property Decisions.
I.P.J	: Intellectual Property Journal.
L.ed	: Lawyers Edition.
Myl. Cr	: Mylne & Craig.
N.Z.L.R	: New Zealand Law Reports.
K.B	: King's Bench.
Ky	: Kyshe's Reports. (Malaya 1808-90)
Ky. Ec	: Kyshe Ecclesiastical.
I.P.R	: Intellectual Property Reports.
L.T	: Law Times.
Mac.C.C	: Macgillivrays Copyright Cases.
M.E.E.D	: Middle East Business Weekly.
M.L.J	: Malayan Law Journal.
OJEPO	: Official Journal European Patent Office.
Qd.R	: Queensland Reports.
Q.B	: Queens Bench.
R.I.D.A	: Revue Internationale Du Droit D'Auteur.
R.P.C	: Reports of Patent Cases.
S.A	: South African.
S.S.L.R	: Straits Settlement Law Reports.
T.M.R	: Trade Mark Reporter.
U.S	: United States Supreme Court.
U.S.P.Q	: United States Patent Quarterly.
W.L.R	: Weekly Law Reports.

GLOSSARY

- '*Adah*': normal period (as opposed to emergency).
- '*Adl*' ('*Adalah*'): justice, upright and just.
- '*Adillah*': (pl. of '*dalil*'): proofs, evidences, indications.
- '*Adillah al-syari'yyah*': proofs from the sources of Shari'ah.
- '*Ahadith*': (pl. of '*hadith*') narratives and reports of the deeds and sayings of the Prophet.
- '*Ahkam*' (pl. of '*hukm*') : laws, values and ordinances.
- '*Ahl hall wa al aqd*': (lit. those with power to loose and bind) the consultative body.
- '*Ahl al-suq*': members of the market.
- '*Alaqah ikhtisasiyyah*' : special relationship.
- '*Al-huquq al-adabiyyah wa al-fahmiyyah wa al-faniah wa al- tijariah wa al-sina'iyah al muta'arif biha lil muallafin wa al- musiqin wa al-mukhtarin*' : rights related to cultural, intellectual, artistic, commercial and industrial more known as author's, musical and inventor's rights.
- '*Al-fi'lu al-masyru*': any legal act or recognised deed.
- '*Al-iltizam allazi yatimmu bil ijab- al iradah al munfaridah*': dispositions which are concluded without offer and acceptance.
- '*Al-taaddi ala haqqi al-ghair*': the transgression of others rights.
- '*Amal*' : act, practice, precedent or labour.
- '*Amanah*' : trust/ uberimai fidae contract.
- '*Amr*' ('*Amar*') (pl. '*amir*', '*umur*') : command, matter, affair or injunctions in the Qur'an in the form of commandments.
- '*Aqar*': immovable property.
- '*Aqd*' : contractual disposition.
- '*Aql*' : intellect, rationality, reason.
- '*Ariyah*': loan contract.
- '*Arkan*' (pl. of '*rukn*'): pillars, essential requirements.
- '*Ashab*': companions of the Prophet.
- '*Asl*' : root, origin, source or the accepted premise.
- '*Athar*' : lit. impact, trace, vestige, also deeds or precedents of Companions of the

Prophet.

'*Ayah*' (pl. '*ayat*') :lit. sign, indication; a section of the Qur'anic text often referred to as 'verse'.

'*Ayn*' :tangible goods/ substance.

'*Bai*'' :sale.

'*Bai'ah*':pledge of allegiance.

'*Bara'ah al-dhimmah al-asliyyah*' : original absence of liability.

'*Batil*': null and void.; also the antonym of justice, right or rightness.

'*Bayan*': explanation, clarification.

'*Bayt al-mal*': treasury.

'*Dalalah*': meaning, implication.

'*Dalalah al-nass*': inferred or implied meaning of a given text.

'*Dalil*':proof, indication, evidence.

'*Dallals*' : brokers, contractors.

'*Darurah*' : emergency/ exigency. (During emergency a wider range of things may be enjoyed).

'*Daruriyyah*': crucial or essential items.

'*Dayn*': debt, a thing owing.

'*Dharr*': (literally) harmful or injurious.

'*Dharar fahish*': excessive harm.

'*Dhimmah*': liability.

'*Din*': matters pertaining to religion/ matters of faith.

'*Diyah*': blood money.

'*Far*': subsidiary, branch or the conclusion in an analogy.

'*Fard*' : obligatory, obligation

'*Fard 'ayn*': personal obligation

'*Fard kifayah*' : collective obligation, imposition, duty, obligation.

'*Fasad*': corruption, immoral.

'*Fasakh*':dissolution of marriage initiated by the wife.

'*Fasid*': corrupt, void, deficient (as opposed to '*batil*' which is null and void).

'*Fi'l ghair mashru*': illegal conduct.

'*Fiqh*': is the identification of substantive legal rules from the Shari'ah principles.

'*Fiqih*' (pll. '*fuqaha*') : jurist, one who is learned in jurisprudence.

'*Fitrah*': religious tithe payable once a year during fasting month, not proportionate to income, but so much per head in the family.

'*Ghalib*': in most cases, most likely, in all probability.

'*Ghasb*': misappropriation of property.

'*Ghayah*': endresult, goal, purpose.

'*Ghallah*': produce, crop, fruits.

'*Hajah*': necessity, exigency.

'*Hajiyah*': matters which are not essentially pertaining to the existence of the subject matter but its non-existence will produce much hardship; matters which are ancillary but important matters; less important than '*daruriyah*'.

'*Hakam*': conciliatory body.

'*Hakaman*': in the legal sense.

'*Halal*': lawful, legal, legitimate, permissible.

'*Haqq*': right, entitlement.

'*Haqq al-Abd*' ('*haqq al-adami*'): right of man, or private right.

'*Haqq al-hadhanah*': custodian rights.

'*Haqq al-Ibtikar*': rights of origination.

'*Haqq al-ikhtira*': patent rights.

'*Haqq al-jiwar*': the right of neighbourhood.

'*Haqq al-shafah*': the right to consume water or to irrigate land.

'*Haqq al-tassaruf*': rights of disposal/ disposition.

'*Haqq al-wala*': rights arising from a contract of agency.

'*Haqq al-wazaiif*': rights arising from the appointment as a leader.

'*Haqq Allah*': Right of God, or public right.

'*Haqq lil muallif*': author's right.

'*Haqq mutlaqah*': absolute, unqualified right.

- '*Haram*' ('*hurmah*') : forbidden, prohibited, unlawful, illegal.
- '*Hikr*': real rights on land which is given in endowment or in perpetuity.
- '*Hisbah*': the enforcement of market and public moral.
- '*Hissan*': in the physical sense.
- '*Hiyazah or wad' yad*': means occupancy and taking possession or control.
- '*Hudud*': (pl. of '*hadd*') the prescribed penalty for capital offences in Islam.
- '*Hukm*' (pl. '*ahkam*') as in '*hukm sharai*': law, value or ruling of the Shari'ah.
- '*Hukama*': those possessed with wisdom.
- '*Hurriyyah al-amal*': freedom to engage in occupation.
- '*Ibahah*': a permissible act.
- '*Iddah*': the waiting period following dissolution of marriage by death or divorce.
- '*Idhtirar*': emergency, exigency.
- '*Ihsan*': benevolence, performance of good deeds.
- '*Ihtikar*': hoarding, monopoly.
- '*Ihya al-mawat*': the reclamation of dead/ unutilised land.
- '*Ijarah*': lease/ hire/ tenancy.
- '*Ijazah*': authorisation.
- '*Ijazah bil-fatwa*': licence to issue religious ruling.
- '*Ijazah bit-tadris*': licence to teach.
- '*Ijazah bit-tadris wal-fatwa*': licence to teach and issue religious ruling.
- '*Ijma*': consensus of opinion among jurists.
- '*Ijtihad*': lit. exertion and usually the effort a jurist makes in order to deduce the law, which is not self evident, from its sources.
- '*Ikhtilaf*': juristic disagreement.
- '*Ikhtisas al hajiz*': exclusive assignment.
- '*Ikhtiyar*': by choice, election, option.
- '*Illah*': effective cause or ratio legis of a particular ruling.
- '*Ilm*': knowledge, science, scholarship, education.
- '*Intaj al-zihni al-mubtakir*': original intellectual creations.
- '*Intifa*': enjoyment (of property), making use of, utilization, availing oneself of.
- '*Inqida' al-haqq*': the termination of right.

- '*Iqtibas*': adaptation, extraction, borrowing.
- '*Irtifaq*': rights of easement.
- '*Isalah*': originality, authenticity, genuineness, purity of origin.
- '*Isti'mal al-haqq*': the use of right.
- '*Istifa' al haqq*': the fulfilment of right.
- '*Istihsan*': to deem something good, juristic preference.
- '*Istislahat*': technical vocabulary.
- '*Istinbat*': inference, deducing a somewhat hidden meaning from a given text.
- '*Istikhlaf*': to appoint as successor.
- '*Istila' ala al-kala wa al-ajam*': finder of grazing field.
- '*Istila' ala al-ma'adin wa al-kunuz*': finder of mines and treasure.
- '*Istiqrar*': permanence, stability, constancy.
- '*Istishab*':
- '*Istislah*': means taking the public interest into account (Schact's glossary in An Introduction to Islamic Law)
- '*Istiyad*': hunting.
- '*Ittifaq*': consent / agreement.
- '*Izdn*': affirmative permission.
- '*Jaizan mashru'an*': valid and lawful.
- '*Jawaz al-Shar'i*': lawful enjoyment under the Shari'ah.
- '*Jihad*': holy war.
- '*Jumhur ulama*': the dominant majority of the jurists.
- '*Kabiruna*': an expression used to refer to the group of people who are senior than others.
- '*Kala*': herbage.
- '*Karahah*' (or '*karahiyyah*') : abhorrence, abomination.
- '*Kathir*': often, frequently.
- '*Khabar*': news, report, also a synonym for '*hadith*'.
- '*Khass*': specific, a word or a text which conveys a specific meaning.
- '*Khilafah*': the concept of stewardship.
- '*Khiyanah*': an act of betrayal.

'*Kitabiyyah*': People of the Book, a phrase used to refer to the Jews and the Christians.

'*Khulu*': a special form of divorce whereby the wife redeems herself by purchasing her freedom.

'*La dharar wa la dhirar*': no harm done nor harm done in return.

'*Madhhab*' (pl. '*madhahib*'): juristic/theological school.

'*Mafsadah*': harm.

'*Mahall al-haqq*': 'locus' or object of '*haqq*'.

'*Mahar*': dowry for marriage.

'*Majliyy*': referring to the physical embodiments in which ideas are expressed.

'*Makruh*': abominable, reprehensible acts.

'*Mal*': subject matter of legal transaction or property.

'*Maliyyah*': financial gains.

'*Mandub*': recommendable.

'*Manfa'ah*': usufructuary rights.

'*Manfa'ah mubahah*': usufructuary rights which are lawful.

'*Man lahu haqqan faliwarathihi*': a claim (*haqq*) can be transmitted through inheritance.

'*Mansha'*': the inception/ source, origin.

'*Maqasid*' (pl. of '*maqsud*') :goals and objectives.

'*Ma'ruf*': what is moral and desirable.

'*Mashaf*': written manuscript, often used to denote the written manuscript of the Qur'an.

'*Maslahah*': considerations of public interest.

'*Maslahah mursalah*': unrestricted public interest.

'*Mazalim*': Board of Grievances.

'*Mu'add al-istighlal*': excessive damage.

'*Mu'amalah*': commercial transactions.

'*Mu'aqat*': impermanent.

'*Mubah*': permissible goods/ property.

- '*Mubasharah*' : direct.
- '*Mubtakir*': newly created.
- '*Muhaddithin*' : narrators of '*hadith*'s.
- '*Muhtasib*' : the market inspector.
- '*Mujarrad*': personal rights, pure rights.
- '*Mujtahids*': the persons who exercise independent opinion
- '*Mukallaf*': a competent person who is in full possession of his faculties, legal capacity or the party of incidence.
- '*Munkarat*' : what is not desirable and is condemned.
- '*Muqayyad*' : confined, qualified.
- '*Muqawala*': contract, agreement.
- '*Musabib*' : the person causing damage.
- '*Mustawalli*' : capturer, the person who seize, expropriated.
- '*Mut'ah*': consolatory gift upon divorce.
- '*Mutaqarrir*' : property rights, rights which are quantifiable and be legally transacted.
- '*Mutaqawwimah*': property which can be valued in monetary terms.
- '*Mushtari 'aadi*' : the ordinary consumer.
- '*Mutlaqah*': absolute, unqualified.
- '*Muzara'ah*' : agricultural joint venture agreement.
- '*Milkiyyah*' : the concept of ownership.
- '*Mirath*': inheritance.
- '*Nadir*': rare, seldom, scarce, infrequent.
- '*Nadjassatihi*': uncleanness.
- '*Na-fa-a*': literally benefit or utility
- '*Nahy*': prohibition.
- '*Najash*' : artificial price raising.
- '*Naqli*': transmitted as e.g, in '*transmitted proofs*' to be distinguished from '*rational proofs*'.
- '*Nar*' : fire.
- '*Nass*' : a clear injunction, an explicit textual ruling (provision, only used in the context of the provision of the Qur'an and the Sunnah).

'*Nata'ij*' : the end result/ the consequence.

'*Nawafil*' : superogatory.

'*Nazr*': an expressed vow to do any act or to dedicate property for any purpose allowed by Islamic Law.

'*Nikah*': the contract of marriage.

'*Nisbi*': relative, comparative, proportional.

'*Nusus*' (pl. of '*nass*') : clear textual rulings.

'*Nusyuz*': wife unlawfully refuses to obey lawful wishes or commands of husband.

'*Qadi*': judge.

'*Qat'i*': definitive, decisive, free of speculative content.

'*Qisas*' : just retaliation.

'*Qur'an*': the Holy Book.

'*Quyud*': limitations.

'*Raqabah*': substance.

'*Riba*' : usury/ interest.

'*Riwayah*' : narration, transmission.

'*Rukhsah*' : concession or concessionary law, that is law which is modified due to the presence of mitigating factors.

'*Rukn*': pillar, essential ingredient.

'*Sabab*' (pl. '*asbab*') : cause, means of obtaining something.

'*Sadaqah*': alms, charity.

'*Sadd al-zara'i*' : (lit) blocking the means.

'*Saghiruna*': an expression used to denote a group of people who are junior among others.

'*Sahih*' : valid, authentic.

'*Sahib al-haqq*': the right-owner/ bearer.

'*Sama*'' : a certificate of audition.

'*Sanad*': basis, proof, authority.

'*Shai'*: thing, object.

'*Shakhsiah'*: personality.

'*Shamil'*: comprehensive.

'*Shari'ah'*: literally means the path denoting the way of life ordained by God.

'*Shart'* (pl. '*shurut'*): condition.

'*Shura'*: consultation.

'*Sufaha'*: those who are ignorant.

'*Sunnah'* : the deed, saying and practice of the Prophet.

'*Su isti'mal al-haqq'* : misuse of rights.

'*Ta'ah'*: an act of obedience or submission.

'*Ta'assuf fi isti'mal al-haqq'*: the wrongful use of rights.

'*Tahalli'*: abandonment

'*Tahrim'* : prohibition, or rendering something into haram.

'*Tahsiniyyah'*: matters which relates to the embellishment of a right.

'*Tajawuz hudud al-shar'iyyah'*: the transgression of rights.

'*Takhsis'*: specifying the general.

'*Taklif'*: liability, obligation.

'*Talaq'* : divorce initiated by the husband.

'*Ta'lim'* : education, instruction.

'*Ta'lik'* : dissolution of marriage upon dissolution of marriage.

'*Taqlid'* : imitation, following the views and opinions of others.

'*Taqawwum'* : having commercial value.

'*Tasabbub'* : indirect without causation.

'*Tasarruf'*: disposal rights / alienation rights of the owned property.

'*Tashri'*: legislation.

'*Taskhir'* : exploitation, utilization, subjugation.

'*Ta'wid ad-darar'* : make amends for the damage.

'*Tawqit'*: temporary.

'*Ta'zir'* : deterrence, discretionary penalty determined by the '*qadi'*.

'*Tazwir'*: a fabrication of a mark which corresponds exactly with the original mark.

'*Thaman'* : the purchase price.

'*Thamarah*' : literally means fruits. In legal terminology, it is used to refer to those kinds of thing which emanate from a tangible property.

'*Thubut*': something which is or becomes a manifest and an indubitable fact or event.

'*Tullab*': student / disciple.

'*Ulama*': religious scholars.

'*Ulu al-amr*' : persons in authority and in charge of community affairs.

'*Ummah*': Muslim society.

'*Urf 'am*' : a customary practice which is prevalent everywhere and on which the people agree regardless of the passage of time.

'*Urf khass*' : a customary practice which is prevalent in a particular locality, profession and trade.

'*Ustadh*': teacher, spiritual leader.

'*Usul fiqh*': the branch of science on the method of deduction of legal principles in Islamic scholarship.

'*Wahy*' : divine revelations.

'*Wajib*' : obligatory, often synonymous to '*fard*'.

'*Wajib 'ayni*': personal obligation.

'*Wajib kafa'i*' : collective obligation of the entire community.

'*Wakalah*' : contracts of agency.

'*Waqf*': gift left in perpetuity, inalienable estate.

'*Wazifah*' : the contract of employment / service.

'*Wujub*': obligation, rendering something obligatory.

'*Wujud*': something which is real, established or confirmed, as a truth or fact; something which is necessitated, unavoidable or incumbent.

'*Wasilah*': the means, method.

'*Zann*' ('*Zanni*'): speculation, doubt, conjecture.

'*Zahir*': manifest, apparent.

'*Zakat*': almsgiving, alms tax.

NOTES ON TRANSLITERATION

The following system has been followed in transliterating Arabic words (without diacritics).

ء a	ز z	ق q
ا a	س s	ك k
ب b	ش sh	م m
ت t	ص s	ن n
ث th	ض d	ه هـ h
ج j	ط t	و w
ح h	ظ z	و u
خ kh	ع e	و au
د d	غ gh	ي y
ذ dh	ف f	ي i
ر r	ل l	ي ay

Source : Encyclopedia of Islam (Second Edition)

The thesis uses the following methods:

1. Arabic terms that have been Anglicised, i.e which have entries in the Oxford English Dictionary (1989) are non-italicised, but they are mentioned in the Glossary, e.g Shari'ah, Islam, Zakat, Allah, Mufti, Sunnah, Qur'an, Ummah, Qadi.
2. Arabic terms are italicised and with Arabic transliteration (without diacritics).
3. Malay terms (including those of Arabic origin) are underlined.
4. Latin and other foreign words are placed in inverted commas.

INTRODUCTION

1 Problem defined and statement of intent

Intellectual property law is a relatively new but increasingly important area of law in Malaysia. If Philips(1986) points to the statistical significance and importance of intellectual property law in the UK, initial research shows a very different situation in Malaysia. In fact, in terms of research, the present writer is only aware of one previous study at the Ph.D level (Khaw Lake Tee, LSE, 1990).

Despite there being a Copyright Act, a Patent Act, a Trademark Act and other relevant Acts (Contracts Act and Civil Law Act 1957), one finds numerous infringements, abuses and rampant disregard for these laws, the thriving businesses of "pirate copying" and uncontrolled photocopying being just two examples. Without a doubt, lack of understanding, awareness and enforcement are contributing reasons for the existing state of affairs. However, it is when one asks what causes this lack of understanding, awareness and enforcement, that one is led to the underlying cause of inappropriate and sometimes irrelevant "wholesale import" of the U.K. laws into Malaysia. Despite inheriting the British legal system upon independence, it is increasingly recognised and acknowledged that reforms are needed in many areas of the law to make them more suitable for Malaysia, intellectual property possibly being one such area. The laws of the land must reflect the religious, cultural and social values of Malaysian society as well as take into consideration the corresponding economic and political factors. Laws which fail to satisfy this "local" requirement, are bound to seem ineffective.

It is the aim of this study to analyse and evaluate the current legislation relating to intellectual property in Malaysia and to suggest necessary reforms needed, taking into consideration the society, with its institutions and values. Such a study is necessarily an interdisciplinary effort and not one that is confined to the analysis of the legislation only. The position of Islam as the "religion of the state" and the renewed interest in Islamic law in Malaysia, will also serve to introduce the view in Islamic scholarship

on this matter of intellectual property. This prominent position given to Islam in the Federal Constitution and the strong religious sentiment of the Muslims (who form the majority in Malaysia), cannot be overlooked or dismissed lightly by the legislators and on the contrary, must be taken into serious consideration in any future legislative reforms. Although not known as having "intellectual property laws" Islam has a very detailed moral code of ethics and laws which can apply to modern issues such as copyright, patenting and misuse of information and trade marks.

It is our contention that while studies on Intellectual property laws in Malaysia are far too scarce, there is a vacuum that exists on the legal framework of these rights. Little has been done to analyze intellectual property laws from an Islamic point of view.

2. Objectives of the study

The aims of this study can be epitomised as follows:

i) To analyse and evaluate the current legislation on intellectual property in Malaysia.

This involves the following:

- a) the analysis of the relevant Acts relating to intellectual property in Malaysia
- b) a comparative analysis with the legislation in the UK and if possible, with other common law countries and EC countries (this would also involve the question of definitions).
- c) evaluation of Malaysian legislation as compared to the U.K and other common law jurisdictions in terms of effectiveness and relevancy.

ii) To provide an understanding of Malaysian society in terms of the relationship between religious, cultural and social values to the development of legislation. This entails the following:

- a) overview of "Malaysian" society (historical perspective).
- b) analysis of the position and importance of religious and cultural values in Malaysian society.
- c) overview of the Malaysian legal system and the position of religion and custom.

iii) To study the position of Islam as "the religion of the state" and the Islamic view on intellectual property. This requires the following:

- a) an historical account of the position of Islam in Malaysia.
- b) the scope and present position of Islamic law in Malaysia.
- c) an elaboration of the Islamic view on intellectual property.

iv) To suggest relevant reforms to the intellectual property laws in Malaysia as well as to propose how Islam can contribute to these reforms. This entails the following:

- a) the evaluation of the present intellectual property laws on in Malaysia in terms of their consistency and inconsistency with Islamic principles,
- b) where the present standards are inconsistent with the Islamic principles, to suggest reforms by emulating other available alternatives which are practised in other jurisdictions.

3. Scope of study and the outline of chapters.

This study is undertaken with the hypothesis that the present Intellectual Property laws in Malaysia are to be tested in terms of their consistency with Islamic values and legal theory. A study of this kind will not be sufficient if the laws governing intellectual property are not examined from their theoretical and conceptual undertakings. Therefore, in this study, we have concentrated on three main areas which constitute the body of laws governing intellectual property i.e in terms of the philosophy and rules governing the existence, ownership and exercise of intellectual property rights. From the point of existence and ownership, this study endeavours to develop a coherent and logical conceptual framework from an Islamic perspective, which can be further developed to explain the basis of rights. A theoretical and conceptual framework is needed for building a sound philosophical base for the formulation of legal rules. From the point of existence and exercise of rights, this study attempts to identify the Islamic parameters from the analysis of certain fundamental legal concepts which have been developed by Muslim jurists.

This study being a conceptual work, concentrates only on the main theoretical construct which governs intellectual property, leaving aside the technical parts which would not affect the validity of these rights. In choosing these areas, we have basically adopted an approach based on logic from conceptual viewpoint and adding some of the more distinct areas in intellectual property. It is felt that the scope of analysis is sufficient to provide a relatively comprehensive comparative study of intellectual property from Islamic perspective.

The thesis is divided into four parts. The first part looks at the historical background of Intellectual Property legislations in Malaysia, their changes and future prospect. This part comprises two chapters. Chapter one examines the position of Islam and the Shari'ah in Islam, adopting a historical approach by looking into factors which contribute to the minimal use of the Shari'ah in the current Malaysian legal system. Chapter two focusses on the roots of the present intellectual property laws in Malaysia. This chapter, which also adopts a historical approach, traces the introduction of intellectual property law by the British and the changes and developments which have occurred since then.

The second part, comprising chapter three and four examines the existence and position of ownership of intellectual property in Islamic Jurisprudence. Chapter three analyses the normative framework of property rights under Islamic Law. It is first examined whether the intellectual property constitute a '*mal*' (property) in Islamic jurisprudence. Such an inquiry involves the examination of the meaning, definition and classification of '*mal*'. For that purpose, it is pertinent that we address the jurisprudential arguments against the recognition of intellectual property which includes the prohibition against concealment of knowledge. Finally, the chapter analyses the nature of the proprietary rights in intellectual property, emphasizing the main criteria of property such as transferability, alienability, exclusivity and duration. The focus of the inquiry is the distinction between intangible rights of intellectual property and the rights in the physical embodiments of them.

Chapter four proceeds with the analysis of the justification and basis of intellectual

property. For purposes of comparison and consistency of theme, the chapter traces the evolution of the property conception in intangible rights in natural right theories by focussing on the Locke's justification of property rights in intellectual ideas. One of the issues central to the determination of existence of rights is to establish the basis of such rights. For that purpose, it is pertinent that the basis of ownership rights as have been expounded by Muslim jurists and scholars be examined. This in turn involves the analysis of the concept of '*haqq*' (legal rights) and '*milkiyyah*' (ownership). From the point of '*milkiyyah*', this chapter analyses the mode of acquisition of property under Islamic Law and questions whether the acquisition of intellectual property can be accepted on any of the recognised bases of ownership in Islamic scholarship.

The third part, which comprises chapter five, six and seven, deals with the enjoyment of Intellectual Property in Malaysia and will go into detail of the various subject-matters of Intellectual Property. This study examines the three main subject matters of Intellectual Property : copyright, patents and trade marks and focussing on the subsistence and the scope of those rights.

Copyright, being a non-monopoly right, has often been quoted as an important impetus to the dissemination of works. Chapter five explains the role of copyright, particularly, the way copyright laws mediate between control and access. This delicate and precise balance between control and access becomes the focal point to determine the formulation of copyright laws. To this end, issues which are central to copyright are examined and particularly the twin issues of moral and economic rights. As to the latter, the relevant key issues identified are the issues pertaining to the subsistence and the scope of right. As the study cannot pretend to be exhaustive, we have been selective in our choice of issues which ensures that most of the main issues are well represented.

Chapter six explores and assesses of the acceptability of patents from an Islamic perspective, from the point of view of the long-held assumption that patents are forms of monopolistic rights. To achieve this, the linkage between patents, labour, profit

motivation, wealth and economic parameters are examined from Islam's point of view. The study also endeavours to identify an alternative theory which can be further developed into a logically derived range of policy prescriptions which can be used to determine the scope of patents. It is our contention that while the subsistence of patents can be justified, the exact parameters of patents can also be determined from an Islamic point of view.

Chapter seven proceeds to question the regulatory functions of trade marks in an open market system, emphasizing on their informative function which directly serves consumers' interests. From the Islamic perspective, the subsistence of trade marks can be seen from the historical role of '*hisbah*' (market inspector) which is examined in full in this chapter. This hypothesis can be further substantiated with further principles, which can be derived at, from the examination of general concepts on fair trade and dealing in Islam. As far as the association between trade marks and consumer's interest is concerned, this chapter assesses the consumer's participation in trade marks. For that purpose the chapter examines the deployment of consumers in the determination of confusion and deception in establishing infringements of trade marks. Here, the exact nature of the symbiosis between trade marks and consumers becomes the focal point.

In part four, which comprises chapter 8, analyses the various limits of Intellectual Property, both within and without the Intellectual Property legislation. This chapter attempts to identify factors which delineate intellectual property including limits drawn in the name of public interest and limits drawn to maintain competitive forces in the present free market mechanisms. The chapter seeks to analyse how these limits work in avoiding the creation of monopolistic situations and reducing the abuse of the competitive advantage conferred by intellectual property.

4. Methodology, Sources and Limitations.

Since this study involves the analysis of concepts and issues from Islamic perspectives, the methodology adopted must necessarily be reflective of Islamic

scholarship. As far as the sacred works are concerned, we have referred to the authentic sources. The Qur'an is consistently referred to with the assistance of the translation by Ali, 'Abdullah Yusuf, The Glorious Qur'an : Translation and Commentary (New Revised Edition), (1989), International Institute of Islamic Thought, Maryland.

Equally, an authoritative body of '*hadiths*' (stories of the Prophet) are referred to, which includes the English translation of the Prophetic traditions:

- i) Sahih Bukhari, of Al-Bukhari, Muhammad ibn. Ismail, Arabic-English, translated into English by Muhammad Muhsin Khan (1962), S.G.Ali & Sons, Lahore;
- ii) Sahih Muslim of Muslim b. al-Hajjaj, , (rendered into English by Abdul Hamid Siddiqi (1972-1975), Muhammad Ashraf, Lahore;
- iii) Al-Muwatta' of Malik b. Anas, Abu Abd Allah al-Asbahi (d.179H), which is translated by Aishah 'Abd al-Rahman and Ya'qub Johnson, (1982), Cambridge, (edited by Muhammad Fu'ad Abd al-Baqi, Cairo, 1951)'Muwatta' of Imam Malik.

Besides these English translations, this study consults the original Arabic texts which are listed below:

- i) Al-Jami' al-Sahih of Al-Tarmizi, Abi Isa Muhammad ibn. Isa ibn. Sawrah, , (209-279H), edited by Ahmad Muhammad Shakir, (1937), *Matba'ah Mustafa al-Babi al-Halabi Wa-Awladuhu*, Cairo;
- ii) Sunan al- Darrimi of Al-Darimi, Abdullah ibn. Abd al Rahman (d.255H), *Dar al-Sunnah al-Nabawiyyah*, 2 vols.,(1984), Hadith Akadimi, Pakistan;
- iii) Jami' Masanid al-Imam al-'A'zam of Al-Khuwarazmi, Muhammad ibn. Mahmud, (d. 665H), (collection of the traditions transmitted from Abu Hanifah by various authors), (1332H), *Matba'ah Majlis Dairah al-Ma'rif al-Ka'inah*, India;
- iv) Al-Tarhib wa al-Tarhib Min al-Hadith al-Sharif of Al-Munziri, Abdul Azim ibn Abdul Quwa, , (d. 656H) 4 Vols., ed. by Mustafa Muhammad 'Imarah, *Dar al-Ulum*, Egypt;

- v) *Sunan Abu Dawud Wa Ma'alim al-Sunan li Abi Sulaiman al-Khitabi* of Al-Munziri, (edited by Ibn. Qayyim al-Jawziyyah), (n.d) Dar al-Ma'arif lil-Tiba'ah wal-Nasr, Beirut.

For a clearer elucidation of 'hadith's, we have sought the assistance of the works of other scholars which are as follows:

- i) Al-Nawawi, Muhyiddin Abi Zakariyya Yahya Ibn. Sharaf (631-686H), *Sharh Sahih Muslim*, (1978), Dar al-Qalam, Beirut;
- ii) Al-'Ayni, Badr al-Din Mahmud b. Ahmad, *Umdat al-Qari li Sharh al-Bukhari*,(1308H), *Matba'ah Dar al-iba'ah al-Amirah*; Al-Asqalani;
- iii) Shihab al-Din Abi al-Fadl Ahmad b. Ali Muhammad Hajar (d. 852HO), *Fath al-Bari li Sharh Sahih al-Bukhari*, (1301H), *Matba'ah al-Kubra al-Amiriyyah*, Cairo;
- iv) *Umdat al-Salik wa'Uddat al-Nasik*, translated into English by Noah ha him Keller, *The Reliance of the Traveller*, (1991), Modern Printing Press, Dubai.

As far as jurisprudential works are concerned, we have sought guidance from contemporary works of modern scholars. This is not to deny the fact that classical works constitute the main references as far as Islamic scholarship is concerned. The reference to classical works is somewhat limited due to the nature of our inquiry which is best characterised as a contemporary issue. Contemporary works which constitute the main references are listed below:

- i) Al-Darini, Fathi et.al, *Haqq al-Ibtikar fi al-Fiqh al-Islami al-Muqaran*, (1984), *Muassasah al-Risalah*, Beirut;
- ii) Al-Khafif, Ali, *Al-Milkiyyah fi Al-Shari'ah al-Islamiyyah Ma'a al-Muqaranah bi al-Shara'i al-Wad'iyyah*,(1966), *Ma'ahad al-Buhuth wa al-Dirasat al-Arabiyyah*, Cairo;
- iii) Al-Ibadi, Abdul Salam Daud, *Al-Milkiyyah fi al-Shari'ah al-Islamiyyah; Tabi'atuha wa Wazifatuha wa Quyuduha; Dirasah Muqaranah bi al-Qawanin wa an-Nuzum al-Wad'iyyah*, 2 Vols, (1974), *al-Maktabah al-Aqsa*, Jordan;
- iv) Al-Zarqa, Mustafa Ahmad, *Al-Madkhal ila Nazariyyah al-Iltizam al-Ammah*, (1946), *Matba'ah Jami'ah*, Damascus;

- iv) Mahmassani, Subhi, Rajab, The General Theory of Law of Obligations and Contracts Under Islamic Jurisprudence: A Comparative Study of The Islamic Rites Form the Modern Standpoint (1948), the Arabic title is al-Nazariyyah al-'Ammah li al-Mujabat wa al-Uqud fi al-Shari'ah al-Islamiyyah : bahth Muqaran fi al-Madhahib al-Mukhtalifah wa al-Qawanin al-Hadithah, (1983), Dar al-Ilm al-Malayin, Beirut, (3rd. edition).

Therefore in our task of defining the Islamic paradigm, we seek assistance from the primary sources in the Qur'an and the 'Sunnah' and the writing of other Muslim scholars. It should be noted at the outset the importance of the rule of reason and logic especially on technical aspects which would not be within the domain of 'fiqh' (jurisprudence). In determining conformity with Islamic principles, we have adopted the cautious approach by using the rule of construction that unless a certain practice is prohibited by the Qur'an and the Sunnah, then it should be accepted. In most instances, where technical issues are not relevant as far as the subsistence and scope of rights are concerned, these issues are left unexplored.

To overcome the problem of validity in our construction of the Qur'anic, Prophetic and legal principles, we are assisted by guidance by many academicians in universities and institute of higher learning who have contributed tremendously in terms of intellectual ideas and thinking.

In choosing topical issues which are covered in this thesis we are also assisted by the various discussions and the legal developments which have taken place in other Muslim countries such as the comparative work by al-Fatlawi in Iraq and Mangalo's excellent article on the UAE trade marks system. More and more discussion is coming about in other Islamic/Muslim countries particularly in the Saudi Arabia, and the United Arab Emirates. These Muslim countries have been the focus of attention because of the high percentage of piracy and counterfeiting in them.

With respect to the common law regime, the sources include:

- i) legislation pertaining to intellectual property in Malaysia which includes the

Copyright Act 1987, Trade Marks Act 1976 and Patents Act 1983. The recent 1994 amendments to the Trade Marks Act and the Patents Act have been incorporated. As far as the Copyright Act is concerned, it has been announced that certain changes are pending which are awaiting a reading in Parliament sometime this year. The Malaysian government has also announced the introduction of local legislation on industrial designs and competition. These two legislative instruments are still in the drafting stage. Like other legislative drafts, no access can be obtained to them and this somewhat restricts our coverage of them. Finally, Malaysia being a member of the Berne Convention, Paris Convention and GATT, these international treaties are referred to, in order to assess Malaysia's obligations under them.

ii) Interviews have also been conducted with the officers in the Intellectual Property Unit of the Ministry of Trade and of the enforcement section of the Ministry of Domestic Trade and Consumer Affairs. These interviews are relevant to gauge the policy directions of those involved in policy making and to provide an insight of the local scenario of the enjoyment of intellectual property laws in Malaysia. Further assistance is sought from consumer associations particularly the Consumer Association of Penang which has enlightened us on the issues which concern 'local' needs.

iii) reports of decided cases in Malaysia, the U.K and other relevant jurisdictions. The choice of jurisdictions is somewhat selective and not exhaustive. Despite its selective nature, care has been taken to ensure that important and relevant decisions pertaining to the present discussion are covered.

A study of this nature almost certainly has some limitations. The first and probably the biggest limitation is the lack of literature and discussion of various issues pertaining to Intellectual property in Islamic jurisprudence. In Malaysia, intellectual property itself is an infant subject, even more the comparative study of intellectual property and Islam. While some discussion has taken place on the acceptability of intellectual property as a whole in Islamic jurisprudence, there has been no or little discussion on various related issues. Added to this is the difficulty in understanding the key concepts in intellectual property which are somewhat technical in nature. This

is particularly true for patents, where most issues are related to economics and science. A comprehensive analysis of intellectual property should be based on the premise that these rules as a whole are an amalgam of economics and legal concepts.

Secondly, the presently available discussion of the Islamic perspective is restricted to the justification and acceptance of intellectual property with little analysis on the scope of right. This thesis endeavours to transcend the barrier of existence of right, by considering as well the scope, the exercise and the limitation of rights.

A pioneering study like this also suffers from the unavailability of reference materials on the methodology of analysis and comparison of intellectual property laws and the Shari'ah. Despite these limitations, the choice of issues has been made as comprehensive as possible, though the analysis and comparisons will have to be judged by the readers themselves.

Another limitation is the lack of a conceptual framework which forms the basis of the protection of intellectual property laws in Malaysia in guiding the formation of policy principles and the formulation of legal rules. Most changes are made on a pragmatic basis, therefore most principles are adopted piecemeal. There is therefore an acute difficulty in discerning any coherent philosophy which determines the future formulation of legal principles. From our discussion with the officials in the Intellectual Property Unit of the Ministry of Trade, the need to maintain an encouraging environment for foreign investment and technology transfer has been quoted as the main factor in policy making. In this sense, it can be criticised that while external factors are given priority, local factors play no influential role in shaping policy direction.

It is our contention that Islam and Islamic jurisprudence offers a coherent and conceptually systematic paradigm, which in deeper analysis, can satisfy both our current obligations under international treaties, as well as our obligation to practice our religion to the fullest. Such a study accords with the present renewed interest in the 'Islamization' of laws. It has been recently announced that the Malaysian

government has appointed a committee comprising of, among others, the present Attorney General and Prof. Emeritus Ahmad Ibrahim, to undertake the task of assimilating common law and Islamic principles. While it is difficult to anticipate when full 'Islamization' will take effect, or if it ever will, a study of this kind can offer, to a certain extent, the kind of direction and policy alternatives which can be adopted in implementing laws which are consistent with Islamic principles and rules.

It is felt that no serious research has been conducted in the area outlined above and that this study will contribute significantly to the development of a more relevant and appropriate legislation on intellectual property in Malaysia that is sensitive to its "local" needs.

CHAPTER ONE

DEVELOPMENT OF ISLAM AND ISLAMIC LAW IN MALAYSIA

1 Introduction

Ample researches are conducted on the position of Islam in the colonial Malaya and the contemporary Malaysia.¹ Most studies on Islam in the colonial Malaya are from the historical perspectives, from the advent of Islam in Malaya to the actual penetration of Islam and the Islamic values in the early 13th century. The supremacy of Islam and the Islamic law during this period cannot be dismissed lightly. It was readily accepted that if not for the active interference by the British, Islam would have remained the law of the land in Malaysia now².

This chapter, traces the role played by Islam and the Islamic law in Malaysia from the moment Islam set foot in Malaya (as it then was) up till the present day. It is important to understand the changes that took place during the British administration for any study on the basis of today's religious law and institutions in Malaysia.

¹ See Yegar, Moshe, Islam and Islamic Institutions in British Malaya: Policies and Implementation, (1979) The Magues Press, Jerusalem; Abdullah, Abu Bakar, Ke Arah Perlaksanaan Undang-undang Islam di Malaysia: Masalah dan Penyelesaiannya, (1986) Pustaka Damai, Terengganu, Malaysia; Wilkinson, R.J, Papers on Malay Subjects, Federated Malay States Government Press, Kuala Lumpur, 1908; Ibrahim, Ahmad, Parallel Systems of Law in Malaysia and Singapore, (1976) Vol 3 Part 1 JMCL, p.1-34, Hooker, M.B, The Personal Laws of Malaysia; An Introduction (1976) Oxford University Press, Kuala Lumpur, Hooker, M.B, Reading in Malay Adat Laws, (1970) Singapore University Press, Singapore, Jusoh, Hamid Pemakaian Undang-Undang Islam Kini dan Masa Depan di Malaysia, Al-Ahkam, jilid 1 (Prof. Ahmad Ibrahim dll), Ahmad Ibrahim, Islamic Law in Malaysia, JMCL 1981, Mackeen, Abdul Majeed Mohamed, Contemporary Islamic Legal Organization in Malaya, 1969, Yale University Southeast Asia Studies, and standard text books on Malaysian Legal System such as the works of Wu Ming Aun, An Introduction to the Malaysian Legal System, (1978) 2nd. ed., Heinemann Educational Books (Asia Ltd), Kuala Lumpur and Yaacob, Abdul Monir, An Introduction to Malaysian Law, (1989), Penerbit University Kebangsaan Malaysia, Bangi.

² See Wilkinson, p.49 op.cit where he wrote;
"There can, however, be no doubt that Moslem law would have ended by becoming the law of Malaya had not British law stepped in to check it."
See also Yegar's comment;, "it is accepted that the British penetration of Malaya during the last quarter of the 19th. Century brought about radical changes in all areas of Malays' way of life, in its social, legal and economic relationships, in the organisation of its government and even in its religious affairs."

Before we go into a full discussion of the historical setting to the present mechanism of application of the Islamic law, we will begin with a cursory examination on the Shari'ah and its sources.

2 The definition of Shari'ah and sources of law.

Literally, the term Shari'ah means the path denoting the way of life ordained by God and hence is not confined to the corpus of a legal system as that of the civil law system or common law system³. Principally in legal jurisprudence, the term Shari'ah denotes the set of laws which are ordained by God, either through the Qur'an, which is the book consisting His commandments or the practice of the Prophet Muhammad (known as the Sunnah)⁴. While the Qur'an contains the letter of the rule as revealed by God, the Sunnah represents the actualisation of the rule manifested in the actions, sayings and deeds of the Prophet Muhammad (p.b.u.h). Many of the rules contained in the Shari'ah are not normally characterised as positive laws proper in any other modern legal system⁵. The Qur'an and the Sunnah constitute the two major sources of Islamic law. Muslims are asked to follow the dictates of the Qur'an and the Sunnah in all matters governing their lives as Islam itself means a total submission to the Will of God. Because of this need to find guidance and to find consistency with the Divine Will, Muslim scholars have developed rules on construction and analogical reasoning known as '*usul fiqh*'⁶. Using these rules, Muslim scholars have developed a body of legal rules known as '*fiqh*'⁷. The term '*fiqh*' in fact is the closest term to

³ This part contains only a cursory analysis of Shari'ah and its related concepts as this subject has been analysed thoroughly in many works. Major works include, Ibrahim, Ahmad, Islamic Law in Malaya, Hashim Kamali, Islamic Jurisprudence, and other works of Muslim scholars.

⁴ The main premise behind the primacy of the Qur'an and the Sunnah is the belief that the authority to enact laws lies primarily in God.

⁵ This include among many, rules relating to '*ibadah*' (forms of worship) and '*adab and akhlaq*' (morality and ethics).

⁶ '*Usul fiqh*' is defined as the science of the principle whereby one reaches fiqh in the true way. Most of the definition of the legal term used here are based the works of Ahmad Ibrahim, Islamic Law in Malaya op.cit and Kamali, Hashim, Principles of Islamic Jurisprudence, op.cit.

⁷ '*Fiqh*' is the identification of substantive legal rules from the Shari'ah principles.

law in the modern sense.

The two most accepted methods of construction by the four Sunni schools of thought are '*ijma*'⁸ and '*qiyas*'. From these tools of constructions, rules are expounded on the basis of the Qur'an and the Sunnah. These legal rules, however, have to be founded and established by a text in the Qur'an and the Sunnah and should not result in any change to the law embodied in the original prescription. Laws which are expounded through these two mechanisms are normally accepted as valid and represent the will of the Qur'an and the Sunnah. However, as compared to the Qur'an and the Sunnah, rules derived through '*Ijma*' and '*Qiyas*' can be abrogated and changed from time to time. '*Ijma*' refers to the agreement of scholars on a particular rule and hence provides the stamping of its validity and acceptability. '*Qiyas*', on the other hand, denotes the method of analogical reasoning by deriving analogy with an established rule in the Qur'an and Sunnah. Through '*qiyas*', the established rule in the text are extended to a new problem which is not directly mentioned in the Qur'an and the Sunnah.⁹

Another related concept is '*ijtihad*' or the exercise of independent opinion guided by the principles laid down in the Qur'an and the Sunnah. The validity of '*ijtihad*' is derived from the advice given by the Prophet (p.b.u.h) to Mu'adh ibn. Jabal to refer to the Qur'an and the Sunnah in any matters and to use his independent thinking in cases not covered by the Divine prescriptions. Elaborate rules were drawn on the exercise of '*ijtihad*'. It is through the concept of '*ijtihad*' that legal reasoning and jurisprudence in Islam flourished and contributed the formation of legal schools of thought in the 7th and 8th A.D. The flexibility of '*ijtihad*' as an instrument to

⁸ '*Ijma*' refers to those legal opinion or '*ijtihad*' which received consensus among scholars. The basic validity and even existence of '*ijma*' is the subject of disagreement among Muslim scholars. For a detailed analysis see Kamali, Hashim, Principles of Islamic Jurisprudence, op.cit.

⁹ '*Qiyas*' (analogy) is a process of deduction by which a rule of law is applied in the absence of specific sacred text to cases which, although not expressly, are implicitly governed by a legal text in view of a common effective cause ('*illah*').

propound laws was aptly described by al Shafie, the founder of Shafi'ite school of thought: "Whenever a ruler does his best and rules correctly, he will be doubly rewarded (by God). If he does his best but the result is incorrect, he will also be rewarded"¹⁰.

There are other tools of interpretation adopted by Muslim scholars which are '*istishab*'¹¹, '*istihsan*'¹² and '*istislah*'¹³. These rules of construction are adopted by different schools of law and hence are not regarded as primary sources of law.

3 Malay states before the advent of British control

Since the coming of Islam to Malaya in the seventh century (A.D), Islam had had tremendous influence in the life of the Malays, socially, politically and intellectually. Scholars are in disagreement as to the actual date of Islamization of Malaya. Abdullah (1986) is of the opinion that the first interaction between the Malays and Islam occurred in the 7th Century (A.D) through Arab traders which came to Kedah and Palembang¹⁴. Al Attas (1966), argues vehemently that the first conversion of the Malays to Islam occurred in the 6th. Century (A.D).¹⁵ Before the coming of Islam, Peninsular Malaya was at that time under the influence of Javanese Hindu rulers.

¹⁰ See Ahmad Ibrahim, Islamic Law in Malaya, op.cit. Note that in the tenth century free reasoning was not anymore allowed by the Sunni schools which made '*ijtihad*' akin to analogy.

¹¹ '*Istishab*' (deduction by presumption of continuity) means that once a rule has been confirmed it must remain in force until a contrary rule is established (Abu Zahra, Tarikh al Mazahib al-Islamiyya, Vol.II, p.338; Shorter Encyclopedia of Islam)

¹² '*Istihsan*' refers to the method of analogical deduction preferred by the Hanafites as choosing the better or 'favourable construction.

¹³ '*Istislah*' means taking the public interest into account (Schacht's glossary in An Introduction to Islamic Law)

¹⁴ Beside traders from Arab lands, traders from India and China were also responsible to the widespread of Islam to Peninsular Malaya.

¹⁵ To him, the islamization of the archipelago underwent three phases. The first phase (from approximately^{1578-805/1200-1400}) was the phase of nominal conversion or conversion of the body. The second phase (from approximately^{1803-1112/1400-1700}) described as the period of the conversion of the 'spirit' saw the rising influence and spread of philosophical mysticism, '*tasawwuf*' and '*kalam*'. The third phase (from¹¹¹²⁻¹⁷⁰⁰ onwards) saw the continuation and consummation of the second phase coinciding with the coming of the West. See Al Attas, Syed Muhammad Naguib, (1966), Preliminary Statement On A General Theory of The Malay-Indonesia Archipelago, Dewan Bahasa & Pustaka, Kuala Lumpur.

Scholars are in agreement that Islam has brought a lot of changes to the Malays' scope of thinking and intellectualism¹⁶. At the political level, the Sultanates, which were earlier influenced by Hindu concepts of 'dewa' (gods and goddesses in Hindu religion) and semi-god, followed the concepts of the Sultanates from the Ottoman Empire¹⁷. Socially, Malays pride themselves as Muslims, although they have very restricted understanding of Islam. Islamic law was the governing law and the law of general application. Many customary practices associated with Hindu influences were retained; as a result many scholars agreed that the Islamic law which was enforced during that time was a mixture of Islamic law and adat laws¹⁸. The assimilation of Islam into the life of the Malays become a 'distinctive cultural phenomenon' and constituted a 'comprehensive cultural variety'¹⁹.

When Islam first came to Malaya, it was a personal religion until the conversion of the Malacca Sultanates in the thirteenth century (A.D). Many historians ascribed the conversion of the Malacca sultanates to Islam as the paramount factor to the upgrading of the status of Islam as an official religion and as a source of law. In Malacca, the supremacy of the Islamic law was evident from the Malaccan digest or The Risalat Hukum Kanun of A.D 1523²⁰. The Code consisted of criminal laws regulating 'qisas', 'hudud', 'taazir' and 'diyah'; transactions ('mu'amalah') such as trusts, family law, evidence and procedural matters. The digest not only contained Islamic

¹⁶ Al Attas (1966) op.cit, argued that Islam has turned the world view of the Malay Muslims from the crumbling world of mythology to the world of intelligence, reason and order through its rational theology and metaphysics ('ilm al-kalam and 'tasawwuf') and the dissemination of Islamic legal thought (Islamic jurisprudence and 'fiqh').

¹⁷ See Mc Keen, op.cit.

¹⁸ See the works of Ahmad Ibrahim, Wilkinson and Yegar, op.cit.

¹⁹ Al-Attas (1966) aptly observed that this total assimilation is reflected in the Arabic script and the Arabized lexicon and literature, certain modes of dress, musical and oral culture and socio-and legal organisation.

²⁰ Historians were of the view that the Malaccan digest was written after the dissolution of the Malaccan sultanates under the Sultan of Riau. Unlike other digest, the Malaccan digest was based on a set of laws which were actually enforced during the Malaccan Sultanate. For a text of the digest see, Fang, Liaw Yock, Undang-undang Melaka; A Critical edition, Singapore 1936.

law but was also overlaid with relics of the Malay customary law²¹ and relics of the Hindu Law.²²

The Malaccan digest became a model written law which was subsequently followed by other Malay states including Pahang during the reign of Sultan Abdul Ghaffar (1592-1614 A.D), Perak (Ninety nine laws of Perak) which was administered in the 17th. Century (A.D) under the reign of Sultan Ahmad Tajuddin Marhum Tanah Abang and in Johore. In Johore besides this set of laws, '*Majallatul Ahkam*' was also translated and enforced for a period of time. '*Majallatul Ahkam*' was a codification of the Islamic Law based on the Hanafi school of law which was enforced in Turkey in the early nineteenth century. Besides '*Majallatul Ahkam*', the Hanafi code of Qadri Pasha was adopted and translated as the '*Ahkam Shar'iyah*' Johore. The state of Islamic law in Johore was quite advanced. Johore was the earliest state to have a written constitution in Malaya (even among other Muslim / Islamic countries). Even though Western historians asserted that the Constitution was drafted by British, it was modelled after Islamic concepts of constitution²³. The influence of Islamic concepts was clear as the Constitution sets out that the appointment of a Sultan should be on the basis of '*bai'ah*' and '*istikhlaf*' and with the consent of '*ahl*

²¹ The two main body or sets of customary laws are the '*adat temenggong*' and '*adat perpatih*'. Both these set of laws were superimposed with Islamic influence. See Mat, Ismail, Adat and Islam in Malaysia: A Study In Legal Conflict and Resolution, (u.p Ph.D thesis 1985, Temple University). He disagreed with some Western scholars opinion that these customary laws were not influenced by Islam as they contained elements which were contrary to Islam. To him the combination represented, rather, an attempt to reconcile adat laws and Islamic law. He argued that the reduction of Islam as a personal and private law resulted in the adat law being recognised as a separate body, the adjudication of which was unrelated to Islamic legal thought.

²² It would seemed that most of the laws originate from Islamic law and some are direct translations of books on Islamic jurisprudence. However, many of the sentences which were followed do not accord with the imposition of penalties in Islam. (Ahmad Ibrahim, op. cit). Hooker explained this phenomenon in his book. The Malaccan digest which consisted of six separate rules which are; (i) the Malacca law "proper" which consisted of the general law, (ii) the maritime law (iii) Muslim marriage law, (iv) Muslim law of sale (v) the laws of the state (vi) Johore laws. As far as the Islamic elements are concerned, there are two types; one which is a mixture of Islamic laws and customary laws and the other which is Islamic law proper. The first two sections of the Malacca digest existed and completed within the region of 1424-1458. The Muslim law section which comprise of sub-sets (iii) and (iv) came much later, dating from the sixteenth century. Thus as far as general laws were concerned, these were the result of reconciliation of adat laws and Islamic law. see Hooker, M.B, (ed), (1986), Malaysian Legal Essays, Malayan Law Journal, Singapore par. p.431-457.

²³ See also the Terengganu Constitution of 1911.

hall wa al aqd'. In addition, a Sultan under the Constitution is not above the law and likewise is subjected to the supremacy of Islam and the Islamic Law.

This shows that prior to the arrival of British, some Malay states enforced Islamic law even if not to the extent of the application of the entire body of laws known as the Shari'ah. Islamic law became a major source of law and most disputes were accordingly litigated and resolved on the basis of it. The application of Islamic law was done on piece-meal basis and as there were no written statutes at that time, juristic works by Muslim scholars in the Middle East became the major source of law²⁴. A number of these works were translated into the Malay language to ease the process of assimilation and application of the Islamic law.

The other states also applied Islamic law even though Islamic law remained uncodified in these states. The state of Kelantan, situated north of Peninsular Malaya, was known for its strict observance of Islam and the Islamic law under Sultan Muhammad I and Sultan Muhammad II. Under their reigns, Islamic administration and judiciary system in that state were set up. Terengganu, another state to the east of Malaya, apparently, had the earliest history of the application of Islamic law. Traces of these laws can be seen from the Inscripted stone (*Batu Bersurat*), the earliest evidence of Islamic civilization in Peninsular Malaya²⁵.

In Perak, the influence of Islamic law can be seen from the Ninety- nine laws of Perak, one of the rare written digests of Malay laws which was compiled by British administrators. These two digests represent the substantive laws which were enforced and practised by the Malays at that time. This digest was heavily influenced by Islamic law, consistent with other states which had Islam and Islamic law as the

²⁴ Reference are made to works of scholars particularly of the school of Shafi'i law, by the 14th Century, among texts which are authoritative are those of Abu Shuja' *al-Ghayah* (ca.1106) and Nawawi *Minhaj al-Talibin* (d. 1277), *al-Mahalli* (d.1459) and the works of commentators of Ibn Hajar al-Haitami in *al-Tuhfah* (d.1565) and al-Ramli (d.1596), Zain al-Din al-Malibari (d.1522) in *Fath al-Muin*.

²⁵ Al-Attas argued that the correct date of this stone is 22nd. February, 1303 (A.D) or 14th. Rejab, 702 (H). see Al Attas, Syed Muhammad Naguib, *The Correct Date of Terengganu Inscription*, Kuala Lumpur, Muzium Negara, 1970.

major paradigm for any legal and social development. The Perak digest consisted of 99 legal dicta or judgements purported to have been delivered by the Persian Minister Buzujmihr for the guidance of his master Nushirwan 'the just'. This digest owed a lot of similarity with the Malaccan digest. In terms of substantive legal rules, the application of Islamic law was quite wide. The digest governed matters ranging from family, marriage, divorce and matrimonial property, public law and administration, evidence and civil procedure, criminal law, inheritance and distribution of property upon death, tort and negligence, property and rules regarding proper conduct and ceremonial occasions²⁶.

4 Malay States under the administration of British

The prominence of Islamic law as the applicable law continued under the British administration in most Malay states with the exception of Straits Settlement.²⁷ The total imposition of English law in the Straits Settlement and the reasons given by the British to this different treatment was somewhat unsatisfactory. Unlike other Malay states, Straits Settlement was under direct British control. Decided cases in Kelantan, Kedah, Perlis and Johore²⁸ and the important Court of Appeal's decision of Ramah v. Laton.²⁹ in the Federated Malay States illustrate the extensive application of Islamic law.

The first step taken by the British upon getting control of the Malay states was to

²⁶ For the translation of the digest, see Rigby, J; The Nine-Nine Laws of Perak; Hooker, M.B, Readings in Malay Adat Laws, op.cit p.57.

²⁷ In the case of Shaik Abdul Latif and others v. Shaik Elias Bux (1915) 1 F.M.S.L.R. 204 Braddell C.J.C in his judgement said:
"Before the first treaties the population of these states consisted solely of Mohammdan Malays with a large industrial and mining Chinese community in their midst. The only law at that time applicable to Malays was Mohammedan modified by local customs".

²⁸ See Fatimah bt. Harris v. Haji Ismail bin Tamim, Law Reports of the State of Johore, 1938- 1940 pp.67-69.

²⁹ The Court of Appeal of the Federated Malay State held in Ramah v. Laton (1927) 6 F.M.S.L.R. 127 that Muslim law is not foreign law but local law and the law of the land. The Court must take judicial notice of it and must propound the law.

appoint the British advisors³⁰. The function of the British advisors were to advise the Sultans on matters relating to administration of states. Matters relating to Islam and customs were outside the power of the advisors. This, however, was not strictly followed. Because of the British narrow understanding of the Shari'ah as a law of general application, the tendency was to construe the Shari'ah as a personal law in a secular way, to govern only personal matters.³¹ Hence in matters which are regarded as part of public law, English law was introduced as law of general application. The intrusion of English law came in two ways, by the introduction of statutes which were modelled after English law and indirectly through the interpretation of English judges³². Another step taken by the British was the reform

³⁰ The Malay states were theoretically independent of British rule and only expected to listen to British advice. see Mighel v. Sultan of Johore, where the government of Johore was recognised as an independent government and Duff Development Company v. Government of Kelantan on the independent status of the Kelantan government. Instead most of the English statutes enforced in the Straits Settlement were introduced in the Malay States. This includes all the statutes governing copyright, industrial design, invention and patent and trade mark and other commercial matters.

³¹ The British administrators' prejudices and misconceived ideas on Islam was clear in the judge's statement in Ong Cheng Neo v. Yap Kwan Seng (1897) 1 S.S.L.R. SUPP.1, "As to the Mohammedan Law, the entire Mohammedan Law is a personal Law. Founded in religion it gives rights only to those who acknowledge Islamism". And in an earlier Penang case, Reg v. Willans (1858) 3 Ky. 16, Maxwell R. stated as one of the objections to the continuance of the law of Kedah in Penang what he called the nature of the Mohammedan Law. He said: "Lord Coke laid it down in Calvin's Case 7 Rep.10 that "if a Christian king should conquer a kingdom of an infidel and bring them under his subjection, then *ipso facto* the laws of the infidel are abrogated", and although Lord Mansfield treated this proposition as absurd, the Indian Law Commissioners are well justified in asserting that a "system of law which according to its principles can only be administered by Mohametan judges and Mohametan arbitrators, upon the testimony of Mohametan witnesses, is not a system which can devolve *ipso jure* and without express acceptance upon the Government and people of different faith". It seems to me impossible to hold any Christian country could be presumed to adopt or tolerate such a system as its *lex loci*."

³² As a result of indiscriminate introduction of English law, western law which was modelled after foreign values were enforced in the then Malaya and resulted in conflicts of values. See Ainan v. Syed Abu Bakar (1939) M.L.J 209, held that as the Evidence Ordinance is a statute of general application, section 112 of the Ordinance applies in question of legitimacy to the exclusion of the rule of Islamic Law. Thus if a child is born to a woman less than six months after her marriage to a man, the child is deemed to be legitimate in the civil courts, although he is deemed to be illegitimate under the Islamic Law. In Myriam v. Mohamed Ariff (1971) 1 M.L.J 265, a mother who has remarried a stranger is entitled to the custody of her infant child, even though it was provided under the Guardianship of Infants Act, 1961, that "nothing in this Act which is contrary to the Muslim religion or custom of the Malays shall apply to any person under the age of eighteen who professes the Muslim religion." In Commissioner of Religious Affairs, Trengganu & Ors v. Tengku Mariam (1969) 1 M.L.J. 110, the High Court rejected the authority of a '*fatwa*' issued by the Mufti declaring a '*waqf*' to be valid and held instead that the '*waqf*' was void on the authority of the decisions of the Privy Council from India and Africa. In Nafsiah v. Abdul Majid (1969) 2 M.L.J 175 the High Court held that a Muslim woman who had been seduced by a man on his promise to marry, could bring an action for breach of promise of marriage against him, although such an action

and modernization of the administration of the Islamic law. The British administrators were particularly embarrassed with the manner in which Islamic law was enforced³³. Previously, Islamic law was expounded and decided by a local kadhi. As part of the administrative reforms, Islamic law was incorporated into a religious system known as the Shari'ah courts. Hence the jurisdiction of kadhis was limited, with more serious cases tried before magistrates on the basis of English law. Nomination of qadhis and muftis of the Shari'ah court were undertaken as the advice of the British advisors and administrators. In the name of modernization, Islamic law itself was codified in a series of Administration of Muslim Law Ordinances. From this codification, the subject matter of the Shari'ah was extensively narrowed down³⁴. Only offences which were not considered as part of English concept of criminal law were included within these ordinances. Even in matters which were purely of Islamic penal origins, the penalty was minimized.

With the reorganisation of the administration of Islamic law and the gradual intrusion of English concepts, English law radically restricted the extent to which and the manner in which the Islamic law was applied in terms of subject matter. This legacy remains until the present day where, in common with other modern Muslim states, there are two parallel systems of law, the Shari'ah and the civil courts, both having their own jurisdictions.

would not lie under the Islamic law.

³³ Sadka, Emily in The Protected Malay States, 1874-1895, University of Malaya Press, Singapore, 1968.

³⁴ Due to British intervention as mentioned above, Islamic law was confined to matters relating to personal law and related procedural and evidential rules regulating the Kathi's court. In the field of family law this pertained to administration of family law, betrothal, solemnisation of marriage, 'idda' and the marriage of widows, 'mahr'(dowry), prohibited marriages, forms of dissolution of marriage such as 'talaq', 'taklik', 'khulu', 'fasakh'; presumption of death, appointment of 'hakam', 'nusyuz', 'mut'ah'(consolatory gift), maintenance of a wife, harta sepencharian, distribution of property on divorce, legitimacy of children and adoption and married women's property. In the field of property, matters pertaining to general inheritance, wills, customary land tenure, 'waqf' and 'nazr', 'bayt-al mal', gifts, interpretation of wills, mortgage by conditional sale. In the field of evidence, the procedure in matrimonial offences, unlawful sexual intercourse, consumption of intoxicating liquor, spiritual aspects of individual life such as Friday prayers, fasting in 'Ramadan', non payment of 'zakat' and 'fitrah', commencement of 'Ramadan'(Fasting and the 'Eid'.) conversion and adoption of Muslim Children, other miscellaneous offences, jurisdiction and administration, number of witnesses, status of witnesses, quality of witnesses, direct and hearsay testimony, acknowledgement ('iqrar'), procedure in criminal cases in Qadi's courts and procedure in civil cases.

5 Islam in contemporary Malaysia.

From the foregoing , we have seen, the process of secularization of Islamic law and the introduction of English law occurred under the British administration. Another important factor to the understanding of Islam in contemporary Malaysia is the position of Islam under the Federal Constitution³⁵. As far as the Federal Constitution is concerned, Islam is the official religion of the state³⁶. This, according to the scholars, is to be understood in the secular sense, that Islam is the official religion only for ceremonial purposes. Malaysia remains as the British wanted it to be, a secular state with secular laws³⁷. This constitutional provision does not mean that Islam is the supreme law of the land and hence any laws which are repugnant and contrary to Islamic law are not void.³⁸ Furthermore, Islamic law is excluded from the definition of law under the Constitution³⁹. This anomaly, is not consistent with the nature of Malays who pride themselves as Muslims and under the Constitution the definition of a 'Malay' is synonymous to a 'Muslim'⁴⁰.

³⁵ For a detailed exposition of the position of Islam in the Federal Constitution, see Ibrahim, Ahmad, The position of Islam in the Constitution of Malaysia, in The Constitution of Malaysia: its development: 1957-1977; Suffian & Anors, Oxford University Press, Kuala Lumpur, 1978. See also Lee & Anor, The Constitutional Law in Malaysia and Singapore, Malayan Law Journal, Singapore 1991.

³⁶ Article 3 of the Federal Constitution provides that Islam is the religion of the Federation but other religions may be practised in peace and harmony in any part of the Federation. Article 11 of the Federal Constitution further provides that every person has the right to profess and practise his religion and subject to the qualification in the Article to profess it, the qualification is that the law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

³⁷ See the Federal Constitution's Commissioners' report. The Commissioners initially rejected for the inclusion of such provision in the Federal Constitution.

³⁸ See Salleh Abas's decision in the Federal Court's decision of Che Omar bin Che Soh v. Public Prosecutor, (1988) 2 MLJ 55. In this case there was an attempt to invalidate the death penalty for drug and firearms offences on the basis of its inconsistency with Islamic law. The distinguished Judge noted that the effect of A.11 is to, "purposely preserves the continuity of secular law prior to the Constitution".

³⁹ A.160 of the Federal Constitution.

⁴⁰ The definition of a Malay under the Constitution is, "a person who professes the religion of Islam, habitually speaks the Malay language; conforms to Malay custom" and was born or domiciled in the Federation or in Singapore. This trend of associating Malay and Islam was not unique of the Federal Constitution. In Kelantan such definition was adopted in 1930, (No.18 of 1030), Perlis (1934), Johore (1936) No.1 of 1936 Government Gazette No.14 Vol XXVI April 8, 1936 and Terengganu (1941).

Despite being the national religion, under the Constitution and as part of the division of powers between the Federal and the states government, administration of Islam and Muslim affairs is vested under the power of individual states and the '*Sultan*'s. The Constitution provides that the '*Sultan*' of each state is the head of religion for the particular state. The power of the state to legislate on matters relating to Islam is however, limited to the extent of its consistency to the Constitution⁴¹ and the matters spelt out in the State list⁴². This constitutes a major obstacle to the development of Islam and the Islamic law in Malaysia. Any laws which are passed by any of the thirteen states on matters within their jurisdiction should be consistent with the Federal Constitution. Indirectly, the Federal Constitution implicitly guaranteed the observance of common law as the legal system which was inherited upon independence. Not only are laws which are contrary to the written constitution become null and void, but the civil courts can also review cases within the jurisdiction of the Shari'ah courts. Common law is made supreme and Islam and the Shariah courts are deemed inferior and subject to review by the civil courts.

The extent of conflict between the Federal Constitution and state enactments is illustrated with the current conflict arising from the state of Kelantan's decision to

⁴¹ Article 11(4) of the Federal Constitution gives the Federation the power to overrule Islamic laws decided by these states. Article 75 enshrines that, "if any state law is inconsistent with a Federal law, the Federal law shall prevail and the state law shall, to the extent of the inconsistency be void. Further article 4(1) states that all laws in conflict with Federal Laws are automatically null and void.

⁴² The Federal Constitution sets out among the subjects which are in the State List in the following: "Muslim Law and personal and family law of persons professing the Muslim religion, including the Muslim law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Muslim wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Muslim religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay custom; '*zakat*', '*fitrah*' and Baitul Mal or similar Muslim revenue; mosques or any Muslim public place of worship, creation and punishment of offences by persons professing the Muslim religion, except in regard to matters included in the Federal list; the constitution, organization and procedure of Muslim courts, which shall have jurisdiction only over persons professing the Muslim religion and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by Federal law; the propogating doctrines and beliefs among persons professing the Muslim religion; the determination of matters of Muslim law and doctrine and Malay custom".

enact Islamic penal laws (*'hudud'*)⁴³. The governing law on criminal matters is the Criminal Law Code which was modelled after the Indian Penal Code. As criminal laws are not within state jurisdiction, for the *'hudud'* laws to be enforceable, special leave has to be obtained from the Federal Government. A political reason for the rejection of *'hudud'* laws is the conflict between the Kelantan government (which is the only government ruled by opposition party) with the governing government in Malaysia. Ironically, it was reported that the rejection is not on the basis of total rejection of the supremacy of Islamic law but on the 'brand of Islam' projected by the Kelantan Government. To reject the allegation that the ruling party is against the application of Islamic law, the Federal Government has announced the setting up of a committee to study the application of *'hudud'* law in Malaysia and to come up with another version of *'hudud'* law which may be more acceptable to the Malaysian mixed population.

6 Future of Islam and Islamic law in Malaysia.

Of recent, Islam has been an important agenda in the Malaysian political scene⁴⁴. The governing party is also claiming to be committed to Islam as representative of the modernist Islam as opposed to the opposition party; the Pan Islamic Party (PAS) which is normally characterised as fundamentalist and orthodox⁴⁵. Since the 1970's, influenced by the renaissance and revivalism of Islam in other countries, many attempts were undertaken to inject Islamic values in administration, banking and finance sectors⁴⁶. In terms of financial market, Malaysia is at the forefront in the

⁴³ On the November 25th. 1993, the state assembly of Kelantan passed a law to introduce the Islamic Shari'ah penal system. The bill if enforced in Kelantan would not face the challenge of non-Muslims as Kelantan Muslims make up 95 percent of the total population.

⁴⁴ For a detailed analysis, see Mutalib, Hussin Islam in Malaysia; From Revivalism to Islamic State, Singapore University press, 1993, Singapore. There are other works as well, too numerous to cite here.

⁴⁵ Dr. Mahathir constantly talked of the need not to use force in any Islamic policy but through persuasion, good example and information (NST, 5 Feb.1986).

⁴⁶ Inculcation of Islamic values (IIV) is an agenda introduced by the premier Dr. Mahathir to introduce positive values which are not contradictory to modernization such as honesty, trust, efficiency, diligence, moderation and thrift (NST 20 Nov. 1984). Although certain sectors in Malaysia are not convinced that

application of Islamic concepts as the alternative to the existing dominant western institutions and banking. A more recent report (New Horizon, Feb. 1993) cites Malaysia as the best example of a country whose Government was in full support of the reforms taking place in the banking and financial sector.⁴⁷

Unfortunately, the same fervour is not seen in legal spheres. The most clear example is the Federal Government's rejection of the Kelantan '*Hudud*' Bill. The Federal Government alleges that Kelantan's '*Hudud*' laws are not the true version of Islamic Law. To provide against the backlash of uprising calls for the implementation of Islamic Law the Federal Government set-up a committee to study '*hudud*' laws with the intention to enforce Islamic law when the Malaysian society is ready for it. The Attorney General has also announced the readiness of implementing Islamic law when the time comes. The biggest challenge in implementing Islam in Malaysia is its multiracial population⁴⁸. Many fears that the present Islamisation policies will turn Malaysia into an Islamic state and would result in open revolt among the non Muslims.

The existing conflict between the civil courts and the Shari'ah courts has been resolved by the amendment of the Constitution to effect the finality of the Shari'ah Courts decisions⁴⁹. As a result, Civil courts may no longer encroach in matters within the jurisdiction of the Shari'ah courts. Attempts were also taken to breach the gap between civil courts and the Shari'ah courts. The status of qadhi and the Shari'ah courts were improved. Special courses were set-up to train qadhis and a special

there was a definite (positive) change in the government administration towards Islamization, however, there are others who view that the IVV policy and the other developments as an opportunity to implement Islam in its full scope.

⁴⁷ Other Islamic countries, including the Islamic Republic of Iran are said to have requested for Malaysia's 'blueprints' of its financial sector reforms. see New Straits Times, 22 March 1994.

⁴⁸ Muslims now made up 55 percent of the total population. The population of Malaysia in 1991 was 18.2 million out of which 55 per cent of the population are Malay Muslims.

⁴⁹ Federal Constitution Article 121 (A) provides that, "The Courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Shari'ah courts".

Shari'ah Appeal Court was established. To reduce intra-state conflict of laws, harmonization of the various enactments on administration of Muslim law in various states were set in place.

Applying the Islamic law is not by any means imposing foreign law as was the case of introduction of English law. It is rather returning to the roots of Malay culture and civilisation. The biggest obstacle is not amending the Federal Constitution but rather the negative attitude prevailing amongst the Muslims in Malaysia. There are many ways in which Islamic law can be given a more prominent role in the legal system in Malaysia. One suggested way is to include Islamic Law as a source of law in the Constitution. By so doing, any law which is passed by the federal Government would have to be consistent to Islam and the Shari'ah. In this way the Government is committed legally to enact only laws which are consistent to the Islamic law. Another way is by introducing legal concepts known in Islamic law through judicial interpretation on the basis of 'natural justice' as done by the English. In this way Islamic concepts of justice could be introduced gradually on a case by case basis, paving the way to substitute Islamic principles in place of common law principles.

Current political struggle with the opposition party shows the need to adopt a fresh and pragmatic approach towards implementation of the Islamic law. For the first time in many years, the Federal government has shown a shift of attitude. This is seen with the recent Attorney General's announcement to implement Islamic law when the time comes. It is hoped that this desire reflects a serious commitment and not a mere political gimmick.

Finally, to use the arguments put forward by Hooker, a known scholar on Islam, "Law must not be considered as an ultimate value in itself but as a means of realising other values, including a variety of social and political goals."⁵⁰ That higher goal within the context of Malaysia's deep root and linkage with Islam lies in Islam and the Islamic law.

⁵⁰ Hooker, M.B, The Personal Laws of Malaysia; An Introduction (1976) Oxford University Press, Kuala Lumpur.

7 Conclusion

In this chapter, we began by looking into the root of the present legal dualism and prominence of Common law in Malaysia. History has shown that Islam has made a tremendous impact on the life of Muslims in Malaya and seeped into the Malay civilisation to become an important, if not, indistinguishable part of it. The prevailing legal system, thus, has to fit in with this external conditions and seek to accomplish the value system which Islam represents. To do this is not as simple as the abolition of the common law but to study how the Islamic law befits the present legal mechanism.

This effort is necessary even in the event that total islamization of laws in Malaysia is not achieved. Passing laws which reflect the views and interest of Muslim is still necessary as Islam is the official religion and Muslims are the dominant population in Malaysia. It is with this hope that this study on Intellectual Property and Islam is undertaken.

CHAPTER TWO

INDUSTRIALIZATION, INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE.

1 Introduction

For the historical reasons, the development of Intellectual and Industrial Property laws in Malaysia are heavily based on the English Law. During colonial times, the introduction of these laws was basically an endeavour to enhance the colonial interests. Unfortunately, long after independence, no concerted effort has been undertaken by the government to evaluate the present economic and social needs of the country. Hence, many of the provisions of Intellectual property laws in Malaysia are isolated from the country's economic development. Many key issues are left unanswered. One of them is the debate whether the present patent system stimulates local technology at a sufficient level, enough to realise the government's aspiration to be a New Industrialized country by the year 2020.¹ As statistics disclose, the ratio of local industry's participation in innovation and inventive activity is still insignificant².

With the current international commitment to the GATT's agreement on trade related aspects on Intellectual Property, Malaysia's option is tied, either to follow the wave

¹ One success story of the transfer of foreign technology is the case of the Palm Oil industry. With the assistance of government bodies such as PORIM, FELDA, a lot of innovation had been done on industry, which was twenty years ago a substantially foreign technology. See Ong, Augustine S.H, Study on Industrial Property Use in the Palm Oil Industry in Malaysia, WIPO 1993. Now, there are a few patents/inventions which are held by the local company, PORIM. Two patents concern farm mechanisation, another concerns a process for the production of high concentration of tocopherols and tocotrienols from palm-oil by products--palm fatty acid distillate. There is also a process patent to produce alkyl esters from oils and fats. When the industry was first set-up, most technology was imported from abroad. Most of this technology has been improved to adapt to local industry. Many innovations are not patented and kept as inhouse technology. With the set-up of PORIM, more research was carried out to improve the industry.

² The total number of local patent applications after the Patents Act 1983 from 1986 to 27 October 1990 is 3344. Out of which US constitute the largest number of applications (1248) followed by Japan (776) and Great Britain(365). Malaysian applications comprise of only 74. Out of this 74, 45 are held by individuals, 18 by cooperations and 11 by government agencies.

of change or to be totally isolated from the international trade scenario³. In preserving the current surge of foreign investment in Malaysia, the balance is tilted disparately in favour of joining the GATT's agenda, in the hope of further profilteration in the exchange of foreign technology.

In terms of copyright protection, an upsurge of enforcement of rights is apparent in the last five years⁴. Besides the enforcement role carried by the Ministry of Trade to check infringement of copyright under the Trade Practices Act, performance of copyright works are also administered by the Music Authors Copyright Protection.⁵ The Ministry of Trade is currently considering a few proposals to tighten copyright laws which includes payment for photocopying and the protection of performer's right. With these proposals, the public's ability to freely copy and evade the copyright laws are further curtailed.

With more changes expected in the next five years in compliance with the GATT's

³ Malaysia was among 44 nations which was accused by the U.S of practising unfair trade practices. Even though U.S threats is not the single factor behind legislative changes in relation to Intellectual property rights in Malaysia, it remains a strong factor. In 1992, after much talks of bilateral agreement with the U.S Malaysia acceded to Berne Convention with the view that multilateral convention will bring more benefit to Malaysia.

⁴ On enforcement of copyright, the number of complaints of infringement have increased in proportion to the increase of the rate of effectiveness of raids. When the government first launched the campaign against counterfeiting and imitation in December 87, 77 complaints were received within a month. Out of 231 complaints received since 1987, there are three cases of failure noted. Phonographic work remains the highest complaint - 2,881 out of 3, 596 cases amounting to the value of RM 5 916 635. 40. Musical works came second - with 609 cases followed by literary works - 49 cases. Following behind are other artistic works (42 cases) and computer works (15 cases). A large number of offences are noted in Wilayah Persekutuan, followed by Penang and Johore. Most complaints involved foreign rights.

⁵ Music Authors Copyright Protection (MACP) is a local company of the Performing Rights Society (PRS) Ltd which is vested with the exclusive authority to enforce PRS' public performance rights in the musical works and/or lyrics in Malaysia. It is a non profit company which administers the public performance, broadcast and diffusion rights of musical and associated literary works and their successors in title. Its administrative role throughout Malaysia is as a central body to which application for the licence may be made by a person or a organisation intending to publicly perform, broadcast or diffuse copyright music. The MACP have also taken legal action against performance of musical works without consent. It was reported in the STAR and New Straits Times that an injunction was granted by the High Court to MACP for performance of 'Hey jude' composed by John Lennon and Paul Mc Cartney in the presence of 10 to 15 people in a nightclub in Kuala Lumpur. The MACP has received support from local music industry. The latest success to MACP is the agreement of RTM (Radio & Televisyen Malaysia) as the biggest broadcasting organisation in Malaysia to pay royalty for performance of musical works broadcasted in radio and television from 1989.

substantive requirements, Intellectual Property laws is a hot topic. Even if these changes will not be entirely in favour of local needs, at least they will generate more efforts into inculcating awareness and recognition of Intellectual property rights. In certain aspects, these pressures are highly desirable in accelerating changes which are long overdue such as unfair trade practices, and the protection of plant and industrial variety and industrial designs.⁶

Leaving aside the complex interplay of international trade and Intellectual Property, this chapter will trace the development of Intellectual Property laws in Malaysia since the cessation of Penang to the British in 1786. Even though there has been deliberation on this matter in other literature, no complete account of this is available⁷. The first local legislation on patents was in 1871, Trade Marks in 1888, Copyright in 1902 and design as late as 1931. It may be queried why copyright came much later than patents and trade marks. Most of these laws were first introduced in the Straits Settlement and later extended to the Federated Malay states and the Unfederated Malay States even though in other matters, English Law in these states was not infiltrated in total.

2 The Straits Settlements (1791- 1866)

Straits Settlements consisted of Penang, Province Wellesley, Singapore, Malacca, Pangkor Island, Dindings, Cocos Island and Christmas Island. The British first occupation in Malaya (as it then was) was in Penang (or otherwise known at that time as the Prince of Wales Island). Through a treaty with the King of Kedah, Captain Light obtained a cession of the island. No formal administration of law was enforced at that time until the passing of the first charter of justice in 1807 (as of 25th. March 1807). This charter not only endorsed the setting up of a Court of Judicature in

⁶ The Government has recently announced that a new law is proposed to curb unethical trade practices such as cartels, monopolies, oligopolies and dumping of goods. In addition the Ministry is also working on a policy of competition and unfair business practices to ensure better implementation of the rules and regulations. Among the objectives of this law are to protect consumers and upgrade local productivity and production quality. For further elaboration, see Chapter 8 of this thesis.

⁷ See L.A Sheridan (ed), Malaya and Singapore, the Borneo Territories, The Development of their Laws and Constitutions, Steven & Sons, London, 1961, Laddie et.al, Copyright

Penang but also applied the existing law of England. The charter expressly introduced the law of England, as it stood then, into the colony. However, there was uncertainty as to the actual legal effect of it. Local cases ruled out the application of English Statutes in cases where there were modified by express provision and had abrogated any law previously existing.⁸ Singapore was acquired in 1819 through a memorandum which was signed between Stamford Raffles and Sultan Hussein of Johore. Malacca was first occupied in 1795 and subsequently retroceded in 1824. For purpose of unification, the second charter of justice was passed in 1826. This second Charter extended the Court of Judicature's jurisdiction to Singapore and Malacca. This charter contained the same provision as the 1807 charter and introduced into the colony the English law as it existed on the 26th. November, 1826.⁹ It is questionable whether the Second Charter of Justice introduced the English common law on Intellectual Property in the Straits Settlement.

In 1833, Statute 3 & 4 Wm. IV c.85, was passed to bring the Straits Settlements under the control of the East India Company. For a period of 33 years, Acts which were passed in India were applied to the Straits Settlement if there were express or implied order. In 1866, Straits Settlement was separated from India.¹⁰ There was no evidence that Indian Acts governing Intellectual Property were extended to Straits Settlement during this time.

In 1878, the Government of the Straits Settlement passed the Civil Law Ordinance. This Ordinance brought into force the mercantile law of England into the Colony "as

⁸ See Rodyk v. Williamson (1834) 2 Ky Ec at p.9, Kamoo v. Thomas Turner Bassett (1808) 1 Ky 1, In Re Goods of Abdullah (1835) 2 Ky. Ec.8, Moraiss v. de Souza 1 Ky.27, Regina v. Willans (1858) 3 Ky. 16, Fatimah v. Logan (1871) 1 Ky.255.

⁹ The practical effect of the Second Charter of Justice of 1826 in Malacca was to abrogate Dutch Law and introduced the English law. See In the Goods of Abdullah 2 Ky. Ec.8, Moraiss v. de Souza 1 Ky. 27, Regina v. Willans 3 Ky. 16, Jemalah v. Mahomed Ali 1 Ky. 386, Ismail bin Savoosah v. Madinasah Merican 4 Ky. 315, In re Sinyak Rayoon 4 Ky. 331, and Scully v. Scully 4 Ky. 602. For a detail discussion of the historical introduction of English Law in the Straits Settlement, see Bartholomew, G.W, The Commercial Law of Malaysia, Singapore, Malayan Law Journal, 1965 and Sheridan, L.A, Malaya and Singapore, The Borneo Territories, The Development of Their Laws and Constitutions., London, Stevens and Sons Limited, 1961.

¹⁰ The Government of the Straits Settlements Act (c) 29 & 30 vic. c. 115 was passed to this effect.

if such question or issue had arisen or had to be decided in England".¹¹ Issues arose whether the expression "mercantile law" should be given a wide meaning and include all undertakings related to merchants. Particularly, in two cases Vulcan Match Co. v. Herm, Jebson & Co¹² and Fraser & Co v. Nethersole¹³ the Court dismissed the suggestion that trade marks laws were part of mercantile law. Therefore the Ordinance did not introduce into the Colony the Registration of Trade Marks Act, 1875¹⁴ and the Patents, Designs and Trade Marks Act¹⁵. Both Wood J (in the earlier case) and Goldney J (of the latter case) were of the view that mercantile law generally could not be held to refer to so specific and exceptional a subject.¹⁶ Two observations can be discerned from the above-mentioned cases. Firstly, it is arguable that, unless expressly enacted, the Second Charter of Justice had no relevance to the introduction of the English concepts of common law trade marks into the Straits Settlement. This is probably the reason why the court did not consider the application of trade mark on the basis of common law rights. Secondly, as far as registered trade marks were concerned, such rights were attained by way of registration and hence registered trade mark rights could not be automatically recognised and enforced in the Straits Settlement without the setting up of proper administration system locally.

¹¹ Section 6 reads:

"In all questions or issues which may hereafter arise or which may have to be decided in this Colony, with respect to the law of partnership, joint stock companies, corporations, banks, and banking, principals and agents, carriers by land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England unless in any case other provision is or shall be made by any statute now in force in this Colony or hereafter to be enacted".

¹² (1884) 1 Ky. 650.

¹³ (1887) 4 Ky. 269.

¹⁴ 38 & 39 Vic c. 91.

¹⁵ 46 & 47 Vic c. 57.

¹⁶ The learned judge commented: "The rights of the parties in actions which have reference to trade marks are therefore dependent upon the general principles of the commercial law. This I understand to be the meaning of Section 6 of Ordinance iv of 1878. Before I could say that the provisions of the English Trade Marks Act were incorporated among the Ordinances of this Colony in the wholesale way suggested on the part of the defendant, I should require words more specific than those used in the section referred to above."

2.2 Post 1886-1946.

2.2.1 Patents

It was not until 1871 that the legislative Council passed the Inventions Ordinance 1871.¹⁷ This Ordinance brought into force the dual system providing both for local patents and patent rights obtained in the United Kingdom and Northern Ireland. Even though this Ordinance went through minor amendment in 1915¹⁸, and 1922¹⁹ it remained the principal ordinance until 1924 where the system was changed into that of entirely reinforcing patent rights obtained in the United Kingdom and Northern Ireland. The 1871 Ordinance was modelled after the 1859 Indian Act²⁰, with certain modifications.²¹ The 1859 Act was passed when the Straits Settlements were placed under Indian administration. Therefore not surprisingly Straits Settlement was included as part of India as far as the definition of India is concerned.²² Seemingly, this Act would have been applicable if an Order in council was passed to the effect. As there was no available evidence supporting this proposition, Straits Settlement was a part of India only in so far as construing the provision of this Act in India. As an illustration, public use and public knowledge of an invention in the Straits Settlement

¹⁷ No.12 of 1871.

¹⁸ Ordinance 56 of 1915 widened the power of Governor in Council. S.2 of the Ordinance empowered the governor to avoid, suspend, grant or extend the duration of the exclusive privileges granted under the principal ordinance. The Governor was also empowered to licence the invention to someone else to make, use or sell the invention. With the pending war, the Ordinance stipulated for the application of this ordinance to those persons resident and carrying business in the territory of a State at war. The duration of the ordinance was made to continue in force during the continuance of the state of war in Europe and for a period of six months thereafter and no longer.

¹⁹ The 1922 Amendment NO. 24 of 1922 prolonged the duration of exclusive privileges to 16 years. This applies to exclusive privileges which are granted under the Ordinance and have not expired.

²⁰ Act No.XV of 1859.

²¹ The differences between the 1859 Indian Act and the 1871 Straits Settlement ordinance are not many. Firstly, under the Indian Act, one cannot import invention and claim rights over the invention unless he is also the inventor. Secondly, the period given to holders of British patent to apply for exclusive rights in India is only 12 months, compared to 3 years in the Straits Settlement's Ordinance. Thirdly, the requirement of novelty under the Indian Act is stricter. An invention is no longer considered as new if it has been publicly known in any part of India or United Kingdom by means of a publication, either printed or written or partly printed or partly written. Under the Straits Settlement Ordinance only public usage of the invention may defeat the novelty of an invention.

²² According to the Statute, 'India' here refers to the territories which are or may become vested in Her Majesty by the Statute.

may defeat the newness of the invention as far as the 1859 Indian Act was concerned.

The principal feature of the 1871 Enactment was that it allowed the application of exclusive rights of any inventions which were new.²³ New within the context of this ordinance was something which was not being publicly used in the United Kingdom, or in any possession or dependency thereof. The provision would have been very favourable to the local industry (if there was any) as an importer was also regarded as inventor.²⁴ The Ordinance also contained favourable terms to the inventor as pre-registration use was not detrimental to the novelty of the invention if it was used by the inventor himself or by his servants.²⁵ In addition, there were wide terms of compulsory licensing²⁶, cessation of privileges²⁷ and revocation of privileges.²⁸ The Ordinance which also provided for the application of exclusive rights obtained in the

²³ For application of new invention once granted given 16 years - see S.12 of the Ordinance.

²⁴ Invention here includes improvement and manufacture includes any art, process or manner of producing, treating, preparing or making an article and any article prepared or produced by manufacture. Inventor also includes the first importer into the state of the invention not publicly used or known in the United Kingdom.

²⁵ See S.3(2) & (3) of the Ordinance.

²⁶ The circumstances which will warrant compulsory licensing areas follows:

- (i) where the invention has not being worked on a commercial scale and no satisfactory reason given,
- (ii) demand for the product is not being met
- (iii) if any trade or new trade is prejudiced and it is in the public interest for the grant of compulsory licences
- (iv) any trade or industry is unfairly prejudiced by the condition attached by the grantee to the purchase, hire, license or the use of the invention. Compulsory licence given upon payment of royalty.

²⁷ S.22 empowered the Governor in Council to declare the cessation of rights in cases where granting of exclusive privileges may be mischievous to the State, or generally prejudicial to the public or if a breach of any special condition has been committed.

²⁸ Revocation of patents are allowed on these grounds:

- (i) invention not new, the grantee not the inventor
- (ii) invention not described in the specification
- (iii) fraud in petition or specification
- (iv) fraudulent misdescription of part of the invention. Non fraudulent misdescription of the patent however is not a ground for revocation of patents.

U.K.²⁹ contained wide terms of infringement³⁰. The 1871 Ordinance brought forth features which are common until now such as registration, opposition proceedings and legal proceedings under the High Courts. It was not evident how many inventions were brought over by the British under this Ordinance, despite the laws being very conducive and generous to transfer of technology. The dual system proved to be difficult to administer. Most inventions came from the U.K and most of them were already patented in the U.K. In 1924, it was changed to a registration system of patent rights obtained in the United Kingdom.³¹

2.2.2 Copyright

The first copyright legislation in the Colony was not concerned with literature, artistic or dramatic works. Surprisingly, the Straits Settlement's Council passed the Telegraphic Copyright Ordinance³² which provided for the exclusive right to the person receiving a news telegram to publish such news. The duration of protection provided by this Ordinance reflected the short life span of telegram news. Up to 48 hours from the time of first publication, no other person may print or publish the news without consent in writing of the person who received such news. Apart from local publication, transmission of any telegraphic messages abroad was also prohibited within the period mentioned.³³ This Ordinance was extended to Labuan up until 1952

²⁹ The Act provided for registration within 3 years of grant of rights in the U.K. Once granted, the rights will be enforceable as long as it is enforceable in the UK -see S.14 of the Ordinance.

³⁰ Among acts of infringement are : making, selling, using or putting into practice, counterfeiting or imitating an invention which are patented. See s.23 of the Ordinance.

³¹ Ordinance 15 of 1924 introduced the registration of exclusive privileges obtained in the U.K. The Ordinance provided for the owner of the exclusive right three years to apply for registration in the Straits Settlement. The privileges and rights granted shall date from the date of the patent in the U.K and shall continue in force only so long as the patent remains in force in the United Kingdom. Any amendments which were made to the specification of exclusive rights in the U.K will also have to be notified to the Straits Settlement Registry. The ordinance also set up a Registry and a Register of petitions and applications.

³² No.XXIII / 79 (1902).

³³ As to the reason of the introduction of this Ordinance in the Colony, see Khaw, Lake Tee, Copyright Law in Malaysia, (1994), Butterworths Asia, Malaysia.

when it was finally repealed, revoked and cancelled.³⁴

The first principal legislation related to copyright which was passed by the U.K Parliament and extended to the Straits Settlement was the Imperial Copyright Act 1911³⁵. This Act was not only extended to British Dominions, but also to self governing dominions, protectorates and British possessions. One interesting feature of this Act was that it governed all published work within the British dominions and in the case of unpublished work, if the author was a British subject or was a resident within the Dominion. The Act which contained generous provision for compulsory licence remained the major Act on copyright in the Straits Settlement until after independence.

By virtue of S.14 of the Imperial Act, in 1914 an ordinance was passed basically to regulate importation of copyright works from outside the Colony³⁶. This Ordinance vested the Registrar of Imports and Exports with powers which were initially vested in the Commissioners of Customs and Excise in the United Kingdom. Under the Ordinance, the registrar was empowered to issue regulations as to what could be imported into the Colony. The Ordinance also provided for the forfeiture, disposal or destruction of works which were imported in contravention of the regulation. Although it was made an offence to have the necessary apparatus to infringe the provision, the act of piracy itself was not defined as the Ordinance was principally concerned with regulating imports of printed works.

This ordinance was amended in 1918³⁷. The amendment was concerned provisionally, to provide for more severe punishments for infringements of copyright. The acts of infringement was enlarged, not only to the principal offender but also to

³⁴ See Repeal Laws Ordinance, No.6 of 1952 (date of force 23rd. October, 1952).

³⁵ 1 & 2 Geo.5,c. 46.

³⁶ Copyright Ordinance 1914, No XVIII.

³⁷ Act No.24 of 1918.

the accessories.³⁸ With the amendment, it was an offence to import works from outside the Colony otherwise than by ship. In addition, the amount of fine for infringement was also enlarged.

2.2.3 Trade Marks

In 1886, the first local ordinance was passed by the legislative council³⁹. Even though this ordinance made reference to the Imperial Act 46 and 47 Vict.c.57 known as the Patent Designs and Trade Marks Act 1883, it was not certain whether this Imperial Act was actually extended to the colony.⁴⁰ Case law seemed to indicate that this was not the case, thus the law which was applicable before this ordinance was not clear.

Prior to that, it was the British policy to prohibit the importation of foreign goods which bore the names, brands, marks of manufacturers resident in the United Kingdom, into the British possessions abroad.⁴¹ It is not surprising that the first Ordinance on trade marks did not regulate the use of trade marks in the course of

³⁸ Punishment was inflicted not only to those who imported or brought or was concerned in importing but also to those who shipped or assisted those who are involved in shipping written works, and also to those who harboured, kept or concealed or knowingly permitted or suffered or caused to be harboured, kept, concealed any such works or knowingly acquired possession of such works.

³⁹ Ordinance No.3 of 1888. This Ordinance was modelled after the Indian Merchandise Marks Act No IV of 1889.

⁴⁰ S.3 of the Ordinance defined 'trade mark' as a trade mark which is protected by law in this Colony and when the provisions of the one hundred and third section of the Imperial Act 46 and 47 Vict.c. 57 known as the Patents Designs and Trade Marks 1883 are applied to this Colony by Order of the Queen in Council shall include any trade mark registered in the register of trade marks kept under the said Imperial Act and any trade mark which either with or without registration is protected by law in any British possession or foreign State to which the provisions of the said section are under Order of the Queen in Council for the time being applicable.

S.101 of the Imperial Act also provided for colonies and India if an Order in Council was passed to the effect.

⁴¹ See Cap XCIII, Trade of British Possession Abroad.

trade but to prohibit the falsification and forging of trade marks⁴² and trade descriptions.⁴³

For the offence of forging a trade mark, the mark had to be affixed to the goods without the assent of the proprietor, or by the falsification of any genuine trade mark by alteration, addition, effacement. A person who was employed in the course of business was exempted from the offence upon proof that he took reasonable precautions against committing the offence and had no reason to suspect the genuineness of the mark. He was also expected to give information to the prosecutor. Under the Ordinance, to be a false trade description, it had to be false to a material degree.

The 1913 Amendment did not bring major changes.⁴⁴ Later in 1917, the 1888 Ordinance was repealed⁴⁵. The 1917 ordinance retained the essential features of the 1888 ordinance and the subsequent changes made thereto in 1913. For the first time "trade mark" is defined and regulated in the context of its use as an indication of goods with the manufacturer.⁴⁶ Beside trade marks, the use of property marks were also regulated.⁴⁷ Importation was made an offence under this Ordinance.

⁴² One principal feature of this ordinance was making it an offence for all forms of forging such as falsely applying trade mark, making instrument for forging, application of false description or disposing instrument for making false trade mark. The term 'trade mark' was not defined under this ordinance.

⁴³ Trade description is defined as "any description, statement or other indication, direct or indirect which concerns the number, quantity, measure, gauge, weight, place, country, mode of manufacture, material or whether the goods are under existing patent, privilege or copyright."

⁴⁴ Ordinance No.6 of 1913 widened the definition of 'trade description' to include the degree of fineness of gold and silver goods.

⁴⁵ Merchandise Marks No.9 of 1917.

⁴⁶ 'Trade mark' is defined as "a mark which is used for denoting that goods are the manufacture or merchandise of a particular person".

⁴⁷ 'Property mark' is defined as "the mark which denotes that any movable property belongs to a particular person".

Changes occurred in 1922⁴⁸, 1926,⁴⁹ 1938⁵⁰ and 1940.⁵¹ Such changes were not in relation to substantive issues. In 1919 an ordinance was passed by the legislative Council to prohibit the representation on trade marks of the Royal Arms and National Flags⁵².

In 1936⁵³ the legislative council passed an ordinance which took effect of prohibiting the importation⁵⁴ or sale of articles for use in connection with Coronation celebrations⁵⁵ which did not bear a mark or origin.⁵⁶ Infringing goods were liable to forfeiture under this Ordinance. Consistent with the earlier Ordinance which exempted employees from being liable, the 1936 Ordinance put the fault on the

⁴⁸ Act No 7 of 1922. The definition of 'false trade description' was widened to include description of measurements and weights. Stamping of length of piece goods in transshipment or in the course of transit was made an offence.

⁴⁹ No. 17 of 1926 & No.19 of 1926.

⁵⁰ No.33 of 1938 which introduced the compounding of offences under the Merchandise Mark Ordinance. For those who were legally not competent such as minor, idiot or a lunatic or under some other legal disability, his offences may be compounded by someone else who are competent to contract on his behalf.

⁵¹ No.41 of 1940 which came in force on 26th. October 1940, provided for the setting up of a district court.

⁵² Straits Settlement No.8 of 1919. The Ordinance made it an offence for anyone to use in his business or trade any representation of the Royal Arms or Royal Crests, Royal Crown, British National flags, or any flags of the British Dominion which was so nearly resembling and may lead to mistake. The passing of this Ordinance is consistent with S.106 of the Imperial Act 46 and 47 Vict.c. 57.

⁵³ No.34 of 1936.

⁵⁴ For the first time the word 'import' was defined as to mean "to bring or cause to be brought into the Colony, or into any part thereof from a non-contiguous part, by land, sea or air, but excluding import as a shipping agent for transshipment on through bill of lading or to carriage through a port without transshipment".

⁵⁵ A 'Coronation article' was defined as to mean "any article which consisted of or bore a representation or a colourable imitation of a representation of His Majesty the King, or any member of the Royal Family or any Royal emblem, badge or device or the Union Flag, or the flag or badge of any part of the British empire or any article consisting of or bearing any other mark, design or device which rendered it suitable for use in connection with the celebration or commemoration of the Coronation of His Majesty or which was otherwise in any way suitable for such use."

⁵⁶ 'Country of origin' here means "the country of manufacture of an article or where an article has been manufactured partly in one country and partly in another, the country in which the last manufacturing process was done." Such mark of origin shall be in English language.

employer.⁵⁷

As far as the use of trade mark as a connection between goods and the manufacturer, registration was introduced in 1938⁵⁸. This provided for dual system of registration of the U.K marks and local marks.⁵⁹ Marks were registrable either under part A or part B.⁶⁰ Most of the substantive provision of this Ordinance are common to the current applicable Trade Mark law. Shortly after the passing of this Ordinance, changes were made⁶¹.

2.2.4 Designs

The first legislation relating to registered designs were introduced in the Straits Settlement in 1931⁶². Under this system, any registered proprietor or any one who received right via assignment, transmission and other operation of law had to apply for conferment of rights within three years. Once the exclusive rights were granted, the proprietor not only received the same privileges and rights in the U.K but also they subsisted on the same duration as rights obtained in the U.K. The certificate of registration was a prima facie evidence of the entry having been made and of the

⁵⁷ The employer was made liable for any act, omission, neglect or default of any agent or servant employed by him and acting within the scope of his employment.

⁵⁸ Ordinance No 38 of 1938.

⁵⁹ A 'mark' is defined as "to include a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof". 'Trade mark' is defined as (with the exception of certification trade mark) "a mark used or proposed to be used in relation to goods for the purpose of indicating or as to indicate a connection in the course of trade between the goods and some person having a right either as proprietor or as registered user to use the mark, whether with or without voluntary indication of the identity of that person".

⁶⁰ The registration system introduced in the Straits Settlement was modelled after the U.K Trade Mark Act (1905) 5 Edw.7.c. 15 (as amended by Trade Mark act 1919) with modification.

⁶¹ No.21 of 1939. This ordinance shortened the duration of registration from twelve months from the date of the commencement of this ordinance to six months from the expiry of the period within which applications under section 8 may be made. No application for registration is valid after the expiration of this period.

⁶² No.6 of 1931.

contents thereof. The 1931 Ordinance was later amended in 1933 where an extra ground was added for the revocation of exclusive rights.⁶³

3 Federated Malay States

The Federated Malay States consisted of Perak, Pahang, Selangor and Negeri Sembilan. Perak fell under British administration via the Treaty of Pangkor in 1874, Sungai Ujong in 1874, Negeri Sembilan in 1889 and Pahang in 1887. Under the British administration, Residents were appointed to take charge of the administration of the various Councils set-up in the states. It was under this capacity that numerous Orders in Council were passed on inventions.⁶⁴ In Pahang, the legislative instrument to provide for exclusive privileges of inventors was framed as early as 1897. This Ordinance was never enforced. In 1909, the legislative council passed the Enactment No. 13 of 1909 to validate any proceedings which were made by virtue of the 1897 enactment.⁶⁵

The four states were placed under one federation, i.e the Federated Malay States in 1895. From thereon, the Federal Council passed enactments which repealed the former Orders in Council by the respective states. After the formation of Federation of Malay States, a federal Enactment was passed in 1914.⁶⁶ This Enactment repealed all the previous ordinances which were passed by the respective states. This

⁶³ No.10 of 1933. Prior publication referred herein was of prior publication of the design in the U.K and not prior publication of the design in the Colony before the date registration in the Straits Settlement. See also Straits Settlement No.17 of 1938 (date of force 14/9/1938) which reinforced the registration of the U.K designs in the Colony.

⁶⁴ Perak Order in Council, No 2 of 1896, Selangor Order in Council No.5 of 1896 and Negeri Sembilan Order in Council No. 4 of 1896 (date of force 9/4/1896).

⁶⁵ All petitions for and grants of exclusive privileges, all orders, declarations and payments, all registers and books and all proceedings of whatever nature made, kept or had were declared to be of the same force and effect and to be as valid for all intents and purposes as the same would have been if the inventions enactment had come into force on the 29th. day of January 1897.

⁶⁶ Inventions Enactment No 19 of 1914.

enactment reinstated the system brought into force by the various Orders in Council.⁶⁷ Although this Federal Enactment was also modelled after the 1871 Straits Settlement Ordinance, certain modifications can be found.⁶⁸ Unlike the Straits Settlement 1871 Ordinance, this Ordinance only provides for local inventions. The 1925 Amendment changed this position.⁶⁹ Rights obtained in the United Kingdom were allowed to be registered in the Federated Malay States. This amendment also extended the duration of exclusive privileges to 16 years.

3.1 Copyright

In the Federated Malay States, copyright was introduced in 1930⁷⁰. This Enactment was modelled after the Indian Imperial Act 1914. It is not clear whether the Imperial Act was ever extended to the Federated Malay States even though the Act contained provision to that effect. By the promulgation of the Enactment, seemingly this was not the case. A law was passed in 1936, to regulate importation of printed works into the Federated Malay States.⁷¹

In 1938, copyright was extended to works first published in Sarawak or to literary, dramatic, musical or artistic works where the authors were subjects and residence of Sarawak.⁷² Sarawak had already extended its copyright provision to works originated from the Federated Malay States in 1935.

⁶⁷ The Selangor Order in Council no. 5 of 1896 was also modelled after the 1871 Straits Settlement Ordinance.

⁶⁸ The Federal Enactment introduced more extensive rules on revocation of grant, surrender of grant, groundless threat, provisions as to anticipation and extra provision on the grant of exclusive privileges.

⁶⁹ Enactment No 2 of 1925 which came into force on 3rd. of April 1925. 2 other amendments were made to the principal amendment; 3 of 1938 and 1 of 1948.

⁷⁰ Enactment No. 1 of 1930.

⁷¹ Notification No. 3018, June 25, 1937, No.14, Vol.XXIX.

⁷² Notification No.3882, August 19, 1938, No.18 Vol.XXX.

3.2 Trade Mark & Designs

No law was passed in the various states in their own respective capacity before the formation of the Federated Malay States. The first law proclaimed in relation to trade marks came after the Federation in 1910. This law was the same as the legislation on fraudulent marks passed in Straits Settlement.⁷³ Minor changes were made to the principal Ordinance in 1911⁷⁴ and 1926.⁷⁵

As far as designs are concerned, the same law as in Straits Settlement was passed in 1932⁷⁶. This Enactment was later amended in 1933 principally for two purposes. Firstly, to remove ambiguities on the rights conferred under the patent certificate. Secondly, to improve the power of the Registrar to rectify any error in the Register upon certain grounds.⁷⁷

4 Unfederated Malay States

The Unfederated Malay States consisted of Kelantan, Perlis, Kedah, Terengganu, and Johore. The four earlier states were obtained from the Siamese in 1909 via the Siamese Treaty. Johore went through a different phase, in 1914 through an agreement with Temenggong Hussein, Johore accepted a British officer to advise on the administration of the states. All these states were considered as protected states, unlike the Straits Settlements which were part of the British colony. Theoretically, these states were dependent of the British administration and were not bound to attend to British's advice. However, in effect, most British's advice was taken seriously

⁷³ F.M.S No.1 of 1910.

⁷⁴ F.M.S No.1 of 1911, amended by 6/1913 and later replaced by Federal Enactment 7/1917 (10th. August 1917) which repealed Federal Enactment No.1 of 1910, 6/1911, 6/1913, S.16 amended by Federal Enactment No.17 of 1926.

⁷⁵ F.M.S Enactment No.17/1926 which amended Section 16 of the principal enactment.

⁷⁶ The Registration of United Kingdom Designs Enactment, 1932.

⁷⁷ Enactment No. 43 of 1933.

even though the local law was not replaced by English law, we find many enactments were passed to introduce English law. As the administration of these states was not unified, different states passed their own respective enactments to deal with Intellectual Property.

4.1 Patents

The earlier enactments in Kelantan and Kedah were concerned with the registration of patent rights which have been obtained either in the United Kingdom or other parts of Malaya.⁷⁸ Both these enactments provided for conferment of patent rights or exclusive privileges granted in the Colony or the Federated Malay States. The Kelantan Enactment was repealed in 1928.⁷⁹ The 1928 Enactment contained the same substantive provision as the 1916 Enactment. The reason why the 1916 Enactment was repealed only to reinstate the same substantive provisions in 1928 was not clear. In 1936, the Kedah Enactment was amended to extend to letters patent granted in the United Kingdom or in any other British dominion. With that amendment, patent rights which were obtained in the United Kingdom and other British dominion may be directly conferred in Kedah but not in Kelantan.

Johore's changes, as far as patent is concerned, followed closely that of Straits Settlement. The 1911 Enactment was modelled after the 1871 Straits Settlement Ordinance.⁸⁰ Further amendments were made in 1922⁸¹ and 1924⁸² and 1933⁸³. The 1924 amendments introduced in Johore the changes introduced in the Straits

⁷⁸ Kelantan Enactment No.3 of 1916 and the Inventions Enactment of Kedah 1332 No.66.

⁷⁹ Enactment No.11 of 1928.

⁸⁰ Enactment No.III of 1911, further amended by Enactment No.1 of 1915.

⁸¹ No.17 of 1922 which came in force on 17th. October 1922.

⁸² Enactment No.13 of 1924 which came into force on 25th. November 1924.

⁸³ Enactment 8 of 1933.

Settlement in 1922 and 1924.⁸⁴

In 1939, the 1911 Enactment was repealed and replaced with a system registering only patent rights obtained in the United Kingdom and Northern Ireland.⁸⁵

4.2 Copyright, Trade Marks and Designs

There was no evidence of any legislative instruments passed in Kedah, Kelantan, Terengganu and Perlis on copyright and trade marks. It is unclear as to what law was applicable to these states regarding copyright and trade marks as English law was not applicable per se. The best view would be that in these states there was no law applicable to copyright and trade marks. This vacuum continued until after the formation of the Federation of Malaya.

Unlike Kedah, Kelantan and Terengganu, Johore had its first legislation on copyright in 1931.⁸⁶ The system introduced in Johore was different from those introduced to other states. It provided for a deposit system for printed work in Johore⁸⁷. The interesting characteristic of this ordinance was that it regulated all publication in Johore, where no printing and publication could be done unless according to this enactment.

As far as trade marks was concerned, the same development as in the Straits Settlement can be discerned. The first law regulated the fraudulent use and forging

⁸⁴ The Inventions Enactment No. 13 of 1924 which came in force on on 25th. November 1924 introduced dual system and the extension of patent duration to 16 years. S.3 of the Enactment made renewal of exclusive grants automatic.

⁸⁵ Registration of United Kingdom Patents, No.7 of 1937.

⁸⁶ Johore Enactment No. 9/1931.

⁸⁷ The definition of 'book' was wider, includes annual sheet, trade secular, trade advertisements, or any other employment papers relating to legal matters. The word 'printed' was defined as "printed on a book, anything which is printed either by stone print or other similar print".

of trade marks⁸⁸.

Laws relating to registered designs could only be found in Kedah⁸⁹. This statute was later amended on the point of appointment of Registrar and Deputy Registrar.

5 Sarawak & North Borneo

Sarawak was ceded to James Brooke by the Sultan of Brunei in 1841. North Borneo came under British administration in 1865. In 1888 both became protected States.

5.1 Copyright

In Sarawak, only works composed or created in Sarawak or in any part of the British Empire, including protectorates and mandated territories, or by Sarawak authors or British Subjects were given copyright protection⁹⁰. This Order introduced the shorter version of Imperial Act⁹¹. There were only three exceptions noted in the legislation i.e : quotation, publication of a report in the newspaper or periodical and reproduction of speech in a public function and private use for non profit purpose.

In 1936 more substantive provisions similar to the Imperial Act were accepted in Sarawak⁹². Ironically, the jurisdiction of copyright was further narrowed down to works first published within Sarawak or created by Sarawak residents and subjects.⁹³

⁸⁸ Merchandise Marks Enactment No. 4, 1918 of Johore. Under this enactment, the act of counterfeiting was an infringement although the term 'counterfeit' was not expressly defined therein.

⁸⁹ U.K Designs (Protection) No 26 of 1357.

⁹⁰ Order No. C-8, 1935.

⁹¹ 'Copyright' was defined in the 1938 Act as "the exclusive right to publish, republish, produce, reproduce, perform, dramatize or broadcast the abovementioned works."

⁹² Order No C-13 (Copyright), 1936.

⁹³ One important provision introduced in this Act, similar to the Imperial Act was compulsory licensing.

In 1937, minor amendment was made to the principal Order.⁹⁴

In a series of Orders in 1936, copyright in works in Sarawak was extended. Firstly to works first published in Eire, or by citizens of Eire and residents of Eire.⁹⁵ Secondly, to works of Canada, Australia (including Norfolk Island, Papua and the territory of New Guinea), the Dominion of New Zealand (including West Samoa), The Union of South Africa (including South-West Africa) and Newfoundland⁹⁶. Later in 1917, it was further extended to another 40 countries.⁹⁷ Finally in 1939, the Order was extended to recognise all works coming from the Berne Convention countries.⁹⁸

North Borneo's copyright law was also based on the Imperial Act⁹⁹. Following that Ordinance, regulations concerning the importation of copyright works from outside the Colony was made in 1952¹⁰⁰.

5.2 Patent

In Sarawak the first legislation on patents was Order L-1 (Letters Patent) of 1927

⁹⁴ Order No.C-13A (Copyright Amendment) 1937, (date of force 16th. June, 1937).

⁹⁵ Notification 74/39 of the 4th. January, 1939.

⁹⁶ Notification 1234/38 of 1st November, 1938.

⁹⁷ Notification 1434/37 of the 7th. December, 1937.

⁹⁸ Notification 140/39 of 2nd. January 1929. Firstly, right to prevent the reproduction of newspaper or magazine article if such reproduction was forbidden by express declaration . Secondly, for works of certain countries, the protection is conditional upon the publication of that work within 10 years of the first publication in Sarawak and other part of the Majesty's dominions. Thirdly, for musical work of Greek and Siam origin, the right to prevent public performance is dependant whether such act is prohibited by an express declaration. Fourthly, works originating from Siam, the entire rights were conditional upon the accomplishment of the conditions and formalities specified in that country.

⁹⁹ Ordinance 4 of 1935.

¹⁰⁰ The Copyright Regulations Ordinance No.9, 1952 of North Borneo. This ordinance has the same objective of the 1914 ordinance, to prevent importation of works from outside the Colony. Notice should be given by the owner of the work who are desirous of preventing copies from being imported in the colony. The subject matter of the ordinance is "books or other printed work" as every part or division of a book, pamphlet, sheet of letter press, sheet of music, map, plan, chart or table separately published.

which came into operation on 16th August, 1927.¹⁰¹ The Order provided for those who hold a grant of letters patent in the Great Britain or in the Federated Malay States to apply for petition for grant of such rights in the Sarawak.

North Borneo adopted the Straits Settlements Inventions Ordinance in 1887.¹⁰² In 1908, the Governor of North Borneo passed a second proclamation, only to reinstate the same substantive provisions.¹⁰³ Along with the changes in other states, the dual system was abolished in 1937.¹⁰⁴ In 1949, the North Borneo 1937 Enactment was extended to Labuan and changes were made to the principal Ordinance to that effect.¹⁰⁵

5.3 Trade Marks and Designs

In relation to trade marks in Sarawak, a registration system was adopted in 1934¹⁰⁶. The Order provided for the exclusive right to the use of a mark in connection with particular class of goods. Damages can be obtained against unauthorised user. To bring the legislative provisions on trade marks consistent with other states, an Order was passed to prohibit the use of marks similar to Royal Arms, Royal Crests, Sarawak Arms, British National flags or other flags of any of British's dominions.¹⁰⁷

Labuan incorporated the Straits Settlement's law relating to fraudulent marking of

¹⁰¹ See also Order No.26 of 1922 (copies missing) and the Rules passed thereon under No.CVX, 1922.

¹⁰² See Proclamation I of 1887 (copy missing from the IALS Library).

¹⁰³ See Proclamation II of 1908 which came into force on 1st. of July, 1908.

¹⁰⁴ See the Registration of United Kingdom Patents Ordinance No.9/ 1937 which came into force on 3rd of March 1938.

¹⁰⁵ See Ordinance No.16 of 1949 (11/8/1949) and No.4 of 1950 (3/5/1950). Minor amendments were made in 1956, see No.1 of 1956 (12/5/56).

¹⁰⁶ Order No T-3, 1934.

¹⁰⁷ Order No. T-3 (Trade Marks) 1934.



merchandise in 1891.¹⁰⁸ A register of trade marks was set up in 1893.¹⁰⁹ These two laws were repealed in 1928¹¹⁰. The 1928 Ordinance was a shorter version of the Straits Settlement 1938 Ordinance on registration of trade marks. In 1947, Straits Settlement's Ordinances on trade marks and merchandise marks ceased to apply in Labuan, and Labuan is united with the North Borneo.¹¹¹ In its place came the Merchandise Marks Ordinance 1928. The principal law was amended to reinstate marks which were registered before the unification (or pre occupation marks).¹¹²

Designs registered in the United Kingdom were enforced in the North Borneo in 1940.¹¹³ In 1951, the Straits Settlement's United Kingdom Designs (Protection) Ordinance, 1938 were repealed.¹¹⁴

6. The Federation of Malaya & Post Independence

Upon the formation of the Federation of Malaya, laws relating to patents, trade marks and designs were consolidated. In the case of invention and designs, the same system of registration of patents/ designs granted in the United Kingdom was retained.¹¹⁵ Both these laws applied only to West Malaysia. The laws in Sabah and

¹⁰⁸ Ordinance No.III of 1891. (1st April 1891).

¹⁰⁹ Ordinance No.IV of 1893. (1st. November, 1893).

¹¹⁰ Ordinance No. 2 of 1928.

¹¹¹ Merchandise Marks (Unification) No.15 of 1947.

¹¹² Merchandise Marks (Amendment) No.16 of 1947.

¹¹³ Ordinance No.2 of 1940. (13th. January, 1940).

¹¹⁴ No.39 of 1951 (date of force 8th. December, 1951). The Ordinance also substituted the word 'colony' with 'state'.

¹¹⁵ See Federation of Malaya, The Registration of United Kingdom Patents Ordinance, No.9 of 1951, and United Kingdom Designs (Protection) Act, 1949.

Sarawak remain unchanged¹¹⁶.

In relation to trade marks, the law in West Malaysia was consolidated in 1950¹¹⁷. Most of the features of the previous law relating to trade mark and merchandise marks were retained. Again, the laws in North Borneo and Sarawak remain unchanged.¹¹⁸

The law relating to copyright remained unchanged in all states until 1969. Upon independence there were several laws applicable in Malaysia. In Penang and Malacca, the applicable law was the Imperial Act 1911 (as amended by no.24/1918). In Federated Malay States, Enactment Cap 73 was still in force and in Sabah and Sarawak the law in force was the United Kingdom 1956 Act. In 1969 all these laws were repealed and on its place was the Copyright Act 1969. This Act was further repealed in 1987 with modifications done after the accession to Berne Convention.

7 Conclusion

A few observations can be made from the above elucidation of the various legislations proclaimed in Malaysia, since the reception of English law. Firstly, it is clear from the nature of the laws passed that the earlier laws pertaining to Intellectual Property were principally aimed to safeguard the British interest and trade. Among the first step taken is to buttress infringement of British's Intellectual Property rights by reinforcing the importation of copyright works into the colony and the prohibition of the fraudulent use of goods which may contain the U.K registered marks. The transition to a full registration system for trade marks and patents came in effect several years later when the British trade in Malaya (as it then was) flourished.

¹¹⁶ In North Borneo the law applicable relating to patents is Registration of UK Patents Ordinance No.9/1937. In relation to designs the law is the Ordinance No.2 of 1940. In Sarawak, the law relating to patents is Order L-1 (letters Patent) 1927.

¹¹⁷ Trade Mark Ordinance, No.26 of 1950 and Merchandise Marks Ordinance, No.10 of 1950.

¹¹⁸ Sarawak Order No.T.3 1934 as amended by Order No.T.3 (Trade Marks) 1934; Sabah-Merchandise Marks (Unification) Ordinance 1947.

As far as patents for invention is concerned, the first system introduced was a dual system, providing for the registration of both local and the U.K patents. The requirement of 'novelty' is also very minimal. This criteria is reflective of old English statutes which were carefully drafted for the espousal of importation of outside technology and manufacturing activities. The idea of relaxing the criteria of novelty may no longer be acceptable according to present standards. However, the idea of treating foreign patents on a different basis than local patents may finds its significance in a different form. From the latest amendment to the current Patent Act, foreign applications of patents granted elsewhere will not be subjected to full substantive examination. The rationale is to reduce administrative burden and cost in examining patent applications which had been granted elsewhere¹¹⁹.

In relation to trade marks, two different sets of laws were put in force by the British administrators. The laws relating to fraudulent use of merchandise marks were first introduced. The laws relating to registration of trade marks came much later. This dualism is preserved till this day, signified in the Trade Marks Act 1976 and the Trade Practices Act 1972.

As far as copyright is concerned, the deposit system as administered in Johore has many important significance, if taken up by the legislators in Malaysia today. Having depository system ensures the accumulation of publications in Malaysia in a single / several banks. Thus, by having a deposit system, there would be an easy and ready source of reference available for the public.

¹¹⁹ See S.29(A) (2) of the 1983 Act as amended in 1993 which states:

"If a patent or other title of industrial property protection has been granted to the applicant or his predecessor in title in a prescribed country outside Malaysia or under a prescribed treaty or Convention for an invention which is the same or essentially the same as the invention claimed in the application, the applicant may, instead of requesting for a substantive examination, request for a modified substantive examination".

CHAPTER THREE

THE CONCEPT OF 'MAL' AND INTELLECTUAL PROPERTY

1. Introduction

The concept of 'property' and 'ownership' is discussed in the Islamic jurisprudence as '*mal*' and '*milkiyyah*' respectively. The word '*mal*' refers to the 'res' or subject matter of legal transactions and the word '*milkiyyah*' is discussed by Muslim scholars in the context of rights of ownership. In the Islamic jurisprudence, there are three types of 'res' of property;

- i) '*ayn*' (tangible goods);
- ii) '*dayn*' (debt) and;
- iii) '*manfa'ah*' (usufruct)¹.

The legality of intellectual creations was not directly discussed by classical Muslim scholars as the issue did not exist then. Some of the contemporary scholars justify these intellectual property rights on the basis of '*maslahah mursalah*' (public interest)². This chapter will examine the criteria of '*mal*' as understood and discussed in the four major schools of jurisprudence namely; Shafi'i, Hanafi, Hambali and Maliki. This chapter will discuss, the concept of '*mal*' in the context of "it capable of being the subject matter of the property rights."³

Most of the arguments relating to the acceptance of intellectual property as '*mal*' are discussed by Al-Darini in his scholarly work entitled '*Haqq al-Ibtikar*'⁴. Other

¹ With the exception of the Hanafi school of law, see the discussion at page 67.

² See for example the views of Dr. Khalid Abdullah Abid in his book, '*Mabadi' al-Tashri' al-Islami*', 1986.

³ Bell, *Modern law of Personal Property in England and Ireland*, Butterworths, London (1989) p.3.

⁴ al-Darini, Fathi et.al, *Haqq al-Ibtikar fi al-Fiqh al-Islami al-Muqaran*, Muassasah al-Risalah, Beirut, 1984 (hereinafter referred to as *Ibtikar*).

writings are also referred to such as Sanhuri's 'Masadir al Haqq'⁵ and 'al Wasit Fi al Qanun al Madani', Subhi Mahmasanni's, 'The General Theory of Law of Obligations and Contract Under Islamic Jurisprudence'⁶, Al Khafif in 'Milkiyyah'⁷ and 'Ahkam al Mu'amalah al Shari'iyah'⁸, and Al Ibadi's excellent work on the comparative analysis of ownership in the civil and the Islamic laws⁹.

This chapter will argue that the intangible right of intellectual property is a form of usufructuary right ('*manfa'ah*') within the classification of '*mal*'. The focus of the inquiry is as follows:

- i. The nature of rights in Intellectual Property,
- ii. The classification of things as the subject matter of property in English Law,
- iii. The meaning, definition and classification of '*mal*' in the Islamic Law,
- iv. The meaning and understanding of '*manfa'ah*' in the Islamic Law.

This inquiry will next focus on the jurisprudential arguments on the concept of ownership in intellectual property. In this respect, the arguments given by Al-Qarafi and Ibn. Hazm are analysed. Another objection to the recognition of intellectual property is the concern that recognising exclusive rights over 'ideas' may be in possible contradiction to the religious prohibition against the concealment of '*ilm*'. In this chapter, the various Qur'anic injunctions and Prophetic '*hadiths*' pertaining '*ilm*' are analysed. It is the contention of this thesis that the recognition of intellectual

⁵ Sanhuri, Abd. al-Razzaq, Masadir al Haqq fi al-Fiqh al-Islami, (1954), Cairo, 6 vols. in 2, hereinafter referred to as Masadir al-Haqq.

⁶ Mahmassani, Subhi, The General Theory of Law of Obligations and Contracts Under Islamic Jurisprudence: A Comparative Study of The Islamic Rites From the Modern Standpoint (1948) hereinafter referred to as The General Theory of Law and Obligations. Dar al-Ilm al-Malayin, Beirut (3rd.ed)

⁷ Al Khafif, Ali, Al Milkiyyah fi Al Shari'ah al Islamiyyah Ma'a al-Muqaranah bi al-Shara'i al-Wad'iyyah, Al Qahirah:Maahad al-Buhuth wa al-Dirasat al-Arabiyyah, 1966, hereinafter referred to as Milkiyyah.

⁸ Al Khafif, Ali, Ahkam al-Mu'amalah al-Shar'iyyah, Cairo, 1948.

⁹ Al-Ibadi, Abdul Salam Daud, Al-Milkiyyah fi al-Shari'ah al-Islamiyyah; Tabi'atuha wa Wazifatuha wa Quyuduha; Dirasah Muqaranah bi al-Qawanin wa an-Nuzum al-Wad'iyyah, 2 Vols, al-Maktabah al-Aqsa, Jordan, 1974.

property does not fall within the said prohibition.

Having established that intellectual property is '*mal*' and that recognition of intellectual property is valid in Islamic jurisprudence, this chapter will proceed with the analysis on the nature of exclusive rights in intellectual property. Being intangible property, the nature of '*mal*' in intellectual property differs from other forms of property. In this section, the focus of the inquiry are the followings:

- i. The distinction between intangible rights of Intellectual Property and the rights in the physical embodiments.
- ii. The nature of rights vis-a vis the third party.
- iii. Other related issues.

2 Terms and definition.

One may take as a starting point a definition directed to layman provided by WIPO; Intellectual Property¹⁰ refers to:

"pieces of information which can be incorporated in tangible objects at the same time in an unlimited number of copies at different location anywhere in the world. The property is not in those copies but in the information reflected in those copies."¹¹

Distinctions are often drawn between information in the abstract ('idea') and in particular expressed form¹². However, the boundary between 'idea' and 'expression'

¹⁰ For the purpose of this chapter, the term intellectual property is used in its widest sense to cover all forms of intangible rights over ideas. The distinction between intellectual property and industrial property would not be relevant for our purposes.

¹¹ World Intellectual Property Organization, Background Reading on Intellectual Property, 3 (1988), cited in Leaffer, M.A (ed), International Treatises on Intellectual Property, The Bureau of National Affairs, Washington, 1990 par. p.3.

¹² See Plix Products v Frant M Winstone 3 IPR 390 where Prichard J distinguished between the general idea or basic concept of a work and the transformation of basic concept into a concrete form.

is not clear, all depends on level of abstraction¹³. As much as we disagree with the proposition that Intellectual Property rights involves the ownership of information at the lowest level of abstraction, as implicated in the definition of WIPO above. In practice, Intellectual Property rights do give control over questions of, whether, when, how and to whom information is disseminated, and give at least some control over its use.

In the convention establishing the World Intellectual Property Organization¹⁴, Intellectual Property was defined in Article 2 as:

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

And in subsection (viii) of the said provision:

"Intellectual Property shall include:

literary, artistic and scientific works; performances of performing artists, phonograms and broadcasts; inventions in all fields of human endeavour; scientific discoveries; industrial design; trade mark, 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".

In this respect, a better way of defining Intellectual Property is by looking at the bundle of rights one has over 'ideas'¹⁵. Hughes for example define Intellectual Property as "non physical property which stems from, is identified as, and whose

¹³ See also Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd (1994) FSR 275, L.B. Plastics v Swish (1974) RPC 551, Computer Associates v Altai, (1992) 982 F.2d 693 (2nd. Cir), Nichols v Universal Pictures 4 S F 2d 119 at 121 (2nd Cir 1930).

¹⁴ The Convention was signed at Stockholm on July 14, 1967. For a copy of the Convention, see Leaffer, *op.cit* p.566.

¹⁵ The word 'ideas' here has to be understood as 'applied ideas' as opposed to 'pure ideas', the latter not being the subject matter of intellectual property.

value is based upon some idea or ideas"¹⁶. It is clear that in defining Intellectual Property, one has to be careful to distinguish between absolute property rights in ideas (which are not seen as the effect of Intellectual Property) and the rights to control the use of the ideas in specified ways (which are). Hence, Hughes argues that 'where X is the idea, Intellectual Property is defined by the external functions of X'¹⁷.

the subject matter of
The term used by Muslim scholars to describe these intangible rights is '*ibtikar*'¹⁸. '*Ibtikar*' refers to intellectual ideas which are the product of one's labour, effort and expenditure, these ideas being new and not being invented by a prior person¹⁹. The term '*ibtikar*' here according to the Faruqi Law Dictionary means invention or creation; '*mubtakir*' means newly created, novel, new or original and '*intaj al-zihni al-mubtakir*' means inventive intellectual creation. While '*ibtikar*' is used in a wide context to cover all fields of Intellectual Property, other terms are also used such as used the term '*al-huquq al-adabiyah wa al-fahmiyyah wa al-faniah wa al-tijariah wa al-sina'iyah al-muta'arif biha lil-muallafin wa al-musiqin wa al-mukhtarin*'²⁰ (rights related to cultural, intellectual, artistic, commercial and industrial more known as author's, musical and inventor's rights.) Other terms being used by others are '*haqq lil muallif*' (author's rights) and '*haqq al ikhtira*' (inventions/patents rights).

3 Classification of 'things' and related terms.

In the classical English law, the confinement of property to mere corporeal substances is reflected by Austin who defined 'things' as:

" permanent objects, not being persons, as are sensible or perceptible through the sense. Or (changing the expression) things are such permanent external

¹⁶ Hughes, Justin, The Philosophy of Intellectual Property, The Georgetown Law Journal, Vol 77 p.287 par. p.294.

¹⁷ Hughes, p.294, op.cit.

¹⁸ See Darini, Fathi, Haqq al-Ibtikar. p.9.

¹⁹ See al-Darini p.9 op.cit.

²⁰ See Subhi Mahmasanni, op. cit. p.19.

objects as are not person"²¹.

This classical view is subjected to frequent changes. The notion of the subject matter of ownership has expanded to include choses in action, certain rights and other intangible rights such as intellectual property. Salmond took the view that the true subject matter of ownership was in all cases a right, on the ground that it would be a logical absurdity if the subject-matter was sometimes a material object and sometimes a right²².

Unlike Salmond who argued that all rights were necessarily ownership rights, the English law differentiates between rights which are treated as 'things' and those which are not. Commonly recognised rights which are not considered as 'things' include the right of expression and right to own one's body. Hence we see that the meaning of 'rights' is wider than the meaning of 'things', Dias argues that the meaning of ownership is coterminous with that of 'things'²³. This conclusion is consistent with the jurisprudential argument on the nature of ownership of copyright and patents,

²¹ Austin, Jurisprudence, Vol.2, edited by R.Campbell, London, John Murray (1873), cited in Bhalla, The Institution of Property: Legally, Historically and Philosophically Regarded, Eastern Book Company, Delhi, 1984 p.250.

²² See Fitzgerald, P.J, Salmond on Jurisprudence, 12th.ed, Sweet & Maxwell, London (1966).

²³ See Dias, R.W.M., Jurisprudence, 5th. ed. (1985), Butterworths, London p.295. See also the objection by Professor Williams on this point. He argued that associating ownership with the concept of 'things' as amounting to a substitution of the word 'things' for 'rights'. See Williams, Language and the Law (1945) 61 LQR 386 cited in Dias, p.297, op.cit.

which to him are treated as 'things'²⁴. On the other hand, on the same basis, there is a wealth of jurisprudential debate whether 'ideas', 'information' and trade secrets can be considered as property²⁵.

Lawson & Rudden (1982) classify the ownership rights of patents and copyright as a form of choses in action²⁶. In English law the classification of property in the sense of subject matter of ownership is as follows: land, goods, tangible movables other than money, choses in action i.e intangibles movables such as debts, patents and copyright, money and funds. Patents and copyrights are considered as choses in action because like debt their value depends on the intangible rights and not the physical medium. This classification ignores statutory provisions which characterise Intellectual Property as personal property, without being a thing in action²⁷.

In Islamic jurisprudence, the subject matter of property can consist of '*ayn*' (physical things), '*dayn*' (debt), '*manfa'ah*' (usufruct) and certain '*haqq*' (rights). Al Khafif,

²⁴ See Dias, *op.cit* p. 296. For an illustration of the judicial reluctance to afford general protection to all intangible 'things' see the case of Victoria Park Racing and Recreation Grounds Company Limited v. Taylor and Others, (1937) 58 C.L.R. 479. Dixon J. (as he then was) of the Australian High Court summed up the Position at p.509:

"(The courts) have not in British jurisdiction thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organisation of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the law of copyright and by the fact that the exclusive right to invention, trade marks, designs, trade name and reputation are dealt with in English law as special heads or protected interests and not under a wide generalisations."

For an alternative view, see, Libling, D.F, The concept of property: property in intangibles, 1978, LQR, Vol 94 p.103-119.

²⁵ See Roberts, R.J, Is Information Property?, Intellectual Property Journal, (1987) p.209 - 215; Soltysinski, S.J, Are Trade Secrets Property?, (1986) IIC, Vol. 17 p.331-355; Hammond, Grant, The Legal Protection of Ideas, Pt.1 and II, (1992) 8 CLSR 111.

²⁶ See p.20, Lawson & Rudden, The Law of Property, 2nd. Ed. Clarendon Press, Oxford, 1982 par. Ch.II on classifications of things.

²⁷ S.30 of the U.K Patents Act 1977 which characterise patents as personal property without being a thing in action. See also S.1(1), S.90(1) and 96(1) of the U.K CDPA 1988 which characterise copyright as personal property. The position is the same with trade marks, see S.22 of the 1994 U.K Trade Mark Act.

explained the distinction between '*shai'*', '*ain'*' and '*manfa'ah*'²⁸. In Islamic jurisprudence, the term '*shai'*' is used to signify everything which is in existence either in the physical sense ('*hissan'*') or in the legal sense ('*hakaman'*'). The later refers to intangible things which exists in notions such as words (non printed). Everything which is known to exist is classified as '*shai'*'. '*Ain'*' refers to all corporeal things which may be '*mal'*' or non '*mal'*'.

'*Manfa'ah*' comes from the root word '*na-fa-a*', which literally means "benefit" or "utility" and is used in contrast to '*dharr*' (harmful or injurious). Al-Khafif argued that rights of '*manfa'ah*' was contingent upon the existence and the legality of the physical embodiments and hence not considered as a right which can stand on its own. Mahmassani in his work, agrees on the last issue and points out that there are certain '*manfa'ah*' which are not '*mal'*' such as the enjoyment of sunlight, air and the right of neighbourhood ('*haqq al-jiwar*') which to him are not capable of being the subject matter of legal transactions²⁹.

'*Dayn*' is another form of property. '*Dayn*' refers to debt, financial obligation and liability ('*dhimmah*') and therefore in many respects similar to the conception of 'choses in action' in the English Law³⁰.

4. The meaning of '*mal*' under the established rules of *Fiqh* (Islamic Jurisprudence)

The term '*mal*' comes from the root word '*ma-wa-la*' which means to enrich.³¹ '*Mal*' is discussed in Islamic Jurisprudence in the perspective of legal transactions or

²⁸ See the al Khafif, Ali, *Al Milkiyyah* , op.cit. pgs.9-11.

²⁹ The General Theory of Law of Obligations and Contracts, op.cit. vol.I p.11.

³⁰ See Sanhuri, *Masadir al-Haqq fi al-Fiqh al-Islami*. vol.I p.13-20.

³¹ Al Mawrid, A Modern Arabic-English Dictionary, Dar al 'Ilm lil Malayin, (1992).

'res in Commercio'.³² The concept of ownership or '*milkiyyah*' is wider and it includes proprietary and non proprietary rights.³³ A modern definition of '*mal*' is "[a]ll that has commercial value," or "[t]hose corporeal, usufructuary and other rights of any kinds of any kind the exchange of which is customary are to be regarded as property (*mal*) of commercial value." It includes both movables and immovables, both specific objects and their use (or income which they produce), both what a man owns and has in his possession, and what is owed to him (i.e choses in action)³⁴.

Al-Darini, classifies intellectual property rights using the established Islamic legal rules, by means of '*Qiyas*'³⁵ - to usufructuary rights ('*manfa'ah*') of tangible goods. Muslim scholars have discussed '*manfa'ah*' in the context of rights issuing of, and incidental to, the rights of ownership of tangible property such as in the context of right to '*intifa'*' (right of enjoyment) and the right to '*irtifaq*' (easement)³⁶. In this respect, there is a critical conceptual gap between the understanding of the concept of '*manfa'ah*' in classical works and Al-Darini's view. The concept of '*manfa'ah*' in classical works refers to the collaterals of tangible property and hence treated as incidentals to physical property. Intangible rights of Intellectual Property, while manifested in physical embodiments, exist independently and are not dependent upon the physical elements. The physical embodiments are mere vehicles and do not determine the proprietary nature of the intangible property.

³² See Schact, Joseph, Introduction to Islamic Law, Oxford University Press : Oxford, 1964. p.134.

³³ Among non proprietary rights considered as '*milkiyyah*' are '*haqq al-hadanah*' (rights of guardianship), '*haqq al-wakalah*' (right of agency) and '*haqq al-nikah*' (right accruing from a marriage contract).

³⁴ International Encyclopedia of Comparative Law, J.Norman D. Anderson, Islamic Law, Vol.VI, ed. by Frederick H.Lawson, (Tubigen: Mohr,1976).

³⁵ '*Qiyas*' is defined as "the accord of a known thing by reason of the equality of the one with the other in respect of the effective cause ('*illah*') of its law", Al Subki, *Jama' al-Jawami* Vol.iv.p.1. It is the application or extension of the law established by a binding authority to a particular case. '*Qiyas*' is accepted by all schools of jurisprudence as one the sources of Islamic Law. See Prof. Ahmad b. Ibrahim, Sources and Development of Muslim Law, (1965), p.23.

³⁶ Subhi Mahmasanni, The General Theory of Law of Obligations and Contract under Islamic Jurisprudence, op. cit. vol.1 pgs. 20-25.

Despite this conceptual gap, Al-Darini's view can be accepted on many basis. Firstly, the essential element of '*manfa'ah*' is its utility. This is the view of Imam Izzu ib. As Salam, who opined that the '*athar*'³⁷ (effect) of '*manfa'ah*' enjoyment and benefit.³⁸ Secondly, even though the proprietary of intellectual property is independent of physicality, intellectual property in most cases requires tangible medium. In this respect, the usufructuary rights of intellectual inventions differ from usufructuary rights of tangible property in two ways; source and origin. While the source and origin of usufructuary rights of tangible property are the physical property itself, the origin and source of intellectual inventions is human intellect or effort which can only be understood notionally.

Under Islamic jurisprudence, usufructuary rights in intellectual ideas, when residing permanently in the medium which it is expressed in, is analogous to the usufructuary right of tangible property when separated from its origin. The exploitation of the usufruct is independent of and separate from the origin and source of the intellectual property, leaving the origin as clear evidence of the link between the author and his intellectual creations.³⁹ Tangible property however cannot be separated from its usufruct in the sense that the tangible property itself has to be possessed if its usufruct

³⁷ When the '*Shari'a*' value consist not a connection of one thing with the other, it is either a quality of an act by a legally responsible person ('*mukallaf*'), such as the quality of an act being allowed ('*ibahah*') or prohibited ('*hurmah*') in the Shari'a, or it is the effect ('*athar*') of such an act - such as ownership - which is the effect of the act of purchase. These are some of the meanings, expounded by the jurists, whereby a declaratory law under the Shari'a derives its character. See Ahmad b. Mohd. Ibrahim, Sources and Development of Muslim Law, p.34 op.cit.

³⁸ The oft-quoted statement from Imam Izzu ibn. As- Salam is '*al gharad al azhar min jami' al amwal*'. See also the loose definition given by Imam Ibn Arafah at p. 73 supra. He defines '*manfa'ah*' as intangible rights which cannot be apprehended notionally. Arguably, this includes the intangible rights of intellectual property.

³⁹ The relationship between the author and his intellectual creations is described as a special relationship ('*alaqah ikhtisasiyah*') by the author in the sense that it is a direct relationship and not interrupted by another person. Al-Darrini argued that because of this direct relationship, one's ideas reflect a person's personality '*shakhsiyah*'. This means that the originator of an idea does not only owns it for purposes of transactions but is also held responsible to it. See al-Darini, p.16, op.cit.

is to be used.⁴⁰

5. The position of usufructuary rights 'manfa'ah' and intellectual creation under the classification of 'mal' according to the schools of jurisprudence.

5.1 The Hanafi school of jurisprudence

The classical Hanafi jurists did not generally accept 'manfaah' as 'mal' (with certain exceptions) because one of the requirements to constitute property under this school of jurisprudence is the physical possession. In 'Majallatul Ahkam', 'mal' is defined as 'what is by nature inclined and liked by humans (i.e something which apt to benefit humans) and can be stored and preserved until the time of need." Through this definition, it is clear that the Hanafis define 'mal' from its linguistic meaning⁴¹. Al-Khafif defines 'mal' as something which is capable of being possessed, physically acquired, where normal enjoyment is possible in ordinary times ('adah')⁴² (as opposed to 'idhtirar' (times of emergency).

From the above, it is clear that the criterion of 'mal', according to the Hanafis are:

- (i) something which is by nature liked by humans,
- (ii) physical or corporeal goods which can be possessed, acquired and stored.

By this conception, non-tangible 'things' such as sunlight and 'ilm' are not 'mal'. Similarly, 'things' which are trivial in amount are not capable of being consumed by normal enjoyment such as a grain of rice or a blade of grass, are not 'mal'. Likewise 'mubah' things such as fish and birds are not considered as 'mal' until they are acquired and possessed.

⁴⁰ To understand this concept the most easiest example is a contract of hire of a chattel, the chattel remains under the possession of the hiree on trust to be utilised until the end of the contractual period when the chattel has to be returned.

⁴¹ The rootword of this word is 'ma-wa-la', 'yamilu', 'mal'.

⁴² See al Khafif, Ali, Ahkam al Mu'amalah al Shar'iyah, op. cit. p.9.

The general rule is that all these requirements need to be satisfied in times of '*ikhtiyar*' and not in times of emergency ('*idhtirar*'). Hence, wine is not considered as '*mal*' as according to the normal ruling the consumption of wine is prohibited. The skin, bones and other parts of dead animals, are '*mal*', in contrast to the flesh of dead animals (or animals which have not been ritually slaughtered), as the prohibition of dead animals is in the context of consumption of the flesh.

With the requirement of corporeality, intangible rights such as '*manfa'ah*' and '*haqq*' are not considered as '*mal*'. Further, these intangible rights are not permanent ('*istiqrar*'), they are contingent upon the possession of the physical embodiments and cannot exist on their own. For example, the right to reside a house will only arise upon acquiring the ownership of the house. Thus according to this view, any transgression of usufructory rights will not give rise to any damages. When a property is wrongly confiscated, the tangible property should be returned. The Hanafis do not require the compensation of any unlawful use and enjoyment of the confiscated good. Secondly, the Hanafis do not accept the transmissibility of '*manfa'ah*' upon death. Hence, a contract of lease will expire upon the death of the lessor.

The Hanafis, however, accepted the validity of certain transactions involving '*manfa'ah*' such as the contract of lease ('*ijarah*'). In this respect, the Hanafis draw a distinction between '*mal*' and '*milkiyyah*' and stipulate that even though '*manfa'ah*' rights are not '*mal*', they can be the subject of '*milkiyyah*'. In some exceptional circumstances, the Hanafis have recognised '*manfa'ah*' as '*mal*' via the application of '*istihsan*'. Hence when the property of orphans or a '*waqf*' property is unlawfully appropriated, any unlawful enjoyment and usage of it should be compensated⁴³.

Other scholars criticise the views of the Hanafis. To them the Hanafi conception of '*mal*' is not consistent with accepted legal practice. In the Qur'an for example,

⁴³ For further elaboration, see Badran, Abu al-'Aynayn Badran, *Al-Shari'ah al-Islamiyyah: Tarikhuha wa-Nazariyyah al-Milkiyyah wal-'Uqud*, (n.d) Muassasah Shihab al-Jami'ah, Alexandria par. pgs 304 & 305.

'*manfa'ah*' is accepted as a valid dowry, and hence should be '*mal*' as only '*mal*' can be given as dowry⁴⁴. Many contemporary Hanafi jurists accept the proprietary nature of '*manfaah*' as property as it is customarily regarded as having commercial value ('*mutaqawwimah*')⁴⁵.

5.2. The Shafi'i school of jurisprudence.

Property is anything ('*ma*') which it is permitted under the Shari'ah to benefit, either corporeally or by usufruct...⁴⁶ Unlike the Hanafis who emphasize the corporeality of a thing the Shafi'is emphasize its utility and value⁴⁷. A thing will be of 'value' if it has commercial value in the sense of being traded or that which necessitates compensation when damaged. The Shafi'is also exclude whatever is expressly prohibited in the Qur'an.

The use of the relative pronoun ('*ma*') in the definition given by Al-Zarkashi above, which means "whatever", "all that", indicates the inexhaustiveness of the definition and arguably may include intellectual creations. What determines whether something is of value or not is the accepted '*urf*' (customs) among the people at large according to Imam Sayuti⁴⁸.

⁴⁴ See *Surah al Nisa*: 24;

"Thus hath Allah ordained (prohibitions) against you: except for these, all others are lawful, provided ye seek (them in marriage) with gifts from your property".

See also *Surah al Ra'd* : 16:

"*la yamlikuna li anfusihim naf'an wa la dharran.*"

⁴⁵ See al Zarka, *al Madkhal ila Nazariyyah al Itizam al Ammah*, Matba'ah Jami'ah, Damshik, (1959) par. pgs. 113-120.

⁴⁶ See *Qawaid al Zarkashi*, p.323 as cited in *Haqq al-Ibtikar* p.23, op.cit.

⁴⁷ See al Rashid, Abdullah ibn Abd. al-Rahman, *Al-Amwal al-Mubahah Wa Ahkam Tamlikuha fi al-Shari'ah al-Islamiyyah*, 2 vols, (1984) *Sharikah al-Tiba'ah al-'Arabiyyah*, cairo. vol.I.p.28.

⁴⁸ P.23 *Haqq al-Ibtikar*, op. cit.

5.3 The Hambali school of jurisprudence.

'Mal' is something which is permitted to be enjoyed ('*manfa'ah mubahah*') in normal circumstances i.e not in necessity or exigency ('*darurah*' or '*hajah*')⁴⁹. Thus the conception of '*mal*' according to the Hambalis is near to that of the Shafi'is. The emphasis is not on corporeal existence but on utility and value. From this definition it has been extended to include every benefit which is of commercial value among the community. Likewise, the Hambalis exclude those goods which are expressly prohibited in the *Shari'ah* from the domain of '*mal*'.

5.4 The Maliki school of jurisprudence.

'Mal' is anything which can be owned and which all the incidental rights of ownership can be exercised⁵⁰. Imam al-Shatibi, who is one of the main Maliki jurists, is of the view that property refers to the legal entitlement of an owner, as ownership is the relationship between the owner and the thing owned. Imam Al-Qarafi added that such legal entitlement may vest in corporeal and non-corporeal things. (Again the use of the word "'*ma*'" here indicates the inexhaustiveness of the definition). Thus with this relationship, it is clear that an owner has a right to prevent others from encroaching his legal entitlements on the property or exploiting it without his consent⁵¹.

Other scholars disagree with the Malikis' approach on equating '*milkiyyah*' and '*mal*'. They point out that not everything which is classified as '*milkiyyah*' is '*mal*'. *Milkiyyah* as understood in Islamic jurisprudence, which is the bundle of rights possessed by somebody, includes non-proprietary rights such as rights of guardianship, rights of '*wakalah*' and rights of '*wazifah*'.

⁴⁹ See Ibn Qudamah, *al-Mughni*, cited in *Haqq al-ibtikar* p.23, op. cit.

⁵⁰ See al Shatibi *al-Muwafaqah*, cited in *Haqq al-ibtikar* p.35, op. cit.

⁵¹ Al-Qarafi *al-Furuq*, cited in *Ibtikar* p.32, op. cit.

With such a wide definition, one can argue that the Malikis include both tangible property and usufruct in their conception of '*mal*'.

5.5 Views of other jurists on the concept of property.

Imam Ibn. Arafah defines '*manfaah*' as things which can only be apprehended notionally and not in the normal sensory meaning. He defines property to include both corporeal and chattels. Imam Ibn.Arafah further distinguishes '*manfaah*' which resides in tangible things and can be indirectly possessed and exploited from those which cannot be exploited. The latter is not considered as property. Examples of the latter is the intellectual character or the attribute of inventiveness of a creation⁵².

It has long been accepted since the period of the Companions of the Prophet ('*Ashab*')⁵³ that a contract of employment or labour is valid on the basis of the acceptance of '*manfa'ah*' of labour as a valid subject of contract. On the same line of argument, intellectual creations have a prior right as (they are) of greater effect ('*athar*') and greater significance ('*intifa'*').

Imam Shatibi views property differently. To him ownership is the essence of property. No ownership is possible unless something which has benefit and commercial value. Arguably '*manfa'ah*' which has all these attributes can be owned as property. Thus ownership here does not mean corporeality but equally reside in corporeal, '*manfa'ah*' and rights⁵⁴.

It is clear that corporeality is not the essential element of property. As to physical possession, this is not necessary as intellectual creations can be possessed indirectly through the medium which it is attached. There should not be any difficulty in accepting intellectual creations as '*manfa'ah*' and consequently, valid property under

⁵² Ibn Arafah, *Sharh Hudud*, cited in *Haqq al-Ibtikar* p.90, op. cit.

⁵³ This is the period under the first four Caliphs; Abu Bakr, 'Umar, 'Uthman and Ali.

⁵⁴ Cited in *Haqq al-ibtikar* p.35, op. cit.

the Islamic Law.

In conclusion, the basis of recognition of intellectual creations as property under Islamic Law lies on two grounds:

- i. *'Manfaah'* which is allowed under the Shari'a
- ii. *'Urf'* or recognised custom⁵⁵.

The outcome is the same for those jurists who argue that the bases of property under Islamic Law are "commercial value" and *'urf'*. Intellectual creations have been accepted by *'urf'* (recognised custom) to have commercial value (*'taqawwum'*). The *'jumhur ulama'* (majority of the jurists) accept this determination so long as there is no contrary *'nass'* (definitive principle of the law). The *'jumhur ulama'* (the majority of the scholars) also agree that anything which is forbidden under the Shari'ah cannot be accepted as recognised property. Hence, the subject matter of Intellectual Property is also subjected to the fulfilment of the requirement of legality. The elaboration on the concept of *'halal'* and *'haram'* and its application on Intellectual Property will be dealt with separately in each subject-matter: copyright, trade mark and patent. On this basis, content based restrictions are part and parcel of an Islamic perspective of Intellectual Property⁵⁶.

Earlier in this chapter, it has been pointed out that intellectual creations can be a form of usufructuary right (*'manfa'ah'*). From the above discussion of the position of

⁵⁵ *'Urf'* is defined as 'recurring practices which are acceptable to people of sound nature'. *'Urf 'am'* means customary practices which are prevalent everywhere and on which the people agree regardless of the passage of time while *'urf khas'* means customary practices which are prevalent in a particular locality, profession or trade. Conditions of valid *'urf'* are;

i) *'urf'* must represent a common and recurrent phenomenon; Article 14 *Majallah al Ahkam al Adliyyah* : "effect is only given to custom which is of regular occurrence".

ii) Custom must also be in existence at the time a transaction is concluded. In contracts and commercial transactions, effect is given only to customs which are prevalent at the time the transaction is concluded and not to customs of subsequent origin. For further elaboration see the work of Kamali, Muhammad Hashim, *Principles of Islamic Jurisprudence*, Islamic Texts Society, Cambridge, 1991, p.286.

⁵⁶ The precise understanding of what is considered as *'halal'* and *'haram'* is coloured by juristic disagreement. This thesis will not elaborate on the whole corpus of literature and arguments on this matter. For further reference see, El-Helbawy et. al, *The Lawful and the Prohibited in Islam* being the translation of Al-Qaradawi, Yusuf, *Al-Halal wal-Haram fil-Islam*, American Trust Publications, USA (19--).

'*manfa'ah*' within the classification of '*mal*' as understood in Islamic Jurisprudence, this study proceeds to the discussion of other jurisprudential arguments against the recognition of Intellectual property. The discussion will question the plausibility of these arguments and contend that these objections are not sustainable.

6. Jurisprudential objections against the recognition of Intellectual Property.

Ibn Hazm in '*al-Muhalla*', denies the proprietary nature of intangible rights in written works. To him, the transaction of books are allowed since what is being traded is mere papers and ink. '*Ilm*' to him is not '*mal*' and hence cannot be the subject matter of transactions as '*ilm*' is not tangible. He cites numerous '*athar*' and '*khobar*' to demonstrate that transaction of '*mashaf*' was discouraged by the Prophet. Not only is the buying and selling of '*mashaf*' was discouraged, even the reduction to writing of '*ilm*' was discouraged by the Prophet(p.b.u.h)⁵⁷. Ibn Hazm rejects the validity of these '*athar*' and argues that it is clear that '*bai*' (transaction) is expressly legalised in the Qur'an. Hence to him, there is no basis for the rule against the transaction of books. He does not, however, recognise the proprietary nature of '*ilm*'⁵⁸.

Imam Al-Qarafi, doubts whether '*ijtihad*' (juristic independent opinion which is the result of intellectual exercise on certain issues), is property and can be owned⁵⁹. Recognised technique in Islamic jurisprudence is that of '*qiyas*'(analogy) in Islamic jurisprudence, from accepted premise ('*asl*') to the conclusion ('*far*'). Imam al-Qarafi applies this to the fruits of the intellect and reasons that as the '*asl*' (the origin) of such '*ijtihad*' is the intellect, which cannot be inherited, thus its subsidiary ('*far*') equally cannot be inherited. Even if the author can claim a right over his intellectual

⁵⁷ The argument that the reduction of '*ilm*' was discouraged by the Prophet (p.b.u.h) may have originated from the Prophet's discouragement of the writing of '*hadiths*' during his lifetime.

⁵⁸ Ibn Hazm, Ali ibn Ahmad, (d.1301) , *al-Muhalla*, Idarah al-Tibaah al-Munirah, Vol 9 p.44-47.

⁵⁹ Al Qarafi, *Al Furuq*, cited in *Haqq al Ibtikar*, op. cit. pgs.55-80.

products, it is a personal right and not proprietary and cannot be alienated⁶⁰. Furthermore '*ijtihad*' is a religious exercise and anything to do with religion cannot be inherited.

Al-Darini refutes such a contention by quoting a '*hadith*' which narrates that when a person dies and has a right which has not been fulfilled, such rights can be inherited⁶¹.

More fundamentally, Al-Darini argues that the mental faculty or the intellect is not the '*asl*' but the source or inception ('*mansha*') of intellectual creations. Once these ideas are manifested in a medium which exist independently from the '*mansha*', that nature changes. The proprietary nature only vests when they are manifested in some medium. This right can be inherited. Furthermore, to apply the legal position of an '*asl*' to a '*far*' is not correct in this circumstance because of differing '*illah*' or effective cause and nature. In fact, the corporeal part and the usufruct exist independently, therefore, it is not proper to apply the same legal rule⁶².

Secondly, refuting al-Qarafi, it is possible that knowledge can be separated from its origin i.e author or the knowledgeable person. As reported from a '*hadith*' that the religious deeds of a person stop with his demise except in three instances; '*sadaqah*' (voluntary alms-giving), beneficial knowledge he has passed on and the prayers of his children to him.⁶³

Thirdly, Al-Qarafi argues that seeking knowledge is an obligation and hence a form of obedience ('*ta'ah*'). Any form of religious duty cannot be made a form of commercial transaction. Al-Darini answers (that) it is not true that all religious

⁶⁰ Even on this view, it may be argued that intellectual property does not reside in information at the highest, most powerful, level of abstraction and therefore is not inconsistent with the concepts of '*ilm*'.

⁶¹ P.55, *Haqq al-Ibtikar* op. cit.

⁶² See pgs.60, 62 and 74 *Haqq al-Ibtikar*, op. cit.

⁶³ See pgs.65 and 73 *Haqq al-Ibtikar*, op. cit.

endeavours are the absolute rights of Allah the Almighty. The Qur'an has consistently urged Muslims not to neglect the mundane rewards. The Qur'an itself emphasizes the balance of earthly and heavenly deeds. The fact that an act is a religious deed does not stop someone from making a living out of it.⁶⁴ The Prophet (p.b.u.h) during his lifetime accepted the recitation of the Qur'an as a valid '*mahar*' (dowry) for marriage. It is also reported that some '*muhaddithin*' (narrators of '*hadiths*') transmitted '*hadith*' and accepted token of money for their services.

In light of the above, it is arguable that Intellectual Property can be property right on these bases:

- (i) the position of Intellectual creation should not be confused with the position of intellect. An intellectual creation, once expressed, can exist on its own and give rise to a different entity, separated from its origins.
- (ii) with regard to (i) above, because of its severability from its '*asl*', it has a separate value and hence can be transacted separately from the '*asl*'. In the same way, the value of '*manfa'ah*' is unconnected to the value of its '*asl*', such as in the case of compensation for the use of confiscated goods.

The extension of the concept of '*manfa'ah*' to Intellectual Property is methodologically correct. This study will further analyse another important objection against the recognition of Intellectual Property, i.e the objection against any form of exclusivity in '*ilm*'.

7. The possible conflicts between the recognition of Intellectual Property and the religious objections against concealment of '*ilm*' (knowledge).

The Qur'an contain numerous injunctions against the concealment of '*ilm*'

⁶⁴ See p.72 *Haqq al-Ibtikar*, op. cit.

(knowledge)⁶⁵, either in the form of religious knowledge or concealment of action. These injunctions are expressed in the following terms:

2:42: "and cover not the truth with falsehood, nor conceal the Truth when you know (what it is)."

2:140: "Ah! Who is more unjust than those who conceal the testimony they have from Allah".

2:146, referring to the People of the book: "but some of them conceal the Truth which they themselves know."

2:174: "Those who conceal Allah's revelation in the Book and purchase for them a miserable profit".

3:71, referring to the People of the book: "ye people of the Book, why do you clothe the truth with falsehood and conceal the Truth when ye have knowledge. (see also 3:187)

4:42 : "but never will they hide a single fact from Allah".

5:99 : "the Messenger's duty is but to proclaim (the Message) but Allah knoweth all that ye reveal and ye conceal."

5:106: "we shall not hide the evidence before Allah".

Part of the rationale of the prohibition is the requirement that human beings should refrain from being dishonest in their dealing with others. This is made clear through other Qur'anic *'ayah's*; as follows:

2:228, referring to pregnancy which will defer the commencement of divorce : "Nor is it lawful for them to hide what Allah hath created in their wombs".

2:283, referring to the creation of deposit in trust in a journey; "Let the Trustee (faithfully) discharge His trust and let him fear God. Conceal not evidence, for whoever conceals it his heart is tainted."

⁶⁵ The word *'ilm*' comes from the rootword *'a-li-ma'*. In the Qur'an the word *al'ilm* is used to denote *'al-yaqin'* in the sense of religious truth or religious knowledge; see E.W.Lane. This word and its derivatives occurred 105 times in the Qur'an. It word has many connotations; science, knowledge, learning, lore and information. With its wide meaning, Muslim scholars often use the word to denote both religious knowledge and other sciences.

3:167, referring to the hypocrites : "saying with their lips what was in their hearts but Allah hath full knowledge of what they conceal".

5:61, referring to evidence of murder: "Remember ye slew a man and fell into a dispute among yourselves as to the crime, but Allah was to bring forth what you did hide.(see also 2:72)

5:106, referring to testimony of bequest: " we shall not hide the evidence before Allah".

21:110, warning to the hypocrites: "It is he who knows what is open in speech and what ye hide (in your hearts)."

The '*illah*' (effective cause) of this prohibition is the 'concealment of knowledge' and not the prohibition of 'transactions' involving knowledge. Another effective cause in the prohibition against the concealment of knowledge is the possibility that by doing so will lead to falsehood and telling lies, an act which is a sin⁶⁶.

Narrated Ali : the Prophet said:"Do not tell a lie against me for whoever tells a lie against me (intentionally) then he will surely enter the Hell fire."

Narrated Abdullah az-Zubair: I said to my father,"I do not hear from you any narration (Hadith) of Allah's Messenger as I hear (his narrations) from so and so?" Az Zubair replied,"I was always with him (the Prophet) and I heard him saying,"Whoever tells a lie against me (intentionally) then (surely) let him occupy, his seat in Hell fire."⁶⁷

In addition, there are numerous '*hadiths*' which prohibit the concealment of knowledge. In a '*hadith*' reported by Abu Hurairah the Prophet said:

"Whoever is asked of '*ilm*', which he learns and conceals it will be lashed

⁶⁶ Concealment of '*hadiths*' for example is considered as an act of telling lies against the Prophet (p.b.u.h).

⁶⁷ For other variations of the '*hadith*' reported by Anas, Salama and Abu Hurairah, see '*hadith*' No 108,109,110 in Sahih Bukhari, op.cit.

with the bridle of fire from hell"⁶⁸.

In another '*hadith*' reported by Abi Sa'id al Khudri, the Prophet said:

"Whoever conceal '*ilm*' which would benefit others in religious matters , will be lashed with the bridle of fire form Hell on the Day of Judgement"⁶⁹."

It should be noted here that Muslim scholars have differentiated between the position of religious knowledge and other knowledge. The term '*ilm*' in Islamic scholarship is used to denote all forms of knowledge; be it religious or other sciences. As far as religious knowledge is concerned, its spreading to others is obligatory.

Narrated Abdullah ibn. Mas'ud: the Prophet (s.a.w) said:" Do not wish to be like anyone except in two cases: (the first is) the person, whom Allah has given wealth and he spends it righteously; (the second is) the one whom Allah has given wisdom (the holy Qur'an) and he acts according to it and teaches it to others"⁷⁰.

According to Prophetic '*hadith*'s, those who acquire religious knowledge and spread it to others are superior to them.

'*Hadith*' narrated by Abu Musa: the Prophet said:

"The example of guidance and knowledge with which Allah has sent me is like abundant rain falling on the earth, some of which was fertile soil that absorbed rain water and brought forth that vegetation and grass in abundance. (And) another portion of it was hard and held the rain water and Allah benefitted the people with it and they utilized it for drinking, making their animals drink from it and for irrigation of the land for cultivation. (And) a portion of it was barren which could neither hold the water nor bring forth vegetation (then that land gave no benefits). The first is example of the person

⁶⁸ al-Munziri, Abdul Azim ibn Abdul Quwa, *al-Tarhib wa al-Tarhib min al-Hadith al-Sharif*, Vol I Dar al Fikr, p.121; hereinafter referred to as *al-Tarhib*.

⁶⁹ *Al-Tarhib*, op.cit p.121.

⁷⁰ *Sahih Bukhari*, translation into English by Hilal Yakin Lari, Vol II, Book III p.59.

who comprehends Allah's religion and gets benefit (from knowledge) which Allah has revealed through me (the Prophet) and learns and then teaches others. The last example is that of a person who do not care for it and does not take Allah's guidance revealed through me (he is like that barren land)⁷¹.

It is explicit from the Qur'an itself that religious knowledge is a common property which is inherited from the Prophet.

"It is essential to know a thing first before saying upon it, according to the statement of Allah. So know Muhammad (s.a.w) that none has the right to be worshipped but Allah (Q47:19). So Allah stated that one should acquire knowledge first. And religious scholars are inheritors of the Prophets i.e they inherit knowledge. And whoever gains knowledge is lucky and gains a great thing. And whoever followed a way to seek (religious) knowledge, Allah will make easy for him the way to Paradise. Allah (s.w.t) said,"It is only those who have knowledge among His slaves fear Allah (Q35:28) and Allah said," But none will grasp their meaning except those who have knowledge (Q29:43). And also Allah's statement: And they will say: had we but listened or used our intelligence we would have been among the dwellers of the blazing fire.(Q67:10) And Allah also said," Are those who know equal to those who do not know." (Q39:9)⁷²

In other '*hadiths*', it is accepted that a person retains certain rights over his knowledge such as the right to choose the recipient of knowledge and to safeguard religious knowledge which includes imparting it only at the proper time and to the proper

⁷¹ *Sahih Bukhari*, op.cit p.67.

⁷² *Sahih Bukhari*, op.cit p.59. See also '*hadith*' 2.2.(5) in *Umdat al-Salik wa'Uddat al-Nasik*, Translated into English by Noah ha him Keller, *The Reliance of the Traveller* Modern Printing Press, Dubai, 1991 par. p.4.

Hadith reported by Abi al-Darda that the Prophet (p.b.u.h) said:

"Whoever travels a path seeking knowledge Allah makes easy for him a path to paradise. Angels lower their wings for the seeker of knowledge out of pleasure in what he seeks. Those in the heavens and the earth, and the very fish in the water ask Allah to forgive the person endowed with sacred Knowledge. The superiority of the learned Muslim over the devotee is like the superiority of the moon over all the stars. The learned are the heirs of the prophets. The prophets have not bequeathed a dinar nor dirham, but have only left Sacred Knowledge, and whoever takes it has taken an enormous share."

person.

Narrated Anas bin Malik: Once Mu'adh was along Allah's Messenger as a companion rider. Allah's Messenger said, "O Mu'adh bin Jabal". Mu'adh replied, "*Labbaik and saddaik*" O Allah's Messenger!". The Prophet said, "There is none who testifies sincerely that none has the right to be worshipped but Allah and Muhammad is His Messenger, except that Allah will save him from Hell fire." Mu'adh said, "O Allah's Messenger! Should I not inform the people about it so that they may have glad tidings?". he replied, "When the people hear about it, they will solely depend on it". Then Mu'adh narrated the above mentioned '*hadith*' just before his death, being afraid of committing a sin (by not telling knowledge)⁷³.

This right to choose the recipient of '*ilm*' is clear from the following '*hadith*':

'*Hadith*' reported by Anas ibn. Malik, that the Prophet (p.b.u.h) said, "Seeking knowledge is obligatory on all Muslims. The one who gives knowledge to those who do not deserve it is like the one who puts fake jewels and gems to a pig's neck."⁷⁴

In another '*athar*':

It is reported that Harir ibn. Salman ibn. Samir said:

Do not narrate falsehood to '*al-hukama*' (those possessed with wisdom), do not narrate wisdom to '*al-sufaha*' (those who are ignorant) for they will lie against you, do not conceal knowledge to those who deserve it for you will commit a sin, do not narrate it to those who do not deserve it for you will become ignorant. Indeed, you are obliged to observe the right in your knowledge as you are obliged to observe the right in your property.⁷⁵

⁷³ *Sahih Bukhari*, p.96, op.cit.

⁷⁴ *al-Tarhib* p.96, op. cit.

⁷⁵ Abu Muhammad Abdullah ibn. Abd al Rahman (d.255H), *Sunan al-Darrimi*, Dar al Sunnah al Nabawiyah, vol.1 p.105.

The Prophet asked Muslims to respect and revere those who are knowledgeable. This obligation to respect or revere those possessed with knowledge is part of the Islamic conception of ethics and good conduct.

'*Hadith*' reported by Ubadah ibn. Samit :that the Prophet said: "Those are not among my people who do not exalt '*kabiruna*' (the senior among us) and have compassion for the '*saghiruna*' (the junior among us) and do not recognise those who are knowledgeable".⁷⁶

In a variation of the above *hadith* reported by Wa'ilah ibn al Asqa', that the Prophet (p.b.u.h) said:

"Those are not among my people, who do not have compassion for '*saghiruna*' (people with lower ranking) and exalt others '*kabiruna*' (in higher ranking)."⁷⁷

And in another variation of the above '*hadiths*', reported by Amru ibn. Shu'aib: that the Prophet said:

"Those are not among my people, who do not have compassion for people with (the junior among us) or '*saghiruna*' and recognise the honour of '*kabiruna*' (the senior among us)."⁷⁸

From the above discussion, it is thus arguable that, apart from religious knowledge which is a common property, other forms of '*ilm*' can be a subject matter of property. With regard to 'religious knowledge', it is still arguable that a narrow basis of right can be discerned particularly with regard to the rights of '*muhaddithin*' to decide to whom to transmit the '*hadith*'s. There are many reasons for this proposition namely:

i. It is clear from the above *hadiths*, that a person has certain form of rights over his '*ilm*'. The rights may be in the form of choosing the right recipient and the

⁷⁶ al-Targhib, p.114, op.cit.

⁷⁷ al-Targhib, p.114 op.cit.

⁷⁸ al-Targhib p.114, op.cit.

right time of disclosure. Abu Hassan Ali An Nadawi⁷⁹ is of the opinion that an author has the freedom to decide what to do with his intellectual creation⁸⁰. He drew support from the practice of the '*muhaddithin*' who were selective in their transmission of '*hadith*'. This proposition is consistent with our earlier contention that, with due regard to the various abstraction level of ownership of information, Intellectual Property in most cases, involve the control of external use of 'information'⁸¹. The author however cannot prevent others from benefitting from his intellectual ideas⁸². What he has is the right to stop others from commercially exploiting his intellectual creations without his consent.

ii. Secondly, the '*hadiths*' also indicate that a person with knowledge has another right, which is the right to be revered and respected. In the context of Intellectual Property, what more that a person deserves but the recognition that he is the author or the person who brainchilds an idea. This underpins the recognition of moral rights of authors and inventors. Thus, it is arguable that, so long as Intellectual Property rights serve this important role, their validity can be sustained.

iii. Ideas can be a subject of benefit (*intifa'*) as knowledge is one of the objectives

⁷⁹ al-Ibtikar, p. 150, op.cit.

⁸⁰ These are the rights of the copyright owner under S.13(1) Copyright Act 1987; to control the doing of various acts in Malaysia such as reproducing the work in a material form, performance, showing or playing (as amended A.775/90), broadcasting the work, communicating the work by cable and distributing the work to the public by sale, rental, lease or lending (A.775/90). The exclusive rights extends to the whole or substantial part of the work, either in its original or derivative form.

⁸¹ See the discussion on page 59 supra.

⁸² Under the Malaysian Copyright Act 1987, there are acts which do not need the consent of the owner;(i) acts done by way of fair dealing for purpose of non-profit research, private study, criticism or the reporting of current events; (ii) acts done by way of parody, pastiche or caricature; (iii) the inclusion of work for teaching purposes which will include the use of work for the purpose of examination by way of setting the questions, communicating the questions to the candidates or answering the questions (S.13 (2)(ff) A.775/90); (iv) the performance, showing or playing of the work to the public of a work for charitable or educational purpose by a non-profit making club or institution; (v) the use of a work for judicial processes, the making of quotations, and the reproduction of works for purpose of providing information;(see also S.13(3) as amended to include the use of a work in the proceedings of a royal commission, a legislative body and a statutory or Government inquiry; and (vi) the use of work by or under the direction or control of Government, national libraries and archives and certain prescribed institutions so long as it is in the public interest, compatible with fair practice and statutory regulations and that no profit made therefrom.

of the '*Shari'ah*'. Likewise ideas can be a basis in differentiating between one person and others.

In Surah 39: *Al Zumar*, 9 :

"Say:"Are those equal, those who know and those who do not know" and '*hadith*' on the superiority of those who have knowledge to support this contention⁸³. This indicate that 'ideas', unlike religious knowledge, can become the subject of private property.

iv. In fact the exercise of intellectual faculty and thinking is very much encouraged under the *Shari'ah*⁸⁴. The scholars in the past have emphasized on the criteria of creative and intellectual capacity on '*mujtahids*' which is described as '*aql*'. Knowledge and learning is a '*fard kifayah*' (communal obligation) and hence by conferring proprietary rights on Intellectual property, will enhance and promote the objectives of the *Shari'ah*.⁸⁵.

v. There is no direct prescription nor express prohibition under the '*Shari'ah*' against the conception of rights over '*ilm*' and hence Intellectual Property can be recognised.

vi. Furthermore the author should not be deprived of his lawful livelihood. If one can say that the labour of cattle belongs to the owner, why can't one argue that the product of one's ideas belongs to him?.

vii. It has been mentioned that the rationale in the prohibition against the prohibition

⁸³ It is arguable here that the basis of differentiating as understood in both the context of the provision of the Qur'an and the Prophetic '*hadiths*' can be in terms of moral recognition as well as economic entitlements.

⁸⁴ Seeking knowledge is a duty and a form of '*ibadah*'. See Qur'an 39:9," Say, 'Are those who know and those who do not know equal?" 35:28, "Only the knowledgeable of His slaves fear Allah". 58:11, "Allah raises those of you who believe and those who have been given knowledge above degrees".

⁸⁵ See Al-Darini, *Haqq al-Ibtikar* p.14 op. cit. He argued that the conferment of proprietary rights to Intellectual Property is consistent with the obligation of seeking knowledge in Islam.

of 'ilm' is the possibility of falsehood and fraud. In the context of Intellectual Property, the recognition of rights does not lead to the concealment of truth. There are many good reasons to believe that Intellectual Property will result in the reverse. By granting Intellectual Property rights, more works will be disseminated. In the context of patents, technical knowledge is made available to the public through the disclosure requirements. Such information can form a rich source of technical information to others. The recognition of the economic entitlements of copyright owners assists the preparation of works for publication and hence in the long run benefits the users⁸⁶. Accurate representation is made when referring to other works, as copyright law requires acknowledgement of the original author.

viii. Most important, recognition of Intellectual property does not lead to the concealment of knowledge or information. Earlier on, this point has been deliberated in our attempt to provide a satisfactory definition to Intellectual Property rights. The property rights in Intellectual Property do not refer to the information contained in the ideas but to the exclusive rights to control the use of these ideas in certain ways, as provided in the statutes. In other words, the propertisation of 'ideas' does not lead to the monopolisation of 'ideas' but only the exclusive control over⁸⁷ their vehicle. This distinction is very important in Intellectual Property and we shall see the elaboration of this rule and its implications in chapter 8 of this thesis.

⁸⁶ This role of preparation of works is no longer a small factor in the field of publication particularly in databases. Copyright proponent of databases emphasize on the need to give proper reward to publishers for their role in editing and preparing works. For example in the case of Internet, the quality and accuracy of information contained therein is well known. Recognising copyright in databases will further enhance the quality of works.

⁸⁷ See these cases ;Stowe v. Thomas, 23 F. Cas. 201, 206-207 (C.C.E.D. Pa.1853) (No 13, 514):
 "(The author's) exclusive property in the creation of his mind cannot be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed.
 This is what the law terms copy, or copyright".

Mr. Justice Erle of Jeffreys v. Boosey, 10 Eng. Rep, 681 (1854) wrote:

"The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, not the ideas expressed by those words, they existing in the mind alone, which is (sic) not capable of appropriation".

In conclusion, it is arguable that Intellectual Property, in most cases, results in diffusion of knowledge. In this regard, the recognition of Intellectual Property serve the function of '*ilm*'(knowledge) in Islam i.e that of dissemination and easy access.

In a '*hadith*' reported by Samurah ibn. Jundab: that the Prophet (p.b.u.h) said: "There is no other form of '*sadaqah*' that equals knowledge which is being disseminated"⁸⁸.

An in another '*hadith*' reported by Ibn Abbas, that the Prophet said:

"Advise each other in '*ilm*'. Indeed the betrayal or '*khiyanah*' of one of you in '*ilm*' is worse that his betrayal in property. Allah will judge your responsibility"⁸⁹.

The discussion now turns to the nature of '*mal*' in Intellectual Property. The study focusses on the differences and similarity of the characteristics of Intellectual Property as compared to tangible property.

8. Nature of property right in Intellectual Property

In this part, the objective of the inquiry is the nature of proprietary rights in Intellectual Property. Bearing in mind that Intellectual Property is an intangible right, many factors deserve special consideration such as the rules pertaining to alienability, transferability and duration. The nature of exclusive rights in Intellectual Property differs markedly from those in tangible property. The most important distinction in this regard is that between the ownership rights of Intellectual Property and the ownership rights in the physical embodiments. This distinctions carry great significance particularly in delineating the ambit of the exclusive rights of a right-owner ('*sahib al-haq*') of Intellectual property and the rights of others or the third party.

⁸⁸ *Al-Tarhib* p.119, op.cit.

⁸⁹ *Al-Tarhib*, p.123, op. cit.

Of greater significance is the rule that not all 'ideas' qualify to be protected as Intellectual Property. In this respect, the ambit of protectable and non-protectable ideas differ according to the fields of Intellectual Property. These rules and their differences will be examined in detail in the respective chapters relating to copyright, patent and trade-mark.

9. The distinction between protectable and non protectable subject matter

Not all intellectual ideas qualify to be protected as Intellectual Property. Under the common law, in copyright, a work has to exist, with a minimum level of originality; in a patent the invention must be novel i.e not anticipated by prior art, amount to an inventive step and capable of being industrially applied. For trade marks, the marks must be capable of distinguishing the product from other products. Al-Darini, rightly pointed out that being 'new' means that an intellectual creation is not a repetition, or reproduction of previous creation even though in a different form⁹⁰. He however does not deliberate on the yardstick to be applied in determining the requirement of 'new' here. He acknowledges that knowledge cannot be described as new in the strict sense as the present knowledge exists on the accumulated knowledge of the past. There is also a possibility that the idea can be of a forgotten civilisation of the past. Thus the '*isalah*' (strength of origin) of the intellectual creations is relative ('*nisbi*') and not absolute ('*mutlaqah*')⁹¹.

10. Accepted characteristics of 'mal'

10.1 Al-Darini contends that the rights of the author in his intellectual creations is that of tangible property rights⁹² which he describes as '*mutaqarrir*' (quantifiable rights) and not pure rights

⁹⁰ Despite this assertion he admits that translation and other derivative works such as compilation and encyclopedias are entitled for separate copyright. See S.6.2 of chapter five of this thesis for further analysis.

⁹¹ See footnote 1 p. 18 *Haqq al-Ibtikar*, op. cit.

⁹² It is recognised as tangible property rights as these intellectual creations are attached to tangible things. In this sense the meaning of tangible property under Islamic Law is wider than Common Law as it incorporates '*manfaah*' and rights which are '*mali*' and '*non mali*'.

(*'mujarrad'*).⁹³ *'Mujarrad'* right is personal to the right owner, indisposable and terminates with his death⁹⁴. Again the *'illah'* (effective cause) is the fact that such intellectual creations are reflections of the author's intellect and the author has a responsibility over them. Secondly they are the fruits of intellect which can be separated from the intellect itself. An intellectual creation is found in a medium such as book which is capable of being physically possessed. The relationship between author and intellectual creations is direct as there is no intermedium. And the reason why it is a proprietary right is because its medium is tangible⁹⁵. In contrast, al-Sanhuri argues that Intellectual Property rights are personal rights and not property rights. He argues that Intellectual Property lacks the accepted characteristics of *'mal'* such as perpetuity, inheritability and tangibility. It has been elucidated and argued earlier that perpetuity and tangibility are not essential requirements of *'mal'* and hence Intellectual Property is arguably *'mal'*⁹⁶.

10.2 Abu Hassan Ali an-Nadawi views the rights of an author as similar to the rights of a manufacturer.⁹⁷ If the manufacturer can own the manufactured goods, on the same basis an author can own the product of his labour, time, effort and expenditure.

10.3 As far as the determination of the value of the *'manfaah'* is concerned, this can

⁹³ *'Mutaqarrir'* here means rights which can be disclaimed (*'isqat'*) (according to Hanafi, Maliki and Hambali schools of jurisprudence)

⁹⁴ Examples of *'mujarrad'* rights are *'haqq al nikah'* (rights accruing from marriage), *'haqq al wala'* (rights arising from contracts of agency), *'haqq al waza'if'* (rights arising from appointment as a leader) and *'haqq al hadhanah'* (custodian rights). Right for payment of *'diyah'* (bloodmoney) is also a form of personal right as it is personal to the heir of the deceased and cannot be transferred to another person.

⁹⁵ See p.43, *Haqq al-Ibtikar*, op. cit where al-Darini argued that rights over Intellectual Property is *'haqq aini mali mutaqarrir'*.

⁹⁶ *Al-Wasit fi al-Qanun al-Madani*, op. cit. vol.8 pgs.274-491 par. at 281.

⁹⁷ P.149, *Haqq al-ibtikar*, op. cit. Arguably An Nadawi is referring to both the author's moral and economic rights. In Malaysia, S.25 (2) of the 1978 Act endorses the author's right of paternity or authorship, right of publication and right of integrity or right to withdraw or disallow and the right to object to any changes in the work which may affect the integrity of the work as the basic minimum protection as those under the Berne Convention. See also Mokhtar Hj. Jamaluddin v. Pustaka Sistem Pelajaran (1986) 2 MLJ 376.

be done according to the accepted practice in the business circle. For example in the case of copyright, this can be done according to the number of copies produced and published.

10.4 With the recognition of Intellectual Property as '*mal*', any violation of intellectual creations rights is considered as misappropriation of property.⁹⁸ Remedies for misappropriation of property are in the form of damages and restitution.⁹⁹

10.5 On this basis, the author as the rightful owner has the power to enforce his rights over his intellectual creations in the court of law in cases of infringement.

11. Transmissibility, alienability and inheritability

11.1 Since the ownership of intellectual inventions is that of tangible property (and '*mutaqarrir*'), it follows that it can be transferred and transacted upon, inherited¹⁰⁰ and be disposed through will¹⁰¹. Abu Hassan Ali An Nadawi is of the view that this right of inheritance cannot be sold to another person, thus the inheritor cannot accept royalty¹⁰². Prof. Wahbi Sulaiman Gahawazji (p.171) added that if the inheritor

⁹⁸ See Majalla A.881 on the basis of the legal maxim : one who should not reap the property of others without due cause. Subhi Mahmasanni, The General Theory of Law of Obligations and Contracts under Islamic Jurisprudence. See also Sura an Nisa' : 29:

" O ye who believe, eat not up your property among yourself in vanities; but let there be amongst you traffic and trade by mutual goodwill."

⁹⁹ See Majalla A.890/1. The same position can be seen in common law.

¹⁰⁰ Following the '*hadith*' :

"whoever dies leaving property or rights, then it can be inherited by the family".(translation mine)

¹⁰¹ In contrast to the common law practice which allows the alienation and transmission of copyright, the civil law differentiates between economic rights and moral rights. While economic rights can be alienated and transmitted, there are restrictions to the disposal of moral rights, which are considered as personality rights. For more elaboration, see Stewart, S.M, International Copyright and Neighbouring Rights, (1989), 2nd. ed. Butterworths, London, particularly para 15.1 -15.16.

¹⁰² See p.153 Haqq al-Ibtikar, op. cit. Compare to s.25 of the 1987 Act which gives the inheritor or personal representative of the deceased author the same rights as the owner as far as action against infringement and recovery of damages is concerned.

passed away this copyright will not be re-inherited by further successor.¹⁰³

11.2 All these incidental rights to ownership vest in the intangible sense of the creations and not on the corporeal medium. Earlier we have pointed out the importance of distinguishing between the proprietary rights over the physical embodiments and the proprietary rights over the intangible property such as copyright. This distinction is very important in Intellectual Property. Al-Darini explained this by differentiating between '*asl*' and '*thamarah*'¹⁰⁴. Property which may be the source of other proprietary rights is known as '*asl*'. While property which originated from other things is called '*thamarah*'¹⁰⁵. Included in the second group of property is the income from the hire of chattels and movable property, fruits, labour from animals and others which derived from the original property¹⁰⁶.

11.3 Any subsequent change to the medium of the intellectual creations does not effect the ownership rights over it¹⁰⁷. This issue of change of medium is particularly important in the context of copyright such as in the case of translation and compilations. In copyright, any change of medium necessarily results in a separate copyright. In a translation, the translator has a right over his translation, subject to an independent and separate copyright of the original author.¹⁰⁸ This right subsists

¹⁰³ al-Ibtikar, op.cit.

¹⁰⁴ See Haqq al-Ibtikar p.45, op. cit.

¹⁰⁵ '*Thamarah*' literally means fruits. In legal terminology it is used to refer to those kind of 'things' which springs or originates from property.

¹⁰⁶ See Al-Zarqa, Mustafa Ahmad, Al-Madkhal ila An-Nazariyyah al- Iltizam al-'Ammah fi Al-Fiqh Al-Islami, (1946) Vol.3 p.217-218. He points out that '*thamarah*' is also known as '*ghullah*' or '*kharaj*'. The term '*kharaj*' is more popular among Muslim scholars, consistent with the Prophetic hadith, "*al- Kharaj bi al-dhaman*".

¹⁰⁷ P.45 Haqq al-Ibtikar, op. cit.

¹⁰⁸ Under Common Law, translation being a secondary work on the existing source is also protected provided that it satisfies the requirement of originality i.e sufficient skill, labour and judgement expended by the author in creating the work. See Byrne v. Statist Co. (1914) 1 KB 622 & Cummins v Bond (1927) 1 Ch. 167. See also Longman Malaysia Sdn Bhd. v Pustaka Delta Pelajaran Sdn. Bhd. (1987) 2 MLJ 359, which followed Byrne v. Statist Co., to hold that a translation of a textbook from English to Bahasa Malaysia is protected under the Copyright Act. With the effect of A.775/90 derivative works protected under the 1987

in the language translated and not in the original language which it is written. In a translation, often the translator has contributed original effort in his understanding of the meaning and context of the translated text and his composition and choice of words.

Muslim scholars argued that any translation of a protected work can only be undertaken with the consent of the original author.¹⁰⁹ This was the view of Abd. Hamid Tahar in his short article¹¹⁰. Prof. Wahbi Sulaiman Ghawazji further elaborated that copyright also subsists in a compilation of previous works.¹¹¹

11.4 The lawful rights of the Intellectual Property owner over his intellectual creation remain even though his power over it is not perfect¹¹². In western jurisprudence, as the concept of property refers to that bundle of rights, the imperfections of those rights do not affect his title or ownership.¹¹³

11.5 The ownership rights of tangible property is permanent but the ownership rights of 'manfa'ah' is temporary ('*tawqit*') i.e subjected to time and place¹¹⁴. Most Muslim scholars agreed that physicality affects the duration of property rights.

Act has been extended to include all works eligible for copyright which includes (1) translations, adaptations, arrangements and other transformations of copyright works and (2) collection of copyright works which by reason of the selection and arrangement of their contents constitute intellectual creation.

¹⁰⁹ Note that Malaysian 1987 Copyright Act, like most other copyright legislations in the developing countries, allows the production and publication of translation for purpose of teaching, scholarship or research, upon a licence granted by the Copyright Tribunal in these circumstances; translation has not been done by the owner within one year after the first publication of the work, or if it is so published, it is out of print, or request to translate has been denied by the owner.

¹¹⁰ See p.186, *Haqq al-ibtikar*, op. cit.

¹¹¹ P.170, *Haqq al-ibtikar*, op. cit. See also S.8(1) of the 1987 Act in note 7 supra.

¹¹² See p.42 *Haqq al-Ibtikar*, op. cit.

¹¹³ See *People v. Walker* (1933) 33 Cal. App. 2d 18, 20, "Since property or title is a complex bundle of rights, duties, powers and immunities, the pruning away of some or a great many of these elements does not entirely destroy the title....."

¹¹⁴ Note that the Malaysian 1987 Act still recognise the perpetual copyright of an unpublished works (in the U.K it was abolished in 1988), see S.17 (2).

Despite this the jurists agree that it can be transmitted through inheritance and disposed off through will¹¹⁵. The basis of the transmissibility is the Prophetic 'hadith' : " *man lahu haqqan faliwarathihi*" (who has a valid claim (*haqq*), that can be transmitted through inheritance).

Since the proprietary nature of intellectual inventions is temporary ('*tawqit*') i.e not permanent - as distinct from tangible property- it is confined to the time, place, nature and characteristics of the transaction.¹¹⁶ As far as the duration of copyright is concerned, Muslim scholars have argued that the duration of protected rights is 60 years after the demise of the author¹¹⁷. The *ulama'* draw this rule with analogy to the duration of ground rent and with analogy to rights of dwelling on '*waqf*' lands and long lease of buildings. The *ulama'* also take into consideration the fact that intellectual creations are '*nisbi*' (relative) i.e the product of the accumulation of inherited past knowledge.

After the termination of 60 years, the rights in the work becomes the shared property of the ummah (society)¹¹⁸. This does not mean that publication of the work is prohibited altogether. Effort must be taken to continue to disseminate the ideas through publication and the money gained given to charity. The value of the usufructory rights of the intellectual creations depends on the number of copies published and manufactured.

¹¹⁵ See p.51 *Haqq al-Ibtikar*, op. cit.

¹¹⁶ Similar rights are hire-purchase rights of land or vehicles which usufructory rights are only valid until the satisfaction of the contractual agreement.

¹¹⁷ The duration of copyright for a literary, musical or artistic work (other than photograph) is the life of the author plus 50 years after his death, while that for all other works is 50 years after publication, or in the case of broadcast, after the broadcast is first made (S.13(1)) Malaysian Copyright Act 1987.

¹¹⁸ In Common Law system, works which copyright has expired falls under Public Domain free for all to use. In contrast, Italy and France have an established *domaine public payant*, a pool of royalties of expired copyright works, for the purpose of promotion of arts. See al-Darini's suggestion for a body to be set up to administer the exploitation of expired copyright works and to channel the funds into charitable means such as education, setting up of educational institutions or mosque. In addition, this body will also ensure that no illegitimate exploitation of the expired copyright works is taking place.(p.121) *Haqq al-ibtikar*, op. cit.

11.6 Having regard to all this the nature of ownership rights over intellectual creations are similar in many aspects to that of tangible property¹¹⁹.

In the above discussion, it is shown that in many instances, intellectual property corresponds to ordinary characteristics of tangible property. In the next section, the distinction between the ownership right in intellectual property and the ownership right of physical embodiments, a characteristic which marks the uniqueness of intellectual property is deliberated. This important distinction is further seen in the context of alienation of the physical embodiments and its consequences in the delineation of the exclusive rights of the Intellectual Property owner and others.

12. Distinction between the intangible right in Intellectual Property and the property rights in the physical embodiments

In classical English law, the distinction between tangible and intangible property has been aptly pointed out by Blackstone¹²⁰. To him, hereditaments are of two kind: corporeal and incorporeal. Corporeal consists of such as affect the senses; such as may be seen and handled by the body: incorporeal are not the subject of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation¹²¹. Even though this incorporeal right "is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to or exercisable within the same", it should not be confused with the right over the physical embodiments¹²². He argued that "corporeal hereditaments are the substance, which must always be seen, always handled: incorporeal hereditaments are but a sort of

¹¹⁹ See p.51 *Haqq al-ibtikar*, op.cit.

¹²⁰ Blackstone, William, *Commentaries on the Law of England*, Book of the Second, 14th. Ed. A Strahan, London, (1803). Whether or not his view is representative view of modern property lawyers, it is a distinction very much used by rules on Intellectual Property.

¹²¹ See p.17, op.cit.

¹²² See p.20 where he said," And indeed, if we would fix a clear notion of an incorporeal hereditament: we must be careful not to confound together the profits produced, and the things, or hereditament, which produces them."

accident, which is inhered and are supported by that substance; and may belong, or may not belong to it, without any visible alteration therein". To him, a right of incorporeal property is a contingent right and cannot stand on its own, "collateral to or issuing out of" and "can never been the object of sense", nor is "capable of being shown to the eye, nor being delivered into bodily possession"¹²³.

On the same line of analysis, Al-Darini, distinguished between the intangible rights of Intellectual Property and the rights of ownership of the physical embodiments. With this term, he is referring to the "intellectual ideas per se" regardless the medium ('*majliyy*')^{123A} in which these ideas are expressed or manifested (e.g books in the case of rights over a written work)¹²⁴. These intellectual creations are intangible in the sense that they cannot be understood in the normal perceptory sense as they do not embody themselves in physical substance but has to be apprehended notionally. Being intangible, the only means of benefitting and exploiting these intellectual creations are through the medium.

This distinction between the ownership of Intellectual Property and the ownership of the physical embodiments is very important in the context of copyright. The transfer of title to the physical material does not necessarily transfer the title to the copyright, any more than the assignment of the copyright necessarily transfers the title to the physical material¹²⁵. This conflict is also apparent in the issue of ownership of copyright in letters and the physical ownership of the letter of the receiver. The author is prima facie the first owner of the copyright in it and can restrain the receiver of the letter from publishing it. The receiver of the letter enjoys the ordinary incidents

¹²³ See p.20, op. cit.

^{123A} Al-Darini's terminology to describe the medium in which the ideas are expressed.

¹²⁴ See al-Darini *Haqq al-ibtikar* p.9 op.cit.

¹²⁵ See Copinger 5-1 and the cases of Time Life International (Nederlands) B.V v. Interstate Parcel Express Co. Pty Ltd (1978) F.S.R 251 (H/Ct. of Australia), Cooper v. Stephens, 1 Ch. (1895) 567 and Marshall (W) & Co. Ltd v. Bull A.H Ltd (1901) 85 L.T 77. In Time Life's case, the court held that the sale of a book does not necessarily confer on the Plaintiff any right, either by way of assignment or licence to exercise any of the exclusive rights incidental to the copyright of the book. In Cooper's case the court held that the sale of blocks from printing drawings did not result in the transfer of the copyright in the drawings and did not entitle the buyer to reproduce the drawings. In Marshall's case the sale of electro-blocks used for the printing of designs did not transfer the copyright in the designs.

of ownership of the letter and he has an unqualified title to the material, short of publishing the letter¹²⁶, as the latter conduct may constitute an act of breach of confidence.¹²⁷

13 The rights of the Intellectual Property owner and others

This dichotomy is further illustrated in copyright in the context of the rights of the publisher over a manuscript and the ownership rights of a buyer over a written work. In this instance, Al-Darini envisages a number of scenarios whereby contractual undertakings are entered into between author and publisher¹²⁸.

(i) In most instances, like common law, publication agreements are subject to normal rules under the law of contract.

(ii) If the author publishes his work at his own expense, then the author retains his publication right as well as the ownership of the printed materials. If the author enters into an agreement with the publisher to distribute his work by transferring his right over the printed materials, then ownership of these printed materials belongs in this instance with the publisher.

(iii) Another instance contemplated by Al-Darini is the transfer of publication right, which under common law will be known as a licence to publish. In this instance, because only the publication right is transferred and not the copyright of the book, the publisher is bound by the terms of the agreement between him and the author. In this instance, the position of the publisher is like that of a licensee whereby he does not own the original '*manfa'ah*', and hence he cannot reprint or make extra copies of the protected work without the permission of the author. As for the author, he may

¹²⁶ See Pope v. Curl 2 Atk. 342, Oliver v. Oliver 11 C.B., N.S. 139.

¹²⁷ See Philip v. Pennel (1907) 2 Ch. 577 where the court confirm the rule that the writer of letters has a proprietary right in them sufficient to entitle him to restrain the publication, but, that on the other hand, the receiver of the letters is entitled to use them in some way, although not to publish them by way of the multiplication of copies. In this case the court held that the plaintiff was entitled to use the information contained in letters or documents written by another person which had lawfully come into their possession without any express or implied authority given by the author of the letter, but they were not entitled to publish these letters or any extracts therefrom or paraphrases thereof.

¹²⁸ See p.122, 144 of '*Al-ibtikar*'.

no longer make copies of the book without the publisher's consent as he has transferred his publication right to him. Once the author has disposed of his publication right, he cannot effectively enter into another contract with another publisher with respect to the same publication right. This contractual undertaking between the author and the publisher, can for this reason be understood as an exclusive licence under the common law¹²⁹. The value of the '*manfa'ah*' of the intellectual creations in this transaction will be determined from the number of copies published under the contract, the cost of publication and the sale price.

(iv) Al-Darini does not contemplate the possibility of total transfer of intangible rights in a written work (known as assignment in the common law jurisdiction). Under the common law, the outright disposal of copyright is possible through assignment, whereby the publisher will enjoy the full legal title to the copyright and will alone be entitled to enforce the right against third parties¹³⁰. This point will be further taken up in chapter five pertaining to copyright¹³¹.

13.2 Transfer of rights to the consumer.

The transfer of usufructory rights to the buyer or consumer is by an outright sale and not through a contract of hire. Under a contract of hire of the '*manfa'ah*' of tangible property, the consumer only possesses the book as a trust ('*amanah*')¹³². The consumer or the buyer does not own the original '*manfa'ah*', he thus, would not have the right to make copies or photostate copies of the book as the only legitimate passing of usufructory rights is by sale. The rights of public libraries, universities and

¹²⁹ Under common law, an exclusive licensee may sue for infringement of copyright but must (where the exclusive licensee and copyright owner have concurrent rights of action) join his licensor as a party to the action, except where an interlocutory injunction is sought. For further details, see Copinger, op.cit para 15-1 - 15-24.

¹³⁰ It should be noted that under the MCA 87 and under the U.K CDPA 88, an assignment should be in writing.

¹³¹ See S.11 of Ch.5 of this thesis.

¹³² P.113 *Hagg al-Ibtikar*, op. cit.

educational institutions are those of user rights¹³³. A consumer only owns that part of '*manfa'ah*' which is contained in the tangible medium which is the subject of sale¹³⁴.

This distinction is recognised by statute. Despite the exclusiveness of the rights of the intellectual property owner, the law has allowed certain freedoms to the consumer. For instance, in the context of the copyright of computer software, the law allows the making of back-up copies of programmes¹³⁵ and decompilations of programmes for private purposes. In the context of patents, the law grants an implied licence to repair, rebuilt and extend a patented product without necessarily infringing the rights of the patent owner¹³⁶.

Referring to another work and borrowing ideas or '*iqtibas*' is permitted so long as the original author is acknowledged. Plagiarism and copying of the whole book or substantial part of it is wrong on the basis of '*Sura an Nisa*' : 29 ,

" O Ye who believe, eat not up your property among yourself in vanities; but let there be amongst you traffic and trade by mutual goodwill.¹³⁷

¹³³ P.117 *Haqq al-Ibtikar* , op. cit.

¹³⁴ Pg.116 *Haqq al-Ibtikar*, op. cit.

¹³⁵ See S.40 (1) (a) (b) of the 1987 Malaysian Copyright Act.

¹³⁶ See *British Leyland v. Armstrong* (1986) R.P.C, (1986) 1 All. E.R p.850, where the House of Lords rejected an infringement action on the basis of reverse engineering or indirect copying of a drawing or design of an object. The House of Lords introduced a new concept; non-derogation of grant to allow the purchaser of a patented goods the right to repair the patented goods so as to maintain it in good working order. Hence, in this case, the owner of the patented goods were not entitled to use their copyright in such a way as to maintain a monopoly in the supply of spare parts for their cars.

¹³⁷ Under the U.K Copyright Act 1988, s.16(3)(a), to constitute an infringement, a substantial part of a protected work should be copied. The court in *Ladbroke v. William Hill* [1964] 1 W.L.R. 273 decided that 'it depends much more on the quality than the quantity of what has been taken.' The Malaysian Court has taken the same stand in *Longman Malaysia Sdn Bhd. v. Pustaka delta Sdn. Bhd.* (1987) 2 MLJ 359.

14. Conclusion

In this chapter, it is submitted that the recognition of Intellectual Property does not result in inconsistency with the ordinary requirements of '*mal*' in Islamic jurisprudence. With the exception of the classical Hanafites jurists, the majority view is that intangible rights are a form of '*mal*'. By the application of '*qiyas*' the intangible rights of Intellectual Property is more akin to '*manfa'ah*' within the classification of '*mal*' in Islamic jurisprudence.

It is also argued that a jurisprudential objection against the recognition of Intellectual Property cannot be sustained. Firstly, it has been pointed out that Intellectual Property does not lead to concealment of '*ilm*' and hence do not fall within the prohibition against the concealment of '*ilm*'. Secondly, it is argued that al Qarafi's objection against the proprietary nature of '*ijtihad*' is not sustainable. Using the methodological tool in jurisprudential arguments, al-Qarafi's arguments are seriously flawed.

With regard to the special nature of Intellectual Property, it is shown that in most cases the ordinary rules on '*mal*' such as valuation, alienability, transferability and durability cannot easily be fit into Intellectual Property. Being intangible, Intellectual Property is subjected to special rules, some of which have been discussed in this chapter. Firstly, Intellectual Property has its special rules on non-protectable subject matter. Secondly, there should not be any confusion between the ownership of Intellectual Property and the ownership of the physical embodiments or manifestations. Such distinction carries great consequence particularly in respect of alienability through sale of the physical embodiments. In other aspects, the nature of exclusive rights in Intellectual Property is similar to other property rights.

CHAPTER FOUR

'HAQQ', 'MILKIYYAH' AND INTELLECTUAL PROPERTY

1 Introduction

The concept of '*mal*' as propounded and elaborated by Muslim jurists in the past has been elucidated in the previous chapter. It is argued that the intangible rights over "intellectual ideas", though not discussed by past Muslim jurists, are established as a form of '*manfa'ah*'. In the present chapter, we will proceed to discuss the concept of '*haqq*' in Islam and to raise the question of the recognition or otherwise of the legal rights over Intellectual Property. Muslim jurists have discussed at length over the subject of '*haqq, milkiyyah*' and the basis of acquisition of property rights but their works do not generally take into account the concept of ownership of intellectual property.

In this chapter, it will be argued that ownership of intellectual property, on a theoretical basis, is valid upon the exertion of labour in the creation of new utility. The conceptualisation of this kind of ownership, if seen from the perspective on the basis of '*haqq*', crystallises upon labour and work ('*amal*'). On the theoretical side, support for this proposition can be drawn from the rules governing the acquisition of ownership of '*mubah*' property ('*res nullius*'). It would not be valid to characterise intellectual property as a form of natural resource (as that of '*mubah*'). However, it is important to investigate the meaning of acquisition of property in natural resources ('*mubah*'), as this may provide a rich fund of insight, reminder and argument which can be drawn on for the present debate as to the ownership of Intellectual Property.

The acquisition of ownership of the '*mubah*' property and Intellectual Property is, on a certain level, similar. Firstly, Intellectual property involves the creation of something new, something which has never existed before, or even if it did exist, involves the improvement or adaptation of a previous entity. Secondly, Intellectual

Property involves the combination of available resources and information in the form of knowledge and ideas, which are common to us as a whole and to some degree regarded as common resources. Thirdly, it will be argued that the process of labour which is involved in the creation of a work, an invention or a trade mark, (albeit being an intellectual labour), is a valid basis for rights over Intellectual Property. It is our contention that these basic principles of ownership justify the initial allocation of Intellectual property rights and suggest certain limitations thereto. These theoretical bases are predicated on the assumption that certain amount of labour is required in the creation of Intellectual Property.

The focus of our study is the following:

(i) Justifications of Intellectual Property in the Western jurisprudence.

Bearing in mind that there are a myriad of justifications sought for the recognition of Intellectual Property, be it either from natural law perspectives or on utilitarian grounds, this chapter will only concentrate on the labour theory and not on alternatives such as theories of personality. It is submitted that this theory as postulated by Locke and Nozick¹ constitutes the most important theory in Intellectual Property by virtue of its influence on case laws and statutes².

(ii) the meaning and definition of '*haqq*' and '*milkiyyah*' in the Qur'an,

(iii) the meaning and definition of '*haqq*' and '*milkiyyah*' given by the Muslim jurists,

(iii) the nature and ambit of '*haqq*',

(iv) the basis of ownership or '*haqq al-milkiyyah*' in Islam,

(v) the role of labour and work or '*amal*' as a basis of ownership.

¹ R.Nozick, Anarchy, State And Utopia 18 (1974), referred to in Hughes, Justin, The Philosophy of Intellectual Property, The Georgetown Law Journal, Vol 77 p.287.

² See for example Article 27(2) of the Universal Declaration of Human Rights which provides: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". See also the preamble to the Massachusetts Act of March 17, 1783: "As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is procured by the labor of his mind". Cited in Ginsburg, Jane C, A tale of Two Copyrights: Literary Property in Revolutionary France and America, Tulane Law Review, Vol 64 (1990) no.5 p.991-1023.

(vi) '*amal*' as a basis of '*haqq*' and '*haqq al milkiyyah*' of Intellectual creations.

2 The normative framework of labour theory in Western jurisprudence

Reference to natural right theories are sought by many western scholars to support Intellectual property rights³. Questions are raised whether a writer or an inventor owns the work he creates. Using a right based argument many philosophers such as Locke⁴ and Hegel⁵ hold that the writer's or the inventor's interest is considered in itself sufficiently important from a moral point of view to justify holding people to be under a duty to promote it⁶. According to Locke, the first to labour on something creates a relationship between the writer or inventor and his work.⁷ Economic activity on ideas signifies the mixture of one's labour with the idea and hence annexes

³ Enough study has been undertaken on the justifications of property rights. For detailed discussions, see Hammond, R.G, Personal Property, Commentary and Materials, (1992) Oxford University Press, Oxford; Macpherson, C.B. (ed), Property, Mainstream and Critical Positions, (1978) Basil Blackwell, Oxford; Reeve, Andrew, Property, (1986) Macmillan; Waldron, Jeremy, The Right to Private Property, (1988) Clarendon Press, Oxford.

⁴ Locke, John, Two Treatises of Government, (edited by Peter Laslett), (1988), Cambridge University Press, Cambridge.

⁵ Hegel, G.W.F, Elements of the Philosophy of Right, (edited by Allen W. Wood, translated by H.B. Nisbet), Cambridge University Press, Cambridge. His 'personality' theory of property rights differs markedly from the labour theory. It is not within the province of this thesis to discuss his theory in relation to Intellectual Property.

⁶ John Locke, Two Treatises on Civil Government, Book II, paras 25-51 (1690). The main criticism against Locke's conception is that (i) the incompatibility of the two arguments; ownership of limb and ownership of product of labour; an argument which may entail that parents are also entitled to property rights in their children (ii) alleged inconsistency with liberty (iii) is property the only fitting benefit?. See Becker, Lawrence C., Property Rights, Philosophical Foundation(1980), Routledge, Chapman and Hall.

⁷ "....yet every Man has a Property in his own person. This nobody has any right to but himself. The Labour of his body, and the work of his Hands, we may say, are properly his. Whatever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joynd to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men. For this labour being the unquestionable property of the Labourer, no Man but he can have a right to what that is once joynd to, at least where there is enough, and as good left in common for others."
Ch.5.27, Locke, John, op cit.

the idea to be one's property.⁸ In this sense, the writer or the inventor has, natural property rights over his work, so important that they impose duties on others to refrain from interfering with or undermining his rights over his work.⁹

The theological premises of Locke's account of ownership are unmistakable¹⁰. Natural resources of the world are the subject of original donation from God to man, as created objects intended for human use.¹¹ Locke justifies the assignment of natural resources to those who work on them as labouring on natural resources "does not lessen but increase(s) the common stock of mankind".¹² This right is not without limitation. To Locke, there must be "enough and as good" of resources remaining for others. Secondly, this right is limited to one's need and does not entitle a person to waste or negligently destroy natural resources.¹³ Thirdly, a person's entitlement to natural resources are limited to the extent of his labour and so long as he keeps the

⁸ Locke also accepts the proposition that humans acquire property through possession such as gathering nuts from the ground, picking an apple from a tree, and killing a deer.

⁹ Natural property rights here are understood not in the sense that the individuals concerned are born with them (in the way that one says, rights to life and liberty are said to be natural) but rather in the sense that the force of these rights obtains and can be recognised as valid by moral and rational people, quite apart from any provisions of positive law. And they perhaps are also natural in the sense that the sort of relationship out of which these rights and duties are generated has important roots in the nature of a human being, see Waldron, *op.cit.*

¹⁰ This concept is shared in Islam. All property originated from God. Man is bestowed with the power to consume and utilise property in his capacity as '*khalifah*' (regent) of God. See al-Ibadi's work, *al-Milkiyyah*, 1975.

For other classical Western views see, Bishop of Oxford in his introduction, *Property, its Duties & Rights, Historically, Philosophically & Religiously Regarded* (1913), where he wrote that the concept of property is understood in the light of Bible doctrine of stewardship. According to this concept, God is the Creator and absolute owner of all things or persons. Hence everything that we 'own' is in our capacity as stewards to manage for the purpose of His Kingdom. Ownership, in old Biblical terms is relative and dependant, limited at every point by the purpose for which it was entrusted to us. See also Blackstone, *A Commentary of the Laws of England*, Vol II paras 2-5, 14-15 (1765-1769).

¹¹ See ch.5.26, Locke, John, *Two Treatises of Government*, ed Laslett.P, Cambridge University Press, 1988, p.285- 302.

¹² See ch.5.34, and ch.5.37, Locke, *op cit.*

¹³ See ch.5.31 and ch.5.37, Locke, *op cit.*

resources in constant use.¹⁴ In this sense Locke does not regard enclosure as giving property rights or even special rights to the land.

Grunebaum (1989)¹⁵ attributes Locke's theory into two streams of thought: the utilitarian and the deontological approach. The first considers appropriation as justified by the good consequences that flow from private ownership; more good, more agricultural production and greater incentive to work hard. The second justifies rights over one's labour when they become mixed with the object of one's labour so the object then becomes one's own. Munzer¹⁶ (1988) emphasises the "labour entitlement" theory, i.e one is entitled to the product of one's labour.

Hughes¹⁷ forcefully argues that 'propertisation'¹⁸ of ideas easily fits the Lockean approach to acquisition of property in three ways:

- (i) that the production of ideas requires a person's labour,
- (ii) that those ideas are appropriated from a "common" property which is not significantly devalued by the idea's removal,
- (iii) ideas can be made property without breaching the non waste condition.

Two theories were advanced to support the proposition that Intellectual Property involves labour. The first theory posits that people should be rewarded for involving themselves in intellectual activities as labouring on these activities is unpleasant.¹⁹ This is known as the avoidance theory of labour. The second theory advances the view that involvement in Intellectual Property brings positive values to society and

¹⁴ See ch.5.32, Locke, op cit.

¹⁵ Grunebaum, J.O., Private Ownership, (1989), Routledge & Paul. London.

¹⁶ Munzer, Stephen, A Theory of Property, (1990) Cambridge University Press, Cambridge.

¹⁷ op.cit.

¹⁸ This term is used loosely to refer to the act of acquisition of property rights. See for instance, Sherwood-Edwards, M., The Redundancy of Originality, IIC Vol 25 No. 5 (1994) p.658-689.

¹⁹ Here Hughes quoted Lawrence Becker's proposition that labour is something unpleasant enough so that people do it only in the expectation of benefit, see Hughes, op.cit.

hence they should be rewarded for "how much value they add to other people's lives, regardless of whether they are motivated by such reward".

The role of labour in the production of Intellectual Property can be seen in the distinction between thinking up an idea which may not involve labour and the execution of idea which refers to the process of employing the idea as the core of a finished product. Hughes argues that this distinction is represented by the dichotomy between idea and expression which is well accepted in copyright.

The similarity between natural resources and the 'common' property in Intellectual Property is not in the sense that "ideas exist in some platonist form, ready to be plucked". The similarity can be seen in other ways such as the inexhaustibility of resources. Intellectual Property is non rivalrous, one person's use does not deplete the 'common' in any sense. Indeed Hughes argued that "(the) field of ideas seem to expand with use. The common does not only contain ideas which cannot be granted property status, but also property rights which have expired. This guarantees that there is a constant common field of ideas, ready to be used for the production of ideas. In this way, Locke's discussion of "as good and as many" does not pose a hurdle to the proprietization of ideas. As to the non waste condition, Hughes argued that unlike food, ideas are not perishable and therefore always retain future value.

Besides the important work of Hughes, other writers such as Litman and Yen²⁰ have shown how natural right theories justify the initial allocation of Intellectual Property and suggest limits to the extent of these²¹. Copyright's relationship with that part of natural resources or 'res naturae' is clearly represented by the creation of a public

²⁰ Litman, Jessica, The Public Domain, Emory Law Journal Vol.39 (1990) 39 and Yen, Alfred C., Restoring the Natural Law: Copyright as Labor and Possession, Vol. 51 (1990) Ohio State Law Journal, 517-559.

²¹ For other theoretical analyses of labour theory, see Ricketson, Sam, New Wine into Old Bottles: Technological Change and Intellectual Property Rights, Prometheus, Vol.10. No.1, June 1992; Gordon, Wendy J, An Inquiry Into The Merits Of Copyright: The Challenges of Consistency, Consent and Encouragement Theory, Stanford Law Review, Vol.41 (4-6) 1989 p.1343-1409; Vaver, David Some Agnostic Observations on Intellectual Property, Intellectual Property Journal, Vol. 6 No.2 June 1991 p.125-153; Spector, Horacio M., An Outline of Theory Justifying Intellectual and Industrial Property Rights, (1989) 8 EIPR, 270-273.

domain. Reference to natural right theories does not warrant an absolute conception of rights over Intellectual Property. In fact careful use of natural law principles creates a vibrant public domain in two ways. Firstly, the practical idea embodied in the Roman notions of 'res communes' and 'ferae naturae'²² admonish the natural law thinker not to extend copyright beyond the bounds of what human institutions such as copyright can practically accomplish.²³ In this sense, this view accords with Hughes who regards the idea/expression dichotomy as one important limit to copyright. Secondly, the moral principles which suggest the extension of copyright also justify the dedication of the author's work to the public. Yen and Litman forcefully argued that authorship is not an individual effort, unlike Locke's theory. This means that the author alone should not be rewarded for his effort without some form of recognition of society's contribution.²⁴ Public domain represents the limit to the property claim of authors' in their works, from which the future authors can borrow and to which they must contribute.²⁵

²² 'Res comunes' are things that under natural law common to all such as the air, running water, the sea and the seashore. 'Ferae naturae' refers to wild animals that are inherently free, and can be propertised by the reduction into possession. In this respect, Yen argued that natural law theories originated with and were substantially influenced by Roman Law which seeped into common law thinking in the 18th. Century. To the Romans, natural law was the construction of rules which simply reflected the way things were. The English, however, regarded natural law as a prescription of the way things are. This can be seen in Locke's conception of natural law in which he had drawn limits to the doctrine of occupancy and labour. Things which are not capable of possession cannot be the subject matter of property rights but can only be subjected to temporary right of use. See Yen, op.cit.

²³ Referring to the limits of copyright, Yen points out that the idea/expression dichotomy should prevent the extension of copyright beyond the most concrete and obvious facets of a work. Therefore, theory of labour and possession postulates that there should be a recognition of the existence of inherent physical or metaphysical limits on things a person may claim as property. Thus, it is logical, that a literal infringement is within the idea/expression dichotomy but claims that a work's perspective, style, or "total concept and feel" would not be. See Yen, op.cit.

²⁴ Yen described authorship as (something which) "is not the creation of works which spring like Athena from the head of Zeus, but the conscious and unconscious intake, digestion and transformation of input gained from the author's experience within a broader society". Litman described authorship as "a combination of absorption, astigmatism, and amnesia is not intended to diminish its merit.All works of authorship, even the most creative, include some elements adapted from raw material that the author first encountered in someone else's works....". See Yen & Litman, op.cit.

²⁵ The concern that originality in copyright as not to be understood as ineffable creation from nothing justifies Professor Litman in her article for the creation of a strong public domain as an important source of raw material for future writers. She argued that the public domain should be understood not as the realm of material that is undeserving of protection, but as a "device that permits the rest of the system to work by leaving the raw material of authorship available for authors to do". See Litman, op.cit.

To conclude, despite certain valid reservations, labour theory remains a significant theory in justifying Intellectual Property rights. Its invocation is illustrated in case law and legal instruments. With respect to copyright, labour theory could be said to be the impetus to the birth of modern copyright law as illustrated in the case of Millar v. Taylor²⁶ or in the case of Wheatan v. Peters²⁷ in the United States.

In the case of patents, the labour thesis was enshrined in the French patent law of 1791²⁸. The thesis postulates that a man has a natural right to the products of his mind, which to some thinkers are of higher value than physical products.²⁹ This thesis, unfortunately, was not widely accepted in the common law system whereby by virtue of registration, exclusive rights under patents were not automatic. Rights were given to the person who is first to file and register at the patent registry and therefore the proposition that inventors have inherent rights over their inventions is not true in practice. Even more contradictory to the idea of natural rights is the fact that exclusive rights under a patent are not permanent.

²⁶ (1769) 4 Burr. 2303, 98 ER 201. For a detailed analysis, see Birrell, A, Seven Lectures on the Law and History of Copyright in Books, (1899) Cassell & Company Ltd, London; Rose, Mark, The Author as Proprietor: Donaldson v. Beckett and the Genealogy of Modern Authorship, Representations, 1988 p.51. The case led to a debate as to the existence of common law rights of perpetual copyright in the author. The House of Lords, later reversed this case in Donaldson v. Beckett 4 Burrow's 2408; 2 Brown's Parliamentary Cases, 129, which held that the Statute of Anne had abolished common law copyright and replaced it with a limited statutory right. See also the comment made by Lord Mansfield in Sayre v Moore which is quoted in Cary v Longman 1 East 358, 361 n.b, 102 Eng. Rep. 138, 150 n.b (1801).

²⁷ 33 U.S (8 Pet) 591 (1834), where the court states, "that an author, at common law, has property in his manuscript....cannot be doubted; but this is very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.....that every man is entitled to the fruits of his own labor, must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property which regulate society, and which define the rights of things in general".

²⁸ The French Constitutional Assembly declared: "that every novel idea whose realization or development can become useful to society belongs primarily to him who conceived it, and that it would be a violation of the rights of man in their very essence if an industrial invention were not regarded as the property of its creator". Law of January 7, 1791 cited in Machlup, Fritz & Penrose, Edith, The Patent Controversy, Journal of Economic History, May 1950, No.1 p.1-29.

²⁹ In this respect Macleod succinctly summarised the whole issue in these terms: "Just as the mind of man is admitted to be of a much higher nature than his body, so is the service rendered to his mind of a much higher nature than his body. Hence ideas are loftier species of property than material wealth." See Henry Dunning Macleod, the Elements of Political Economy (1958) London p.181 cited by Machlup, op.cit par. f.n. 35 p.12.

Furthermore, since inventors contribute significant advancement in art and science, therefore they should not be deprived of their rightful reward and income by permitting free-riders.³⁰ This notion assumes that the market system cannot guarantee efficient rewards to inventors, and therefore the state should intervene to provide a temporary monopoly.

With the above elucidation of labour theory as a basis of Intellectual Property, we will now turn to the acceptability of Intellectual Property within Islamic law. The position of Intellectual Property in Islamic law depends primarily on the understanding of the concept of '*haqq*' and '*milkiyyah*'.

3 THE CONCEPT OF 'HAQQ' AND 'MILKIYYAH' IN ISLAM

3.1 'Haqq' and 'milkiyyah' in the context of the Qur'an.

The word '*haqq*' and its derivatives are used in the Qur'an 272 times³¹. Despite its frequent usage in the Qur'an, there is no standard meaning of the term '*haqq*'. '*Haqq*' is most popularly used in the Qur'an to indicate ('*al-thubut*') i.e something which is or becomes a manifest and an indubitable fact or event. This is seen in 32:13 when the Qur'an refers to the day of Judgement:

"But the word from Me will come true ('*haqqa*'), I will fill Hell with Jinns and men altogether"³²

References in the Qur'an to '*haqq*' are also used to indicate something which is real, established or confirmed, as a truth or a fact; ('*al-wujud*') i.e something which is

³⁰ This proposition is supported by many utilitarian thinkers. Among them is John Stuart Mill who presented the argument in a very succinct way, where he said, "That he, the inventor, ought to be both compensated and rewarded ... will not be denied... it would be a gross immorality of the law to set everybody free to use a person's work without his consent, and without giving him an equivalent". Mill, Principles of Political Economy, p.932, cited in Machlup, p. 17 op.cit.

³¹ See al-Baqi, Mohammad Fu'ad Abdul, al-Mu'jam al-Mufahris li Alfaz al-Qur'an al-Karim, Darul Fikr, (1987).

³² Ali, Abdullah Yusuf, The Holy Qur'an, Text, Translation and Commentary, (1989), Amanah Corporation.

necessitated, unavoidable or incumbent. Thus we see the word '*haqq*' is used to refer to death as something which is unavoidable, incumbent or real in 50:19:

"And the stupor of death comes with truth (*bi-al-haqq*)".

In other instances the word '*haqq*' is used to contrast it with '*batil*' (falsehood), which if used in this context connotes suitability to the requirements of wisdom, justice, right or rightness. This can be found in '*Surah Saba*' 34: 49.³³ In '*Surah al Baqarah*' 2:109 it refers to the truth, reality or fact.³⁴ In '*Surah Ali Imran*' 3:21 it connotes rightness to the exigencies of the case (when referring to a judgement).³⁵

Beside these primary significations the word '*haqq*' carries the connotation of equity and justice in '*Surah al-An'am*' 6:151 ³⁶, a right or due as in '*Surah Az-Zariyyah*' 51:19,³⁷ anything that is owed; as a fee, hire or pay and as a price as in '*Surah al Baqarah*' 2: 282 ³⁸ and in '*Surah al Baqarah*' 2:121 referring to a duty or obligation.³⁹ So important is the word '*haqq*' that it is used as an epithet of one of the names of God to mean the Really-existing, whose existence, and divinity are proved to be true, or the Creator according to the requirements of wisdom, justice,

³³ "Say: "The truth (*al-haqq*) has arrived and falsehood neither creates anything new, nor restores anything".

³⁴ (After referring to the People of the book), "From selfish envy, after the Truth (*al-haqq*) hath become manifest unto them, but forgive and overlook, Till Allah, accomplishes His purposes for Allah hath power over all things".

³⁵ "As to those who deny the signs of Allah, and in defiance of right (*bi ghairil-haqq*), slay the Prophets".

³⁶ "Take not life which Allah hath made sacred, except by way of justice and law" (*bil-haqq*).

³⁷ "And in their wealth and possessions (was remembered) the right of (*haqq*) the (needy) Him who asked, and him who (for some reason) was prevented (from asking)".

³⁸ Referring to transactions which involves obligations in a fixed of time," reduce them to writing, let a scribe write down faithfully as between the parties, as Allah has taught him, so let him write, let him who incurs the liability dictate (*al-haqq*), but let him fear his Lord Allah".

³⁹ "Those to whom we have send the Book, study it as it should be studied (*haqqa tilawatih*): they are the ones that believe therein: Those who reject faith therein- the loss is their own."

right or rightness⁴⁰

3.2 Definition of 'haqq' and 'milkiyyah' by jurists.

Classical jurists had not attempted to give a juridical definition of the term 'haqq'. In many of their works, these jurists relied on the semantic meaning of 'haqq'.⁴¹ This gap is nevertheless filled with works of contemporary jurists.

One popular way of defining 'haqq' is in the context of 'maslahah' (benefits/interests). Prof. Sanhuri for example defines 'haqq' as the pecuniary interests which are prescribed through legislative power to individuals⁴². By confining 'haqq' as only pecuniary interest, his definition ignores other non pecuniary rights such as personal rights which are equally guaranteed in Islam⁴³. In a similar vein, rights cannot be equated with 'maslahah'(interest) albeit the idea of right itself is predicated on the basis of 'maslahah' upon which the right rests. The two concepts are intertwined but not similar. Thus we see any exercise of a right which is not coincidental to the 'maslahah' of the right, which forms the basis of the right, can be considered as a wrongful exercise of right and may lead to the limitation, waiver or in certain instances even termination of the right⁴⁴. Furthermore, rights ('haqq'), as opposed

⁴⁰ Lane, E.W, Arabic English Lexicon, (1984) Islamic Texts Society Trust. Cambridge.

⁴¹ See the excellent analysis by Al-Ibadi, Abdul Salam Daud, Al-Milkiyyah fi al-Shari'ah al-Islamiyyah; Tabi'atuha wa Wazifatuha wa Quyuduha; Dirasah Muqaranah bi al-Qawanin wa an-Nuzum al-Wad'iyyah, 2 Vols, (1974), al-Maktabah al-Aqsa, Jordan.

⁴² Masadir al-haqq, Vol. 1 p.4. Definition according to modern legislation. Masadir al-haqq vol.1 p.4. He later pointed out at p.9 that in the Shari'ah 'haqq' is defined as including both proprietary and non-proprietary rights.

⁴³ See the criticism of this view by Kamali, Muhammad Hashim, Fundamental Rights of the Individual: An Analysis of (Haqq) Right in Islamic Law, The American Journal of Islamic Social Sciences, Vol.10 No.3 Fall 1993, pgs 341-366.

⁴⁴ See the views of Kamali, op.cit. This view has obtained support among contemporary scholars, see al-Darini, Nazariyyah al-Ta'asuf fi Isti'mal al-Haqq, (1977), Muassasah al-Risalah, Beirut and Al-Haqq, Wa Mada Sultan al-Daulah fi-Taqyidihi, (1984), Muassasah al-Risalah, Beirut. The term abuse of right (tajawuz al-haqq) is often distinguished with wrongful exercise of rights (al-ta'assuf fi isti'mal al-haqq). This distinction is more acceptable as the concept of abuse of rights, even though found in modern legislation in the Middle East, has been criticised heavily by many scholars. See D'Emilia, Antonio, The Abuse of Rights According to Muslim Jurists, Actorum Academiae Universalis Jurisprudentiae Comparativae, Vol.III, Pt. III, 75-106, par. his comment on p.105. This distinction will be further taken up in Ch.8 of this

to permissive power (*'ibahah'*) have elements of exclusivity of power which are not typically reflected by *'maslahah'*.⁴⁵

Another strand of thought is to define *'haqq'* in the context of *'hukm'* (value or ruling of the Shari'ah)⁴⁶. Al-Zarqa, a prominent contemporary Muslim jurist defines *'haqq'* as the exclusive assignment given by the Shari'ah either in the form of power or obligation.⁴⁷ Al-Qarafi's view reflected this stream of thought. To him a right is one which arises from the Communication from the lawgiver (*'al-khatib'*) either in the form of command or prohibitions. According to this view, the idea of *'haqq'* is synonymous to *'hukm'*, thus no rights may arise in the absence of an effective command from God. The proponents of this view derive support from the *'hadith'* of the Prophet to the effect that God's right over His servants is for them to worship Him and not to associate Him with others.

In contrast, another view defines *'haqq'* as 'exclusive assignment' (*'ikhtisas al hajiz'*). Al-Darini defines *'haqq'* as the exclusive appropriation or power over something, or a demand addressed to another party which the Shari'ah has validated in order to realise a certain benefit.⁴⁸ Abu Sinnah defines *'haqq'* as a right which is established in the Shari'ah, either for humans or for God, over someone else.⁴⁹ According to this view *'haqq'* is not confined to those rights which are already

thesis.

⁴⁵ See also the definition given by Al-Khafif. To him, the term *'haqq'* refers to the benefits which are prescribed by the Shari'ah, *Kitab al-Haqq wa al-Zimmah* p.36, c/f al-Sabuni, Abdul Rahman, Al-Sabuni, Abdul Rahman, *Al-Madkhal li-Dirasah al-Tasyri' al-Islami* (1979), *Matba'ah Riyadh*, Damsyik, Vol. 2. pgs. 7,8.

⁴⁶ *'Hukm'* is defined in *'usul al-fiqh'* as "communication from the Lawgiver pertaining to the conduct of the legally competent person (*mukallaf*) consisting of a demand, an option, or an enactment (*al-wa'd*)", see Kamali, op.cit.

⁴⁷ Al-Zarqa, Mustapha Ahmad, *Al-Fiqh al-Islami fi Thaubihi al-Jadid, Al-Madkhal ila an-Nazariyyah al-Iltizam al-Ammah fi al-Fiqh al-Islami*, (1946) Vol.3, Damsyik par. p.10.

⁴⁸ c/f Al-Sabuni, Abdul Rahman, *Al-Madkhal li-Dirasah al-Tasyri' al-Islami* (1979), *Matba'ah Riyadh*, Damsyik, Vol. 2 par.p.10.

⁴⁹ Abu Sinnah, Ahmad F, *Nazariyyah al-Haqq* in *Al-Fiqh al-Islami Asas al-Tashri'*, edited by Muhammad T. 'Uwaydah, (1971/1391 H), *Matabi' al-Ahram al-Tijariyyah*, Cairo p. 175.

established, either in the Qur'an or Sunnah. This conception allows Muslims the freedom to evolve new rights which are not dealt with in the Qur'an and Sunnah so long as they are coincidental to the will of these two main sources of Islam.⁵⁰

While '*milkiyyah*' is a form of '*haqq*', not all '*haqq*' is '*milkiyyah*'. '*Haqq*' refers to all kinds of exclusive power while ownership is seen more in the context of relationship of a person vis a vis a thing, in relation to another person.

Ibadi (1974) argues that the classical definitions of '*milkiyyah*' (ownership) are seriously flawed as they do not represent the accurate characteristic of ownership. He points out that there are three strands of thought to these definitions. Firstly, some classical jurists described '*milkiyyah*' as a legitimate state of affairs which is God given. Among those who belong to this group are Abi al-Makarim in *Sharh an-Niqayah*, Shihab ad-Din al-Qarafi, Taj ad-Din Abdul Wahab as-Subki and Al-Zarkashi.⁵¹

The second group of jurists defined ownership in terms of its indicia. Al-Karabisi defines '*milkiyyah*' as consisting of all rights of disposal. On a similar plane, al-Qadhi Hussein defines '*milkiyyah*' as the ability to benefit or consume ('*al-intifa*') and dispose of property which may vary according to the subject matter of the ownership.⁵² The third group of jurists defines ownership as the abstract concept which refers to the relationship between the owner and the owned property. Among those in the third group are Muhammad ibn Arafah, Ibn al-Dihan and Sadr al-Shari'ah.⁵³

⁵⁰ For other definitions, see Al-Ibadi, op.cit., par. pages 94-102. He defines '*haqq*' as the exclusive power which are established in the Shari'ah, giving rise to power or obligation, in both horizontal relationship between man and other fellow human beings and vertical relationship between man and God.

⁵¹ This group defines '*milkiyyah*' in terms of it being a God-given right and prescribed by the Shari'ah. See Al-Ibadi, op.cit. par. pg. 140-144.

⁵² Referred to in Al-Ibadi, op.cit.

⁵³ Sadr al-Shari'ah defines '*milkiyyah*' as the legal relationship between a person and a thing, his exclusive rights to dispose of it and to restrain or forbid others from interfering with his rights. Muhammad ibn. Arafah defines it as the entitlement to dispose of something with all powers which are allowed under

Al-Ibadi adds that '*milkiyyah*' should consist of these indicia:

- i. exclusive right
- ii. the right of enjoyment ('*intifa*') and disposal ('*tasarruf*') of the owned property
- iii. in certain circumstances, these rights may be restrained from being exercised such as for persons under age or those suffering from insanity.
- iv. these rules and power should have support from valid sources of Shari'ah.⁵⁴

3.3 Nature of '*haqq*' in Islamic scholarship.

From the above jurisprudential debate on the definition of '*haqq*' we can describe the nature of '*haqq*' in the following terms:

- i. the idea of '*haqq*' is related to something which is apt to benefit and of interest to a person. In this relation Muslim scholars have elaborated on the essentials of '*haqq*'. The idea of '*haqq*' includes four indicia:
 - a) subject matter of '*haqq*' ('*mahall al-haqq*')- i.e something which is proven or established by the authority of the Shari'ah. The subject matter of '*haqq*' must either be a '*haqq mutlaqah*'(absolute, unqualified right), '*raqabah*' (tangible), '*manfa'ah*'(usufructuary right) or '*dayn*'(choses in action). As it has been argued in the previous chapter that Intellectual property is a form of '*manfa'ah*', this part is clear.
 - b) the holder of the right ('*sahib al-haqq*'). If it pertains to human right, the holder of the right will be man and if it pertains to God's right, the holder of the right will be God.
 - c) the party to whom the '*haqq*' is addressed, that is the party of incidence ('*mukallaf*'), who is bound by a duty to respect the right. In the context of Intellectual Property, the right bearer of '*haqq*' is either an author, inventor or a trade mark proprietor and the public is the party of incidence.

the Shar'iah, either in deed or jural, or something which is done in '*niyabah*' (by proxy or mandate/agency). See p.144 al-Ibadi.

⁵⁴ See Al-Ibadi, Abdul Salam Daud, op.cit.

d) there must also be affirmative permission (*'izn'*) from the lawgiver, or failing that, there must be at least no prohibition concerning it⁵⁵.

ii. there should be a basis in the Qur'an and Sunnah for the recognition of a valid *'haqq'*. In this respect, there must be affirmative permission from the Lawgiver, or failing that, at least be no prohibition concerning it. This criteria would prove problematic as reference to the rights of man in the Qur'an in the form of absolute rulings are not many. In this relation Kamali argues that,

"The norm in the Shari'ah is that rights and obligations do not exist unless there is evidence to suggest otherwise. Such a norm is termed "original absence of liability" (*'bara'ah al-dhimmah al-asliyyah'*) by which is meant a presumption that can only be overruled by positive evidence.⁵⁶

However, even though the Qur'an does not provide a detailed list of the basic rights and liberties, there is an abundance of principles which may provide support for the existence of rights or for that matter the enforcement against encroachment of rights. Therefore the absence of direct ruling is understandably not confined to intellectual property only, but to many other valid rights.

Kamali further argues that in many instances, the Qur'an and the Sunnah when referring to the idea of *'haqq'*, garb them in the form of duty or obligation. This means that the idea of right is subservient to duty. The emphasis in Islam is more on the fulfilment of duty than the satisfaction of individuals' right. This, according to Kamali, does not mean that there is no recognition of rights but in many instances it is the fulfilment of duty which is given priority⁵⁷. In the previous chapter we have identified the various Qur'anic injunctions and Prophetic *'hadith's* which support the view that the learning, seeking and dissemination of knowledge is a duty. Muslims are also dutybound not to conceal any knowledge and to respect those who are

⁵⁵ See Kamali, p. 345 op.cit.

⁵⁶ See p.347 Kamali, op.cit.

⁵⁷ See p.363 ibid.

engaged in activities pertaining to education. It is thus arguable that even though the Qur'an and the Sunnah do not directly recognise any form of proprietary right on 'knowledge', this does not mean that there will be no recognition of property rights over knowledge-based products.

On the other hand, this also means that the idea of '*haqq*' in Islam is geared towards an orientation of right and duty. Kamali, described this harmonious union at p.357:

"In the Qur'an, right and duty merge into justice so much so that they become, in principle, an extension of one another"⁵⁸.

This orientation between right and duty is very important in the context of Intellectual Property. For example, in the context of copyright, the right of the public to have access to published works for the promotion of learning and education is not only an important balance but a duty. The precise balance of rights and other higher objectives will be further elaborated in chapter 8 of this thesis.

In this relation to this, Muslim jurists have identified six valid bases of '*haqq*' which relate to the existence and the subsistence of legal rights.

- (a) '*Adillah al syari'yyah*' which refers to the commands of God and His prohibition either in the form of command ('*amar*'), prohibitions ('*nahy*') or permissibility ('*ibahah*').
- (b) Transactions ('*aqd*') which are concluded by two parties.
- (c) Dispositions which are concluded without offer and acceptance ('*al-iltizam allazi yatimmu bil ijab- al iradah al munfaridah*').
- (d) Inheritance ('*al mirath*').
- (e) Any legal act or recognised deed ('*al-fi'lu al-masyru*') may also give rise to rights. In the context of ownership, possession and work or labour will give rise to a valid ownership claim.
- (f) Finally, the Shari'ah also recognises that violation of other rights may give rise to rights on the person who is being violated. This is known as '*al-taaddi*

⁵⁸ Kamali, p.357 *ibid*.

ala haqqi al-ghair.⁵⁹

The first and the fifth basis of *'haqq'* will be relevant to the present discussion. This will be later developed in the discussion of basis of ownership rights over 'intellectual creations'.

iii. A *'haqq'* is an exclusive right and should be distinguished from a mere permissibility (*'ibahah'*). The nature of exclusion of *'haqq'* is not absolute. Firstly, a *'haqq'* is subservient to a set of higher values such as justice (*'adl'*). These rules on the use of right (*'isti'mal al haqq'*), the fulfilment of right (*'istifa' al haqq'*), the termination of right (*'inqida' al haqq'*) and the wrongful use of rights (*'ta'assuf fi isti'mal al-haqq*) have been developed by Muslim jurists. The basis of this orientation of *'haqq'* and the concept of justice is the Qur'anic injunctions in 57:25; 4:135; 60:8; 5:8; 4:58.⁶⁰ The precise scope of this orientation is very important, and this balancing of rights between the *'sahib al haqq'* and the *'mukallaf'* will be further developed in our discussion of limits and the extent of Intellectual Property rights in chapter 8 of this thesis.

iv. *'Haqq al-milkiyyah'* is the most perfect form of right. The idea of the nature of exclusionary rights in ownership as being the most perfect form of exclusive right has to be seen in the context of the concept of ownership in Islam. Firstly, property / ownership is a God-given right and hence should be exercised according to the

⁵⁹ See Abu Sinnah, op.cit. par.pgs. 190-195.

⁶⁰ 57:25: "We sent aforetime Our Messenger with clear signs and sent down with them the book and the balance (of right and wrong) that men may stand forth in justice".
 4:135: when addressing a challenge to the unbelievers, "Say: O my people! Do whatever you can, I will do (my part): soon will ye know who it is whose end will be (best) in the Hereafter: certain it is that the wrongdoers will not prosper".
 60:8 : "Allah forbids you not with regard to those who fight you not for (your) faith nor drive you out of your homes, from dealing kindly and justly with them. For Allah loveth those who do just".
 5:8 : "O ye who believe! Stand out firmly For allah, as witness to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from Justice. Be just, that is next to piety : and fear Allah. For Allah is well acquainted with all that you do".
 4:58 : " Allah doth command you to render back your Trusts to those to whom they are due and when you judge between man and man, that ye judge with justice; verily how excellent is the teaching which he giveth you! For Allah is He who heareth and seeth all things".

dictates of the Shari'ah. Secondly, everything in this world is created by God⁶¹ for man to consume and utilize. Man is encouraged to work for wealth and is promised for due returns commensurate to his labour.⁶² Thirdly, property, as a God given right, is not absolute. It is to be utilized according to God's will and it forms a trial /test for man. Property which is utilized in good ways will merit reward and vice versa.⁶³ On top of that there is a share of the needy in property, hence the obligation to give 'zakat'.⁶⁴

From the above discussion, it is submitted that rights over Intellectual creation can find support within the conceptions of '*haqq*' and '*milkiyyah*'. Firstly, despite the absence of direct rulings in the Qur'an and Sunnah, Muslims are given the flexibility to formulate other forms of '*haqq*' as the Qur'an and Sunnah themselves do not constitute an exhaustive list of legal rights. Secondly, one of the valid bases of '*haqq*' is '*amal*' (labour) and hence arguably, intellectual creations which owe their birth entirely to combinations found in the human mind, and which, but for his ingenuity, would not have existed, are loftier and more worthy of recognition. The conception of '*amal*' as the basis of recognition of Intellectual Property will be further elaborated in the next section. More fundamentally, the conception of '*haqq*' and '*milkiyyah*' is not absolute. Hence, in certain circumstances, '*haqq*' and '*milkiyyah*' would be subservient to other higher goals. This, and the concept of '*khilafah*' constitute two main limitations to ensure the correct orientation of duty and

⁶¹ i. God created all 'the heavens and the earth and all in between', (2:21-22,29), 'the east and the west (2:115), 'night and day' (3:190-191; 7:6-7) jinn and man (15:26), in short, all creation (11:19)
 ii. All creations are in 'natural submission' to God in their 'own mode' (7:54, 22:18; 24:41),
 iii. The universe contains signs for man of God's Omnipotence, Omniscience and Lordship and is meant to be recognised by 'men of understanding' (3:127, 190-191; 7:6-7; 13:4; 14:32-34).

⁶² i. Man is to utilize and develop nature as God has created everything for man (2:21-22; 6:95,103, 15:16-23; 16:3-21; 31:20) but according to God's will (3:32; 4:59).
 ii. Man must do good works with self and property (2:112, 208; 61:11) and gets returns commensurate (53:39).

⁶³ Property is one of the trials/ tests for man and he will be rewarded accordingly (2:155; 3:186; 8:28; 17:64; 18:46).

⁶⁴ In one's property is the share of the needy (5:19) and the need to give zakat so as to purify oneself and one's property (9:103).

'haqq'.

4. THE BASIS OF OWNERSHIP OF INTELLECTUAL PROPERTY IN ISLAM; THE LABOUR APPROACH.

In this part we will examine the basis of ownership and raise the question whether labouring on "intellectual ideas" will give rise to a form of ownership rights over the finished product. The focus of our study in this part is

- (i) the basis of '*amal*' as a justification of property in the Qur'an, and
- (ii) the application of '*amal*' in the context of the discussion of the acquisition of '*mubah*' property' ('*res nullius*').

4.1 The basis of '*amal*' in the Qur'an.

Effort and labour is much encouraged in the Qur'an, in which case the Qur'an consistently calls for rewarding of one's effort. In 62:10, the Qur'an encourages man to work and create wealth, " and when the prayer is finished, then disperse in the land and seek God's bounty". Out of which a person's entitlement to his effort is clearly addressed in Surah 4:32 where the Qur'an states that "Men have a right to what they have earned and women are entitled to what they have earned". In '*Surah al-Baqarah*', a person's right to spend their lawful earning is guaranteed. The ayah states, " O believers, spend of the lawful/pure substance you have earned and of the resources we have in store for you in the earth."⁶⁵ Beside '*a-ma-la*' and its derivatives, the other term used to signify effort is '*ka-sa-ba*' and '*sa'a*'. For the purpose of this chapter, these Qur'anic provisions are listed below:

2:134: "That was a People that hath passed away. They shall reap the fruit of what they did and ye of what ye do! of their merits; there is no question in your case."

6:132: "To all are degrees (or ranks) according to their deed: For thy Lord is not

⁶⁵ See Q2:267.

unmindful of anything that they do".

17:19: "those who do wish for the (things of) the Hereafter, and strive therefore will all due striving and have faith, they are the ones whose striving is acceptable (to Allah)".

20:15, "Verily the hour is coming, my design is to keep it hidden- for every soul to receive its rewards by the measure of its endeavour".

46:19: "And to all are (assigned) degrees according to the deeds which they (have done) and in order that (Allah) may recompense their deeds, and no injustice be done to them".

53:39; "That man can have nothing but what he strives for".

53:40, "that (the fruit of) his striving will soon come in light".

76:22, "Verily this is a reward for you and your endeavour is accepted and recognised."

79:35, " The Day when man shall remember (all that he strove for).

92:4, " Whoever works any act of Righteousness and has Faith his endeavour will not be rejected: We shall record it in his favour." (repeated in 21:94).

Scholars regard these provisions as applicable to both earthly as well as heavenly merits. Any conscientious endeavour, either for heavenly merits or earthly gain are equally highly appreciated and recognised in the Qur'an. From the foregoing Qur'anic injunctions, the argument that an author or an inventor is entitled to his/her work/invention as it is a product of his/her labour and effort, is therefore substantiated.

4.2 The discussion on 'amal' as a basis of rights in contemporary works

Classical scholars discussed 'amal' primarily in the context of first acquisition of 'mubah' goods. Four classic example where ownership arises through first acquisition are, 'ihya al-mawat' (reclamation of dead land), 'al-istiyad' (hunting), 'al-istila' ala al-kala wa al-ajam' (finder of grazing field) and 'al-istila' ala al-ma'adin wa al-kunuz' (finder of mines and treasure). Many jurists equate 'mubah' goods and common property. This is the stand taken by Hanafites school of thought with the

support of the Prophet's tradition:

"Men are co-sharers in three things- water, herbage ('*al- kala*')⁶⁶ and fire ('*an-nar*')⁶⁷."

The idea of common property in the above quoted natural resources does not in anyway suggest that these natural resources cannot be privately owned. There is a view that private ownership of these common resources is possible.⁶⁸ This is the view taken by Ibn Abidin, who had interpreted the term of '*haqq*' in the above hadith as referring to permissibility or general rights of others to consume water or to irrigate land - '*haqq al-shafah*'- if there is no other source of water nearby. To him anybody who first found a source of water and exercised his possession over it has prior right to it, he is the owner of it and not anyone else.⁶⁹

Acquisition of property through '*hiyazah or wad' yad*' means occupancy and taking possession or control over '*mubah*' goods⁷⁰. '*Hiyazah*' gives rise to ownership to

⁶⁶ '*Al-kala*' is defined in the Majallah as grass which grows by itself on land either on owned property or unowned property.(See Article 1234 *Majallah al-Ahkam*). So long as it grows by itself, owner of the land cannot prevent others from availing of this grazing rights.(See *Majallah al-Ahkam* Article 1257).

⁶⁷ '*Al-nar*' (fire) here means fire which is started by man in the wilderness. This fire is privately owned by the person who started it. But the others have general right for '*istila*', '*istidfa*' or '*istidha'ah*' which is the right to warm oneself, and illuminated by light of the fire but he cannot take the whole thing.(*Majallah al-Ahkam* Article 1261)

⁶⁸ There is an argument that natural genetic resources are the common heritage of mankind (that should be available without restriction. This has caused global conflict between industrialised countries and developing countries. The latter who possess the most of wild genetic resources dispute that and argue that they have a kind of property rights over these genetic resources. See Sedjo, Roger, Property Rights, Genetic Resources, and Biotechnological Change, 35 *The Journal of Law and Economics*, No.1, 1192, 119-213. See also Straus, Joseph, The Rio Biodiversity Convention and Intellectual Property, IIC, Vol. 24, No.5/1993, p.602-615.

Careful consideration of property concepts in Islam will warrant that wild trees and animals are common property. However it is also recognised that one in authority has a power of control over his jurisdiction and this includes the power to restrict or control any acquisition of '*mubah*' property.

⁶⁹ *Raddul Mukhtar* 4:283, referred to in Ibn. Qudamah, Muwaffaq al-Din (d. 620H), *Al-Mughni*, (n.d), *Dar al-Kutub al-'Ilmiyyah*, Beirut, 12 vols. par. pgs.563- 593. vol.5.

⁷⁰ '*Mubah*' property is property which is originally not owned by anybody such as water in the river or other natural sources, wild animals, and wild trees and fruits. Everyone alike is entitled to possess and consume these natural resources as far as their physical ability admits. See Al-Zarqa, Mustafa Ahmad, *Al-*

the 'mustawalli', as long as the 'mubah' goods are not owned by anybody.⁷¹ With the exception of the degree of possession needed, there is no fundamental disagreement in this area among the major schools of jurisprudence.⁷²

Contemporary scholars have extended it to other 'free' gifts created for mankind as a whole. In this sense, 'ilm' being God-given, arguably, is a form of these 'free' gifts. Scholars have further developed the first acquisition theory to that of labour theory, i.e a man can only get what he strives for. They argued that labour is the basis for appropriation of wealth and property. This creative labour theory is also not something new in Islamic scholarship. Among the first to associate labour to economic gain is Ibn Khaldun (d. 1406) where he writes at p.313:

"the effort to (obtain sustenance) depends on God's determination and inspiration. Everything comes from God. but human Labour is necessary for every profit and capital accumulation.

at p.314 " it has thus becomes clear that gains and profits, in their entirety or for most of the part, are value realized from human labour."⁷³

Madkhal ila Nazariyyah al-Iltizam al-Ammah, (1946), *Matba'ah Jami'ah*, Damascus. The Hanafites defined 'mubah' property as property which is freely available to be owned after 'istila' or possession. In many instances, the Hanafites used the term 'mubah' goods in contra-distinction with 'mamluk' property i.e goods which are readily owned either under private property or public property. Al-Khafif defines 'mubah' property as everything which is created by God for human consumption, on the condition that these resources are not possessed by anybody else. See *Ahkam al Mu'amalah al Shari'iyah*, (1948), *Matba'ah al-Majazi*, Cairo.

⁷¹ See Al-Sabuni, Abdul Rahman, *Al-Madkhal li-Dirasah al-Tasyri' al-Islami* (1979), *Matba'ah Riyadh*, Damsyik, Vol. 2. Such activities will give rise to ownership rights either on 'aqar' (immovable) or 'manqul' (movable) property. See *Majallah* Article 1198-1200.

⁷² The Hanafites have drawn a distinction between two forms of possession:

- i. 'haqiqi'-actual or de facto- through possession or taking control,
- ii. 'hukmi' or jural/de jure. In this instance, acquisition is complete by the use of hunting tools which render the animals powerless and cannot run away.

The Hanafites, Malikites and Hambalites regarded 'istila hukmi' as sufficient so long as it is accompanied by intention to possess, such as in the case of animals caught by tools set up with the intention of hunting. This view was not shared by Shafie and Ahmad who views that actual possession must take place. See Al-Rashid, Abdullah ibn Abd al-Rahman, *Al Amwal al-Mubahah Wa Ahkam Tamlikuha fi al-Shari'ah al-Islaamiyyah*, 2 vols, (1984), *Sharikah al-Tiba'ah al-Arabiyyah*, Cairo.

⁷³ The Muqaddimah, An Introduction to History, trans. by Franz Rosenthal, Princeton University Press, 1980.

Muhammad Baqer Sadr, (1935-1980)⁷⁴ gave the most systematic analysis of theory of acquisition of property rights⁷⁵ in his analysis of theory of distribution before production. The premise of his theory is the conception that natural resources such as springs, roots of mine, open oceans and rivers and animals in the wilderness belong to nobody. He quoted these traditions in support of his contention:

Al-Allamah al-Hilli in '*Tadhkirah*': "He does not possess the vein which is in the earth. He who reaches it from another side that he will take it".

Al-Shaykh al-Tusi in '*al-Mabsut*'," Water of seas, rivers or streams springing up in the plane or hilly waste land, all these are '*mubah*' (free for all). Any one can make use of what he wants and how he wishes."

Al-Allamah al-Hilli in '*Qawa'id*': " A prey does not become one's property by its entering one's land, nor a fish by leaping up to one's boat."

'*Al-Tadhkirah*'," A man does not become the owner of the snow falling under his possession merely by its falling on his land."⁷⁶

He further argues that the right of an individual in the natural wealth, to distinguish him from others, is the reflection of his labour. Labour, according to him, is the sole basis of acquiring appropriative rights in the wealth of nature⁷⁷. This right differs in its theoretical sense in accordance with the difference in the natural resources and

⁷⁴ '*Iqtisaduna*' (Our Economics) , Vol.2 Pt.1 , Chapter 3 p.173 ,English translation, 1984, World Organization for Islamic Services, Tehran.

⁷⁵ Sadr's scholarly work on the economic analysis of Islamic principles of acquisition of ownership remains the most important work on economic thought in Muslim literature. Even though the work came within Shi'i circles and understanding, Sadr's analysis was not confined to mere Shi'i scholars. Due to this, his work is well accepted and well regarded in the Sunni world. For a detailed analysis of his work, see Mallat, Chibli, The Renewal of Islamic Law; Muhammad Baqer as-Sadr, Najaf and the Shi'i International, Cambridge University Press, 1993.

⁷⁶ p.175, '*Iqtisaduna*'.

⁷⁷ P.178 *ibid*.

the kind of wealth⁷⁸. Further, he explains the source of his theory to that body of juristic discussions particularly on '*ihya al-mawat*', the founder of mines and spring water and hunting of wild animals.

To restate the theoretical basis of this theory, we may refer to the following discussions:

- (i) the land is his who reclaims and revives it, as stated in the Prophetic traditions.
- (ii) He who digs up a mine till it is opened up, has a greater right⁷⁹ and claim to it and the ownership of the quantity uncovered from the pit and such other material.
- (iii) he who digs up a natural spring of water is more entitled to have it.
- (iv) If an individual takes possession of a wild (*an-nafir*) animal by hunting, wood by gathering it, or a natural stone by carrying it, or water by scooping it up in a pail or such other vessel from the river, it is his property by possession or custody⁸⁰.

From the above discussion, Sadr argues that the special rights on sources of nature are established on the basis of work⁸¹. In the case of reclamation of land, the nature of labour exerted on the land must resuscitate the land, reviving the land into a fertile land. It is this new creation of utility which according to him, is the basis of the entitlement of that person, as the utility would not have existed if not of his effort. Thus, in the case of reclamation of land, mere enclosure is not sufficient for the emanation of rights.⁸² There must be, firstly, active labour, i.e the work must be of

⁷⁸ P.185 *ibid*, examples are set out below.

⁷⁹ (s.i.c) In translation the quotations used relatives (greater, more entitled) to express the thresholds for priority over ones who strive to such extent.

⁸⁰ P.177 *ibid*.

⁸¹ P.189 *ibid*.

⁸² See p.184 *ibid*. Enclosure to him is an act of monopolization and but not active labour.

economic nature; and secondly, the creation of new circumstances or a definite utility⁸³. Hence, work expended on already fertile land does not produce any rights on the land as no new circumstances are created. Once these two criteria are fulfilled, the worker by virtue of his active labour is entitled to a special right to the land. He should be able to appropriate the product of his work, reap the fruits of his labour and to exclude others from interfering with his exclusive enjoyment to the product of his labour⁸⁴. Because the basis of the worker's entitlement is the creation of new circumstances and new utility, his special rights to the product of his labour will last as long as the utility is maintained. Hence, Sadr argued that neglect and abandonment of work on the reclaimed land will sever his appropriative link with the land⁸⁵. When this happens, the land will revert to the 'common' for others to appropriate⁸⁶.

Basis of rights over wild animals emanates from the activity of hunting. In hunting, he argued the capture of the animals by overpowering them creates a new utility by rendering these wild animals as the subject of benefit for human consumption. For hunting, possession of the hunted animals are not relevant to his appropriative rights thereto. So long as he has subjugated the animals to his power, nobody can interfere with this rights, even by possession of the hunted animals⁸⁷.

On the other hand, simple possession of a stone found lying on the ground or the collecting of water from rivers is enough to justify ownership rights to it. This difference emanates from the difference of nature of natural resources and the nature

⁸³ See his comment at p.190, *ibid*, on the creation of new utility in the reclamation of dead land, "since this utility was not available in the land before its reclamation but resulted from the operation of reclamation, the worker becomes the owner of the utility, it being the product of his labour and work; and his ownership of the utility results in preventing others from stealing of him of this utility or of despoiling it by depriving him of it by their seizure of the land from him and of their utilization of it instead of him, for thereby they deprive him of the utility which he had created by his strenuous labour, acquired by a duly lawful right". See also p.192 *ibid*.

⁸⁴ See p.189, 190, 191 *ibid*.

⁸⁵ See p. 204 *ibid*.

⁸⁶ See p.192 and 206 *ibid*.

⁸⁷ See p.196 and 201 *ibid*.

of economic work needed to each separate subject matter. Sadr argued that the basis of possession in respect to natural resources such as stones and water is simple possession. Allah has created these things to be used, hence the simple availing of it entitles the person to own it⁸⁸.

On the same basis, the founder of a natural spring, or he who excavates a well is more entitled to the spring and the well. However, due to the nature of water which can be shared without ordinarily denying the originator's rights, he cannot prevent others from availing themselves of the spring water or water from the well if there is excess to his needs⁸⁹. The nature of exclusive rights in water hence differs in degree of absoluteness to that of the rights over reclaimed land. Exclusive enjoyment over land may not be obtained without total denial of others⁹⁰.

In short the theory justifies appropriation of ownership on the basis of economic work which produces new circumstances or a definite new utility. Neglect and abandonment of the property will cause the status of property to revert to that of '*mubah*' and the ownership will be extinguished. This is the import of a sound tradition narrated by Abdullah ibn. Sinan on the authority of Ahlu'l-bayt which says:

"He who lights upon a property or a camel in a deserted tract of land exhausted or gone astray, its owner abandoning it, having not pursued it, another person takes it up, maintains it, spend for it to live out of its sheer exhaustion and inamination, that will be becoming his property indisputably and the former has no right in it. This is like a '*mubah*' (free to all).⁹¹

Sadr further distinguishes between the labour theory as understood in Islam and capitalism. According to him, capitalism regards private special rights over the

⁸⁸ P.203 *ibid*.

⁸⁹ See p.197 *ibid*.

⁹⁰ See p.194 *ibid*.

⁹¹ P.183, *ibid*.

natural resources as an expression of the man's freedom which he enjoys under the aegis of the capitalist system. In Islam it is an expression of the activity of man and his pursuit of labour for the utilization and fructification⁹².

On the difference between Islam's labour theory and Marxism, the distinguishing factor is what constitutes ownership rights. While Marxism justifies only the ownership of the value added upon the labour of the worker, Islam confers on the worker the ownership of the product of his labour. According to him, the creation of new utility entitles the worker to the product of his labour and his rights subsist as long as the utility remains. Nobody else can interfere with his ownership by exerting fresh labour. Hence under this theory, appropriation of rights goes to the first person who expands economic work and creates new utility⁹³.

Sadr's analysis of the nature of rights of first acquisition can aptly be summarised the table below.

RIGHTS OF FIRST ACQUISITION			
	<u>reclamation of dead land</u>	<u>founder of stone</u>	<u>founder of spring</u>
nature of economic work	possession and economic work	possession	possession
nature of right	right of ' <i>raqabah</i> '	ownership	ownership
degree of exclusivity	absolute	relative	relative

5 The basis for the extension of the labour theory to justify rights over Intellectual Property.

i) Firstly, an initial caveat on our extension of labour theory to Intellectual Property should be noted. It is not accurate to describe 'ideas' as the subject matter of Intellectual property as similar in nature to the understanding of 'natural resources'.

⁹² P.209 *ibid.*

⁹³ P.210 *ibid.*

Many technical ideas are inherently complicated and hence cannot be regarded as common. On the other hand, 'ideas' originate from a common pool of knowledge which is inherited from past generations. It is from this characteristic that many would not hesitate to ascribe the common ownership of certain forms of knowledge such as that of religious knowledge in Islam. Secondly, it is clear in the Qur'an that knowledge (*'ilm*), as the composite of all information, originates as a form of gift from God.

In this respect it is most appropriate to quote from Pendleton:

"In a technologically advanced society no one can meaningfully be said to create information; rather they may innovate and synthesise, but necessarily they must build on existing stocks of knowledge. It follows that, in a limited sense, some aspects of technology are the common heritage of mankind"⁹⁴.

ii) Secondly, '*amal*' (work and labour) can as, a general rule, be a basis for appropriation of wealth. In our discussion above, we have seen that the application of '*amal*' in juristic books are confined to the context of ownership of '*mubah*' property. The Qur'an is emphatic that everyone should be rewarded commensurate to his effort and hence all forms of '*amal*' should be rewarded provided that the economic gain is not obtained by virtue of work on someone else's property. Islamic scholars have argued that 'labour' should be the basis of property. This theory of economic gain based on creative labour is aptly described by Beheshti (1988)

"We are the rightful owner of our labour, be it production work or a service. Entitlement of an individual to his labour constitutes the pith of all kinds of ownership. So far as his productive work continues to be there, he is the rightful owner of the same. Like wise if his work entails formation of an object manifesting his accumulated labour, he is also considered to be its owner"⁹⁵.

⁹⁴ M.Pendleton, Intellectual Property, Information-based Society and A New International Economic Order: The Policy Options?, Opinion, 1985, 2 EIPR 31.

⁹⁵ Beheshti, Ayatollah, Ownership in Islam, translated by Ali Reza Afghani, (1988), Foundation of Islamic Thought, p.31.

In the second form of labour i.e services, Beheshty draws a distinction between "a person who is engaged in a sustained work and it does not exist in a crystallised form". In this sense he is referring to services performed by sellers, cloth sellers, etc who do not form catalyst for factors of production⁹⁶.

iii) The requirement of active labour, or creative work as stipulated by Sadr in his analysis above illustrates the need to have a certain threshold of endeavour for propertisation to be effectively materialized. This proposition draws support from the juristic view that mere fencing, either with soil or stone in the case of revival of land, is not enough to confer rights over the land. Secondly, Ibn. Quddamah has also illustrated instances whereby dead-land was given by the states to individuals. Such lands were not considered as appropriated until work had been done on the land. With regard to the different form of 'labour' from mere possession in the case of water and hunting and 'active labour' in the case of revival of land, this distinction can be rationalised in the 'propertisation' of 'ideas' as well. The requirement of 'originality' in copyright is of a lower threshold than the requirement of novelty in patents⁹⁷. Such differences can be rationalised as to the degree of claim of priority right. In this respect, in the case of authorship, it is conceded that to a certain extent authorship results from the "conscious and unconscious intake, digestion and transformation of input gained from the author's experience within a broader society"⁹⁸. While, in the case of patents, due to the requirement of novelty, such

⁹⁶ P.31-33, *ibid.*

⁹⁷ See *Stowe v. Thomas*, 23 F. Cas. 201, 206-207 (C.C.E.D. Pa.1853) (No 13, 514): "(The author's) exclusive property in the creation of his mind cannot be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. This is what the law terms copy, or copyright".

Mr. Justice Erle of *Jeffreys v. Boosey*, 10 Eng. Rep, 681 (1854) wrote: "The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, not the ideas expressed by those words, they existing in the mind alone, which is (sic) not capable of appropriation".

⁹⁸ See Litman, *op.cit.* In this perspective, we are assuming that the philosophical underpinnings of the theory of 'originality' in copyright in common law jurisdictions are legitimate. For a different theory see Aide, Christopher, A More Comprehensive Soul: Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right, *University of Toronto Law Review*, Vol.48 (1990), 211-228. The

conflict of rights, is unlikely.

vi) Further, support can also be drawn from the Prophetic '*hadith*':

"Whoever has preceded other Muslims in something which has never been acquired before, he has the right of priority over it".⁹⁹

With regard to 'intellectual creations', therefore, it must satisfy the requirement of the creation of new utility, a different product than the one which existed in common. In this respect, even though the common law jurisdictions used different yardsticks of 'creativity' and originality' to different subject matter, it is not within the province of this thesis to challenge these accepted thresholds.

iv) Further lessons can be obtained from the juristic discussion of '*ihya al-mawat*' which defines the boundary of the application of the concept of '*amal*'. Firstly, the concept rule out the ownership of something which is previously owned. Secondly, acquisition of rights will not arise if the subject matter is something which is already 'common'. Arguably, copyright and patents have eliminated 'common' subject-matter from their protection¹⁰⁰. Thirdly, Muslim jurists have further ruled out the acquisition of something which may result in conflict with public needs. Among the types of land which are not allowed to be revived are public road, passages which connect a place with another village or land adjacent to another village. The jurists further limited the application of 'revival of land' to lands within the periphery of a village¹⁰¹.

v) Fourthly, consistent with the distinction drawn between the labour theory and the exchange value in socialist countries, it is submitted here that labour and work

Romantic conceptions emphasized on the author's originality and creative genius, and the bond which exists between an author and his or her work.

⁹⁹ '*Man yasbiq ila ma lam yasbiq ilaihi Muslim fahua ahhaqu bihi*', referred to in *Al-Mughni*, op. cit. vol.5 p.569.

¹⁰⁰ See Hughes & Litman, op.cit.

¹⁰¹ This inherent need to balance the conflicting interests in Intellectual property will be dealt with in detail in Ch. 8 of this thesis.

justifies the ownership of the whole intangible value of intellectual creations. This is despite the arguments that the process of authorship and inventorship are accumulative processes¹⁰².

vi) As far as the nature of this right is concerned, it would be that of a special right against the use of one's property without one's permission. This priority right to the product of his labour can manifest itself in different forms such as that of possession of land and possession of water as illustrated in Sadr's illustration. Arguably, this will rationalise the difference between the degree of exclusionary power between different subject matters. More fundamentally, this in turn, depends on how far others' right will be balanced without upsetting the owner's priority right. In the case of copyright, it is not a monopoly right. Under copyright a similar work can be protected if it is independently derived. Copyright allows such duplication of interest as one interest does not prejudice the right of priority of the other.

vii) Sadr argues that this right of priority is not permanent. He argues that a thing will revert back to the common upon neglect and abandonment. While his proposition may not find support with the Shafi'i school of thought, its relevance to ownership of Intellectual property, particularly in the case of trade mark, is arguable¹⁰³. Therefore, 'priority rights' should be maintained so long as the mark is still in use. Non-use of a mark marks the abandonment ('*tahalli*') of the mark. Furthermore, Intellectual Property cannot be permanent and ceases upon the expiration of its lifetime as provided under the law.

¹⁰² See (iii) supra.

¹⁰³ His concern for the maintenance of the 'common' by imposing constant maintenance and labour can find support in Maliki school of thought. Jurists have differences of opinion on owned lands which are left neglected after being reclaimed. The Malikis argue that this type of land reverts to the 'common'. This view is not shared by the Hanafites who views that so long as the land is under the dominion of an owner and the owner is known, such land cannot be considered as dead land. The Hanafites further sought reference to the Prophetic '*hadith*' indicating that such land should not be under the dominion of a known owner. In another hadith, the Prophet declared that such property should not be under the ownership of a Muslim. See the discussion in *Al-Mughni*, op.cit.

6 Conclusion

In this chapter, it has been shown that theorising on intellectual property is possible through the understanding of the concepts of '*haqq*' and '*milkiyyah*' in Islamic scholarship. It is argued that the concept of '*haqq*' is flexible and non exhaustive, allowing for further extension in other forms of '*haqq*' which may not be anticipated by classical scholars. In the case of Intellectual Property, the concepts of '*haqq*' and '*milkiyyah*' do not only justify the initial allocation of rights but also the subsistence and limitation of rights.

Rights over intellectual creations subsist by virtue of labour ('*amal*'). It is established that the general theory of acquisition of wealth through labour is more consistent with the Qur'anic injunctions. This concept should not, therefore, be confined to the discussion of first acquisition through possession ('*hiyazah*') and revival ('*ihya al-mawat*') only. Secondly, the author/inventor's entitlement to the product of his mental labour is legitimate. Mental labour, in any case, should not be any different from any other kind of physical labour. In this respect we can draw support from Beheshty's work:

"The scope of the term "labour" is large enough to accommodate terms like "physical" as well as "mental exertions"¹⁰⁴.

Furthermore, to discriminate mental labour from other forms of exertions and endeavour would be inconsistent with the Qur'anic injunctions on '*amal*'. The wanton disregard to the authors/ inventors lawful entitlement would be a great injustice.

A careful consideration of the principles of 'first acquisition' further provides us with certain principles which mark the boundary of the labour theory. Firstly, it calls for the creation of something new, which has never existed before. Secondly, the subject-matter acquired should not be owned by someone else. Thirdly, acquisition of rights is subjected to the higher threshold of public interest and needs. This last

¹⁰⁴ See footnote at p.44, op.cit.

requirement accords with the nature of '*haqq*' and '*milkiyyah*' which is not absolute. In cases of conflict with public interest, certain adjustments have to be made. This is further substantiated with the orientation between '*haqq*' and duty. With regards to Intellectual property, such reorientation is necessary and a precise balance should be struck between an individual's interest and the public's access for '*ilm*'.

CHAPTER FIVE

COPYRIGHT : INCENTIVE THEORY AND DISSEMINATION OF WORKS

1 Introduction

There is a widely held belief among developing countries that copyright protection is an unnecessary obstacle towards dissemination of literature, thereby affecting their capacities for intellectual development. This belief is further heightened with the expansion of copyright into new technological subject-matter such as computer programs, reprography and recently, the multimedia networks. Contrary to this belief, copyright has long mediated between the need of authors for economic gain and the right of access for the public to written works¹. The balancing role played by copyright depends on the understanding of the role of copyright. The concept of copyright reproduced the fundamental contradiction between control and access. A stress on the interests of past "authors" could generate arguments for broad copyright protection, while an emphasis on the interests of future "authors" and the public could generate an equally compelling arguments for delimitations on the scope of copyright².

This chapter will seek to explain and assess how copyright has resolved this unique balance between protection and dissemination. In chapter 3 we have pointed out that one of the principal concerns of 'ilm' in Islam is its diffusion. Without repeating those arguments in detail, it is necessary to investigate to what extent copyright has fulfilled that role from its historical context. The chapter seeks to focus on the historical evolution of moral ownership of 'ideas' both in Western and Muslim

¹ See the arguments given by Ladd, David, Securing the Future of Copyright: A Humanist Endeavour, IIC Vol.16 No.1/1985 p76- 83. He suggests that there is an increasing trend in copyright towards the dissemination and access of copyright works which is made easier by the introduction of new technology such as reprography and databases. He maintains that copyright policy should aim at plenty for consumers. Authorship is essential to public purposes, however: public uses of protected works i.e government uses, should not be borne as a subsidy from authors and publishers, but paid as a social cost.

² See Jaszi, Peter, Toward a Theory of Copyright: The Metamorphoses of "Authorship", Duke Law Journal, (1991) 455-499.

literatures.

One of the means to ensure dissemination of knowledge is through the recognition of moral rights. It is arguable that the acknowledgment of moral rights of authorship signifies the social appreciation and recognition to the contribution of authors for their endeavour. This chapter highlights the present precepts of moral rights in Malaysia and analyses the modern standards of moral rights in Malaysia in terms of their conformity with the standards imposed by the Shari'ah.

The chapter then proceeds to discuss the economic significance of copyright. Within this framework, key issues pertaining to copyright will be evaluated individually as they are understood in Malaysia and other common law jurisdictions. As far as the position in the Shari'ah is concerned, we are assisted by the various opinions of Muslim scholars who have undertaken the task of analysing the acceptability of copyright precepts within the Shari'ah. For clarity, the following issues are highlighted in this chapter:

- (i) subject matter of protection,
- (ii) originality,
- (iii) idea / fixation dichotomy,
- (iv) ambit of exclusive rights,
- (v) exceptions to exclusive rights,

It is important to note here that (i), (ii), (iii) are crucial to the subsistence of right. While (iv) and (v), are linked to the determination of scope of copyright. From the analysis of the subsistence and the scope of copyright, it is evident that copyright laws are couched in a way to mediate between control and access.

2. Moral justifications of copyright in historical context in the Western literature

It is crucial that proper appreciation is made to the historical significance of moral ownership of copyright both in Western and Islamic literatures. It is only by this appreciation that one can realise the parallelism between the two worlds, particularly

on factors and roots of recognition of copyright rights and their linkages to the growth of intellectual academia.

The existence and forms of moral ownership of copyright in history is well-documented in the work of Streibich. Streibich³ maintains that the moral right to protection of intellectual property emanates from the natural need of the human mind in order to sustain mental development. Since the beginning of written history, there had existed a moral or natural right of ownership to intellectual property, which manifested itself in different ways at different times⁴. This right existed in the form of censorship of the ancient civilisations of Mesopotamia⁵ and Egypt; the plagiarism of Greece and Rome⁶; and the control of the Church during the Middle Ages until the Age of Printing⁷. In the latter period, it was a common practice that copies of books contained an *anathema*, at the end of the books, against any person who would steal or destroy them⁸.

During the middle ages in the U.K, the ownership of intellectual property, with the exception of profane music, was vested in the Church or its institutions. During this period, the church played its most important role in providing the impetus of the growth of religious works, the preservation of manuscripts and therein developed the

³ Streibich, Harold C., The Moral Right of Ownership to Intellectual property : Part 1- From the Beginning to the Age of Printing, (1975) Memphis State University Law Review, Vol.6 p.1-35.

⁴ Vukmir disputes Streibich's proposition that moral right principles have been observed from time immemorial, even though in different forms. He argues that until the end of the Middle Ages, the author's right generally were limited to a ban on plagiarism and it was not until the eighteenth century that the notion of moral right as understood now even began to be discussed.

⁵ This is evidenced by the mutilation and defacement of monuments, temples and tombs, where the names, titles and heroic deeds of prior rulers and gods were stricken therefrom in an attempt to erase their existence from history. Streibich, op.cit. p.3.

⁶ This period was illustrated with the 'stigmatization' of plagiarism as a crime and the persecution of free thinkers. Streibich, op. cit. p.8.

⁷ Censorship was carried out by the Church to protect the status quo, so that conformity to the accepted religious doctrines could be enforced and not be undermined by revolutionary ideas. Streibich p.7.

⁸ See p.12 Streibich, op.cit.

foundation of the Western university system, which was an outgrowth of monastic schools. These medieval universities helped to decentralize and effectively diluted the total censorship control of the Roman Catholic Church. Promotion of freedom of ideas or secularization of knowledge under the banner of these medieval universities, contributed to the growth of intellectual academia and libraries. Regulations regarding the production and distribution of manuscripts were imposed to ensure the preservation of written works. These universities maintained the property right and title of all the manuscripts which remained in the university⁹.

Censorship, either to enforce certain religious views or to control the propagation of radical ideas against the royalty was the cornerstone to the publishing industry in the U.K, made effective as licence to publish were granted by Royals in the early 16th.Century. During the reign of Henry VII and Mary I, licence to publish had to be sought in the form of privileges, patents and monopolies. This system of monopolies was designed as a means of protection of the developing book industry, often supported by state effort to control of the book market, rather than as an institution complying with the needs of authors. This censorship control was further assumed by the Stationer's Company which was empowered the right to regulate the publishing industry by the Royal Charter of 1557. The preamble states that the Charter is being granted to control 'scandalous, malicious, schismatical and heretical books'¹⁰. The Stationer's Company was given the right to control entry into trade by regulating apprenticeship, the prohibition on printing by non-members and the rights of search and seizure in pursuit of illegal books. Despite further changes made to the publishing industry, censorship informed all the early copyright legislations.¹¹

The roots of moral ownership of ideas within the Islamic cultural heritage occurred much earlier than that in the U.K. These rights grow within the Islamic world, alike

⁹ P.34, *ibid*.

¹⁰ Cited in Feather, J., The History of British Publishing, (1988), Routledge, London p.32.

¹¹ See also Boytha, S., The Justification of the Protection of Authors' Right as Reflected in Their Historical Development, RIDA, 15th. Jan 1992, p.53.

its Western counterpart, out of the same concern i.e the incentive for intellectual and technological growth.

2.1 The historical groundings of moral ownership of 'ideas' in Islamic scholarship.

There have been sporadic remarks on plagiarism where such practice is condemned and criticised, indicative of the intolerance of such conduct in Islam¹². Ibn Khaldun (732-808 H.) in his celebrated work '*Muqaddimah*'¹³, describes some of the tactics which were employed by authors such as ascribing the work of an earlier author to himself with the aid of certain tricks by changing the wording and arrangement of the contents. There are also remarks on spurious poetry which finds echo in Ibn Qutaiba's (d.276H) critical analysis of poetry. He describes poetry as a science, '*ilm*', just the same as theology, '*din*', where one has to learn many things properly and accurately for the proper understanding of what one hears¹⁴.

Ibn Sallam, a known poetry critics (d 276H) for example wrote on instances of false attribution, non attribution and forgery in the transmission of poetry and hadith. Ibn. Sallam wrote:

"One of those who corrupted and adulterated poetry and transmitted all kinds of worthless verse was Mohamad b. Ishaq ibn. Yassar..... People then accepted such poetry on his authority. He used to excuse himself by saying,"I know nothing about poetry. It is brought to me and I transmit it,"but that was no excuse for him. He included in the Sira poems by men who never wrote any

¹² Streibich gives due recognition to Muslim's role in the preservation of manuscripts and the channeling of classical works back to modern civilisation. see p.16, op.cit.

¹³ '*Muqaddimah*' is an important historical-sociological work in Islamic scholarship. Its significance has not been bypassed by any other works. vol.2 p.391-395.

¹⁴ See W.N. Arafat, Landmarks of Literary Criticism in 3rd. Century A.H., The Islamic Quarterly, Vol XIII No.1, Jan-March 1969 p.72. The reasons for the generally critical attitude of this period are perhaps: the interest in collecting and recording pre-Islamic as well as early Islamic poetry, and the corresponding tendency to supplement any deficiencies, which in turn generated further awareness of deliberate forging; the critical spirit which accompanied the beginnings of scholarship; the rationalism as well as the tendency to inquiry which came with Hellenic influences; connected with that, the influence of the scholasticism generally, and lastly , perhaps the sheer bulk of the invented material.

poetry at all, and poems by women too. He even went as far as 'Ad and Thamud and recorded many poems by them which were not poetry but mere words put together and provided with rhymes. Could he not have asked himself who had transmitted this poetry and who had handed it down thousands of years when God, exalted be He, says, "And He destroyed the first 'Ad and Thamud and left none remaining"?.¹⁵

The condemnation of plagiarism and copying is consistent with the principles on creativity and originality. Creativity and originality have been highly regarded in the Islamic historical academia and scholarship. Crafts, textiles, pottery, bookbinding: all were normally signed with the author's name, dated and inscribed with the place of manufacture to indicate origin and authorship.¹⁶ The state was active in the dissemination of knowledge. Incentives in terms of state grants, patronage and wages were given to Muslim scholars involved in writing and translating books.¹⁷ In addition, the state enabled scholars and scientist to spend all their time on researching, inventing, arabicising, translating and writing of scientific works. The state's involvement in intellectual pursuit was paid off well. As a result, academic institutions, public libraries and observatories were established¹⁸.

There is one interesting report of enforcement against imitation of architectural works effected through the command of Mas'ud, Prince of Ghazneh. It was reported by Baihaqi that Mas'ud (first half of eleventh century) acted as an architect. He enforced his copyright on the engineering drawings effected through the Prince's command that

¹⁵ Quoted by Arafat, op.cit. p.73.

¹⁶ An early instance of inscription of the place of production on bookbinding is the Manafi'manuscript (an early Persian bookbinding AD 500) , where date and place of publication is the city of Maragheh in Northwest Iran.

¹⁷ See Hassan & Hilli, *Islamic Technology*, (1986), Cambridge University Press, par. 8-9. He recounts that financial means are provided to scholars, they were paid salaries and pension. Caliph al Mu'tadid (d.290AH/AD 920) for example provided in his palace lodgings and rooms for all branches of science, and professors were paid salaries for teaching there.

¹⁸ See Hassan & Hilli, *ibid.* par. at p.10.

this building should not be copied.¹⁹

Germane to the understanding of moral rights in Islamic scholarship is the discussion on the methods adopted to check the accuracy of transmission of 'sacred works' such as '*hadith*' and other works such as jurisprudential works and poetry. For '*hadith*', this checking of transmission entails the scrutiny of the the narrators background and the accuracy of their narration is checked. Once this test of ingenuity is satisfied, his right to be named as the narrator is kept intact perpetually. For jurisprudential works, works which have satisfied the test of authenticity are given a certificate which is called '*ijaza*'. '*Ijaza*' indicates the authorization to teach. This method was developed in the Islamic culture at least as early as 4th/10th C. '*Hijrah*'. It first originated in religious sciences to guarantee the authoritative transmission of religious knowledge and later seeped into the studies of legal sciences in legal colleges in many forms i.e '*ijaza bil-fatwa*' (licence to issue religious ruling), '*ijaza bit-tadris*' (licence to teach), '*ijaza bit-tadris wal-fatwa*' (licence to teach and issue religious ruling).

The significance of '*ijaza*' as a recognition of ownership of intellectual ideas is illustrated in the process of book writing²⁰. Most books were written under dictation in the process of learning. The teacher would grant a licence for his student to take note of his lectures. This book would later be attested with the signature of the professor and that copy alone will be regarded as a true copy of the professor's work.

Not everybody was given a licence to take note. Some were given the licence to teach. Even though a particular work might have been authenticated with the author's name, not everybody could transmit the content of the book unless he received a certificate

¹⁹ "As such it was said that nowhere a similar garden palace is shown and no 'padishah' commanded to build a similar structure and he (Mas'ud) did everything thanks to his knowledge and calculation and by his noble hand he made the plans since he was outstandingly skilled in the art of handling the instruments and particularly in the measuring..."Quoted in Giuzalian, "Qalamdani" p. 106-107. See Ettinghausen, Richard, Islamic Art and Archeology, Collected Papers, (1984), Gebr. Mann Ver Lag.

²⁰ See also Sibai, Mohamed Makki, Mosque Libraries, An Historical Study, 1987, Mansell Publishing limited, London & New York.

to teach and a certificate of audition ('*sama*')²¹. The latter certificate was appended to the book certifying that a particular person had personally studied the book under the author and was given an authority to teach the content of the book. These methods played an important role as transmission of knowledge in Islamic scholarship at that time was through personal contact. Even if a book had been authenticated as that of the author, authorisation to teach and to issue religious rulings had to be given from the teacher to the master. In all instances, legitimate authorisation must be sought from the original author. Through this filter, the accuracy, authenticity of written works were kept intact.

Hence, we see that, unlike the role of anathema in the preservation of sacred works, the concept of '*ijaza*' marks the legitimate channel of knowledge. It also acts as a point of reference, emphasizing the importance of the linkage between not only of the author and the work but also the author and the audience. Should the reader have difficulties in comprehending any of the concepts which the author is conveying to him, correct attribution of 'authorship' ensures that he can turn to the correct source for assistance. In this respect, the concept of '*ijaza*' is comparable to the concept of copyright in broadcasting works in the U.K under the prevailing Copyright Designs and Patents Act 1988. Whereby under the Act, the author of a broadcasting work include those who assume the responsibility to the content of the works²². This need to preserve authenticity of works is further illustrated in the following discussion on the legal or juridical basis of moral rights in Islam.

²¹ The *musmi*' (the certifier) could himself be the author (*mu'allif*) of the work being studied, or he could be another scholar authorized to teach the book, in which case he cited his authority going back directly to the author, or through one or more authorized scholars intervening between the author and himself. See Makdisi, George, The Rise of Colleges : Institutions of Learning in Islam and the West (1981), Edinburg University Press, Edinburg.

²² See S.9(2)(b) of the 1988 CDPA whereby an author of a broadcast is the person who makes it which includes the transmitter of a programme if he has responsibility to any extent for its content and the person providing the programme who makes with the person transmitting it the arrangements necessary for its transmission. (S.6(3)).

3.1 The evolution of moral right principles in common law jurisdictions

Despite the dicta that there exists recognition of moral rights principles, moral rights play little role in the evolution of copyright laws in the common law. Due to this, some maintain that principles of moral rights are traces of Roman law.²³ The romantic conception of moral right predicates on the distinction between "intellectual" and "physical" property, and the assumption that the former is superior than the latter.²⁴ The central romantic conceptions of the author is by the appreciation that a work of art results from the overflow, utterance or projection of the thoughts and feelings of the author. The author himself becomes the major element generating both the artistic product and the criterion by which it is to be judged²⁵. Romanticism emphasizes the unity of the work and the author and the metaphor of the author as the creator.

The romanticism's conception is highly individualistic in its approach to authorship and stresses on the author's work as the emanation or manifestation of his personality, thoughts, ideas, sentiments and feelings. The focal point of romanticism is the preservation of the way in which the author presents his work to the world and the way in which his identification with the work is maintained. The common law, on the other hand, perceived authorship not as a result of the authors' genius and creativity but on the basis of the skill and labour expended on a work. Because of this differing philosophy and outlook on the concept of authorship, Romanticism

²³ Vukmir, Mladen, The Roots of Anglo-American Intellectual Property Law in Roman Law, IDEA - The Journal of Law and Technology v. 32 (1992) p.123-154. Vukmir maintains that the concept of moral rights both in the U.K and the U.S were influenced by Roman conceptions of natural right theories. The influence of Roman law on common law was thought to have been taken place in the twelve and thirteenth century. These traces of Roman law was deeply incorporated in English law even after the open reaction against Roman Law in the 14th. century. He reveals the instances whereby Roman law assist to shape copyright laws into a coherent set of criteria particularly in the shaping of major concept such as incorporeal right and fair use.

²⁴ Aide, Christopher, A More Comprehensive Soul: Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right, University of Toronto Law Review, Vol.48 (1990) p. 211-228.

²⁵ The romantic conceptions emphasized on the physiological and intellectual link between the author and his work. What is the difference between writers and their work, and labourers and their work?. Romantic theory provides ready answers - originality, innate genius, and the mystery of artistic creation are among the ideas which come to the mind as distinguishing features. See Aide, p.228 *ibid*.

concepts never took ground in the U.K.

In contrast, the central notion of 'authorship' in Islam, is less individualistic as that of the Romanticism. The emphasis of 'authorship' as an obverse of responsibility, carries with it the notion that his work should be preserved, not as a recognition of his personality but to preserve the authenticity of his work. This notion of responsibility will be the focal point of our discussion in the next section.

3.2 The legal and juridical basis of moral rights in Islamic scholarship

The insistence on accuracy and legitimacy in the transmission of knowledge-based works is coincidental to the religious requirements that 'knowledge' should only be transmitted to the proper audience. The following '*hadith*' is instructive on this matter.

'Hadith' reported by Anas ibn. Malik, that the Prophet (p.b.u.h) said, "Seeking knowledge is obligatory on all Muslims, the one who gives knowledge to those who do not deserve it is like the one who puts on fake treasures, jewels, gems and gold to a pig's neck.²⁶"

By appreciating this principle, valuable literature and written works are not corrupted by inaccuracies or errors. Arguably, ensuring legitimacy of transmission of knowledge is a form of 'rights' which is due to knowledge as the following '*athar*' illustrates;

It is reported that Harir ibn. Salman ibn. Samir said:

"Do not narrate falsehood to *al-hukama'* (those possessed with wisdom), do not narrate wisdom to *al-sufaha'* (those who are ignorant) for they will angry against you, do not conceal knowledge to those who deserve it for you will commit a sin, do not narrate to those who do not deserve it for you will become ignorant. Indeed, you are obliged to observe the right in your

²⁶ *al-Targhib* p.96, op. cit.

knowledge as you are obliged to observe the right in your property.²⁷"

The Qur'an itself confirms the special status of those possessed with 'knowledge' and 'wisdom'²⁸. Thus it befits to respect them as a form of religious observance which is further made clear in the following '*hadith*'. Hence conformity to these religious requirements is the personal right of a person who initiates or divulges a work. The kind of reverence expected for these categories of people falls within the following '*hadith*':

'Hadith' reported by Ubadah ibn. Samit :that the Prophet said: "Those are not among my people who do not exalt '*kabiruna*' (the senior people among us) and have compassion for the '*saghiruna*' (the junior among us) and do not recognise those who are knowledgeable".²⁹

It should be appreciated that the religious requirement to honour and respect, appertains only to intellectual works. The courteous treatment of transmitters on poetry, '*hadith*' and other religious knowledge indicates that such a strict requirement may not fit non intellectual works³⁰. Arguably, the need to preserve accuracy and legitimacy of information may be a less crucial factor in utilitarian works. Thus, we see that the role of moral rights of knowledge in Islamic scholarship lies in the multifold purpose and aim of moral rights, the deep appreciation of the intellectual

²⁷ Abu Muhammad Abdullah ibn. Abd al Rahman (d.255H), *Sunan al-Darrimi*, Dar al Sunnah al Nabawiyyah, vol.1 p.105.

²⁸ See 39:9, "Say: Are those equal, those who know and those who do not know? It is those who are endowed with understanding that receive admonition".

²⁹ *al-Tarhib*, p.114, op.cit.

³⁰ This different treatment between different categories of work finds its juridical basis in Continental jurisprudence and also in common law countries. See Dietz, Adolf, *The Artist's Right of Integrity Under Copyright Law - A Comparative Approach*, IIC No.2/1994 p.177-194 par. p.185 where he points out that technical and utilitarian works are treated differently from artistic works. Such distinction finds favour in the U.K CDPA 1988 certain works are excluded from moral rights such as computer programs and computer generated works. For further analysis of the U.K provisions, see Dworkin, Gerald, *Moral Rights and the Common Law Countries*, Australian Intellectual Property Journal, Vol.5, Feb. 1994, p.5-36. See also, Berg, Jeff, *Moral Rights: A Legal, Historical and Anthropological Reappraisal*, IPJ, Vol.6 No.3, Sept. 1991, p341-376.

linkage between authors and their works, the responsibility of the authors to guide others and the need to check the legitimacy and accuracy of transmission of knowledge. The threshold of moral rights is high in Islam, and this is further echoed by a renown contemporary scholar, Al-Darrini.³¹ Al-Darrini argues that if a man can own products of technology, equally he can own the ideas behind it.³²

From the above discussion, it can be deduced that the premise of moral rights recognition in Islam is the need for accuracy and correct channelling of knowledge and information. The emphasis on the correct attribution of authorship, the prohibition against false attribution ensures that knowledge is being disseminated correctly and recourse can be made to the author to check the accuracy of the work. This emphasis on representing the truth means that it would be justifiable for the author to object to any derogatory treatment of his work so as to represent him as possessing certain opinions or views which in fact he did not, which may affect his reputation as a writer and severely affect his reputation. In this regard, Al-Fatlawi argues that the author's right to object against derogatory modification should be balanced with other's duty / right to correct errors.³³ Consistently, an author may even withdraw his work if later his ideas have been changed and his work no longer represents his views.

In addition, the emphasis on the author's personal responsibility for his work would include the negative right to prevent false attribution on his work. A person should be able to prevent his name from being associated to a work of which he is not the author.

The recognition of these rights is mandatory under the implicit categories of 'rights attached to knowledge' adduced by the above Prophetic '*hadiths*'. Furthermore, it is

³¹ Another scholar Al-Sanhuri accepted the four moral rights; rights of paternity, rights of integrity, rights of publication and right of retraction, *Al- Wasit fi-al Qanun al-Madani*, par.at p.309.

³² P.18, '*Haqq al-Ibtikar*', op.cit.

³³ Al-Fatlawi, Suhail Husin, *Huquq al-Mu'allif al-Ma'nawi fil-Qanun al-Iraqi, Dirasah Muqaranah*, (1978), *Wizarah al-Thaqafah wal-Funun*, Iraq par. p.125.

also necessary that the author should have a right to control reproduction of his work, which stems from the need to check the accuracy on translation. However, this right should not justify unjustifiable refusal to consent for translation for that it would be against his obligation to disseminate ideas as upheld in the Qur'an.

Finally, it is implicit in the '*hadith*'s which allows the choosing of audience of '*ilm*', the recognition that a person who initiates work has a right to decide how, when and to whom a work is to be disclosed. This would imply the possibility of control of uses of work and the right to control the disclosure of a work to the world.

The analysis, thus far, highlights that these so called moral rights emanates from the linkage between the author and his work. These rights are imposed, as being the person who initiates the work, he is personally responsible to its accuracy and authenticity. In terms of practice, being the obverse of responsibility, these rights may not be unnecessarily wide that they become unnecessary obstacle to the dissemination of works. A balance has to be struck between the moral interest of the authors and the legitimate expectation of the public. Pursuant to this, we will further explicate the scope and role of moral rights in modern copyright system, focussing particularly on common law jurisdictions. From here we can discern those crucial streams of thought which are influential to the shaping of moral rights in Malaysia. Provisions from international conventions are also referred to, to provide the necessary framework from which necessary standards of protection may be emulated by national legislations.

4 Moral right precepts in modern copyright systems

The receptacle of moral rights is embodied in Article 27(2) of the United Nations 1948 Universal Declaration of Human Rights³⁴ and Article 6 bis of the Berne

³⁴ Which provides that "everyone has the right to protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author". This provision is emphatic that moral rights are of equal standing with material rights of authors.

Convention.³⁵ The essential features of moral rights as enshrined in the Berne Conventions are:

- (i) they exist independently of economic rights,
- (ii) they subsist even after the transmission of economic rights,
- (iii) the right to claim authorship is a positive right even though the convention does not stipulate on the methods of assertion.

Most common law jurisdictions offer recognition to two types of moral rights, right of attribution or authorship and the right to oppose modifications and uses of his work which adversely affects his reputation³⁶. In the U.K prior to the C.D.P.A 1988 which incorporates moral right concepts legislatively, adaptation rights³⁷ and right of integrity are pursued, to a limited extent, through traditional common law avenues of defamation, passing off and also through contractual agreements. Such a practice falls short to the threshold of A.6 bis of Berne Convention. Passing off is confined to commercial contexts, and the defamation right dies with the author; also, both rights presuppose some element of misattribution³⁸.

³⁵ Article 6 bis of the Berne Convention provides that:

(1)Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

(2)The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained. For further analysis, see Ricketson, Sam, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, (1987) Centre for Commercial Law Studies, Queen Mary College, London.

³⁶ There are four types of moral rights:

- (i) right of paternity,
- (ii) right of integrity,
- (iii) the right not to be falsely attributed as author or director (false attribution of work),
- (iv) right of disclosure.

³⁷ Even though there is an acceptance that an adaptation work constitute an original work, it has now been recognised that such adaptation should not be done without the author's consent.

³⁸ See Goldstein, Paul, Adaptation Rights and Moral Rights in the United Kingdom, the United States and the Federal Republic of Germany, IIC 1/1983 p.43. See these cases Frisby v British Broadcasting Corp, 2 All E.R. 106 (1967); Gilliam v American Broadcasting Companies, Inc, 538 F.2d 14 (2d Cir.1976).

The hesitation in accepting moral rights precepts lies in the fear that such rights may impede dissemination of works and reproduction of works³⁹. Due to this, the juridical basis of integrity right is discretionary and the law has imposed certain limitations to the exercise of this right. It is important that a balance should be struck between the conflicting interests of authors and the numerous industries related to copyright works. Moral rights if pursued strictly, may dampen the efficacy of commercialization of copyright works. Even countries with deep traditions of moral rights have imposed certain conditions to qualify the exercise of integrity rights⁴⁰. In France for example, moral rights are conceived as discretionary rights, the exercise of which must not be justified in detail - apart from clear cases of apparent misuse⁴¹.

See also the cogent arguments given by Dworkin, Gerald, in The Moral Right and English Copyright Law, IIC Vol.12 No.4/1981, Moral Rights and the Common Law Countries, AIPJ, Vol.5, Feb.1994, No.1 p.5-36.

³⁹ See Dworkin, Gerald, Moral Rights and the Common Law Countries, AIPJ, Vol.5, Feb.1994, No.1 p.5-36 par. p.34;

"The simple fact is that moral rights impinge upon economic activity and, where they exist, cannot be ignored. It may be that some fears are exaggerated and that the opposition to moral rights has at times bordered on the hysterical; but industry hostility, to unqualified moral rights in the United Kingdom, and to general moral rights legislation in the United States, cannot be simply be dismissed as irrational or unreasonable. Those exploiting copyright works have good reason to be concerned about the existence of high-sounding rights which may be used by authors or their estates to interfere with or block the way in which they wish to use the product they have acquired. They have a legitimate point of view."

⁴⁰ Dietz, Adolf, The Artist's Right of Integrity Under Copyright Law - A Comparative Approach, IIC No.2/1994 p.177-194.

In these countries, the basis of integrity right is defined by the acceptance that the relation of creation between work and author and that a work is the reflection of the author's personality. Romantic notions of authorship influence the recognition of moral rights particularly paternity and integrity rights. The right of paternity allows an author to claim (or disclaim) authorship of the work in question. The right of integrity grants an author to restrain any distortion, mutilation or other modification of his work that would be prejudicial to the author's honour and reputation, even though the ownership of a work's copyright may belong to another.

⁴¹ Dietz, Adolf, The Artist's Right of Integrity Under Copyright Law - A Comparative Approach, IIC No.2/1994 p.177-194 par. p.185. Most jurisdictions including Germany allow only the objection against gross distortions or gross injuries of the work or their contribution to it. Other criterion which have been taken into account are for example, the nature and extent of the alteration of the work and also how far the latter is reversible or irreversible; the number of people or the size of the public addressed by the user of the work in altered form; the fact whether the author created the work in an employment relationship or as a self-employed author, or else whether a commissioning party did not have a decisive influence on the final result of the creation; also the possible consequences for the professional life of the author and, of course, for his/her reputation have to be taken into account.

In Malaysia, moral rights are enshrined in S.25 of the MCA 1987⁴². That section provides for the right to be named as the author of the work and the right to object against the modification of his work which are adverse to his reputation. These moral rights exist independently of economic rights and can be exercised even if the ownership of the copyright of the work is no longer with the author or his heirs. It is thus clear that the treatment of moral rights in Malaysia is, to a certain extent, in conformity with the Berne Convention⁴³. In Mokhtar Hj Kamaluddin v Pustaka Sistem Pelajaran⁴⁴ the Malaysian Court has awarded aggravated damages for wrongful attribution of authorship. In this case there had been a mistake with the printing of the author's name implying another person to be the author.

From the above discussion, thus far, and from the important assumption that proper recognition of moral rights enhances the economic value of work, moral rights are complementary to economic rights. It is crucial therefore, for such rights to achieve its purpose, that all necessary elements are fulfilled. It is arguable, however, that the provisions pertaining to them in Malaysia falls short of the high standards set in Islamic scholarship. It is crucial that these unfounded fears of moral rights should be properly eliminated. The correct approach should be that of proper orientation

⁴² S.25 of the MCA provides:

Subject to this section, where copyright subsists in a work, no person may, without the consent of the author, or after the author's death, of his personal representative, do or authorize the doing of any of the following acts:

- (a) the presentation of the work, by any means whatsoever, under a name other than that of the author; and
- (b) the presentation of the work by any means whatsoever, in a modified form if the modification-
 - (i) significantly alters the work; and
 - (ii) is such that it might reasonably be regarded as adversely affecting the author's honour or reputation.
- (3) except for modification for purposes of publishing, reproducing, performing in public, broadcasting or communicating by cable
- (4) The author or, after his death, his personal representative, may exercise the rights conferred by this section notwithstanding that the copyright in the work is not at the time of the act complained of, vested in the author or personal representative, as the case may be.

⁴³ Khaw, however argues that the above provision on moral rights falls short of the Berne requirements. Firstly, the provision does not secure the right to be identified as the author. For instance, the Act does not cover instances whereby a work is presented without any attribution whatsoever. Secondly, right of integrity will subsist upon subsistence of copyright. Thirdly, the right to oppose modification does not include the use of work which may be derogatory to the author's interest. See Khaw, Lake Tee, Copyright Law in Malaysia, (1994) Butterworths, Malaysia, p.173.

⁴⁴ (1986) 2 MLJ 376.

between the moral rights of the authors and the need of the business industry. Within this framework, the approach adopted by some of the continental countries, as pointed out above, may be a possible paradigm to emulate.

5. Recognition of economic rights

In this section, the key issues pertaining the economic aspects of copyright are analysed. These key issues are related to two main aspects of copyright; subsistence of right and scope of right. In the former, the issues involved are subject-matter or protection, authorship, idea-expression dichotomy and originality. The second group pertains to scope of right. Among key issues identified within this group are scope of exclusive right, alienability and transmissibility of copyright.

Before dealing with those key concepts in copyright, it is crucial to investigate, first, the acceptability of economic aspects of copyright in Islamic scholarship. In this respect, it should be noted that despite assertions that some authors write without expectation of direct monetary reward⁴⁵, the economic rights of authors are well founded in jurisprudence. Muslim scholars have argued that the economic rights of an author are concomitant to his moral right for recognition, attribution, and authorship⁴⁶. There are traditional scholars who are reluctant to recognise property

⁴⁵ See Plant, Arnold, The Economic Aspects of Copyright in Books *Economica* Vol.1 (1934) p.167, who argues that book production can subsist without copyright. He emphasizes on the publishers' natural head start and tacit understanding among publishers that works should not be pirated. Without copyright, he argues, there will be more competition in publishing books and hence in order to check against rival, induce the publishers to adopt low price policy, which in turns benefits the readers. He critically questions the accuracy of the economic theory that copyright is essential in order that the monopoly profits from successful books might cover the losses. He argues that copyright monopoly, like patent monopoly, enables the privileged producers to increase their receipts from successful products by restricting the supply. This tendency leads to the discrimination of unsuccessful works. He suggests the introduction of the royalty system at a general scale particularly on books which may not elicit revenue. He further emphasizes on the need to ensure low prices for books and enable the continuance of authors whose books the public want.

⁴⁶

See Mahmasanni, S.R; Al-Nazariyyah al-Ammah lil-Mujabat wa al-Uqud fi al-Shari'ah al-Islamiyyah (1983), *Dar al-Ilm al-Malayin*, Beirut (3rd.ed.) p.19; Al-Khafif, Ali, Al-Milkiyyah fi al-Shari'ah al-Islamiyyah (1966), *Maahad al-Buhuth wa al-Dirasat al-Arabiyyah*, Cairo, p.8; Fathi et.al, Haqq al-Ibtikar fi al-Fiqh al-Islami al-Muqaran, (1984), *Muassasah al-Risalah*, Beirut at footnote no.1 p.13-14.

rights in literary works, which to them are categories of "knowledge".⁴⁷ Objection may lie in the fear that copyright may lead to concealment of information. As Ibn. Rushd's opinion goes, "the right of those in want of knowledge is greater". It is a duty of those with knowledge to disseminate his ideas to others.⁴⁸

On the other hand, there are scholars who highlight the positive contributions of authors and their need for economic gains. Al-Darrini, for example, argues that an author should be rewarded for his effort in disseminating knowledge through publication,⁴⁹ a duty which is classified by the Muslims jurists as '*fard kifayah*'. The basis of this right emanates from the Qur'anic injunctions which promise the awarding of rewards to those who strive in '*ilm*', '*ta'lim*' and thinking⁵⁰. It is also argued that it is in the public interest that intellectual ideas are rewarded so that it can serve as an incentive for further creativity.⁵¹ It would be contrary to the '*maqasid al-Shari'ah*' (the objectives of the '*Shari'ah*') if such efforts are not recognized as striving in knowledge and creativity is highly encouraged in the Qur'an.

6.1 Subject matter of protection.

Under the MCA 1987, works which are eligible for copyright are literary works, musical works, artistic works, films, sound recordings, broadcasts, and typographical arrangement in a published editions.⁵²

⁴⁷ According to the conception of Hanafites '*ilm*' or knowledge as something which cannot be owned or given proprietary characteristics. See the discussion in Ch.3.

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⁴⁹ P.84, 104, 105 of *Ibtikar*, op.cit. See also the views of Prof Wahbi Sulaiman Ghawazji (p.180); Prof Abd. Hamid Tahmaz and Wahbah Zulaihi (at p.188); *Ibtikar*, op.cit.

⁵⁰ For further arguments, see Ch.3.

⁵¹ See Id, Khalid Abdullah, *Mabadi' al-Tashri' al-Islami*, (1986). pgs.260-262.

⁵² See S.7(1) of the MCA 1987. Such right will subsist if the published edition is not a mere reproduction of previous typographical arrangement of a previous edition of the same work or works. See S.9 of the MCA 1987.

In practice, the criteria of protection does not depend on them being factually a 'literary' or 'artistic work'. Other works have been accepted under the epithet of "literary work" such as computer programs or compilations of information. The criteria of literary here is anything which is in writing or other notation form. Similarly the term 'artistic' is not to be construed according to the normal, ordinary understanding. With the wide ambit of 'drawings' under the category of 'artistic' works, even drawings of functional and utilitarian article such as industrial designs are capable of protection under the umbrella of artistic works⁵³. Hence, unlike the civil law system of author's right, the rights granted under copyright give effect to the 'sweat of the brow' philosophy and extend protection to 'anything which is worth copying'⁵⁴.

6.2 Original and derivative works

With regard to works, both original and derivative works are protected in Malaysia. Derivative works consists of adaptation ⁵⁵ of original work in different versions

⁵³ There has been questions whether the MCA includes three dimensional utilitarian articles by reason of the protection of the design drawings. There has been conflicting decisions on this matter, see Alfa Laval AB v. Salcon Centrimax Engineering Sdn. Bhd High Court of Malaya at K.L. Civil Suit No D12234/91, 7(1991) IP Asia, 26.

⁵⁴ In cases where existing subject matter is used for the creation of new work, it is normally considered as original so long as he has expended sufficient independent skill and labour. This determination is not an easy task particularly to adaptation work. The court will have to consider whether the revised version is substantial enough to be considered as a new work. In L.B. (Plastics) Ltd v Swish Products Ltd (1979) R.P.C 551, it was held that where there has been a previous drawing or a model from which the drawing is prepared, or some sketches have been made which are in part redrawn, the new drawing may be entitled to copyright as a whole because of the amount of skill and labour involved in producing it.

⁵⁵ The MCA lists "adaptation" to include any of the following,

- (a) in relation to a literary work, a version of the work (whether in its original language or a different language) in which it is converted into a dramatic work.
- (b) in relation to a dramatic work, a version of the work (whether in its original language or a different language) in which it is converted into a literary work;
- (c) in relation to a literary or dramatic work-
 - (i) a translation of the work
 - (ii) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical.
- (d) in relation to a literary work in the form of a computer program, a version of the work, whether or not in the language, code or notation in which the work was originally expressed not being a reproduction of the work;
- (e) in relation to a musical work, an arrangement or transcription of the work;
- (f) in relation to a literary or artistic work, a version of the work (whether in its original language or a

which includes translations, arrangements or other transformations of the works⁵⁶. Derivative works even though are based on existing subject matter are entitled to their own copyright⁵⁷ even though they infringe another work⁵⁸.

Even though an adaptation work may be considered as a work sufficient for the purpose of copyright, adaptation cannot be carried out unless the consent of the original author is sought. This is because adaptation of a work is the copyright owner's exclusive right. This view is echoed by Muslim scholars. Al-Sanhuri maintains that right of adaptation or '*iqtibas*'⁵⁹ impinges upon the freedom of work or '*hurriyah al-amal*'. He concedes that such adaptation can only be done with the consent of the original author.⁶⁰ The Muslim scholars, however, have not discussed the position of adapted works which are carried out without the consent of the original owner⁶¹.

different language) in which it is converted into a film.

⁵⁶ See S.8 (1) and (2) MCA, 1987.

⁵⁷ This is despite by doing so, unprotectable subject matter such as information is included in the realm of copyright. Such is the effect of copyright in compilation of telephone listing, train schedule, television listing and other forms of listing. Copyright has also been upheld even in cases where the effort taken in compiling is for other purpose such as in the case of Football League Ltd. v Littlewoods Pools Ltd (1959) Ch. 637. In this case the purpose of compiling is to set the date of matches and not for the creation of fixture list. Despite that Upjohn J. held that copyright subsisted in the list, and that part of the skill and labour involved in its preparation was that of working out the appropriate dates of matches. Unlike in the U.S whereby as a result of the Supreme Court's decision's in Feist Publications Inc. v Rural Telephone Service Co.Inc., 113 L.Ed. 2d 358 (1991) only the original part of a compilation is protected. See the disagreement set by Sherwood-Edwards, Mark, to this requirement of originality, The Redundancy of Originality, (1994) IIC p.658-689.

⁵⁸ This is provided that the derivative work constitute an original work. See S.7 (4) of the MCA 1987 which states that:

"A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work involves an infringement of copyright in some other work. If the work cannot substitute an original work, then remain the consideration of infringement.

⁵⁹ Sanhuri, op.cit at pgs. 299, 307 and 325.

⁶⁰ See also the view of Prof. Abd. Hamid Tahaz, p.186, Prof. Wahbi Sulaiman Ghawazji p.170, Ibtikar, op.cit.

⁶¹ Under common law, such works would be entitled to copyright. In Stowe v. Thomas, 23 F.Cas. 201, the issue was whether a copyright owner may stop another person from translating her work without her authorisation. The court had to consider whether the translation can be considered as a new work. In the course of judgement, the court held that "a translation, may in loose phraseology, be called a transcript

Concomitant to the acceptance of the right to adapt a work is the acceptance of copyright of derivative works. Al-Darrini and Al-Sanhuri accept that derivative works, which include translation, compilation of works and encyclopedias, should be protected on the basis that these effort require a certain level of originality of thought⁶². There should be at least a certain amount of original summary or analysis contributed by the person who adapt any original work.⁶³ For example in a translation, Al-Darrini argues, that originality exists from the choice of words and context of the translated works.⁶⁴ Such requirement accords with the emphasis in Islam on accuracy and truth as advocated above. This will also entail that the original author should have the right to check the accuracy of translation or the adaptation of the work so that the content of his work is not misrepresented.

6.3 Non-discrimination of subject matter

The prevailing attitude in modern copyright system is the non-discrimination of subject matter⁶⁵. Works are to be protected regardless of their quality, quantity, purpose and content⁶⁶. Hence in many instances the court in the U.K has refused to entertain the arguments that protection of the work would be contrary to ethical and moral concerns⁶⁷. This doctrine has been carried to works of irreligious tendency,

or copy of her thoughts or conceptions, but not in the correct sense can it be called a copy of her book". (p.208).

⁶² See p.10 of 'Ibtikar' and p.311 of Al-Wasit, op.cit.

⁶³ See Sanhuri, Abd. al-Razzaq, al-Wasit fi al-Qanun al-Madani, (1962) par. p.296. vol.8.

⁶⁴ P.10, ibid. See also the views of Prof Abd. Hamid Tahaz, p.186 and Prof Wahbi Sulaiman Ghawazji p.170 in Al-Darini, Fathi et.al, Haqq al-Ibtikar fi al-Fiqh al-Islami al-Muqaran, (1984), Muassasah al-Risalah, Beirut.

⁶⁵ The same policy consideration arose in Australia. See Howell, Robert G, Copyright & Obscenity: Should Copyright Regulate Content, IPJ, Vol.8, No.2 p.139-188.

⁶⁶ See also S.7(2) of the MCA 1987 which states that works shall be protected irrespective of their quality and the purpose for which they are created.

⁶⁷ While in the past immoral and indecent works have been refused copyright in the present day the court will not be too willing to do that. See Glyn v Western Feature Film (1916) 1 Ch. 261, Stephens v Avery (1988) F.S.R 510, Murray v. Benbow (1822), Stockdale v. Onwhyu (1826) 5 B.C 510. Copinger notes

immoral or indecent works, libellous works or works against the public policy⁶⁸. The court in the U.K for example has allowed works attacking Christian belief so long as it is not done in an offensive manner⁶⁹. However the U.K court has in one instance indicated that it will refuse the enforcement of copyright where by doing so will be against public policy⁷⁰. Another method which has been adopted to control undesirable works is by the refusal of injunctive and remedial relief if these works are copied. Both these methods have been adopted in the U.K and Canada⁷¹.

the possibility that the principle could still effectively be invoked to refuse protection in relation to a work which was considered to be no more than pornography. However, he concedes that there is still the question as to what is pornographic according to the moral code of the day, where art and pornography may overlap.

⁶⁸ See Barnard v White & Co (1923-28) Mac.C.C.218 (form for credit betting on football matches not against public policy); see also Sitwell v Sun Engraving Co. Ltd (1936-45) Mac.C.C. 137 (poem alleged to be libellous). In Hime v Dale (1809) 2 Camp, 27n Lord Ellenborough accepted the principle that if a work appeared so gross a libel as to affect public morals then it would not be protected, but did not consider the work in question of such a nature.

⁶⁹ See R v Lemon (1979) A.C. 617, involving an alleged blasphemous libel concerning the Christian religion published in the magazine 'Gay News'. The above statement is obiter as in this case the work concerned was held to be blasphemous. See also Chaplin v Leslie Frewin (Publishers) Ltd (1966) Ch.71, where although the presiding judges considered the book in question to contain blasphemous passages, the point was not taken as to whether this affected the subsistence of copyright in the book, or the court's willingness to intervene to protect such copyright.

⁷⁰ See A.G v Guardian Newspapers Ltd, A.G v Observer Ltd, A.G v Times Newspaper Ltd; (1989) 2 F.S.R 181. This case concerns a work which were written by an ex-spy (Mr. Wright) who was under the obligation not to disclose any information regarding his work for reasons of national security. His books were published in Australia (Heinemann Publishers) and then in the U.S. Later extracts of the book was published in the U.K. The A.G of the U.K brought action against the U.K newspapers for breach of confidence. In the course of establishing breach of confidence, the courts had to consider whether the courts can enforce the copyright of the book by restraining the publication of the book by any third parties without the consent of the publisher. When the matters came to the House of Lords, Lord Brightman was of the view that anybody is at liberty to publish the work in the U.K as it is likely that neither Wright nor Heinemann has any copyright which would be recognised in the U.K (Lord Brightman p.318). Lord Griffiths (p.327) advocated that in this instance the copyright in the book belongs to the Crown. Lord Jauncey (p.345-46) & Lord Keith (p.314) refused relief on the ground that the U.K court will not enforce copyright claims of works which were against the public interest.

⁷¹ See Aldrich v. One Stop Video Ltd (1987) 13 B.C.L.R. (2d) 106, 13 C.I.P.R. 202, 17 C.P.R. (3d) 27 (S.C) where Davies J, denied relief for unauthorized copying of photographic videotapes by balancing the policies favouring the creator of the work against the opposing public interest of an increasing concern about "the quality and quantity of materials which portray and communicate with human sexuality", particularly the undue exploitation of women and children. See the arguments given by Howell in favour of content-based restrictions on the similar lines as trade marks and patents; Howell, Robert G., Copyright and Obscenity: Should Copyright Regulate Content?, Intellectual Property Journal, Vol8. No.2 July p.139-188.

Even though these two methods are effective, to a certain extent, in filtering the circulation of works which are deemed 'undesirable' on any of the abovementioned grounds, it remains to be seen whether that would conform to Islamic principles. Firstly, the notion of property rights in Islam is coloured with and depends on the permissibility of use of a thing. Crucial to the existence of a valid right is the existence of a valid subject-matter. One of the essential requirements of '*mal*' in Islam is its conformity to the rules of '*halal*' and '*haram*' in Islamic scholarship⁷². Upon these basic principles, it would seem that works which criticise the religion, or any other sacred notions in Islam would not qualify for protection.

Secondly, the Islamic notions of ethics and morality differ substantially from their western counterparts. Some of these notions are not based on popular understanding of moral standards, but consists of standards which are imposed by the religion. It is therefore necessary, to decide, in the first place, whether a particular work complies with these requirements before copyright is even given. The compliance with these religious rules affects the very existence of right and not simply the exercise of rights⁷³.

With the above reservations, it is, therefore, necessary that an express derogation is drawn legislatively, on the exclusion of works which are contrary to Islamic religion and Islamic notions of ethics and morality. One alternative is to emulate the new U.A.E copyright legislation. A.36 of the U.A.E Copyright and Authorship Protection Law makes registration subject to the work's approval by the Censorship Department and its conformity with the Printing and Publication Law. The provision in effect requires that the work be morally unobjectionable (or be edited to pass censorship)⁷⁴.

⁷² A.199 of the '*Majallah*' states that it is necessary that a thing sold should be '*mal mutaqawwim*'. A.211 states the effect of sale of non-'*mutaqawwim*' property. Such sale is '*batil*'.

⁷³ See also A.34 and 35 of the '*Majallah*'. A.34 provides that when the receiving of a thing is forbidden, the giving of it is also forbidden. A.35 states that when it is forbidden that a thing should be done, it is also forbidden that it should be asked for.

⁷⁴ Copyright and Authorship Protection Law No.40/1992. For an analysis of the law, see Azar, Philip J and Wolfson, Herbert S, Draft Federal Copyright Law, MEED July 1992 p.8. At the time of the writing of the article, this statute was still in draft stage. It is noted that this law has been implemented as of 30th.

However, the practice of eliminating 'unwanted' works through registration may be contrary to the philosophy of the Berne Convention which provides that the enjoyment and exercise of rights to be free of any formality⁷⁵.

Another method is to take the permissive note of A.17 which allows the state to control, permit or prohibit the circulation, presentation or exhibition of any work or production. This Article may be invoked for a number of reasons, inter alia, to prevent obscenity and pornography, to protect national security, particularly in times of war and as a means of regulating political and social activity⁷⁶.

The control of unwanted works can be further strengthened through judicial means. It has been earlier shown that certain kinds of works which do not conform to Islamic concept of ethics and morality and works which are against the Islamic religion may not be considered as valid subject-matter for commercial transactions within the definition of '*mal*'. On this basis, courts may refuse the validity of transactions involving these works as they are vitiated with illegality under the Shari'ah. The filtering of works through this process is not contrary to the Berne Convention as the tenor of A.5(2) allows the country of origin to determine "the extent of protection, as well as the means of redress afforded to the author"⁷⁷. Arguably, non-recognition through judicial means concerns the extent of protection and not the existence of protection, as would be the case in a registration system.

August, 1994. See Trade Marks and Patents Bulletin, Issue No.26, Sept. 1994. See also comments made by WIPO in WIPO comments on Copyright Law During May Copyright Seminar, World Intellectual Property Report, Vol.7 No.8 August 1993, p.216; and comments made by Loutfi, Dr. Mohamed-Hossam; Reform of Egypt's Copyright Law and Copyright Future in the Arab World, World Intellectual Property Report, Vol. 7 No.2 February 1993, p.44-47.

⁷⁵ See A.5(2) of the Berne Convention which stipulate:
 ".....such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed".

⁷⁶ See Ricketson, Sam, The Berne Convention for the Protection of Literary and Artistic Works : 1886-1986, (1987), Kluwer, London par.9.69-9.71.

⁷⁷ See Ricketson, op. cit, para. 5.86.

7. Authorship

Because of the varied nature of the subject matter of copyright, each category of work has its own definition of the "author". Consistent with the requirement of originality, authorship, unlike in the case of works done under hire⁷⁸, normally belongs to the person who creates the work such as:

- (a) in relation to literary works, means the writer or the maker of the works;
- (b) in relation to musical works, means the composer;
- (c) in relation to photographs, means the person by whom the arrangements for the taking of the photographs were undertaken;
- (e) in relation to films or sound recordings, means the person by whom the arrangements for making of the film or recording were undertaken;
- (f) in relation to broadcasts transmitted from within any country, means the person by whom the arrangements for the making of the transmissions from within that country were undertaken;
- (g) in relation to any other cases, means the person by whom the work was made.

The definition of 'author' in the above context indicates the importance of creative link between a work and the author⁷⁹. With the exception of works done under hire or by employee, the person who normally brings something into existence, be it literary, artistic or technical works, is the author. In this regard, it is apt to quote the statement by Lord Justice Cotton's in Nottage v Jackson⁸⁰. He states that "author" involves originating, making, producing, as the inventive or master mind, the thing, the thing which is to be protected whether it be a drawing, or a painting or a photograph".

This emphasis on the definitive link between the work and the person who creates it

⁷⁸ S.26 of the MCA provides that works done in the course of employment and works done under commission, both belongs to the employer or to the person who commissioned the work.

⁷⁹ For the ideological basis of 'authorship' see Jaszi, Peter, op. cit.

⁸⁰ (1883) 11 Q.B. 627, at p.635.

is consistent with our earlier proposition that '*amal*' (economic labour) is the basis of ownership rights in intellectual property⁸¹. Using the yardstick of creative labour, it is the person who has expended time and effort in engaging in a work who should be rightly compensated and rewarded.

8. Originality

To be eligible for protection, a work has to be original⁸². The requirement of originality here does not indicate totally new in the sense of novelty but in the sense that it is not obtained by mere copying from other works. The law requires a certain amount of effort and endeavour for it to be capable of protection.⁸³

The term used by the Muslim scholars in this context is '*ibtikar*'. Al-Darrini defines '*ibtikar*' as something which is new; not being a reproduction of previous works⁸⁴. Although he did not advance any test as to the requirement of originality, he is careful to observe that absolute originality will never arise as knowledge is built on the accumulation of past stocks of information. The '*isalah*' (the strength of originality) in copyright, he argues, is relative.⁸⁵

In common law jurisdictions, the test of originality is a low one. Originality here does not imply originality of idea and thought in the sense that nobody has never thought of it. It is sufficient that the work originated from him and is not copied from others.

⁸¹ See ch.3 of the thesis.

⁸² The operative provision on originality is S.7(3) of the MCA. S.7(3) states that:
A literary, musical or artistic work shall not be eligible for copyright unless:
(a) sufficient effort has been expended to make the work original in character.

⁸³ The requirement of originality also applies to derivative works. See *Byrne v. Statist Co.* (1914) 1 KB 622, *Cummins v. Bond* (1927) 1 Ch. 167. In Malaysia before the 1990 amendment, protection of derivative works was based on common law. See *Longman Malaysia Sdn. Bhd. v. Pustaka Delta Pelajaran Sdn. Bhd.* (1987) 2 MLJ 359.

⁸⁴ See p.9 *ibtikar*, op.cit.

⁸⁵ See footnote p.17, *ibtikar*, op.cit.

In Lau Foo San v. The Government of Malaysia⁸⁶, certain engineering drawings done by the plaintiffs were held as original despite similarity with other engineering drawings produced by other engineers. Such similarity arose as all engineering drawings of the government schools, as in this case, have to comply to certain basic features. In Hardial Singh a/l Hari Singh v. Daim Zainuddin & 56 others⁸⁷, the court rejected the claim of originality in a compilation work of import and export duties which are mainly derived from the statutory regulations on the matter. There was no original effort in a simple compilation of facts which are derived from statutory sources.

Hence, the requirement of originality under the MCA accords with that of para 2.5 of the Berne Convention. 'Original' means something that is the author's own creation. There is no qualitative or aesthetic requirement attached to a work unlike that of France which requires a certain amount of intellectual contribution⁸⁸. In practice even computer works⁸⁹ have to satisfy the requirement of originality either in the selection or arrangement of works or both. In the case of compilation of data, protection is available only where there exist originality of selection and arrangement of data⁹⁰.

⁸⁶ (1974) 1 MLJ 28.

⁸⁷ (1991) 1 CLJ 116. The court in this case had accepted the test of originality as laid down in University of London v. University Tutorial Press Ltd (1916) 2 Ch. 601.

⁸⁸ For a computer program to be protected under copyright in France and under the EEC Software Directive, there should be evidence of an intellectual contribution of the author. Prior to the EEC Software Directive, the German system required a high degree of individuality and creativity. The program had to be significantly different from existing programs. Its design had to be above average as regards the choice and arrangement of the information and the commands.

⁸⁹ Under the MCA 1987, computer program means an expression, in any language, code or notation, of a set of instructions intended to cause a device having an information processing capability to perform any of these functions : conversion to another language, code or notation and reproduction in a different material. See S.3.

⁹⁰ With regard to the position of photographs, see Lupton, Keith, Photographs and the Concept of Originality in Copyright Law, (1988) 9 EIPR, 257. He maintains that the test of originality on photographs is subject to different opinion especially on snapshots. Lahore sees no reason why the most haphazard photograph of a scene in nature should not be regarded as "original" for copyright purposes. On the other hand Sterling and Carpenter take the view that "the snapshot produced without the skill and labour or discretion in arrangement of the subject is unlikely to be considered as protected by copyright. Likewise, Copinger questions the subsistence of copyright in simple snapshots of still scenes in nature.

In chapter 3, it is argued that for the recognition of intellectual labour to take effect, a certain threshold of originality must exist. It is argued that there must be a creation of a different entity than the one existed. It is not within the premise of this thesis to investigate the kind of originality which is assumed here. Suffice that there should be distinctive factors which differentiate a given work from a previous one.

9. Idea/ expression dichotomy, the requirement for fixation

In most common law jurisdictions, works should be expressed or reduced to a material form for them to be eligible for protection.⁹¹ This requirement of reducing works into 'physical form' has been justified to accord with evidential rules which requires 'physicality' for ease of proof. Likewise, it is difficult to be sure of the scope or content of such a work, and without fixation the protection of such a work may come close to the protection of the 'ideas' or subject of the work. It is immaterial whether the work is recorded by or with the permission of the author⁹². However, such requirement ignores the special status of oral work in Islamic cultural and educational framework. Nasr⁹³, writes on the significance of the oral tradition and memory as a vehicle of transmission of knowledge which came to complement the written word contained in books, especially those books which became central texts for the teaching of various schools of thought and which figured prominently in the relationship between the traditional master ('*al-ustadh*') and the students ('*tullab*'). As far as books on philosophy are concerned, he points out that they are often written in difficult language whereby the meaning of the text is transmitted orally. Hence, only those of who are well acquainted with the oral tradition could elucidate the

⁹¹ Fixation for literary, musical and artistic work under the MCA means that the work has been written down, recorded or otherwise reduced to material form. See also the UK CDPA 1988 S.3(2)(3) and Inala Industries Pty. Ltd and others v. Associated Enterprises Pty Ltd.(1960) Qd.R 562. Material form is defined in section 3 to include any material form (whether visible or not) of storage from which the work or derivative work, or a substantial part of the work or derivative work can be reproduced.

⁹² See Copinger and Skone James on Copyright, (edited by E.P Skone James) 13th. ed. London, Sweet & Maxwell, 1991 par. 3-49.

⁹³ Nasr, Seyyed Hossein, Oral Transmission and the Book in Islamic Education: The Spoken and the Written Word., Journal of Islamic Studies 3:1 (1992) pp.1-14.

meaning or the levels of meaning of the technical vocabulary (*'al-istislahat'*). In this manner, the students often propagated the master's knowledge and wrote commentaries based on these oral teachings.

The importance of oral transmission of knowledge is not only confined to the study of philosophy as discussed above but also extended to jurisprudence, scientific and technical works. Even technical and craft skills are personally transmitted⁹⁴. Therefore by excluding oral works, the importance of oral transmission of knowledge is ignored. Although this means that the work has only a transient existence, its form is not less complete than when it existed in some material form. One way to avoid such dichotomy is by excluding the criteria of fixation such as the approach adopted in the Saudi Arabia⁹⁵. A.3(b) of the Saudi Arabia Copyright Law confers copyright on works expressed orally such as lectures, speeches (oratory), sermons and similar things such as poetry and songs.

Further the elimination of the boundary between oral and expressed works is consistent with the stand adopted in the Berne Convention which does not impose the criteria of fixation on the member countries⁹⁶. We could further emulate the present boundaries which are drawn in some member countries that only spoken works of a more formal or considered kind delivered before or to an audience are covered. Therefore, oral transmission of knowledge and technical skills is covered but leaving aside more aleatory or spontaneous forms of oral expression.

⁹⁴ See Hassan & Hilli, p.269 op.cit.

⁹⁵ See Copyright Law issued under the Prime Minister's Decision No. 30 dated 25th. september 1989. See Business Laws of Saudi Arabia, 4 Vols., (1992), Graham & Trotman. See also the commentary by Hanson, Maren, Saudi Arabia- Recent Developments in Copyright Protection, Copyright World, Issue Forty Five, November, 1994 p.38- 41.

⁹⁶ The present A.2(2) of the Berne Convention is merely permissive in form, allowing the stipulation of 'fixation' while not imposing others in civil law jurisdictions from changing their approach. A.2(2) of the Convention reads:

"It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form".

See Ricketson, op.cit par. para. 6.15.

10. Exclusive rights

Because of the nature of intellectual property which can be covertly copied and infringed, the law has couched the ambit of exclusive right in copyright in wide terms. With the creation of new technologies, more methods of copying are introduced and hence copyright has to be expanded to cover possible copying which may prejudice and defeat the legitimate expectation of authors.

Therefore, in Malaysia, the reproduction, distribution or the communication to the public of a work constitutes an infringement. This occurs when the work is reproduced, or shown to the public by way of broadcasting, communication by cable or distribution by lease and rent⁹⁷. In this respect, the Malaysian court has interpreted the term "reproduction" generously. In one instance the court held that reproduction of engineering drawings into a three-dimensional works constituted an infringement of copyright as the drawings comprise an artistic work⁹⁸.

As far as Islamic law is concerned, the author is the original owner of the '*manfa'ah*' in a work⁹⁹. Therefore, any kind of reproduction constitutes an infringement of his right. In this respect, an analogy can be drawn with the ownership of land. An owner of a piece of land owns the exclusive ('*mutlaq*') and comprehensive ('*shamil*') rights to use the property¹⁰⁰. The owner should be entitled to stop any form of action which may defeat his exclusive rights over his land. Therefore, it is logical that in respect of intellectual property right this would include all form of reproduction which exploits and defeats the right-owner's legitimate entitlement. Further, reproducing

⁹⁷ See S.13, 14, 15 & 16 of the MCA 1987.

⁹⁸ See Peko Wallsend Operations Ltd v Linatex Process Rubber Ltd (1993) 1 MLJ 225. Such an interpretation in this case brought the undesirable effect of holding utilitarian articles as artistic work. See the commentary by Azmi, Ida Madieha, Slurry Pumps and the Obscurity of Artistic Copyright Works : Peko Wallsend Operations Ltd v Linatex Process Rubber Bhd, 3 EIPR (1994) p.123-129.

⁹⁹ See p.114 of Ibtikar, op.cit.

¹⁰⁰ See Mahmassani, Subhi, Al-Nazariyyah al-'Ammah lil-Mujibat wal-Uqud fi al-Shari'ah al-Islamiyyah (1946) p.23. A.1194 of the '*majallah*' states that whoever is '*mulk*' owner of a piece of land is the owner of what is above it and what is below it.

other's work also constitutes an unlawful act under the *Shari'ah* on the basis of the rule against unjust enrichment and unlawful competition. Thus the author should be rightly compensated in any instance of reproduction of his work and for the infringement of his work. The basis for compensation for such cases is the general principle that no one should cause damage to others (*'la dharar wa la dhirar'*).

In the case of copyright in photographs, while copyright belongs to the person who arranged the production of the photograph, S.85(1) of the UK CDPA 1988 confers a new moral right entitling a person to a right of privacy in respect of photographs which were commissioned for private and domestic purposes.¹⁰¹

While the right of privacy in the U.K CDPA is only confined to photographs produced under commission, sanctity of privacy in Islam is a moral obligation¹⁰² and covers a larger area than only photograph works. As far as the rights of the person being photographed is concerned, Al-Sanhuri advances the view that his picture cannot be published in any manner unless his consent is sought. This argument depicts the assurance against unnecessary encroachment of privacy¹⁰³. He qualifies his argument with regard to those photographs which would be in the public interest for them to be published. In such cases, if there has been refusal to allow publication of the photograph, such refusal has to be justifiable.

11. Alienation of rights

As elucidated in chapter three, the proprietary nature of Intellectual Property emanates from its alienability and transmissibility of rights to others. This stand has been

¹⁰¹ This is the position in the U.K. Malaysia does not have the same provision. S.85 of the U.K CDPA 1988 allows the person who authorised the taking of photograph to oppose to the issuing of the copies of his photograph to the public, exhibiting and showing to the public and the broadcast or inclusion in a cable programme service.

¹⁰² The ethical foundation of right of privacy stems from the duty to respect other's personal privacy as expressly stated in the Qur'an 24: 58-62.

¹⁰³ Al-Sanhuri, op.cit, p.354.

recapitulated by Muslim scholars. As Intellectual property rights can be considered as rights of '*mutaqarrir*',^{103A} Al-Darrini maintains that they are transmissible upon death.¹⁰⁴ It follows then that the successor of the author will inherit both economic and moral rights from the original owner of a protected work. The same stand can be seen from the MCA 1987. Section 25 of the MCA 1987, gives the inheritor or personal representative of the deceased author the same rights as the owner as far as action against infringement and recovery is concerned¹⁰⁵.

As far as transmission of rights upon death is concerned, due to the complexity of Islamic Law on succession, it has been argued that this entails division of rights to a number of family members who may not be interested in pursuing the author's interest. Al-Sanhuri suggests that the best way to avoid the above problem is to appoint a single person to manage the economic rights of the author and to distribute the income to other heirs¹⁰⁶.

Transfer of right can also be done through contractual agreement, either by licensing or assignment. Muslim scholars have considered the legitimacy of sale or contracts of publication ('*muqawala*'). The general view is that in a contract of publication, a publisher stands in the position of licensee, empowered only to publish the work within the terms of the agreement¹⁰⁷. This would mean that a contract of publication is not to be understood as assignment under the common law where the total rights of the owner is absolutely assigned to third party. A publisher may not reassign the publication to someone else on monetary consideration as naturally he

— 103A. c/f to p.82 at note 92. —

¹⁰⁴ The view is based on the reported '*hadith*': Whoever dies leaving property or rights, such rights are transmissible to the heirs (translation mine)

¹⁰⁵ S.27 of the MCA provides:

- (1) Subject to this section, copyright shall be transferable by assignment, testamentary disposition, or by operation of law, as movable property.
- (2) An assignment or testamentary disposition of copyright may be limited so as to apply only to some acts which the owner of the copyright has the exclusive control, or to a specified country or other geographical area.

¹⁰⁶ See p.397, *Al-Wasit*, op.cit. See also p.85, *Ibtikar*, op.cit.

¹⁰⁷ See p.113 *Ibtikar*, op.cit.

does not own the original '*manfa'ah*' to deal with the work¹⁰⁸. Al-Nadawi describes the publisher's position in a contract of publication as that of an agent¹⁰⁹. It would seem therefore that a publisher may sue a third party for infringement without naming the author as the party suing, as this is within powers of an agent under Islamic Law.

An author may sell his publication rights through sale contracts ('*bay'*'). In this instance, Al-Sanhuri argues that moral rights remain with the author as they are inalienable¹¹⁰. Al-Nadawi observed the possibility of current practices in contractual agreements relating to publication may offend the prohibition of '*gharar*'¹¹¹. This is because most publication contracts do not have a fixed amount of royalty stipulated in the contracts. The normal accepted practice is that the amount of royalty is left undetermined at the conclusion of the contract. These practices lead to uncertainty of subject matter whereby authors in this instance would have to take the risk of losses. In Islamic law, the general principle is that, during the conclusion of a contract, the subject-matter of the contract and the price involved should be ascertained¹¹². One way to avoid this unnecessary uncertainty, is to adopt the practice in France whereby an agreed consideration may be re-opened by way of judicial litigation if the work proves to be more successful than the parties thought it would be and enables the

¹⁰⁸ See p.114 *Ibtikar*, op.cit.

¹⁰⁹ See p.153 *Ibtikar*, op.cit.

¹¹⁰ See p.409 *Al-Wasit*, op.cit.

¹¹¹ See p.151 *Ibtikar*, op.cit.

¹¹² Imam Malik illustrated the disapproval of contractual agreement which contain uncertain terms. At page 301, he related:

Yahya related to me from Malik from Abu Hazim ibn. Dinar from Sa'id ibn al-Musayyab that the Messenger of Allah. may Allah bless him and grant him peace, forbade the sale with uncertainty in it. Malik said, "A similar case is the selling of ben-nuts for ben-nut oil. This is an uncertain transaction because what comes from ben-nut is ben-oil. There is no harm in selling ben-nuts for perfumed ben because perfumed ben has been perfumed, mixed and changed from the state of raw ben-nut oil." See Malik Ibn. Anas, *Al Muwatta*, *The First Formulation of Islamic Law*, Diwan Press, (1989).

See also Rayner, S.E, *The Theory of Contracts in Islamic Law: A Comparative Analysis With Particular Reference To the modern Legislation in Kuwait, Bahrain and the United Arab Emirates*, (1991), Graham & Trotman, London par.p.290.

court to award a complementary sum¹¹³.

For an assignment to be effective, the contract must be in writing, in Malaysia.¹¹⁴ The author thereafter cannot interfere with the transferee's rights except where the transferee has exceeded his powers designated under the contract. An oral assignment is, however, not void; it will be treated as an agreement to assign, giving the assignee an equitable right over the work¹¹⁵. As the equitable owner, he does not enjoy the reliefs which are available to the legal owner as prescribed under S.37 of the MCA, unless the latter is joined as a party to the proceedings.

Reducing the contractual agreement into writing is highly recommended in the Quran¹¹⁶. However, an oral agreement is equally accepted as valid and binding,¹¹⁷ so long as the essential requirements of a contract are fulfilled.¹¹⁸ Thus, jurists view that the document itself does not give rise to any additional legal obligation. Written document acts as a confirmation that all the essential requirements are satisfied;- to lessen the possibility of conflict between the parties and to endorse the terms of the

¹¹³ See in particular A.35 of the 1957 Law which provides that the author should be remunerated periodically, but the law allow lump sum sales where periodical payments would be excessively difficult or expensive to administer or determine. A.37 allows the challenge of a lump-sum payments if the work is much more succesful than the party anticipated. See Hudson, A.M, France, Practical Commercial Law (1991), Longman, U.K par. at p.18.

¹¹⁴ S.27(3) of the MCA 1987 states that, "No assignment of copyright and no licence to do an act the doing of which is controlled by copyright shall have effect unless it is in writing."

¹¹⁵ See Khaw, para 5.3.1, p.75 op.cit.

¹¹⁶ See Sura 2:282.

¹¹⁷ Sura 2:282 : "it is not sin if you do not write it down".
Under the common law, oral promise creates an equitable right or interest if supported by consideration. For an illustration of common law principles, see Western Front Ltd & Anor v. Vestron Inc. & Ors (1987) FSR 66.

¹¹⁸ The essentials of a contract in Islamic jurisprudence are the '*aqad*'-effective offer and acceptance, eligibility of the contracting parties, certainty of object of contracts and certainty of consideration. The essentials of a '*muqawala*' contract are:

- i. description of the subject matter of the contract.
- ii. particulars of the type and amount.
- iii. the manner of performance.
- iv. the period over which it is to be performed.
- v. consideration.

contract. Theoretically, there is no difference between written and oral contracts, both giving rise to a valid obligation, enforceable under the Shari'ah. In spite of this, most modern legislation in the Muslim /Islamic countries have stipulated for the fixation of these agreements in writing on the acceptance that modern commercial reality dictates the most effective and easy to prove methods of transaction.

Section 27 of the MCA further allows disposal of rights of a future work, or an existing work in which copyright does not yet subsist¹¹⁹. Assignment of future work vests in the assignor equitable interest in the work, as soon as the work is created, sufficient for him to sue for infringement of copyright¹²⁰. Assignment of non-existent future work will not be valid under Islamic law due to uncertainty of the subject matter¹²¹. The assignment of future works may not vest any equitable or legal interests to the assignee. This is because trading something which is not owned or not yet owned is forbidden according to strong authority of '*hadith*'.¹²²

However, assignment of the copyright in the second instance enumerated in S.27 of the MCA may be valid in Islamic law as the subject matter already existed. This is because even if the copyright in a work does not yet subsist; for example in the case of works originating from members of the Berne Convention before the effective date of accession to that Convention; the relevant subject-matter of the assignment is already in existence.

¹¹⁹ See also CDPA 1988 S.91.

¹²⁰ See also the old case of *Macdonald (E) Ltd v Eyles*, (1921) 1 Ch. 631, where Petersen J held that publishers who had an option to publish the next three future works of an author had an equitable interest to restrain another publisher from publishing the work.

¹²¹ See A.205 '*Majallah*'. A.205 states that the sale of a non-existing thing is invalid ('*Batil*'). A.110 defines a '*bati'*' transaction as a transaction which is not good ('*sahih*') in its foundation ('*asl*'). See also *Al-Wasit*, p.389, op.cit.

¹²² It is narrated by Tawus; ibn Abbas said: Allah's Apostle (p.b.u.h) forbade the selling of foodstuff before its measuring and transferring into one's possession. "I asked Ibn. Abbas,"How is that?", Ibn Abbas,'replied,"It will be just like selling money for money, as the foodstuff has not been handed over to the first purchaser who is the present seller." It is also narrated by Ibn. Umar: the Prophet (p.b.u.h.) said:"He who buys foodstuff should not sell it till he has received it"*Sahih Muslim*. Abd. Hamid Siddiqi (trans) vol III, 1973, S Muhammad Ashraf, Kashmiri Bazar, Lahore par.p.831.

While 5.10 and 5.11 illustrate the nature of exclusive rights, the copyright has long needed to strike a balance between control and access. The higher right for education, information and personal use has circumscribed the periphery of copyright domain in the form of exceptions and permitted use; which will be the subject of our following discussion.

12. Exceptions to exclusive right

The concern that there are certain legitimate uses which might be unnecessarily curtailed by copyright leads to the allowance of non-profit uses in copyright. The argument is that such use should be allowed so long as the use does not deprive the authors of their legitimate expectations. In Malaysia, the list of exceptions has been expanded in 1990. The exceptions seek to allow legitimate uses for the purpose of education, such as the use of a work in schools, universities or educational institutions. Under the law it is allowed to use the sound recording of a phonographic works for educational purposes; the use of the work by the National/ state Archives, national library, state library or other public libraries and educational, scientific or professional institutions. The scope of educational use is fairly wide. It includes the reproduction of the typographical arrangement of a published edition for the purposes of research and private study¹²³.

The use of reproduction material of copyright works for purposes of study is subject to it being a 'fair dealing'. The Act does not define the term 'fair dealing'. Neither has it been defined judicially in any case in Malaysia. It is therefore, pertinent that precedents and case law be sought from other common law jurisdictions to illustrate the scope of educational use allowed under the law. From case law decisions in other common law jurisdictions, a few factors can be discerned in determining 'fair dealing'. The act must be judged in relation to one of the stipulated purposes enumerated in that provision. The proportion of the work taken in relation to the whole work is also taken into consideration. Lastly, the motive of the defendant in

¹²³ Private study only covers the case of a student himself copying out a book for his own use, but not copying by anyone else on his behalf, nor the circulation of copies among other students.

doing the act is an important factor in deciding whether the dealing is fair¹²⁴.

In New Zealand, the issue of the extent allowed for reproduction for purposes of education became the issue in Longman v Carrington¹²⁵. The case concerns a compilation of reproduction of text books prepared by a tutor for his students. The court held that the provision only excused reproduction done by students for the purpose of private study. Therefore the tutor's compilation was a teaching aid and not something produced for research or private study even if capable of being so used. The case emphasized the fairness of reproduction as the statutory provision should be used to balance the competing interests of copyright owners and the legitimate demands of the educational sector on the other hand.

As far as reproduction for educational purposes by educational institutions is concerned certain conditions must be considered. The first, that there should be requests to supply and consequential supply. Secondly, the copying had to be a reasonable proportion of the copyright works. Thirdly, that persons to whom the copies are supplied shall not be required to make a higher payment that cost together with a reasonable proportion of the school's expenses. The reproduction should also be done in the course of instruction. In this case, the copying was done a year prior to its use in class. Therefore it is not in the course of instruction¹²⁶. It would seem therefore that while copying by students is excepted under the law as being a form of private study, copying by educational institutions may not necessarily be justified as a "fair dealing".

The law also makes allowance for reproduction of work to enhance the diffusion of information. Included in this group is the reproduction of press, criticism or review,

¹²⁴ See Khaw p.107-108, op.cit.

¹²⁵ (1991) 2 NZLR 574.

¹²⁶ See the commentaries by Katz, John, Reprography and Fair Dealing - Copying for Educational Use: Longman v Carrington, (1993) 2 EIPR 67. See also University of London Press v University Tutorial Press (1916) 2 Ch. 601; Sillitoe v McGraw Hill Co. (UK) Ltd (1983) FSR 545 at 558; De Gariss v Neville Jeffress Pidler (1990) 18 IPR 292.

reporting of current events and the use of work for the purposes of any judicial, legal, legislative and official proceedings.¹²⁷

The defence of criticism and reporting of current events may not extend to the copying of news among competitors in journalists and newspapers as this may not be considered as "fair dealing". In this case, the MCA 1987 further provides that fair quotation for purposes of review, is allowed if it is compatible with fair practice and its extent does not exceed that which is justified by the purpose. This exception is subject to mention being made to the source and the name of the author and that reproduction is compatible with fair dealing. The exact scope of 'fair dealing' with regard to criticism was reconsidered in a recent case in the U.K in the Express Newspaper plc v News (U.K) plc¹²⁸ which concerns the copying of news among two competing newspapers. In this case it was argued that the fair dealing defence did not apply where there had been no acknowledgment of authorship. Secondly, it was argued that the public interest defence did not apply since the information had already been disclosed and was not in any event something the public needed to know¹²⁹.

The third group of exceptions pertains to personal use of works for private and domestic use such as the making of a film of a broadcast, or a literary, artistic,

¹²⁷ This provision only envisages the use of such works in the course of legal and judicial proceedings and does not cover a situation where copyright works are being copied for future references when proceedings have not commenced. See Khaw, p.115, op.cit.

¹²⁸ (1991) FSR 36. Where the court questioned whether there existed between newspapers an implied licence to use each other's stories with or without acknowledgement. The court held that the mere reporting of another's words may give rise to a reporter's copyright if skill and judgement were employed in the report's composition.

¹²⁹ See also Time Warner Entertainment Co. Ltd v Channel 4 Television Corporation Plc., 28 IPR 459. The case concerns a documentary on a film entitled 'Clockwork Orange' which had been produced without the copyright owner's consent. The film was banned in the U.K. The defendant obtained a copy of the film in France, where it was legitimately on sale. The plaintiff alleged that since the copy of the work was obtained without his consent, the defendant cannot claim that the production of the documentary was allowed as fair dealing. The plaintiff further alleged that the documentary had misrepresented the film by focussing on the violent parts of it. The Court held that criticism of a work already in the public domain which would otherwise constitute fair dealing will rarely be rendered unfair because of the means by which the work had been obtained. The way in which the defendants had obtained the film did not therefore affect the question of fair dealing. It was not relevant to the question of fair dealing that the documentary might have misrepresented the film's content.

dramatic or musical work or a film included in the broadcast. Finally, the law allows the incidental reproduction of broadcasting work through the making of temporary reproduction of work for purposes of broadcasting.

Besides these exceptions which are explicitly provided for in the Act, it is arguable that the law may imply certain accepted allowances such as reverse engineering and the implied licence to repair¹³⁰. These implicit exceptions have been accepted judicially in countries such as the U.K and the U.S. Reverse engineering is to disassemble portions of software object code in order to learn information necessary to develop interoperable products. In the U.S, the Federal Court stated that reverse engineering is allowed as fair use in the case of Atari Games v Nintendo of America¹³¹. At page 19-20 the court stated the underlying policy of reverse engineering;

"The legislative history of S.107 suggests that courts should adopt the fair use exception to accommodate new technological innovations Section 107 also requires examination of the nature of the work when determining if a reproduction is a fair use. When the nature of a work requires intermediate copying to understand the ideas and processes in a copyrighted work, that nature supports a fair use for intermediate copying. Thus reverse engineering object code to discern the unprotectable ideas in a computer program is a fair use".

¹³⁰ See the explanatory note to the 1990 amendment of the MCA 1987, whereby it was written that the purpose of confining writing to exclusive licence only is to preserve the acceptability of implied licence to repair or to replace damaged parts. Source: Intellectual Property Unit, Ministry of International Trade, Malaysia.

¹³¹ No.91-1293 (Fed. Circ. 10 September 1992). See also Sega Enterprise Ltd v Accolade Inc, No.92-15655, 9th. Cir., Decided on 20th. October 1992; 977 F.2d 1510 (1992). Where the US Court of Appeals for the Ninth Circuit reversed the trial court's judgement, holding that it is 'fair use' to disassemble object code of a computer program when that is necessary expedient to gain access to the ideas and functional concepts of the program. Although Accolade disassembled Sega's program to be able to sell video game programs compatible (interoperable) with Sega's microcomputer hardware, and therefore in general competition with Sega's programs, Accolade's use was nonetheless fair, since the programs did not compete directly. Furthermore, Sega's monopolistic attempt to make rivals' video games incompatible with Sega's hardware tilted the equities against Sega. For further analysis see Stern, Richard H., Reverse Engineering of Software as Copyright Infringement - An Update: Sega Enterprise Ltd v Accolade Inc, (1993) 1 EIPR 34. The appellant further moved for reconsideration of the case by the entire Ninth Circuit. The Court declined to reconsider its ruling. See (1993) 4 EIPR D-91.

Finally, the law allows the parallel importation of copyright works into the jurisdiction. By allowing import of legitimate copyright works, this would create an internal market with healthy competition, thereby resulting in reasonable pricing. Under the MCA 1987, parallel importation cannot be deemed as an act of infringement. This is because under the Act, copyright is infringed by any person who, without the consent or licence of the owner of the copyright, imports an article into Malaysia for commercial purposes¹³². Arguably, if the imported works are genuine copyright works, the right-owner would deem to have consented to the exploitation of such works.

13. Duration of protection.

In most jurisdictions, copyright remains valid throughout the life time of the author plus a certain period after his death ('post-mortem auctoris'). In the U.K, the current duration is 50 years p.m.a¹³³. It has often been justified that the term 50 years is chosen out of the need to provide for two successive generations. The impermanency of copyright emanates from the policy objective of providing the authors ample reward for their effort while at the same time ensuring that these works will be freely accessible when they eventually fall into the public domain after the termination of the duration.

The duration is set differently to different subject matter. For works which originated primarily from the effort of 'authors' the term commences from the authors' death¹³⁴. For technical works, whereby they are not generally the product of individual authorial endeavour, the term is set upon the publication of the work. Thus we see in Malaysia, for literary, musical and artistic works, copyright subsists

¹³² S.36(2). See also the explanatory note to the MCA, Source: Intellectual Property Unit, Ministry of International Trade, Malaysia.

¹³³ This duration will be extended to 70 years in the near future when harmonisation of copyright laws in the E.C takes effect. See Ricketson, Sam, The Copyright Term, IIC, vol. 23 No.6/1992 p.753-785.

¹³⁴ This is provided that his work is published before his death. If his works is published after his death, copyright subsists from the publication of his death. See S.17(2) MCA 1987.

during the life of the author and fifty years after his death¹³⁵. For other works, copyright subsists for fifty years from its publication¹³⁶.

In this respect, as far as Islamic law is concerned, it has been argued in chapter three that Intellectual property rights are rights of '*manfa'ah*'. Thus Al-Darrini, maintains that being a right of '*manfa'ah*' the duration of the right is temporary¹³⁷. He accepts that the impermanency ('*mua'qat*') of intellectual property rights as justifiable in balancing the rights of the author to the rights of the public. Al-Darrini, by drawing an analogy of intellectual property rights to rights of dwelling on '*waqf*' lands and long lease of buildings ('*hikr*'), argues that the duration should be 60 years after the demise of the author¹³⁸. '*Hikr*' which is the usufructuary rights of '*waqf*' lands was formulated by jurists to allow exploitation of '*waqf*' land in return of payment of lease. The duration of '*hikr*' subsists throughout the lifetime of the lessee and is transmissible after his death to his successor for a further 60 years. Rights of '*hikr*' being real interest, can be disposed of and transmissible by inheritance.¹³⁹ The similarity of '*hikr*' and usufructory rights of Intellectual Property can be seen in three aspects; firstly both are usufructory rights, secondly, both are created by jurists due to necessity i.e on the rule of '*maslaha*' and finally both are real rights.

¹³⁵ See S.17 MCA 1987.

¹³⁶ Works under this category includes published editions, sound recordings, broadcasts, photographs, films and works of Government, government organizations and international bodies. See S.18-23 of the MCA 1987.

¹³⁷ See p.109 *Ibtikar*, op.cit.

¹³⁸ See p.121 *Ibtikar*, op.cit.

¹³⁹ See p.64-68 of Ziadeh, Farhat J, Property Law in the Arab World; Real Rights in Egypt, Iraq, Jordan, Lebanon, Libya, Syria, Saudi Arabia and the Gulf States, (1979) Graham & Trotman, London.

14. Conclusion

It is often admitted by Muslim jurists that writing is one of the main forms of disseminating knowledge. Ibn Khaldun¹⁴⁰ observes the position of writing in these words:

"the art of writing and book production, which depends on it, preserve the things that are of concern to man and keep them from being forgotten. It enables the innermost thoughts of the soul to reach those who are far and absent. It perpetuates in books the results of thinking and scholarship".

Copyright is borne out of concern to safeguard the authenticity of written works and to confer the authors proper recognition for his endeavour. These two constitute the root to copyright both in the Muslim world and its western counterparts. Even though copyright laws have differed substantially since then, the objective of these laws remains. The most important concern in copyright is to counterbalance the scope of control with the availability of access.

The comparison with Islamic law dictates that certain aspects of the copyright law as practised in Malaysia have to be improved. Firstly, the control on offensive materials which are against the Islamic religion or against the public conception of ethics and morality should be tightened. The present regulatory framework, which allows the curtailment of such works through censorship, results in no nexus between copyright and censorship. Such a stand is clearly not acceptable if compared to the Islamic standards, whereby according to Islam, these works lack the capacity to be a valid property right. However, imposition of content-based restriction by denying certain kinds of works through registration would not be acceptable to the Berne standards. Censorship is important in Islam as copyright itself cannot be regarded as a positive right but rather a right given under the Shari'ah. Therefore, the non-recognition of works against Islamic conception of ethics and morality can be vigorously eliminated through judicial means whereby the court may refuse to entertain claims related to

¹⁴⁰ *'Muqaddimah'*, op.cit. p.356.

these works on the basis that the rights of the owner over these works are vitiated with illegality of the subject-matter.

Secondly, the present stand on moral rights in Malaysia should be further improved. It has been shown that the Islamic approach would encompass the right to control the disclosure of work. The primary concern in Islamic approach, as illustrated in this chapter, is the safeguarding of authors' personal responsibility over their works. In a wider context, it would also be deemed necessary to enact laws to stand guard over authors, who are, often, the weaker party in a publication contract. The welfare of authors should be effectively secured under the aegis of copyright.

Thirdly, the current MCA is silent on the issue of privacy rights of the person who commissions a photographic work. Laws should be enacted to that effect as the probability of misuse of copyright in this instance is eminent.

Fourthly, the law should extend to oral works. As illustrated in the above discussion, the discrimination against oral works may create a critical gap in our treatment of 'works'. Furthermore, conferment of copyright to oral works has long been the tradition in civil law countries. Thus, there is a plenty of precedents set in other countries which Malaysia could benefit from and emulate with.

In other aspects, the copyright law in Malaysia, to a certain extent, conforms to the Islamic standards. The requirement of originality substantiates our earlier proposition that a certain threshold of distinctiveness is indispensable in differentiating the product of intellectual labour and those ideas existing in the 'common'. The definition of 'authorship' and the emphasis on the person who is personally responsible for producing a work, accords with the discussion of attainment of priority rights in intellectual labour. On a similar scale, the extension of exclusive rights to all kinds of reproduction in any form and version falls squarely within the legitimate expectation of the authors.

More fundamentally, the balance between control and access should be maintained.

This reorientation of control and access constitutes the foundation of copyright in Islam. To learn and to disseminate is the cornerstone of Islamic scholarship and therefore they must be preserved. Should the law further expand the scope of exclusive rights, the scope of access should also be drawn on an equal scale.

CHAPTER SIX

PATENTS AND MONOPOLY

1 Introduction

Much discussion and debate has taken place on the role of patents and its linkage to inventive activity and innovation. Most stimulating are the discussions by scholars such as John Stuart Mill¹, Adam Smith, Jeremy Bentham, Arnold Plant² and many others who have contributed to the debate. These debates coupled with current economic studies in the U.K, U.S, Canada and Australia question the accuracy of the economic theories and the philosophy behind patent systems. The significance of these theories cannot be dismissed lightly. This chapter will initially discuss these theories and their influence on the shaping of the current patent system.

The chapter then proceeds to question the acceptability of patent systems from an Islamic perspective. For the purpose of this study, issues pertaining to the role of labour and profit motivation, wealth and economic parameters are examined. As the most important objection against patents is their likely association with monopoly, we have also endeavoured to explain the meaning and understanding of monopoly both in the context of modern western economics and the discussion of Muslim scholars.

The preoccupation with economic theories is prominent in patent rights and most discussions on the scope of patents depend on economic reasoning. Economic considerations not only determine the initial existence of a patent right, but constantly shape and influence the scope of patents, particularly in areas where there are

¹ See, Mill, John Stuart, Principles of Political Economy, With Some of Their Applications to Social Philosophy, University of Toronto Press, par. Book 5 p.929.

² Smith, Adam, Wealth of Nations; Bentham, Jeremy, Observations of Parts of the declaration of Rights, As Proposed by Citizens Sieyes. For a discussion of their works see Plant, Arnold, The Economic Theory Concerning Patents for Inventions, *Economica*, (1934) Vol.1 p.30-51 par.p.31.

conflicting interests such as food, medical products and methods of medical treatment. The main economic concern in a patent is the need to recoup expenses involved in the research and development of a new marketable product. In this chapter, it is argued that while profit motivation and private property are accepted in Islam, other non-economic values play an equally significant role in economic parameters. These non-economic values, which comes in the form of general ethical and moral concerns, constitute an important moral filter to economic criteria. On this basis, this chapter adopts the approach postulated by Al-Ghazali and Al-Shatibi in balancing economic interests with other higher objectives.

The discussion will now turn to the elucidation of economic theories underlying the patent system. Later, the position of economics and wealth returns will be examined from an Islamic point of view.

2 Patent theories

The role played by economic theories in the discussion on patent system cannot be underestimated. Economic theories are not only used to defend the initial allocation of rights in patents but also the scope of rights. It is in this sense that economists differentiate between tangible property rights and intangible property rights. According to this notion, property rights assume scarcity of resources. The idea that a thing is owned comes from the fact that the owner holds it to the exclusion of everyone else. This yardstick of scarcity however cannot be applied to intangible property. For this, Plant (1934) argued that Intellectual Property is "not a consequence of scarcity but a deliberate creation of statute law"³.

³ Plant argued that;

"it is the peculiarity of property rights in patents (and copyrights) that they do not arise out of the scarcity of the objects which become appropriated. they are not a consequence of scarcity. They are the deliberate creation of statute law; and whereas in general the institution of private property makes for the preservation of scarce goods, tending....to lead us to "to make the most of them", property rights in patents and copyright make possible the creation of a scarcity of the products appropriated which could not otherwise be maintained".

See Plant, Arnold, op.cit. See also the discussion in the classical work of Machlup, Fritz & Penrose, Edith, The Patent Controversy, Journal of Economic History, May 1950, No.1 p.1-29.

Plant's proposition was not agreed by Steven (1970). He distinguished between inventions which would have been produced in the absence of any property rights protection and those that would not have been produced without protection. Plant's view may be true with respect only to the former class. For such inventions, the patent grant will, under certain pricing arrangements, inhibit the widespread use of an already developed idea. Scarcity may then be said to have been 'created' by protection. However, for ideas which would not have been produced without the same form of protection, Plant's view is in error. That is, for any invention which would not have been produced at all in the absence of property rights, the scarcity is not in "ideas" as such; rather, the scarcity lies in the resources required to develop the ideas themselves.⁴

Another economic theory is that of incentive. This theory is widely accepted in common law jurisdictions and originated from the eighteenth century idea of contract, where society and the inventor made a bargain, one offering temporary protection and the other offering knowledge of new techniques. The disclosure of new techniques contributes to the accumulation of technological knowledge and enhances technological capacity. In this way an inventor's contribution to society should not be underplayed and hence the monopoly which is granted to him is justly deserved by him. This theory played a significant role in England during the Elizabethan period.⁵ The importation and establishment of foreign industrial methods was seen as deserving of incentives.

Most economists agree that patents stimulate research and the development of

⁴ Steven, N.S. Cheung, Property Rights and Inventions, Research in law and Economics (1986) p.5-18 par.p.10.

⁵ This theory has played significant influence in socialist block as well. As a special aspect of the so-called "principle of material interest" the incentive effects of inventor remuneration are recognised early by the socialist doctrine of invention protection. By combining pecuniary reward with additional moral recognition, for example, in the form of government awards, certificates, letters of recognition, or public honors, the moral effect inherent in tangible recognition is further increased. This leads reform in many socialist countries such as Rumania and Bulgaria whereby no secondary exploitation of inventions is allowed without compensation. See Beier, Karl Friedrich, Traditional and Socialist Concepts of Protecting Inventions, 1 IIC, 3/1970, 329.

inventions. They disagree however, on the real effects of patents. Arrow and Plant provide illuminating views in this respect. Whereas Plant argued that patents overreward basic research (excessive appropriability) Arrow is of the opinion that even under patent laws, basic research is bound to be underrewarded. Kenneth Arrow⁶ (1962) did not doubt that the patent system would encourage invention. He did, however, doubt that patent systems alone could achieve optimality in research and invention. For this he quoted three reasons for failure to achieve optimality; i.e. uncertainty, indivisibility and inappropriability. He claimed that underinvestment in invention is inescapable with or without a patent system and that this problem could be best be mitigated by expanded government investment in innovative activities.

Meanwhile Steven argued that patents did not result in blocking the improvement and development of other inventions. His argument hinged on the distinction between development right and production right. Development right might be obtained through contractual agreement or licensing. To him, "patent confers production rights on the patentee but only to the extent that the improvement is at least in part dominated by the original invention. On the other hand, a patent grant of production rights does not prevent anyone from thinking about the patented idea or using it to produce a different, improved product not embodying the original invention".⁷

Another economic theory links patent with competition. Lehman, a strong proponent to this school of thought, argued that a patent is deemed necessary as it provides the requisite competitive restriction in the promotion of a competitive economic order⁸. Patents provide "the restraint in competition by way of property rights on the production level. For example, patents, which lead to the creation of competition on

⁶ Arrow, Kenneth, Economic Welfare and the Allocation of Resources for Inventions, (1962) in The Rate and Direction of Inventive Activity: Economic and Social Factors, Princeton, N.J, National Bureau of Economic Research. See the discussion in Steven , op.cit, par. p.10.

⁷ Steven, op. cit par. p.13.

⁸ Lehman, Michael; Property and Intellectual Property - Property Rights as Restrictions on Competition in Furtherance of Competition. IIC, No.1/1989 Vol.20 p.1- 15.

the next higher level, namely the level of innovation. If the improvement of technical knowledge is regarded as an essential factor for the growth of the economy and consequently competition between innovators and inventors is deemed desirable, then property rights protecting technology can kindle the growth of competition in the production and economic exploitation of this matter." According to this view, patents "restrict universal free consumption or production in order to encourage economically meaningful, productive activity on the next higher economic level". Set on this background, Lehmann explained the antagonism between the competitive restraints of monopoly-like exclusive rights on the one hand and their economic efforts (in particular by antitrust and competition law) to ensure the proper functioning of competition. To him, there exist no fundamental contradiction as both economic theories are set to counterbalance competitive restrictions and the promotion of a competitive economic order⁹.

Current research undertaken in the U.K, Australia and Canada have proven that these economic theories may not be significant. Among the findings is the overemphasis of the role of profit motivation in research and development. The reports also doubt the incentive provided by patents. For example in a report by Taylor, the finding is that patents provide only a very limited inducement for industrial invention and innovation.¹⁰ Another report in Canada found that the impact of patents on the rate and direction of inventive and innovative activity undertaken by both industrial and non industrial research is minimal. The report concluded that the incentive theory was not conclusive. Secondly, with regard to the effectiveness of patent as stimulating disclosure of inventions is also minimal. The present practice is inadequate as it does not encourage disclosure of know-how which constitutes an important element in the innovation process. The same finding is arrived at for the analyses of advantages of

⁹ Lehmann does not regard efforts taken to regulate markets as interventionist as to him," with the correct quantitative allotment of property rights to the various economic levels of consumption, production and innovation, the costs of legal protection and the enforcement of these powers of disposal can be an important regulator, because only when the expected marginal revenue rises above the marginal costs of market exploitation guided by competition in the economic good protected by a property right, will it be reasonable for a profit-maximizing participant in the economy to become active", op.cit, p.12-13.

¹⁰ Taylor & Silberstone, The Economic Impact of the Patent System: A Study of the British Experience, Cambridge University Press, London, 1973 par. p.365.

patent as an incentive to innovation¹¹. These reports confirm the findings of Machlup which illustrate the apparent difficulty in understanding the behaviour of the inventive process and the influence of patent protection.

From the above discussion, we have seen that profit motivation is central to the economic analyses of patents. Despite the findings of recent reports on the link between patent and inventive activities, the importance of profit motivation cannot be easily be dismissed. Our discussion now turn to the association of patents and monopoly.

3. Patents and monopoly

The most common misunderstanding of patents is their association with monopoly. The linkage of patents and monopolies is probably of historical significance. In the Elizabethan era there was a practice of granting monopoly rights in perpetuity to encourage the importation of technology from outside. Unfortunately this practice lead to abuse¹². The grant of letters patent which was a prerogative of the Sovereign, was found to be a useful tool to increase revenues and also to introduce foreign industry. The use of the word 'monopoly' may be accidental and is not reflective of the power granted. The objection against the practice lies basically in that it was an unregulated prerogative. In many instances, monopoly was granted for 'everyday necessities' including coal, fruit, iron, leather, salt, soap and starch. After the case of Darcy v. Allin¹³, there were attempts to restrict unregulated monopoly practices.

¹¹ See also the report of the "Working Paper on Patent Law Revision," Canadian Department of Consumers and Corporate Affairs, 1976; and Schmookler, Jacob, Invention and Economic Growth, (1966), Harvard University Press, Cambridge.

¹² See Davenport, Neil, The United Kingdom Patent System, a Brief History, with Bibliography, (1979).

¹³ (1602) 11 Co. Rep. 84b. The case concerns an infringement action for a monopoly in the production of playing cards. Instead of confirming his rights, the Court of Queen's Bench declared the patent invalid.

This led to the passing of the Statute of Monopolies in 1624¹⁴.

This illustrates that while unregulated monopoly may be objectionable, regulated monopoly is not. It has been explained earlier that to associate patents with monopoly is a simplistic view and cannot be sustained. Firstly, it is important to understand the nature of monopoly in economic terms. In this sense, monopoly is achieved only if a certain market power is achieved to emulate and influence or control prices.

Objectionable monopoly is a term which describes a position where a person or a body is able to dominate the market, control prices and effectively dismiss any competition. To borrow the definition given by Webster;

"The ultimate test by which the character (of a monopoly) may be ascertained is, whether the monopolist benefits himself without injuring others....with a monopoly of existing trade all others are excluded from that which the public were already in the possession and practice of, which is a clear violation of public right and policy, but with the manufacture of a new invention... nothing is taken from the public which it before possessed."¹⁵

In the same terms, Burke arrived at the same conclusion. To him,

"monopoly is an odious term, (but a patent) is not making a monopoly of what was common. It is the direct reverse, for the condition of the patent, compelling a discovery, makes that common which was private before".¹⁶

To associate patent with monopolies will only be true in circumstances where there

¹⁴ S.1 rendered all monopolies illegal. S.6 provides one of the exceptions - allowed the grant of monopolies ' for the term of 14 years or under, hereafter to be made of the sole working or making of any manner of new manufactures, which others at the time of making such letters patent and grants shall not use, so as also they be not contrary to the law nor mischievous to the State by raising prices of commodities at home, or hurt of trade, or generally inconvenient".

¹⁵ Cited in Dutton, H.I, The Patent System and Inventive Activity During the Industrial Revolution (1750-1852), (1984), Manchester University Press, Manchester, p.22.

¹⁶ Cited in Dutton, H.I, op.cit.p.23.

are no easily available substitutes of the patented product in the market.¹⁷ Patents do not deprive the public of anything which they had previously enjoyed.

However, it has been accepted that the practice of patenting may lead to monopolistic tendencies. Firstly, patents are capable of being used to create a dominant position in market and compulsory licensing is inadequate to safeguard against the harmful exploitation of patent monopolies.¹⁸ Theoretically, upon the expiration of the patent, this dominant position will diminish and there is the possibility of takeover by new entrants in the market. In practice, the competitive position enjoyed by the patent holder out of his exclusive rights obtained under his patents may be difficult to surmount. After 15 years, it is very likely that the patent owner develops a lead in know-how and hence a natural head start over its competitors. Secondly, new entrants can be deterred by their inability to match large incumbent's cost. Thirdly, there is also the possibility that the patentee may prolong patent protection through patents of addition.

The practice of patenting and licensing may also result in the increase of prices and limitation on supply and hence may stifle competition. Patents can be the subject of abuse and used instead to strengthen market domination as in the case of large firms blocking effective competition in the market from smaller ones. It is to this recognition that in the U.K and the U.S principles of fair-competition and anti-trust are developed to eliminate patent monopoly. In circumstances where patents are subject to the possibility of abuse,- as in pharmaceutical inventions - governmental intervention is necessary.

Hence, while a patent itself is not comparable to a monopoly, the monopolistic tendency of patents needs to be controlled. It is in this perspective that Malaysia has a long way to go. Currently, there is no legislation controlling patent pooling,

¹⁷ See the skilful presentation of economic understanding of monopoly and patents in Cornish, B, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, Sweet & Maxwell, London, 1986 par 1-016 -1020.

¹⁸ Taylor & Silberstone, *op.cit*, p.35.

cartels, unfair trade practices in licensing and other anti-competitive conduct.

Our discussion will now turn into the position of ownership of patents from an Islamic perspective. The focus of the study will be the position of profit motive and the prohibition of hoarding and concentration of market power in Islamic scholarship.

4. Islam and ownership of patents

It has been pointed out in the previous chapters that ownership of intellectual property is consistent with the concept of rights and ownership in Islam¹⁹. While there is no disagreement among scholars in support of the acceptance of copyright, patents do not receive the same treatment. Many reasons can be given for this. First is the difficulty of applying property concepts to patent. Unlike copyright, patent rights are not automatic. The prevailing practice among common law jurisdictions is to reward the person who files the patent first. Secondly, the parameters of patents are determined by economic considerations and hence, many scholars refrain from discussing patents from an Islamic economic point of view. As far as the legal discussion of patents from the Shari'ah point of view, many scholars simply justify patents on the basis of '*maslahah*' without any indepth discussion as to whether patents fit into an Islamic economic framework.

The Qur'an and the Sunnah do not contain detailed prescriptions on economic matters. The Prophet himself discouraged Muslims from asking too many questions to avoid rigidity. Muslims are constantly asked to use their own intellectual skills and knowledge in conducting their worldly affairs²⁰. This does not mean that there exists

¹⁹ See ch.3 & 4 on the theoretical framework of ownership of Intellectual Property in Islamic Law.

²⁰ It is obligatory to follow the Prophet (p.b.u.h) in all matters pertaining to religion, but one is free to act on one's own opinion in matters which pertain to technical skill. Anas reported that the Prophet happened to pass by the people who had been busy in grafting the trees. Thereupon he said: "If you were not to do it, it might be good for you (so they abandoned this practice) and there was a decline in the yield. He (the Prophet) happened to pass by them (and said), "What has gone wrong with your trees? They said: You said so and so. Thereupon he said: You have better knowledge (of a technical skill) in the affairs of the world. See Sahih Muslim, (rendered into English by Abdul Hamid Siddiqi, (1975) Sh. Muhammad Ashraf, Kashmiri Bazar, Lahore, par. Vol IV ch. cmlxxxvi p.1259.

a demarcation between worldly and religious affairs. In so far as economic matters are concerned, ample guidance can be sought from the Qur'an and the Sunnah.

In the first place, ownership of patents can be examined from the perspective of it being a form of private ownership. At the outset, private ownership and the profit motive are well accepted in Islam. In many instances the Qur'an urges man to work and persevere and promise him returns commensurate with his effort²¹. In another ayah, the Qur'an explicitly enjoins man to seek beneficial returns in the Hereafter without forsaking material gain²². The recognition of profit motivation is implicit in the recognition of private ownership as one of the forms of ownership rights.

At a certain level, this is consistent with the patent system which assumes a free enterprise system, whereby private ownership is considered as the norm. As the above economic discussion illustrates, patents are felt as a necessary instrument to induce private enterprise into engaging in invention and innovation. In contrast, in a socialist system, private ownership is considered as subsidiary to public ownership and hence any effort towards material progress should contribute first to the progress of the society as a whole.²³ Hence, in an inventor's certificate system, inventions are deemed as state property. As a token of the inventor's contribution, the inventor will be given monetary compensation for the use of his invention. Conceptually, while the reward thesis demands the appropriation of private ownership in the capitalist system, in socialist systems the reward comes in the form of monetary compensation. Under that system, an inventor has to request a certificate of

²¹ See for example Q :9:105,

"And say: "Work (righteousness): soon will Allah observe your work, and His Messenger, and the Believers: Soon will ye be brought back to the knower of what is hidden and what is open: then will He show you the truth of all that ye did."

²² See Q: 28:77,

"But seek, with the (wealth) which Allah has bestowed on thee, the Home of the Hereafter, nor forget thy portion in this world: but do thou good to thee, and seek not (occasions for) mischief in the land: for Allah loves not those who do mischief".

²³ Even though the 'modus operandi' of patent and inventor's certificate system differ, Beier argued that the basic conceptions of patent system are in conformity with the latter system. See Beier, Karl Friedrich, op.cit.

authorship from the state. Once the certificate is issued, the use of the invention shall be vested in the state. The state assume the responsibility of exploiting the invention with proper returns given to the inventor.²⁴

These distinctions between the Islamic, capitalist and socialist positions are central to the understanding of the Islamic ownership system.²⁵ The philosophical differences stems from the conceptual differences in the understanding of property and ownership²⁶. While a 'homo islamicus' is encouraged to strive for material progress, he is constrained by moral and ethical limits. Among others, a 'homo islamicus' is also expected to contribute towards distributive justice. In this respect, distinction should be drawn with the socialist system. In the latter system, common ownership is taken as the norm and an individual is not expected to strive for individual material progress.

To a certain degree the basic philosophy underlying patents as a tool for material progress is acceptable and valid. The only problem is the way patent systems operate nowadays which rewards only the first person to register, as in the case of common law jurisdictions. The practice may not only be contrary to the concepts of '*adl*' and '*ihsan*' but also of the labour theory of value as well. However, it has long been accepted in Islamic scholarship that it is within the privilege of the state to govern economic matters of the state. Provided that such a practice may lead to a higher goal

²⁴ Compared to the patent system, the inventor's certificate system has its pros and cons. For further discussion, see the Working Paper On Patent Law Revision, Canadian Department of Consumer and Corporate Affairs, 1976 and other references cited therein.

²⁵ An Islamic system, it is said, would be free on the one hand of the exploitation and severe inequalities that characterise capitalism, and on the other hand of the class struggles and intolerable restrictions that are the hallmarks of socialism. For extensive comparisons, see Yusuf al Qardhawi, Economic Security in Islam, trans. Muhammad Iqbal Siddiqi (Lahore:Kazi Publications, 1981, first Arabic ed. 1966) ch.2; Mohammad Abdul Mannan, Islamic Economics; Theory and Practice (Lahore: Sh. Muhammad Ashraf, 1970), ch.3; Syed Nawab Haider Naqvi, Ethics and Economics: An Islamic Synthesis (Leicester: The Islamic Foundation, 1981).

²⁶ For a detailed exposition of these philosophical distinctions between Islamic economics system, capitalism and socialism, see as Sadr, Muhammad Baqir, Iqtisaduna (Our Economics), (English translation) World Organization for Islamic Services, Tehran, 1984. See also Beheshti, Ayatollah, Ownership in Islam, (1988) (English translation by Ali Reza Afghani), Foundation of Islamic Thought, Tehran.

there is no reason why it should be rejected.

5. Islam, wealth and economic parameters

One of the main objective of Shari'ah is the attainment of objectives of religion or '*maqasid*'. Among the classical scholars who have discussed this are al-Ghazali²⁷, Ibn. al Qayyim²⁸ and al-Shatibi²⁹. According to this notion, the Shari'ah is prescribed by God for man for the fulfilment of certain objectives, principally to advance human interest ('*maslahah*')³⁰.

For the furtherance of the '*maslahah*', Muslim scholars took recognition of the five essential '*maqasid*' as enunciated by al Ghazali i.e faith, life, intellect, posterity and wealth.³¹ The order of the five essentials or '*maqasid*' is not without significance. Faith comes first, then come the rest. The application of these rules to patents can be seen from the weighing process in determining the scope and ambit of patent. Patents are important as they protect inventors from free riders and unfair competition. To a certain extent, patents also signify a token of recognition of inventor's rights over his intellectual creation. In the perspective of the '*maqasid*' such an action is desirable as it is an enhancement of intellect and wealth. However, if the decision

²⁷ Al-Ghazali, *al-Mustasfa min 'Ilm al-Usul*, (1937), Cairo. vol.1 pgs. 139,140, cited in Chapra, *Islam and Economic Challenges* infra, p.1.

²⁸ Ibn Qayyim al Jawziyyah. Muhammad ibn. Abi Bakr, *I'lam al-Muwaqqi'in*, tahqiq Taha Abd Al-Rauf Sa'd, Bayrut, Dar al-Jil, 1973. vol.3 p.14, cited in Chapra, *Islam and Economic Challenges*, infra, p.1.

²⁹ See al Shatibi, Abu Ishaq, *Al-Muwafaqat fi Usul as-Shari'ah*, Vol 2. pgs.3-5.

³⁰ See these '*ayah*'s:
 Al-Anbiyaa:107, "We sent thee not, but as a mercy for all creatures".
 Al-Jathiyah:20, "these are clear evidences, to men, and a Guidance and a mercy to those of assured faith".
 Al-Nahl:90, "Allah commands justice, the doing of good, and giving to kith and kin, and he forbids all indecent deeds, and evil and rebellion: he instructs you that ye may receive admonition".
 Al-Nisa':58, "Allah doth command you to render back your trusts to those whom they are due and when you judge between people that you judge with justice: verily how excellent is the teaching which he giveth you! For Allah is He who heareth and seeth all things".
 Al-Anfal:28, "And know ye that your possessions and your progeny are but a trial; and that it is Allah with whom lies your highest reward".

³¹ See al-Buti, Muhammad Said Ramadhan, *Dhawabit al-Maslahah fi as-Shari'ah al-Islamiyyah*, Muassasah al risalah (1982) particularly from pages 75-79 on the authority of the doctrine.

to grant a patent involves a sacrifice of certain principles of religion, then such exercise should not be taken. From the order of priority, matters of faith take precedence, and thus any action or policy which contradicts faith will not be adopted. We will discuss this further in the context of patenting of human biological material.

The scholars go further to classify the '*maqasid*' to three levels: '*daruriyyah*', '*hajiyyah*', and '*tahsiniyyah*'. What is considered as crucial to the existence of all the five objectives is of highest importance and classified as '*daruriyyah*' (necessities).³² The '*hajiyyah*' pertains to matters which are not essentially pertaining to the existence of the subject matter but whose non-existence will produce much hardship. The '*tahsiniyyah*' are matters which relate to the embellishment of a right such as issues of ethics and good conduct in human relations.

Hence, when two competing values are at stake, the one which is of higher level takes priority. Policy issues which involve matters which are of necessity presides over '*hajiyyah*' and '*tahsiniyyah*'. Among matters which are considered as crucial to the existence of life and intellect of mankind, depending on the level of economic development in a particular place, must be considered as a basic need. Everything which is necessary to ensure its fulfilment in all facets of life such as food, medical facilities and medicine, clothing, housing, education, transport, must be available for all.

Wealth is considered as one of the objectives of the Shari'ah. Islam encourages the growth of wealth and supports any initiative taken to improve material progress. However, market or economic forces alone are not the sole determinants of resource allocation. While it is valid to use economic criteria in determining the ambit of patents, other issues should not be forsaken.

³² Islamic scholars put the criteria of '*min haithu al wujud wa min haithu al ma'ni*' (whatever is essential for the fulfilment/existence of life and whatever deprivation of which, the existence/fulfilment of life cannot be sustained), for the determination of this classification.

In the perspective of weighing of interests in determining the scope of patents, it should be borne in mind that the position of patents within this hierarchy will be under the last category. Therefore, it is arguable that, the exemptions from patenting of inventions relating to medicine, pharmaceutical goods and food forms part of public interest. Even though, the present international agreements, particularly GATT, no longer accept those policy criteria, such criteria, if observed, would be valid in Islam's worldview. However, if distributive justice succeeds in establishing the threshold standards in a given economy, patents for such subject matter may be consistent with Islam.

In the understanding of this 'weighing of interests' muslim scholars have developed these criteria:

- (i) what is considered as public interest will take precedence over private interest.
- (ii) matters pertaining to '*al-fardhu*'(mandatory) will take priority over matters pertaining to '*al-nawafil*'.
- (iii) in policy choices which act as a restraint (as contrasted with promotion of values), the choice is to avoid the greater evil.
- (iv) in the field of economic transactions, what is commonly held as the presiding interest of the whole community of traders ('*ahl al-suq*') prevails over the interest of individual traders.
- (v) the scholars also look at the chances or the probability of occurrence. Hence one which has the highest chance of occurring should be given priority.³³

From the above discussion we have seen the role of profit as a reward to work and labour. We have also seen that wealth is one of the objectives of the Shari'ah. Chapra³⁴ argued that the five essentials of Shari'ah can be adopted as a moral filter to a well balanced economic system. For the purpose of this chapter, we will apply the five policy criteria in determining the scope of patents. Analyses have been made

³³ See Al-Buti, Muhammad Sa'id Ramadan, *Dawabit al-Maslahah fi al-Shari'ah al-Islamiyyah*, (1986), *Muassasah al-Risalah*, Beirut.

³⁴ See Chapra, M. Umar, *Islam and Economic Challenges*, (1985), The Islamic Foundation, Leicester.

to apply natural law and economic theories to delineate the scope of patents. A work of this kind, being the first of its own, cannot pretend to be comprehensive. Before that, we will turn to another issue pertaining to patents, i.e that of the association of patents and monopoly.

6. Islam, patents and monopoly.

Islamic sources have laid down rules governing economic activities³⁵. One of the most important behavioural norms in Islam in the field of economic activities is the rule against hoarding and monopolistic practices³⁶. From Prophetic traditions, hoarding is forbidden as an act of manipulation of market³⁷. Hoarding is abhorred as it increases prices of goods and hence leads to oppression. Most '*hadith*'s concerned relate to the act of hoarding food for consumption. Due to this scholars are in disagreement as to the scope of the prohibition in the manipulation of circulation of other goods besides food.

³⁵ For an exposition of early economic practices in the days of the Four Righteous Caliphs, see Hasanuz Zaman, S.M, Economic Functions of an Islamic State (The Early Experience) International Islamic Publishers, Karachi, 1991.

³⁶ See Quran (III:180) "That which they hoard will be their collar on the Day of Resurrection'.

³⁷ 1. '*Hadith*' from al Muwatta- Imam Malik p.296-297

i) Yahya related to me from Malik that he had heard that Umar Ibn. al Khattab said: "There is no hoarding in our market, and men who have excess gold in their hands should not buy up one of Allah's provisions which he has sent to our courtyard and then hoard it up against us. Someone who brings imported goods through great fatigue to himself in the summer and winter, that person is the guest of Umar. Let him sell what Allah wills and keep what Allah wills."

ii) Yahya related to me from Malik from Yunus ibn. Yusuf from Said ibn al-Musayyab that Umar ibn al Khattab passed by Hatab ibn. Abi Balta'a who was underselling some of his raisins in the market. Umar ibn. al Khattab said to him, "either increase the price or leave our market".

Yahya related from Malik that he had heard that Uthman ibn. Affan forbade hoarding.

2. Sahih Muslim. Abd. Hamid Siddiqi (trans) vol III, 1973, S Muhammad Ashraf, Kashmiri Bazar, Lahore, p.845 Ch.DCXXXIV

i) Ma'mar reported that Allah's Messenger (may peace be upon him) as saying: He who hoards is a sinner. It was said to Said ibn. al Musayyib): you also hoard, Said said: Ma'mar who narrated this hadith also hoarded.

ii) Ma'mar ibn. Abdullah reported that Allah's Messenger (may peace be upon him) as saying: no one hoards but the sinner.

This hadith has been transmitted on the authority of Sulaiman b. Bilal from Yahya.

The problem in understanding the nature of monopoly as understood in these Prophetic '*hadith*'s lies behind the debate on the meaning of '*al-ihlikar*'. Even though the '*hadith*' specifically prohibits piling of food by merchants as a way of cornering the market, Muslim scholars have extended that prohibition to any kind of economic activity which may manipulate the market through the increase of price of goods³⁸. This is the view of later jurists of Hanafites and modern scholars.³⁹ The Shafiites and the Malikites however confine the understanding of '*al-ihlikar*' to the literal meaning and other goods which are considered as main commodities for consumption⁴⁰. Such disagreement arose due to the vagueness of the meaning of '*al-ihlikar*' in early Islamic literature.⁴¹

Modern muslim scholars have outlined three criteria with regard to the prohibition of hoarding,

(i) included within the prohibition are goods which are within the category of 'essential items'. The meaning of essentials here differs from '*hajiyyah*' as understood within the hierarchy of values mentioned above. One view is that what is considered as essentials include what is in demand at a particular period. Hence during the time of war necessary items include armaments and weaponry.⁴²

³⁸ Sadr has broadened the concept further to include hoarding of factors of production. According to this view if an enterprise produces output lower than the maximum capacity in order to acquire higher prices, this is hoarding. Hence, leaving a land idle can also be considered as an act of hoarding. His view has not gained acceptance by other scholars. See Sadr, Muhammad Baqir, *Iqtisaduna (Our economics)*, Vol.2-part 2, (1984) WOFIS, Tehran.

³⁹ See the views of Abu Yusuf in *al-Kharaj* p.83. The view is taken from 3 *hadiths* reported by Ahmad, Abu Maslamah and Umar which condemn the act of increasing the price of goods above the market price. See also the views of Ibn al-Qayyim in *al-Turuq al-Hukmiyyah* at.p.284 who was at the forefront in the extension of the concept of *al-ihlikar* to all economic activities which are oppressive. See all these views in al-Sahi, Dr. Shauqi Abduh, *al-Mal wa-Turuq Istithmarihi fi al-Islam*, (1975) *Matba'ah Hissah*, Ummul Qura, p.148-171.

⁴⁰ The examples which are quoted beside food are olives, cotton and wool. Support of this proposition is sought from a *hadith* reported condemning hoarding of food for a period of forty days, see al-Sahi, p.153 op.cit.

⁴¹ *Lisan al-Arab* defines hoarding as an act to inflate price. Qamus al Munir defines '*al-ihlikar*' as unjust and oppressive conduct, see al-Sahi, op.cit p.148.

⁴² See Ibn. Taymiyyah, *Majmu Fatawa* in al Sahi, op.cit.

(ii) Some scholars stipulate that the activity should take place for at least one year to be oppressive. This view is based on the literal meaning of the Prophetic '*hadith*' and is not accepted by all jurists.

(iii) Another requirement is that there are no substitutes ready for use in place of such goods. In this case, Muslim scholars have allowed compulsory purchase of the hoarded goods. The owners of the goods should be compensated not on the basis of the inflated price but on the basis of market price.⁴³ While most scholars agree that the rights of the owner of the goods should also be safeguarded through monetary compensation, they differ as to whether compulsory purchase should be done without the consent of him. Abu Hanifah requires consent or '*al-ittifaq*' be sought. Ibn Nujaim, on the other hand, views that compulsory purchase can be enforced on owners of goods.⁴⁴

Contemporary scholars have assimilated modern economic understanding of monopolistic practices to broaden the concept of '*al-ihthikar*' to include practices which are considered as abuse of fair market practices such as restrictive trade practices, pool agreements, cartels, dumping practices and net price agreements.⁴⁵ Contemporary scholars agree that the interpretation of the Prophetic '*hadith*'s have to be understood in the context of modern economic practices. These views call for intervention of government by way of regulating prices to reduce the ill-effects of unfair trade practices.⁴⁶

⁴³ See the views of Ibn al Qayyim, al Qarshi and Ibn Hajar al Haithami in al-Sahi, p.158 op.cit.

⁴⁴ See Zaydan, Abdul Karim, *Al-Quyud al-Waridah ala al-Milkiyyah al-Fardiyyah lil-Maslahah al-Amah fi ash-Shari'ah al-Islamiyyah*, (1982), *Jami'ah Ummal*, Amman. pgs. 67-68.

⁴⁵

See al-Sahi p.154.

⁴⁶ The Righteous Caliphs resorted to price control of goods as a move to enjoin fair dealing among traders and to protect consumers. Regulating price in ordinary times are discouraged as the Prophet did not like imposition of price while market mechanism is the method preferred by him. For a detailed exposition of this, see in Hasanuz Zaman, S.M, *Economic Functions of An Islamic State (The Early Experience)*, International Islamic Publishers, Karachi, 1981 Ch.3. Price control is one as the many public duties of

As far as the nature of patents itself, it is clear that patents per se do not constitute monopolistic practices. Even though it is arguable that certain practices in patents have monopolistic tendencies, from the point of view that these monopolistic tendencies can be curtailed through forms of anti-trust or competition rules, then the argument that patents necessarily are a form of '*al-ihthikar*' is not sustainable⁴⁷.

With the Islamic prohibition on '*al-ihthikar*' we now come to the discussion on the scope of patents. In this part, we will be arguing that the five essential objectives of Shari'ah can be taken as a tool for determining the scope of patents.

Part II Factors in determining the scope of patents.

In this part we will apply the criteria of policy objectives proposed by al-Ghazali in determining the scope of patent rights. The order of discussion will be in accordance to the hierarchy of values enunciated by al-Ghazali. Analyzing patents in this perspective is important as defining the scope of patents is not a clear cut issue. In Western literature, the yardstick used to draw the line between patentable and non patentable subject-matter, with the exception to matters pertaining to public policy, is principally economic.

7 Patentability of matters which may be in conflict with '*din*' or faith

The first objective of the Shari'ah is the advancement of religion and matters pertaining to faith. One area in which patenting may result in the conflict with

a state in Islam. See Ibn Taymiyyah (1982) Public Duties in Islam (English Translation by Mokhtar Holland), Islamic Foundation, Leicester. p.47-58.

⁴⁷ It is submitted that the view that authors and inventors rights are forms of monopoly is not valid and cannot be substantiated with current interpretations of the term '*al-ihthikar*'. See the views by Vadillo, Umar Ibrahim & Khalid, Fazlun M in Trade & Commerce in Islam in Khalid, Fazlun & O'Brien, Joanne (ed) Islam & Ecology, Cassell (1994). The authors argue that the exclusive right of an author or an inventor is a legal right which guarantees a monopoly. Patents restrict the access of industrial products to the market and artificially raises the price of patented products by controlling supply. Further, the concept of Intellectual Property is contrary to the concept of knowledge whereby all knowledge comes from God. Finally they argue that it is a means to control the market and therefore is against the Islamic principle of freedom of transaction.

religious tenets is that of biotechnological inventions. The argument is that by allowing patenting of life-forms, man is assuming God's power of creation and hence raises the theological question of man's relationship with God over other life forms. Man's dominion over other creatures does not justify the modification, creation and commercialization of new life forms⁴⁸. Patenting reflects an inappropriate sense of human control over animal life and an underestimation of the value of non-human life.

Different theological arguments and philosophical theories are embroiled in the issue, particularly on the ontological status of man vis a vis other life forms. Lower forms of life such as micro-organisms are not capable of perception and hence can be manipulated without causing suffering. Certain higher life forms have a restricted sense of perception and hence due care should be taken to avoid the imposition of unnecessary suffering. On this point, critics have raised the issue of animal suffering. Man has long assumed the right to dominate animals for consumption, transport and experimentation. However, the traditional method of control and exploitation do not result in the same kind of suffering as that of creating a new genus of animals through bio-engineering. Many question the development of transgenic animals in which outcome cannot be predicted in relation to the animals' health and welfare. Further, critics are also concerned with the environmental impact of releasing transgenic animals into the wild.

The debate also raises the issue whether by so accepting bio-engineering, man is reducing life forms to pure matter⁴⁹. Kass questions the whole concept of creation

⁴⁸ See Hoffmaster, Barry, The Ethics of Patenting Higher Life Forms, 4 IPJ, 1988 p.1; Brody, Baruch A. An Evaluation of the Ethical Arguments Commonly Raised against the Patenting of Transgenic Animals, unpublished; Moufang, Rainer, Patentability of Genetic Inventions in Animals, 20 IIC (1986) p.823; New Developments in Biotechnology, "Patenting Life", Report by the Congress of the United State Office of Technology Assessment, Washington, April 1989.

⁴⁹ See the view by Kass, Leon Toward A More Natural Science; Biology And Human Affairs,(1985) The Free Press, New York. He argued that the philosophy behind the current debate over patentability of life forms is the reduction of all life to mere composition of matter. At p.149 he said:

"consider first the implicit teaching of our wise men, that a living organism is no more than a composition of matter, no different from the latest perfume or insecticide. What about other living organisms- goldfish, bald eagles, horses? What about human beings? Just composition of matter? Here arise deep philosophical questions to which the Court has given little thought; but in its eagerness to serve innovation, it has, perhaps unwittingly, become the teacher of philosophical

involving the product of nature. To him, man's ability to change nature is very limited. He argues that "the laws of nature permit prediction and control phenomena, but they are not of our making and cannot be transgressed. One might say, what nature's God keeps asunder, no man can put together. Man's ability to change nature is, in principle and in practice, always consistent with and limited by nature's unchanging ground."⁵⁰

The debate focusses on the issue of whether life forms constitute the proper subject matter of manufacturing and industry. Further, there is the Judeo-Christian conception that creation is in essence held in trust and there are limitations to what humans can do. Man is responsible for preserving the integrity of creation and for working with it in order to preserve its intrinsic values.

More difficult issues arise in patenting of inventions using human tissues and by products. Philosophical issues arise as to whether parts of the human body can be combined with genetic traits of animals. One philosophical argument is to distinguish between part of human body which constitute man's identity and consciousness and other parts of human body. The introduction of genes of the human growth hormone into farm animals to produce greater growth questions the fundamental issue of sanctity of human worth. Patent law does not contain avenues for theological, ethical, and metaphysical issues except that of inventions against ordre public and morality in the EC. It has been argued that patenting of animals should be considered as unethical. The European Patent Office has been slow to accept such generalisations⁵¹. On a similar vein, the Supreme Court in Diamond v. Chakrabarty was reluctant to entertain the philosophical question whether patenting of living

materialism - the view that all forms are but accidents of underlying matter, that matter is what truly is- and therewith, the teacher also of the homogeneity of the given world, and at least in principle, of the absence of any special dignity in all living nature, our own included."

⁵⁰ He argues on page 152:

"Even in true compositions of matter, that is, when chemicals are placed together to produce a new mixture or compound, nature is commanded only as she is obeyed. The potentialities of given matter may be exploited, but they cannot be artfully created".

⁵¹ See the decision of the Examining Division in Harvard Onco-Mouse, (1991) 1 EPOR 525.

matters is morally permissible⁵².

In Harvard Oncomouse⁵³'s case, a transgenic rodent had been inserted with cancer virus at an embryonic stage. These transgenic rodents were capable of reproducing further mice which carried the cancer virus. Arguments were forwarded in the court on both risks and benefits of genetic engineering for human beings. The court questioned whether the harm to animals was offset by the prospect of benefit for human beings. Ironically, the court, in balancing the relative risks and benefits was convinced that allowing patenting of transgenic animal would reduce pain and suffering of animals by reducing the number of animals used in laboratory research⁵⁴.

In interpreting A.53 (a) and (b) of the European Patent Convention⁵⁵, various propositions came to light⁵⁶. One view was that the whole field of genetics belonged to the realm of biology and that consequently, all genetic processes and methods were -as essentially biological processes - excluded from patents. Another view suggested

⁵² See the comment at p.23,

"Whether the genetic engineering of animals and human beings is morally permissible is, on the other hand, a harder question, one that continually needs to be asked. the objections to genetic engineering are not, at present compelling. The factors to which these objections require constant scrutiny, however, and changes in them would warrant a careful reappraisal of genetic engineering's status. What genetic engineering requires, above all, is moral vigilance."

⁵³ Decision Onco-Mouse/Harvard, 14th July, 1989 (OJ EPO 11/1989, 451; (1990) 1 EPOR 4, OJ EPO 12/1990, 476; (1990) 7 EPOR 501, (1991) 1 EPOR 525. Opposition has been raised by 16 parties against the grant of this patent and is still awaiting decision. The grounds of the opposition and the parties involved are discussed in Jaenichen, H.R and Schrell, A, in The 'Harvard Onco-mouse' in the Opposition Proceedings before the European Patent Office, (1993) 9 EIPR 345.

⁵⁴ The decision by the Examining Division, op.cit above.

⁵⁵ A.53 EPC reads: European patents Shall not be granted in respect of:

- (a) inventions the publication or exploitation of which would be contrary to 'ordre public' or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States.
- (b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.

⁵⁶ Article 53(a) EPC prohibits the grant of European patents for - inventions, the publication or exploitation of which would be contrary to 'ordre public' or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contract States.

that biological processes should be confined to natural or uncontrollable processes⁵⁷. The view preferred by many is the second one.

With the exclusion of A.53(b), more importance is attached to A.53(a) in filtering inventions which may be considered as "contrary to 'ordre public' and morality". The emphasis on A.53 (a) brings forward major difficulties. Beyleveld⁵⁸ (1993) highlights the various interpretations of the section by the differing meaning of the word 'morality', 'ordre public', 'exploitation' and 'publication'⁵⁹. The term morality may refer to cultural morality; or some specified philosophical theory of morality such as that of utilitarianism, Kantian or Hegelian; or the critical cultural morality which refers to the manner of the 'right thinking' or 'reasonable man'. While the term 'ordre public' may refer to the English idea of "public order" offences against which are constituted by various common law offences such as breaches of the peace, riot, affray and so on.

Beyleveld suggests that 'ordre public' refers to the structure of social relations governed by the Rule of Law itself, to the foundations of civil government as such, whereas "morality" refers to matters of public morality that were not directly implicated within the idea of the Rule of Law itself. This means that, under Article 53 (a), the examiners must ask, first, whether publication or exploitation of an invention would threaten the Rule of Law itself, and then whether it is contrary to public morality.

As to the criterion to be employed in this test of objective morality, he suggests that of the European Cultural morality as the examiners are not only operating within the terms of the European patent system but also against the backdrop of an emerging European Cultural morality.

⁵⁷ See Moufang, *op.cit* above.

⁵⁸ Beyleveld, Deryk and Brownsword, Roger Mice, Morality and Patents, CLIP, 1993.

⁵⁹ This point will be elucidated in section 7.10.

He further adds that the current pure technical conception of A.53(a) and (b) is untenable and maintains that the moral conception of invention involving biotechnological invention is the preferred approach. He rejects the argument that the patent office or the court is not the proper forum to resolve the difficult issues of ethics and morality. To him, the Rule of Law is a matter of concern in any legal order, regardless of the content of legislation that is enacted within that order⁶⁰. Thus the examiners have two tasks; firstly, once the biological invention satisfies the technical requirements, there should be a presumption in favour of granting application. Secondly, the examiners should carry out a moral balance of the relevant interests before concluding that the arguments weigh in favour of granting the Onco Mouse application. The position of the presumption is that it operationalises A.53(a) in such a way that patentability is barred only where an invention is shown to be clearly 'contrary to 'ordre public or morality'.

He further argues against the conception that A.53(a) only operates against inventions which "use" could be against morality. Instead he suggests that 'publication' should be given its natural meaning and "exploitation' be read broadly to cover the use, access, and monopolistic concomitants of a grant of a patent⁶¹.

Beyleveld's view and his interpretation of A.53(a) and (b) reflects the overall concern of bio-ethics in regulating bio-engineering research. It also illustrates the unsatisfactory state of moral and ethical concerns in many jurisdictions, particularly the U.K and EC today. The balancing mechanism proposed by GATT goes even further to include considerations of "protection of human, animal or plant life or health or to avoid serious prejudice to the environment"⁶².

Within this framework and against the uncertainty of the meaning and understanding of morality in western jurisprudence, it would be totally impossible to adopt the

⁶⁰ P.63 op.cit.

⁶¹ See Beyleveld, p.122. op.cit.

⁶² Subsection (3) and (4) of A.60.

approach in the U.K and the EC in this issue without being embroiled with the same jurisprudential debate. Currently, there exist no direct derogations in the Malaysian Patent Act 1983. S.13 (b) of the Act excludes plant and animal varieties or essentially biological processes for the production of plants or animals, other than man-made living micro-organisms, micro-biological processes and the products of such micro-organism processes. In so far as the meaning of the term 'variety' within this exclusion, Malaysia has adopted the approach in the U.K. With the opening of the door to biotechnological inventions, a structured approach and philosophy on this matter is needed.

In this matter, it is submitted that Islam, with its philosophy and views on the sanctity of life and the relationship between animate and inanimate matter, can be a possible paradigm. The approach in Islam is not dependent on what is perceived as immoral according to the popular understanding of 'public morality' or 'critical morality'. In Islam, moral issues and law are intertwined and therefore moral concerns are of high significance in Islamic jurisprudence. The criterion of morality in Islam is God-revealed and hence is free from matters of personal aversion or taste, arbitrary stands and the like which plague the modern understanding of modern concept of morality. Before we go deeper into the discussion of Islamic principles on treatment of animate matter, we now turn to another related issue, that of the patentability of microorganisms.

7.1 Patentability of microorganisms

The first case to consider the patentability of microorganism was Diamond v. Chakrabarty⁶³. In this case the U.S Supreme Court held that a bacterial strain in which a plasmid from another strain had been inserted is a patentable subject matter. The Court recognized that the relevant distinction was not between living and animate things, but between products of nature, whether living or not, and human made inventions.

⁶³ 206 USPQ 193-202 (1980).

Before that case, inventions involving products of nature were not considered as patentable as they fell within the domain of nature. The argument was that this type of invention could not be seen as an invention in the sense of something which is created and hence coming under the category of "discoveries"⁶⁴. This has been the view in the U.K Patent Office and the EPO till the recent breakthrough in genetic engineering.⁶⁵ In Canada, the policy of the Patent Office is that,

"All new life forms which are produced en masse as chemical compounds and are prepared and formed in such large numbers that any measurable quantity will possess uniform properties and characteristics are patentable. Patentable subject matter includes micro-organisms, yeasts, moulds, fungi, bacteria, actinomycetes, unicellular algae, cell lines and viruses or protozoa."⁶⁶

To overcome the initial objection against patenting of products of nature, the law draws a distinction between products pre-existing in nature and products which, by virtue of human intervention can no longer be considered the same as the natural products⁶⁷. In that sense, even if the invention involved products in nature, it could still be considered as an act of creation, i.e creating something which had never existed before.

The same arguments arose before the Court of Appeal in the U.K in the Genentech's

⁶⁴ Geneva Treaty on the International Recognition of Scientific Discoveries define the term 'discovery' as;
"a discovery is the recognition of phenomena, properties or laws of the material universe not hitherto recognised and capable of verification."

⁶⁵ See the report prepared by Straus, Joseph for WIPO; Industrial Property Protection of Biotechnological Inventions, BIG/281 July 1985. He summarised three different approaches to the distinction between discovery and inventions for products and processes which involved or contained living matter. Firstly, such products represented discoveries and were not patentable inventions. Secondly, if the pre-existing mixture was of natural origin, such as plant or animal material or a soil sample, such products were natural materials and therefore not patentable subject matter. Thirdly, such a product/process was not new since the product existed before. This position did not apply to products which were isolated or synthesized to be physically different from the mixture available to the public prior to the invention.

⁶⁶ Re Application of Abitibi Co. 62 CPR (2d) 81. The claim in this case is directed to a microbial culture system.

⁶⁷ See the report by Straus, Joseph, op cit above.

case⁶⁸. In this case the principal claims of the patent in suit related to a method of producing the synthetic version of human tissue plasminogen activator (t-PA). By means of genetic engineering, using a particular route of recombinant DNA technology, the patentees took the relevant genetic information from the cell line and expressed it in microorganisms capable of producing t-PA as a therapeutically acceptable product.

In this case, the applicant's claim depended primarily on whether an invention which relates to a discovery of phenomena of nature was a patentable subject matter. It was conceded in the course of argument in the court that the invention would not have been possible if not for the discovery of the nucleotide sequence of the dNa corresponding to t-PA. Once this information was known, anyone knowledgeable with the process of genetic engineering would be capable of producing the synthetic version of t-PA. The technique which was used to do this was known as part of 'prior art'. The claim was rejected by Purchas, Dillon L.JJ and Mustill L.J but on different grounds. Both Purchas L.J and Dillon L.J conceded that a patent which claims the practical application of a discovery did not relate to the discovery as such and patentability was not excluded by section 1(2) even if the practical application might be obvious once the discovery had been made. They however rejected the claim on technical grounds. Parts of the claims were not claims for the practical application of the discovery of the sequences but were claims for the discovery itself.

Mustill L.J had no difficulty in accepting patentability of inventions involving discovery of the laws of nature. To him, whether the combination of a new idea conceived by an inventor and an obvious application of it could lead to a patentable new article or process or not, was not germane to the patentability of an invention founded upon the ascertainment of an existing fact of nature, i.e a discovery. If the identification of a discovery as a foundation of a patent was not fatal to its validity, the only available means was reliance on the words "which consists of" in the claim.

⁶⁸ Genentech Inc's Patent (1989) R.P.C 147.

It is now almost settled law that inventions involving new forms of microorganism is a patentable subject matter provided that the legal and technical requirements of novelty and non-obviousness are fulfilled. In the U.K itself, patents pertaining to recombinant DNA molecules of Hepatitis B and C viruses have been recently upheld⁶⁹. Beside these legal issues, concern has also been raised on the dangers posed by biogenetics on the environment. These problems may be eliminated through strict requirements and supervision of bio-genetic research.

With the above discussion on the legal position of bio-genetic inventions, we now turn to an Islamic conception of nature and the relationship between man and nature.

7.2 Islam and the concept of creation

This world and whatever in it is an object of domination (*taskhir*) from Allah to mankind and includes animals and plants⁷⁰. Man is free to exercise this '*taskhir*' but is held responsible for his action⁷¹. Man can own animals for his own benefit either

⁶⁹ See Biogen Inc. v. Medeva Plc., FSR April 1994, Pt.4 Vol 21 p.202, Pt.4 Vol 21 p.252, p.258, Pt.7 p.448, pt.4 p.458; and Chiron v. Organon (no.2) (1993), F.S.R 324. See also commentary by Jones, Nigel, Biotechnology Patents: A Change of Heart (1994) 1 EIPR 37 and Kelly, Helen, Biogen's Hepatitis B Patent Held Valid and Infringed (1994) 2 EIPR 75.

⁷⁰ 22:65, "Seest thou not that Allah has made subject to you (men). All that is on earth and the ships that sail through the sea by His command? He witholds the sky (rain) from falling on the earth except by His leave: For Allah is Most kind and most merciful to man".

35:39, " He it is that has made you inheritors in the earth, if then, any do reject (Allah), their rejection (works) against themselves; their rejection but adds to the odium for the Unbelievers in the sight of their Lord: their rejection but adds to (their own) undoing".

14:33, "And He Hath made subject to you the sun and the moon, Both diligently pursuing their courses; and the night and the Day hath he (also) made subject to you".

31:20, "Do you not see that Allah has subjected to your (use) all things in the heavens and on earth and has made His bounties flow from you in exceeding measure, (both) seen and unseen? yet there are among men those who dispute about Allah without knowledge and without guidance, and without a Book to enlighten them."

7:32, "Say: Who hath forbidden the beautiful (gifts) of Allah Which he hath produced for His servants, and the things, clean and pure (Which he hath provided) for sustenance? Say: they are, in the life of this world, for those who believe, (and) purely for them on the Day of judgement. thus do we explain the signs in detail for those who understand".

⁷¹ 7:32, op. cit. foot note No.70.

87:1-2, "Glorify the name of thy Guardian-Lord Most High who hath created and further given order and proportion".

90:8-10, "Have we not made for him a pair of eyes and a tongue and a pair of lips and shown him

for consumption, transport, labour for work and even for experimentation. Since man's dominion over nature is a trust from God⁷², man is held accountable for his actions. There are limits to these rights and man is consistently asked not to create '*al-fasad*' (corruption) out of his economic endeavour. Scholars have used this authority to support the proposition that among the limits of human's dominion over nature are :

- (i) the duty not to abuse our control over natural resources and nature,
- (ii) the duty to preserve the environment,
- (iii) the duty to avoid cruelty to animals.

There is thus no fundamental objection against patenting per se of higher life forms particularly animals and plants. Traditional breeding has long been accepted. There is no reason to reject genetic engineering simply on the basis that in doing so we are assuming to 'play God' as long as the purpose of genetic engineering is for a positive benefit such as producing animals with higher growth and activity, to heal sickness or any other benefit to mankind.

In this economic endeavour, like other economic endeavours, there are moral constraints to man's action and these moral constraints outline man's relationship with nature. Man is expected to respect animals and kindness to animals is a meritorious act. It is recognised in Islam that animals have 'spirit' or soul'. If that is so, there is no basis in Islam for the conception that animals are merely compositions of matter. Hence man should take care that experimentation with animals should not subject the

the two highways".

43:10, " (yea, the same that) has made for you the earth (like a carpet) spread out, and has made for you roads (and channels) therein, in order that ye may find guidance (on the way)".

45:13," And He has subjected to you, as from Him all that is in heavens and on earth: behold, in that there are signs indeed for those who reflect."

⁷² 11:6-7, "There is no moving creature on earth but its sustenance, dependeth on Allah: He knoweth the time and place of its definite abode and its temporary deposit, all is in clear record. He it is who created the heavens and the earth in six days- and his throne was over the waters- that He might try you which of you is best in conduct. But if thou went to say to them "Ye shall be raised up after death," the Unbelievers would be sure to say, "This is nothing but obvious sorcery!"

87:1-2, "Glorify the name of thy Guardian-Lord Most High who hath created and further given order and proportion".

animals to unnecessary suffering⁷³.

Secondly, it is reiterated in the Qur'an that the universe and all creation are created in a sense of order and proportion.⁷⁴ The Qur'an explicitly recognizes the existence of laws of nature which cannot be changed by man⁷⁵. In this sense, there is an implicit limit to man's interference with laws of nature⁷⁶.

Thirdly, it is also acknowledged in the Qur'an that all creations are created in the best form. These shapes and sizes are not without function. The Qur'an repeatedly warns of the consequences of interfering with this 'fixed' and 'permanent' reality⁷⁷.

⁷³ The Prophet (p.b.u.h) once stopped a group of children who were using a live chicken for target practice by throwing stones at it and told them that animals are to be treated kindly. According to another tradition of the Prophet, Allah reserved a place in Hell for a woman who locked her cat out to find her own food. The Prophet's concern for animals was such that the Prophet insisted that jugular veins be ruptured using razor-sharp knives to reduce animal's pain.

⁷⁴ 67:2-3, "he Who hath created Death and Life, that He may try which of you is best in deed and He is the exalted in Might, Oft-Forgiving. He who created the seven heavens one above another: No want of proportion wilt thou see in the Creation of Allah Most Gracious, so turn thy vision again: Seest thou any flaw?"

40:64, "It is Allah who has made for you the earth as a resting place and the sky as a canopy and has given you shape and made you shape and made your shapes beautiful- and has provided for you sustenance of things pure and good such is Allah your Lord, so Glory to Allah, the Lords of the Worlds".

65:12, "Allah is He Who created seven firmaments and of the earth a similar number through the midst of them (all) descends his command: that ye may know that Allah has power over all things, and that Allah comprehends all things in (His) knowledge."

10:5-6, "It is He who made the sun to be a shining glory and the moon to be a light (of beauty), and measured out stages for it: that ye might know the number of years and the count (of time). No wise did Allah create this but in truth and righteousness (thus) doth He explain His signs in details, for those who understand. Verily in the alternation of the night and the day and in all that Allah Hath created, in the heavens and the earth, are signs for those who fear Him."

⁷⁵ 15:16, "It is We Who have set out the Zodiacal Signs in the heavens and made them fair-seeming to (all) beholders".

⁷⁶ Here we tend to agree with Kass proposition that man cannot claim in any invention involving natural products/process as entirely his own creation. This however does not mean that man cannot claim rights over his sweat and labour.

⁷⁷ 54:59, "Verily, all things have we created in proportion and measure".

36:38-40, "And the sun run its course for a period determined For it, that is the decree of (Him) the exalted in Might, the All knowing. And the Moon- we have measured for it Mansions (to traverse) till it returns like the old (and withered) lower part of a date stalk. It is not permitted to the Sun to catch up the Moon, nor can the Night outstrip the Day, Each (just) swims along in (its own) orbit (according to Law)".

67:2-3, "he Who hath created Death and Life, that He may try which of you is best in deed and

The question whether modification of animate matter through genetic engineering is morally permissible in Islam would depend on the interpretation of those ayahs. One view would be that the warning against interference of nature would indicate the absolute prohibition of all kinds of such activities. This rigid approach towards science has been ruled out and rejected by many scholars in the context of narrow permissibility of use of contraception methods. It is submitted that the preferred approach would be a cautious one. While Islam allows the use of science to change what is in existence in nature, the Qur'an warns us of the danger and risk of changing what is created naturally. The attitude of Islam is that of caution, allowing the interference of nature when it is necessary and safe, taking into account all factors. It has been elucidated earlier that there exist numerous risks to bio-engineering particularly in relation to the suffering of animals and the risks to the environment. It is often recognised that modern science has not come up with a method which guarantees the absence of harm to animals. There is a need to be mindful of the disasters that have occurred in bio-engineering research such as that of pigs which have been inserted with a human growth hormone gene⁷⁸ or that of dairy cattle which were injected with growth hormone to improve milk yields⁷⁹.

Further, as is clear from the Prophetic '*hadith*'s, Islam asks for the observance of certain rules over the treatment of animals, such as that against unnecessary suffering. Our treatment of animals would have to satisfy this basic requirement. The approach is not that of rigid prohibition against harm to animals. The preferred approach which

He is the exalted in Might, Oft-Forgiving. He who created the seven heavens one above another: No want of proportion Wilt thou see in the Creation of Allah Most Gracious, so turn thy vision again: Seest thou any flaw?"

87:1-2, "Glorify the name of thy Guardian-Lord Most High who hath created and further given order and proportion."

25:2, "He to whom belongs the dominion of the heavens and the earth: no son has he begotten, nor has He a partner in his dominion, it is he who created all things and ordered them in due proportions."

⁷⁸ The pigs that result grow faster and are leaner than naturally bred pigs, but they suffer from crossed eyes and severe arthritis in the joints and are susceptible to disease. See Hoffmaster, p.8 op.cit.

⁷⁹ After the injection of Bovine Somatotrophin, the dairy cattle tended to keel over after two years of gargantuan production. Pigs, injected with a similar wonder drug, froze to death because they grew so much lean meat they couldn't keep warm. See Hoffmaster, p.8 op.cit.

has been adopted by Muslim scholars in cases like this is that of 'weighing of harm and benefit'. In this matter, there is a grain of truth in the proposition tendered in the court in Diamond v. Chakrabarty⁸⁰ that what genetic engineering needs is a constant moral vigilance⁸¹. Hence the call for a more detailed study to be carried out at the community level into the use of transgenic animals, effective inspection arrangements, the question of what constitutes an animal species, a stock or a breed is a sensible one indeed.

Having established the cautious middle approach of Islam, the next concern would be the forum to address these issues. In this perspective, it is difficult to sustain the proposition that the court is not a proper forum for assessing all the advantages and ill-consequences arising from patenting of higher life forms⁸². In Islam the responsibility to uphold religious precepts of law and justice is a '*fard kifayah*' (community obligation). Therefore, in relation to the court, all factors should be considered, not only calculating the economic advantages but also the moral constraints set up above⁸³. The proposition given by Deryk is particularly attractive in this respect. He argues that not only the use of bio-genetic inventions should be regulated but also its exclusionary and monopolistic aspect, access and publication. In this way, not only is the process of bio-engineering supervised but also its potential use.

⁸⁰ op.cit. See note 63.

⁸¹ See the Court's comment in Diamond v. Chakrabarty, op.cit.

⁸² The Court in Diamond v. Chakrabarty commented that:
 "the grant or denial of patents on micro-organism is not likely to put an end to genetic research or its attendant risks. The large amount of research that has already occurred when no researcher had sure knowledge that patent protection would be available suggests that legislative or judicial fiat as to patentability will not deter the scientific mind from probing into the unknown any more than Canute could command the tides. Whether respondent's claims are patentable may determine whether research efforts are accelerated by the hope of reward or slowed by want of incentives, but that is all".

⁸³ The Court in Diamond v. Chakrabarty op. cit was of the view that public forum was the best place to conduct the debate about genetic engineering - the debate should be placed in its proper perspective on the much broader concerns on the future of genetic manipulation in both sentient animals and humans. It is submitted that this should not be the only forum available to address the issue.

Transgenic animals should be allowed if they are of overall use to man, particularly in the field of scientific research, medicine and agriculture. This is in so far as the transgenic animals are not produced from the combination of human genes and animal genes. Combining human genes and tissues may give rise to other objections such as that of sanctity of human dignity.

Having discussed Islam's point of view on bio-engineered animals, we now turn to the patenting of human tissues, genes and parts of the human body.

7.3 Patenting of human tissues, genes and other part of human body

In Western literature, the dispute between those who believe that commercialization of the human body is justified and those who think it is not seems mostly to be an argument between those who accept a dualistic view of the separation between body (material, physiological being) and mind (immaterial, rational being) and those who do not⁸⁴. In so far as the religious views are concerned, the 'Judeo-Christian tradition' emphasizes on the concept of "imago dei" or the image of God⁸⁵. Therefore there are limits on what human beings can do with their own bodies. The study conducted by the United States Office of Technology Assessment concludes that the religious implications of these views depends on the distinction between ethically acceptable and ethically preferable policies and practices. Hence, according to the report, even though these traditions preferred explicit gifts and donations, they did not preclude tacit gifts, sales, abandonment and appropriation⁸⁶.

The secular view focusses mainly on the recognition or refutation of proprietary rights

⁸⁴ For example Paul Ramsey believes that human beings exist in their bodies and that respect for the body is indivisible from respect for the person. While Joseph Fletcher argued that the body appears to be merely a necessary condition for the pursuit of the truly important things about being human. Its significance is only instrumental, not essential. For the whole arguments, see New Developments in Biotechnology: Ownership of Human Tissues and Cells, Office of Technology Assessment Task Force, Science Information Resource Center, 1988 ; par. Ch.8.

⁸⁵ For an analysis of this issue in Jewish Law see Katz, P. Arie, Patentability of Living Within Traditional Jewish Law : Is the Harvard Mouse Kosher?, American Intellectual Property Association, No.2 (1993) Vol. 21 : 117.

⁸⁶ See New Developments in Biotechnology: Ownership of Human Tissues and Cells, op.cit.

in human tissue. The arguments analyse the various legal rights a person has over his or on other's body. The argument is that the right vested in the surviving spouse or next of kin of a deceased person is a quasi property right and not a mere executor's right. The proponents of this view argue that human tissue can be regarded as personal property so as to enforce possession, to prevent damage and destruction, for the purposes of criminal offences such as theft, and for the purposes of bailment⁸⁷. While this view has its attractions, it is our view that the present debate of the use of human body materials cannot be seen purely within the context of personal ownership. Religious and ethical issues should not be disregarded.

The issue of ownership of human biological materials first became of concern in Moore v. University of California⁸⁸, a case involving the struggle between the tangible ownership of tissues and the intangible right of Intellectual Property. The case involved an allegation of conversion of bodily tissues. The plaintiff, John Moore, underwent treatment for hairy-cell leukemia at the medical Center of the University of California at Los Angeles. As part of his treatment, a certain amount of bodily substances were extracted which included blood, bone marrow aspirate and other bodily substances and later his spleen was removed. The removal of the spleen was necessary to his health. The spleen was found to contain a special cell-line which produced lymphokines at a very high rate. Unknown to Moore, his improved "MO cells" were developed to produce lymphokines commercially and later patented by Moore's physician and the university of California. The physician and the university were quoted to be benefitting up to 3 billion dollars from the commercialization of the MO cells. The court agreed that there was a breach of fiduciary duty and lack of informed consent but disagreed whether a right of conversion exists. This is because for a right of conversion to exist, there must be actual interference with one's

⁸⁷ See Magnusson, Roger.S, The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions, Melbourne University Law Review, Vol.18 June 92 p.601 par. p.629. This view is gaining popularity and is being reiterated by many other writers. It is not within the province of this chapter to review the various cases on the legal position of human body parts. See also the reservations made by Moufang on the proprietary approach, Moufang, Rainer, Patenting of Human Genes, Cells and Parts of the Body?-the Ethical dimensions of Patent Law, IIC Vol.25, No.4/1994.p.487.

⁸⁸ 15 USPQ 2d, 1753.

property and ownership. Recognising conversion to arise in this case would have been to confer rights of property over one's body, a result which the majority of the judges in this case strongly opposed⁸⁹.

Another reason which was given for the refusal of the recognition of proprietary rights was the fear that this may impede research and free exchange of biological material. Thirdly, they viewed an action for breach of fiduciary duty as adequate to remedy the situation in this case. Fourthly, they viewed that there was no pressing need to extend the conversion concept to cases like this. This was an area where legislative action was the best mode⁹⁰. Fifthly, the proposition that Moore might own his cells was contrary to patent law, which constitutes an authoritative determination that the cell line was the product of invention.

The dissenting judgement of Broussard J emphasised different issues⁹¹. To him, the case was not whether a patient generally retained an ownership interests in a body part after its removal from his body, but rather whether a patient had a right to determine, before a body part was removed, the use to which the part would be put after removal. Broussard J made an interesting observation,

"as a matter of policy or morality, it would be wiser to prohibit any private individual or entity from profiting from the fortuitous value that adheres in a part of a human body, and instead to require all valuable excised body parts to be deposited in a public repository which would make such materials freely

⁸⁹ See Arabian J p.1768 of the case, *op.cit.*,

"plaintiff has asked us to recognise and enforce a right to sell one's body tissue for profit. He entreats us to regard the human vessel- the single most venerated and protected subject in any civilised society- as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much".

⁹⁰ See the comments made by the judge at p.1765 of the case, *op.cit.*, " Unfortunately, to extend the conversion theory would utterly sacrifice the other goal of protecting innocent parties. Since conversion is a strict liability tort, it would impose liability on all those into whose hands the cells come, whether or not the particular defendant participated in, or knew of, the inadequate disclosures that violated the patient's right to make an informed decision. In contrast to the conversion theory, the fiduciary-duty and informed-consent theories protect the patient directly, without punishing innocent parties or creating disincentives to the conduct of socially beneficial research".

⁹¹ For the purposes of this discussion, the observations made by Mosk J will not be dealt with here.

available to all scientist for the betterment of the society as the whole".⁹²

We now discuss the Islamic point of view on usage of body parts.

7.4 Islam and the sanctity of human dignity

7.4.1 Islam and ownership of human body

In Islam, man cannot be said to own his body in the sense of an exclusive right to deal, enjoy and dispose of his body. Muslim scholars have discussed the position of the ownership of human parts in the context of donations of human organs. For the purpose of this study, it is felt that the work by Professor Yaseen is particularly instructive and illuminating⁹³. Classical scholars were extremely cautious on the issue of possible acts vis-a vis human organs. The basic rule in their discussion is that the utilization of parts of the human body is forbidden (*'haram'*), whether such transactions occur through sale or otherwise. The rationale of the prohibition is either to protect human dignity and value or because no legitimate use can be made of the parts.

It is pertinent to our discussion that the views of classical scholars on the selling and buying of human parts is repeated here⁹⁴.

Al Mirghenani says:" It is not permitted to sell a human being's hair or utilize it in any way, because humans are highly dignified, therefore no part

⁹² P.1774 of the case, op.cit. For an ethical analyses of genetic engineering involving human biological material, see the analysis by Moufang, R in Patenting of Human Genes, Cells and Parts of the Body - The Ethical Dimensions of Patent Law, 25 IIC No.4/94 p.487-515.

⁹³ See Yaseen, Dr. Mohammad Naeem, The Rulings For The Donation of Human Organs In the Light of Shari'a Rules and Medical Facts, Arab Law Quarterly, Vol.5, Part.1 Feb 1990, p.49-87. See also the discussion by Chaim, Vardit Rispler, Islamic Medical Ethics in the Twentieth Century, E.J.Brill, Leiden (1993) Ch.4 on organ transplantation. See also the work of Isam, Ghanem, Islamic Medical Jurisprudence, Med. Sci. Law (1981) Vol.21, No.4 p.275-287 for further details on Islamic juristic works and manuals on Islamic medical jurisprudence. While the classical works have underlined the basic philosophical underpinnings of medical treatment and methods, these principles can be further developed to answer some of modern issues pertaining to medical jurisprudence. See Isam's further work in The Response of Islamic Jurisprudence to Ectopic Pregnancies, Frozen Embryo Implantation and Euthanasia, Arab Law Quarterly, pt. 4 Nov. 1989, p.345-349.

⁹⁴ See p.51 of Prof.Yaseen's work.

therefrom should be undignified or demeaned..."⁹⁵

Al-Kassani says, "Human bones and hair should not be permitted to be sold, not because of their uncleanness (*'nadjassatihi'*), as such parts are determined to be clean in the Prophetic tradition, but out of respect for human organs; the demeaning of such human organs through their sale is a form of humiliation"⁹⁶.

Al Kassani also prohibits the sale of maternal milk. He says, "it is forbidden to sell a mother's milk, as it is part of the human body, and as such it is worthy of the highest respect and dignity, and it is not dignified or respectable to demean the human body by making it an object of selling and buying"⁹⁷.

The Prophet Muhammad (p.b.u.h) is reported to have said:" the breaking of a dead person's bones is just like the breaking of his bones while alive"⁹⁸.

Against the restrictive approach of classical scholars, Prof. Yaseen argues for the permissibility of transplant and the donations of body parts for medical purposes. He points out that acts involving human organs become a violation of human dignity only when these are taken from him to be used in the way animals and inanimate objects are used, such as the use of human skin to make garments or bags, or the cutting of an organ to be consumed as food, or the use of bones to make tools and instruments or the use of human blood as a drink, dye, etc⁹⁹.

Secondly, he argues that the classical jurists' position has to be understood in the

⁹⁵ *Al-Hidayati*, Part II, p.34 cited in Yaseen, p.51 op.cit.

⁹⁶ *Al-Badai*, Part V, p.142, cited in Yaseen p.51 op.cit.

⁹⁷ *Al-Bada'i*, Part V p.145, cited in Yaseen, p.51, op.cit.

⁹⁸ Reported by Ahmed and Abu Daud, *al-Fateh al-Rabbani*, Part VIII, p.89; cited in Yaseen p.53 op.cit.

⁹⁹ See Yaseen, p.58 op.cit.

context of the amount of knowledge available at their time regarding diagnosis, therapy and surgery.

He suggests a cautious approach to the issue. First, he calls for the assessing of the relative risks and benefits and the rule of choosing the least of two harms in order to reject the worse of the two. The permissibility of donating human biological material must not cause harm to the donor. Secondly, the process of transplantation should likely to be successful. Thirdly, the rule varies for the type of organs donated. Most importantly, he argues against the commercialization of body parts as to "demean human dignity". To him human organs cannot be evaluated in terms of financial gain. Attributing financial gains (*'al-maliyyah'*) to something, presupposes the fulfilment of two conditions for the jurists, these are first, that this object should in fact be exploitable and useful; second, that Islamic religious law should have permitted its exploitation in many possible ways and not under compulsion or a need that demeans it¹⁰⁰.

7.4.2 The case for a cautious approach towards patenting of inventions involving parts of human body

The above discussion on the permissibility of donations of human parts carries many observations which are of importance.

(i) The law recognise that for purposes of protection of human dignity, certain use of body parts are not permitted. This does not mean that research for good causes are not allowed, only that they are qualified.

(ii) As part of this protection of human dignity, sale of body parts is not allowed. In the context of donation of human organs, it is by way of gift and not sale. In this context it has been pointed out earlier that there should not be any profit ing from any wealth produced by the commercialization of human body parts. As human body parts are not considered as legitimate property, any purported sale involving those

¹⁰⁰ See Yaseen p.67 op.cit.

materials would not be valid.

(iii) The body of a person is linked with two types of rights; that of the individual and that of God¹⁰¹. The former comes in the form of the limited rights to be washed before burial, shrouding, preburial prayers, absolution prayers and keeping the body from being mutilated. The latter comes in the form of right against suicide and against harming oneself. The right of God can only be waived in certain circumstances such as in the case of saving other lives. Hence in this context, and in the light of (i) and (ii), the usage of body parts is restricted only to good cause. Usage of body parts for the purpose of researching the causes of, and to heal, sickness is allowed so long as the benefit to mankind offsets its possible harm. In all instances, the rule of choosing the least of two harms will be applicable.

(iv) With the restrictive interpretation of man's ownership over his body, it is questionable that body parts can be the subject of property rights or exclusive rights in Intellectual Property. The preferred view is that as research using human materials is allowed, it should not be the subject of private ownership.

(v) As stated earlier, a person does not have an absolute right over his body due to the linkage with God's right. Muslim scholars have, however, drawn circumstances whereby these rights can be waived and transferred provided that the requirements in the Shari'ah pertaining to them are fulfilled¹⁰². Among the requirements is that this right to waive God's right in a body belongs only to that person. Thus only he has a say in determining the use of his body parts, both during his life and after his death. This rule is particularly important in the context of Moore's case above.

¹⁰¹ See Yaseen, op.cit p.59 where he cited the view of Al-Izz ibn Abd al-Salaam of Qawa'id al-'Ahkam, Part 1, p.30.

¹⁰² See the views of Ibn al-Jawziyya, Al-Qaraffi and Al-Izz Ibn Abd al-Salaam cited in Yaseen p.63 op.cit.

(vi) The Qur'an describes man as 'the best of all creations'¹⁰³. Compared to animals, man is endowed with intellect and is repeatedly asked to act in accordance with his dignity. To introduce human genes into animals to enhance the growth of animals may not be acceptable as it is contradictory to human dignity. The objection against such practice in that we are using human parts in the way animals and inanimate matter are used and hence by so doing we are blurring the distinction between man and animals. Hence to exclude patenting of inventions which are against the dignity of man accords with the dictates of the Qur'an.

7.4.3 The need for specific derogations for inventions contrary to the dictates of Shari'ah

Earlier, it has been submitted that the approach adopted by the EC and GATT is open to too many shades of interpretations as to concepts of morality. Here, it is suggested that the approach adopted by the Gulf Cooperation Council ('GCC')¹⁰⁴ would be more in line with the dictates of the Shari'ah. In Saudi Arabia and Oman, direct derogations of inventions contrary to the dictates of Shari'ah is provided. Article 9 of the Saudi Arabia Patent law states;

" A patent shall not be granted if the invention itself or its use is contrary to the Islamic '*Shari'ah*'; any patent to the contrary shall be abrogated. Save those patents which are contrary to Islamic '*Shari'ah*', the granting of a patent to an interested party may not be withheld according to this Law."

Article 2(1) of the Oman Patent Law states that:

¹⁰³ 32:7, "He who has made everything which he has created most good: he began the creation of man with (nothing more than) clay".

22:5, "O mankind! If ye have a doubt about the resurrection, (Consider) that We have created you out of dust, then out of sperm, then out of a lech-like clot, then out of a morsel of flesh, partly formed and partly unformed, in order that we may manifest (Our power) to you; and We cause whom we will to rest in the wombs for an appointed term, then do we bring you out as babes, then (foster you) that ye may reach your age of full strength; and some of you are called to die, and some are sent back to the feeblest old age, so that they know nothing after having known (much) and (further), thou seest the earth barren and lifeless but when we pour down rain on it, it is stirred (to life), it swells, and it puts forth every kind of beautiful growth in pairs".

¹⁰⁴ The GCC members are : Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE.

"The patent of invention shall be patentable in accordance with this Law and its Implementing Regulations if it is novel, inventive, and industrially applicable and if it is not incompatible with the provisions of the Islamic 'Shari'ah', public order or public morals in the GCC countries."

Within this framework, the recommendations given by the former European Council report on the legal protection of biotechnology were sound and valid¹⁰⁵. According to the report, on principle the group saw no ethical grounds for opposing the patentability of inventions relating to living matter, even though there were certain types of genetic manipulation which should in its view, be strictly prohibited. These were:

- i. processes for modifying the genetic identity of the human body for non therapeutic purpose which are contrary to the dignity of man (implicit reference to cloning and chimera-production, etc)
- ii. patenting of the human body or parts of the human body per se.

8 Patentability of matters affecting life

8.1 Patentability of food and pharmaceutical inventions

It has been pointed out earlier that items which are essential to the preservation of life are considered as '*hajiyyah*', even though not '*daruriyyah*'. In the context of patent, the same concern arises in inventions pertaining to food items and pharmaceutical product. Not many countries still exclude food and medicine from patents with the

¹⁰⁵Ethical Questions Arising From the Commission's Proposal For a Council Directive on Legal Protection for Biotechnological Inventions.(Date 30.09.1993). It should be noted that the Commission's stand on this matter have been overturned in the European Parliament in Feb this year prior to the regulation's rejection by the European Parliament recently. Under the terms of the January 23 compromise agreement, there will be a possibility to patent an invention including parts lending themselves to industrial application and obtained by technological means from the human body in such a way that they are no longer directly related to a specific individual. Source: European Intelligence, February 7, 1995 This European Directive has been axed by the European Parliament in Brussels. See Science, Vol. 267, 10th. March 1995 p.1417. For reasons underlying the rejection see the comments by Roberts, Tim, The Former Biotech. Patents Directive; Council Common Position 4/94 : Directive on the Legal Protection of Biotechnological Inventions, Patent World, May 1995 p.27-33.

exception of a few, among them Korea and India¹⁰⁶. Under the old law, Korea excluded inventions relating to food and drinks or articles appealing to the sense of taste as well as inventions of substances manufactured by the process of transformation of the atomic nucleus¹⁰⁷. Under the Indian Patents Act 1970, in the case of inventions claiming substances for use, or capable of being used, as food or as medicines or drugs; or inventions relating to substances prepared or produced by chemical processes no patent is granted in respect of claims for the substances themselves but patents can be granted for the method of manufacture.

The old U.K Patent Act of 1919-1946 excluded claims for substances intended for food or medicine. After the repeal of the law in 1949 patenting of food and medicine was made possible. Stringent provisions were added to prevent the owner of a patent relating to food or medicine from restricting the use of the invention. It was easy to obtain compulsory licence. The onus of proof was on the patentee to show that there were special reasons why the compulsory licence should be refused. The Comptroller also supervised the price of food and medicinal items to ensure that these items were available to the public at the lowest price consistent with the patentee's deriving a reasonable advantage from the patent rights¹⁰⁸.

In Islam, one of the social duties of the state is to guarantee a minimum level of living. A part of this social duty is to ensure that food and medical items are well circulated and easily accessible. This collective caring obligation stems from the fact that Muslims are a community in faith and as a community they are obliged to help one another¹⁰⁹. Further, Muslim scholars are in consensus that if a person is caught

¹⁰⁶ For a list of countries which exclude pharmaceutical products, see the survey by Sinnott, John, Pharmaceuticals IP Portfolios, Managing Intellectual Property, issue 36/94 p.20.

¹⁰⁷ This is the position under the old law of No.950 of Dec 31, 1961). The 1990 Act has wholly amended this law. Under the current law, patents on food products is allowed.

¹⁰⁸ See Meinhardt, P., Inventions, Patents and Monopoly, Stevens and Sons, London, 1950.

¹⁰⁹ See Surah 5:2 ; "...help ye one another in righteousness and piety, but help ye not one another in sin and rancour; Fear Allah: for Allah is strict in punishment"; and Surah 9:71; "The Believers, men and woman, are protectors, one of another: they enjoin what is just, and forbid what is evil; they observe regular prayers, practice, regular charity, and obey

stealing during famine he should not be punished with '*hudud*'.

This duty of need fulfilment should not be seen as a strong reason to deny patenting. As long as patenting does not affect the supply of food and medical items, there is no reason to deny patenting altogether. Hence we see in many countries, strong rules of compulsory licensing and licences of rights are provided to ensure that the supply of food and medical items are sufficient.

However, there is one concern from the patenting of medical items, that is the price of patented drugs. The problem is particularly serious in countries which depend totally on foreign pharmaceutical goods such as Malaysia. From an old report¹¹⁰ in Malaysia, 74% of the drugs used are imported. Drugs produced by transnational corporations dominate the market; vitamins and tonics, antibiotics, analgesics and anti-tussives. These problems can be satisfactorily resolved through a comprehensive drug policy whereby the price of essential drugs items are regulated.

8.2 Patentability of methods of medical treatment

The case against patenting of food and pharmaceutical products may not be as compelling as the case against methods of medical treatment. Patenting does not necessarily lead to restricted availability of the items but it may lead to the increase of prices of the patented products compared to the non-patented ones. So long as the price of patented food and pharmaceutical items are regulated, the normal rule would be that there was no substantive objection against the patenting of these two items. In other circumstances such as famine or the outbreak of war, which necessitates the availability of patented products and processes the rule would be that compulsory licences should be allowed and easily obtainable to avoid hardship.

The approach to inventions pertaining to methods of medical treatment of the human

Allah and his Messenger. On them will Allah pour His mercy: for Allah is exalted in power, wise."

¹¹⁰ See Utusan Konsumer Jan.1986.

body by surgery or therapy and diagnostic methods practised on the human or animal body, are treated differently. As the court in NRDC v. Commissioner of Patents¹¹¹ rightly observed:

"Part at least of the premises on which the observation were made was that surgery or other processes for treating the human body were of their nature essentially non economic. The national economic interest in the product of good surgery and therefore in the advancement of its techniques - if in no other respect than that the repair and rehabilitation of members of the work force, including management in that grouping, is both obvious and may be regarded as sufficiently proximated, in my opinion, as to be capable of satisfying the economic element of an invention, if no other elements are present and no impediments exist to the grant".¹¹²

Public health and social ethics demand that any treatment be made free without having to consult the inventor of the treatment. It is inconceivable that a surgeon is not free to make the choice of treating his patients with whatever methods he deems proper. A surgeon is committed to the Hippocratic Oath to tend to his patients by whatever methods available. It is thus legitimate in this case that the interests of the public are weighed to those of the proprietor of medical treatment. Secondly, the patenting of the medical process causes harm to physician-patient confidentiality. If a medical process is subjected to a patent licence, hence requiring the disclosure of patient's condition. This will inhibit a patient from giving full disclosure of his condition to the doctor and will obviate accurate diagnosis. Thirdly, patenting may affect the methodology of scientific interest. If an innovation of medical treatment is monopolised by an individual, this will inhibit disclosure or the publication of the research findings. It could also restrict independent, unbiased evaluation by other investigators who might be denied a licence to confirm or refute the observation of

¹¹¹ (1973) RPC p.59.

¹¹² NRDC v. Commissioner of Patents (1959) 102 CLR 252, par. p.62. In this case claim for cosmetic treatment for changing the appearance of the human body or of parts of it is patentable and is not of a like kind of medical prophylactic or therapeutic processes or methods.

the group having the patent.¹¹³ Faced with this weighing duty, many jurisdictions particularly in the common law countries, deny the patentability of medical treatment¹¹⁴. This rationale is accepted in the Commonwealth jurisdictions in the case of Joos v. Commissioner of Patents¹¹⁵. In Canada, the same principle can be seen in Re Application of Regents of the University of Minnesota.¹¹⁶ The Patent law in Malaysia has a specific exclusion for methods of medical treatment.¹¹⁷

¹¹³ See Annas, Surrogate Embryo Transfer: The Perils of Patenting, *Hastings Center Rep*, June 1984, at 26, quoted by Burch, Gregory.F, Ethical Considerations in the Patenting of Medical Process. 65 *Texas Law Review*, 1987 p.1139.

¹¹⁴ A.52(4) of the European Patent Convention
 "Methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body shall not be regarded as inventions which are susceptible of industrial application. This provision shall not apply to products, in particular substances or compositions, for use in any of these methods".

UK PA 1977, S.4(2): "An invention of treatment of the human or animal body by surgery or therapy or of diagnosis practised on the human or animal body shall not be taken to be capable of industrial application".

See also the former E.C Draft Directive on Legal protection of Biotechnological Inventions (October 1988) Draft Art.18: (note that this Draft has been axed by the European Parliament, see footnote 104 *ibid*):
 "Any exclusion from patentability or from the field of industrial applicability or surgical or diagnostic methods practised on an animal body shall apply to such methods only if practised for a therapeutic purpose."

A.8 of the Common Position provides:

"A process comprising a succession of steps shall not be excluded from patentability merely on the grounds that one or more of the steps involve a method of treatment of the animal body by surgery or therapy or a diagnostic method practised on the animal body. This treatment or diagnostic method shall not, however, be protected as such".

¹¹⁵ (1973) RPC p.59. Court held that cosmetic processes and methods for improving the human body or part of it can satisfy the requirement of an invention under the Patents Act 1952-1966.

¹¹⁶ (1990) 10 EIPR D-195, 29 CPR (3d) 42. The Court rejected a claim for a method for inhibiting the side effects in live mammals and other multicellular organisms when treated with certain platinum compounds to inhibit tumour growth. See also the case of Wellcome Foundation Ltd v. Commissioner of Patents (1979) 2 NZLR 591 in New Zealand. On appeal the decision was reversed, see (1983) NZLR 385. On the basis of a 'balancing exercise', Cooke J described that there was a deep seated sense that the art of the physician or the surgeon in alleviating human suffering "does not belong to the area of economic endeavour or trade or commerce" (p.388 and 389).

¹¹⁷ See S.13(1) (d) of the 1983 Act.

(1) Notwithstanding the fact that they may be inventions within the meaning of S.12, the following shall not be patentable:

(d) methods for the treatment of human or animal body by surgery or therapy, and diagnostic methods practised on the human or animal body:

provided that this paragraph shall not apply to products used in any such methods"

Many criticisms are levelled against this policy. Their argument lies on the fact that if innovation in the medical process is not given the proper reward, no effective incentive would be available for any research in the medical process especially with the increase of the cost of innovation of new medical procedures. Secondly, it is illogical that pharmaceutical products can be patented and not methods of medical treatment¹¹⁸. Thirdly, since the main ethical objection against patenting of medical treatment is the issue of access, patenting should be allowed provided such medical treatment be made available easily.

Burch rejected the deontological analysis whereby medical process patents are inherently bad because they derogate other ultimate values. Instead he applied the instrumentalist view on the basis that people do not value the interests infringed by the medical process patents as ends in themselves, but rather as instrumentalities to the greater good of improved health. As a matter of principle he argued that at the juncture between property rights and human health, there should be a bias in favour of the greater availability of medical innovations, privacy of the patient, and openness of research methodology. Thus, given, that all these ethical objections are alleviated, the practical effect of patenting should be acceptable. One of the option is to dictate mandatory/automatic licensing requirements. This will facilitate the expectation of the proprietor of the patent for a reasonable profit. No discrimination in terms of the prospective licensee occurs and hence a surgeon would be able to fulfill his obligation effectively. To facilitate access, once patented, such treatment should be made easily available through a system of automatic licensing¹¹⁹.

Another critic Moufang, argued that the present difficulties posed by patenting of medical treatment is not sufficient to justify its prohibition.

"The main question is whether protection for medical methods would result in

¹¹⁸ See Gruber, S and Kroher, J., Patentability of Pharmaceutical Inventions- a Comparison of the Legal Situation in Germany and Some Common Law Countries, Pt.1 (1984) 15 IIC 588; Pt.II (1984) 15 IIC p.726.

¹¹⁹ See Burch, Gregory F, Ethical Considerations in the Patenting of Medical Processes, 65 Texas Law Review 1987 p.1139.

the serious danger that in a concrete case members of the medical profession would have to deny medical treatment or make do with inferior method. Every attempt to find a definitive answer to this question necessarily contains an element of speculation."

According to him, the difficulties posed by allowing patenting can be overcome through the present available methods such as compulsory licensing or an order for use in the interest of public welfare. Privilege of necessity can always be relied on in instances of emergency and when there is no sufficient time to seek the licence or consent of the patentee¹²⁰.

The policy prohibition against the patenting of medical methods has been construed narrowly in case law decisions. Hence, a distinction is drawn between treatment for therapeutic and cosmetic purposes¹²¹. The test is whether " the purpose of the application of the body whether of a substance or a process must be the arrest or cure of a disease or diseased condition or disability".¹²² Hence methods of contraception are not considered as 'medical treatment' in the strict sense of curing or preventing disease, and hence, patentable.¹²³

If the claimed invention is not directed solely to a cosmetic effect, but is also necessarily defining a treatment of the human body by therapy as well, such a claim

¹²⁰ Moufang, R, Methods of Medical Treatment Under Patent Law, 1 IIC (1993) Vol.24 p.18.

¹²¹ C & W's Application (1914) 31. R.P.C 235. The case concerns a patent application for process of extracting metals of living bodies was denied. In this case, it was clear that the process was used to extract lead from persons suffering from lead poisoning and therefore constituted a method of medical treatment.

¹²² Joos v. Commissioner of Patents (1973)RPC p.59 at page 63. A claim for a process of improving the strength and elasticity of keratinous material, especially human hair and finger nails was allowed.

¹²³ See Schering's Application. In contrast see London Rubber Industries Ltd's Patent (1968) R.P.C. 31 where a claim to a process of birth control involving taking certain hormonal drugs at a specific time and in a specific order was refused. However, in another case Organon Laboratories Ltd's Application (1970) FSR 419, a claim to a card with pills attached to it in a particular order coupled with instructions on how to take them was allowed. In another case Upjohn Co. (Kirkton's) Application (1976) R.P.C 324, a method of inducing abortion was also held as a method of treatment of the human body and not a prophylactic method in the same sense as contraception.

is excluded from patentability. Whether such an invention is excluded depends on whether the method would have a beneficial effect to the health of the person. If it is not, then the claim does not fall within the exclusion.¹²⁴

The exclusion of patentability of methods of treatment is also extended to animals. The same policy objective arises here and for reasons of public health, it is necessary that any veterinarian should not be inhibited to use any methods of treatment by the existence of patents. This was the rationale for rejecting a claim for a method of immunising poultry against coccidiosis by adding viable oocysts in subclinical doses to the feed of poultry.¹²⁵ On similar grounds, a method for improving the tenderness of meat by injecting an enzyme solution into the live animal shortly before slaughter is unpatentable.¹²⁶ Seemingly, this exclusion includes methods of treatment carried out by farmers on individual animals.¹²⁷ No distinction can be drawn between medical treatment carried out by a veterinarian and treatment activities which are normally routinely carried out by a farmer.

The meaning of 'therapy' has been construed widely, to cover all medicament for relief of all kinds of pain. Irrespective of the origin of pain, discomfort or incapacity, its relief, by the administration of an appropriate agent, is to be construed as

¹²⁴ See Blendax GmbH v. Imperial Chemical Industries PLC No.6/1992 IIC Vol.23 p.815. In this case, the European Patent Office rejected a claim of a method of cleaning plaque and/or stains from human teeth. The court in this case distinguished the case of Appetite Suppressant T144/83 OJ EPO 1986, 301. A claim for a method of loss of weight which had both cosmetic and therapeutic effect when used to treat obesity was patentable.

¹²⁵ See Unilever Limited (Davis's) Application (1983) R.P.C. p.219. The word "therapy", is to be understood in its wider sense of the medical treatment of disease. See also the case of Duphar/Pigs II T 19/86 (1988) 1 EPOR, whereby the word 'therapy' should be understood in the sense of 'maintenance or restoration of health' p.10.

¹²⁶ See Swift & Co's Application (1962) RPC. p.37.

¹²⁷ See Wellcome/ Pigs I (1988) 1 EPOR 1.

"therapy" or of "therapeutic use" in the sense of A.52(4) EPC.¹²⁸ It does not only relate to a treatment of disease in general or to a curative sense (in the narrow sense) but also includes the alleviating of the symptoms of pain and suffering.¹²⁹ Thus it includes any non-surgical treatment which is designed to prevent or reduce the possibility of contracting any malfunction of the animal body.¹³⁰

The exclusion relates only to those methods which directly allow a decision on medical treatment. Methods which merely give intermediate results are not diagnostic methods within the meaning of A.52(4), even if they can be used for making a diagnosis.¹³¹

In contrast, the meaning of surgery is not confined to therapeutic surgery in the sense of treatment for cure of diseases or disability. The court in Occidental Petroleum Application¹³² held that the concept of surgery under S.4(2) of Patents Act 1977 must not be narrowly interpreted in the sense of therapeutic surgery. Rather, it included every method of surgery, whether for curative, prophylactic or cosmetic

¹²⁸ See Re Rorer (1988) 19 IIC 803 which involves a claim for the use of a medicament for relief of menstrual discomfort. The court outrightly rejected the distinction between pain and discomfort which are caused by natural circumstances (e.g menstruation, the pregnancy or age etc) and reactions to situations in the human environment (e.g atmospheric condition provoking tiredness, headache etc).

¹²⁹ See Jorg Schultz & Partner (Patent Application No. 8221174) The Court held that therapy here must be construed in a wide sense and includes methods which are directed towards alleviating, at least temporarily, the symptoms of a particular disease. (1986) IPD 1003.

¹³⁰ See Salminen/ Pigs III (T58/87) 3 EPOR 1983 125. The case involved a claim for preventing piglets from suffocating under the dam in a brooding pen.

¹³¹ See Siemens/Diagnostic method (1988) 6 EPOR 365 for a claim directed to an electrochemical method in determining sugar in the presence of foreign substances, and especially of the concentration of glucose in body fluids. See also Brüker/Non Invasive measurement (1988) EPOR 357 and Siemens/Flow Measurement T245/87 (1989) 5 EPOR 241 for a method of measuring the rate of flow of small quantities of liquid passing through a tubular element, used in controlling drug administration.

¹³² (1985)IIC 216. The case involved a method claim for a solution to the problem of the implantation of an embryo from a thoroughbred female animal, a so-called donor mammal, into an animal of similar race but with indifferent genetic make-up, a so-called recipient mammal, for the purposes of shortening the thoroughbred animal's natural term of pregnancy.

purposes. Secondly, it did not matter whether a treatment was carried out by a nurse or a surgeon¹³³.

All the above arguments for and against patenting of methods of medical treatment were reviewed in Australia, in the case of Rescare Ltd v. Anaesthetic Supplies Pty Ltd.¹³⁴ The Federal Court reviewed the long held policy and the line of cases against the patenting of this kind of invention and held that what was/not patentable should be construed consistent with the language of Statute Of Monopolies. Hence methods of medical treatment should be exempted if they are generally inconvenient and contrary to public policy. The Court noted that inventions as to methods of medical treatment in Australia belonged to the area of economic endeavour or trade and commerce. The case is interesting as the long-held rationale for denying patents for medical treatment was dismissed by the courts.

8.3 Second medical use

In the U.K and the EC, another compromise was set on the non-patentability of methods of medical treatment. Where an invention pertained to a discovery of further therapeutic treatment of a substance already known for some therapeutic use, this was held patentable in the EEC in the case of Switzerland¹³⁵. The rationale was that pharmaceutical research devoted to synthesis was even more complicated and more costly to prepare¹³⁶. In the U.K, this 'Swiss form' claim was held to be valid in

¹³³ In George Sewell Allen (Patent Application No 91 13 228.2)IPD 16040, a claim for a method of fixing implants into patients for purposes of imaging the human body, a process which can be done either by a surgeon or a nurse.

¹³⁴ 25 IPR 119. The observation made on the patentability of processes of medical treatment was affirmed on appeal by the Federal Court of Australia. See Anaesthetic Supplies Pty Ltd v. Rescare Ltd, 28 IPR 383. Lockhart J held that there was no justification in law, logic or principle why a treatment of the human body was not a manner of manufacture.

¹³⁵ OJEPO 11/1984, 581.

¹³⁶ See the arguments in White, Alan W, Protect The Known, Explore The Unknown, Managing Intellectual Property, October 1991 p.18.

the case of Schering's and John Wyeth's Applications¹³⁷. This development was further followed by the EPO's decision in Mobil's case¹³⁸ which allowed the claim for further use of a known chemical compound.

In Malaysia, with the recent amendment to the 1983 Patents Act, second medical use of a known substance is patentable. S.14(4) provides that " any substance or composition comprised in the prior art, for use in a medical treatment for the purpose of paragraph (d) of subsection (1) of Section 13, if its use in any such method is not comprised in the prior art" is patentable.

It would be difficult to disregard the above discussions on the unacceptability of patenting of methods of medical treatment in stating the Islamic point of view. Preservation of life and alleviation of pain and suffering is a social obligation or part of '*fard kifayah*' in Islam. During the Umayyad period, medical care was provided for by the state. As a part of this obligation, a person should be able to alleviate the pain of others in whatever method that is available. In this sense, the reservations made by many commentators on the patentability of medical treatment and its effect on the freedom of physicians should be taken into consideration. A mandatory system of licensing may not be a satisfactory alternative as it may subject the physician to discriminatory pricing.

9 Patentability of matters pertaining to the intellect

Part of protection of the intellect is the exclusion of discoveries from patents. Matters which are in the realm of ideas are considered as essentially non-economic and hence non-patentable¹³⁹. The rationale of this rule is the recognition that ideas, as

¹³⁷ (1985) RPC 585.

¹³⁸ Mobil/Friction Reducing Additive, T59/87, (1989) 2 EPOR p.80. The application of this case has been narrowed down in the case of Merrell Dow Pharmaceuticals Inc. and anr. v. H.N. Norton & Co. Ltd. (1994) RPC p.1.

¹³⁹ See S.13 which contains the list of non-patentable subject matter including, discoveries, scientific theories and mathematical methods and schemes, rules or methods for doing business, performing purely mental acts or playing games.

opposed to applied theory, are part of scientific truth and therefore are synonymous to nature¹⁴⁰. Included within this realm of unpatentable subject matter are discoveries, scientific theories, mathematical methods, schemes and rules or methods for doing business, performance of purely mental acts or playing games. The rationale behind this policy is that all the above involve ideas as opposed to execution of ideas¹⁴¹. In practice, the exception has been construed only to the extent that the patents relate to the conceptions as such. Inventions which consist of a method for the practical application of a discovery does not fall within the purview of the exception¹⁴².

10. Matters pertaining to protection of posterity

This is an area with which the patent system has no direct connection. In Islam, within the five objectives of the Shari'ah, protection of posterity comes in many forms such as through the institution of marriage and the imposition of 'hadd' in cases of adultery. In relation to patents, advancement of posterity, arguably, comes indirectly - if not accurately - by the dissemination of technical knowledge through the requirement of patent disclosure¹⁴³. It is an economic theory that the requirement of disclosure ensures that technical information embodied in patents is not concealed

¹⁴⁰ See the observation made by Burton J in Funk Bros. Seed Co v. Kalo Inoculant Co, 333 U.D 127 at p.130 above.

¹⁴¹ See Hughes, Justin, The Philosophy of Intellectual Property, 77 The Georgetown Law Journal, p.287.

See also Diamond v. Diehr USPQ (1981) 1;

"While a scientific truth, or the mathematical expression of it, is not patentable invention, a novel and useful structure created with the aid of knowledge of scientific truth may be." The mathematical algorithm in Diehr was the known Arrhenius equation, and the court held that when the algorithm was incorporated in a useful product, the subject matter was statutory.

¹⁴² See Genentech Inc's Patent (1989) R.P.C p.147.

¹⁴³ Failure to give complete and clear disclosure may be a ground for invalidating patents. For a complete discussion of sufficiency of disclosure, see Cornish, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, 2nd. ed, (1989) Sweet & Maxwell, London, 5-0585-063. See also S.56 of the Malaysian Patents Act, 1983 and S.12 of the Regulations thereof.

from others to use for further innovative processes¹⁴⁴. Hence, the patent system not only rewards the individual inventor but also guarantees the dissemination of technology to society at large and the succeeding generations to benefit from. Without patent systems, most technical knowledge and invention would be kept secret and concealed from society. More fundamentally, the law also recognised the need to control the publication of information, from patent applications, which might be prejudicial to the nation¹⁴⁵. In simple words, patent information constitutes a basis of technological development for future generations and thus of economic and social progress of the society at large¹⁴⁶.

11 Matters pertaining to wealth - the concept of distributive justice

It has been elucidated at length above that patents are deemed necessary as an incentive to invent, develop and market new inventions. It has often been argued that the justification of patents is deontological in nature in that patents advance a higher benefit to the society i.e promotion of technological progress.

In Islam, wealth is not an end in itself but is a means to achieve other objectives. The concept that property and wealth are social tools, is given the recognition by the obligation to pay '*zakah*' and '*sadaqah*' to those in need¹⁴⁷. In the perspective of

¹⁴⁴ For further deliberations see Beier, F.K, Strauss, J, The Patent System and Its Informational Function- Yesterday and Today, Vol. 8 No.5/1977 p.387.

Beyleveld.

¹⁴⁵ See S.30A of the Malaysian Patents Act, 1983. In this respect, 人 suggested that the law should also filter biotechnological inventions, if the publication of such technical information is contrary to 'ordre public' and morality. See Beyleveld This obligation can be further extended to include other type of information which may be considered as prejudicial to the Shari'ah.

¹⁴⁶ See the findings of the economic report of Canadian Department of Consumers and Corporate Affairs, op.cit. See also Yusing Ko, op.cit.

¹⁴⁷ See Surah 59:7, "What Allah has bestowed on his Messenger (and taken away) from the people of the townships- belongs to Allah -to His Messenger and to kindred and orphans, the needy and the wayfarer; in order that it may not (merely) make a circuit between the wealthy among you. So take what the Messenger assigns to you, and deny yourselves form which he witholds from you. And fear Allah; for Allah is strict in punishment";

Surah 9:60: "Alms are for the poor and the needy, and those employed to administer the (funds); For those whose hearts have been (recently) reconciled (To the truth); for those in bondage and in debt; in the cause of Allah, and for the wayfarer, (Thus it is) ordained by Allah, and Allah is full of knowledge and wisdom"; and

patents, distributive justice can be achieved through the balancing of material wealth with need fulfilment. These have been dealt with earlier in our discussion on society's right of food, essential items, medical care, information and knowledge.

Another concern of distributive justice which arises out of the effect of granting exclusive rights over sources of nature is the issue of a farmer's privilege to use traditional breeding methods and to save seeds for further re-seeding. Under the former proposed regulation on biotechnological inventions, further multiplication is not allowed¹⁴⁸. Under Article 10 of the regulation, the first and all subsequent generations of material obtained by multiplication or propagation are prohibited, provided the crucial characteristics of the original are retained. Such a practice is unfair and discriminates against farmers and inhibits them from deploying traditional agricultural methods.

The proposed regulation on biotechnological inventions was revised on this issue before its rejection by the European Parliament. Prior to the rejection, concessions were reached on 'farmers' right' and farmers were allowed to use seeds for further use in limited circumstances. In pursuance to that the Parliament had been able to persuade the Council of Ministers to accept the farmers' privilege (allowing farmers to continue using an "invention"- such as seeds from their own crops - on their own behalf, once the plant variety rights have been paid for). What remained was to guarantee this right for the use of livestock on behalf of the farmer. The new European Commissioner for the Internal Market, Mario Monti, had made a statement on behalf of the Commission so as to stress that once an EU legislative provision on the production of animal species allowed a farmer to use protected animals for reproduction purposes on his own farm so as to renew his stock, the Commission should undertake to take due account of the purposes of including such an exemption

Surah 70:24-25; "And those in whose wealth is a recognised right. For the (needy) who asks and him who is prevented (for some reason from asking)".

¹⁴⁸ The UPOV Convention had also been recently revised to reduce the scope of 'farmer's right in respect of the use of the product of the harvest obtained by planting for propagating purposes. See A.15 of the International Convention for the Protection of New Varieties of Plants of Dec. 2, 1961, as revised on March 19, 1991.

in the framework of the Directive¹⁴⁹.

12. Conclusion

In this chapter we have attempted to analyse the legal theories which are relevant to the justification and parameters of patent systems, within an Islamic perspective. It should be mentioned again that our study, being the first of its kind, is not exhaustive. At the outset we have examined the economic justifications of patents and the Islamic point of view on wealth and property.

It is felt that the most important factor in understanding patents for inventions is their role in stimulating research and technological progress. It has been pointed out that the profit motive should not be the only concern in a healthy competitive progressive economic system. There is a great role for the concept of 'distributive justice' here. This role of 'balancing of interests' should be given more prominence both before and after the granting of patent rights.

It has been established that the five objectives of Shari'ah are central to the Islamic position. It is argued that the weighing of interests within the scale suggested by Al-Ghazali, Al-Shatibi and as developed by contemporary scholars are imperative if we are to have a patent system which is equitable. By adopting this moral filter, it is shown that many of the problems facing the determination of patent scope can be resolved.

As far as protection of matters pertaining to faith is concerned, this can be seen through the present debate on the patentability of transgenic animals and human tissues. While patenting of transgenic animals may not lead to a direct conflict with the dictates of the 'Shari'ah', patenting of human body parts does. In this chapter, the position of exploitation of human biological materials was examined in the context of discussion on the ownership of human biological materials. It was shown that

¹⁴⁹ Source :European Intelligence, February 7, 1995. It should be noted that this EC Draft Regulation has been thrown out by the European Parliament, see f/n 104 *ibid*.

classical Muslim scholars have classified any dealing relating to human biological material as '*haram*'. In this chapter, it was argued that the question pertaining to patentability of these matters should not be answered in the context of ownership but in the context of ethical and moral concerns. The controversy over the patent application of the human genome project illustrates that the patenting of human genes, cell lines and parts of body material will lead to insurmountable ethical problems.

The discussions on patentability of food items, pharmaceutical products and methods of medical treatment is linked directly to the second objective of Shari'ah, that is the protection of life. It has been argued in this chapter that patenting of food and pharmaceutical products need not adversely affect the supply and availability of these two items. Other consequential effects such as pricing can be satisfactorily addressed through strong compulsory licensing rules. Inventions pertaining to methods of medical treatment, however, are not suitable as a patentable subject matter, given the difficulties posed by patenting such methods. These difficulties outweigh other positive factors such as the need for material reward for further research and innovations.

The protection of matters pertaining to the intellect can be seen from the exclusion of discoveries and pure ideas from the domain of patents. As far as protection of posterity is concerned, the benefits of patent may come indirectly in terms of patent information. The statutory requirement of disclosure ensures a rich source of technological innovation for others to use. Finally, it is also shown that patents are consistent with the Islamic objective of enhancement of wealth, so long as the requirement of distributive justice is fulfilled.

CHAPTER SEVEN

TRADE MARKS: AT THE JUNCTURE OF PROPERTY FUNCTION AND CONSUMER PROTECTION.

1 Introduction.

The deployment of marks as a designation of goods, adopted by manufacturers in trade can be traced back from ancient history¹. The earliest discernible use of marks are found in the ancient Chinese, Roman and Greek pottery. Marks have also been used in trade and manufacture in early Islamic civilisation. This is evident by the Islamic literature, whereby marks are used to indicate conformity with certain quality requirements as illustrated by the use of the '*muhtasib*'²'s seal on measures, scales and mints during the Abbasid period³.

The proprietary nature of trade marks differs from that of copyright and patents. Unlike copyright and patents which are temporal, trade marks are perpetual. Despite this, trade marks can hardly be characterised as monopoly rights. The modern trade mark paradigm is characterised by the inhibition of the use of a same or similar trade mark for the same or similar goods to avoid confusion in the identification of products in the market. This chapter will begin with the analysis of the proprietary nature of trade marks in both common law and Islamic law⁴. In understanding trade marks, it

¹ For an historical account on the use of trademarks, see Schechter, Frank I., The Historical Foundations of The Law Relating to Trade-marks, (1925), Columbia University Press, New York; Diamond, S.A., The Historical Development of Trademarks, Vol.65 T.M.R p.265; Ruston, Gerald, On the Origin of Trademarks, Vol.45 T.M.R., 127; Paster, Benjamin, G, Trademarks - Their Early History, Vol.59 T.M.R 551 and Elliot, Harrison, Watermark Held Unlikely to Have Cryptic Meanings; Early Papermakers' Devices Religious Modern Usage Is Like Trademark, 37 T.M.R p.211.

² '*Muhtasib*' is the term used to denote a 'market inspector'.

³ See footnote 106 infra.

⁴ It has been argued in chapter 3 and 4 that Intellectual property is consistent with the concept of '*mal*', '*haqq*' and '*haqq al-milkiyyah*' in Islamic jurisprudence.

is crucial that proper knowledge is grasped on the role played by trade marks both as indication of origin and indication of quality of products in the market. Therefore, in this part, the focus of our inquiry are the followings:

- i. the proprietary nature of trade marks,
- ii. the deployment of marks in advertisement,
- iii. the function of trade marks as an emblem of quality.

The nature of ownership of trade marks is unique because of its association with other rules and principles of trade and commercial dealing. Due to this, this inquiry will address other significant principles which may influence and proscribe the proprietary rights of trade marks. The second part of the chapter questions the 'locus' of consumer protection in common law and proceeds with a discussion on the conflicting interests between manufacturers and consumers in trade marks. To this end, the nature of our inquiry necessitates the examination of these two basic issues:

- i. the deployment of consumers' participation in the determination of confusion and deception in establishing infringements of trade marks.
- ii. protection of well known marks and measures against the dilution of marks which is based on the protection of consumers.

The chapter, then proceeds with an elaboration of consumer standing in Islam. Often, trademarks have to accommodate both the conflicting interests; in most instances in favour of the consumers. This symbiosis between consumers and competitors will be addressed in the third part of the chapter. The conflict between consumers rights and trade mark owners rights is more apparent in two instances; parallel importation and that rule against unfair competition which is known in common law jurisdictions as passing off.

With this short introduction, the chapter will begin with the theoretical framework of property rights in trademarks.

2.1 Theoretical framework of proprietary right in trade marks.

A trade mark⁵ is an incorporeal property right⁶, serving to protect the labour, skill, effort and investment of time and money of the proprietor in creating and promoting its mark. The property concept of trade marks in the U.K was first evolved by the Courts of Equity. This notion that equity would intervene to protect a right of property in a trade mark had been established in Millington v Fox⁷. It was noted that in extending protection to marks the court of Equity drew analogy to copyright⁸. The clearest formulation of the property analysis was given by Lord Chancellor in The Leather Cloth Co. Ltd v The American Leather Cloth Co Ltd⁹;

"The representation which the defendant is supposed to make, that his goods are the goods of another person, is not actually made otherwise than by his appropriating and using the trade mark which such other person has an exclusive right to use in connection with the sale of some commodity; and if the plaintiff has an exclusive right so to use any particular mark or symbol, it becomes his property for the purposes of such application, and the act of the defendant is a violation of such right of property, corresponding with the piracy of copyright or the infringement of the patent. I cannot therefore assent to the dictum that there is no property in a trade mark.

⁵ A mark is defined in the Malaysian Trade Mark Act 1976 (hereinafter referred to as MTMA) as "including a device, brand, heading, label ticket, name, signature, word, letter, numeral or any combination thereof. Trade mark is defined as to mean ".....a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and same person having the right either as proprietor or as registered user with or without any indication of identity of that person". In an old 1955 case, under the old Trade Mark Ordinance in P.P v. Tan Keng Siew, the court accepted that a detachable mark which is to be fixed on goods and not embossed on goods is within the definition of a trade mark or property mark. (1955) 21 MLJ 59.

⁶ See S.20 of the U.K Trade Marks Act, 1994. There is no equivalent provision under the MTMA 76.

⁷ (1838) 3 My & Cr 388. See the elaboration on this principle in a series of judgements by Lord Westbury LC during the 1860s, starting with Edelsten v Edelsten(1863) 1 De GJ & S 185; 46 ER 72. See also Hall v. Barrows (1843) 4 De GJ & S 150; 46 ER 873, M'Andrew v. Bassett (1864) 4 De GJ & S 380; 46 ER 965 and The Leather Cloth Co Ltd v The American Leather Cloth Co Ltd (1965) 11 HLC 523, 11 ER 1435, affirming (1863) 4 De GJ & S 137; 46 ER 868.

⁸ Lupton, Keith, Trade Marks as Property, 2 (1991), Intellectual Property Journal, 29-39.

⁹ (1863) 4 De GJ & S 137 at 142; 46 ER 868 at 870.

It is correct to say that there is no exclusive ownership of the symbols which constitute a trade mark apart from the use or application of them, but the word 'trade mark' is the designation of these marks or symbols as and when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property. The true principle therefore would seem to be, that the jurisdiction of the Court in the protection given to trade marks rests upon property, and that the Court interferes by injunction, because that is the only mode by which property of this description can be effectually protected".

With the introduction of registration system, this notion of property rights in trade mark themselves was transformed to a statutory footing. Lord Diplock was instructive on this when he pointed out, referring to the 1875 Trade Marks Act in General Electric Co (of USA) v General Electric Co. Ltd¹⁰

"(that the Act) did not itself create any right of property in trade marks...it simply provided for (their) registration and spelled out the consequences of registration and non-registration upon the proprietary rights of the owner and the remedies available to him for (their) protection".¹¹

From the above discussion, it is clear that the concept of a trade mark as property was initially advanced by the Courts of Equity in the U.K, even in the absence of deceit. At common law, property in goodwill remains the subject-matter of passing off. These rights grew from the need to provide redress against counterfeit and imitation products. Our next inquiry is the acceptance of proprietary nature of trade mark in Islam. In the course of our discussion, it will transpire that the juristic discussions on

¹⁰ (1971) 1 WLR 729, par. at 741

¹¹ See also Loudoun Manufacturing Co Ltd And Another v Courtaulds plc (trading as John Lean and Sons), The Times, February 14, 1994. In this case the opponents argued that the applicant for the trade mark were not entitled to register the mark, because the applicant was not the true proprietor to the mark. The applicants claimed to be its proprietor but went further, submitting that section 17 was not concerned with who was its true proprietor; it only required an applicant to have a bona fide claim to be registered. In this case the court commented that Mr Justice Lloyd-Jacob in Vitamins Ltd's Application for a Trade Mark (1956) RPC 1, was mistaken in suggesting that such a right could be obtained by origination; there have never been any property in an unused mark until it had been used, deemed to be used, or registered.

the acceptance of trade marks in the Muslim countries arise from the same concern.

2.2 Recognition of property rights in trade marks in Muslim countries.

In some Islamic / Muslim countries, the protection of trade marks originated from the extension of the concept of consumer protection¹². This extension is substantiated by the Qur'anic '*ayahs*' and '*hadiths*', prohibiting deceitful practices which have been interpreted to include cases of deception through imitation and counterfeit products. Such extension is certainly desirable as the safeguarding of the consumer's cause is a religious obligation.

This philosophy is further echoed by current Muslim writers such as S.H.Amin (1992)¹³, Mangalo (1982)¹⁴ and Irshad Kadir (1989)¹⁵. Mangalo, reviewing the UAE cases on this, advocates for the recognition of trade marks as property rights "which are recognised under the principles of prior usage rights, that is the act of first use. Such right is acquired by possession ('*hiyazah*') which takes place at the time there is an intent to appropriate the mark by first user.¹⁶" From this proposition, two principles can be extracted:

- i) when a particular mark or sign is adopted by a manufacturer to distinguish his goods from others, he acquires ownership of the mark by possession when such intention to appropriate the mark exists.

¹² See Al-Nayal, Ma'wia al-Tahir, Agency Contracts & Consumer Rights, Arab Law Quarterly, Pt.4 August 1986 p.401.

¹³ Amin, S.H Intellectual and Industrial Property in the Middle East, Royston Publishers, 1992, Intellectual Property Under A Religious Law: Experimentations in Saudi Arabia and United Arab Emirates, Religion and Law Review, Summer 1992 p. 39-64.

¹⁴ Mangalo, N, Trademarks and Unfair Competition Law in the United Arab Emirates, An Overview With Special Emphasis On The Development Of The Legal System, III Vol 13, 1982 p.588.

¹⁵ Kadir, Irshad, Trademark Protection in the United Arab Emirates, Arab Law Quarterly, Vol.4 Pt.1 Feb 1989,p.31.

¹⁶ Mangalo, op.cit at p.609, citing Mc Donalds (I), Civil Court of Abu Dhabi, June 30, 1980, 13 IIC 656, Mc Donalds (II), Federal Ct. of Appeals of Abu Dhabi, March 18, 1981, 13 IIC 658 (1982), Prophecy & Cachet, Civil Court of Dubai, Oct. 27, (1980), 13 IIC 665, Pif Paf, Civil Court of Dubai, May 10, 1981, 13 IIC 661 (1982).

- ii) when there are two similar marks, the claimant who is the "first in time to use" the mark is entitled to the ownership of the mark.

From the first principle, it is presupposed that the differences of opinion on the possibility of possession on intangibles are ignored. The Hanafis insist on physical possession and refute the idea of possession of usufructuary right (*'manfa'ah'*). According to this view, ownership of *'manfa'ah'* is derived indirectly from the recognition of any dealings involving such rights. The other main schools of law like Maliki, Shafi'i and Hanbali have no such objections against possession of intangibles. The Hambalis view possession of intangibles as possible through indirect possession of the tangible to which the usufruct attaches.¹⁷

Implied in the second principle is the seeming support for "the first in time" rights and not "the first to register" rights. This dichotomy is important as most of the modern trade mark systems in the world are "the first to register" system although many countries do provide for concurrent user of a mark to accommodate innocent prior user. In countries which have a dual system, (i.e registered trade mark and passing off), the 'first in time' is an important consideration in the tort of passing off. Even then, the first user has to establish "reputation" in the mark in the sense that the mark has been associated exclusively to him¹⁸.

All the three writers illustrate the experimentation in the United Arab Emirates whereby resort is made to Islamic jurisprudence to hold against passing off in the absence of any codified legislation. Even though, this development has been followed with the introduction of enactments on trade marks in these countries, the cases remain important as they illustrate the recognition of rights in 'names' or marks' by the application of principles of Islamic Law, in the absence of any direct rulings from the Qur'an and the Sunnah.

¹⁷ For further discussion see ch. 3 and 4.

¹⁸ See also *Imperial Group Plc & Another v Phillip Morris Limited & Another*, (1984) R.P.C No.17, p.293. In this case Mr. Justice Whitford dismissed an action of passing off on the ground that the plaintiffs had not established that their mark was distinctive and was exclusively associated with their product.

In Rainbow/Rainshow¹⁹ the UAE court accepted the recognition of rights to marks, stemming from principles of equity and justice under Islamic jurisprudence. These principles require the protection against deception of consumers in the form of imitation of goods. The court accepted the view of Prof.Sanhuri²⁰ and Prof Mustafa Kamal Taha²¹ on the importance of trade marks as the indication of origin and quality and as "the most important means available to the manufacturer and the trader of making himself known to the consumer of his goods". In determining the test of resemblance, the court again referred to the view of Prof.Sanhuri. The most important element of the mark is the literal description or symbol. If this element appears in another mark, this constitutes true counterfeiting (*'tazwir'*)²² or imitation (*'taqlid'*)²³, irrespective of any modification or addition which may have been made to certain secondary parts of the marks. This view seemingly supports a blanket prohibition against adoption of any kind of similar mark²⁴. This broad principle of equity and justice was later applied in Brylcreem²⁵, to provide remedy for a foreign trade mark owner against counterfeit activities. The court held that importation of imitation products of a known international mark, which is registered in another

¹⁹ Case No 320/72, Abu Dhabi Civil Court, 12 IIC 883 (1981).

²⁰ *'Al Wajiz fi al Qanun al Madani'* (Commentary on Civil Law), Cairo 1952. vol.8, p.465, 466.

²¹ *'Al Mugaz fi al Qanun al Tigari'*(handbook on Commercial Law) 559, Alexandria, 1974. p.559.

²² *Tazwir* is fabrication of a mark which corresponds exactly with the original mark even if the imitator adds other words.

²³ *Taqlid* is the creation of a mark similar in its totality to the original in such a nature as to deceive the public.

²⁴ This distinction between *'taqlid'* and *'tazwir'* is based on French law and has to do with the degree of offence. While *'tazwir'* causes misappropriation of property to occur, *'taqlid'* only affects the distinctiveness of the trade mark. The common law system however approaches counterfeit and imitation differently. In Malaysia for example dealings with counterfeit goods are a criminal offence appropriately dealt in the Criminal Act while the Trade Marks Act 1976 also concerns the second part of offence or *'taqlid'*. This implies that the main concern of a common law trade mark system is an imitation of mark which may lead to the confusion and deception of the public. Such difference of approach is however not significant as it is more of the difference between the common law and civil law system and does not reflect Shari'a principles.

²⁵ Civil Court of Dubai, October 27, 1990, 13 IIC 668 (1982).

country, eventually leads to unfair competition against the original merchandise²⁶.

The two abovementioned cases can be criticised in that they do not, explicitly, establish the foundation of protection of trade marks in Islam. The court did not elaborate on the issue of extension of property concepts to intangibles. Further, there was no attempt to consider how such rights are justified under Islamic Law. Rather they illustrate the "dynamicity of Islamic law to accomodate justice and sanction against what is apparently unjust." ²⁷

The property concept is more apparent in Sharikat Versailles /Muassassat Versailles.²⁸ Here the court clearly held that a mark is a property right which may be not used other than by its owner. The basis of this proprietary right is prior use as enunciated in the case of Mc Donald²⁹.

In determining 'confusion', the court in Pif Paf³⁰ held that the whole general appearance of the products must be observed. As to the degree of confusion, the court applied the yardstick of the ordinary consumer ('*mushtari 'aadi*'). Proof of deception

²⁶ This association of passing off and unfair competition is also seen in Sharikat Versailles/Muassassat Versailles(1980) Abu Dhabi case no 570/80, Federal Court of First Instance, Appeal No 174/80, Fed. Ct. of Appeal, Abu Dhabi, 13 IIC (1982) p.605 and Prophecy and Cachet(1979) 13 IIC 665 (1982). In the former case the court held that the need for trade mark protection is to inhibit the use of same or similarly designed designation, colours or symbol of products which serve the same intended use in order to prevent deception and unfair competition. In Prophecy and Cachet the court observed the importance of trade mark as an emblem of the goodwill of an enterprise.

²⁷ Further in finding for passing off by importation of imitation products of an internationally established trademark whose trade mark is not registered in UAE, the court did not even consider whether the international company has established reputation in UAE for the mark to be associated exclusively to it. In economic arguments, the consumer at large may benefit from these imitated goods in circumstances where the genuine product is difficult to get and is too expensive for public consumption.

²⁸ (1980), see Mangalo op.cit.

²⁹ Civil Court of Abu Dhabi, June 80, 1980, 13 IIC 656 (1982), Federal Court of Appeals of Abu Dhabi, March 18, 1981, 13 IIC 658 (1982). In this case passing off was found even though the plaintiff international company was not engaged in any commercial activity in Abu Dhabi.

³⁰ See Mangalo op.cit.

is important. Where this is missing, the court will be reluctant to extend protection³¹. This is because, as "trademarks had not been so far addressed by Islamic Law, nor did trademarks constitute property as defined by Islamic Law, therefore they did not warrant protection from usurpation in the same manner as property would"³².

These cases illustrate the willingness of the UAE courts to extend classical Islamic jurisprudence to redress the injury caused by counterfeit and imitation products. The courts have also accepted, prima facie, the importance of proof of confusion and deception in proving 'injury'. Therefore, the court concluded that the rights of a trade mark owner are proprietary and the nature of protection is based upon proof of deception and confusion.

The experimentations of the UAE and Saudi Arabia Courts in extending the Islamic principles of equity and justice are seen as a method to recognise and enforce the rights of trade marks owners. In the course of establishing the foundation of trade marks in Islam, the Court of Appeal of Dubai has accepted the uniqueness of trade marks as compared to ordinary property right. These developments were followed in both the common law world and the Middle East by the promulgation of enactments on trade marks statutes. Before considering the statutory system, we will explore the role of trade marks in the market place.

3 Trade marks and product differentiations.

A trade mark performs the role of an affirmative link between the consumer and

³¹ In Lux/Luv Case No 451/1981, Dubai Civil Court of First Instance, Appeal No 116/81, Dubai Court of Appeal, the court of appeal reversed the decision of the lower court ordering a local manufacturer to refrain from manufacturing and selling soap products which trade name is similar to an international manufacturer. The court found that there was lack of confusion and deception as there were sufficient differences between the packaging, labelling and prices of the products.

³² Per Dubai Court of Appeal, Tide/Type Case no 3/1981, Dubai Civil Court of First instance. Appeal no 17/82.

market. S.A.Ozga (1960)³³ points out that for perfect competition to arise, both the buyer and seller must have perfect knowledge of the market. Smallwood (1979)³⁴ argues that where consumers are not fully informed, there would be uncertainty as to product quality.

The economic analysis of trade marks concentrates on the function of trade marks in facilitating consumers' choice³⁵. Trade marks enable the communication of the unobservable differences in quality and variety of goods in an analytical form, enabling consumers to choose the product with the desired combination of features. Historically, marks were used as an indication of source as in the case of police marks and guild marks. Later, the quality or differentiation function plays a more prominent role. Schecter³⁶ describes the function of a trade mark as to identify a product as satisfactory and thereby stimulate further purchases by the consuming public. Trade marks, to him, are not merely the symbol of goodwill but often the most effective agent for the creation of goodwill, imprinting upon the public mind an anonymous and impersonal guarantee of satisfaction, creating a desire for further satisfactions. The protection and preservation of this differentiation role, therefore enhances consumers' information about the product in the market.

The maintenance and preservation of the distinguishing role of trade marks has been justified as it lowers consumer search costs in searching for the quality wanted³⁷. The

³³ S.A.Ozga, Imperfect Markets Through Lack of Knowledge, Vol.74 Quarterly Journal of Economics. p.29-52.

³⁴ D.E. Smallwood & J. Coulish, Product Quality in Markets Where Consumers Are Inadequately Informed, 1979, Vol 93 Quarterly Journal of Economics, p.1.

³⁵ See also Shanahan, Dan, The Trademark Right: Consumer Protection or Monopoly ?, Vol. 72 (1982) The Trademark Reporter, 233-250.

³⁶ Schecter, Frank I, The Rational Basis of Trademark Protection, Vol.60, (1970), Trade Mark Reporter, 334-347.

³⁷ Landes and Posner's views are explicit on this. See Landes, W.M, Posner, R.A, The Economics of Trademark Law, The Trade Mark Reporter Vol. 78, (1988) 267-306.
 "...yet an important and widely recognized benefit of trade marks is that they give firms an incentive to improve the quality of their products. Without an exclusive right to use one own's trade mark, a firm that was producing a lower-quality brand could hope, by duplicating the trademark of a superior brand, to mislead consumers into believing that the brands were equivalent. By making it more costly for consumers

minimisation of search costs can be further assisted with the exclusion of non-distinctive marks. Allowing exclusivity of non-distinctive marks will increase search costs. Cutting off trademark protection when a trade mark becomes generic will reduce the cost of communication by making it cheaper for competitors of the first producer to inform the consumer that they sell the same product. Similarly, a functional feature is unlikely to identify a particular brand and hence may increase consumers' search cost.

In order to achieve this role of product differentiation, three factors have to be present:

- (a) the consumers's ability to recall the mark and its associated features,
- (b) the inability of others to use a confusingly similar mark; and
- (c) the reluctance of firms to change the variety and quality features of the trade-marked product.

There are, however, observable detriments which may occur from the advertising practices. Firstly, the deployment of trade marks in advertising can create distortions such as the distortion out of perception advertising. It distorts decisions by changing the minds of consumers regarding the desirability of the product. Further, the association of products with quality can reach mythical stage whereby the consumer buys a certain product to seek a certain identity³⁸. Due to this, it has been claimed that trade marks create a barrier to entry for newcomers, as brand loyalty is likely to reduce the number of differentiated products³⁹. The effect of this is the creation of dominance in the market whereby a strong trade mark owner is able to curtail new and existing competition. Some justified this dominance on the ground that the trade

to distinguish higher quality from lower-quality brands, this duplication would reduce a firm's incentive to incur the added cost that would be necessary to produce a higher quality."

³⁸ See Drescher, Thomas D, The Transformation and Evolution of Trademarks - From Signals to Symbols to Myths, Trademark Reporter, Vol. 83, p.301-340.

³⁹ In this respect, Economides, N.S, in her article, The Economics of Trademarks, Vol.78 (1988) Trade Mark Reporter, 523-539, defends trade marks. She argues that the effect of small barriers to entry will be to reduce the number of differentiated products towards the surplus maximizing number, and thus increase social welfare.

mark owner has spent money in building up the mark, monitoring quality and after-sales service. Furthermore, dominance can only take effect if there were very substantial economies of scale, or if the capital required from a new brand owner were large or if there were specialised knowledge about marketing available only to the existing name owners⁴⁰.

Secondly, often the information channelled by the manufacturers is incomplete and in the absence of other forms of information consumers are often misguided as to the differences between goods. Such distortion can be remedied by developing an independent source of information, such as by mandatory use of marks and labelling. Labels should contain all information that is relevant and comprehensible for the average consumer.⁴¹ In addition there should be special laws regulating advertising to enhance the product differentiation role of trade marks.

From the foregoing discussion, it has been illustrated that despite certain reservations pertaining to the importance of product differentiation in a free market system, trade marks are often the simplest mechanism whereby differentiation of products can be effected. The detriments of trade marks, as discussed above, are related basically on advertising practices which could be overcome by other regulations. In the next section, we will address the second economic function of trade marks i.e their quality function.

⁴⁰ See Fuller, C.W.F. Baden, Economic Issues relating to Property Rights In Trade Marks: Export Bans, Differential Pricing, Restrictions on Resale and Repackaging. 6, Eur. L.R, 162, 164-165 (1981). He denies the possibility of the creation of dominance even among the famous and well known marks. At p. 166 he argues that in practice, brand owners face competition from many directions. First there is the threat from existing brand owners already selling similar products to the same customer groups. Secondly, and more serious, there is the threat from existing brand owners selling the similar products in other markets. Lastly and most serious is the threat from brand owners which are well established in selling other product lines.

⁴¹ In Malaysia, labelling can be categorised as trade descriptions governed by the Trade Description Act 1972. The Act defines instances whereby a trade description is false, if it is likely to be taken as an indication that would be false to a material degree. (S.5(2)). Applying false trade description on goods is a criminal offence under S.3(1) TDA 1972. There are separate laws which lay down the minimum requirement of information in labelling and trade descriptions such as the Price Control (Labelling by Manufacturers, Importers, Producers or Wholesalers) Order 1989.

4 Trade marks as the guarantee of quality of goods.

Trade marks not only encapsulate knowledge of goods but also expectations about the quality of goods. Trade marks symbolize a psychological function in motivating consumers to choose and associate goods with quality⁴².

Despite that, and even though this economic function underlies the philosophy of trade marks⁴³, ordinary trade mark law does not usually provide avenues for consumers to challenge the validity of such marks if the goods do not measure to their expectations. One reason why modern trade mark laws seldom adopt stringent measures is that if a product's quality is reduced, the consumer will detect them and this will affect the demand for such goods.

Regardless of the above reservations, laws often deal with some of the problems relating to quality particularly when a mark is licensed to a third party especially from a different jurisdiction. These measures are necessary as without them, diminution of quality may occur as goods produced under licence often cater for different localities and often have variation in quality and ingredients⁴⁴. Some countries require the promotion of local trade marks to be used together with the foreign marks. This measure while encouraging the diffusion of foreign technology, does not effectively eliminate the problem of quality consistency of goods produced under licence.

Because of these problems, there are suggestions that other sanctions should be adopted such as the cancellation of the said mark, refusing relief against piratical

⁴² See Oddi, A. Samuel, Consumer Motivation in Trademark and Unfair Competition Law : On The Importance of Source, Vol. 31 Villanova Law Review, No. 1 Feb. 1986, p.1-79. His main thesis is that a consumer may purchase a product primarily to satisfy an emotional need for what the product represents rather than what it does or how it appears.

⁴³ It is said that a consumer's choice of a particular product is inimical to his own personal measures of quality and expectation. See Elmer William Hanak II, Quality Assurance Function of Trade Mark, Trade Name Reporter, Vol 65, p.318.

⁴⁴ See for example Francesco Cinzano & Cie GmbH v Java Kaffeegeschaft GmbH & Co, Vol. 2 (1974) C.M.L.R p.21.

imitations of the mark⁴⁵, ordering the information be made to public when such reduction in quality is taking place or provide a fiat for consumers to take action against the trade mark owner when this occurred⁴⁶. Cancellation of marks has been criticised as being too drastic and having adverse effect on consumers⁴⁷. More and more countries have taken up the policy to regulate the maintainance of quality of goods produced under licence. In Malaysia, for example, the recent amendment to the Trade Marks Act 1976 has introduced a provision for the control of quality to be undertaken by the registered proprietor when a mark is licensed⁴⁸. However, this does not require quality to be set at any particular level⁴⁹.

From the above two sections, it has been illustrated that trade marks are crucial to a modern market system whereby all goods compete freely on equal stand. By having trade marks, consumers may differentiate between one product and another and thereby making their choice by relating a product with its desired attributes. Without trade marks, it will be more difficult for consumers to distinguish between one

⁴⁵ See Menendez v Faber, Coe & Gregg Inc. 345 F.Supp. 527 (1972) where the court had refused relief to the trade mark owner who had significantly reduced the quality of his goods on the basis of the equity doctrine of "unclean hands". See also Urecal Corp. v Masters, 413 F.Supp 873 (1976). In Malaysia, see the old case of Webster Automatic Packeting Factory Ltd v Chop Kim Leong Thye, S.S.R Vol. II, 61. Whether a trade mark itself contains a false representation calculated to deceive the public or if the trade itself is fraudulent, no action can be maintained to restrain the imitation of such a mark. When, however, the misrepresentation is merely collateral and the defendant is himself guilty of misrepresentation, the plaintiff will not be deprived of his remedy.

⁴⁶ See Sanders & Maniatis, A Consumer Trade mark; Protection Based on origin and Quality, (1993) 11 EIPR 406. See also the recommendations given by WIPO that government should play a role in alleviating consumer education, setting up a tribunal for the speedy and inexpensive disposal involving consumers and combating piracy and counterfeiting. More noble is the suggestion of the setting up of a consumer ombudsman as in Sweden and Norway. The Malaysian Government has recently set up a special department dealing with complaints on infringement of trade regulations from the public. The department gives legal advice and where necessary takes up legal action against the trader.

⁴⁷ See Cornish & Phillips, The Economic Functions of Trade Marks Vol 13 No.1 (1982) IIC p. 41.

⁴⁸ See S.48(1) of MTMA as amended by S.36. The grant of licence to a registered user is subject to the provision that the registred proprietor retains and exercise control over the use of the trade mark and over the quality of the goods or services provided by the registered user in connection with that trade mark.

⁴⁹ Some commentators have criticised quality control provisions. See Parks, Kevin, "Naked" is Not a Four-letter Word: "Debunking the Myth of the Quality Control Requirement" in Trademark Licensing, Vol.82 TMR 531 and Pendleton, Michael D., Excising Consumer Protection - The Key to Reforming Trade Mark Law, (1992) 3 AIPJ, 110-121.

product and another. In the following discussion, we will question to what extent consumer participation is embedded in trade mark law. This analysis will be assisted with the examination of decided cases in Malaysia⁵⁰.

5 Trade marks as a tool for consumer protection- the role of distinctiveness, confusion and deception.

The property role and the consumer⁵¹ role of trademarks are complementary to each other. Therefore, in establishing infringement of trade marks, it is very much depends on the existence of confusion and deception of consumers. In Malaysia, like many other jurisdictions, it is an infringement for a person not being the registered proprietor and registered user to use a mark which is identical to or nearly resembles a registered trade mark, as such practices amount to deception or to cause confusion to consumers as to the origin of the product.⁵² The test of infringement is whether such a trade mark is likely to deceive or cause confusion to the public.⁵³ Further, the trade mark system allows post-registration attack on marks which resemble or

⁵⁰ For the purpose of this chapter, the discussion on factors of confusion and deception will be confined to decided cases in Malaysia. This approach is adopted to highlight the local variables in trade mark infringement.

⁵¹ A consumer is defined in a WIPO document as a person who, for his or her own personal needs or pleasure, buys or rents goods or services offered by private or public enterprises. See The Role of Industrial Property in the Protection of Consumers, WIPO, 1983. p.9.

⁵² S.19 & S.38(1) of the Malaysian Trade Mark Act. Dr. Zakaria Yatim J. in Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & 5 Ors, underlines the requirement in S.38(1)(a) which are as follows:

- i. the defendant uses the mark identical with the plaintiff's mark;
- ii. the offending mark is used by persons who have not been authorised or licensed by the plaintiffs;
- iii. the defendant was using the offending mark in the course of trade;
- iv. the defendant uses the offending mark in relation to goods in respect of which the trade mark is registered;
- v. the defendant uses the offending mark in such a manner as to render the use of the mark to be taken as being likely used as a trade mark.

S. 20 of the Act allows concurrent use provided the concurrent user is honest and has continuously used the trade mark before the use of the registered property or his predecessor or before such registration. Registration by a concurrent use even if the mark is identical or nearly resembles, is allowed.

⁵³ In Whang Tar Choung v. Kwoong Foong & Co(1957) 23 MLJ 53, there were two identical marks being used by the applicant and the opponent. Registration was denied as that would be likely to cause confusion..

partly resemble a registered mark through the process of opposition⁵⁴ and expulsion.⁵⁵

The participation of consumers in the determination of infringements is further enhanced by the fact that the question of resemblance is a question of fact. In determining the likelihood of deception and confusion, decided cases in Malaysia and Singapore illustrate the importance of looking into the context of the market of the product or the main consumer of the product. The High Court of Singapore in Hille International Ltd. v. Tiong Hin Engineering Private Ltd.⁵⁶ adopted the principle laid down by the Privy Council in White Hudson & Co v. Asian Organisation Ltd.⁵⁷ that emphasis should be given to the fact that "not all customers in Singapore speak English or write English." The court held that the defendant's trade mark "Cilly" was a deliberate imitation of the plaintiff's mark, which sounded like "Hille" that there was a serious possibility of deception.

The court in Chong Fok Shang & anor v. Lily Handicraft & Anor.⁵⁸ similarly took into account the skills of persons of average intelligence. Level of illiteracy is another factor which has been adopted in the recollection test. In M.I & M. Corporation & Anor v A. Mohamed Ibrahim⁵⁹, it was held:

"the test to be applied is whether a person who sees the one trade mark in the

⁵⁴ See In the Matter of an Application by Messrs William Jacks & Co Ltd and In the Matter of an Opposition by Messrs Fussell & Co. Ltd. (1946) 12 MLJ 97. An opposition was lodged against the use of the mark pyramid. The opposition was rejected as the mark in respect of which the registration was applied for by the applicants was not itself similar, and it was not shown that the use of the mark would be likely to deceive or cause confusion.

⁵⁵ S.28 of the Malaysian Trade Marks Act. The onus of proof that registration ought to be refused is on the applicant. This is held by Wilson J in Kwong Foong & Co v. Whang Tar Choung (1957) 23 MLJ 31. See also Ronuk Ltd. v. Sin Thye Hin & Co (1962) 28 MLJ 383.

⁵⁶ (1983) 1 CLJ 50.

⁵⁷ (1965) 31 MLJ 186.

⁵⁸ (1989) 2 CLJ 196.

⁵⁹ (1964) 30 MLJ, 392.

absence of the other trademark and in view only of his general recollection of what the nature of the other trade mark was, would be liable to be deceived and to think that the trade mark is the same as the other of which he has a general recollection. This recollection test is to be applied having regard to the sort of people who would buy the goods and the circumstances in which they buy". (emphasis added)

In the present case the test to be applied is in relation to people who are generally illiterate and who do their shopping in small dark grocers' shops where large quantities of goods are crowded in a disorderly manner in a very small space⁶⁰.

Another method is that of brand - conscious consumer. This test was rejected in Tong Guan Food Products Pte Ltd v. Hoe Huat Hng Foodstuff Pte Ltd⁶¹. The court criticised the learned judicial commissioner which had applied this test and rejected its validity. The court lamented that the proper test was that of a purchaser using ordinary caution. The court further held that:

"the test of comparison of confusingly similar names, marks or other distinguishing indicia is not to compare them side by side but to take into account the fact that confusion which may occur will take place when the customer has in his mind his recollection of the appellant's mark which may be only an idea of the whole or actual mark".

Another method of proving similarity and resemblance is to compare the two marks

⁶⁰ See also The United Kingdom Tobacco Ltd v The Malayan Tobacco Distributors Ltd, Vol II (1933), MLJ, 1. The plaintiff's company manufactured and sold since November 1929, a brand of cigarettes called the "Golden Sword" brand. The cigarettes themselves each bore the number "21" in figures placed above a device consisting of crossed swords with the word "Virginia" written below. This brand of cigarettes was sold throughout Malaya to natives consisting of Malays, Chinese, Indians and others who do not know English. It appears that the plaintiff's brand had become commonly known to its consumers as the plaintiff's manufacture. The defendants, introduced into the market a brand of cigarettes contained in packets of ten. Each packet was marked with the number "21" above a device depicting the Ace and King of Hearts placed together fanwise as held in the hand of card player. The cigarettes themselves have written upon their sides the number "21" in words.

⁶¹ (1991) 2 MLJ 361.

side by side⁶². Such ocular test, has been dismissed by the Malaysian courts in M.I & M. Corporation & Anor v A. Mohamed Ibrahim⁶³ as being ineffective⁶⁴. The courts should be comparing the two marks through the eyes of the consumers who are often unaware of minute difference or variations. Where the basic idea of two marks are the same, even though there are differences, infringement can occur so long as these differences are not substantial⁶⁵. Where the trade brands are more prominently displayed on the front of the packages, an ordinary purchaser using ordinary caution will rely on that and not simply on similarity of appearances⁶⁶. If the brand name is not prominent and is overshadowed by the similarity in overall features, resemblance can easily be made out⁶⁷. Phonetic similarity often is a compelling factor to induce confusion such as that of "Chop Sipoth" and "Chop Sipot Mas"⁶⁸, "Karrinor" and

⁶² Wong Foong Shin v Regina (1955) 21 MLJ 176. This was an appeal against the conviction on the charge of having possession for sale goods with counterfeit trade mark, affixed thereto, namely a mark so resembling the "Arrow" trade mark, the property of the Parker Pen Company, as to be calculated to deceive. The court held that there is no resemblance between the clips in the pens and pencils in this particular case, if the clips were looked at in isolation from the rest of the articles, and therefore the conviction of the appellant must be set aside.

⁶³ (1964) 30 MLJ, 392.

(1975) 2 MLJ 213.

⁶⁴ In Boh Plantations Sdn. Bhd. v. Gui Nee Chuan & Ors, the device of gold seal with the letters "Boh" positioned between the words "gold" and "seal" are especially created and cleverly adapted to distinguish the plaintiff's goods from other products.

⁶⁵ In Shaikh Aly Sahib & Ors v. M.I & M. Corporation & Anor (1963) 29 MLJ 232, the basic idea behind the two marks are flowers even though the colours of the petal differed. The basic idea would remain with any person seeing them apart at different times.

⁶⁶ See Malaysia Dairy Industries Pte. Ltd v. Yakult (Singapore) Pte Ltd (1980) 1 MLJ 205. In this case both the brand names "Deer" brand and "Tong Garden" were prominently displayed in the front of the packages. An ordinary purchaser using caution in Singapore would know enough to be able to read the brand name, considering the "high level of literacy then".

⁶⁷ JS Staedtler & Anor v Lee & Sons Enterprise Sdn Bhd, (1993) 1 AMR 17 p.663. The presence of the name "Staedtler Noris" or "NIKKI" or "120-2B" on the pencils was irrelevant. In an infringement action, the essential features were the competing marks, namely the striking black and yellow colours. Based on the evidence and the court's own examination of the two sets of pencils, the essential features in the defendant's NIKKI pencils closely resembled the plaintiff's pencil. Taking into account the nature and kind of customers likely to buy these goods, namely students, and by ocular comparison among the students, it is likely that the defendant's pencils could be mistaken for those of the plaintiff.

⁶⁸ S.Yuvaran S/O Sreeramulu & Anor, (1994) 3 CLJ, 253.

"Karrimor"⁶⁹, but not in the cases of "Ram Zan" and "Zam Zam"⁷⁰; "Anakku" and "Comelku"⁷¹; and "Mister" and "Sister"⁷².

Besides post registration attacks on marks which are similar or resemble, the Malaysian trade marks system provides another avenue to eliminate the use of such marks, for the advancement of consumer's cause. The Registrar has the power to vary, extend or cancel registration of a registered user⁷³ if the use of the trade mark is contrary to the permitted use or in such a way that may cause deception or confusion. The policy reason to such post registration attack is the need to protect the public from confusing and deceptive marks⁷⁴.

The extent of consumer participation in trade marks, as our discussion above illustrates, comes generally in the form of the determination of consumer's confusion in infringement cases⁷⁵. Some may argue that the role of consumers in trade marks are minimal, but the significance of their participation cannot be dismissed lightly. There have been instances whereby principles are drawn, in trade marks, in the name

⁶⁹ Karrimor International Ltd v Ho Choong Fun t/a Ah Hwa Trading Co, (1989) 3 MLJ 467. (1952) 18 MLJ 149.

⁷⁰ K.E Mohd Ibrahim v. M.Mohamed Ibrahim. In this case the court looked into the meaning of the two words. Both are well known words in Hindi and Arabic which carry different meanings, therefore, both are not identical and can be distinctive in their own nature.

⁷¹ Anakku Baby Products Sdn Bhd v Comelku Baby Products Sdn Bhd & Anor, (1992) 1 AMR 4 p. 21.

⁷² Tohtonku Sdn. Bhd v Superace (M) Sdn. Bhd (1992) 2 SCR 300. The court held that the two words are different, despite the similarity in the second syllable.

⁷³ S.49 of the Malaysian Trade Mark Act.

⁷⁴ See the case of NSW Dairy Corp v Murray Co-operative Co Ltd (Moo), (1990) 18 IPR 385; 97 ALR 73.

⁷⁵ Pendleton, disagrees with the expansion of the concept of consumer protection to that of subordination of the trade marks owner's interest. He concludes that trade mark today has not adequately serve to protect the labour, skill and effort and investment of time and money of the proprietor in creating and promoting its mark. Irrelevant considerations of consumer protection in the form of a test of infringement based on misrepresentation rather than misappropriation and functional qualifications to a proprietor's mark, such as subsequent loss of distinctiveness, all serve to dilute the value of a mark to the proprietor. Pendleton, Michael D, Excising Consumer Protection- The Key to Reforming Trade Mark Law, (1992) 3 AIPJ, 110.

of consumer, even if they are adverse to the trade mark owners. Such trends can be seen in the philosophy behind the policy for the preservation of well known marks and the steps taken against the dilution of such marks.

6 Avoiding consumer confusion and deception, the role of well known marks and anti dilution measures

The practice of free-riding on the reputation of well known marks⁷⁶ may induce the consumers to a false association of a product with the well known marks. Buyers may believe that the product is produced with the consent or under a license of the well-known mark⁷⁷. This form of unauthorized use of well known marks and trade names for identical or similar goods and services is prohibited under article 6 bis of the Paris Convention⁷⁸.

Furthermore, unauthorized use of a well known mark may diminish or eliminate the differentiation function of the mark and in this instance the mark is said to have been

⁷⁶ There are various approaches to the determination of 'well known'. Article 16 of the French Intellectual Property Code (Act of 4 January 1991) distinguishes between the 'well-known' marks which is recognised by a large fraction of the circles concerned with the production, sale or use of the goods in question and which is clearly perceived as indicating a particular origin of these products; and the 'famous' ('renomme') marks which would be known internationally or worldwide. The WIPO's Trademark Law Treaty adopted the criteria of well-known and exceptionally well-known mark.(A.103(2) of its June draft). Article 16(2) TRIPs Agreement take account of "the knowledge of the trademark in the relevant sector of the public". See Blakeney, Michael, Well-known Marks, (1994) 11 EIPR, 481.

⁷⁷ See Lehmann, Michael, Unfair Competition - Trade Misstatements, Competitor and Consumer, No.6 (1986), IIC Vol. 17, p.747. He advocates that the promotional aura is the subject of the protection of famous marks. "In competition one is not permitted to plow using others' oxen. Anyone who uses trademarks that are similar to famous marks wishes to tap the positive force, the goodwill of these marks, and divert it to promote his own sales". p.751.

⁷⁸ S.6 bis reads:

(1) The countries of the Union undertake, 'ex officio' if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known or an imitation liable to create confusion therewith.

deteriorated into generic names⁷⁹. This occurs when, in the public's mind, the name or appearance primarily identifies the product as a genus rather than indicating a product from a single source (as a species of a broader genus). When this happens, the mark is held "generic" and hence must be in the public domain. The process whereby a trade mark may become generic is said to be adverse to consumer's interest. Schechter rationalises this by emphasizing that the protection of generic marks will increase the consumer's search cost as the marks no longer ease consumer in choosing the product with the required characteristics as they would want⁸⁰.

In legal practice, consumers play a major role in determining genericisation of marks. In decided cases in the U.S, the test of 'genericisation' is the consumer's motivation in purchasing a particular product. If the primary consumers' motivation in buying the product is the utilitarian function of the product rather than the distinctive origin, then the mark has lost its uniqueness⁸¹.

With the above danger of dilution of marks, most jurisdictions have adopted measures to reduce such possibility from occurring. Dilution of marks can be eliminated by introducing the requirement that a mark will not be reproduced unless it is clearly stated that it is a registered trade mark. Such measure may not be effective if the mark is not used by competitors in the way of trade such as in the case of Johnson & Johnson Australia Pty Ltd v Sterling Pharmaceuticals Pty Ltd.⁸²

⁷⁹ See Wall v Rolls-Royce of America, 4 F.2d 333 (CA 3 1925) (the American Radio Tubes cases) and Eastman Kodak Co. v Kodak Cycle Co 15 RPC 105 (1898)(the British bicycles cases). To avoid the dilution of well known marks, certain states in the U.S have since promulgated anti dilution laws.

⁸⁰ See Schechter's article, *op.cit.*The validity and soundness of dilution doctrine has been attacked by academicians. See Pattishall, Beverly W, The Dilution Rationale For Trademark - Trade Identity Protection, Its Progress and Prospects, Vol. 67 TMR, 607-624.

⁸¹ This consumer motivation test has been applied in the Anti-Monopoly, Inc v General Mills Fun Group, Inc (Anti Monopoly III), 684 F.2d 1316 (9th Cir. 1982). See also Kellog Co. v National Biscuits Co 305 U.S 111 (1938). The test adopted by Anti-Monopoly's case has been criticised for failure to give precise indication of the extent of effective elimination of the origin function of the mark. See Swann, Jerre B, Anti-Monopoly: An Exercise in Economic Futility, Vol. 78 TMR 65.

⁸² (1991) 21 IPR 1. In this case the Federal Court held that the use by the appellant of the respondent's trade mark "Caplets" (registered in respect of pharmaceuticals), in describing the packaging of its pharmaceutical Tylenol as containing 24 caplets, did not infringe the mark. Lockhart J held that

While the common law jurisdictions emphasize the effect of unauthorised use of well known marks on the differentiation function of trade marks, the detriments of such practices can be criticised on a different angle as far as Islamic perspective is concerned. The practice of free-riding on a well-known marks amounts to deceit in Islamic law and hence such fraudulent practice should be vigorously forbidden. It is a fraudulent act to sell goods under the disguise and pretence of another mark. These practices, therefore, fall under the prohibition against fraud and deceit in commercial transactions which will be further elaborated in this chapter.

It has been pointed out earlier that, in some instances, the law has drawn the balance between consumers and trade marks owners interest by favouring the former. Another instance where the consumers' interest reigns supreme is in the case of parallel importation which will be elaborated in the next section.

7 Parallel importation, the juncture of consumer protection and indication of origin.

Several theories are formulated to define the linkage between parallel imports and consumers. One theory is that by allowing parallel imports, intra-brand competition is amplified, thereby encouraging price competition and benefit the consumer⁸³. On the other hand, not only the practice affects the trade mark owner's interest, there may be unnecessary ill-consequences in allowing such practices⁸⁴. The grey market

Caplets is so essentially and inherently descriptive that it is incapable of functioning as an indication of origin and thus could not be infringed.

⁸³ Fuller, argues that allowing parallel importation would have the adverse effect of impeding competition in the long run, consumers to suffer and markets becoming more divided. He argues that dual pricing structure should be allowed as long as those who supply the product, or those who distribute the product do not have a dominant position. Fuller, Baden, Economic Issues Relating To Property Rights in Trade Marks; Export Bans, Differential Pricing, Restrictions on Resale and Repackaging 6 Eur. Law Rev. (1981) 162-179.

⁸⁴ Hiebert, Timothy H, maintains that parallel imports impinge upon the basic duality of trade mark protection - of proprietor as source and of origin. Consequently the violation of property in trade-marks involves a twofold injury. Thus he suggests that when a divergence occurs in a trademark's twofold function, the courts should decline to offer protection. "If trademarks are to continue to serve both private and public interests, if goodwill is to retain both its proprietary and psychological dimensions, then trademark doctrine should continue to accommodate elements of both territoriality and universality".

goods may not be of the same quality of the goods produced locally under the same brand⁸⁵. To eliminate the ill-effects of parallel importation, several steps can be taken. Clear information of the origin of the grey market goods and the product differences vis-a-vis the local products should be given⁸⁶. The same guarantee should also be given with respect to after sales service and supply of spare parts.⁸⁷ Measures should also be taken to ensure that parallel importation is not simply an exercise of dumping defective and default goods.

Subject to these reservations, the practice of parallel importing is often seen as pro-competitive. In the E.U, the practice of prohibiting parallel imports contravenes the basic foundation of economic union within the European market. In a line of cases, it has been established that national Intellectual property rights should not be used as

Foundations of the Law of Parallel Importation: Duality and Universality in nineteenth Century Trademark Law, Vol. 80 TMR (1990) 483, p. 512.

⁸⁵ In cases where there has been substantial diminution of quality which will mislead the consumer to origin and quality, the courts have not been hesitant to stop parallel importation. See Colgate Palmolive Ltd & Anor v Markwell Finance Ltd & Anor (1988) R.P.C No. 14. In this case the Brazilian toothpaste products which were imported into the U.K were of inferior quality both as regards cosmetic and prophylactic properties. The consumers in the U.K were aware of flouride toothpaste and expected them to be such and were generally aware of the value of flouride in toothpaste as a protection against tooth decay.

⁸⁶ In Dansk Supermarked A/S v Imerco A/S, Case 58/80 (1981) 3 CMLR 590, where sub-standard china wares were sold in the U.K with the prohibition of their sale in Denmark. A Danish importer them imported them albeit differently packaged into Denmark. The Danish Supreme Court referred the question to the ECJ as to whether the exercise of rights was permitted. The ECJ held that as the goods had been lawfully distributed in a Member State with the proprietor's consent, without prejudice to consumer protection laws, then his rights were exhausted and thus the owner of a trade mark or copyright could not exercise his rights to prevent the import of such goods. The court further observed that in this case there was no likelihood that Danish consumers would have been confused.

⁸⁷ S.218 of the New York General Business Law requires the retailer to warn the consumer of the shortcomings in the grey market product which he is selling. Such requirement can also be imposed through other judicial means such as the court in Sony KK v. Saray Electronics (London) Ltd (1983) FSR 302, where the defendant was ordered to make clear to its customers that the defendant was not an authorised dealer and that the modified goods were not covered by Sony guarantees. See also the comment made by the German Supreme Court in Francesco Cinzano & Cie GmbH v. Java Kaffeegeschafte GmbH & Co Case I ZR 85/71, Vol 2 (1974) Common Market Law Reports, p.21 par. p.30. ".....(i)t must be pointed out that it is in principle the right, and, in case of danger of error, also the duty, of the producer to indicate the differences in such goods marketed under a common trade mark, which are relevant to consumer expectation; on the other hand".

an obstacle to the freedom of movement of goods⁸⁸ within the single market. With the exception of certain instances⁸⁹, the European court has developed the doctrine of 'exhaustion' of rights whereby once products with valid trademarks are released in any country within the single market, the trade mark owner can no longer prohibit the importation of those goods into another territory. The court regards goods which are manufactured by enterprises of common origin as of a single source.

"For the trade mark to be able to fulfil (its) role, it must offer a guarantee that all goods bearing it have been produced under the control of a single undertaking which is accountable for their quality."⁹⁰

The underlying principle of the exhaustion of rights in trade marks was the concept of "unitary control" -the function of a trade mark was that it is a guarantee that all goods bearing it must have been produced under the control of a single undertaking - the origin which a trade mark is intended to guarantee is not defined by reference to the manufacturer but by reference to the control of manufacture⁹¹.

⁸⁸ See Deutsche Grammophon, Case 78/70 KG (1971) ECR 487, EMI Records v CBS U.K Case 51/75, Terrapin (Overseas) Ltd v Terranova Industries C.A Kapforer & Co (1979) 2 CMLR 482.

⁸⁹ Case 192/73 Van Zuulen v HAG (1974) ECR 731 (HAG I) reversed by Case C-10/89 CNL-SUCAL v HAG (1990) ECR 1-3711 (HAG II)- where there is no foundation for the doctrine of common origin in the case of expropriation in a Member State. See also IHT Internationale Heitztechnik GmbH and Another v Ideal Standard GmbH and Another, (1995) F.S.R, 59 where the ECJ applied Hag's doctrine of voluntary assignment of mark to an independent third party. For the doctrine of consent to apply, the owner of the right in the importing state, directly or indirectly, should be able to control the quality of the products to which the trade mark may be applied in the exporting State. That control was lost when the mark was assigned to a third party having no economic link with the assignor. The decisive factor guaranteed by a trade mark was the possibility of control over the quality of goods, not the actual exercise of that control. See the comment by Tritton, Guy Articles 30 to 36 And Intellectual Property: Is the Jurisprudence of the ECJ Now of an Ideal Standard, (1994) 10 EIPR, 432. See also the cases on repackaging and relabelling of the grey market goods such as Hoffman La Roche V Centrafarm, (1978) ECR 1139 and American Home Products v Centrafarm (1978) 1823; (1979) 1 CMLR 326. For further analysis see chapter 8.

⁹⁰ Case 192/73 Van Zuulen v HAG (1974) ECR 731 (HAG I) and Case C-10/89 CNL-SUCAL v HAG (1990) ECR 1-3711 (HAG II).

⁹¹ IHT Internationale Heitztechnik GmbH and Another v Ideal Standard GmbH and Another, (1995) F.S.R, 59. See also Centrafarm v Winthrop (1974) ECR 1183, where different marketing subsidiaries were held as within the legal, financial, technical or economic link; Van Zuulen Freres v Hag (1974) ECR 731, (1974) 2 CMLR 127; Francesco Cinzano & CIE GmbH v Java Keffeggeshafte GmbH & Co CMLR (1974) Vol 2 where three separate subsidiaries in Italy, Spain and Italy were considered as one entity. The court recognized that trademark can be an indication of origin in multinational concern.

The 'exhaustion' doctrine has been applied in other jurisdictions as well. In Malaysia, for example, the practice of parallel imports has been allowed⁹².

While competition and consumer's interest are the main rationale for the acceptance of parallel importation in common law, the same basis can equally be applicable in Islamic perspective. This is because most contemporary Muslim scholars have advocated for a free enterprise system, whereby state interference is only allowed in restricted circumstances⁹³. Such interference is allowed when justice and equity cannot be upheld except by way of intervention. In the case of parallel imports, all the economic advantages and disadvantages of parallel import, as discussed above, should be relevant factors in influencing policy objectives. Consumers' desires for intra brand competition and information as to the different attributes of the grey market goods should, on a similar scale, be catered for.

The discussion now turns to the 'locus standi' of consumers in Islamic principles of commercial dealing. It will be shown that most principles on commercial dealing in Islam are pro-consumer. These principles exist on four basic foundations:

- (i) the consumer standing in commercial transactions,
- (ii) the enjoinder for fair trade and dealing,
- (iii) the institution of '*hisbah*' in Islam,
- (iv) the rule against any form of unjust enrichment.

⁹² In Malaysia see the decision of V.C. George J. Winthrop Products Inc. & Sterling Drug (M) Sdn. Bhd. v. Sun Ocean (M) Sdn. Bhd. & Maltown Ltd. (1988) 2 MLJ 37:

"the legal ownership of the trade mark Panadol enables the proprietor to protect in Malaysia the reputation and goodwill of the owner and of the group of which the member by ensuring that the number of goods are sold with the mark unless they are produced and labeled by the Sterling Company. The legal ownership of the mark does not go further and enable the owner or registered owner to ensure that products manufactured elsewhere (eg in the United Kingdom or in the USA) are not sold within the territory of Malaysia. Neither common law nor the statute law of Malaysia allows this".

In Australia see the case of Fender Australia Pty Ltd v Berk (1989) 89 ALR 89. See also Revlon Inc. v Cripps & Lees (1980) F.S.R 85.

⁹³ For further discussion see Ch.6 on the economic methodology in Islam.

8 Consumer standing in commercial dealings in Islam.

Compassion for the weaker members of society, fairness and good faith in commercial dealings, incorruptibility in the administration of justice are the cornerstone of the Shari'ah. Not surprisingly, Mangalo maintains that any forms of unfair competition is by nature a "damaging conduct" and should thus be regarded as illegal conduct (*'fi'l ghair mashru'*). Therefore, in all instances whereby damage have been done, the person causing damage (*'musabib'*) must repair or make amends for the damage (*'ta'wid ad- darar'*)⁹⁴.

It can be argued that the principles of unfair competition in the Shariah are wider than the conception of unfair competition in common law. Firstly, there are numerous calls in the Qur'an for fair dealing in trade and condemnations of fraud and trickery. Secondly, in promoting fair competition, the use of unfair practices is discouraged in Islam. This rule is particularly important in comparative advertising, disparagement of another's good reputation in advertising and promotional tactics. These general rules which lay down the norm of behavioural conduct are more of encouragement of fair competition than rules of unfair competition per se. These principles will be further analysed in the following sections.

8.1 Fair dealing in trade.

Prohibition against fraud, trickery and misrepresentation can be seen in the following verse of the Qur'an :

Surah al Mutaffifin : 1, "Woe to those that deal in fraud".

Surah Yusuf:52, "this (say I) in order that he may know that I have never been false to him in his absence, and that Allah will never guide the snare of the false ones".

Al Nisa':107, "Contend not behalf of such as betray their own souls, for Allah loveth not one given to perfidy and crime".

⁹⁴ The association of property theory and unfair competition theory is particularly noticeable in the decided cases in the UAE as has been illustrated earlier in this chapter.

Among forms of fraudulent commercial practices which have been mentioned specifically in the manuals on trade in Islamic scholarship are adulteration of food, fraud in weights and measures and hoarding. These fraudulent practices are all prohibited as part of measures ensuring fair trade and dealing. This obligation to uphold honesty in commercial dealings is expressed in the Qur'anic injunctions commanding others to be truthful in measures and weights in the following 'ayah's:

Surah al-Isra': 35, "Give full measure when ye measure and weigh with a balance that is straight : that is the most fitting and the most advantageous in the final determination"

Surah al-A'raf : 85, "To the *Madyan* people...Give full measure and weight, nor withhold from the people things that are their due and do no mischief on the earth ...

Surah Hud : 84,85, "... And O my people! Give full measure and weight, nor withhold from the people the things that are due;..."

Surah Yusuf : 59 "...see you not that I payant full measure and that I do provide the best hospitality"

Surah al-Shu'ara': 182, " Give just measure and cause no loss (to other by fraud).

So important is the duty to uphold uprightness in commercial transactions that we can find support from the Prophetic '*hadiths*' which are expressive on this:

- (i) Malik reported to me that Yahya ibn. Said heard Sai'd ibn al-Musayyah said," When you come to a land where they give full measure and full weight, stay there, when you come to a land where they shorten the measure and weight, then do not stay there very long.⁹⁵"
- (ii) Malik said about a man who bought camels or sheep or dry goods or slaves or any goods without measuring precisely, " There is no buying without

⁹⁵ Imam Malik ibn. Anas, *Al Muwatta*, The First Formulation of Islamic Principles, (English translation), (1992) Diwan Press, England, par. at p.308.

measuring precisely in anything which can be counted."⁹⁶

Despite the emphasis on just measure and weights, many scholars have interpreted these Qur'anic injunctions and Prophetic '*hadith*'s, to enjoin all forms of unjust commercial dealings and scrupulous commercial practices. Arguably, this includes all forms of deceptive conduct such as promoting a merchandise by fraudulent means and describing the object differently from its characteristics⁹⁷. Dressing a product with a different trade mark and copying the get-up of another product, should in this instance, be enjoined. Firstly, the person who does that is not being truthful about the origin and the quality of the product. Secondly, it is a form of active fraud as the intent of the person is to sell his goods, by deceiving the public as to the nature of his goods. The institution of '*hisbah*' is another illustration of the zealotry to certify the threshold of justice and compassion to the public.

8.2 The institution of *hisbah*.

The emphasis on fair trade and dealing can be further seen in the role of '*hisbah*' as the enforcement of market and public moral. The concept of '*hisbah*' as formulated by the jurists is based on the general command to do what is moral and desirable ('*al-ma'ruf*') and the avoidance of what is not desirable and condemned ('*al-munkarat*'). The Qur'anic support for the establishment of an institution for the maintenance of good and the abhorrence of evil conduct is the following:

Surah al-Imran:110, "Ye are the best of peoples, evolved for mankind, enjoining what is right, forbidding what is wrong'.

Surah al-Imran : 104, "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".

⁹⁶ Imam Malik ibn. Anas, *Al Muwatta*, ibid.

⁹⁷ Jaafar, Zainuddin, The Concept and Application of 'Daman' in Islamic Commercial Law, April, 1994, Ph.D thesis submitted to the University of Edinburgh (u.p) p.17. The concept of '*daman*'(liability) has been utilized in Islamic jurisprudence as a basis for restitution in any unjust commercial dealings.

Surah al-Taubah : 7, "How can there be a league, before Allah and His Messenger, with the pagans, except those with whom you made a treaty near the sacred mosque? As long as these stand true to you, stand ye true to them: For Allah doth love the righteousness".

Sura al-Taubah : 112, "Those that turn to (Allah) in repentance; that serve Him, and praise Him; that wander in devotion to the cause of Allah; that bow down and prostrate themselves in prayer; that enjoin good and forbid evil; and observe the limits set by Allah- (those do rejoice). So proclaim the glad tidings to the Believers.

The early conception of '*hisbah*' is exemplified by the Prophet himself where he would take occasional visit to the market making checks on business practices. Umar the Second Caliph even took night duties in the market⁹⁸.

It was in the Abbasid Empire that an inspector known as a '*muhtasib*' carried out the duty of quality control in all trades and crafts and supervised professionals such as eye doctors, millers and bakers' guilds. Hassan and Hilli⁹⁹ account that, in Damascus, blacksmiths, bookbinders, booksellers and the production of foods were all subjected to quality control. From other writings, it is evident that all known professional crafts existing at that time were subjected to supervision and quality control. Buckley¹⁰⁰, recount the trades and professions dealt with by the '*muhtasib*' which included: butchers and slaughterers; fryers of fish; sausage makers; perfumers; tailors; educators of boys; confectioners; bakers; grainsellers and millers; silk manufacturers, apothecaries; blood-letters; doctors and so on. As regards doctors, the '*muhtasib*' was

⁹⁸ See Ibn al-Ukhuwwah, Diya al-Din Muhammad b. Muhammad al-Qurashi (d.729H), *Ma'alim al-Qurbah fi Ahkam al-Hisbah* (edited by Muhammad Mahmud Sha'ban (1976), Al-Hai'ah al-Misriyyah al-'Ammah lil-Kitab. pgs.228-240.

⁹⁹ Hassan, A.Y. and Hilli, D.R., *Islamic Technology : An Illustrated History*, (1988), Cambridge University Press, Cambridge. pgs.189, 200, 219, 272 & 277.

¹⁰⁰ Buckley, R.P, *The 'Muhtasib'*, Arabica, Mars 1992 Vol. XXXIX, p.59-117.

enjoined to make them swear the Hippocratic oath¹⁰¹.

The most important function of the '*muhtasib*' was to ensure that all market practices and commercial dealings conformed to the principles of the Shari'ah. Among the malpractices which were prevalent among merchants and which were cited in the manuals of the '*hisbah*' were the mixing of white dust with flour of wheat by millers¹⁰² and the adulteration or the fraudulent alteration of goods. The '*muhtasib*'s duty was to carry on strict vigilance, such as periodical inspection, official measures and weights, malpractices of different workshop owners, '*dallals*' (brokers, contractors), sale of bread, horses and slaves.¹⁰³ In exercising his duty, the '*muhtasib*' exercised a constant inspection of weight, measures and mints and used a certain seal to indicate conformity with the market requirement.¹⁰⁴ So established was the institution that there were written guide books and manuals containing information on the various quality standards of various crafts and manufactured goods to enable the '*muhtasib*' to carry out his duties¹⁰⁵. It is clear therefore that the duty of the '*muhtasib*' went beyond mere inspection of weighs and measures and this is certified in the written manuals of '*hisbah*'. In '*Nihayat al-Ratabah*', a '*muhtasib*' is reported to have 40 separate duties. While the text of Ibn. Ukkuwwah reported 70

¹⁰¹ The doctors were also enjoined to swear not to administer any harmful medicine, nor to prepare a poison nor amulets for any of the people; nor to mention to women the potion which makes the embryo fall; nor to mention the medicine which stops the begetting of offspring; and to avert their eyes from the women-folk when they enter unto the sick, and not to disclose secrets and pull up veils. Al-Shayrazi, *Nihayat al-Rutba fi Talab al-Hisba*, Cairo, 1946, cited in Buckley op. cit p.95. Al-Shayrazi's account differs from Ibn Taymiyyah's account on the specific account of trade which were under the control of '*hisbah*'. For detailed discussion see, Abdul Mun'im, Subhi, *Al-Hisbah fil-Islam, Bayna al-Nazariyyah wat-Tatbiq ; Dirasatun Muqaranah* ,(1993) Matba'ah al-Shuruq, Cairo. pgs.86-118.

¹⁰² On the account of Abu Abdullah b Abu Muhammad al-Sa'ati, who lived in Malaga, in the 14th. century, in his book on '*hisbah*', cited in Imamuddin, infra, p.26.

¹⁰³ See Imamuddin, S.M, *Al-Hisbah in Muslim Spain*, Islamic Culture, Vol. XXXVII (1963), 25-29.

¹⁰⁴ The '*muhtasib*'s seal indicated authenticity and conformity to the market regulation. Forgery of mark was taken very seriously. See Amedroz, H.F, *The 'Hisba' Jurisdiction in the Ahkam Sultaniyya of Mawardi*, Journal of the Royal Asiatic Society of Great Britain, (1916)p 77-101, 287-314.

¹⁰⁵ Al-Jarsifi, in another manual, recounts the quality control of craftsmanship particularly potters and paper makers by ensuring the exact mixture of ingredients. These step are taken to secure conformity to "that required by the principles of craftsmanship in a degree attained (only) by conscientious effort". Wickens, G.M, *Al-Jarsifi on the 'Hisba'*, The Islamic Quarterly, Vol. III no.3 p. 176-187, par.183.

different functions¹⁰⁶. With the width of the '*muhtasib*'s duties, it is arguable that '*hisbah*' should be effected whenever there is a need to uphold righteousness which applies equally to other economic functions in the field of trade and manufacturing.

Another important characteristic of the '*hisbah*' as practised during that period was the emphasis on the independence of action. Even though '*muhtasibs*' were employed by the state, they were at liberty to take action against errant traders. Therefore, that institution was an important mechanism to enforce justice and fairness and more so to enhance consumers interest. This is further reinforced on the fact that their duties were intermediate between those of the '*Qadi*' and those of the '*Mazalim*' tribunals¹⁰⁷. Furthermore, they were entitled to investigate in the absence of any complains armed with the invested power to enforce any of the state's regulations. From the above discussion, it is thus clear that the ambit of '*hisbah*' comprises three main categories of action: what concern Allah or religion¹⁰⁸, what concern mankind¹⁰⁹, or what may partake of both.

From the foregoing, the nature of the '*muhtasib*'s duty, particularly the combination of supervision of market practices and religious observances, illustrates the importance of upholding justice and fairness in the market as a form of religious duty¹¹⁰. Not

¹⁰⁶ See Ibn al-Ukhuwwah, op.cit.

¹⁰⁷ In terms of enforcement, the '*muhtasib*' was assisted by the institution of '*mazalim*', as a forum for complaints against injustices committed by the strong against the weak. For a detailed discussion see, Nielsen, Jorgen S, Mazalim and Dar al-Adl Under the Early Mamluks, The Muslim World, Vol. LXVI (1976) p. 114-132.

¹⁰⁸ For example neglect of Friday prayers.

¹⁰⁹ Besides market supervision, a '*muhtasib*' was also responsible to the general public for such as failure of water supply, ruinous city walls, or the arrival of needy wayfarers whom the people of the place failed to provide for. His duties also included compelling guardians to sanction a widow's remarriage, on request with a suitable person; securing the interval between a woman's divorce and remarriage, and enforcing parental duties.

¹¹⁰ See Amedroz where he argues that the '*hisba*' jurisdiction is based on the duty imposed on Moslems in the Qur'an, i.e of enjoining good and forbidding evil actions. For an illustration of the scope of powers of a '*muhtasib*', see Serjeant, R.B, A Zaidi Manual of Hisbah of the Third Century (H), Rivista Degli Studi Orientali (1952) Vol. XXVII 1-34.

surprisingly, contemporary scholars have accepted 'hisbah' as the most important institution of an Islamic state¹¹¹. The institution of 'hisbah' exemplified the preciousness of equitable environment for the exchange of goods. This duty is further reinforced with the legal duty to amend any unjust enrichments in commercial transactions.

8.3 The rule against unjust enrichment and unfair competition.

The basis of this principle is that no person may take the property of another without lawful cause.¹¹² Everyone who comes into possession of that which does not belong to him is liable to the true owner. Consequently, anyone who makes profit unlawfully will have to compensate the original owner. In the context of trade marks, on the assumption that trade marks are property, reaping benefit by imitating an established trademark, or by passing off, constitute an act of unjust enrichment. If the principles of the Shari'ah are applied in such cases, anyone who engages in such illegal activity should be held subject to damage ('*ta'awid*') which could either be actual damages or other additional damages.

Sanhuri¹¹³ views unjust enrichment as not being a general theory of law in Islamic Law as compared to common law and civil law system. He maintains that the existing principles of unjust enrichment can only be read in their own context and should not be extended to any forms of unjust and unlawful conduct. Despite the above view, it is submitted that principles of unjust enrichment should not be narrowly interpreted. A wider interpretation of unjust enrichment is consistent with the above Qur'anic injunctions and Prophetic '*hadiths*' is to endorse the promotion of '*ma'ruf*' and the prohibition of '*munkar*'.

¹¹¹ Ibn. Taymiyyah, Public Duties in Islam : The institution of the 'Hisba' (translated from Arabic text *al-Hisbah fi l-Islam* by Mukhtar Holland) (1982), The Islamic Foundation, Leicester.

¹¹² See A.318 UAE Civil Code 2/87.

¹¹³ 'Al Wasit fi Al Qanun al Madani' (Commentary of Civil Law), Cairo 1952. vol.I p.1107-1108.

One form of unjust enrichment is the unfair advantage drawn by traders by blemishing the product of other traders. Such unfair practices by and between competitors, even though little support can be obtained in Islamic literature on this, arguably, can constitute '*najash*' in the wider sense, even though not in factual sense.

The prohibition of '*najash*' has been discussed in the context of unilateral and collaberative price-raising in the following '*hadith*'s:

Yahya related to me from Malik from Nafi' from Abdullah ibn. Umar that the Messenger of Allah said:"Do not let one of you bid against the other."

Malik said from Nafi' from Abdullah ibn. Umar that the Messenger of Allah forbade '*najash*'. Malik said,"*Najash* is to offer a man more than the worth of his goods when you do not mean to buy them and someone else follows you in the bidding".¹¹⁴

The popular interpretation is to narrow the context of '*najash*' to actual price jacking cases as explicit in the '*hadith*'s¹¹⁵. However, it is submitted that '*najash*' should not be confined to those factual situation and should cover other instances whereby a trader has manipulated the market by disparaging the product of another trader. To this end, we would argue that the underlying rationale of the prohibition of '*najash*' is the promotion of fair competition among traders, in the name of fairness and justice in commercial dealing. Within this framework, these '*hadith*'s could form the basis of enjoining unfair competitive practices as well as anti-competitive practices. If this wide interpretation is adopted, unfair disparagement, creating confusion, deceiving and possibly misappropriation is seen to be prohibited. Therefore, any form of unjustified disparagement of another manufacturer's product, would constitute unfair practices in the light of the above '*hadiths*'.

¹¹⁴ Imam Malik ibn. Anas, *al Muwatta*, First Formulation of Islamic Law, English translation, 1979. Diwan Press, p.307.

¹¹⁵ For an illustration see the views of Sanhuri, Abd. al-Razzaq, *Masadir al Haqq fi al-Fiqh al-Islamiyy*, *Dar al-Fikr*, (1954), Cairo, 6 vols. in 2, Book.2 p.75-77.

This discussion of protection of manufacturers against the unfair practices by another competitor necessitates the elaboration of the passing-off action under common law. A person who has passed-off his product as the property of others, should by virtue of his unjust enrichment, be made responsible to his action.

Unlike the notions of unfair competition prevalent in some jurisdictions, there has been a reluctance to extend protection in common law for disparagement of a competitor unless there has been deception to the public¹¹⁶. The common law in Malaysia deals with the creation of confusion (and possibly some type of misappropriation) by tort of passing off. Being a common law action, the right of passing off in Malaysia is in 'pari materia' with the common law of passing off in the U.K¹¹⁷. Therefore, this study is confined to the discussion of the application of common law principles on passing off in Malaysian cases.

2 Passing off

In addition to protection given to registered trademark, the common law protects unregistered marks if these marks have been associated exclusively to the person who has built up a reputation in them. The law of passing off could be summarised in one general proposition: no one may pass off his goods as those of another.

The following factors are of concern in determining the tort of passing off:

- i. similarity of get-up, trade name, trade mark and
- ii. such similarity will lead to deception to the public and the likelihood that the

¹¹⁶ The courts in the U.K have made it clear that unfair competition is not recognised, despite recent assertions that passing off could expand to cover some types of unfair competition as in Mirage Studios v Counter-feat Clothing (1991) FSR 145 and Waterman v CBS (1991) 20 IPR 185.

¹¹⁷ Being a common law remedy for unfair appropriation of another's goodwill, the essentials of passing off are the same as the U.K. See Warnick v Townend (1979) AC 731; (1980) RPC 31. See also Reckitt and Colman Products Ltd (t/a Colmans of Norwich) v Borden Inc and Others, (1990) 1 All.E.R 865, (1990) RPC 341 where the House of Lords dismissed the claim that providing protection to a lemon-shaped lemon juice would achieve, in effect a perpetual monopoly in the lemon juice market. For a current analysis, see Firth A, Cushions & Confusion : The Ro Ho Passing Off case, (1994) 11 EIPR 494; Karet, Ian, Passing Off and Trade Marks: Confusing Times Ahead (1995) 1 EIPR 3.

public will be confused into believing the respondent's goods to be that of the applicant.

Similarity can occur due to phonetic similarity of the Chinese characters to the trade mark¹¹⁸. Confusion and deception can easily arise due to the relationship of the parties particularly if the alleged product and the genuine products are distributed by the same group of companies¹¹⁹ or where both the plaintiff and the defendant are engaged in the same field of activity.¹²⁰

Deception and confusion are normally factually proven in the court¹²¹. If the products are exactly similar, there is no need to prove intention to deceive, it will be implicit in the copying¹²², otherwise deceit should be proven¹²³.

¹¹⁸ Haw Par Brothers International Ltd & Anor v. Jack Chiarapurk & Ors (1991) 2 MLJ 428. In this case the defendant, who was a partner in a joint venture to manufacture and trade "Tiger Balm", later produced his own balm under the brand name "Lion Balm" which had the same shape, get-up and size of "Tiger Balm". The court held that there was a deliberate attempt to take advantage of the goodwill of the Tiger Balm products.

"This is all the more so when we bear in mind that a fairly substantial proportion in Singapore are Chinese educated and quite a proportion of of the elderly people in Singapore are illiterate."

¹¹⁹ Haw Par Brothers International Ltd & Anor v. Jack Chiarapurk & Ors (1991) 2 MLJ 428. See also Regent Decorators (M) Sdn. Bhd & Anor v. Michael Chee & Ors (1984) 2 MLJ 78 where the former employee of the plaintiff had set up another company under the same trade name engaging in the same business with the former employee. There could easily be confusion among members of the public entering into transactions with the defendants thinking that in fact they were dealing with the plaintiff. In Excelsior Pte Ltd.v Excelsior Sport (S) Pte Ltd (1986) 1 MLJ 130, the plaintiffs and the defendants carried on the same business activities i.e the supply of a variety of swimwear, sportswear and other clothing.

¹²⁰ See Regent Decorators (M) Sdn. Bhd & Anor v. Michael Chee & Ors (1984) 2 MLJ 78. If the defendant is engaged in a different field of business the court has been slow to hold passing off as in Mun Loong Co Sdn. Bhd. v. Chai Tuck Kin, (1982) 1 MLJ 356. In this case there is no calculation to deceive by diverting customers from the plaintiff to the defendant or cause confusion to the customers.

¹²¹ What the parties normally do is to call consumers to testify in court. In Nestle Product Ltd. & Anor v. Asia Organization Ltd. & Anor (1965) 2 MLJ 195, the case was dismissed because the plaintiff failed to prove that the labels used by the defendants had caused deception and confusion. In this case even though the defendants had been in competition for nearly 10 years, only 5 instances of confusion were shown.

¹²² As held by the Privy Council in White Hudson & Co v. Asian Organization Ltd. (1965) 3 MLJ 186 and in the case of Haw Par Brothers Inter. Ltd & Anor v. Jack Chiarapurk & Ors (1991) 2 MLJ 428.

¹²³ Lee Kar Choo v. Lee Lian Choon (1967) 1 MLJ 167.

A third condition is:-

- iii. proof of reputation in the get-up: it must be distinctive of the goods and business and be associated or identified with them¹²⁴.

Exclusivity of use in a trade mark is easier to make up if the mark is distinctive and not commonly used in trade¹²⁵. The design of the get-up or packaging need not be novel, provided that the get-up was distinctive of the appellant and had been identified with them¹²⁶. Where the design of the get-up or packaging is not distinctive the court will not provide protection¹²⁷.

Where exclusivity of use of common word or phrase may lead to monopoly in that word, the court may refuse a claim of passing off.¹²⁸ For foreign trade marks, there should be proof of reputation such as the use of the trade within the jurisdiction; otherwise protection cannot be extended to such marks.¹²⁹

¹²⁴ See Clairol Incorporated v. Too Dit Co (1980) 2 MLJ 112, where the particular get-up had not been associated exclusively with the plaintiff's goods as the goods had not been in the market long enough, so as to be identified in the course of time with the plaintiff's goods and with no others. Sinnathuray J. held that (p.113) in considering passing off the labels, "the two ingredients which the plaintiff must prove, reputation and deception or confusion become inseparable".

¹²⁵ Excelsior Pte Ltd. v. Excelsior Sport (S) Pte Ltd (1986) 1 MLJ 130. In this case, the court held that the trade name "Excelsior" is not a common word, neither it is descriptive of the business. It is a fancy word which the plaintiffs have used for 34 years. The close resemblance of the two names has caused and is likely to continue to cause confusion.

¹²⁶ White Hudson & Co v. Asian Organization Ltd. (1965) 31 MLJ 186. This was a passing off action between Hacks and Pecto medicated cough sweets. The wrappers of the respective sweets bore the respective trade names, but the wrappers were of similar colour. The Privy Council's decision was a reversal of the Court of Appeal case which clearly held against monopoly of colour on wrappings. Buttrose J. held in the Court of Appeal that the distinguishing feature of the plaintiff's sweets was the words "Hacks" and not the colour of the wrapper, and the plaintiff had no right to the monopoly of orange, red or other coloured paper for wrapping sweets because they were common to trade.

¹²⁷ Tong Guan Food Products Pte Ltd v. Hoe Huat Hng Foodstuff Pte Ltd (1991) 2 MLJ 36.

¹²⁸ Mun Loong Co Sdn Bhd v Chai Tuck Kin (1982) 1 MLJ 356 where the court refused to grant an injunction to stop another trader from using the trade name "Mun Loong". The court observed that the words "Mun Loong" are known Chinese words meaning "a lot of prosperity". "It is the common objective that all business enterprise to be prosperous".

¹²⁹ See Tan Gek Neo Jessie v. Minister for Finance & Anor (1991) 2 MLJ 301, where an American Corporation whose mark "Penneys" had not been used in Singapore since the expiry of the registration of the mark in Sept 1983.

Finally the fourth condition is:-

- iv. proof of damage. Where there is no proof of damage, the court is slow to uphold a claim for passing off.¹³⁰

In most cases, these four conditions are necessary to constitute an act of passing off. These conditions are imposed by virtue of the transitory nature of passing off. Unlike registered trade marks, passing off exists as long as the mark is distinctive in the eyes of the public or a class of the public.

10 Conclusion and recommendations.

The analysis of trade marks in common law and the emphasis of trade and dealing in Islam, as discussed in this chapter, can be represented in the following table:

<u>GENERAL FEATURES OF THE MODERN TRADE MARK SYSTEM IN MALAYSIA AND THE PROTECTION OF TRADE AND DEALING IN ISLAM.</u>	
<u>TRADE MARK REGISTRATION SYSTEM AND PASSING OFF</u>	<u>PROTECTION OF FAIR TRADE AND DEALING.</u>
1. protection on the basis of registration.	1. protection as part of social function of an Islamic state.
2. protects property rights link with consumer indirect.	2. emphasis on consumer
3. even protects defensive trade marks.	3. protection on the basis of actual use.
4. provision for compulsory licensing	4. state has wide power to encroach personal property to protect public ' <i>maslaha</i> '.

¹³⁰ See Tong Guan Food Products Pte Ltd v. Hoe Huat Hng Foodstuff Pte. Ltd. (1991) 2 MLJ 361. In this case the appellant's sales figures showed that in fact the monetary value of sales increased. The goods were also not in direct competition with one another. If the goods are in direct competition with one another, the court will readily infer the likelihood of damage to the plaintiff's goodwill, not merely through the loss of sale but also through the loss of exclusive use of his name or mark in relation to the particular goods or business concerned.

5. provision for regulatory body.	5.institution of ' <i>hisba</i> ' (ombudsman)
6.mislabelling, misrepresentation in advertising provided for under other regulations.	6.wide prohibition against any kind of dishonesty, fraud and misrepresentation in trade.
7.not against parallel importation.	7.pro free movement of goods.
8.power of owner absolute	8.power of owner relative

The above diagram epitomises the analysis of the features of a modern trade mark regime and the principles on trade and dealing in Islam. Firstly, notwithstanding rights of passing off, the basis of protection in a modern trade mark regime is based on registration. On the other hand, the emphasis on fair trade and honesty in commercial transactions in Islam would entail that all kinds of scrupulous malpractices are curtailed. Thereby, the need to check on the use of trade marks comes indirectly under such obligation. It has been established that forging or counterfeiting goods of a registered trade mark is clearly a form of forgery and deceit which is forbidden in Islam. By selling counterfeit and imitation products, the intention of the seller is to mislead the public as to the characteristics of the product. Added with the proposition to extend the concept of '*daman*' (civil liability) to cover all forms of unjust commercial dealings, the expansion of Islamic jurisprudence to provide redress against counterfeiting and imitation is supported with valid grounds in the Shari'ah. Such an extension has taken place in some of the Muslim countries such as Saudi Arabia and the United Arab Emirates¹³¹. These cases provide the impetus for the introduction of a proper trademark system. All these countries have since introduced a full

¹³¹ See El-Nayal, Ma'wia al-Tahir, Agency Contracts and Consumer Rights, Arab Law Quarterly Part 4 August 1986, p.401 and Amin, op.cit.

registration system¹³² as opposed to claims of rights by individual advertisement.

This proposition impinges upon the appreciation that trademarks play an effective role in their differentiation function. It is also assumed that all the above-mentioned distortions created out of advertising and mis-information are effectively eliminated. Economic theory holds that consumers demand the most reliable information available and that firms convey the information which consumers demand. Hence, within this realm of prohibited deceitful practices in Islam are incorrect advertising, unfair competition, false advertising and dilution of quality.^{132A.} Measures should be taken to ensure that promotion of goods by advertisement does not contain false assertions. Advertisements should give accurate and fair information of the attributes of the products. This requires additional regulation on the use of labelling and indication of origin. Quality of products should be constantly monitored to check against any surreptitious dilution of quality.

It has been shown that trade marks play a balancing role to accommodate both the consumers and trademark owners interests, both whom trademarks continue to serve. The development of trademarks law, thus far, has proven that the two interests are not entirely discordant. Rights of competitors are also rightly served by rules of unfair competition, or even to a limited extent by passing off. In this context, the Islamic prohibition against '*najash*' can be broadened to cover all forms of unfair practices.

The present trade mark laws can still be further tightened for the furtherance of consumers' cause. Even though, these laws essentially grow to enhance the interest of trade mark owners, the assimilation of consumers' interest would not only improve the present laws but also achieve the basic philosophy behind the Islamic principles on trade and commerce. The furtherance of consumer's cause can be accomplished by

¹³² See Meyer-Reumann & Schackel Torsten, The Trademark Law of the United Arab Emirates (Federal Law 37/1992) And An Outline of the Legal Protection in the Gulf Region, Arab Law Quarterly, pt.3 Sept.1993 p.236-240. See also the discussion by Hanson, Maren, Counterfeiting and Infringement; The Gulf View, Trade Mark World, Feb. 1993 p.25; Gaya, Javed, Reforming the Law in Dubai, MEED, Middle East Business Weekly, 3 July 1992 p.24; Al-Tamim, Essam, The New UAE Federal Trademark Law, 4 Sept 1992, MEED, p.31. See also Registration of Trade Marks Law, enacted by High Decree No. 8762 of 28/7/1358 AH, Karam, Nicola H, (ed) Business Laws of Saudi Arabia, 4 vols, Graham & Trotman, (1992).

^{132A} Except for the Hanbalis, all Sunni schools penalize verbal misrepresentation ('*taghrir qauli aw lafdzi*') only when accompanied with lesion ('*ghubn*').

the introduction of various measures.

Firstly, the use of both indication of source and appellation of origin which will further assist consumers in making their choice. Sanctions can be imposed for false indication of source and appellation of origin as provided under Article 10 (1) of the Paris Convention¹³³. There can be four methods of protection of these special marks; registration system, system of special orders, combined system or protection without registration and system of special orders. The scope of protection should be broad enough to cover both direct and indirect uses, false and misleading indications and goods and services. Where necessary, such use of indication of source and appellation of origin be made compulsory. To avoid any geographical sign which indicates a unique commercial source from deteriorating into a generic name, strict measures should be taken to indicate that such geographical sign is used as a trade mark.

Secondly, there should be more checks on advertising. Advertisement should be truthful, contain all complete information which is necessary and should not try to portray mythical images or promote lavish lifestyles.

Thirdly, one way to overcome the problem of inconsistency and diminution of quality of trade marked goods which are produced under licence, is to encourage the use of collective and certification marks¹³⁴ both at the national and international level in

¹³³ A.10 of the Paris Convention provides:

(1) The provisions of the preceding Article shall apply in cases of direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer, or merchant.

(2) Any producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used, shall in any case be deemed an interested party. See also Article 22 of the TRIPs Agreement.

¹³⁴ S. 25(3) & (4), S. 56(11) of the Malaysian Trade Mark Act and Rules 27 & 28 of the Regulation provides for formal examination and substantive examination of certification marks which includes a search. The use of collective marks which indicate a traders' membership of an organisation are not provided for.

the light of article 7 bis of the Paris Convention¹³⁵. Use of such marks should be opened to anybody who complies with the relevant quality requirements¹³⁶.

Fourthly, on the assumption that parallel importation is pro-competition, the present stand on parallel importation should be maintained. Extra measures must be taken that in our endeavour to encourage competition, the consumer's needs should not be forsaken. For example, importation of grey goods should not justify the dumping defective, faulty goods which do not pass the quality standards in other countries. Furthermore, the public should be informed of the grey goods' origin and their differences with the original goods, if any. Whenever possible, the same after sale service for such goods should be offered to the consumer as well. These measures are necessary as while the practice of parallel importation does not constitute a form of misrepresentation to the consumer as they are genuine products, misinformation of the nature of the goods would.

Fifthly, measures should also be taken against the unauthorised use of well-known marks. The mechanism adopted in Malaysia to this effect is by allowing the registration of well-known marks as defensive marks¹³⁷. A more stringent method has been introduced by the U.K Trade Marks Act 1994 which allows the restraining

¹³⁵ Article 7 bis provides for the registration of collective marks. Each country shall be the judge of the particular conditions under which a collective mark is contrary to the public interest.

¹³⁶ Some Arab countries such as Saudi Arabia and Iraq provide standardisation services by introducing quality marks. This special mark serves the consumer, who needs a simple, practical and reliable means - approved by a neutral specialized body- that guides him to choose the best commodity, helps him to avoid any hazards to health or safety and protects him from being subject to commercial adulterations, without having to pay any testing expenses or to go through technical details of standards and tests etc. See Saudi Arabia: Quality Mark and Certificate of Conformity Regulations, Feb. (1987) Arab Law Quarterly, Vol. 2, p.75. See also, Iraq, Regulation of Trade Names and the Register of Commerce, No.6 of 1985.

¹³⁷ See S.22 of the MTMA. The 1993 amendments has further strengthened the well-known trade mark owner's interest by eliminating the requirement of use.(S.57(1). In the UAE, a third party is not allowed to register well-known marks without the consent of the original owner. See World Intellectual Property Report, Vol.7 p.45. Such a provision is not effective enough to stop unlawful use of well-known marks.

of the use of a well-known marks by a third party¹³⁸.

Finally, further rules on unfair competition and competition should be enacted to provide a healthy environment for commercial transaction by curbing the abuses by trade marks owners. These measures which maintain competition can either be incorporated in the present trade mark regime or be separately provided for.

¹³⁸ S.56(2) provides that;

"The proprietor of a trade mark which is entitled to protection under the Paris convention as a well-known trade mark is entitled to restrain by injunction the use in the United Kingdom of a trade mark which, or the essential part of which, is identical or similar to his mark, in relation to identical or similar goods or services, where the use is likely to cause confusion".

CHAPTER EIGHT

INTELLECTUAL PROPERTY, PUBLIC INTEREST AND COMPETITION

1 Introduction

Intellectual property is a property right which is intrinsically limited in many ways. The two most important factors involved in the process of delimitation of intellectual property are public interest and the need to maintain market competition. It has been reiterated throughout this thesis that intellectual property is not a form of monopoly right but a form of property right. Like other forms of property right, the ambit of ownership in Intellectual Property depends on the power to exclude. The law draws certain constraints on these exclusive rights and imposes certain behavioral limits to obviate the creation of monopolistic situations and the perceived danger of abusing the competitive advantage conferred by Intellectual Property.

This need for a balancing exercise is expressed in Art 27 of the Universal Declaration of Human Rights which provides:

- (i) everyone has the right to freely participate in the cultural life of the Community, to enjoy the arts and to share in scientific advancement and its benefits;
- (ii) everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is an author¹.

In the previous chapters, we have deliberated on the existence of intellectual property and their justifications on a theoretical plane, both in common law and Islamic scholarship. In this chapter, we will proceed to discuss the process of defining the perimeters of Intellectual Property. An exercise of this kind will not be valid without looking into the delimitation of rights assumed within the theoretical conception of right or '*haqq*' and even within the natural law conception of property rights. Within

¹ See Dworkin G & Taylor RD, Blackstone's Guide to the Copyright, Designs & Patents Act 1988: The Law of Copyright and Related Rights, (1989), Blackstone, London. Quoted for discussion at p.3.

Islamic scholarship, this periphery is known in the concept of '*su isti'mal al haqq*'.

To that end it is important to note that, certain limitations are imbued in the legislations relating to Intellectual Property itself. These restrictions, which will be defined briefly later, support our proposition that Intellectual Property, is constructed to achieve a suitable balance between private property rights and other important goals, principally, the advancement of public interest. For that purpose, this study will not be a comprehensive one and not all instances of limitation will be outlined here.

We also propose to describe in this chapter the various mechanisms which are developed to resolve the anti-competitive effects of Intellectual Property. As opposed to the previous-mentioned limitations, these mechanisms exist and evolve independently of the Intellectual Property regime. A cursory examination of competition rules in the United Kingdom and United States is given. It is not within the ambit of this chapter to evaluate the basic framework and philosophy of these two mechanisms nor to give an extensive analysis of competition and antitrust laws in the U.K and the U.S.

With the above introduction and a brief outline of this chapter, we will proceed with the discussion of theoretical conception of parameters of Intellectual Property right. We propose to begin with the analysis of the concept of '*su isti'mal al haqq*' in Islamic jurisprudence.

2 Theoretical delimitation of property rights- the property theory

2.1 the concept of '*su isti'mal al haqq*'

Conceptually, the nature of right ('*haqq*') in Islamic jurisprudence, being a God-given right, is not absolute. Firstly, all rights, existence and exercise should be consistent with the dictates of the Shari'ah. Secondly, the exercise of any right is underpinned by recognised '*maslahah*' (considerations of public interest). Nobody can exercise his right adversely to the '*maslahah*' upon which the right rests. Thirdly, even in cases

of strictly individual rights (*'haqq adami'*) in the various classification of rights in Islamic jurisprudence, these rights are circumscribed by the boundary set by considerations of *'maslahah'*. Fourthly, in similar terms, right of ownership (*'milkiyyah'*) are not free from this constraint. The exclusive rights prescribed by the Shari'ah to an owner does not mean that an owner of right may exercise his right as he likes. Fifthly, imposition of limits on the capacity to exercise a lawful act (*'ibahah'*) is accepted in Islamic jurisprudence if circumstances demand it. Umar, (the second Caliph after the Prophet) for example restricted the consumption of meat for two consecutive days during famine and the restriction of the right to marry *'kitabiyah'* woman. Muslim scholars have discussed the various limitations to the concept of right and ownership at length, particularly in relation to rights of neighbours.

Among these restraints (*'quyud'*), the avoidance of harmful exercise of rights constitutes the most important boundary and varies from case to case according to the degree of harm inflicted². In instances where the exercise of a right involves the promotion of *'maslahah'* to the right-owner but at the same time results in unnecessary harmful consequence (*'mafsadah'*) to others, that *'mafsadah'* being of equal or greater strength, this calls for the reorientation of the initial right. If no middle way is met, non-exercise of the right is preferred. The terms which are used by most scholars to describe this area of jurisprudential principle is *'su isti'mal al haqq'* or *'ta'asuf fi isti'mal al haqq'* (wrongful exercise of right).

Classical scholars did not offer any general theory which would be understood as the concept of limitation nor abuse of rights as it is understood now. Most instances where curtailment of ownership rights had been drawn by the Muslim jurists were confined to their factual applications. These instances are further taken up by modern scholars who draw general principles to circumscribe the boundary of legal and

² See also the elaboration of this concept propounded by Mahmasanni, Subhi, *Al-Nazariyyah al-Ammah li al-Mujabat wa al-Uqud fi al-Shari'ah al-Islamiyyah* (1948), *Dar al-Ilm al-Malayin*, Beirut (3rd.ed) p.44-55, Hassan, Hussein Hamid in *Nazariyyah al-Maslahah fi al-Fiqh al-Islami* pgs. 424-434; Al-Darini, Fathi, *Nazariyyah al-Taasuf fi Isti'mal al-Haqq* (1977), *Muassasah al-Risalah*, Beirut, ch.1 par.pgs. 42-44.

ownership rights. This chapter will adopt the views of modern Islamic scholars.

According to this conception, all rights are prescribed by the Shari'ah to promote certain '*maslahah*' (positive social or religious value)³. The basic rule is that where there is a conflict between private or individual rights and public rights, public rights take precedence.⁴ The class of public rights differs from place to place and includes all rights which are related to societal interest such as those of public health, national trade, industrial, agricultural, manufacturing activities. The exercise of balancing rights is done through the weighing of conflicting interests, giving preferences to public interest when justice requires.

These constraints prescribed by the '*Shari'ah*' under the wide rubric of '*maslahah*' firstly need to be distinguished from the concept of transgression of rights ('*tajawuz hudud al shar'iyah*'). Al Khafif, a reknown Hanafite scholar, defines '*su isti'mal al haqq*' (wrongful exercise of rights) to cases where the exercise of the right itself is per se valid and lawful ('*jaizan masyru'an*') but may cause harm or damage to others. Abuse of rights on the other hand, resulted in the nullification of the initial right. Hence any abuse of rights will not be tolerated and the initial right will be void *ab initio*. To elaborate further, the difference between 'wrongful exercise of rights' and 'transgression of rights' depends primarily on the end results ('*nata'ij*' or '*athar*')⁵.

The concept that the exercise of rights will be limited to the extent of avoidance of harm to others is recognised by all scholars. Intention to commit harm is not important. To the Hanafites, the restraint on the exercise of a lawful right may only be done in instances where it results in '*dharar fahish*' (excessive harm) -if the exercise of right necessarily and in most instances leads to the infliction of harm to

³ See Al-Shatibi for his known and well argued conception of '*maslahah*' in Al-Shatibi, Abu Ishaq Ibrahim b. Musa al-Gharnati (d. 790H), *al-Muwafaqat fi Usul al-Shari'ah*, Cairo : n.d 4 vols. vol.2 pgs. 3-5.

⁴ See p.101 of Al-Khafif, Ali, *Al-Milkiyyah fi Al-Shari'ah al-Islamiyyah Ma'a al-Muqaranah bi al-Shara'i al-Wad'iyyah*, (1966), *Ma'ahad al-Buhuth wa al-Dirasat al-Arabiyyah*, Cairo.

⁵ P. 99 al Khafif, op cit.

others. In this instance the Hanafites differentiate between three degrees of possibility of occurrence of harm; that which rarely results in harmful consequence ('*nadir*'), that which normally results in harmful consequence ('*ghalib*'); and that which in most occasions results in harmful consequence ('*kathir*')⁶. Most scholars agree to the desirability to restrain the exercise of rights in the second and third instances. The case is not the same with the first. The Hanafis and the Shafi'is scholars attach higher significance to 'harm' which is definite ('*qat'i*'). If the occurrence of 'harm' is doubtful ('*zanni*'), the right of the rightowner will prevail. In contrast, the Malikis and the Hanbalis attached higher significance to prevailing public interest even in the first instance and allow for the waiver of private interest in such instances⁷.

Muslim jurists have evolved five legal maxims related to the concept of avoidance of harm. Firstly, any harm which occurs need be redressed⁸. Secondly, what is perceived as greater harm should be avoided even if resulting in inconsequential minor harm⁹. Thirdly, general or unspecified harm should be given priority to specific 'harm'. In this instance, promotion of general interest is obligatory and presides over specific or individual interest¹⁰. Fourthly, the avoidance of harm takes precedence over promotion of interest¹¹. Finally, during emergency ('*dharurah*'), normal rules of legality are waived and resort to unlawful acts are allowed.¹² Under all instances, the relative benefits need be weighed against any ill consequences of the exercise of rights.

⁶ See p. 102 of al-Khafif, *Al-milkiyyah*, op cit.

⁷ P.103 al-Khafif, *al-Milkiyyah*, op. cit.

⁸ '*Al-Dhararu yuzal*'.

⁹ '*Yatahammalu al-dharar al-akhaffu li daf'i al-dhara al-ashadu*'.

¹⁰ '*Yatahammalu al dharar al-khass li daf'i al dharar al-'amm or taqdim al maslahah al-'ammah 'ala al-maslahah al-khassah*'.

¹¹ '*Daf'i al-mafasid muqaddimun 'ala jalb al-masalih*' or in the language of '*majallah al-ahkam*' as '*dar'u al-mafasid awla min jalb al-manafi*'.

¹² '*Al-dharurat tubiha al-mahzurat*'.

Some classical scholars, with the exception of al-Shatibi, discussed this concept and its application in very restricted ways¹³. Al-Darini, forcefully argued that this balancing exercise should be given greater significance and should be considered as one of the main theoretical delimitations to the concept of rights¹⁴. He argued that it is the objective (*'maqasid'*) of the Shari'ah to achieve justice (*'adalah'*). Hence the exercise of right contrary to the objective of the Shari'ah and contrary to the concept of *'adalah'* would vitiate the basic purpose and function of right. A legal right is not an end in itself (*'ghayah'*), but a means (*'wasilah'*) to promote justice and to achieve other higher objectives set by the Shari'ah. He justified the interference by the state, either in delimitation of rights of ownership (*'milkiyyah'*), permitted acts (*'ibahah'*), or other rights (*'haqq'* in general) in the name of promotion of public interest.

It has been mentioned earlier that Muslim scholars have articulated the various restraints (*'quyud'*) with regard to traditional property. The same principle, it is submitted here, applies to Intellectual Property. The exclusive rights conferred to an Intellectual Property owner should be curbed where the exercise of the right vitiates the basic function of the grant of the right. This will depend ultimately on the circumstances of the case.

2.2 Theoretical framework of property rights

It is difficult to sustain the idea of limitless property rights.¹⁵ All the natural law thinkers, who sought different grounds and justifications for property rights, have the same 'caveat' to delimit property rights¹⁶. Lockeans for example would not hesitate

¹³ Concepts of *'maslahah'* and *'adalah'* are discussed by some scholars in relation to *'sadd al-zara'i'* and *'istihsan'*.

¹⁴ Al-Darini, op.cit. p.10.

¹⁵ See the arguments in favour of limiting Intellectual Property rights in Vandeveld, Kenneth J, The New Property of the Nineteenth Century: The Development of the Modern Concept of Property, (1980) Buffalo Law Review, Vol.29 325-367.

¹⁶ For analysis of natural law arguments in relation to Intellectual Property, see Kitch, Edmund W. Property Rights in Inventions, Writings and Marks, Harvard Journal of Law and Public Policy, Vol.13 p.119- 124 (Vol.13 Winter 1990), Palmer, Tom G, Are Patents and Copyrights Morally Justified? The

to restrain property rights if the exploitation of such rights leads to 'waste' and inequitable distribution¹⁷. Intellectual Property presents a peculiar problem of allocation of rights, even though its similarity with traditional property can be drawn.¹⁸ In the first place, contrary to some assertions that allocating property rights in "knowledge" is basically contrary to the 'concept of knowledge itself'¹⁹, this need to find a reorientation of protection and access, has been accepted and recognised.

Within this perspective, the concept of property refers to a "bundle of rights" rather than referring directly to a material object owned²⁰. One of the main attributes of property rights is the power to exclude. The degree of exclusion may vary and there may be valid grounds for pruning away this exclusive right without destroying the title

Philosophy of Property Rights and Ideal Objects, Harvard Journal of Law and Public Policy, Vol.13 Pat 3 (Winter 1990) 817, Ko Yusing, An Economic Analysis of Biotechnology Patent Protection, The Yale law Journal (vol.102(1992) p.777-804, Gordon, Wendy J, An Inquiry Into The Merits Of Copyright: The Challenges of Consistency, Consent and Encouragement Theory, Stanford Law Review, Vol.41 (4-6) 1989 p.1343-1409, Paul, Ellen Frankel, Natural Rights And Property Rights Harvard Journal of Law and Public Policy, Vol 13, pt. 1 p.10, Berg, Sanford V. Copyright, Conflict And A Theory Of Property Rights, Journal of Economic Issues, (1971) 5 June 71-79, Hughes, Justin, The Philosophy On Intellectual Property, The George Town Law Journal, (1988) Vol 77:281, Litman, Jessica The Public Domain, Emory Law Journal Vol.39 (1990) 39.

¹⁷ See Hughes, Justin, op. cit.

¹⁸ See Dworkin, Gerald, "Property", Land Law; Industrial And Intellectual Property : Are There Any Common Characteristics (1978), Ford Foundation Workshop on Property Law, Institute of Advanced Legal Studies, London. See also the brilliant analysis by Gordon, Wendy J in An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory, Stanford Law Review, Vol 41 (4-6) 1989 p.1343.

¹⁹ Vaver argued that allocation of property rights in knowledge is impossible as knowledge is infinite in time and space. Secondly, allocating property rights in ideas makes ideas artificially scarce and their use less frequent- and from a social viewpoint, less valuable. Thirdly, it is difficult to dismiss the fact that we all borrow from one another. Hence the boundary of that domain of ideas which can be properly be called 'mine or thine' is impossible to draw. See Vaver, David Some Agnostic Observations on Intellectual Property, Intellectual Property Journal, Vol. 6 No.2 June 1991 p.125-153. Contrary to his assertions, the question of the correct balance of allocation of rights and access have long been recognised and efforts have always been taken to come up to a suitable solution. These deficiencies cannot ignore the fact that exclusive rights over the so called economic activities of "ideas" are sustainable.

²⁰ "Ownership is not a single concrete entity but a bundle of rights and privileges as well as of obligations." (Union Oil Co. v. State Bd. of Equal) (1963) 60 Cal. 2d. 441, 447).

of ownership²¹. This area of non exclusion is described as "no duty" within Hohfeld's schematic correlation of right and duty²².

With the above discussion, we continue with a brief outline of limitations imposed in Intellectual Property rights relating to copyright, trade marks and patents.

3 Delimitation drawn in the name of "public interest"

3.1 Limits in copyright

Copyright presents the clearest case of a property right in which the balancing of private rights, free access and public interest is most demanding²³. Justice Yates described this tension in the historical decision of Millar v. Taylor²⁴:

"all property has its proper limit, extent and bounds....the legislature had no notion of any such things as copyrights as existing for ever at common law:...on the contrary, they understood that authors could have no right in their copies after they had made their works public; and meant to give them a security which they supposed them not to have had before....."

The 1709 Statute of Anne itself represents a striking balance between the author's right and public rights to have easy access to a work. by providing 21 years for published works, 14 years for unpublished work and the stipulation that the price of

²¹ "Since property or title is a complex bundle of rights, duties, powers and immunities, the pruning away of some or a great many of these elements does not entirely destroy the title..." People v. Walker (1939) 33 Cal. App. 2d 18, 20.

²² See Bainbridge, David I, Intellectual Property, 2nd ed. (1994) Pitman Publishing, London. According to this conception intellectual property is defined within Hohfeld's correlations and oppositions. Intellectual property confers an exclusive right to certain kind of 'ideas' and at the same time imposing a correlative duty on others not to infringe this right. There are also associated privilege and 'no right'. This privilege comes in the form of the privilege given by the law to the owner to exploit his intellectual property. The realm of 'no right' includes the exclusions and exemptions which are drawn by the law to reach a balance between conflicting interest. pgs.11-12.

²³ See the various arguments forwarded by Davies, Gillian, in Copyright and Public Interest, Weinheim, New York, 1994 to support her proposition that the main objective of copyright laws, from historical perspective is principally to achieve a suitable balance of the various conflicting interests.

²⁴ (1769) 4 Burr. 2303. at.2390.

the book is not set too high²⁵.

The concept of copyright has drastically changed since its inception. On the one hand the scope of copyright is enhanced and new subject matter is protected.²⁶ While on the other hand, technological progress has made it easier to copy and duplicate and hence, easier to undermine Intellectual Property rights. In the international sphere, we see the call for the tightening of copyright enforcement and a greater campaign against piracy and counterfeiting. Clearly, it is apt that the intensification of copyright control is adjusted with proper control and counterbalanced with proper access to certain acceptable activities.

3.1.1 Copyright, education and fair dealing

Among the limits set upon copyright to achieve this delicate balance of dissemination of knowledge and the protection against piracy and copying are the limits due upon the temporal nature of copyright and the evolution of the concept of "fair use"²⁷. In terms of duration, even though the given duration of copyright has been extended progressively since the 1709 Statute of Anne, the arguments which are forwarded against perpetual proprietary rights have always been that the public have a right to

²⁵ The preamble of the Statute of Anne 1709 states the objective of copyright "for the encouragement of learned men to compose and write useful subjects". See also Chapter XIX, Section IV "if any bookseller or booksellers, printer or printers, shall....set a price upon, or sell, or expose to sale, any book or books at such a price or rate as shall be conceived by any persons to be too high and unreasonable: it shall be and may be lawful for any person or persons, to make complaints thereof" to the Archbishop of Canterbury, Lord Chancellor (or to a number of specified dignitaries of church and bench) who were given powers to enquire into the price and "to limit or settle the price of every such printed book...according to the best of their judgements"

cf. the Copyright clause of the American Constitution which states the objective "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries".

²⁶ For a critical discussion on the expansion of copyright and the necessary implications and ill-consequence arising thereto, see Ricketson, Sam New Wine into Old Bottles: Technological Change and Intellectual Property Rights Prometheus, Vol 10, No.1, June 1992 p.53-82.

²⁷ See the arguments forwarded by Ricketson against the plan in the U.K to extend the duration of copyright to 70 (p.m.a) in the effort to harmonise copyright within the E.E.C. Ricketson, Sam, The Copyright Term, IIC Vol 23 No.6 (1992) p.753-785.

the access of a work as soon as possible. The argument is that the faster a work falls in the public domain, the faster the work is freely accessible to all. Another concern against long duration is the possibility that the owner of a work may unreasonably create an obstacle to the dissemination of the work.

Secondly, the law tolerates certain kinds of conduct such as "minor borrowing" for educational, private and personal use, news coverage, comment and criticism, research, and certain forms of incidental copying on the basis of "fair use" or "fair dealing"²⁸. The law has developed the area of exemption which are necessary to avoid unnecessary hardship to the dissemination of knowledge and the right of the public for information. The exceptions find their blueprints in international treaties governing copyright such as the Berne Convention and GATT and may vary from one jurisdiction to another²⁹. Normally the exceptions do not run counter to the 'normal expectations of the owner of the work'³⁰.

3.1.2 Reproduction of work and non-voluntary licensing system

The law allows reproduction of work through a non voluntary licensing system. The basic premise of this scheme is that it is the most practical means of reproducing works without the hurdle of seeking authorisation of the owners of the work. The most striking example is in the area of reproduction of broadcasting and cable transmission. For these works, subject to certain remuneration, a work may be used

²⁸ Under the Malaysian Copyright Act, the provision dealing with exceptions to copyright is S.13 (2). The various instances of exceptions are too numerous to be illustrated here.

²⁹ See Article 9(2) of the Berne Convention which provides:
"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the authors." This policy objective is also recognised by the GATT Trips's agreement in more or less the same language. See A.13 of the Agreement.

³⁰ See Article 13 to the GATT Trips Agreement and A.9(2) of the Berne Convention as cited above.

without the authorisation of the author³¹. For these kind of works, licensing schemes are the most suitable means of control as it is impossible for the user to negotiate with all the right owners involved.

Another form of mandatory licensing scheme is that which is formed to resolve the problem posed by modern photocopying. The law recognises that, up to a certain extent, the public has a right to reproduce a work cheaply and easily for private and educational use³². Malaysia would have her first licensing scheme for photocopying soon with the setting up of a licensing body for copyright written work³³.

3.1.3 Public domain and non-copyrightable work

The area of non-copyrightable work, presents another interesting limit to the concept of copyright. Inclusive in this area are the idea/expression dichotomy³⁴, facts,

³¹ The validity of non voluntary licensing system can be supported by A. 11 bis(2) and 13(1) of the Berne Convention, Paris Act 1971.

Article 11 bis (2) states that it shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraphs may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

Article 13(1) states that each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any works, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any, but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which in absence of agreement, shall be fixed by competent authority".

³² See A.9(2) of the Berne Convention.

³³ From an interview with the Intellectual Property Unit in the Ministry of Domestic Trade and Consumer Affairs. This private company is awaiting approval by the Registrar of Societies.

³⁴ The approach and understanding of the distinction between idea and expression vary in different jurisdictions. In the United States, the distinction was given statutory recognition in the US Copyright Act of 1976 S.102(b). The section further excludes from copyright protection any 'idea, procedure, process, system, method of operation, concept, principle or discovery' regardless its form of description or illustration. In the U.K there is no similar provision, except that some of these principles are accepted through judicial recognition. However, the courts in the U.K do not interpret this requirement strictly, preferring to reward 'sweat of the brow' rather than allowing the reaping of other's work. See Inala Industries Pty. Ltd & Ors v. Associated Enterprises Pty Ltd (1960) Qd.R 562 and other cases concerning compilations and tables. In Malaysia, the only requirement is for a work to be "written down, recorded or otherwise reduced to material form". See S.7(3)(b) Malaysian Copyright Act.

methods, systems, utilitarian objects, titles, themes, plots, words, short phrases and idioms, literary characters and styles. The approach and understanding of the 'uncopyrightable part' differs in the United States, the United Kingdom and other jurisdictions³⁵. Despite these differences, the idea behind excluding these elements from the domain of copyright is the need to reward a certain amount of creativity and originality³⁶.

The need to differentiate between the 'idea' underlying a work and the 'expression' of that work will not be easy in works of technical character particularly with the extension of copyright to information technology. In addition, extending copyright to the function of a work would obliterate the main purpose of copyright and the dividing line between copyright and patents. In Goodyear Tire & Rubber Co. & Anor v. Silverstone Tire & Rubber Co. Sdn Bhd.³⁷ the High Court of Kuala Lumpur rejected the attempt to use copyright to stop copying of the essential features of an Aquatrip tyre allegedly through the reproduction of the two dimensional drawings of the tyre. The tyre had a unique feature which had won a number of awards for being 'a revolutionary and breakthrough product of the first kind' in the tyre industry around the world. Abdul Malik J, rejected the attempt to use copyright to estop copying of the function of the tyre. In his submission he stated,

"It is my view that what the plaintiffs are in essence asking to protect the idea of the function and not its artistic value."³⁸ He further held that the principle on which the tyre functions, which the plaintiffs were trying to protect, constituted the idea of the work and hence was not protectable under copyright.

³⁵ See Pessa, Perttu, Evaluating The Idea-Expression Dichotomy: Rhetoric Or A Legal Principle, Computer Law and Practice, March/April 1991 p.166.

³⁶ The law requires however a minimal amount of originality in the sense that it is the work of the author and is not copied from elsewhere. The yardstick here is not originality of idea and thought. See University of London Press, Ltd v. University Tutorial Press (1916) 2 Ch. 601. For Malaysian judicial recognition to the principle, see Lau Foo Sun v. The Government of Malaysia (1974) MLJ 28, Hardial Singh a/l Hari Singh v. Daim Zainuddin & 56 Ors (1991) 1 CLJ 116.

³⁷ (1994) 1 MLJ 348.

³⁸ P.354 of the case, op.cit.

Another view is that the limits posed by the concept of "public domain" are important as it "acts as a device that permits the rest of the system to work by leaving raw material of authorship available for authors to use".³⁹ One factor is the reluctance to allow the monopolisation of facts, common words, methods and system. Had it been otherwise, the process of authorship would not have been possible and the concept of originality, inconceivable⁴⁰. The dividing line between what should be protected and what should not, is not a simple task, particularly in works of compilation. One method is to give copyright to the whole work once the requirement of originality is satisfied⁴¹. Another method which was recently taken by the U.S Supreme Courts case of Feist⁴² was to accord protection to only the original parts.

3.1.4 Wider conceptions of 'public interest'

Public policy reasons have been used to refuse copyright protection such as in relation to publication of government secrets or confidential information. This defence is a narrow one. As in the case of Attorney General v. Times Newspapers Ltd⁴³, the Court had to balance between dissemination of a work which contained certain allegations of unlawful activities by M.15 or to suppress publication of confidential information. Lord Oliver of Aylmerton aptly observed on page 1021 that:

³⁹ Litman, Jessica, The Public Domain, Emory Law Journal p. 968 op.cit. She argued that the concept of "public domain" is the most important limits ever set on copyright.

⁴⁰ The judicial reluctance in accepting property rights on 'facts' and 'information' leads to the problem of protecting 'unfair taking' of databases. Efforts have been taken in the EEC to create a 'sui generis' right to databases modelled on the common law principle of 'misappropriation of rights'. The rights are called 'unfair extracting rights'.

⁴¹ See Football League v. Littlewoods Pools Ltd (1959) 2 All E.R. 546.

⁴² Feist Publications, Inc. v Rural Tel. Service Co. (1991) U.S 113 L Ed 2 d 358, 111 Sup. Ct. 1282. In this case the Supreme Court held that alphabetical listing of subscribers in telephone directory white pages is not copyrightable. Feist limited copyright in directories to the work's original and creative elements of arrangement and selection and excluded protection to underlying data. In the U.K in a recent case, Ibcos Computers Ltd Anor v. Barclays Mercantile Highland Finance Ltd (1994) FSR 275, the Chancery Division had restricted the application of Feist's filtration test in the U.K. Mr. Justice Jacob noted that the United States test of abstraction and filtration of the core of protectable expression as not being helpful in English law (p.277).

⁴³ (1991) 2 WLR 994.

"Whilst newspapers have a legitimate interest and an important and necessary function in disseminating information, their rights are not higher than the right of a private individual to preserve the inviolability of that which he has imparted to another under another obligation of confidence and ought not to be permitted to override that right save where the public interest compulsively demands".

Perhaps, the most controversial application of the defence of public interest to refuse copyright protection is in the case of the former premier Baroness Margaret Thatcher's memoirs. The Daily Mirror succeeded in their defence of 'public interest' in publishing extracts of Baroness Margaret Thatcher's memoir. Justice Forbes upheld this defence on the basis that

"the public is entitled to have it placed before it at the earliest available opportunity and particularly during a period of time when much political interest will be focused on the activities of the Conservative party in Blackpool, when no doubt matters such as this will attract political comment by various public figures.." and latterwhose views are, as far as I can see, matters of considerable public interest and therefore of considerable interest to the public, not of the type of interest that does not give rise to the appropriate defence, but legitimate public interest or at least, strongly arguably so"⁴⁴.

3.1.5 Public lending rights

The same balancing exercise is involved in the arguments advanced for the establishment of public lending rights. The proponents of public lending rights argue that the commercial rights of an author need not necessarily be prejudiced when his work is being disseminated through public libraries. As far as the copyright laws are concerned, lending of books is not a commercial activity. However, by the establishment of such a system, an author will be compensated when his work is

⁴⁴ On appeal, allegation of breach of confidence was considered. The court was not persuaded with this argument and held that the information in the book was not confidential in any sense that the public was never intended to learn of it. See the article by Lightfoot, L, How The Law Failed To Protect Thatcher From The Predators, The Sunday Times, 10th. October 1993 p.6.

being borrowed from the public library. Such a system will basically improve the welfare of authors. Opponents to the system argue that the costs of rewarding the author in such instances should be borne by the central government and not individual consumers⁴⁵.

As far as normal exploitations of intellectual property are concerned, this is an area which is not regulated in Malaysia and in many other jurisdictions. In Malaysia, there have been suggestions that the Ministry of Domestic Trade and Consumer Affairs should regulate the dealings between artists and auctioneers pertaining to the sale of paintings and other works. The Malaysian Artists Association urged the Ministry to draft a law to ensure artists get a fair proportion of the profits from the auction of their works. The policy of the Ministry is that agreements and payments between artists and their auctioning agents were personal matters and should not be interfered with⁴⁶.

3.2 Limits in trade mark right

3.2.1 Trade mark as an 'information tool'

Trade marks which are not capable of distinguishing goods and services, identical to or similar with a registered mark, and those which are likely to cause deception and confusion⁴⁷ cannot be registered. It has often been said that the basic premise of this principle is the need to protect consumers.⁴⁸

⁴⁵ See Seltzer, Leon E, Exemption and Fair Use in Copyright; The Exclusive Rights Tensions in the 1976 Act., (1977) Harvard University Press, U.S. In the U.K, the cost of public lending rights is borne by the Department of National Heritage. The basis of this right is the simple concept that the authors earn their living by royalties on each copy of the book sold. When their books are borrowed from public libraries, the result is unfair to writers since there is only a single royalty but dozens of readers. To correct this unfairness, public funds are paid to authors in relation to the lending (or stocking) of their books by libraries. See the report of the Public Lending Right Review (1992-1993), the Registry of the Public Lending Right (1993) and Public Lending Rights in practice, a report to the advisory commission, report by John Sumsion, 2nd. ed, June 1991.

⁴⁶ NST , Friday, May 13, 1994.

⁴⁷ See S.10, S.11(1), S.12(1), S.14(a), S.19 of the Malaysian Trade Mark Act.

⁴⁸ See the article by Cornish & Phillips, The Economic Function of Trade Marks : An Analysis with Special Reference to Developing Countries, (1982) IIC Vol 13 N. 1/82 p.41.

3.2.2 Trade marks and consumers

There has been a call for the delimitation of trade mark rights where the lawful exercise of the mark jeopardises the consumer's valid expectation of trade mark goods. The underlying philosophy is that as trade marks serve the consumer's interest, the exercise of a trademark right should also serve this purpose. This understanding calls for circumscribing trade marks in instances where grave injustice occurred to the consumers⁴⁹. This view has not been favourably received in the U.K and in other common law countries⁵⁰. In relation to this, under the recent amendment to the Malaysian Trade Mark Act 1986, a registered proprietor is required to monitor and check the quality of goods manufactured by a registered user⁵¹. The amendment did not go so far as to give consumers the necessary redress against misuse of a mark in cases of diminution of quality. The new amendment only provides for the cancellation of the mark, in such instances, upon application of the registered proprietor⁵². Nor does it penalise the registered proprietor for such misconduct⁵³.

⁴⁹ See Sanders & Maniatis, A Consumer Trade Mark: Protection Based On Origin And Quality, (1993) 11 EIPR p.406.

⁵⁰ The case of Colgate-Palmolive Ltd v. Markwell Finance Ltd, (1989) RPC 497, is not a proper case to advance the proposition that the function of trade marks is the enhancement of consumer's welfare. The facts and ratio of the case illustrate instead the attempt of narrowing down the concept of 'parallel importation' where the grey market goods are of inferior quality.

⁵¹ S.48(1) reads:

Subject to the provision of this section, where the registered proprietor of a trade mark grants, by lawful contract, a right to any person to use the trade mark for all or any of the goods or services in respect of which the trade mark is registered, that person may be entered on the register as the registered user of the said trade mark whether with or without any conditions or restrictions, provided that it shall be a condition of any such registration that the registered proprietor shall retain and exercise control over the use of the trade mark and over the quality of the goods or services provided by the registered user in connection to that trade mark.

⁵² See S.49 (1) and (2) which allows for the variation and the cancellation of the registration of registered user upon the application of a registered proprietor.

⁵³ S.48 (5) to be read together with 48 (6). The use of the mark by the registered user in instances where the registered proprietor fail to impose satisfactory quality control will not be deemed to be the use of the registered trade mark by the registered proprietor.

3.2.3 Genericism of trade marks and the problem of monopoly over common words

The law recognises that there are certain marks and trade descriptions or names which should not be the subject of monopoly⁵⁴. Included in this list are marks of geographical indications and appellations of origin. Appellation of origin refers to the 'geographical name of a country, region or locality which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical area, including natural and human factors'⁵⁵. In contrast, geographical indication refers to that particular quality of the foodstuff which is attributable to the area of production. While the argument that geographical indications should not be monopolised by a single trader, misuse of such indications lead to confusion and deception of consumers⁵⁶.

From the viewpoint of consumers, a non-geographical mark should lose trade-marks protection when it becomes generic and has become in everyday language the common name of a product. This principle has been given recognition in the U.K, U.S and Australia.⁵⁷ The genericisation of a mark depends on local usage and hence different results occur in different jurisdiction. The best example is the word 'champagne'. In New Zealand, this word "has a special impact or impression on ordinary average New

⁵⁴ See Kolia, Marina, Monopolising Names: EEC Proposals on the Protection of Trade Description of Foodstuffs, (1992) 7 EIPR 233. Effort is on the way in the E.U to regulate the use of geographical indications and appellations of origin.

⁵⁵ Article 2(1) of the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, Oct.31, 1958.

⁵⁶ The E.C Commission had come up with a new regulation to protect geographical indications. See EC Regulations On The Protection of Designation of Geographical Origin, C.Reg. 2081/92, OJ 1992 L208/1. The framework of the regulation exceeds that of Lisbon Agreement in that it provides protection for 'indications of specific character as well'. The latter refers to products which presents 'specific characteristics which distinguish it clearly from similar products'. See Certificates of Specific Character of Foodstuff, C.Reg 2082/92, OJ 1992 L 208/9. For full discussion, see, Kolia, Marina, Monopolising Names of Foodstuffs: the New Legislation, (1992) 9 EIPR 333.

⁵⁷ See Johnson & Johnson Australia Pty Ltd v. Sterling Pharmaceuticals Pty Ltd (1991) 21 IPR 1 , where the word 'Caplets' (capsule/tablet) is so inherently descriptive and that it is incapable of functioning as an indication of origin.

Zealanders"⁵⁸. Hence, in New Zealand, attempts to sell 'Australian Champagne' is held as a misrepresentation of the goods as the word 'Champagne' exclusively refers to wine of a particular region in France. In Germany the usage of the word 'Champagne' to describe mineral waters has been held as devaluing the reputation of the real French's product by comparing water to champagne. To the Court the word 'Champagne' is a symbol of luxury and extravagance and must be viewed as a metaphor of 'elegance', 'exclusiveness', 'expensiveness' and a status symbol⁵⁹. On the same line of arguments, the U.K courts in two cases; J Bollinger v. Costa Brava Wine Ltd⁶⁰ and Taittinger V. Allbev Ltd⁶¹, held that the practice of trading on the reputation of the name 'Champagne' as unacceptable.

3.4 Limits in patent rights

Besides the accepted limits to patentable subject matter and duration, patent rights are also limited to the specification of the application⁶². The law also recognises the right to use a patented product for scientific research⁶³. The basic premise to this

⁵⁸ See Jeffries J, in Comite Interprofessionel du Vin de Champagne v. Wineworths Group Ltd (1991) 2 NZLR, 432, 446.

⁵⁹ See EIPR (1988) 8 D-177. For cases which decided otherwise see the case in Canada in Institut National des Appellations d' Origine des Vins v. Andres wines Ltd (1988) 40 DLR (4th) 239 and (1990) 71 DLR (4th) 575, this word has lost its exclusive protection. In Italy, the court went further to find that the usage of the word 'champagne' to describe bathfoam was not as to generate confusion to consumers, see EIPR (1990) 1 EIPR D-5.

⁶⁰ (1960) Ch.262; (1961) 1 WLR 277, reversed by 1961 R.P.C 116 where the court prevented the sale of sparkling Spanish wine under the name Spanish champagne..

⁶¹ (1992) IPD 15082, (1993) FSR 641, reversed by (1993) F.S.R 641 at 659 where the Court of Appeal held that the use of the word 'champagne' in connection to beverages which are not in truth 'champagne' and which have no connection with 'champagne', could well be a serious cause of damage to the reputation and goodwill attached to the word..

⁶² The details of specific non patentable subject matter, duration and method of construction of patent application are beyond the scope of this chapter.

⁶³ See S.37(1) of the Malaysian Patents Act, 1983. This defence of experimental use has been held in Roche Products Inc. v. Bolar Pharmaceutical Co. Inc., 221 USPQ p.397 "where it is made or used as an experiment, whether for gratification of scientific facts, or for curiosity, or for amusement, the interest of the patentee are not antagonised, the sole effect being an intellectual character in the promotion of the employer's knowledge in the relaxation afforded to his mind.

exception is similar to that of educational use of copyright work. Patent rights should not be an obstacle to further development of science and technology. Such defence applies to pure scientific research and not for experimentation for commercial purposes⁶⁴.

4. Limitations due to ethical conceptions.

Ethical reasons do, on a narrow basis, constitute a yardstick for the granting of rights in common law jurisdictions. On this basis, the test of ethical conceptions, public morality and public order is substantially narrower than those provided by the dictates of the Shari'ah. This part will outline, the role of ethics and its influence on the determination of subject matter of protection of copyright, trade mark and patents.

4.1 Copyright and censorship

In the early days of copyright legislation, copyright functioned simultaneously as a form of censorship. The courts were not reluctant to deny copyright on grounds of morality. On this ground, works which were considered as immoral according to common standards of morality were refused protection. Even though this ground may no longer be relevant to most jurisdictions, its significance can still be seen in many Muslim countries. However, this principle do not find support from both the Berne Convention and the GATT's Trips Agreement⁶⁵. The underlying policy is that it will be against the conception of 'natural justice' that 'offensive works' on general grounds of morality are discriminated against. Another view is that the denial of content-based restrictions ensures compliance with the trite requirement that the preserve of copyright is merely the form of expression, not the content or the ideas⁶⁶. Despite

⁶⁴ Roche Products Inc. v. Bolar Pharmaceutical Co. Inc., op.cit. The issue in this case is whether experiments on a drug conducted with a view to adaptation of patented invention to satisfy the premarketing requirement tests on drugs safety and efficiency for business purposes falls under the exception of 'experimental use'. The court held no.

⁶⁵ See A.9 and 13 of TRIPS and A.1-21 of the Berne Convention.

⁶⁶ See the views by Howell, Robert G, Copyright & Obscenity: Should Copyright Regulate Control, IPJ, Vol.8, No.2 p.139-188.

this, it is recognised that there may be valid grounds in refusing to protect copyright and even prohibiting the circulation of certain work. The Berne Convention itself reserved the right of individual countries to self-regulate the circulation of any works⁶⁷. The language of A.17 is very wide and nowhere in the Convention does it define the circumstances where such an exercise can be undertaken⁶⁸.

The Malaysian Copyright Act 1987 do not contain any content- based restrictions on written works. This position is illustrated in the Federal Court's decision in Asia Television Ltd. Anor V. Viwa Video Sdn. Bhd.⁶⁹ All works are given automatic recognition. The Federal Court rejected arguments that non compliance with the Films (Censorship) Act vitiated the protection awarded under the Copyright Act. While this contention may be legally valid and preferable due to our commitment in the Berne Convention, strict requirements of the compliance of the censorship laws would be more consistent with the Islamic values and sentiments of the majority of the population in Malaysia. This is a preferable view as at present, due to strict rules and requirement of censorship, most works which may offend Islam and general principles of ethics and morality may not find an audience in Malaysia.⁷⁰

⁶⁷ This derogation is affirmed in the GATT Trips's agreement. See A.9, "Members shall comply with Articles 1-21 and the Appendix of the Berne Convention (1971).

⁶⁸ Article 17 reads: "The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may found it necessary to exercise that right."

⁶⁹ (1984) 2 MLJ 407. In this case it was argued that video tapes which are uncensored should not be given copyright recognition in Malaysia. The learned judge held that as no certificates of approval were obtained as required under the Films (Censorship) Act there was no valid publication of the films within the provision of the Copyright Act as the publication in Malaysia must be a lawful one. He accordingly adjudged the publication of the films by the appellants to be unlawful, illegal and an offence punishable under the Films (Censorship) Act and decided in effect that no copyright had been acquired as a result. On appeal to the Federal Court the contentions were rejected. It was held on appeal that there was no prohibition in either of the Acts which would preclude the appellants from acquiring copyright if they were otherwise qualified although they were in breach of the provisions of the Film (Censorship) Act which is concerned only with criminal liability and provides a penalty for breach of its relevant provisions. The court further held that the non-compliance with the provisions of the Film (Censorship) Act does not affect the acquisition of copyright under the Copyright Act. There is no express or implied prohibition linking the respective requirements of the two statutes and accordingly no nexus to justify reading these conjunctively and importing the requirements of one condition as a condition precedent to the operation of the other.

⁷⁰ Such as Salman Rushdie's Satanic Verses which is considered as blasphemous.

4.2 Trade mark and morality

Ethical issues may also find favour in trade mark laws, though with varying emphasis. Marks which are scandalous or morally offensive are normally not accepted⁷¹. Normal notions of ethics and morality require that such marks be left out from the domain of protection⁷².

4.3 Patents, biotechnology and the dimensions of ethics

Old cases in the U.S state the importance of ethical issues in the granting of patent rights. On such a basis, illegal, immoral and harmful inventions have been refused on the ground of lack of utility. Among inventions which were refused were gambling devices and products or processes useful only for perpetrating fraud⁷³. With the changing perception of morality and the movement against a content-based filter for patent rights, this view has changed considerably.

⁷¹ See A.14(a)(2) & (3) of the Malaysian Trade Mark Act. See also Article 8 of the Jordan Trade Mark Law which provides for the non-registration of marks that are contrary to public order and morality, that are designed to deceive the public, that encourage unfair competition, or that contain false indication of origin.

⁷² See the cases of Hallelujah Trade Mark (1977) R.P.C. 605 and La Marquise's Application (1947) R.P.C. 27. In the former case, the application of the word "hallelujah" was refused for women's clothing. The court in this case observed that

"to be contrary to morality, the use of a mark would have to offend the generally accepted mores of the time, while the adverse use of the Registrar's discretion would be warranted if registration would be reasonably likely to offend persons who might be in a minority in the community, yet be substantial in number".

In La Marquise's Application (1947) R.P.C 27, the court allowed the application to register the word 'oomphies' for shoes. The Registrar had earlier objected to the registration on the basis that the word 'oomph' was an American slang term for sex appeal and hence its application to shoes would have, upon morbid and abnormal people, an erotic effect. The Court held to the reverse as the word 'oomph' would not in all circumstances carried a connotation contrary to public morality.

⁷³ See Chisum, Patents S.4.03 on the requirement under the old Patent law that an invention had to be useful to be patentable. In Lowell v. Lewis (1817) 15 F.Cas 1018 (no.8568) CCD Mass 1817 Justice Story indicated that utility would be lacking if an invention was "frivolous or injurious to the well-being, good policy, or sound morals of society. In Brewer v. Lichtenstein (1922) 278 F.512 (7th. Cir 1922) the court rejected a patent claim involving a "punch board" with no apparent utility other than as a lottery. In Richard v. Du Bon (1900) 103 F.868 (2nd. cir, 1990), the patent involved a process of artificially producing spots on tobacco leaf used to wrap cigars. The court held that the invention did not satisfy the requirement of novelty as it did not improve the quality of the leaf but to deceive the consumers into thinking that the leaf were of good quality..

In other jurisdictions, other than the U.S, particularly in the common law system, ethical issues are gaining support particularly in the area of patenting of inventions relating to animal and human tissues⁷⁴. Due to the development of biotechnology, by which inventions using biological materials are made possible, fundamental reservations on this type on inventions developed. In the E.C for example ethical considerations relating to biotechnological inventions are embodied in A.53(a) of the EPC.⁷⁵

5. Limitation imposed to avoid abuse of right.

In section 2 and 3 above, we have discussed the various forces within Intellectual Property involved in the process of circumscribing these rights. Despite these limitations, there are other tensions involved in Intellectual Property rights. Various methods have been adopted to extend the exclusive power beyond that contemplated by Intellectual Property rights, particularly relating to licensing agreements. Within this perspective, we now proceed with the discussion of doctrine of misuse of copyright and patent in the United States. The doctrine, its application, and its independence from anti trust rules, is pertinent to our present study as its similarity with Islamic conception of '*haqq*' and '*su isti'mal al haqq*' can be seen. From this point of view, copyright and patent is confined according to its function.

5.1 Doctrine of misuse of copyright and patent.

In the United States, the underlying policy that Intellectual Property should serve the basic function of promoting progress as embodied in Article 1, section 8, clause 8 of the Constitution can be seen through the development of the concept of misuse of patents and copyrights. The evolution of this concept, which runs parallel to the evolution of anti-trust concepts take place through judicial decisions and not through

⁷⁴ See Moufang, R, Patenting of Human Genes, Cells and Parts of the Body?- The Ethical Dimensions of Patent Law., IIC, Vol 25 No.4/94 p.487.

⁷⁵ The position of ethical consideration in patent laws and the normative construction of A.53(a) will not be dealt with in detail here. See Ch.7 for elaborate analysis.

legislation. The relationship between antitrust law and the misuse doctrine is a complex one.⁷⁶ The philosophy behind this concept is that copyright and patents should be circumscribed when the exercise of these rights are inconsistent with the public policy embodied in their grant. This policy was aptly described by the Supreme Court in Morton Salt Co. v. G.S. Suppinger⁷⁷ in the following words;

".....But the public policy which includes inventions within the granted monopoly excludes from it all that is not embraced in the invention. It equally forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant"⁷⁸.

This doctrine is only invoked as a defence. The basis of this doctrine is the equitable concept of unclean hands. Hence, on that basis, the court will refuse action against infringement if the right-owner himself is tainted with illegality. The doctrine is normally used to curb unlawful extensions of patent rights especially those involving anti-competitive practices such as tying arrangements, price fixing and covenants not to compete⁷⁹. In a later case of Lasercomb America, Inc. v. Reynolds⁸⁰, the concept of misuse was extended into copyright. In this case the patentor's licensing term in restricting the licensee from improving the licensed product and developing competing

⁷⁶ See United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457, 465, 77 S.Ct. 490, 494, 1 L.Ed.2d 465 (1957); Morton Salt Co. v. G.S. Suppinger, 314 U.S. 488, 62 S.Ct. 402, 86 L.Ed. 363 (1942); United States v. Loew's, Inc., 371 U.S. 38, 44-51; United States v. Paramount Pictures, Inc., 334 U.S. 131, 157-159, 68 S.Ct. 915, 929-30, 92 L.Ed.2d 1260 (1948); Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 865 & n.27 (5th. Cir.1979), cert. denied, 445 U.S. 917, 100 S.Ct. 1277, 63 L.Ed.2d 601 (1980).

⁷⁷ 314 U.S. 488, 62 S.Ct. 402, 86 L.Ed. 363 (1942). In this case the plaintiff licensed his salt-depositing machine on the condition that the defendant use only salt tablets produced by him. The Supreme Court held that, as a court of equity, it would not aid Morton in protecting its patent when Morton was using that patent in a manner contrary to public policy.

⁷⁸ At 490-92, 62 S.Ct. at 404-405.

⁷⁹ For further analysis, see Goldstein, Paul, Copyright, Principles, Law & Practice, Vol II, Boston, Little Brown (1989). pgs.177-182.

⁸⁰ 911 F.2d 970 (4th. Cir.1990). The appellate court found misuse in the license terms that extended the prohibition against developing competing products beyond the duration of copyright protection, as well as the extension of the scope of the restriction on creative activity to include all officers, directors and employees of the licensee.

products was described as "violative of the public policy embodied in the grant of a copyright". The United States Court of Appeal observed that the philosophy behind copyright was parallel to patent; i.e "the public benefits from the efforts of authors to introduce new ideas and knowledge into the public domain"⁸¹. The Appellate Court found in no uncertain terms that the rationale in the concept of 'misuse' of patents should also apply to copyrights. On this basis "the granted monopoly power should not extend to property not covered by the copyright"⁸². The Court further observed that misuse of copyright need not be a violation of antitrust law in order to be protected as the equitable defence to an infringement action; the question is not whether copyright is being used in a manner violative of antitrust law but whether copyright is being used in manner violative of public policy embodied in the grant of copyright⁸³.

The application of this doctrine was narrowed down in Mallinckrodt, Inc. v. Medipart Inc⁸⁴. The Court considered the validity of earlier decisions of misuse of the patent doctrine on cases of price-fixing and tying in. While upholding them, the Court was reluctant to extend them to cases of valid restrictions on the use of patented products⁸⁵. In this case the restriction of single use of patented product was held to be reasonable on the basis of a "rule of reason" and on the basis that the restriction was inevitable for reasons of health, safety, and efficacy and it was not violative of

⁸¹ P.975 op.cit.

⁸² P.976 op.cit.

⁸³ See the discussion on pages 977 and 978 of the case, op.cit.

⁸⁴ 976 F.2d. 700 (Fed. Cir. 1992), rev'g 15 U.S.P.Q 1113 (N.D III 1990). In this case the patentee, sold its device that served as a container of radioactive material for application in diagnostic chest x-ray procedures to hospitals with a single use restriction. The defendant, offered hospitals a recycling services for these devices at less than half the cost of a new one. The plaintiff sued the defendant for patent infringement and on 'first sale doctrine'.

⁸⁵ The Court observed at p.708 that;" should the restriction be found to be reasonably within the patent grant i.e that it relates to subject matter within the scope of the patent claims, that ends the inquiry. However if the anticompetitive effects is beyond the power to exclude, these effects do not automatically impeach the restriction. Anti competitive effects that are not per se violation of law are reviewed in accordance with the rule of reason. Patent owners should not be in a worse position, by virtue of the patent rights to exclude, than that owners of other property used in trade."

public policy.

6. Limitation imposed to correct anti-competitive effects of exploitation of intellectual property rights

With the exception of the United States above through its doctrine of abuse of copyright and patent right, the prominent way of resolving the anti-competitive effects of Intellectual Property are through competition policies. These rules are designed to eliminate anti-competitive practices in licensing agreements, both relating to vertical and horizontal agreements. The mechanism, philosophy and understanding of competition rules differs from one jurisdiction to another. It will not be possible to elucidate here the various spectrums of thought and economic theories. The presentation here, thus, is confined to Malaysia, the United Kingdom and the United States.

6.1 Competition Law in Malaysia

Competition is an area which is under study in Malaysia. Unfortunately not much is known of the proposed Competition Act as it is still being drawn up, except that it will be similar to the competition laws of the U.K. Latest reports announced that the Act will be tabled as soon as it is ready. The Government has also responded warmly to the suggestion by the Federation of Malaysian Manufacturers (FMM) to hold discussions with the private sector over the proposed Act⁸⁶. This Act will not only regulate monopolies and unfair trade practices such as cartels, oligopolies and dumping of goods, but will also provide a policy on competition⁸⁷. This is deemed to be necessary as from a study conducted by the Central Bank (Bank Negara), it was shown that oligopoly had increased from 77% in the 1979 to 80 % in 1989. With the liberalisation of trade through trade agreement under GATT, there is a fear that the figures will increase even further. At the moment, licence agreements with foreign

⁸⁶ See NST Friday, May 13, 1994.

⁸⁷ NST Jan.26 1994.

companies are screened by the Ministry of International Trade and unfair trade practices are filtered through this process⁸⁸.

6.2 Antitrust and competition

A main thrust of anti trust principles is to rectify practices resulting from the exploitation of Intellectual property rights which are deemed to be anti competitive. Most if not all of these policies grew specifically from the belief that consumers mainly gain if perfect competition is maintained. According to this notion, both antitrust laws and patents have a common central economic goal that is to maximize wealth by producing what consumers want at the lowest cost⁸⁹. It is this need for economic resources to be allocated between different goods and services in precisely the quantities which consumers wish (allocative efficiency) using the lowest cost possible (or productive efficiency) that anti trust principles are aiming to achieve. In economic terms, the exercise of Intellectual property may lead to certain monopolistic tendencies which may give rise to "output restriction" by diverting production from more urgent need or from legal rules requiring inefficient methods of production."⁹⁰ From here it is apparent that certain behavioral constraints need be imposed to control

⁸⁸ See The Policy and Guidelines on the Transfer of Industrial Technology, a guideline prepared by the Malaysian Industrial Development Authority, Malaysia. The guideline explicitly provides that agreement with foreign partners should not contain provisions that impose "unfair and unjustifiable restrictions or handicaps" on the licencees or that would be "prejudicial to the national interest". However, the guideline do not spelt out clearly what would be considered as "unfair and unjustifiable restrictions".

⁸⁹ For a lengthy discussion on the weaknesses of the economic theory of perfect competition, see Whish, Richard, Competition Law, 3rd. ed, (1993) Butterworths, London, Edinburgh.

⁹⁰ Bowman, Ward.S, Patent and Antitrust law; A Legal and Economic Appraisal, (1973) The University of Chicago press, Chicago and London. Bowman's articulation of the 'consumer welfare test' reflects the Chicago school of thought of promoting the use of economic theory and analysis in evaluating all instances of anti-competitive practices. Bowman was sceptical of the perceived danger of vertical agreements which to him may be a method of maximizing the competitive advantage afforded by patent. These vertical agreements which are contracts not between competitors but between suppliers and their customers or between buyers and their sources of supply. Many patent licensing contracts such as tie-in sales, exclusive licensing, territorial division, discriminating licensing and price-restrictive licences analyzed are often means by which patentees are able to "efficiently" recover the value which is measured by customer evaluation of the competitive superiority afforded by patent. He argued also that these profit maximizing devices are mostly efficient in the social sense, i.e they are means of getting more of what the community wants at lower overall cost than if their use were prohibited.

practices which are inhibitive to competition and attempts by dominant firms to abuse their position and prevent new competition from emerging.

The Chicago school mooted the idea of 'consumer test' in determining the criterion of what are acceptable practices. A consumer welfare test, applied to antitrust law, patent law, or conflicts between them, constitutes a central criterion for making decisions and appraising them- what consumers want at the lowest cost-is to recognize that the analysis of competition under antitrust law or of temporary monopoly under patent law permits the conclusion that both are means and not ends. Under such an approach the productive and allocative efficiencies associated with particular industry structures or particular trade practices are exposed and given their appropriate weight.

6.2.1 Vertical Agreements

Accordingly, in the pursuit of perfect competition, many agreements which have the effect of restricting competition, either between themselves, or between them and third parties, particularly in relation to licensing activities of Intellectual Property rights, are worthy of control. There are two types of agreements which may be of concern here; vertical agreements and horizontal agreement. Section 1 of the Sherman Act prohibits any contracts which are in "restraint of trade" or which "monopolise, or attempted to monopolise a market". Even though vertical agreements do not involve competitors but concern basically the licensee and the licensor, the policy behind the restraint of vertical agreements is the perception that these practices are seen as unwarranted extensions of the patentee's monopoly. Among practices which are deemed as anti competitive are continual royalty payments, taking licences of newly discovered technology, field of use restrictions⁹¹, non competition clauses⁹², no-challenge clauses⁹³, or grant back requirements⁹⁴.

⁹¹ The clause restricts the licensee's authority to produce goods to a particular purpose.

⁹² This clause forbids the licensee from competing with the licensor or using rival techniques to compete with the licensor.

6.2.2 Horizontal Agreements

Horizontal agreements which involve undertaking between competitors are more frowned upon. Among horizontal agreements which are under suspicion are cartels and patent pooling among competitors such as agreements not to licence others. There may be horizontal agreements which are not harmful such as collecting societies although there are concerns that collecting societies should be the subject of the same scrutiny as they represent insuperable bargaining power and can dictate the terms of licensing.

Accordingly, evaluating whether certain patent licensing practices should be sanctioned will involve the ascertaining of the proper scope of the legal monopoly. Is more being monopolized than the patent grants, or is the practice merely maximizing the reward attributable to the competitive advantage afforded by a patent?

6.3 Competition policy in the EC and 'monopoly'

6.3.1 Freedom of movement of goods and parallel importation

One of the major objectives of the integration of economic markets in the EC is free movement of goods enshrined in A.30 and A. 36⁹⁵ of the Treaty. A.30 prohibits "quantitative restrictions on imports and all measures having equivalent effect". Even though the practice of Intellectual property protection is not per se perceived as a "quantitative restrictions", the exploitation and the exercise of Intellectual Property may lead to the effect. To this end , the European courts have drawn fine

⁹³ This clause stipulates that the licensee agrees not to challenge the validity of the licensor's intellectual property right in question.

⁹⁴ The clause requires the licensee to grant back to the licensor any know-how or Intellectual property rights acquired during the licensing agreement.

⁹⁵ A.36 provides certain exceptions to the free movement of goods. The provision reads: "the provision of article 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of...the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states".

distinctions between the existence of Intellectual property rights which are recognised and the exercise of such rights which may fall foul of the policy of freedom of movement of goods.

As the underlying objectives behind the economic policy of the EC is the free flow of services and goods regardless of national barriers, any attempt to use intellectual property to restrict the movement of goods is considered as an unwarranted restriction on competition. Hence where a national Intellectual Property owner attempts to rely on his national rights to stop parallel imports, this is considered as unnecessary 'quantitative restriction' for the purposes of A.30 to 36. It is to this end that the European court has developed the notion of 'exhaustive right' which was developed in the case of Deutsche Grammophon⁹⁶ and later affirmed and extended in other later cases such as Centrefarm v. Sterling Drug⁹⁷. In this case, a Netherland patent owner tried to stop the parallel importation of drugs bought in the United Kingdom. Stopping parallel importation, thus, constitutes an unwarranted extension of patent right and no local patentee can be allowed to rely on this right to stop parallel importation even in situation where goods are imported to a jurisdiction which does not give protection to such goods⁹⁸.

Exhaustion rights only arise if the goods are first put in the market by a company

⁹⁶ Case 78/70, Deutsche Grammophon GmbH mbH v. Metro-SB-Grossmarkte GmbH & Co KG, 1971, E.C.R 631.

⁹⁷ Case 15/74, Centrefarm BV v. Sterling Drug, Inc., 1974, E.C.R 1147, 2 C.M. L.R 480 (1974). The case concerned parallel importation of drugs bought in the U.K into the Netherland. The patent holder of this drug in the Netherlands tried to stop the parallel importation relying on its (Netherlands) patent. The European Court held that the specific subject matter of a patent is the guarantee that the patentee, in order to reward his creative effort, has the exclusive right to use the invention, for manufacturing industrial products and putting them into circulation for the first time, whether directly or indirectly by the grant of licenses to third parties, as well as the rights to impose infringements.

⁹⁸ See Merck & Co Inc v. Stephar BV, 1981 E.C.R 2063, 3 C.M.L.R 463 (1982) where a person had marketed pharmaceutical products in Italy. At that time it was not possible to obtain a patent for such products. The court held that he could not rely on his patent in another member state in order to oppose the importation of those goods. In cases whereby the products have been repackaged prior to parallel importation, the courts have been reluctant to assume exhaustion of rights. See Hoffman-La Roche v. Centrafarm (1978) 3 CMLR 217; Bristol-Myers Squibb, C.H. Boehringer Sohn and Bayer AG v Paranova A/S (1994) 9 EIPR D-247; F.Hoffman- La Roche v Paranova (1994) 10 EIPR D-258 and MPA Pharma GmbH v. Rhone-Poulenc PHarma GmbH Case C-232/94 (undecided).

which has links with the national Intellectual property owner. For this purpose, the court develops the doctrine of common origin, whereby the act of exhaustion only takes place if the goods are placed in the market by him or with his consent⁹⁹. Consent means there should be a link between the two owners of Intellectual Property. The link must be "legal, financial, technical and economic". Hence when the goods are marketed on a compulsory licensing basis, there is no consent¹⁰⁰.

6.3.2 Undertaking under A.85

A.85 applies to agreements, decisions and practices by associations of enterprises and associations that affect trade between member states and result, intentionally or not, in restrictions in competition within the Common market, which are prohibited. These include: the direct or indirect fixing of purchase or selling prices or of any other trading conditions; the limitations or control of production, markets, technical development or investment; the market sharing or the sharing of sources of supply; the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract. S.85 applies basically to licensing agreements which may contain terms which are anti-competitive -subject to certain block exemptions laid down by the Commission¹⁰¹.

The restrictions include territorial restrictions with the exception of exclusivity

⁹⁹ Hag I and Hag II. The ECJ held that the holder of an Intellectual property right in one member state may not prevent the importation of goods protected by that right from another member state if the goods were marketed there by him or with his consent, for the first act of putting the product on the market in the latter member state exhaust the holder's rights.

Van Zuylen v. Hag (1974) ECR 731 (HAG I); HAG II (1990) ECR 1-3711.

¹⁰⁰ See Pharmon BV v. Hoescht AG, (1985) E.C.R 2181, (1986) Common Market Rep. (CCH) 14,206 . See also Phil Collins where an exception has been read in this rule of freedom of movement of goods. In this case the applicant is unable to stop the sale of bootleg CD's in Germany, as under German law foreigners are not given such a right. The court held that this sort of discrimination is contrary to the treaty. Joined cases C-92/92 and C-326, Phil Collins et al, 1993 E.C.R 1-5145.

¹⁰¹ Commission Regulations 151/93.

provisions granting a licensee territorial protection against the licensor, and to some extent, against other licensees. Under some circumstances, territorial restrictions are allowed as in the case of Maize Seed's¹⁰². In this case, the restriction in terms of open exclusive licensing agreements was held as not a restriction for the purpose of A.85 as the grant of exclusive rights in this case is capable of providing an incentive to innovate efforts. In another case Coditel/Cine Vog-II¹⁰³ an exclusive license to exhibit a film within a member state was held as "not to prevent, restrict or distort competition".

6.3.3 Abuse of dominant power under A.86

A.86 involves the determination of whether a particular practice will affect trade between member states. The European court again draws distinction between the exercise and the existence of rights. The basic premise is that the exercise of a right is not in itself an abuse of market power unless resulting in anti competitive effects. Such a distinction was expressed in RTE v. Commission¹⁰⁴ by the Court of First Instance in the following words:

"However, while it is plain that the exercise of the exclusive right to reproduce a protected work is not in itself an abuse, that does not apply when, in the light of the details of each individual case, it is apparent that right is exercised in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of A.86. In that event, the copyright is no longer exercised in a manner which corresponds to its essential function,

¹⁰² Case 258/78 LC Nungesser KG v. Commission (Maize Seed), 1982 ECR 2015, 1 CMLR 278 (1978).

¹⁰³ Case 262/81, Coditel SA v. Cine-Vog Films SA (Coditel II), 1982 E.C.R 3381, 1 C.M.L.R 49 (1983).

¹⁰⁴ See the Court of First Instance's observation in RTE v. Commission Case T-69/89, 1991 E.C.R at 11- 519-21. In this case the applicant's conduct in refusing to license competitors to publish weekly television programme, an act tantamount to the preventing of the emerging of the market of a new product, namely weekly television magazine which will be in the position to compete with its own magazine, thereby excluding all competition from the market solely in order to secure the applicant's monopoly". The court ordered the applicant to permit third parties to publish its weekly program listings by granting compulsory licences. An appeal was dismissed by the European Court of Justice on 6 April 1995. See joined cases C-241/91 p and C-242/91 p.)

within the meaning of A.36 of the Treaty, which is to protect the moral rights in the work and ensure a reward for the creative effort, while respecting the aims of, in particular, A.86....In that case, the primacy of Community Law, particularly as regards principles as fundamental as those of the free movement of goods and freedom of competition, prevails over any use of a rule of national intellectual property law in a manner contrary to those principles".

For purposes of A.86, a particular practice should result in preventing potential markets from entering the relevant market¹⁰⁵ and affect trade between member countries. Mere refusal to license will not constitute an abuse of dominant position unless "it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts"¹⁰⁶.

7. Unfair trade practices and monopoly in the U.K

Besides the policy of integration of markets within the E.C, U.K also has laws against unfair trade practices and monopoly¹⁰⁷. The Monopolies and Mergers Commission

¹⁰⁵ See case T-51/91, Tetra Pak Rausing SA v. commission, 1990 E.C.R II-309, 4 C.M.L.R 334 (Court of First instance) the issue whether the acquisition of a licence to a milk sterilization process effected in the creation of a dominant position under A.86. The effect of the acquisition was to prevent the potential competitors from entering the relevant market.

(1988) ECR 6211, 4 CMLR 122 (1989).

¹⁰⁶ See AB Volvo v. Erik Veng (UK) Ltd, an English case which is referred to the ECJ on the question whether the conferral of the sole and exclusive right to make and import replacement body panels by national law upon a substantial car manufacturer a dominant undertaking within the meaning of A.86 of the Treaty. The issue was whether it was prima facie an abuse of dominant position for the manufacturer to refuse to license others to supply such body panels, even when they are willing to pay reasonable royalty for all articles sold under the licence. The court refuse to hold that "it follows that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that refusal to grant such a licence cannot in itself constitute an abuse of a dominant position".

¹⁰⁷ See the report prepared by the Department of Trade and Industry, Opening Markets: New Policy on Restrictive Trade Practices, July 1989, Cm 727, Her Majesty's Stationery Office, London. The report recognised that in normal circumstances the grant of licences relating to Intellectual Property right do not constitute anti competitive effects so long as the restrictions they contain do not go wider than the subject matter of the licence, for example tying-in the supply of other goods or services.

carry out investigation of monopolization and inappropriate use of Intellectual Property rights. The Commission assumes powers to remedy these situations by either cancelling or modifying these conditions by granting compulsory licences. The U.K CDPA mentions two instances where such powers may be carried out; restrictive conditions and refusal to licence¹⁰⁸.

8. Limits set for socio-economic welfare

The need to limit Intellectual Property rights for the advancement of certain socio-economic welfare is recognised in the recent GATT Trip's Agreement in A.7. A.7 is couched in very idealistic terms. Not only the link between intellectual property rights and technological innovation, transfer and dissemination of technology is recognised, but also the need to tailor intellectual property right to suit social and economic welfare. A.8 further reserves the power of member states to formulate laws which, "are necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development". In the U.K, a limited reservation of rights is provided for the purposes of services of the Crown which includes internal and foreign defence and health service purposes¹⁰⁹.

9. Analysis and Comparison.

At the outset we have underlined the basic premise and function of a 'right' within Islamic jurisprudence. The views advanced by the renowned Maliki scholar Al-Shatibi and the modern scholar Al-Darini demonstrate the importance of tailoring Intellectual Property rights to accommodate other objectives. To guide us in this task and to draw the dividing line between what is acceptable and what is not, will, ultimately depend on the circumstances of the case. In the case of copyright, the greatest tension

¹⁰⁸ See S.144 of the U.K CDPA for copyright S.238 (& Schedule 4 S.10) for design right and S.51, S.295 and schedule 5 & 14 on patents.

¹⁰⁹ See S.240 of U.K CDPA 1988.

involved here is the conflict with others' right of information, education and easy access to knowledge. These tensions have been dealt with to a greater extent through the expansion of exceptions within the copyright legislation. There are numerous other compromises, some of which have been mentioned earlier such as duration, fair dealing, reproduction of works and public domain. In terms of patent, the compromise are in the form of reverse engineering and the defence of experimental research. Using the yardstick proposed by Muslim scholars, as discussed above, this compromise is valid. What is perceived as public right is given precedence over individual right. Right of information, education and knowledge is one of the fundamental rights recognised in the Qur'an.

Secondly, the balancing mechanism proposed by Muslim scholars goes beyond that of redressing inconsequential harm when it arises. The concept contemplates the evaluation of the proper function of a right. Hence a particular right must be enforced in a way which gives a coherent meaning to the function of the right rather than unintelligible conflict when they overlap. Even the misuse doctrine in the United States does not come close to the above paradigm. The understanding of the concept of '*haqq*' and '*su isti'mal al haqq*' necessitates the accommodating of all the tensions and conflicts arising from Intellectual Property. This necessarily demands a full scale examination of the needs of a particular society.

At the theoretical level, the idea of '*haqq*' is imbued with inbuilt restrictions and limitations in Islamic scholarship. Ownership, as defined by Muslim jurists is an aggregate of rights in relation to a thing. With regard to ownership, the restriction governs all elements of ownership such as use, enjoyment and disposition. Such aggregate of rights may be waived, refused and even terminated in certain circumstances without defeating the title of the goods¹¹⁰. Hence, the idea of

¹¹⁰ For an illustration of the principle in real property see Egyptian Civil Codes and Lebanese Civil Codes. The idea that the use, enjoyment and disposition of ownership of real property be consonant with "the social function" of the right of ownership is distinctive in legislations pertaining to real property in some Arab countries. For detail arguments see Ziadeh, Farhat J, Property law in the Arab World; Real Rights in Egypt, Iraq, Jordan, Lebanon, Libya, Syria, Saudi Arabia and the Gulf States, (1979) Graham & Trotman, London par. Ch.3.

demarcation between the existence and the exercise of right has long been recognised and accepted in Islamic scholarship.

Thirdly, with regard to content-based restrictions, the validity of protection depends on whether a particular 'thing' is a valid property under Islamic law. Here, the demarcation and differences with the common law is most remarked. As has been pointed out earlier, anything which is forbidden under the Shari'ah cannot be accepted as a valid property. The current trend in the U.K and even in Canada to control publications perceived as against public policy is through refusal of inconsequential relief or enforcement of copyright as in the case of Spycatcher and Aldrich.¹¹¹

Fourthly, with regard to competition policies and the need to eliminate the anti-competitive effects of Intellectual Property, we have seen above the differing philosophy and approach between U.K and the United States. In the last chapter, we examined Islam's point of view on monopoly and hoarding, made explicit through numerous Prophetic's tradition. These '*hadith*'s specifically prohibit stockpiling of food by merchants as a way of cornering the market. Contemporary Muslim scholars have extended the prohibition to other market activities which resulted in the manipulation of price and supply of goods. Arguably, the list of activities which are perceived as monopolistic is an open one. The demarcation between acceptable and unacceptable economic activities depends on the end-result and the effect of the agreement. In contemporary Islamic literature, among economic activities which have been defined by Muslim scholars to be under the prohibitions are cartels, pooling agreements and other types of market monopoly. In the same vein, commercial practices relating to both vertical and horizontal agreements which involve output restriction or the manipulation of free market forces can easily fit under the above categorisation of monopoly and market hoarding. Any unwarranted extension of power beyond those recognised by Shari'ah and beyond those implied through the function of Intellectual Property rights have to be curtailed. Unfortunately, it is not known

¹¹¹ See the comment by Howell, Robert G, Copyright & Obscenity : Should Copyright Regulate Content., IPJ Vol.8, No.3 p.139-188.

whether there exist any concerted effort to draw competition policies in line with the above Islamic paradigm.

Fifthly, beside the rule against monopoly and hoarding of goods, there are numerous Prophetic' traditions regulating behavioural conduct in market place. Suffice for us to say that there are ample principles for a schematic study of Islamic paradigms of competition and unfair competition relating to economic activities. These rules are general and peripheral in nature and it would be impossible for us to enumerate with precision its application to modern economic practices in detail.

In addition to this, the Islamic law gives more flexibility for the courts to remedy contracts which partakes of inequitable bargaining power. This calls for the readjustment of rights and duties involving contracts whereby a party of insuperable bargaining power exploit the other party¹¹². Even though the principle is not regarded by the Muslim jurists as a distinct principle in Islamic theory of contract, its application can be invoked in the present circumstances.

Sixthly, the legality of licensing agreements which contain restrictive terms, will have to be evaluated in relation to the restriction against combination contracts and the imposition of restrictive conditions in Islamic scholarship. In relation to this, there is a divergence of opinion between Hanafi's and Shafi'is on the one hand and the Maliki and the Hanbali on the other. The Hanafi's and the Shafi's are cautiously restrictive and argue that extrinsic conditions are generally invalid subject to stringent principles laid down by the jurists of these schools. The Maliki and the Hanbali, on

¹¹² In the U.K, the court had set aside agreements made between parties of unequal bargaining power as against public policy as being restraint of trade. See the cases of Schroeder Music Publishing Co Ltd (1974) 3 All E.R 616; (1974) 1 WLR 1308; Clifford Davis Management Ltd v. WEA Records Ltd (1975) 1 All E.R 237; (1975) 1 WLR 61, Elton John & Ors v. Richard Leon James & Ors (1991) FSR 397; O'Sullivan v. Management Agency and Music Co Ltd (1985) QB 428, (1985) 3 All ER 351, (1984) 3 WLR 488 and Panayiotou & Ors v. Sony Music Entertainment (UK) Ltd, The Times, 30th.June 1994. In Malaysia the defendants in the case of Polygram Records Sdn Bhd v the Search & Anor (1994) 3 MLJ 127 attempted to invoke this doctrine to set aside their agreements with the plaintiffs. The court accepted the view that there is some support for the view that, public policy may, in some exceptional cases, demand that certain contracts which are grossly unfair to one of the parties ought to be set aside on the grounds of inequality of bargaining power. However there has been to date, no leading case in which this doctrine has been invoked by the Malaysian courts.

the other hand argue that the basic rule is to admit whatever conditions the parties deem requisite, subject to exceptional cases of invalidity¹¹³. The prevailing view is that conditions in contracts should be in accordance with the tenor of the contract, be sanctioned by custom or usage or be ^{lawfully} beneficial to either of the contracting parties ^{by Shari'ah standards.} subject to the considerations of public policy and morality.

The basic premise to the first view is that additional or extraneous acts which do not naturally result from the contract will not be valid. The position is the same where the seller stipulates for the reservation for himself of any advantage from the sale. On this view, terms such as no challenge clause, no competition clauses, grant back requirements, arguably, are invalid. Secondly, the terms can be invalidated on the basis of their inequitable effects arising from the imbalances of bargaining power.

10. Conclusion

In this chapter we have outlined the various tensions involved in Intellectual Property right and the various limitations which have evolved, both within and without the Intellectual Property regime. The comparisons between the theoretical framework of limitations of rights in Islamic law and the common law is represented in the following table.

¹¹³ See Rayner, S.E, The Theory of Contracts in Islamic Law: A Comparative Analysis With Particular Reference To the modern Legislation in Kuwait, Bahrain and the United Arab Emirates; Graham & Trotman (1991). pgs.352-360.

TABLE OF COMPARISON

COMMON LAW	ISLAMIC LAW
theoretical limits to the concept of ownership, concept of abuse of rights	concept of ' <i>su 'isti'mal al-haqq</i> '
content based restriction, concept of morality and public order. In copyright, the restriction are carried out in the field of enforcement only. In trade mark, the test of morality is that which is accepted within public circles. In patent, the application of the restriction is very narrow, mostly in the field on biotechnological inventions.	subject matter of protection has to fulfill the requirement of ' <i>halal</i> ' and ' <i>haram</i> '
competition rules, against any form of monopolistic practices	rules against hoarding or ' <i>ihlikar</i> '
rules against restrictive trade practices	rules pertaining to behavioural conduct in market, rules against combination contract and the imposition of restrictive conditions in contractual agreements.
rules against unconscionable bargaining power in contractual agreements	readjustment of contracts where there is gross unequal bargaining power.
copyright- right of the public for education	the religious emphasis on diffusion of knowledge and right of education.
trade mark's role in protecting consumers	general principles in Islam to protect consumers, emphasis of ' <i>adalah</i> '.

In the first place, we have seen the concept of '*su isti'mal al haqq*' which marks the boundary of a legitimate right. Secondly, is the content-based restrictions which may not find legitimacy according to current international practice with the exception of the narrow limitation to ethical considerations involved in biotechnological engineering inventions. Such issues have been raised earlier in the chapter on subject matter of protection.

Contrary to popular belief, Intellectual Property rights are beset with numerous limitations. Those related to competition are drawn for economic grounds and may find convergence with Islamic principles of '*adalah*' and economic practice. These

behavioral constraints attempt to resolve anti-competitive practices, cartels and pooling, all of which may be parallel to an Islamic concept of business ethics.

The protection of Intellectual Property must not forsake the need to advance the socio-economic welfare of a particular country as delineated by the GATT Trip's agreement. It is unfortunate that this area of boundary is almost neglected in other international treaties. The most probable reason is that all of these international treaties are drawn by developed countries. Intellectual Property rights should not sacrifice other noble goals such as economic and technological development, which may vary from one country to another.

CONCLUSION AND RECOMMENDATIONS

In the light of the discussion in this thesis, it is apparent that the basis and the foundation of the present intellectual property laws is unsatisfactory from a Muslim Malaysian viewpoint.

These laws, were initially introduced during colonial times to enhance the British's vested interest. Despite many changes to these laws, the theoretical framework remains substantially the same, i.e based on secular laws and secular orientation of legal system. The features of the laws take no consideration of any local factors. Furthermore, these laws are still lacking in terms of their conceptual content. Such a vacuum can be filled with a proper understanding of the framework of ownership rights of Intellectual Property under the Shari'ah. Islam being the religion of the Federation and professed by the majority of the citizens, is but the best form of paradigm which we should emulate.

Furthermore, the reformation of Intellectual property laws in accordance to Islamic perspective is timely, considering the GATT -Trips agreement that colours the international scenario which demands us to reconsider our present laws. In this important task of providing a set of laws which reflect the religious, cultural and social values of Malaysian society, as well as taking into account the corresponding economic and political factors, it is important to consider the basis of these rights, "what, whom and how" these rights conform to Islamic law without forsaking any of our international obligations.

While it is difficult to predict when total integration of Islamic law and common law will take effect, or if it ever will, it is not too early to analyse our positive laws from an Islamic perspective. Such an effort is consistent with the prevailing resurgence of Islam and Islamic law in Malaysia. The hypothesis of this thesis is that such effort can be achieved without resulting in drastic structural changes and at the same time conforming to the international standards. Stemming from these concerns, the intellectual property laws, as practised in Malaysia, is examined in terms of its structure, concept and basic philosophical underpinings from the Islamic perspective.

From chapter three and chapter four of the thesis, it has been proven that a coherent and logical conceptual framework of ownership of intellectual property can be derived from an Islamic perspective, which are further developed to explain the basis of these rights. From the analysis of certain fundamental concepts from authentic sources of Islamic scholarship, a sound philosophical base can be discerned which not only offers the basis of rights but also defines the parameters of these rights.

As far as the theoretical framework of ownership of intellectual property is concerned, it is submitted that their intangible rights are forms of usufructuary rights within the definition of '*manfa'ah*'.^⑥ These rights being dispensable with their origin and of separate value are capable of being traded separately. The protection of these intangible rights, does not contravene the injunction against concealment of knowledge as the subject matter of intellectual property cannot be equated with the meaning of "knowledge" at the highest level of abstraction even though intellectual property does allow a person to control to whom, how and when to depart with information. Furthermore, there are Prophetic '*hadith*'s allowing a person to be selective of the recipient of information and therefore a person has the right to control the disclosure and the audience of his works. In this respect, it is submitted that the propertisation of 'ideas' does not lead to the monopolisation of 'ideas' but only the exclusive control of them.

Despite their being intangible rights, in many ways the usufructuary rights of intellectual property conform to the accepted characteristics of property. The value of intellectual property, even though is temporary, is easily quantifiable according to accepted practice. These intangible rights, on equal basis to tangible property, can be transferred, transacted upon, inherited and disposed of through will. Their only difference with tangible property is that these intangible rights are in the intangible sense and are not attached to the physical medium. Because of this, these usufructuary rights are independent of the physical embodiments and are not affected by the alienation of the latter.

^⑥ With the exception of the Hanafis, see pgs.63-65 above.

It is further established that the ownership of intellectual property can be justified on the basis of '*amal*' (doctrine of economic gain through labour) which finds much support in contemporary works. Such justification is necessary as there exists a vacuum in authentic sources as to the basis of these rights. (This lack of coverage can be explained in that the Qur'an does not contain and cannot be expected to contain a blueprint of all basic rights and liberties.) From our investigations, it is clear that creative labour theory, applies equally to mental exertions, as well as physical endeavour, on the premise that intellectual creations which owes their birth entirely to combinations found in human mind, and which but for his ingenuity, would not have existed are loftier and more worthy of recognition. The premise of creative labour in this instance is dependant on the existence of many criteria; the creation of something new, something which has not existed in common.

The scope of each subject matter within intellectual property varies and this requires separate examination. Copyright is a non-monopoly right which in many aspects is intertwined with dissemination of works. In this thesis, we have examined the various moral justifications which shape the evolution of copyright in a historical perspective. The historical parallelism between the birth of copyright in western jurisprudence and Islamic scholarship points to the conclusion that copyright is necessary to stimulate intellectual and academic growth. It is only from this appreciation that one can realise the parallelism between the two worlds, particularly on factors and roots of recognition of moral rights and their linkages to the growth of intellectual academia. One aspect which the similarity is so striking is the condemnation of plagiarism, copying and the moral anathema attached to these practices, in the days when moral stigma carries more weight than legal responsibility.

It has been argued in this thesis that the threshold of moral rights in Islam is higher than those in common law. These rights emanates from the right a person hold over 'knowledge' or the ideas which he brainchilds. Being the person who initiates the work, he is entitled to control to 'whom, how and when' to divulge a work. The role of moral rights of knowledge in Islamic scholarship lies in the deep appreciation of the intellectual linkage between authors and their works, the responsibility of the

authors to guide others and the need to check the legitimacy and accuracy of transmission of knowledge.

The common law, on the other hand, places emphasis on the work, the amount of effort and expenditure which is poured in creating a work which rightfully should be remunerated and recognised. The emphasis is on the right to copy and not on authorship. In contrast, the central notion of 'authorship' in Islam, is on the author, even though less individualistic than that of Romanticism. The emphasis of 'authorship' in Islam is on the premise that it is an obverse of responsibility, carries with it the notion that his work should be preserved, not as a recognition of his personality but to preserve the authenticity of his work.

Moving to economic rights, these are ancillary and incidental to the author's moral right for recognition, attribution and authorship. In Islam unlike their Western counterparts, there is no absolute freedom of expression of ideas. Copyright is not a positive right, but a right which is conferred under the Shari'ah. One important feature that springs from this, is the emphasis on the legality of subject-matter. On this premise, the existence of right would depend, in the first place, on the non-contravention of the Shari'ah. Using this yardstick of legality, works which are against morality, Islamic ethics and the fundamental concepts of Islamic religion cannot be valid subject-matters for copyright. This yardstick may be stricter than that of, or even contrary to the prevailing international obligations. However, with the help of effective censorship control the same effect can be achieved. This would mean that the courts, an important mechanism in enforcing rights, would always consider the views of the censorship board. In this way, non-conformity of censorship rules will affect the existence and subsistence of copyright. By creating the necessary nexus between copyright and censorship, such works cannot be enforced because they are vitiated with illegality.

Another area in which the present copyright laws should be reformed is that of the extension of copyright to oral works, by taking into consideration the importance of oral transmission of knowledge in Islamic scholarship. Further the elimination of the

boundary between oral and expressed works is consistent with the stand adopted in the Berne Convention which does not impose the criteria of fixation on the member countries. It is further suggested that the present boundaries which are drawn in some member countries be adopted so that only spoken works of a more formal or considered kind delivered before or to an audience are covered. Therefore, oral transmission of knowledge and technical skills are covered leaving aside more aleatory or spontaneous forms of oral expression.

Further, since the emphasis in Islam is on 'authorship', contractual disposition of authors' work should be the subject of regulation, especially since they are often the weaker parties in negotiations. In this respect it is suggested that the practice which is adopted in France is emulated, whereby an agreed consideration may be re-opened by way of judicial litigation if the work proves to be more successful than the parties thought it would be and enables the court to award a complementary sum. Such a practice is more consistent with Islamic law, as under the latter, readjustment of contractual agreements is allowed to do justice.

In other aspects, it seems that there is more consistency in Islamic law, particularly the way on which the law is shaped to mediate between control and access. In fact, the main philosophy behind copyright in Islam is the recognition of 'authorship' and the moral and economic rights incidental thereto, while at the same time emphasizing on disclosure and dissemination of works.

In chapter six, we have criticised the current economic paradigm which does not only determine the initial existence of patents but also shape and influence the scope of patents laws in the common law jurisdiction. From our analysis, it is clear that profit motivation and private property, which constitute the main philosophy behind the protection of patents, are accepted in Islam. However, as it has been pointed earlier other non-economic values play equally significant role.

In this chapter we have adopted the scale of hierarchy of values as enunciated by al Ghazali to determine the parameters of patent rights. By adopting this scale of values,

certain policy prescriptions can be derived at. From this exercise, it was established that in areas where patenting may result in direct confrontation with the tenets of Islamic religion, they should not be within the confine of patents. One area in which patenting may result in conflict with religious tenets is that of biotechnological inventions of human biological materials. The patenting of these products encourages the commercialization of human body parts which are not allowed in Islam. This is because, a man does not have an absolute right over his body in the sense of a right of ownership or property, therefore any purported sale of body materials is not valid. Such practice may also be contrary to the dignity of human kind which is guaranteed in the Qur'an. However, experimentation with human biological materials are not prohibited if done with the purpose of saving other lives.

As far as inventions pertaining to biotechnological engineered animals, we have dismissed the arguments that allowing such practices would raise the theological question of man's relationship with God over other life forms as these are within the permissibility of '*taskhir*' (subjugation of nature). However, such practices should not lead to the inappropriate subjugation of animals without any necessary purpose. We should also take note of the Qur'anic warning against the upsetting of the order and laws of nature, as the world is said to be created in a sense of order and proportion. Furthermore, animals should be treated with respect and kindness as in Islam animals are born with spirits and are not mere composition of matter.

The analysis also shows that another area which, upon a balancing of values, should not be within the confine of patents is in relation to the inventions pertaining to medical methods. The preservation of life is '*dharuri*' and therefore takes priority over other mundane concerns particularly that relating to financial rewards and security to those involved in developing such inventions.

Other items which are necessary to the preservation of life are food and pharmaceutical items. On a balancing exercise, so long as patenting does not lead to the restriction of the supply of these items, they should be allowed. Different countries have different staple needs, therefore it is very unlikely that patenting of

food items would lead to the scarcity of food resources. One problem which often arises with patenting of pharmaceuticals products is the restriction of supply as patented drugs are often more expensive than generic products. This disequilibrium can be satisfactorily resolved through a comprehensive price policy.

In other aspects, patents may even be consistent to the set of values proposed earlier as they enhance the protection of intellect. This is particularly in relation to the exclusion of discoveries and pure theories from the domain of patents and the benefits derived from the statutory requirement of disclosure. Finally, it is proven that patents fulfill the Islamic objective of enhancement of wealth, so long as the requirement of distributive justice is fulfilled.

In chapter five, it is established that the conferment of property rights in trade marks can be justified as it is a means to uphold fairness in commercial dealings and to eliminate unscrupulous commercial practices. This theory is based on the premise that trade marks plays an effective role in communicating the unobservable differences in quality and variety of goods in an analytical form, enabling consumers to choose the product with the desired combination of features.

The prominence of protection of consumer in Islam is shown in the context of the historical institution of '*hisbah*' where the state takes upon the duty to regulate the market and control public morals. On this premise, it is argued that imitating the product and features of another manufacturer's product, may constitute an action of active fraud, provided that actual confusion and association occurs even though such practices have not been covered by classical Islamic jurisprudence. Likewise, on the same basis, unfair competition among manufacturers and traders by the adoption of unethical practices such as disparagement of another's product, comparative advertising should be avoided.

Despite the marginal role played by consumers in delineating the scope of trade mark rights under common law, the emphasis on consumers in Islam would indicate that further measures should be taken to improve the present legislation in Malaysia on this

matter. This can be achieved by improving the distinguishing function of trade marks by encouraging the use of both indication of source and appellation of origin. Further, there should be more checks on advertising to ensure that advertisements are truthful and contain all complete information which are necessary. The use of certification marks has also been suggested, which is an effective method to overcome the problem of variation of quality of goods which are produced under licence. In some jurisdictions, collective marks are used as "quality marks". In others for example U.K, collective marks are distinguishable from certification marks, but probably provide a more immediate guarantee of quality than an exclusively licensed trade mark. Further measures should also be taken if parallel importation is continued to be allowed. Consumers should be informed about the nature of the grey market goods and what they are paying for. The importation of grey goods should not justify the dumping of defective, faulty goods which do not pass the quality standards in other countries. Most important is the development of rules competition and unfair competition which could either be incorporated in the present trade mark regime or be separately provided for.

In chapter eight, it has been argued that intellectual property rights, being archetypes of '*haqq*', are circumscribed by a set of rules defined either within the intellectual property regime or outside them. This chapter defines the various factors which have shaped the scope of intellectual property. These barriers prune away these exclusive rights without destroying the title of ownership. One factor which influences the reorientation of rights is the need to maintain the balance between protection of works and access to information. Another factor is ethical reason which influences the scope of patent, trade mark and to a certain extent, copyright. Further limitations are imposed to curb abuse of intellectual property rights, which if concentrated in one hand and use incorrectly may lead to monopolistic tendencies. It has been shown that certain behavioural constraints need to be imposed to control practices which are inhibitive to competition and may result in an abuse of rights.

RECOMMENDATIONS

At the outset, the present framework of intellectual property protection, as practised in Malaysia, cannot be maintained as it is without necessary changes in order to achieve compliance with the Shari'ah.

The assimilation of Islamic principles does not necessitate the creation of a separate body of law in place of the present regime. However, these laws must be adapted or supplemented in certain specific respects in order to take fully into account the precepts of Islamic religion and legal rules.

- i) With respect to copyright, the threshold of moral rights should be further improved. In view of the fact that the function of copyright is to reward the author with an exclusive right for his creative efforts and thereby encourages literary activities, the holder of the right should also be entitled to control the disclosure and the publication of his work.
- ii) Recognising the fact that copyright plays an important role in a broad range of educational sector, hence to affect the balance between protection of copyright and access to information, is definitely of a fundamental importance for the community's overall development. On this basis, the community should be guaranteed the access to fundamental works, against a fee, in the form of compulsory licensing or translation rights, where the public interest demands the disclosure of the particular work and the work represents significant educational progress.
- iii) The promulgation of laws is to ensure that copyright works are not used to encroach other's privacy. This could be done by the introduction of a limited form of privacy laws in copyright which can be confined to commissioned photographs. A wider form of privacy laws could be introduced, outside the intellectual property regime, through general laws guaranteeing the privacy rights of others.
- iv) In view of the fact that the function of copyright is to reward authors and their

work, the present scope of protection should be extended to oral works by eliminating the requirement of fixation. This would effectively diminish the present discrimination against oral works.

- v) Implementation of copyright laws, should be carried towards the fulfilment of the Shari'ah. The latter contains provisions on the criteria of legality of subject matter of protection; including the provisions to the effect that a copyright may not be granted in respect of works, publication or exploitation of which would be contrary to Islamic concepts of expression, ethics, morality, public policy and Islamic faith. There should be a set of censorship rules which should be considered by national courts with a general guide to interpreting the reference to Islamic religion, public policy or morality.
- vi) In view of the fact that the philosophy "that anything under the sun can be patented" may not be consistent with the Islamic concept of recognition of legal rights, it is advisable to include in the present patent laws such a reference to Islamic religion, public policy and morality. This is in order to highlight the fact that some applications of modern technology, by dint of their consequences or effects, are capable of offending against Islamic religion. In view of the above there should be a set of rules or a body to guide the patent office in interpreting the reference to Islamic religion and the Shari'ah.
- vii) In the light of the fundamental principle that the ownership of human beings is not recognised in Islam, the human body or parts of the human body must be excluded from patentability. Inventions which involve processes for modifying the genetic identity of the human body must be excluded from patentability as these are contrary to the dignity of man.
- viii) With respect to patents involving bioengineered animals, there should be an establishment of a public moratorium on the experiments, research and the use of patented animals, where necessary. This filtering process can be done by

'Majlis Fatwa' which gives religious ruling on other crucial issues by weighing the relative harm and benefit of these patents, including the sufferings and the physical handicaps of these animals. This would free the patent office from the burden of interpreting matters pertaining to Islamic religion in which area expertise is non-existent.

- ix) In light of the view that preservation of life and curing of ailments is '*dharuri*', methods of treatment of human or animal bodies by surgery or therapy or of diagnosis practised on human or animal bodies are not patentable. On this premise, the practice for allowing the claims for second use of medical treatment should be monitored closely insofar as these practices are not taken to obviate the pursuance of the above objective.
- x) With respect to trade marks, in view of the fact that the function of trade marks in Islam is the preservation of fairness and justice in commercial dealings, further measures should be taken to further reorientate the present trade marks laws to secure consumer's cause. This could include the introduction of indication of source and appellation of origin which further enhance the distinguishing function of trade marked goods.
- xi) Realising the fact that the differentiation function of trade marks depends on the accuracy, authenticity and truthful information, advertising practices should be meticulously monitored.
- xii) In view of the fact that consumers would be misled by the differences and variations of quality of trade marked goods produced under licence, the production of these goods under licence should be supervised by setting a standard of quality. This could be done effectively by the encouragement of the use of collective and certification marks.
- xiii) Whereas the practice of parallel importation is theoretically pro-competitive, effective measures should be adopted to inform the public the grey goods'

origin and their differences with the original goods, if any. This measure is necessary as while the practice of parallel importation would not constitute misrepresentation to the consumer, misinformation of the nature of the goods would.

- xiv) In view of the fact that uncoordinated use of intellectual property could result in the creation of monopolistic tendencies which could be disincentives to trade to the detriment of further industrial development and to the smooth operation of the free-markets, rules on competition and unfair competition should be introduced. Measures to maintain the equilibrium in competition can either be enforced through the incorporation of such necessary measures to avoid the abuse of intellectual property within the present framework of intellectual property laws or be separately provided for.

By the endorsement of these measures, the philosophical underpinnings of intellectual property protection both in material and spiritual aspects can be accomplished. While the country's need for material, technological and scientific developments are undeniable, the need to be in line with the approbation of Islamic rules and legal principles is equally important.

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