AFKĀR *Journal of Islamic & Religious Studies*
Volume 4, Issue 2, December 2020, PP 61-76
E-ISSN 2616-8588; P-ISSN 2616-9223
www.afkar.com.pk; hjrs.hec.gov.pk

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The Federal Shariat Court and Intellectual Property Rights

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ARTICLE INFO

Article History:
Received 15Oct. 2020
Revised 29Dec. 2020
Accepted 30 Dec. 2020
Online 30 Dec. 2020

DOI:

Keywords:
Federal Sharait Court, Intellectual Property, Ijtihad, World Trade Organization.

ABSTRACT

The Muslim world is lagging behind in the theoretical conviction about the legality or illegality of Intellectual Property Rights and is, thus, failing to contribute to the growing developments in the field and their corresponding underlying concepts. Today, in the developed world, IP has gained increased protection with advances in technology and international trade. To protect the violation of IPRs, most countries of the world signed the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in 1994, administered by the World Trade Organization (WTO). The Islamic world continues to be part of this illegal activity with some claiming that" such rights are un-Islamic", this study aims to answer this question in the light of the ruling issued by the Federal Shariat court. The Federal Shariat Court invited comments of the public about the Trademarks Act, 1940 and twenty-two other Acts. The Ulema did not respond to the notice, therefore, the Court proceeded to examine the law on its own. This study aims to analyze the recommendations made by the Federal Shariat Court in this regard. It is imperative that Muslims internalize concepts of IP so that they can participate in and carve out a share in this enormous source of wealth. The major aim of this study is to highlight for the Muslim scholars, scientists and intellectuals, the current state of analysis by the FSC for validating intellectual property rights.

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Introduction:

It is pertinent to state at the outset that Pakistan, like most Muslim countries, has a comprehensive set of intellectual property laws, and these laws are periodically updated to conform to international standards and norms of the intellectual property law. Enforcement mechanisms are weak, but progress is slowly and painfully being made. Only a few cases come up to the level of the High Courts and the Supreme Court, and most issues are settled at the lower level. Our issue, however, is somewhat different. The Constitution of the Islamic Republic of Pakistan, 1973 requires that "no law shall be made that is repugnant to the injunctions of the Qur'ān and the Sunnah." This provision is the basis of what is called the "Islamisation of laws in Pakistan." In 1980, a special court called the Federal Shariat Court of Pakistan was created, outside the regular hierarchy of courts in Pakistan, to "strike down" all those laws that conflict with or are repugnant to the injunctions of Islam. This Court of its own accord took up the matter of intellectual property rights in a case that we consider at length in this paper. Since that landmark case, the scope of intellectual property rights in Pakistan has been widened.

The research methodology adopted in this paper is analytical. The material we will be mainly relying upon is the landmark case re: Trademarks Act (V of 1940) and 22 Other Acts, PLD 1983 FSC. Along with the supporting material the FSC in its judgment referred to. To support our findings, we will be referring to some classical text from Islamic Law along with the writings of some western Jurists.

The Concept of Intellectual Property:

The term "intellectual property" refers to a loose cluster of legal doctrines that regulate the uses of different sorts of ideas and insignia. The economic and cultural importance of this collection of rules is increasing rapidly. The fortunes of many businesses now depend heavily on intellectual-property rights.

Traditionally there are two branches of intellectual property. These are "industrial property" and "copyright." These two main branches cover certain types and then have "related rights." To these two is added a third category called "scientific discoveries" by the WIPO Convention. A brief explanation is as follows:

i. **Copyright and related rights:** The areas mentioned in the article quoted above as "literary, artistic and scientific works" belong to the copyright branch of intellectual property.[1] Thereafter, the areas mentioned as "performances of performing artists, phonograms and broadcasts" are usually called "related rights," that is, rights related to copyright.

ii. **Industrial property:** The areas mentioned as "inventions, industrial designs, trademarks, service marks and commercial names and designations" constitute the industrial property branch of intellectual property. The area mentioned as

"protection against unfair competition" may also be considered as belonging to the industrial branch. Unfair competition was acknowledged as related to intellectual property in 1967.

iii. **Scientific discoveries:** Scientific discoveries are not the same as inventions. The Geneva Treaty on Scientific Discoveries defines a scientific discovery as "the recognition of phenomena, properties or laws of the material universe not hitherto recognized and capable of verification."[2]

3- Crucial Issues from the Islamic Perspective Pertaining to Intellectual Property

We may raise a few initial questions here that must be answered by the contemporary Muslim Jurists in order to conform to the international rules laid down for this form of property:

i. **Nature of the right protected.** Copyright law protects only *the form of expression of ideas, not the ideas themselves.* Can expression alone be protected under Islamic law? Does it give rise to some kind of right that requires protection? If so, what is the nature of such a right? In patents and industrial designs, it is the underlying idea that is protected. How does Islamic law protect an idea? In other things, it is either a mark, name, geographical name and so on. Each requires separate analysis from the Islamic perspective.

ii. **Protecting moral rights.** Moral rights remain with the original author, in the case of copyright, even when he has transferred his economic rights to another. Can this be permitted under Islamic law? Does this amount to a conditional transfer and will Islamic law permit this?

iii. **A right that can be inherited but is for a limited duration.** Copyright has a duration of 50 years after the death of the owner. In some countries this has been extended to 70 years. This is for the benefit of the heirs. The question is: can such a limit be imposed on the basis of the *sharī'ah*; *Maṣlaḥah*? A trade name or mark may be renewed forever it appears (for a fee), but what is its real life?

iv. **Music and arts-based copyright.** Will Islamic law acknowledge a right in a work that is based on musical compositions and performances?

v. **Rights of performers.** Can the rights of performers be intermingled with this right? What is the basis according to Islamic law?

vi. **Repeat value.** The expression protected by copyright can be sold again and again. What kind of right is involved here? Can one thing be sold again and again?

Jurisprudential Foundations of Property Law:

Why recognize private property? What is the justification for private property? The answer to these questions is crucial because the justification for private property must necessarily affect the substance of property law. Property law is based on a subtle blend of different and somewhat conflicting theories. It is not possible for us to go into details of these theories as it does not fall under the scope of this article,

nevertheless, we feel that these theories must be examined briefly to make a comparison with the various views about property particularly the intellectual property that prevail in Islamic law.

i - The First Occupancy Theory or the First Possession Theory

First occupancy theory reflects the familiar concept of first-in-time: the first person to take occupancy or possession of something owns it. This theory is a fundamental part of property law today, often blended with other theories. One major drawback of this theory is that while it helps explain how property rights evolved, it does not adequately justify the existence of private property. This theory is directly related to the Islamic concept of *iḥrāz* and the legal category of *iḥyā' al-mawāt*.

ii- The Labour-Desert Theory

The labor-desert theory posits that people are entitled to the property that is produced by their labor. Strong traces of this theory linger in property law, sometimes mixed with first occupancy theory. There are several notable objections to this theory, one of which is that the theory assumes an infinite supply of natural resources. John Locke had a lot to say about this theory, ample support for this theory is to be found in Islamic law.

iii- Utilitarianism: The Traditional Theory

Under the traditional utilitarian theory, property exists to maximize the overall happiness or "utility" of all citizens. Accordingly, property rights are allocated and defined in the manner that best promotes the general welfare of society. This is the dominant theory underlying property law. This theory is tied in very closely to the utilitarian or positivist theory.

iv - Utilitarianism: The Law and Economics Approach

The law and economics approach incorporates economic principles into utilitarian theory. This view essentially assumes that human happiness can be measured in dollars. Under this view, private property exists to maximize the overall wealth of society. Critics question the assumption that social value can be appropriately measured only by examining one's willingness to pay.

Economic analysis of law is the name for the approach of a school of law that maintains that the law has been, and ought to be, concerned with economic efficiency. It attempts to advance a theory of law that is concerned with the promotion of economic efficiency and the protection of wealth as a value. It may be stated at the outset, without going into the elaborations borrowed from economics, that economic efficiency means the optimum utilization of resources and the maximization of social wealth. The approach has its origin in the United States in the 1960s in the work of Ronald Coase, Guido Calebresi and Richard Posner.

v - Liberty or Civil Republican Theory

Liberty theory argues that the ownership of private property is necessary for

democratic self-government. However, the influence of liberty theory has waned due to changing economic, political, and social conditions.

vi - The Personhood Theory

The personhood theory justifies private property as essential to the full development of the individual. Under this approach, some items are seen as so closely connected to a person's emotional and psychological well-being that they virtually become part of the person, thereby justifying broad property rights over such items.[3] This is considered a popular theory for justifying intellectual property rights, because creations of the mind are considered an extension of the personality of the individual.

Federal Shariat Court and Intellectual Property Rights:

The Federal Shariat Court invited comments of the public about the Trademarks Act, 1940 and twenty-two other Acts, through a notice dated 15. 7. 1982. The Ulema did not respond to the notice, therefore, the Court proceed to examine the law on its own. The issue, with respect to the Trademark Act, was: Whether a trademark, a copyright or patent is property that is assignable and transferable.

Tracing Earlier Concepts of Property:

The Court observed that as the concepts underlying such property were developed after the Industrial Revolution, it is not possible to find a precedent for such property in the *shar ī'ah*. The Court then proceeded to trace the development of the concepts of property and ownership, trying to show that these concepts have changed with the change in ideas.[4] The Court noted that the initial concept of property was that of tangible or intangible property, or movable and immovable property in Europe, but in English law the main classification was that of real and personal property, which meant choses in possession and choses in action. The reasons for such a classification were identified by the Court through a number of definitions.

Widening of the Definition to Include Intellectual Property:

According to the Court, it was John Salmond, who for the first time widened the definition of property to include intellectual property rights. Sir John Salmond said:

All property is, as we have already seen, either corporeal or incorporeal. Corporeal property is the right of ownership in material things; incorporeal property is any other proprietary *right in rem*. Incorporeal property is itself of two kinds: (1) *jura in re aliena* or encumbrances, whether over material or immaterial things (for example leases, mortgages and servitudes), and (2) *jura in re propria* over immaterial things (for example, patents, copyrights and trade-marks).[5]

After this Paton raises another objection, which in our view should be the major focus of Muslim scholars today. The Court notes this, and Paton says:

Once we speak of ownership of things which are not corporeal, where are we to stop? My reputation is in a broad sense, but it would be straining language to say that I own that incorporeal *res*. It is perhaps a pity that the word "ownership" was not confined to corporeal things and another term used where incorporeal *res* are concerned.[6]

Thereafter, the Court makes the following observation to identify the latest meaning property current in the West, especially in the U.S.A.:

The present-day definition is much wider and consists of an aggregate of rights which are guaranteed and protected. It has been held by the Courts in U.S.A to be all embracing so as to include within its definition every physical object, tangible benefit and prerogative susceptible of ownership possession or disposition though it's meaning may be restricted by the context of a particular statute. The line is no longer drawn between the wealth consisting of tangible property or incorporeal or intangible property only to the extent of primarily some interest in land. It also includes the fruits of one's brain whether it is in the field of invention or science. Thus, it includes goodwill of a business earned by a particular person or firm or body whether corporate or not; thus, extending its scope to trademark, trade name patents and designs, copy right as well as good will.[7]

The Supreme Court of India has acknowledged this wider meaning, while discussing the concept of property in terms of Article 31 of the Indian Constitution.[8]

Meaning of Property in Islamic Law According to the Court:

The Court then turns to the meaning of property in Islamic law. Relying on some source, the Court observes that property or *māl* in Islamic law is "a thing which one desires, and which can be stored to meet the future requirements." The Court then notes the crucial point that property is something that is assigned a value by the people. "The criteria for determining whether a thing is property is that it be treated by mankind as property (*māl*) and a thing of value."[9]

The Court then notes the distinction drawn by the *Ḥanafī* jurists between a thing and its usufruct. There is ownership (*milk*) in the case of usufruct, but it is not property. The Court then dwells on the view of *Imām al-Shāfi'ī* as elaborated by *Yūsuf Mūsā*. Referring to his opinion, the Court observes, "He approved of this definition because the object is not really the corporeality of the property but the benefit derived from it and this is also in accordance with the usage and customs among people. This according to his opinion also corresponds to contemporary law."[10] The Court adds further that according to *Yūsuf Mūsā*. "Everything from which benefit can be derived is property provided that the acquisition of benefit therefrom is not prohibited in Sharia."[11]

The Court, after describing what is perfect and imperfect ownership according to the *Ḥanafīs*, moves on to the views of '*Abd al-Raḥmān Sābūnī*. "*Sabooni* says that the

definition of the jurists [that is, of property] is rather limited than the definition of mal or property in the contemporary law."[12] The Court then comments on this saying: "But this view is fallacious since it does not appear to take into account the much wider definition of Imam Shafie that everything is *māl* which fetches value if it is sold and if it is destroyed raises a liability for reparation."[13] The Court then implies that trade-marks, trade-names, patents and copyrights can all be included in this definition.[14] In support the Court refers to Yūsuf al-Qarḍāw ī, who appears to agree with this view.

The Court also refers to Mawlāna Ashraf Ali Thanw ī, to Muft ī Kifayatullah, and also to the adverse comments in Fatawa Rashidia and the work of Mufti Shafi.[15] Thereafter, the Court refers to an adverse comment published in a journal where validity of copyright is opposed on the ground that it is not lawful to sell knowledge. The article is by Dr. Ahmad al-Hijji Kurdi. The detailed views of the writer are reproduced and then the views are rejected by the Court.

Mufti Taqi Usmani's Arguments:

The issue of trade name and trademark arose since the increase in trade, both in volume and size. A single trader, or a single company, produces and distributes his substantial wealth among a large number of individuals and countries. Products arising from a single genus vary due to their attributes, and it is these attributes that define the name of the product. Whenever the consumer sees that goods have been produced by such and such company that enjoys a reputation in the market, he buys them merely on the basis of the reputation of the company, or due to the existence of its trademark on the face of the goods.

It is in this way that the trade name or the trademark becomes the basis for ready acceptance of the products by the buyers. Thus, the trade name or trademark has commercial value in the eyes of the traders. Each name that has acquired a good reputation represents immense desire of the buyers in the goods brought to the market under that trade name. This results in greater profits for the trader who deals in the market under that name.

When it appeared that some people started using the names of manufacturers who were well known among consumers, due to the acceptance of their goods under such a name, and it was feared that confusion would be created for the people in general, laws were made by governments for the registration of trade names and trademarks with the government. Traders were prevented from using trade names and trademarks that had been registered by others.

The question now is: Is the sale of a trade name permitted, or that of a trademark? It is obvious that the name or mark is not tangible property. It is an expression of the right to use this name or mark. This right was established as a positive (beneficial) right for the owner due to prior access and governmental registration. It is a right

that is established at present and is not a right expected in the future. It is a right that accepts transfer to another, but it is not a right that is established in existing tangible property. Thus, in the light of the rules that we derived from the writings of the jurists, it is necessary that compensation be given for it in lieu of relinquishment, but not sale, because it is an established right, or a benefit (*manfa'ah*) that has accrued from an existing tangible property.

It appears to this humble servant, may Allāh protect him, that the right to a trade name or trademark, even though it was originally a pure right that was not established in an existing tangible property, but after governmental registration which requires immense efforts and the incurring of substantial amounts, acquires a legal form that resembles transcribed certificates in the hand of the bearer. In the official registers it resembles a right established in tangible property. It is, therefore, linked in mercantile practice with tangible property. It is, therefore, necessary that compensation be paid in lieu of it by way of sale as well. Likewise, the trade name or trademark has become, after registration by the government, things of considerable value in mercantile practice. It is also true of them that they can be preserved by securing their certificates transcribed by the government. The securing of each thing is by means that are suitable for it. These are the essential elements that grant the attribute of value to a thing, even if it is not tangible property. It, therefore, appears that there is no *shar'ī* obstacle for their being treated as wealth whose sale and purchase is permissible. This takes place with two conditions:

First that the trade name or trademark be registered with the government in a lawful manner. The reason is that what is not registered is not considered wealth in commercial practice.

Second that this sale does not give rise to confusion or deception for the consumers. This is through a notice issued by the buyer that the producer of this product is no longer the previous manufacturer.

What we have said about the rule (*ḥukm*) of the trade name and trademark, as to the permissibility of taking compensation for them, is true of the commercial license as well. The meaning of such a license is that today most governments do not permit the import of goods or even their export without a license that is issued by the government. It appears that this is a type of restriction upon traders, and the *shar'ī 'ah* does not permit it without a dire necessity. The fact, however, is that in most countries this is what is done.

The question that arises under the present circumstances is whether it is permissible for the bearer of an import-export license to sell the license to another trader. The fact is that this license is not tangible property; rather it is an expression of the right to sell goods abroad or to purchase them from there. Thus, what we have said about the trade name applies to it insofar as this right is established primarily for benefit;

therefore, it is permissible to relinquish it in lieu of wealth. Further, the obtaining of this license from the government requires substantial effort and wealth. The bearer is granted a legal attribute that resembles written certificates, and the traders, by virtue of it, are granted facilities that are bestowed by the government on the bearer. This license has become, in mercantile practice, something with immense value that is treated like property. Accordingly, there is no harm if it is linked to tangible property for the permissibility of its sale and purchase.

The right to an invention is derived from customary practice and law for one who creates a new invention or a new form (design) for something. The meaning of the right to an invention is that such a person has the exclusive right to produce what he has invented and to offer it for trade. Thereafter, he may sell this right to another, who will undertake transactions in it like the first owner with respect to his production meant for trade. Likewise, a person, who writes a book or compiles it, has a right to publish the book and to distribute it, thus, deriving profits from trade. This right may be sold to another by virtue of which the buyer will have the same rights as those of the author with respect to publication and distribution. The question is whether or not it is permitted to sell the right to an invention or the right of publication and compilation? The views of modern jurists have differed on this issue. There are those who permit it and those who forbid it.

The fundamental point in this issue is whether the right to an invention or the right to publish is a right acknowledged by the *shar ī'ah*? The response to this question is that whoever first invents a new thing, whether it is a material thing or immaterial, undoubtedly possesses a prior right as compared to another with respect to production and utilisation for his benefit, and for moving it out to the market for seeking profit. This is based upon what has been recorded by *Abū Dāwūd* from *Asmar ibn Mudris*, who said: "Whoever has first access to a thing not accessed by another, has a right to own it." There is no doubt that consideration is given to the generality of the expression and not the specific cause on which it is based.

When it is established that the right to an invention is one that is acknowledged by the Islamic *shar ī'ah*, due to the first invention of the thing, then what we have mentioned about the rules pertaining to first access apply to it. We have verified that some of the Shāfi'īs and Ḥanbalīs have permitted the sale of this right, however, the preferred opinion among them is the non-permissibility of its sale. Nevertheless, relinquishment of the right to such a thing in lieu of wealth is permitted according to them. Taking this aspect into account, a number of modern scholars have ruled on the permissibility of such a right.

As for those who deny its permissibility, they rely first on the argument that the right to an invention is a right and not tangible property, where taking compensation for pure rights is not permissible. It is evident, however, from what

has preceded about the writings of the jurists that the absence of compensation for rights is not absolute. There are details that we have explained in the discussion about the various types of rights.

Secondly, they relied upon the argument that when a person sells a book to another, the buyer comes to own the book along with all its constituent parts, therefore, it is permitted to the buyer to do with it what he likes. Thus, it is permitted to him to undertake publication of the book, and the seller has no right to restrict him in this respect. It is possible to respond to this by saying that undertaking transactions in a thing is one thing, while producing something like it is another. What the buyer possesses through purchase is the former; therefore, it is permitted to him to do with the book what he likes in terms of reading it, benefiting from it, selling it, lending it, or giving it away as a gift as well as other similar acts.

Thirdly, they argue that a person, who produces the thing invented or publishes this compiled book, does not cause a loss to the producer or author. The maximum that he causes is a reduction in profits, but the reduction of profits is one thing and the causing of a loss is another. It is possible to respond to this by saying that the reduction in profits, even though it does amount to an injury, and between loss and injury there is an evident difference. There is no doubt that a person who bears physical and mental burdens as well as hardship, who spends a substantial amount of wealth and precious moments of time in inventing a thing or writing a book—for which he stays up nights and gives up moments of enjoyment has a right to enjoy the profits .

The last argument for those who deny validity is: That protecting the right of publication for one person narrows down the sphere of influence of the book. If each person had the right to print the book and publish it, the book would have much wider distribution, and its benefit would be more general and comprehensive. This is a fact that cannot be denied. The argument, however, is reversed when we examine it from a different perspective. The view is that if inventors were denied the prior right to profits from what they invent, their desire to invent would stand paralysed and would stifle the undertaking of important projects that are due to new inventions. The reason is that they would think that their inventions yield only trivial profits. Such issues involve both perspectives that do not affect legal issues, unless there is a *shar'ī* prohibition, because in all permissible things there are elements that are injurious and those that are beneficial.[16]

Analysis by the Federal Shariat Court:

The main points relied upon by the Court, for its conclusion, are the following:

• Intellectual property rights are a new category of rights, and with the changing times the definition of property has to change to accept the new types as was done in the law, otherwise it will kill all kinds of incentive for creative activity.

• That the definition of *māl* is not based upon the Qur'ān and the Sunnah and has been given by each jurist "according to his own lights."[17]

• That property is considered as such when people assign it such a value according to their usage and custom.

• The definition of *māl* given by *Imām al-Shāfi'ī* is quite flexible and wide and should obviously, and does, include this new category of rights. As such this definition represents a great advance and matches the definition given much later by Salmond.

The effort by the Court is commendable. In fact, this case (decided in 1983) appears to provide source material for much of what Justice Taqi Usmani said later. Nevertheless, we would like to make the following observations.

1. It cannot be denied that concepts should change over time to take stock of the new realities. This, however, does not mean that concepts be expanded blindly. All new concepts must be analysed and assessed in the light of the principles of Islamic law before they are declared valid. It is obvious that the Qur'ān and Sunnah do not mention things like copyrights, trademarks, tradenames, patents and so on. These new concepts have to be subjected to analysis before they are taken into the fold of Islamic law. As far as analysis goes, the detailed list we have given above is not reflected at all in the analysis of the Court, except perhaps tangentially where sale of copyright to a publisher is considered. If we start accepting concepts without proper analysis, the entire structure of Islamic law can be destroyed. Here the words of Paton quoted above may be reproduced: Once we speak of ownership of things which are not corporeal, where are we to stop?

2. We find it difficult to agree with the statement of the Court that the jurists have come up with the definition of property "according to their own lights." without referring to the Qur'ān and the Sunnah. In fact, the Court has not tried to analyse why the *Ḥanafīs* do not consider *manfa'ah* to be *māl* or why the majority of the jurists do. We may mention just one tradition here that does play a role in these definitions: "Do not sell what you do not have."

3. The statement that property is something to which the people assign value is true, but it has to be qualified. Such assignment of value must not oppose the texts or their implications, which means the acknowledged principles of Islamic law as well. For this purpose, the discussion of *'urf* and its acceptance above may be seen.

4. We feel that the definition given by the Shāfi'īs has been unduly stretched. Yes, the Shāfi'īs do accept *manfa'ah* as *māl*, but they do not consider pure rights to be *māl*.

In the end, the Court gives its conclusion as follows:

The definition given by different jurists of Islam does not emanate from the Quran and the Sunnah as clearly stated by *Sabooni* in Almadkhal Li Dirasat-ul-Tashri-ul-Islami, vol. 2, p. 455. The definition of what is mal had to be considered on account

of the commandment in the holy Quran and the tradition from the holy Prophet (peace be upon him) as states above. Each jurist defined mal according to his own lights. The difference of views among the jurists was, therefore, natural. However, the definition cannot be static in view of the likelihood of changes in the concept in a changing world and no one opinion can bind, for all times to come. It is important to note that the definition of Imam *Shafie* as accepted by *Malikies* and *Hamblies* has included in the category of *Mal* (property), everything which has a money value. It was a great advance on the jurisprudence in the world of that age since for the first-time only Salmond could arrive at an analogous definition. The definition from Imam *Shafie* corresponds to the modern definition which is found in the precedents referred to above from the judgments of the Courts. The provisions of the Act are not repugnant to Shariah.[18]

Conclusion:

The comments for this section are more or less similar to what was said for the analysis by the Federal Shariat Court of Pakistan. We give our conclusion below in the form of a list. Matters that have not been examined are listed first followed by analytical comments on those that have been considered.

No distinction has been made with respect to copyright with reference to the fact that copyright law protects only *the form of expression of ideas, not the ideas themselves.* Islamic law must give a ruling on what it is protecting.

2- Likewise, in patents and industrial designs, *it is the underlying idea that is protected,* but there is no indication of the awareness of this fact nor is there an indication of what exactly is being protected. ***Both patents and copyright have been analysed together. This appears to be inappropriate methodology as the two are quite different in nature.***

3- Many other things that fall under intellectual property rights have not been included in the analysis.

4- As indicated earlier, copyright consists of a bundle of rights. Some of these rights are passed on to the buyer, while others are retained. Moral rights remain with the original author, in the case of copyright, even when he has transferred his economic rights to another. Retaining such rights prevents the buyer from altering the contents of the work at his discretion. There is no discussion of such a distinction in the above analysis.

5- There is also no discussion about the limited duration for which copyrights and patents are protected. Does Islamic law admit of such a concept? There is no discussion in the analysis above. Nor is there any discussion about the renewal every year of a trade name or mark for a fee. What kind of right would this be under Islamic law?

6- The extension of patents and other rights to food and genetic material has not been taken into account.
7- There is also no discussion about the granting of protection to musical compositions, performances, choreography and so on. These rights fall under copyright.
8- In the analysis no distinction has been made between copyright sold to another, and a book sold to a buyer. The latter issue alone has been discussed. The owner of the copyright can sell the product again and again. This repeat value of the product has not been taken into account.
9- The arguments advanced in the analysis are not really legal arguments. There is no indication of why the jurists do not acknowledge pure rights for unhindered sale. After all, there must be some substantial reason. We have already indicated this in the discussion above.
10- Unhindered *'urf* has been taken into account for assigning value to new types of rights. This is not so in Islamic law, as discussed above, and each *'urf* must tally with the general principles of Islamic law that have arisen from the texts.
11- Registration by the government of such rights has been taken to be the main argument and is deemed sufficient to be considered a mere right as tangible property. This does not appear to be a legal argument, and in our view is mere insistence upon the granting of legal recognition to a right.

References & Notes:

1 Article 1(1)(i), The Geneva Treaty on the International Recording of Scientific Discoveries (1978).

2 John G. Sprankling, *Understanding Property Law*, 11-12.

3-Ibid., 20-21.

4-Ibid.

5--John Salmond, *Jurisprudence*, 12th ed., 110 quoted in PLD 1983 FSC 125, 129.

6-Paton, *Jurisprudence*, 458 as quoted in PLD 1983 FSC 125, 129–30 (emphasis added).

7-PLD 1983 FSC 125, 130. The Court cites a number of cases in support of this statement: *Eric v. Walsh*, 61 A 2d 1, (4); 135 Conn. 85; *Todeva v. Iron Min co.,* 45 N.W. 2d 782 (788); 232 Minn. 422; *Waring v. Dunlea,* DCNC 26 F. Supp. 338 (340); *Button v. Hikes*, 176 S W 2d 112 (115, 117) 296 Ky. 163; 150 ALR 779; *Bogan v. Wiley,* 202 P. 2d 824, (827); 90 Cal. App. 2d 288; *Department of Insurance v. Motors Ins. Corpn. Ind.* 138 NE 2d 157 (163); *Button v. Drake,* 195 SW 2d 66 (68, 69); 302 Ky. 517; 167 ALR 1046; and *Downing v. Municipal Court of City and County of San Fransisco,* 198 P. 2d 293 (926, 927); 88 Cal. App. 2d 345.

8-AIR 1951 SC 41.

9-Ibid.

10-The reference is to the work of Yūsuf Mūsā, *al-Amwāl wa Naẓariyyat al-'Aqd*, 162, quoted in PLD 1983 FSC 125, 132.

11-Ibid.

12-Ibid.

13-Ibid.

14-Ibid.

15-Ibid.

16- The following pages have been translated form Mawlānā Taqi al-'Uthmān ī's book Qaḍāyā Fiqhiyyah al-Mu'āṢarah, vol. 2, 116–125. The purpose was to present the arguments to the reader in a logical arrangement.

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