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## ISLAMIC LAW AND TRADEMARK PROTECTION

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### ABSTRACT

*Protection of trademark in Islamic Law is covered under verses of Holy Quran and traditions of Prophet Muhammad SAW for promotion and protection of legitimate trade and services. Trademark is one of the components of intellectual property (IP) law, which is protected under Islamic Law. Islamic law are those teachings which were revealed to the last Prophet Muhammad SAW for betterment of human beings in both worlds. Islamic Law protects rights of an individual whether they are material like property rights or immaterial like IP rights. Protection of wealth is one of maqasid al-sharia, which is public right and fully preserved under Islamic Law. Almighty Allah says, “Do not eat property of another with unlawful means except with a valid agreement solemnized with a valid consent from both sides”. Prophet Muhammad SAW said “he who copies another’s work is not one of us”. Prophet Muhammad SAW went to Syria for trading upon the wealth of his preceding wife Hazrat Khadija RA. Imam Abu Hanifa and Imam Bukhari used to work as traders besides their exceptional works in fiqh and hadith. All types of trade and investment activities are valid, legal and protected under Islamic Law unless clearly prohibited by Almighty Allah in Holy Quran and by Prophet Muhammad SAW in Sunnah. Transaction must be clear from riba/interest; which is an excess that has no corresponding consideration in an exchange of property for property. Subject matter of transaction must not be uncertain, purpose of transaction and activities governed under a contract must be legal as per verses of Holy Quran and traditions of Prophet Muhammad SAW. IP is protected under Islamic Law,*

*which is that area of law concerning legal rights associated with creative efforts, commercial reputation and good will. IP law includes patent for the protection of inventions, copyright for the protection of literary and artistic works and trademark for the protection of marks, signs, words and trade names, which distinguishes goods and services of one undertaking from goods and services of other undertakings. Trademark is required to be distinctive and non-descriptive as non-descriptive trademark is a unique trademark which is easy to be registered and easily adhered by public at large. The purpose of trademark is to protect trader as well as consumer while providing them opportunity to adhere source of goods and services to distinguish them from goods and services of other undertakings. Trademark is protected under Islamic Law, but it does not allow right holder to held illegal activities under legal trademark. Trademark is protected under Islamic Law only if that trademark is used for promotion and protection of legitimate goods and services.*

**Keywords:** Intellectual Property, Trademark, Islamic Law, Property, Right.

## 1. INTRODUCTION

Protection of trademark in Islamic Law is covered under Holy Quran and Sunnah of Prophet Muhammad SAW. Trademark is used for distinguishing goods and services of one undertaking from goods and services of other undertakings. Trademark is one of the components of IP law, which is protected under Islamic Law if it is used for promotion and protection of legitimate trade and services. IP law is that area of law which is used to protect inventions under patent law, protection of literary and artistic work under copyright law, protection of industrial designs under design law, protection of geographic location of goods under geographical indication law and protection of mark, sign, symbol, name, smell or a sound under trademark law, which are protected under Islamic Law if activities are legitimate as per verses of Holy Quran and traditions of Prophet Muhammad SAW.

Islamic Law is revelation of Almighty Allah revealed to the last Prophet Muhammad SAW within a time span of 23 years in Holy cities of Makah and Madinah, for betterment of human

beings in both worlds. Holy Quran and Sunnah of Prophet Muhammad SAW are two main basic primary sources of Islamic Law. Holy Quran is the book revealed by Almighty Allah to the last Prophet Muhammad SAW which is available in a written form and Sunnah is also revelation of Almighty Allah available in a written form consisted of sayings, acts and approved deeds of Prophet Muhammad SAW. Almighty Allah says in Holy Quran “He (Prophet Muhammad SAW) does not speak on his own. Rather he always speaks the revelation of Almighty Allah”.

Islamic Law protects property rights as Almighty Allah says in Holy Quran “Do not eat property of another with unlawful means except with valid agreement solemnized with valid consent from both sides”. Islamic Law classifies rights into (i) right of Almighty Allah such as offering prayers five times a day, (ii) right of a society such as respecting elders and neighbours, (iii) right of an individual such as fulfilling agreed transactions, and (iv) mixed rights of Almighty Allah and an individual which are classified into (a) right of Almighty Allah that is predominant for example fixed punishments, and (b) right of an individual is predominant for example retaliation and blood money. The purpose of Islamic law is to acquire good and repeal harm. Acquiring good things classified into (i) necessities, (ii) commodities, and (iii) luxuries. Necessities are known as *maqasid al-shariah* which is classified into (a) preservation of religion, (b) preservation of life, (c) preservation of progeny, (d) protection of an intellect, and (e) preservation of wealth. Preservation of an intellect has importance in Islamic Law covered under objectives of shariah. Any positive law under the light of Holy Quran and teachings of Prophet Muhammad SAW gives protection to an intellect, ideas and inventions is highly encouraged. Contracts effecting human intellect and ideas are void contracts.

Right of an individual can be created by persons’ own act such as contract or by other persons’ act such as gift or by nature such as inheritance. Contract creates or transfers rights, it is a voluntary agreement between equals for regulating their interests. IP right is right of an individual, which is created by an individual through his efforts and skills, it is a right which bestows benefit or profit to an individual. Protection of property and rights as well as protection of wealth and trade activities are highly encouraged and covered under verses of Holy Quran and traditions of Prophet

Muhammad SAW if they are not mixed with *riba/interest, garar/uncertainty and maysir/gambling*.

IP is a personal property of an individual, which is a right and an interest attached with a thing and protected under Islamic Law. Similarly, trademark is one of the tools to promote trade and investment activities for promotion and protection of goods and services during trade at market place to distinguish goods and services of one undertaking from goods and services of other undertakings. Islamic Law allows all legitimate trade activities and if a trademark is used for prohibited goods and for bad activities then that kind of trademark is discouraged and not protected under Islamic Law therefore trademark used for promotion of permitted goods and services is highly encouraged and protected under Islamic Law.

## 2. ISLAMIC LAW

Islamic law is communication and teachings revealed by Almighty Allah to the last Prophet Muhammad SAW for betterment of human beings in both worlds. Literal meaning of Islam is peace, its root word in Arabic is *salam* meaning peace. Therefore, Islam means religion of peace and protection. He who accepts Islam enters in peace and protection of Almighty Allah in this world and in the hereafter. Islam protects rights of human beings and orders them to do well with animals as well. Islam is the only religion revealed to the last Prophet Muhammad SAW and has been sent for the whole humanity. Almighty Allah says “Truly, the religion with Allah is Islam, those who were given Scripture did not differ except out of mutual jealousy after knowledge had come to them and whoever disbelieves in signs of Allah then surely Allah is Swift in calling to account” (Quran 3:19). In another verse Almighty Allah says, “And whoever seeks a religion other than Islam, it will never be accepted from him and in the hereafter, he will be one of the losers” (Quran 3:85).

The term used for Islamic knowledge in Islamic Law is *fikh*, which literally means understanding or knowing something. Imam Abu Hanifa has defined *fikh* as knowledge of a person about his rights and duties. Imam Muhammad Bin Idrees Al-Shafai defined *fikh* as knowledge related to rules of Islamic Law on human conduct, derived from sources of Islamic Law. There are four

main components of Islamic Law (i) the Law giver, (ii) the subject, (iii) the act, and (iv) the rule. The law giver is Almighty Allah, He is an entity with obligatory existence, complete in all good attributes and pure from all defects. The subject is all human beings generally and Muslims specially, who are required to obey messages revealed to the last Prophet Muhammad SAW. The subject must have the capacity to acquire right and to execute duty. The capacity of human being can be affected by act of nature or by act of an individual. The act of nature includes (i) minority, (ii) insanity, (iii) idiocy, (iv) sleep, (v) forgetfulness, (vi) death illness, (vii) menses, (viii) menstruation, (ix) slavery, and (x) unconsciousness. The act of an individual includes (i) intoxication, (ii) jest, (iii) indiscretion, (iv) coercion, (v) ignorance, and (vi) mistake. The act must be known and possible to be performed. The rule is communication of Almighty Allah related to human conduct through demand, option or declaration, which is classified into (i) primary, and (ii) declaratory rule (Kamali, 1991).

Primary rule is established rule of Islamic Law which demands commission or omission of an act or an optional act. Primary rule is divided into five types according to majority of Muslim Jurists (i) obligatory act, (ii) prohibited act, (iii) recommended act, (iv) disapproved act, and (v) permissible act. Imam Abu Hanifa adds two more types into primary rule (vi) compulsory act, and (vii) hateful act. According to Imam Abu Hanifa, compulsory act/prohibited act proved through definitive evidence as obligatory/hateful act proved through probable evidence. Furthermore, he who negates compulsory act will become apostate and he who negates obligatory act will not become apostate and he who performs prohibited act will become apostate and he who performs hateful act will not become apostate (Weeramantry, 1988).

Obligatory act is an act whose performance is obligatory upon human beings such as offering prayers five times a day. Almighty Allah says, "And perform prayers and give charity and bow down to Allah along with other bow down performers" (Quran 2:43). Obligatory act is divided into obligatory act within restriction of time and obligatory act without restriction of time. Obligatory act whose performance is demanded within restriction of time is divided into (i) performance of act before time, (ii)

performance of act on time, (iii) repetition of act within restricted time, and (iv) performance of act after expiration of time. Obligatory act whose performance is demanded within restriction of time is also divided into (i) act whose performance cannot be done twice within a restricted time, (ii) act whose performance can be done twice within a restricted time, and (iii) act whose performance can be done twice within a restricted time but not allowed to do so. Obligatory act is also divided into (i) specified obligatory act such as freeing Muslim slave, and (ii) unspecified obligatory act such as freeing any slave. Almighty Allah says “Allah will not punish you for what is unintentional in your oaths, but He will punish you for your deliberate oaths; for its expiation feed ten poor persons on a scale of average of that with which you feed your own families or provide cloths or manumit a slave. But whosoever cannot afford that, he should fast for three days. That is expiation for oaths when you have sworn. And protect your oaths. Thus, Allah make clear to you His signs that you may be grateful” (Quran 5:89).

Obligatory act is further classified into act whose performance is demanded to the whole community or an obligatory act whose performance is demanded to every individual. Prohibited acts are those acts whose performance is either directly prohibited such as worshipping other than Almighty Allah or indirectly prohibited such as fasting on ‘Eid day (Motzki, 2002).

Recommended act is the act whose performance will give benefits to the performer, which is classified into three types (i) act which Prophet Muhammad SAW performed throughout his life and never ignored, (ii) act which Prophet Muhammad SAW sometimes performed and sometimes ignored, and (iii) act which Prophet Muhammad SAW performed as a human being. Disapproved acts are those acts which are recommended not to perform but the performer will not be punished. Permissible act is an optional act which is classified into (i) recommended, (ii) not recommend, and (iii) between both. Recommended act is the act whose performance will give benefit to the performer in this world and in the hereafter such as brushing teeth before offering prayers at the time of performing ablutions. Not recommended act is the act whose nonperformance will give benefits to the performer in this world and in the hereafter such as eating onion before going to mosque for offering prayers and act in between both is the act

whose performance or non-performance will not give anything and it's upon the person go for it or not go for it such as going for a walk or staying at home or going to market etc. (Coulson, 1969)

Declaratory rule is the established rule of Islamic Law, to declare an act (i) valid, (ii) voidable, or (iii) void based on (a) essential thing, (b) cause, (c) condition, and (d) prohibition and there are general rules and there are exceptions to general rule. A valid act is an act in which all conditions and essential things are fulfilled. A voidable act is an act in which some conditions are fulfilled but some are not, and all essential things are fulfilled. A void act is an act in which essentials and conditions are not fulfilled. An essential is a prerequisite and a basic thing required for an act, the act cannot be performed without it such as bride is an essential thing for solemnization of marriage. Cause is the reason to perform an act such as completion of one year to pay *zakat*. Reason of reason is *ila*, which is a clear and constant attribute, good to make ruling and accepted by the lawgiver. A condition is an external thing in an act and without it some acts have legitimacy but cannot be completely performed such as dower amount in a marriage contract. Prohibition is a hurdle in performance of an act such as killing prohibits son to claim inheritance in the wealth of his killed father (Nyazee, 1998).

A general rule is declaratory rule such as performing four *rakats* of *zuhr* prayers and in case of a person in a journey, he is allowed to perform two *rakats*, which is an exception to the general rule (Nyazee, 1998). Almighty Allah says, "And when you travel in the land, there is no sin on you if you shorten your prayers if you fear that disbelievers may attack you, verily, disbelievers are ever unto you open enemies" (Quran 4:101).

There are eleven sources of an Islamic Law (i) Holy Quran, (ii) Sunnah of Prophet Muhammad SAW, (iii) consensus among Muslims Jurists after the death of Prophet Muhammad SAW, (iv) analogy on a new issue based upon established principle prescribed in Holy Quran and Sunnah of Prophet Muhammad SAW, (v) juristic preference of unclear analogy over clear analogy, (vi) presumption of continuity of an established principle, (vii) extended analogy, (viii) blocking lawful means to an unlawful end, (ix) rules in earlier scriptures, (x) opinion of a companion of Prophet Muhammad SAW, (xi) custom and usages. Holy Quran revealed to the last Prophet Muhammad SAW in 23

years, 13 years when he was living in Makkah and 10 years when he was living in Madinah. Rules prescribed in Holy Quran are classified into five types (i) rules related to belief, (ii) rules related to behavior, (iii) rules related to worship, (iv) rules related to transactions, and (v) rules related to offences and their punishments. Holy Quran is the last revelation of Almighty Allah which cannot be changed or altered as Almighty Allah has taken the responsibility of its protection himself, He says “Verily We: It is We Who have sent down the *dhikr*/Quran and surely, we will guard it from corruption” (Quran 15:9).

Almighty Allah has given the challenge to nonbelievers that if they are in doubt about the Holy Quran, bring ten chapters like chapters of Holy Quran or one chapter. Almighty Allah says “Or they say, He (Prophet Muhammad SAW) forged it (Quran). Say: Bring you then ten forged chapters like unto it and call whomsoever you can other than Allah (to your help) if you speak the truth! If then they do not answer, know then that the Revelation (this Quran) is sent down with the Knowledge of Allah and that none has the right to be worshipped but He! Will you then be Muslims” (Quran 11:13-14). Almighty Allah says “And if you are in doubt concerning that which We have sent down to our worshiper (Muhammad SAW) then produce a chapter of the like thereof and call your witnesses (supporters and helpers) besides Allah if you are truthful. But if you do not do it and you can never do it then fear the Fire (Hell) whose fuel is men and stones, prepared for disbelievers” (Quran 2:23-24) Almighty Allah says “Or do they say: He (Muhammad SAW) has forged it? Say: Bring then a chapter like unto it and call upon whomsoever you can, besides Allah if you are truthful! Nay, they deny that; the knowledge whereof they could not compass and whereof the interpretation has not yet come unto them. Thus, those before them did deny, then see what the end of polytheists and wrongdoers!” (Quran 10:38-39).

The second source of Islamic Law is Sunnah of Prophet Muhammad SAW. He is the last messenger of Almighty Allah and sent for the whole mankind and there will be no messenger after him. Almighty Allah says “Muhammad SAW is not the father of any man among you but he is the Messenger of Allah and the last of the Prophets and Almighty Allah is ever all Aware of everything” (Quran 33:40). The purpose of the Sunnah of Prophet

Muhammad SAW includes (i) commentary of Holy Quran, (ii) links facilitating case with a known principle, (iii) performs analogy based on prescribed rule in Holy Quran, (iv) lays down general principle, and (v) elaborates meaning of the word used in Holy Quran.

Third source of an Islamic Law is consensus among Muslim Jurists after the death of Prophet Muhammad SAW, which is classified into (i) *Tasrihi* in which all jurists take part and give their opinions, and (ii) *Sukuti* in which some jurists do not take part and do not comment on the matter. Almighty Allah says “And whoever contradicts and opposes the Messenger SAW after the right path has been shown clearly to him and follows other than believers' way. We shall keep him in the path he has chosen and burn him in Hell - what an evil destination” (Quran 4:115).

The fourth source of an Islamic Law is analogy in which a new matter is disclosed and ruling of the previous established matter will be applied on a new matter if there is a clear and constant attribute/*ila*. There are four elements of an analogy (i) previous established rule/*asl*, (ii) new matter/*far*, (iii) clear and constant attribute/*ila*, and (iv) the ruling/*hukm*. There are two types of analogies (i) analogy in which attribute is manifest, and (ii) analogy in which attribute is not manifest and there is a difficulty to find an attribute/*ila* (Nyazee, 1998).

The fifth source of an Islamic Law is juristic preference, which is a situation in which there are two analogies (i) the one whose consequences are injurious which is manifest analogy, and (ii) the analogy whose consequences are not injurious and good, but it is weak analogy. Jurist prefer weak analogy over strong analogy as consequences of weak analogy is good and not injurious and consequences of manifest and strong analogy in injurious (Nyazee, 1998).

The sixth source of an Islamic Law is presumption of continuity/*istishab al hal*, in which already established principle continues to exist if there is no ruling against it in Holy Quran and Sunnah of Prophet Muhammad SAW. The seventh source of an Islamic Law is extended analogy/*maslaha mursala*, which is used to preserve purpose of an Islamic Law to acquire good and to

repeal harm by settlement of an issue. The eighth source of an Islamic Law is blocking lawful mean to an unlawful end/*sad al zarai*, which is used to disallow some legalize acts in some situations to block harmful results. The ninth source of an Islamic Law is rules prescribed in earlier scriptures, applicable on Muslims if they are also prescribed in Holy Quran and Sunnah of Prophet Muhammad SAW. The tenth source of an Islamic Law is opinion of companions of Prophet Muhammad SAW. The eleventh source of an Islamic Law is custom and usages, which should be general and accepted for an immemorial time and must not be against established principles laid down in Holy Quran and Sunnah of Prophet Muhammad SAW. (Nyazee, 1998) Almighty Allah says “Show forgiveness, enjoin what is good and turn away from the foolish” (Quran 7:199).

It is pertinent to mention that a contract is a voluntary agreement between equals for regulating their interests. It is basis of all transactions which is generally allowed under Islamic Law as there is a general principle that all transactions are allowed unless prohibited by Almighty Allah and his Prophet Muhammad SAW. All types of transactions are allowed under Islamic Law except transactions and trade activities consisted of (i) *riba*/interest, (ii) *gharar*/uncertainty, and (iii) *maysir*/gambling. *Riba* is an increase; over and above; the principle amount payable in any contractual transaction which is not covered by corresponding labor, expertise, risk or commodity. In another word it is an excess that has no corresponding consideration in an exchange of property for property. *Riba* is divided into (i) *riba al-fadl* / *riba* in sale, and (ii) *riba an-nasiya* / *riba* in debt. *Riba al-fadl* is an excess and increase over a principle amount and commodity from one side while the other side effects from that increase/excess. *Riba an-nasiya* is an excess of a commodity or a principle amount while taking back the given loan. The increase and excess over a principle amount or a specific commodity is illegal and prohibited by Almighty Allah as He says, “And that which you give in gift in order that it may increase your wealth from other people's property, has no increase with Allah but that

which you give in *zakat* seeking Allah's Countenance then those, they shall have manifold increase” (Quran 30:39).

Almighty Allah also states “For wrongdoing of Jews, we made unlawful to them certain good foods which were lawful for them and for their hindering many from Allah's Way. And their taking of usury though they were forbidden from taking it and their devouring of men's substance wrongfully. And We have prepared for disbelievers among them a painful torment” (Quran 4:160-161). Almighty Allah also states “O you who believe! Eat not usury doubled and multiplied but fear Allah that you may be successful” (Quran 3:130). Almighty Allah also states “Those who eat usury will not stand on the Day of Resurrection except like standing of a person beaten by Satan leading him to insanity. That is because they say: Trading is only like usury, whereas Allah has permitted trading and forbidden usury. So, whosoever receives an admonition from his Lord and stops eating usury shall not be punished for the past; his case is for Allah to judge; but whoever returns to usury, such are dwellers of Fire - they will abide therein. Allah will destroy usury and will give increase for deeds of charity and Allah does not like disbelievers, sinners. Truly those who believe and do deeds of righteousness and perform prayers and give *zakat*, they will have their reward with their Lord. On them shall be no fear nor shall they grieve” (Quran 2:275-278).

*Gharar* is an uncertainty and a lack of knowledge about ultimate outcome of a contract which may lead to dispute and litigation such as fish in water, bird in sky and fetus in the womb of animal. The object of business must be certain and must not have any kind of uncertainty about price, delivery, quality and quantity. The object of business must be existed, deliverable, specified and known. *Gharar* is divided into (i) major *gharar*, and (ii) minor *gharar*. The major *gharar* is a gross and serious uncertainty about ultimate outcome of a business where capital is not available, not deliverable, not specified and the deferred time is unknown while minor *gharar* is a mere uncertainty which is existed in every form of contract includes sale of fruits without cutting or fix ticket charges while some passengers are not going till the last stop or fix charges for a hotel room while some guests

use more services than others. A major *gharar* is unacceptable while the minor *gharar* is acceptable (Mansuri, 2006).

*Maysir* is gambling where one party benefits without fear of loss such as game of chance. A business gives benefit all the time and there is no possibility of loss is prohibited under Islamic Law. Almighty Allah says “They ask you O Muhammad SAW concerning alcoholic drink and gambling. Say: In them is a great sin and some benefit for men but the sin of them is greater than their benefit. And they ask you what they ought to spend. Say: That which is beyond your needs. Thus, Allah makes clear to you His Laws in order that you may give thought” (Quran 2:219). In another place Almighty Allah says “O you who believe! Intoxicants gambling, arrows for seeking luck or decision are an abomination of Satan handiwork. So, avoid that abomination in order that you may be successful. Satan only wants to excite enmity and hatred between you with intoxicants and gambling and hinder you from remembrance of Allah and from prayer. So, will you not then abstain? And obey Allah and Messenger Prophet Muhammad SAW and beware and fear Allah. Then if you turn away, you should know that it is Our Messenger's duty to convey the Message in the clearest way” (Quran 5:90-92).

IP is created by an intellect of a person, either invention under patent, literary or artistic work under copyright or mark, name under trademark, which is used for promotion of legalize activities and products. Trademark is protected under Islamic Law as a component of legitimate trade activities which is highly encouraged and protected under Islamic Law. Almighty Allah says “O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you by mutual consent. And do not kill yourselves. Surely, Allah is Most Merciful to you” (Quran 4:29).

### **3. INTELLECTUAL PROPERTY LAW**

Intellectual property law is that area of law which concerns legal rights, associated with created efforts, commercial reputation and good will (Bainbridge, 1997). IP is that property which is created by an intellect and main components of IP includes (i) patent for the protection of inventions, (ii) copyright for the protection of literary and artistic work, (iii) trademark for the protection of

word, name, sign, mark, smell or a sound which distinguishes goods and services of one undertaking from those of other undertakings, (iv) industrial design for the protection of industrial designs, and (v) geographical indication for the protection of goods associated with a particular region (Bainbridge, 1997).

It is pertinent to mention historical transformation of IP law. Initially, Guild of Writers consisted of text letters, book binders and book sellers formed, in 1403 for protection of copyright in United Kingdom. Printing technology introduced in 1477 through which piracy started, thereafter the concept of an arbiter came into being, which comprised of 2 wardens appointed by mayor of London to stop piracy and to punish pirates as the basic purpose for the appointment of arbiters was to stop printing any seditious material against Queen. Royal Charter of Queen Mary introduced in 1557 according to which a company was given rights of (i) perpetual succession, (ii) to take legal action, (iii) to make rules for itself, (iv) to meet, (v) to elect master and 2 wardens, (vi) to own property in London and surroundings, and (vii) an exclusive permission to print throughout England. A company was given more powers in 1586 and punishment were increased to printing press destruction, ban on printing and imprisonment for 6 months. Printing Licensing Act introduced in 1662 requiring every issued license must be printed verbatim at the beginning of each book. Printing Licensing Act repealed in 1695 and people endeavored unsuccessfully for reimplementaion of Printing Licensing Act 1695. (Khong, 2006). The Statute of Anne is the first Copyright Act passed and enforced in 1710. It was passed in the reign of Queen Anne, thus named after her name. It has 11 sections, the Preamble of the Statute of Anne 1710 states "An act for an encouragement of learning by vesting copies of printed books in authors or purchasers of such copies during the times therein mentioned". New Copyright Act introduced in 1911 and amended in 1956. The Copyright, Designs and the Patents Act introduced in 1988 which is existing law of copyright applicable in United Kingdom. (Zimmerman, 2010)

Talking about trademark, Blacksmiths used trademarks for the first time on their swords. Thereafter, a beer company named Lowenbrau used lion mark for their alcoholic material in 1383. The Trademark Act was passed in 1266 requiring bakers to use distinctive mark on packaging of the bread. The Trademark Act

1875 started registration of trademarks in United Kingdom. The Bass-Brawley's Red Triangle was the first registered trademark of United Kingdom in 1876. The Trademark Act 1938 developed registration system of trademarks based on intend to use principle. It was considered a model and was adopted in British India in 1940 and elsewhere as well. An eagle with a ribbon labeled: Economical Brilliant was the first trademark registered in United States under Trademark Act 1870 (Higgins, 2012).

#### **4. TRADEMARK**

Trademark is basically a sign, word or a mark which is capable of distinguishing goods or services of one undertaking from those of other undertakings. The owner of trademark has an exclusive right over it to use it and to place it on goods and services for their identification. Trademark protects interests of the producer of goods against an unfair competition with other producers of goods. It facilitates consumer choice of purchasing goods from the market place or using services. It protects goodwill of an undertaking and good will of the consumer against deceptive practice. Although the registration of trademark is not compulsory and non-registered trademark can also be protected based on use. Registration gives a complete monopoly to trader over it and non-registration gives a fair competition (Taubman, 2012).

The registration of trademark clarifies existence and scope of trademark right as well as to notify other traders about existence and scope of trademark right. Trademark registration provides registration with an evidence of the existence of IP right as well as the notice to third party regarding existence of trademark right. The registration of trademark saves time and money of trademark holder. The right of trademark is created based on first to file principle in some member countries and is created based on first to use principle in some other member countries. First to file principle is mostly undertaken in civil law countries and first to use principle is mostly undertaken in common law countries. The registration usually takes place at the place of nationality of the person, domiciled country of the person or a commercial place of a person but in some cases international registration can be adopted by citizens of member states in other member states. The detailed procedure of international trademark registration is

prescribed under Madrid Protocol 1989 (Bryer, 2011). The common law marks are protected without registration based on use as well as well-known marks. Article 6 of Paris Convention states regarding protection of well-known marks that: any country of the union may cancel registration of trademark under law of the land or on request of interested party if it creates confusion because it is identical to already registered mark whose use is well known in the country. The request of cancellation of trademark must be made within five years from the date of registration but limitation does not run against mark registered in bad faith. The intended use and nature of goods and services are not obstacle in registration of trademark. The publication of mark is required to take place before or after registration and registered trademark may be questioned by any party who has an interest in it before the registrar of trademark or before the concerned Court (Bodenhausen, 1968). The use may be the requirement for maintaining registration of trademark and if a party fails to maintain usage for continuous three to five years, the registration would be cancelled except a valid reason is shown by trademark holder. The term of protection for registered trademark is at least for 7 years and renewable after expiration of the term and previous owner will be given preference while renewing the term. The owner can give exclusive or nonexclusive license but a compulsory licensing is not permitted and the owner may also assign trademark with or without transferring his whole business with it (Bainbridge, 1997)

World Intellectual Property Organization (WIPO) and World Trade Organization (WTO) have been working under United Nations (UN) for promotion and protection of trademarks internationally. WIPO established in 1967, which is one of the specialized agencies of UN. The purpose of creating WIPO is to encourage creative activities by promoting effective protection of IP rights throughout the world. WIPO constructed in 1970 and became specialized agency of UN in 1974. It has 26 international treaties for protection of different components of IP (May, 2006). Paris Convention is one of the statutes of WIPO, first made in 1883 and revised in 1886, 1890, 1891, 1897, 1900, 1911, 1925, 1934, 1958 and 1967 and further amended in 1979. Paris Convention 1967 and Madrid Protocol 1989 deal with protection of Industrial Property, including trademark (Robles Jr, 1999). The

basic purpose of Paris Convention is to form a union of all member states for effective protection of industrial property includes patent, trademark and industrial design. Industry includes all types of industries for commerce; whether agricultural or extractive (A-1 Paris Convention 1967).

All member states of WIPO are required to provide an effective protection procedure and process, against an unfair competition; which is an act, contrary to honest practice in industrial and commercial matters and an act which creates confusion, regarding establishment, goods or commercial activities of competitor or false allegation which discredits establishment, goods or commercial activities of competitor or an indication which misleads public at large. The right holder of registered trademark has all rights to take legal action against a person who does any or all illegal activities against registered trademark in member state of WIPO.

Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is the treaty of WTO. Its Preamble states “member states have recognized assurance of measures and procedures for enforcement of IP rights, which should not become hurdle in legitimate trade. Member states have also recognized that there is a need of new rules and disciplines for effective and appropriate enforcement of trade related IP rights and there is also a need for effective and appropriate procedure for settlement of disputes between contracting states and there is need of a model to prevent disputes between contracting states. There is also a need of reducing tensions between contracting states by adopting expeditious procedures and therefore member states are required to give effect to provisions of TRIPS into their domestic laws of state and member states may adopt any suitable method for doing so” (TRIPS, 1994).

Trademark is property of the owner, which is basically a right which is attached with a thing. A person who has a right over the property is called a possessor. Possession is continuing exercise of a claim to exclusive use of it. A person who has an absolute and exclusive right over the property is called the owner of property. It is a relation between a person and a right that has vested in him. Property is classified into fungible property and non-fungible property. A fungible property is a property which can be measured, counted, weighed or calculated and a non-fungible

property is that property which cannot be measured, counted, weighed or calculated. Fungible property further classified into tangible property and non-tangible property. A tangible property is that property which can be touched and felt, and non-tangible property is a property which cannot be touched and felt. Intellectual property is a non-fungible property which cannot be touched and felt, and which is created by an intellect. Trademark is one of the components of IP. Tangible property further classified into moveable property and immovable property. Moveable property is that property which can be moved from one place to another and which is not attached to what is attached to the earth. Immoveable property is that property which cannot be moved from one place to another and which is attached to the earth or attached to what is attached to the earth. Moveable property further divided into current property and long-term property. Current property is that property whose useful life is less than one year and the long-term property is that property whose useful life is more than one year (Demsetz, 1974).

Property is either a material thing such as a house or an immaterial thing such as IP. It is either owned by one person or collectively owned by more than one person. The legal owner of property has right to use it and take all its potential benefits and to give it to another partially or fully. The property is either private which is privately owned by one or more persons or property is public when it is owned by provincial or federal government of the state under Constitution of the State. Private property is either personal property which is used for personal purposes or non-personal property which is not used for personal purposes or for personal benefits. There is also a concept of common property under communism, according to which property is belonged to people and not owned by any individual and output is distributed among people and used by people generally such as public parks. The property can be transferred through contract or through inheritance. A property can be transferred through sale when one or more persons transfer the ownership of a property to one or more persons by act of the parties. Property can be transferred by exchange when other party transfers ownership of his property. Property can be given on lease when right of use and possession is transferred but ownership remains with actual owner. Possession of property can be transferred through mortgage, when

property is immovable or through pledge and lien, when property is moveable and ownership of property can be transferred in moveable and immovable properties through charge as well (Salmond, 1907).

Trademark is a non-tangible property which cannot be touched and felt but can be owned by a natural person or persons or can be owned by a jurisdictional person or persons such as a company/corporation or a partnership firm. Trademark is used for distinguishing goods and services of one undertaking from goods and services of other under takings, which is either registered in favor of one person and can be registered in favor of more than one persons and when a trademark is registered in favor of more than one persons, it is called a collective mark. The owner of trademark can use his own trademark during trade at market place and take all its potential benefits generated from trade activities and can give it to another person for its usage under trademark law of the land, whether fully or partially and without transferring business with it.

A right is an interest recognized and protected by a rule of right. A right is an interest, respect of which is a duty and disregard of which is a wrong. Interest means anything which is beneficial in nature. A person who has a right over a property can waive it, exchange it, give concession or give relaxation. For example, in an Islamic Law, it is the right of Almighty Allah to fast in the month of *Ramadan*, if someone eats or drinks during fasting unintentionally, it would not affect the fast which is a waiver of right and if some old person cannot fast because of his bad health, it would be enough for him if he feeds one time food to a needy person instead which is an exchange of right and if a person performs a journey during fasting, he is allowed to perform half portion of prayers which is a concession to the right of Almighty Allah and if a person is ill during the month of *Ramadan*, he can leave fasting and can do so after expiration of the month and when he becomes fully fit which is relaxation given by Almighty Allah in his right (Nyazee, 1998).

Essentials of legal rights are (i) subject of right, (ii) object of right, (iii) content of right, (iv) subject of duty, and (v) title in the owner. Subject of right is the owner who has a right over a property. Object of right is a property which carries a right. Content of right means that an owner may use his property

exclusively, takes all its potential benefits and gives it to another temporarily or permanently. Subject of duty is the third person whose duty is not to interfere and trespass in the property owned by another and title in the owner is the reason and cause that how right was created and transferred into the owner (Salmond, 1907).

IP rights are classified into (i) general, (ii) partial, (iii) whole, and (iv) with limitations. General rights of IP are in writing where a person has more powers. Partial rights are rights where a person has fewer powers. Whole right is a right where only assignee can take legal action and a right with limitations is a right where the owner and assignee both has similar rights over IP (Mittelstaedt 1997). When ownership of the work is confirmed, the author is entitled to deal with works in any lawful manner as selling it, give it away or leave it to his beneficiaries after his death. On the other hand, if owner does not own right then there would not be such entitlement. The innovation and knowledge of the author combined with his physical and mental work and time spent, all place the author in the rank of an artisan who has right to enjoy ownership of rights for his work. Islamic Law urged protection of author's right in his work to encourage research and enlighten society by encouraging scientists to publish their works, innovation or ideas. On the other hand, negative effect would result in not only the advance of science but psychological effect on the author himself. Since beginning of publishing, it became a custom and a tradition in Islamic countries to apply certain practices such as selling, lending or gifting published work and all these are properties of ownership of right. History is full of examples of selling published works or gifting them to rulers or lending them to Caliphs and men of learning (Jamar, 1992).

IP right's owner is fully entitled to his unfettered right work but if content of work is prohibited in an Islamic Law then such work will have to be destroyed and penalty should be imposed upon the author of prohibited material or blasphemous material. In modern day law, this is not the case, the modern-day trademark law deals with trademark registration and related matters and it does not have to do anything with process and goods and services prosper under the ambit of registered trademark. The registration of trademark does not give a license to trademark owner to do any illegal or immoral activity. Trademark of an illegal and immoral

activity cannot be granted, and it cannot be protected under Islamic Law (Weeramantry,1988).

IP right owner has superior right over his invention as Prophet Muhammad SAW said “he who cultivates an arid land, it would belong to him”. Prophet Muhammad SAW also said “the best of a man's toil is that achieved by his hands”. Prophet Muhammad SAW also said “the best of what you would eat is that attained through your labor and your sons are part of your labor”. Islamic law recognizes IP right of a person who has obtained property by lawful means which is fully protected, and no one has a right to infringe his legal right and trespass into his lawful property. A lawful owner has a right to take all potential benefits of his property and trademark is lawful property of the owner. The owner of trademark has right to use it during trade for identification of his goods or services. He also has a right to give it to another partially or fully. All positive laws made in compliance with established principles laid down in Holy Quran and Sunnah of Prophet Muhammad SAW are protected and accepted in Islamic Law (Udovitch, 1967).

Holy Quran is the book revealed to the last Prophet Muhammad SAW written in the binding and transmitted to us through definitive means. Holy Quran was revealed on the last Prophet Muhammad SAW through Gabriel AS from Almighty Allah in 23 years. Almighty Allah has taken the responsibility of the preservation of Holy Quran as He says, “Verily We: It is We Who have sent down the *dhikr*/Quran and surely we will guard it from corruption” (Quran 15:9). People used to write verses of Holy Quran in different things during the time of Prophet Muhammad SAW. In the reign of Hazrat Abu Bakr RZ, 700 companions of Prophet Muhammad SAW, who have memorized Holy Quran, martyred in the war of Yamama. Thereafter Hazrat Umar RZ came to Caliph Abu Bakr and asked for compilation of Holy Quran in a written form, which was started then and completed and compiled in one book by Hazrat Zaid Bin Sabit RZ and handed over to Hazrat Abu Bakr RZ then after his death to Hazrat Umar RZ and at the time of his death he gave that copy to his daughter Hafsa bin Umar RA, who afterwards sent that to third Caliph Hazrat Usman RA, who made a committee for preparation of authentic final copy of the written Holy Quran which was later on sent to all Muslim Provinces (Abdul Haque, 1915).

Holy Quran is the book of guidance, provides excellent explanations of the oneness of Almighty Allah, put light upon historical events and give a clear picture of the hereafter. It talks about things on every aspect of life in this world and life in the hereafter. Holy Quran is the code of conduct for human beings generally and for Muslims specially. Thinking and innovation and intellectual works are encouraged by Almighty Allah as he says “Verily! In the creation of heavens and earth and in alternation of night and day and ships which sail through the sea with that which is of use to mankind and water (rain) which Allah sends down from sky and makes earth alive therewith after its death and moving/living creatures of all kinds that He has scattered therein and in veering of winds and clouds which are held between sky and earth are indeed signs for people of understanding” (Quran 2:164). He also says “And among His Signs is that He shows you lightning by way of fear and hope and He sends down water from sky and therewith revives earth after its death. Verily, in that are indeed signs for a people who understand. And among His Signs is that heaven and earth stand by His Command then afterwards when He will call you by single call, behold, you will come out from the earth” (Quran 30:24-25).

Trade and investment activities are encouraged under Holy Quran. Almighty Allah says “Save when it is a present trade which you carry out on the spot among yourselves, then there is no sin on you if you do not write it down. But take witnesses whenever you make a commercial contract. Let neither scribe nor witness suffer any harm but if you do such harm, it would be wickedness in you. So be afraid of Allah; and Allah teaches you. And Allah is the All-Knower of each and everything” (Quran 2:282).

Almighty says in another place “O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you by mutual consent. And do not kill yourselves. Surely, Allah is Most Merciful to you” (Quran 4:29). Almighty Allah says in another place “Men whom neither trade nor sale diverts them from Remembrance of Allah nor from performing prayers nor from giving *zakat*. They fear a Day when hearts and eyes will be overturned (from the horror of the torment of the Day of Resurrection)” (Quran 24:37).

In Islamic Law, spending wealth on poor people and giving charity in the way of Almighty Allah is also considered a trade

activity for a good cause as Almighty Allah says “Verily, those who recite the Book of Allah and perform prayers and spend out what We have provided for them, secretly and openly, hope for a trade gain that will never perish” (Quran 35:29). In another place, Almighty Allah says “O You who believe! Shall I guide you to a commerce that will save you from a painful torment. That you believe in Allah and His Messenger Prophet Muhammad SAW and that you strive hard and fight in the Cause of Allah with your wealth and your lives, that will be better for you if you but know! He will forgive your sins and admit you into Gardens under which rivers flow and pleasant dwelling in Gardens of Paradise that is indeed the great success. And (He will give you) another (blessing) which you love, help from Allah and a near victory. And give glad tidings to believers” (Quran 61:10-13).

Almighty Allah says “And when they see some merchandise or some amusement they disperse headlong to it and leave you (Muhammad SAW). Say “That which Almighty Allah has is better than any amusement or merchandise! And Almighty Allah is the Best of providers” (Quran 62:11). Copying another’s work and then sell it with his own name and eating profit of that work is prohibited as Almighty Allah says, “And eat up not one another's property unjustly, nor give bribery to rulers (judges before presenting your cases) that you may knowingly eat up a part of property of others sinfully” (Quran 2:188).

In another place Almighty Allah states “O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you by mutual consent. And do not kill yourselves. Surely, Almighty Allah is Most Merciful to you” (Quran 4:29). Trademark is a personal property and protected as one of the tool to promote legal trade activities to allow customer to distinguish goods and services of one undertaking from goods and services of other undertakings. Prophet Muhammad SAW said “When a man dies, his acts come to an end but three (i) recurring charity, (ii) beneficial knowledge, and (iii) a pious son prays for him (Sahih Muslim 1631). Knowledge is recognized by Islam as being of continuous benefit that outlives the author even after his death and the cessation of property right. Islamic Jurists are unanimous in their view about high regards which Islam considers for the author, the researcher and the scientist who are grouped together under the name of *aalim* to whom several references are made in

Holy Quran and in traditions of Prophet Muhammad SAW. IP products are therefore recognized as being of a paramount benefit to Islam and it was made the duty of every Muslim to learn. Prophet Muhammad SAW said “He who alleviates suffering of a brother out of sufferings of the world, Allah would alleviate his suffering from sufferings of the Day of Resurrection and he who finds relief for one who is hard-pressed, Allah would make things easy for him in the Hereafter and he who conceals faults of a Muslim, Allah would conceal his faults in the world and in the Hereafter. Almighty Allah is at the back of a servant so long as the servant is at the back of his brother and he who treads the path in search of knowledge, Almighty Allah would make that path easy, leading to Paradise for him and those persons who assemble in the house among houses of Allah (mosques) and recite Book of Allah and they learn and teach Qur'an (among themselves) there would descend upon them tranquility and mercy would cover them and angels would surround them and Allah mentions them in the presence of those near Him and he who is slow-paced in doing good deeds, his (high) lineage does not make him go ahead (Sahih Muslim, 4699a).

There is another tradition in which it is stated that all creators of Almighty Allah pray for a person who go for seeking knowledge and they continue to do so until that person come back to his house. There are those Jurists who argue that this saying is limited to those who are seeking knowledge in the religious field but words of Prophet Mohammad SAW in this regard is general knowledge which is unequivocal. These are a clear indication that learning is not limited to one aspect alone but includes innovation, science and technology. Trademark is creation of the owner thus he has a right under Islamic law to use it as his personal property and takes all its potential benefits during trade and to give it to another temporarily or permanently. First inventor is entitled to claim the right as Prophet Muhammad SAW said “He who cultivates land that does not belong to anybody is more rightful (to own it)”. Urwa said, “Umar gave same verdict in his Caliphate” (Sahih Bukhari, 2335). Copying of another’s work without his permission is not allowed as Prophet Muhammad SAW said “He who took up arms against us is not of us and he who acted dishonestly towards us is not of us. And he SAW also said “He who deceives is not one of us” (Sahih Muslim, 101-102).

## 5. CONCLUSION AND RECOMMENDATIONS

Protection of trademark is covered under general protection of trade and investment activities under verses of Holy Quran and traditions of Prophet Muhammad SAW. Trademark is one of the component of IP, which is used for promotion of permissible goods and legal activities under Islamic Law. Islamic Law is teachings which were revealed on the last Prophet Muhammad SAW for betterment of human beings in both worlds. Islamic Law has four components (i) the Lawgiver Almighty Allah, (ii) known and performable act, (iii) human beings, and (iv) the rule which is either primary or secondary. Primary rule is the demand of lawgiver by way of (a) obligation, (b) prohibition, (c) recommendation, (d) disparagement, and (e) permissibility. Secondary rules are declaration by lawgiver through (a) valid, (b) void, and (c) voidable acts based on (d) essential thing, (e) cause, (f) condition, and (g) obstacle. There are eleven sources of an Islamic Law (i) Holy Quran, (ii) Sunnah of Prophet Muhammad SAW, (iii) consensus, (iv) analogy, (v) juristic preference, (vi) continuation of existing principle, (vii) extended analogy, (viii) blocking lawful means to an unlawful end, (ix) rules in previous scriptures, (x) opinion of the companions of Prophet Muhammad SAW, (xi) custom and usages. The basic sources of an Islamic law are Holy Quran and Sunnah of Prophet Muhammad SAW under which trademark is fully protected as one of the tool to promote legal trade and investment but cannot be protected if used for promotion of prohibited goods and illegal services.

IP law is that area of law which concerns legal rights associated with created efforts commercial reputation and good will. It includes (i) patent for the protection of inventions, (ii) copyright for the protection of literary and artistic work, and (iii) trademark for the protection of trademark and tradenames. Trademark is one of the sub divisions of IP, it is used for the protection of trade names and signs which distinguishes goods and services of one undertaking from goods and services of other undertakings. A property is a right which is attached with a thing such as an interest of a trader is attached with trademark thus it is

a property and its owner has a right to use it and take all its potential benefits and to give it to another partially or fully.

All types of transactions and trade activities are allowed in an Islamic Law if they are not prohibited in Holy Quran and Sunnah of Prophet Muhammad SAW. Almighty Allah says “O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you by mutual consent. And do not kill yourselves. Surely, Allah is Most Merciful to you” (Quran 4:29). Any transaction covers usury, uncertainty and gambling are not protected under Islamic Law. Almighty Allah says, “And that which you give in gift in order that it may increase your wealth from other people's property, has no increase with Allah but that which you give in *zakat* seeking Allah's Countenance then those, they shall have manifold increase” (Quran 30:39).

Almighty Allah says “O you who believe! Intoxicants gambling, arrows for seeking luck or decision are an abomination of Satan handiwork. So, avoid that abomination in order that you may be successful. Satan wants only to excite enmity and hatred between you with intoxicants and gambling and hinder you from remembrance of Allah and from the prayer. So, will you not then abstain? And obey Allah and Messenger Prophet Muhammad SAW and beware and fear Allah. Then if you turn away, you should know that it is Our Messenger's duty to convey the Message in the clearest way” (Quran 5:90-92).

Legal trade activities are fully protected under Islamic Law as per verses of Holy Quran and traditions of Prophet Muhammad SAW. Almighty Allah states doing good things of worship also consider a good trade activity. Almighty Allah states “O You who believe! Shall I guide you to a commerce that will save you from a painful torment. That you believe in Allah and His Messenger Prophet Muhammad SAW and that you strive hard and fight in the cause of Allah with your wealth and your lives, that will be better for you, if you but know! He will forgive your sins and admit you into Gardens under which rivers flow and pleasant dwelling in Gardens of Paradise, that is indeed the great success. And (He will give you) another (blessing) which you love, help from Allah and a near victory. And give glad tidings to the believers” (Quran 61:10-13)

All good trade practices are encouraged and permissible and protected under Islamic Law includes activity to promote good

trade and use of trademark to distinguish goods and services of one undertaking from goods and services of other undertakings. Copying of another's work without his permission is not allowed as Prophet Muhammad SAW said "He who took up arms against us is not of us and he who acted dishonestly towards us is not of us. And he SAW also said "He who deceives is not of me (is not my follower)".

It is therefore recommended that the activity under registered trademark should be covered under trademark law and there should be a provision in trademark law which should say that registration of trademark can be invoked if that trademark is used for immoral activities for the purpose of trade and trademark should not be registered if it is used for the purpose of identifying immoral goods and illegal services and that should be written exclusively in trademark law rather than relying on other statutes for this purpose, thus there should be a provision in trademark law to prevent immoral activities prohibited under Islamic Law by Almighty Allah and his Prophet Muhammad SAW.

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