

INTELLECTUAL PROPERTY AN ASSET FOR AWQAF

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Abstract

Waqf, in Arabic, means hold, confinement or prohibition. According to Shari'ah, waqf means holding a property and preserving it so that its fruits, revenues or usufruct is used exclusively for the benefit of an objective of righteousness while prohibiting any use or disposition of it outside its specific objective (Khaf, 1998; 2003; 2011). Traditional assets for waqf were usually real estate. Since real estate is limited in supply and very expensive, such issues might reduce the popularity of real estate for waqf. There is pertinent need to look at other assets for waqf. Intellectual property (IP) is referred to as assets with the capability of generating revenue, decreasing costs, expanding and protecting competitive positions, enhancing customer value propositions, and increasing the attractiveness of businesses (Prashar & Aggarwal, 2009) and refers to ownership of property that is distinct from personal property or real estate as IP are products of human mind or intellect. Several Muslim scholars concede that after examining the Quran and Sunah, the owner of intellectual property is entitled for legal entitlements. Malkawi, Bashar H. (2013), concurs and puts forth that with the exception of the Hanafi School, the other three Schools Maliki, Shafi'I and Hanbali, accept IP as a species of property. Hence IP is an asset that should be seriously contemplated for waqf. Although it is an intangible, it (IP) has properties that make it valuable. IP has value attached since it can be assigned (sold), licensed, manufactured and franchised.

Keywords: *Waqf, Asset, IP*

1.0 INTRODUCTION

Intellectual property (IP) is referred to as assets with the capability of generating revenue, decreasing costs, expanding and protecting competitive positions, enhancing customer value propositions, and increasing the attractiveness of businesses (Prashar & Aggarwal, 2009). IP provides a proprietary right in intangible products of the human mind, which are also known as "knowledge" goods or "creations". IP also refers to ownership of property that is distinct from personal property or real estate as these are products of human mind or intellect. Though ownership is the same however, the kinds of goods are different, tangible and intangible goods.

Article 2 of the World Intellectual Property Organization (WIPO) Agreement defines intellectual property as follows:

"Intellectual property shall include the rights relating to literary, artistic and scientific works, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks and commercial names and designations, protection against unfair competition and all other rights resulting from intellectual activity in the industrial scientific, literary and artistic fields".

The same but much simpler definition of intellectual property could be found in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Under TRIPS, intellectual property refers to all categories of intellectual property that are subject of Section 1 through 7 of Part II (Article 1(2)). The Agreement has classified these rights in the following manner: copyright and related

rights (Section 1), trademarks (Section 2), geographical indications (Section 3), industrial designs (Section 4) and patent (Section 5), layout designs of integrated circuits (Section 6) and protection of undisclosed information (Section 7).

The Paris Convention for the Protection of Industrial Property 1883 (PC) also provides a legal definition of intellectual property. According to Article 1 of Paris Convention 1883, “the protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, tradenames, indications of source or appellation of origin and the repression of unfair competition”.

There various types of IP protection available, which are illustrated in, Figure 1 below:

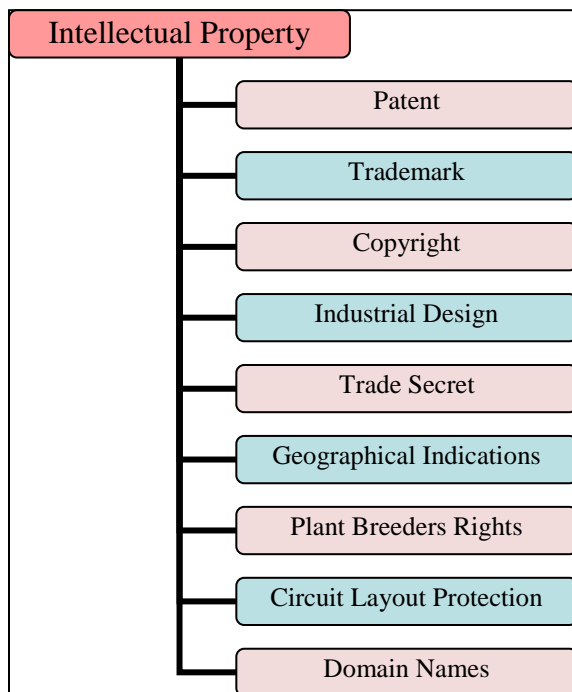


Figure 1: Types of IP

Owning IP Owning IP is a negative right meaning; the IP owner has the right to prevent others from using or intruding upon their property (Lindberg, 2009). Like other property, IP can be sold (assigned), given away for free if it is of minimal costs or, if the costs are subsidized by the government (Landes &

Posner, 2003). Other than assignment, the IP holder can grant limited rights (a license) to the IP (Lindberg, 2009). Licensing usually involves the holder of IP granting certain rights in that property to another firm under specific conditions and for a specific time (Schaffer, Filieberto & Earle, 2009).

2.0 ISLAMIC VIEW ON IP

Rami Olwan (2011) has forwarded several justifications to support the protection of IP. He (Rami Olwan, 2011) argued that many Islamic scholars after examining the Quran and Sunah hold the view that an owner of intellectual property is entitled for legal entitlements. Malkawi, Bashar H. (2013), concurs and puts forth that with the exception of the Hanfi School, the other three Schools Maliki, Shafi'i and Hanbali, accept IP as a species of property. He (Malkawi, Bashar H, 2013) continues that on one hand, the Hanafi School concentrates, in absolute terms, first and foremost on material objects as property that can be experienced by one of the five senses. Accordingly there can be no legal rights to intellectual property because ideas are incorporeal. On the other hand, Maliki, Shafi'i, and Hanbali Schools all agree that the proper criterion should be *manfa'a* (usefulness) and accept both tangibles and intangibles as property as long that is useful or has value. Thus, except for the Hanafi School, protection of intellectual property would fall into the category of permitted action (Malkawi, Bashar H, 2013).

Rami Olwan (2011), Malkawi, Bashar H (2013) quoted that the Prophet said ‘that a Muslim’s property is not permitted (to be taken by others) without his consent’, and whoever precedes others in gaining a Halal thing, will be more entitled to own it, and Muslim’s wealth is forbidden for others to use without his permission’. Other researchers had also earlier put forth that the owner of IP is permitted in turn to claim some sort of payment or rewards (Rosman Ariff, 2003) in disseminating any information and knowledge to others (Ida Madieha Abdul Ghani Azmi, 2009).

Consequently, Malkawi, Bashar H (2013)

declares that Islam recognizes that creativity does not flourish if a person is not compensated fairly for his efforts. Such discussion promotes that the works of individuals ought to be protected and hence allowed to be commercially exploited to compensate that individual for his or her labor.

Of concern though, is whether an author or inventor can exploit the IP and permitted recover more than the initial cost or labour or both. In discussing this, Malkawi, Bashar H (2013) opined that a period of protection is necessary to recoup the large upfront costs of developing these products, but IP protection ought to strike the appropriate balance between personal benefit to the inventor and public at large.

The literature supports that Islam recognizes IP as a property that needs protection, which allows the IP owner to exploit commercially. However the challenge in today's world is the recognition that the IP accorded such protection in Islam has to be *shari'ah* compliant (Malkawi, Bashar H, 2013).

3.0 IP AN ASSET FOR WAQF

Waqf, in Arabic, means hold, confinement or prohibition. According to *Shari'ah*, waqf means holding a property and preserving it so that its fruits, revenues or usufruct is used exclusively for the benefit of an objective of righteousness while prohibiting any use or disposition of it outside its specific objective (Khaf, 1998; 2003; 2011) and to literally protect something from becoming the property of someone else (MTS Mohammad & AHMI 2006). Sait and Lim (2005) clarify that Waqf involves a dedication of fixed asset for the purpose of charity and generating income, which will benefit the beneficiaries in a perpetuity basis. This definition accords continuity or perpetuity to Waqf, i.e., it applies to non-perishable properties whose benefit and usufruct can be extracted without consuming the property itself (Khaf, 1998). Therefore Waqf usually relates to land and buildings. AHMI & Mohammad M. T. S (2014), accord that three characteristics of waqf are

irrevocably, perpetuity, and inalienability. Again this reflects that a waqf asset has to have a perpetual tenure.

There are several arguments on what constitute perpetuity in waqf. Khaf (2011) specifies that perpetuity requires in three conditions, (i) property made Waqf must be appropriate for perpetuity by its legal status, by its accounting treatment or by nature; (ii) the will of the Waqf's founder must be related; (iii) objective of Waqf must be perpetual. Several Muslim scholars Khaf (1998), Razali Othman (2013), AHMI & MTS Mohammad (2014) have said the perpetuity is relative and could mean the remaining tenure of the waqf asset or as long as the waqf asset lasts. Waqf is in perpetuity infers that waqf cannot be sold or transacted and should remain the domain of waqf.

The Maliki school accept that temporary waqf can be brought about by the will of the founder and also accept the Waqf of usufructs, which is by definition temporary too. Consequently the Maliki School strongly argues for the coexistence in Awqaf of temporality and perpetuity side by side (Khaf, 2014). Khaf (2014) argues that that temporality by will of the founder and by nature of objectives is part of social life, as all societies need it as much as they need perpetuity. Shamsiah (2010) discusses the issues of leasehold property which is considered as a waqf asset in Singapore, which can be considered as a wasting asset. Unlike cash waqf, where the value is kept intact, the value of a leasehold property erodes. Here not only is the waqf life temporal but also the value of the asset diminishes with time. This is similar with IP, which has a life span. Once the legal lifespan is expired, the IP become public domain. Hence as such the usufruct from the IP can be considered for waqf for the legal life span. However an IP is also limited by its economic life span especially for patents. Nevertheless Khaf (1998) declared that the sunnah has recognized several forms of waqf, which are temporal such as a horse or a sword. Such understanding leads to an inference that temporal waqf is possible, whether the asset is temporal in nature or the period of waqf is temporal as assigned by the founder. What is

important is the the asset is waqf throughout the agreed term be it the life span of the asset or the as willed by the founder or by the object meaning how long the society need the waqf asset. Based on her research Shamsiah A. K. (2010) recommends for temporal waqf to be part of waqf asset but condones that the period of waqf needs to be specific. Shamsiah A. K. (2010) continues that it is important that perpetuity is confined to the intention, whereas the object, which is the property, can be converted to allow it to last as long as possible. Shamsiah A. K. (2010) while supporting that temporal nature refers to the creation of a waqf for a limited time period suggests the amount that is to be waqf should be substantial and able to benefit the community and whatever else is viable to be administered. Shamsiah (2010) points out that many of the religious institutions such as the mosque and the madrasahs in Singapore have appealed to the community to donate as waqf equipment such as computers, furniture and fittings. However, these assets are not being recognized nor recorded as waqf, since the definition of waqf is a permanent dedication of property, and such gifts do not naturally fit in the description of a waqf. By allowing temporal, the type and class of waqf asset can be enlarged substantially (Shamsiah A. K., 2010; Khaf, 1999; 2003)

A waqf asset will have a “running” feature whether it is able to repetitively produce usufruct either at regular interval or throughout the willed life of the asset. Waqf of usufruct can refer to cash waqf whereby the monies from the usufruct are waqf by the founder for a certain period or for as long as the asset is able to produce usufruct (Khaf, 2003). There are four essential criteria for a donation to qualify as Waqf: (1) the intention or declaration; (2) the donor; (3) the property or any tangible or intangible asset given as Waqf; (4) the beneficiary (this could be the named people such as family members or usually is the public at a local place) (Mahamood, 2006; Abu Zahrah 2007).

Karim (2007), and Mohamad Azhar (2014) argue that there are many resources that could be gained by waqf, and should not be confined to

landed property or cash donations, but also can use other assets such IP, namely copyrights, patents, and goodwill to name a few. Many scholars, Khaf (1999; 2003; 2011), Khan (2009) have mentioned IP as a source of waqf whether the IP itself or the usufruct from the IP. MTS Mohammad & AHMI (2006) has advocated differentiating between the waqf asset and benefits and suggest that benefits can be made perpetual by assigning value to the benefits and maintaining that in perpetuity. Malkawi, Bashar H. (2013) concurs and explains that *shari'ah* accepts the concepts of separation of title and third party use, whereby such concepts can be inferred to allow a titleholder to divide ownership and use by granting a third party the right to use the property without transferring ownership. Separation of title for property in *shari'ah* parallels the current practice of licensing intellectual property rights.

Some IP waqf have been established but only for copyright, which involves books. Khan (2009) describes an interesting development in the area of Waqf in Bangladesh, which encompasses the creation of Waqf of IP consisting of copyright of books. The Waqf created by Maulana Abdur Rahim, a renowned Islamic scholar of Bangladesh, of the copyright of his books with his wife and children as beneficiaries. This type of Waqf is called as The Khairun Prokashani Trust, and The Deeni Publications Trust, which has a printing press, a building of its own in Dhaka. Another renowned Islamic scholar, Maulana Muhammad Abdul Khaleq, had also established waqf of copyright of all his books. Khan, (2010) and Khaf (2003; 2011) advocate that in the contemporary life today there is an urgent need to recognise intangible property as waqf assets.

In considering IP for waqf, there is a need to look beyond just copyright; inventions, ideas, innovations and designs should be of cognisance too. Patents can be a good source for IP waqf. Universities around the world produce numerous IPs every year.

Conversely there are several pertinent issues, which, need to be addressed for IP to be earnestly considered for waqf. Foremost is the

temporal status of IP, since the protection period is not perpetual. This issue can be addressed by converting the IP into cash and maintain the cash as fixed but generating income by the use of the cash as suggested by MTS Mohammad & AHMI (2006) and Shamsiah (2010). Another solution is to consider the term perpetuity in the context of the lifespan of the IP. As an example a patent has a life span of 20 years, upon waqf, the receiver of the waqf can use the IP for either the full remaining life span or the economic life span of the patent.

The next issue that needs serious consideration is what to waqf, whether the IP itself or just the benefits or usufruct from the IP. If the IP is waqf, the beneficiary of the waqf will need to exploit the IP through licensing. However if the benefits or usufruct of the IP is waqf, then the IP still remains with the original owner, but the benefits or usufruct from the IP say through licensing will be waqf.

Of concern is that IP considered has to fulfil the needs and compliance of *shari'ah* (Shamsiah, 2010 & Malkawi, Bashar H., 2013).

4.0 CONCLUSION

There is pertinent need to look at other asset for waqf. Traditional assets for waqf were usually real estate. Since real estate is limited in supply and very expensive, such issues might reduce the popularity of real estate for waqf.

Clearly IP is an asset that should be seriously contemplated for waqf. Although it is an intangible, it (IP) has properties that make it valuable. IP has value attached since it can be assigned (sold), licensed, manufactured and franchised. IP is protected legally although its protection period is not perpetual. With sound legal protection for IP, the numbers of IP being churned out annually is numerous, although there are a number of hurdles that need to be addressed, to make IP a waqf asset. By enlarging the type and class of waqf asset, more people will be encouraged to participate in waqf.

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