Where Sharia meets intellectual property: brand protection in GCC states

For brand owners that need to protect and enforce their intellectual property in the Persian Gulf, understanding the impact of Sharia law can help to ensure their actions are more effective

AUTHORS
RIMI KBAR AND BAHIA ALYAFI

Professor William Ballantyne best described the relationship of Sharia to local laws in the Gulf Cooperation Council (GCC) thus: "Behind all secular law stands the Sharia law of Islam... The Sharia runs like a golden thread through the legal systems of the Arab Middle East" ("The States of the GCC: Sources of Law, the Shari'a and the Extent to Which It Applies", *Arab Law Quarterly*, 1985). There is a common notion that Sharia law influences all kinds of laws in the Arab countries, including IP legislation. This article examines this complicated relationship and how IP law is influenced – or not – by the law of Islam.

IP law in the region dates back to the 1980s, following the inception of the GCC as a free trade zone. When the trend for harmonising international IP laws swept through the nations, this – coupled with further developments in the IP fields – influenced the GCC states' previously passive treatment of intellectual property. The region jumped on board and worked to harmonise its laws by issuing unified regional IP legislation that was compatible with local laws in each of the constituent countries. Consequently, the GCC Patent Law was introduced in 1987, followed by the Trademark Law in 2006.

Why are we referring to Sharia?

Sharia forms the basis of all laws in the GCC and has a significant impact on structure, rulings and jurisprudence. It is the hand that rests firmly on all laws, guiding them towards what it considers intrinsically right and shielding them from deviation.

While Sharia law is vague, it is no invisible force. It is referred to clearly in the laws and constitutions of all

PICTURE: YOKODESIGN/SHUTTERSTOCK.COM

Arab Islamic countries. For example, in the Saudi Constitution, Sharia law is referred to in several articles. Article 8 of Chapter 2 states: "[The] Government in the Kingdom of Saudi Arabia is based on the premise of justice, consultation, and equality in accordance with the Islamic Sharia." Article 46 defines the role of judges thus: "The judiciary is an independent authority. There is no control over judges in the dispensation of their judgments except in the case of the Islamic Sharia." Article 48 further elaborates: "The courts will apply the rules of the Islamic Sharia in the cases that are brought before them, in accordance with what is indicated in the Book and the Sunnah, and statutes decreed by the Ruler which do not contradict the Book or the Sunnah."

The significance of Sharia is not only evident in Saudi Arabia; all other GCC countries incorporate Sharia within their constitutions. Therefore, understanding the viewpoint of Sharia on intellectual property is essential for any action taken or any laws drafted in these jurisdictions.

What is Sharia?

Sharia refers to the fundamental religious concept of Islam – namely, its law. Sharia law is derived from both the *Quran* (Islam's central text) and *fatwas*/*Sunnas* (the rulings of Islamic scholars and/or traditions).

The Sharia system has a much wider scope than traditional Western law. As well as regulating the relationship with the state and the community, it also regulates the individual's relationship with God. Moreover, it emphasises ethical standards and governs not only what individuals are entitled to do in accordance with the law, but what they should do from an ethical standpoint. In addition, and unlike traditional laws, Sharia provides for ritual practices such as how to pray and how to fast. Sharia was not drafted like a regular law – it was revealed through divine revelation and is therefore regarded as fixed and immutable. However, as these revelations are rather vague, they can be interpreted in varying ways.

How does Sharia treat intellectual property?

There is no explicit legal protection for intellectual property in Sharia, as intellectual property is not expressly discussed in the *Quran* or any of the *Sunna*. However, these rights can be inferred through references to tangible property, personal rights and evident practices (norms) during the times of the prophet. We will examine those concluded links by looking at excerpts from the *Quran*, as well as the *hadith*, and by assessing Islamic practices and norms.

In terms of the *Quran*

While the *Quran* does not refer to intellectual property directly, it does place extensive value on knowledge and science in multiple verses. Verse 2:247 (*Surat Albaqara*) highlights the weight of knowledge as compared to material things: "How can he [who has less money and material things] have kingship over us while we are more worthy of kingship than him and he has not been given any measure of wealth?" It goes on to say: "Indeed, Allah has chosen him over you [and has empowered him] with abundant knowledge and stature [important pillars for leadership and society]." Verse 3:71, (*Surat Alimran*) encourages people who have information and knowledge to share it among others, while Verse 39:9 states: "Are those equal, those who know and those who do not know?" – placing a distinct value on knowledge.

The *Quran* also has verses on how to treat the property of others. Verse 4:29 (*Surat Alnissaa*) states: "Oh Believers do not consume your assets between you in vain, unless it be by way of commerce by mutual consent." Verse 2:188 (*Surat Albaqara*) also refers to property: "Do not consume your property wrongfully, nor use it to bribe judges, intending sinfully and knowingly to consume parts of other people's property." Meanwhile, Verses 2:83 and 2:140 relate to both knowledge and property and can be interpreted as dealing with intellectual property.

In terms of the *hadith*

Hadith are the record of the traditions or sayings of the Prophet Muhammad, which are considered a major source of religious law and moral guidance, second in terms of authority only to the *Quran*. Again, intellectual property is not explicitly mentioned in the *hadith*; however, it can be extended from property protection, whereby property is defined as anything that is useful and of value. According to some sources, the prophet said: "Nobody has ever eaten a better meal than that which one has earned by working with one's own hands." From this it can be inferred that if an individual (or corporation) puts effort into develop something (intellectual property), then they are entitled to benefit from this through earnings. It is also believed that during his farewell pilgrimage, the prophet said: "No property of a Muslim is lawful to his brother except what he gives him from the goodness of his heart, so do not wrong yourselves."

The *hadith* does not provide a limitation on whether the property is tangible or intangible, and how it is used – whether completely sold or leased. Both of these excerpts, in addition to many more, provide for the rights associated with property and have been used as a basis for deducing rights associated with intangible property as well.

In terms of practices and norms

There were many prevalent practices and norms in the pre-Islamic era – which continued to be common during the Islamic era – that signify how intellectual assets should be treated.

During the Islamic era, poets used to recite their original poems in public, claiming ownership of them in the process. As these performances spread to other locations, they would always bear the name of the original poet.

Unauthorised use and recitation of the poems would have been seen as disrespectful to the poet and might have led to a public outcry. This exemplifies rights relating to copyright – a form of intellectual property that was prevalent during both pre-Islamic and Islamic times. Some accounts also state that the caliphs (successors of the prophet) used to buy books that they considered valuable and then make and distribute copies of these after paying ample compensation to the authors.

PICTURE: PSBOOM/SHUTTERSTOCK.COM

As these examples demonstrate, the *Quran*, the *hadith* and the norms and practices during the times of the prophet help to provide a basis for the inference that Sharia provides for IP protection. While none of the provisions mention or expressly affirm the protection of intangible assets, rights associated with tangible property were redirected to intangibles through Islamic jurisprudence and *Fiqh* – although some schools of thought (*Hanafi*) use a word-for-word interpretation of the *Quran*, therefore undermining the inference relating to intangible property protection.

Key contentious matters between IP law and Sharia

Gharar – speculative risk

Gharar is defined in various ways by Muslim scholars; some interpret it as deception, danger and risk, while others take it to mean the uncertainty (non-existence) of a contract's subject matter. For the sake of this article, I will use following definition: "*Gharar* is an Arabic word that is associated with uncertainty, deception, and risk, which is described as 'the sale of what is not yet present,' such as crops not yet harvested or fish not yet netted" (www.investopedia.com). *Gharar* is often cited when referring to IP matters specifically when it comes to licensing and valuing intellectual property. Concluding an IP-related agreement where knowledge or information is not equally available to all parties involved may invoke a *Gharar* claim. This is usually evident in transactions relating to trade secrets, technology and R&D based on the unequal availability of information. Some believe that a remedy to this claim is the signature of a fair contract by both parties, which is then recorded with the relevant authorities – although such recordals are not devoid of other risks. Another alternative is to decide in advance how to divide the risks among the parties. However, this can also be contested based on information asymmetry. Essentially, as Chad M Cullen puts it: "Gharar creates a paradox which necessarily makes trade secrets unmarketable" ("Can TRIPs live in harmony with Islamic law", *SMU Science and Technology Law Review*, 2011)

***Riba* (*Reba*) – usury**

Riba in Arabic means excess, increase or addition. From a Sharia standpoint, it is interpreted as an excess compensation or unjustified return in a lending, borrowing or sale transaction. In essence, *riba* means usury, which is divided into two types by Muslim scholars. The first is found in loan contracts, while the second is found in sale or exchange contracts. Therefore, while IP laws provide for a rights holder to receive royalty payments, these might be construed from a Sharia standpoint as interest payments received without any hard work or effort and therefore fall under the definition of usury. To circumvent any such claim when drafting an IP-related agreement it is vital to highlight how royalty payments are calculated and the obligation (effort and hard work) of the rights holder.

***Hekr* – monopolies**

IP rights provide owners with a temporary monopoly to commercialise and exploit their work product. Sharia and Islamic jurisprudence do not specifically define or prohibit monopolies, except when a product is a necessity and major convenience and provided that the product or service does not put the public in financial distress. This issue arises when the underlying intellectual property protects a necessity. For example, if there is a drug that cures a major societal illness, while the drug would obtain protection, the government may need to purchase the patent at a fair price in order to release the public from any distress caused by not having access to the medicine.

Claiming damages

Theft is unacceptable in Sharia and clearly sanctioned. This prohibition also applies to IP theft. An owner who suffers from infringement is thus entitled to damages for any loss incurred. While civil and criminal remedies are provided for in Sharia, there are many key matters to consider when claiming damages. Most important is the proof of the direct cause and effect of the infringing action on the damages faced. The plaintiff is required to highlight and prove exactly how the infringing action caused damage and how this was quantified. Therefore, it is not possible to claim indirect, consequential and speculative damages. Moreover, when claiming damages, there is a fine line between what is perceived as a social need and what is perceived as disproportionate private profit making.

Public morals

The GCC Trademark and Patent Laws do not allow for the registration of any type of intellectual property that is considered to be against public morals or ethics. Article 3 of the GCC Trademark Law states: "The following shall not be registered as a trademark or an element thereof: 2. Any mark breaching the public morals or violating the public order." Meanwhile, Article 2 of the GCC Patent Law states: "2/1. The invention is capable of obtaining a patent in accordance with the provisions of this system and its regulations if it is new and involves an innovative step and capable of industrial application, and does not contradict with the provisions of Islamic Sharia or public order or public morals in the countries of the Cooperation Council, whether related to products or manufacturing processes or manufacturing methods."

The key question here is what is against public morals and ethics? Should we refer to local practices and norms or should we refer to Sharia? This line becomes even more blurred when it comes to public morals and ethics. The most straightforward example – and one with which many practitioners are familiar – relates to alcoholic products. According to current GCC interpretations of Sharia, the sale and consumption of alcoholic products is prohibited. However, in practice, these products are sold in specific outlets in most GCC countries, namely: Bahrain, the United Arab Emirates, Qatar and Oman. Saudi Arabia and Kuwait still have a ban on the sale and consumption of alcoholic products, but it is no secret that alcohol is still consumed locally. The conundrum faced by alcoholic beverage companies in the GCC is not an easy one; their brands are famous and highly sought after, yet there is no legal remedy available to protect these brands and/or enforce their rights. The situation for other goods and services (eg, providers of dance, dating sites and tobacco products) is even less clear – these would need to be assessed on a case-by-case basis in each country.

> **When drafting an IP-related agreement it is vital to highlight how royalty payments are calculated and the obligation (effort and hard work) of the rights holder**

There are many challenges in protecting intellectual property in the GCC countries; however, it is inaccurate to claim that all of these stem from Sharia. Such rights and laws are expanding. In fact, in the past few years there has been a wave of IP reforms throughout the region. Most of the countries have shifted from a traditional hard file system to an online one, making the prosecution process far smoother. In addition, compared to tough older examination criteria in relation to what goes against public morals and what does not, there have been recent instances where the examination criteria appears to be more flexible. While this does not mean that Sharia law will cease to cast a shadow over local GCC laws and practices, it does mean that, with time, the standards set out by this law – especially with regard to matters that fall into grey areas – can and may adapt to the changes around it. What was taboo in the 20th century might become less so in the 21st and going forward. Similarly, in an attempt to alter the views of those elsewhere in the world on IP laws and enforcement in the Arab region and in order to further attract investors, we anticipate many further reforms that will clearly define where the law stands on matters that have traditionally been unclear. WTR

Rimi Kbar is IP assistant manager and Bahia Alyafi is an IP consultant at Alyafi IP Group
balyafi@alyafi-ip.com