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“The Challenges and Perspectives of the Complicated Relationship Between Shari’a and  
Intellectual Property Rights”

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The challenges and perspectives of the complicate relationship between  
Shari’a and intellectual property rights

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*The copyright protection in Europe in the revolution technology era is extremely complex due to the high piracy rate that allows the unauthorized utilization of Intellectual Property (IP) works. This problem is more complicated in Islamic countries taking into account the leverage of Shari’a, considered as God’s law by Muslims. Therefore, the religious ascendancy of Shari’a may lead to a weaker protection of copyrighted contents, related to a different perception of property; in fact, from the Islamic point of view, properties belong to Allah. Concerns about IP protection come from the fact that Muslims are not persuaded that Shari’a prohibits IP violations. The research proposal will seek to outline the perspectives of compatibility between Shari’a and the global harmonization of IPRs through the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Finally, this paper will give accurate advice on the purpose of reducing piracy rate in these countries verifying the opportunities of a virtuous contamination between Muslim and European solutions in order to enforce the IPRs protection.*

Keywords: intellectual property rights, Islamic law, IP enforcement, Shari’a law, international economic law

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## 1. Introduction to IP law in Islamic countries

Today, knowledge forms the greater part of the new wealth<sup>1</sup> and the main route to offer a valid protection and incentive innovation is through the traditional categories of intellectual property (IP). Even if IP ‘s origins can be traced back from the Statute of Anne<sup>2</sup> and the Statute of Monopolies<sup>3</sup> enacted centuries ago the problem of protecting human creativity is still a current issue for its constant balance with other values, for example the freedom of speech referring to new creations, the disclosure of progresses for the human developing and all the new concerns related to the inexorable advent of Internet that has made easier than ever before the dissemination of intellectual property works. The illegal copying and the subsequent illegal usage had become a multi-million-dollar issue already at the end of the second millennium<sup>4</sup> and, nowadays, this issue has not yet received an efficient arrangement.

Creative industries are economically significant for States in the light of studies showing that they are able to grow faster than other productive sectors<sup>5</sup>, being strategical for their economic development. Needless to say, people who work in these industries and spend lot of their time and energy using their intellect – for instance – to produce a movie, write a software program or make an invention should be entitled to benefit financially from their works, otherwise nobody (or only few people) would be encouraged to create something without any kind of financial reward<sup>6</sup>.

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<sup>1</sup> Kamil Idris, *Intellectual property a power tool for economic growth*, (WIPO publication N° 888, 2003).

<sup>2</sup> The Statute of Anne, also known as the Copyright Act 1710 (cited either as 8 Ann. c. 21 or as 8 Ann. c. 19), is an act of the Parliament of Great Britain passed in 1710, which was the first statute to provide for copyright regulated by the government and courts, rather than by private parties.

<sup>3</sup> The Statute of Monopolies was an Act of the Parliament of England notable as the first statutory expression of English patent law. It was introduced by Sir Edward Coke and it passed on 29 May 1624.

<sup>4</sup> Im Al-Jabri and Ah Abdul-Gader, *Software copyright infringements: an explanatory study of the individual and peer beliefs*, 5 Omega Int. Journal, no. 3 (1997), pp. 335-344.

<sup>5</sup> Lisa Matthewman and Amanda Rose and Angela Hetherington, *Work psychology*, (Oxford University Press, 2009).

<sup>6</sup> Mark A. Lemley, *Property, intellectual property, and free riding*, 83 Texas Law Review, (2005), pp. 1031-1075.

This is the major outcome of the economic incentive theory that allocates to the authors or inventors for a limited period of time the exclusive right to use their creations as they discretionary wish<sup>7</sup>: they can public them freely or ask for money compensation or keep them secrets to others. In order to do so, every legal system needs a certain degree of protection with the objective of preventing others from making unauthorized use of the creations of the mind in a way that there are no prejudices to the legitimate interests of the creators.

For this purpose, from 1948 authors benefit from an international protection outlined in Article 27 of Universal Declaration of Human Rights<sup>8</sup>, which provides for right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary, or artistic productions. The wide recognition of intellectual property rights in international and national sources is related to the fact that these rights are accredited as key growth enhancing factor for the global economies<sup>9</sup>. In this sense, according to World Intellectual Property Organization (WIPO), intellectual property refers to creations of mind like inventions, literary, and artistic works and symbols, names and images used in commerce<sup>10</sup>, covering every possible type of human intellectual effort.

On the other hand, some authors<sup>11</sup> are against copyright protection insisting that copyright policy impede the spreading of scientific development and limits academia. It’s true that pay reviews could be a limit for academics living in developing countries and working in universities which cannot afford them, but they should take into consideration that there is an important difference in the objective of creations between academia and other

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<sup>7</sup> William M. Landes and Richard A. Posner, *An economic analysis of copyright law*, 18 *The Journal of Legal Studies*, no. 2 (1989), pp. 325-363.

<sup>8</sup> Article 27 of the Universal Declaration of Human Rights, second paragraph, states expressly that: “*Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author*” (Paris, 1948).

<sup>9</sup> WIPO, *Enhancing use of IP for development*, (WIPO Magazine, 2009).

<sup>10</sup> WIPO, *What is intellectual property?*, (WIPO Publication n° 450, 2004).

<sup>11</sup> For instance, according to Aleksandra Elbakyan ‘thought the results of scientific works should be disseminated and not privatized for the world development. For this reasoning, in 2011 she created Sci-Hub, a website born in Kazakhstan that provides free access to millions of research papers and books, without regard to copyright, bypassing publishers’ paywalls in various ways. See Alexandra Elbakyan, *Free as in Science*, <https://medium.com/a-computer-of-ones-own/alexandra-elbakyan-free-as-in-science-de07894585a8>, accessed August 28, 2019.

fields such as music, movie, company logos: even if both can share the aim of incentivizing innovation the main pursue of the former is to enhance the global development while the latter is to maximize economic interests. That’s why we assisted to the diffusion of social movements for granting open access knowledge, such as Access to Knowledge Movement (A2K), whose objective is to shif the debate paradigm leaving “*more intellectual property is better*” to “*sometimes less is more*”<sup>12</sup>. Nevertheless, for economy of words, we refer this controversial debate to already-existing studies<sup>13</sup>.

The first purpose of this article is to clarify what kind of legal protection can be addressed in Islamic countries to individuals ‘works from an external viewpoint, through a synthetic analysis of the prismatic legal tradition composed by different mandatory sources. Secondly, this work will seek to outline the perspectives of compatibility between Shari’a and the global harmonization of IP through the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the other international conventions, focusing on Saudi Arabia stance. Thirdly, given that the majority of doctrine concludes that Islam generally prohibits IPRs piracy (even if the Islamic legal framework doesn’t provide explicit provisions about this topic), this study will conclude by offering a set of policy recommendations that can effectively help in minimizing IPRs piracy in Muslim countries taking into account the religiosity rate and verifying if European’s solution could be applied in order to enforce the IPRs protection.

## 2. How Shari’a can boost IPRs protection and enforcement

The first step to understand if and how creations of the mind – and mostly their authors – could receive legitimate protection in Islamic countries requires at least a synthetic analysis of their traditional legal framework. In this regard, it’s necessary to understand the

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<sup>12</sup> Noronha Fredrick, *Access to knowledge: a guide for everyone*, (Consumers International, 2010).

<sup>13</sup> For further studies see Iain Samarinda, *Islamic law and copyright in academic world: the dynamic debates between privatization and distribution of knowledge*, 17 *Mazahib*, no. 1 (2018), pp. 23-45; Machin Mastromatteo, Juan Alejandro Uribe-Tirado and Maria E. Romero-Ortiz, *Piracy of scientific papers in latin America: an analysis of Sci-Hub usage data*, 32 *Information Development*, no. 5 (2016), pp. 1806-1814.

main characteristics of Shari’a, a set of timeless religious principles which form part of the Islamic culture<sup>14</sup> and have a significant influence on the legal environment<sup>15</sup>.

Shari’a means the path<sup>16</sup> to the source of water and it’s considered as the eternal law in the Islamic legal tradition<sup>17</sup>. Shari’a is divided into two parts:

1. The revealed one: the *Qur’an*<sup>18</sup> (the holy book) and the *Sunna*<sup>19</sup> (habits and saying of the Prophet).
2. The non-revealed one: *Ijma* (consensus of Muslim scholars on a point of law) and *Qiyas* (a species of strict analogical reasoning).

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<sup>14</sup> For a general overview of Islamic law, see Cherif M. Bassiouni and Gamal M. Badr, *The Shari’ah, sources, interpretation, and rule-making*, 1 UCLA Journal of Islamic & Near East Law, no. 2 (2002), pp. 135-182; Hossein Esmaeili, *The nature and development of law in Islam and the rule of law challenge in the Middle East and the Muslim world*, (Connecticut Journal of International Law, 2011); Mark L. Movsesian, *Fiqh and canons: reflections on Islamic and Christian jurisprudence*, (Seton Hall Law Review, 2010).

<sup>15</sup> Knut S. Vikor, *Between God and the sultan: a history of Islamic Law*, (USA: Oxford University Press, 2005).

<sup>16</sup> Irshad Abdal-Haqq, *Islamic law – an overview of its origin and elements*, 7 Journal Islamic L. & Culture, no. 1 (2002), pp. 27-82.

<sup>17</sup> According to Islamic beliefs, God has placed these knowledge-based assets in an irrevocable trust for human beings. However, Muslims have entered into an irrevocable Covenant with God to be the good faith trustees of these timeless assets. As beneficiaries, Muslims draw upon these assets to lead morally intelligent lives. As trustees, they preserve these assets from the irreverence of misinformed critics, from the assault of misguided assailants, and from the mockery of fools. As trustees, they also transfer these assets to the next generation of Muslims without changing the nature of the trust and without depreciating the value of its assets. Ali Khan, *Islam as intellectual property “My Lord! Increase me in knowledge”*, 31 Cumberland Law Review, (2001), p. 361.

<sup>18</sup> For Muslims the Qur’an is the foremost and the most precious asset that God has created for the benefit of all human beings (Qur’an 39:41; 80:10-12). The Qur’an authenticity was preserved at the time of its revelation so that falsehood cannot come to it from before it or behind it (Qur’an 41:43). As soon as the verses were revealed, they were carefully written by “the hands of scribes, honorable and obedient” (Qur’an 2:11). Each verse came down to respond to a concrete factual circumstance and it calls for special awareness (Qur’an 33:40). The Qur’an is divided into 114 chapters, called *surahs*. Each *surah* is divided into verses, named *ayas* (which means signs, referring to signs from Allah). In the holy book there are approximately 6000 *ayas*. See Ray Bhala, *Theological categories for special and differential treatment*, (University of Kansas Law Review, 2002).

<sup>19</sup> While the Qur’an provides the written law, the Sunna supplies the case law, representing the protected knowledge of the Prophet. It embodies the application of the Qur’an’s written law to concrete disputes and hypothetical question that arose during the Prophet’s life. The substance of the Sunna, reported in thousands of authentic cases, covers a wide range of spiritual, ethical, social, economic and legal topics.

Apart from these fundamental sources, as in European countries, an important relevance can be attributed to the jurisprudence, which is called *usul-al-fiqh*<sup>20</sup>.

For that it concerns to the influence of doctrine, we have to assume that about 90 per cent of Muslim people in the world are Sunnites and Sunni Islam is essentially divided into four orthodox schools of law, each having its own, highly developed doctrine<sup>21</sup>:

- a) Maliki school requires strict application of the *sunna* of the Prophet and minimizes the role of opinion.
- b) Hanafi scholars rely on reason and opinion, using analogy and equity as sources of law.
- c) Shafi’i school has tried to reconcile the Maliki and Hanafi principles.
- d) Hanbali school is well-known for its strict adherence to the text of the *Qur’an* and the *sunna*. Analogy is recognized as a source of Hanbali law<sup>22</sup>.

These schools appeared in the first and second centuries of Islam and they developed initially due to geographical separation, but after a few centuries each of them became personalized and took the name of its leading scholars.

From the above-mentioned four schools only the Hanafi school does not recognize intellectual property since its scholars accept only tangible assets that can be expressed by one of the five senses. In fact, this school considers IP works publics for the good of all (for the general benefit of all humankind)<sup>23</sup>. Following this theory, the payment of an author for his work could be considered by the Muslim community as *riba al-fadl*, a forbidden situation which happens when a person acquires an unlawful excessive profit without exerting efforts over extended period of time and – for this illegal conduct – is obliged to give it back (unjust

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<sup>20</sup> It includes both deductive (from broad general principles in the law to a particular case) and inductive (from a particular case to general principles) method of reasoning. See John Walbridge, *Logic in the Islamic intellectual tradition: the recent centuries*, (Islamic Studies, 2000).

<sup>21</sup> Diana Zacharias, *Fundamentals of the Sunni school of law*, (Article based on a speech held at the Heidelberg Research Fellow Conference on October 17, 2005)

<sup>22</sup> Bashar H. Malkawi, *Intellectual property protection from a Sharia perspective*, (HeinOnline, 2019).

<sup>23</sup> *Ibid.*

enrichment)<sup>24</sup>. In this context, Sheikh Muhammed Shafe’e issued a legal opinion (*fatwa*) recognizing the possibility of getting profits from inventions or authorships, but it is not allowed to exclude others from using them, since at the current state of Shari’a law there are no explicit provisions that recognize temporary monopolies for authors<sup>25</sup>.

However, the other three schools (Maliki, Shafi’i and Hanbali) recognize IP agreeing on the criterion of usefulness (*manfa’a*) rather than tangible<sup>26</sup>. Property can be anything that is useful and of value considering that there are no express provisions in the basic texts of Shari’a that limit ownership exclusively to tangible assets. The term property can be interpreted to accommodate new realities by affording protection to intellectual property works<sup>27</sup>. Following this direction, intellectual property can allow a limited monopoly to come into existence, but only if creations are commercially valuable and usefulness to society<sup>28</sup>.

In addition, referring to the rights related to property, the above cited three schools recognize the division between use and ownership, which could enhance the IP licensing for intangible assets thus allowing the use of IP works without losing the property.

Moreover, we could assess that intellectual property categories were already part of the Islamic culture from its early stage, where many authors earned their living through their works: caliphs hired authors to write books in return for payments<sup>29</sup> and Emirs payed poets who praised them<sup>30</sup>. In more general, indigent authors dedicated their creations to caliphs or wealthy persons in the hope of earning a monetary gift or reward. It appears that copyright

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<sup>24</sup> The Qur’an states “Allah has made buying and selling lawful and usury unlawful” (Qur’an 2:275-278).

<sup>25</sup> Ezieddin Elmahjub, *Protection of intellectual property in Islamic Shari’a and the development of Libyan intellectual property system*, (Queensland University of Technology, 2014).

<sup>26</sup> Muhammad Wohidul Islam, *Al-Mal: the concept of property in Islamic legal thought*, 14 Arab Law Quarterly, no. 4 (1999), pp. 361-368.

<sup>27</sup> Justin R. Koscher, *A patent pool’s white knight: individual licensing agreements and the procompetitive presumption*, 20 DePaul J. Art. Technology & Intellectual Property, no. 1 (2009).

<sup>28</sup> When monopoly rights expire the previously protected creation will enter the public domain, thus satisfying private and public interests. For further information see Silvia Beltrametti, *Intellectual property protection under Islamic law*, (The Prague Yearbook of Comparative Law, 2009).

<sup>29</sup> Heba A. Raslan, *Shari’a and the protection of intellectual property-the example of Egypt*, 47 IDEA: The Journal of Law and Technology, (2006), pp. 497-499.

<sup>30</sup> Amir H. Khoury, *Ancient and Islamic sources of intellectual property protection in the Middle East: a focus on trademarks*, 43 IDEA: The Journal of Law and Technology, (2003), p. 151.



protection was a recognized concept dating back to pre-Islamic civilizations considering that poets who plagiarized other authors’ works to attempt on their reputation were hardly sanctioned and cast from cultural society<sup>31</sup>.

Nowadays, in order to understand where intellectual property rights can find a legal basis from official sources, we should take into consideration that Shari’a tries to classify all possible human acts in five categories:

1. Obligatory.
2. Recommended.
3. Neutral.
4. Objectionable.
5. Forbidden.

Everything is permitted unless expressly prohibited by Allah. Since there are no Shari’a sources against IP protection and neither there are sources that classify IP under one of the cited five categories, we could say, adopting an *a contrario* interpretation, that Islamic countries admit intellectual property; from this point of view, Shari’a could be construed to provide support for IP protection. Even in classical Islamic literature the term copyright or IP is never explicitly discussed and there are no explicit sanctions that punish copyright infringements<sup>32</sup>.

But going more thoroughly in the analysis of the Qur’an and the Sunna we can find some indicators that encompass a kind of protection of the creations of the mind. In this regard, Prophet Muhammad stated “*A Muslim who achieves something before other Muslim who has not achieved is entitled to that*”<sup>33</sup>. He is also reported to have said “*Who revives*

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<sup>31</sup> Muhammad Amanullah, *Author’s copyright: an Islamic perspective*, 9 The Journal of World Intellectual Property, no. 3 (2006), pp. 301-315.

<sup>32</sup> Ida Abdul Ghani Azmi, *Basis for the recognition of intellectual property in light of the Shari’a*, 3 International review of industrial property and copyright law, no. 1 (2007).

<sup>33</sup> Amir H. Muhammad, *Autorship right: the Islamic and legal aspects according to the new intellectual property law*, (Dar Al-jal, e’ah Al-jadedah, 2003).

*dead land, it is for him*”<sup>34</sup>. As Milani and Ahmadi sustain<sup>35</sup>, these saying of the Prophet, indicate that land is the end product of a person’s labour, and that person who exerts effort in developing these things should have the results of their labour. Furthermore, the Qur’an states also that the pursuit of profit is not inferior, but an honorable matter. It provides explicitly that “*There is no fault in you that you should seek bounty (honest profit) from your Lord*”<sup>36</sup>, agreeing on a reward (proportionated) for the time spent and for the intellectual efforts.

Against IP infringements, two Islamic juridical verdicts (*fatwa*) from two grand Muslim clerks (Sistani, 2009 and Bin Baz, 1995) have been issued, and forbid digital piracy<sup>37</sup>. In addition, the Council for Islamic Jurisprudence met in Kuwait in 1988 ruled that “*nobody has the right to violate intellectual property claims*”<sup>38</sup>, giving finally a formal declaration that officially recognizes IPRs. Besides the religious provisions, Arabic countries<sup>39</sup> enacted IP laws in conformity with international standards, especially the ones provided by the WTO on Trade Related aspects on Intellectual Property rights (TRIPS). The first Muslim country ratifying the IP regulation was Egypt in 1939 enacting the Trademark Law, n° 47 of 1939 which granted a ten-year protection to trademark holders from the date of application<sup>40</sup>.

Despite the presence of rules that provide an express recognition of intellectual property, viewed as a *species* of the wider *genus* of property in Islam culture and the prohibition of IP infringements, forbidden because considered as plagiarism (traditionally called *haram*), these illegal conducts do not have the same punishment for the violation of tangible properties in case of theft, which is the cutting off the hand<sup>41</sup>. Instead, in case of

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<sup>34</sup> Iman Malik’s Al-Muwatta, *Book of judgment* (Dar Al-kutub Al-’lmiyah, 1951).

<sup>35</sup> Khan (2001), *supra* note 6.

<sup>36</sup> Qur’an 3:194.

<sup>37</sup> Salaj Al-Fadhli, *The ethical dilemma of software piracy in Islamic societies: the case of Kuwait*, 39 The Electronic Journal on Information Systems in Developing Countries, no. 7 (2009), pp. 1-9.

<sup>38</sup> The *fatwa* can be find on the official website of the *fiqh* academy: [www.fiqhacademy.com](http://www.fiqhacademy.com), accessed August 28, 2019.

<sup>39</sup> The expression “Arabic Countries” refers to all the 22 countries members of the Arab League.

<sup>40</sup> Gil Feiler, *The Middle East in the new millennium*, (Economic development & business law, 2000).

<sup>41</sup> “*As for the man who is a thief and the woman who is a thief cut off their hands in requital for what they have reaped and as a exemplary punishment of God*”, Qur’an 5:38.

copyright infringements, the legitimate author can only ask compensation. In this term, a thief and a web pirate are viewed in a different manner causing problems of IP enforcement. So, if there are formal recognitions of IPRs why there are so many violations in Arabic countries? For instance, in the Middle East and Africa the piracy rate only for software reached the 56% in 2017<sup>42</sup> compared to the overall piracy rate of 44%. The digital era has led new factors which ease the illegal copying and downloading of copyrighted works like availability of untraceable peer-to-peer networks, the increased use of different electronic tools connected to internet and the spread of high-speed internet connection at low cost. There is an evident discrepancy between law in the book and law in the action (Latin people usually refers to the difference between *de iure* and *de facto*).

The regulation of copyright by Muslim worlds confirms that they are in line with the spirit of copyright protection, but they have still problems of enforcement due to the lack of social awareness of the criminality of IP infringements. The IP compliance and enforcement would also have positive trends on foreign investments: for example, Saudi Arabia, the best compliant State for IP provisions received 28 billion compared to Qatar which had “only” 5,5 billion<sup>43</sup>. In the next paragraphs we will check for some recommendations on how IPRs can be recognized by the public in an expanding market in conjunction with established Islamic law principles<sup>44</sup>.

### 3. The influence of the international legal framework in Arabic countries

As mentioned before, the IP is a concept that is not unknown in the Muslim world, but the collective nature of the Arabic culture complicates the process of introduction of this legal category in a society with unquestionably strong and eradicated collective values. Since the legal, social and cultural life of the Islamic society is influenced and outlined by Shari’a

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<sup>42</sup> Business Software Alliance, *Software management, security imperative, business opportunity*, (BSA Global software survey, 2018).

<sup>43</sup> World Investment Report 2011, issued by the United Nations Conference on Trade and Development (Unctad).

<sup>44</sup> Nadia Shehzad, *Developing intellectual property regimes in the Gulf: utilizing intellectual property for positive economic growth*, 2 World Journal of Social Sciences, no. 6 (2012), pp. 231-242.

law, it is interesting to examine how Shari’a law can influence the concept of intellectual property.

In order to understand the role of intellectual property in the Islamic Shari’a law, it is first necessary to discuss the topic of protection of Islamic intellectual property: firstly, since the concept of intellectual property is purely Occidental, it is perceived as something foreign and not in compliance to what established by Shari’a law. Therefore, it is acceptable to undertake specific actions allowing the safeguard of intellectual properties, particularly in foreign countries<sup>45</sup>.

Several Muslim academics and also international Islamic forums arrange intellectual property with the traditional concept of *Maslaha Mursala*<sup>46</sup>, which aim at social, economic and cultural development deriving from a stronger protection of IP. Moreover, the standards of intellectual property have been built up at international level, without giving many opportunities to Muslim countries to participate to the definition process. Therefore, many people believe that these rules are the outcome of an external will<sup>47</sup>.

Regarding this topic, it is interesting to understand the role that Muslim countries assumed in the process of creation and conclusion of the main international agreements, such as the Paris Convention, Berne Convention and TRIPS Agreement.

As a matter of facts, looking at the past, the cities belonging to the Arabic world have always represented the cornerstone to scientific and technological progress<sup>48</sup>. However, despite the recognition of some forms of protection of literary and artistic works, the protection of the intellectual property did not raise interest as juridical institution until the

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<sup>45</sup> Chad M. Cullen, *Can TRIPS Live in Harmony with Islamic Law - An Investigation of the Relationship between Intellectual Property and Islamic Law*, 14 SMU Science & Technology Law Review 45, no. 1 (2011), p. 67.

<sup>46</sup> *Maslaha* means "public interest or benefit" and it is a principle used by Muslims to synthesize laws and rules through the tools used in contemporary fields such as economics, government and science. Felicitas Opwis, *Maṣlaḥa in Contemporary Islamic Legal Theory*, 12 Islamic Law and Society, no. 2 (2005), pp. 182-223

<sup>47</sup> David Price, *The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates* (Routledge 2009) 9.

<sup>48</sup> Mohammed El Said, *The Development of Intellectual Property Protection in the Arab World*, (Edwin Mellen Press, 2008), p. 176 *et seq.*

introduction of the Ottoman Trademark Law in 1871<sup>49</sup> and the Patent Law in 1879, followed by the Ottoman Copyright Law in 1910<sup>50</sup>.

As cited before, Egypt is a good example in this topic, since it is a leading country in the field of protection of the intellectual property. The Egyptian laws Trademark Law nr. 57/1939, Patent Law nr. 132/1949 and Copyright Law nr. 354/1954 represent the starting point for many legislations in the field of giving protection to intellectual properties in Arabic countries. The Egyptian legislation protecting IP has been strongly influenced by the international scene, in particular by the Berne Convention, Paris Convention and legislation of the European continent<sup>51</sup>.

Basically, industrialized countries have used multilateral forums in the attempt to raise the standards of protection and implementation of intellectual properties to levels that were similar to the ones of national laws; developing countries (particularly Arabic countries) have not taken into account appropriate level of protection to support their development, both in terms of industrial and technological competence, and in terms of innovation ability, during the process of adaptation to international conventions and other agreements concerning intellectual property<sup>52</sup>.

During the last 20 years, Arabic countries have been going through a process of importation of the standards of protection of IP from the international to the national level, without monitoring the effects that these rules and standards might have caused at local level, once in contact with cultures and traditions which are different from the ones that developed

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<sup>49</sup> The ‘Trademark Regulation’ (Alamet-i Farika Nizamnamesi) in 1871 was the first regulation regarding trademarks, based on the French Law regarding trademarks dated 1857.

<sup>50</sup> The first Patent Law of Ottomans was enacted in the Period of Autocracy in 1879. However, Ottomans were underdeveloped in terms of industrialisation compared to Europe and they could not produce technology, being obliged to import it. So, the enactment of the cited law was conceived to favor countries transferring technology. This law had been valid for more than 100 years until the Decree no. 551, which came into force in 1995.

<sup>51</sup> An example is the Explanatory Memorandum of Egyptian Copyright Law nr. 354/1954 stating that: “this law is based upon the international conventions and the modern European copyright laws”. Birnhack, Michael D. and Khoury, Amir H., *The Emergence and Development of Intellectual Property Law in the Middle East* (April 21, 2016). Rochelle C Dreyfuss & Justine Pila (eds) *The Oxford Handbook of Intellectual Property Law* (2016).

<sup>52</sup> Nowadays, it is becoming more and more evident that the increase in the protection of the intellectual property above usual level is causing negative consequences to these countries. Ezieddin Elmahjub, *Intellectual Property and Development in the Arab World: A Development Agenda for Libyan Intellectual Property System*, 30 Arab Law Quarterly no. 1 (2016), pp. 1-33.

them. The international system of intellectual protection is formed by different agreements regarding copyright, patents and trademarks<sup>53</sup>.

The main agreements in the international regulatory framework are:

- Paris Convention, 1883, for the protection of the industrial property, aiming at regulating the protection of patents, industrial projects and trademarks<sup>54</sup>;
- Berne Convention, 1886, for the protection of literary and artistic works, aiming at regulating the protection of literary and artistic works, the ones deriving from them, cinematographic and architecture masterpieces<sup>55</sup>;
- The agreement about the aspects of intellectual property rights concerning the trade (TRIPS agreement, 1994)<sup>56</sup>;
- Several bilateral agreements (FTAs) stipulated by European Union<sup>57</sup> and United States<sup>58</sup>. The aim was to establish agreements of free exchange (FTAs) including regulations in the field of intellectual property, to increase the standards of protection decided in the TRIPS, namely TRIPS-plus.

Therefore, it is evident that Arabic countries have not contributed to the definition and creation process of international standards regarding the protection of intellectual property, since they were missing at the signing of both Paris and Berne Conventions. The only

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<sup>53</sup> Graeme B. Dinwoodie, *The Architecture of the International Intellectual Property System*, 77 Chicago-Kent Law Review, no. 3 (2002), pp. 993-1014.

<sup>54</sup> Art. 4 of the Paris Convention. World Intellectual Property Organization (WIPO), *Paris Convention for the Protection of Industrial Property* (as amended on September 28, 1979). Available to: <https://wipolex.wipo.int/en/text/287556>, accessed August 28, 2019.

<sup>55</sup> Art. 2 and 4 of the Berne Convention. World Intellectual Property Organization (WIPO), *Berne Convention for the Protection of Literary and Artistic Works* (as amended on September 28, 1979). Available to: <https://wipolex.wipo.int/en/text/283693>, accessed August 28, 2019.

<sup>56</sup> The TRIPS Agreement, which is Annex 1C of the Marrakesh Agreement, comes as a result of the Uruguay Round where Egypt was the only Arab country participating in the setting process. The text of the Agreement is available to: [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm), accessed August 27, 2019.

<sup>57</sup> Mohammed K. El Said, *The European Trips-Plus Model and The Arab World: From Co-Operation to Association— A New Era in the Global IPRS Regime?*, 28 Liverpool Law Review, no. 1 (2007), pp. 143-174.

<sup>58</sup> For instance: Morocco, Jordan, Baharain and Oman signed FTAs with the US.

country with Islamic population participating at Paris Convention was Tunisia<sup>59</sup>, being a French colony, which became part of the Convention on the 20<sup>th</sup> of March 1884.

Nevertheless, the majority of Arabic countries have signed the main agreements on intellectual property: 17<sup>60</sup> out of 22 Arabic countries signed the Berne Convention; 18<sup>61</sup> out of 22 signed the Paris Convention.

The year 1995 represents a meaningful date for the protection of intellectual property at international level: the Agreement on Trade-Related Aspects of Intellectual Property Rights (The TRIPS Agreement) of the World Trade Organization (WTO) came to life after 8 long years of negotiations, characterized by a strong contrast between developed and developing countries<sup>62</sup>.

The TRIPS Agreement<sup>63</sup> represents a turning point in the creation of international regulations in the field of protection and respect of intellectual property rights. It has been adopted as part of a single-undertaking approach, meaning that it is applied to all the members of the Organization and its provisions are integrated in the dispute resolution mechanism established by the WTO<sup>64</sup>. This conference has a significant relevance because for the first time all the aspects regarding intellectual property<sup>65</sup> were included in a

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<sup>59</sup> Although Tunisia signed the Paris Convention, it did not get involved in the standard setting process as it was under French control.

<sup>60</sup> Algeria, Bahrain, Egypt, Jordan, Lebanon, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, UAE, Morocco, Libya, Comoros, Yemen, and Djibouti. Available at: <https://copyrightshouse.org/countries-berne-convention>, accessed August 28, 2019.

<sup>61</sup> These includes the same signatories of Berne in addition to Iraq. Available at: [https://www.wipo.int/treaties/fr/ShowResults.jsp?lang=fr&treaty\\_id=2](https://www.wipo.int/treaties/fr/ShowResults.jsp?lang=fr&treaty_id=2), accessed August 30, 2019.

<sup>62</sup> Hiroko Yamane, *Interpreting TRIPS. Globalisation of Intellectual Property Rights and Access to Medicines*, Oxford and Portland, Oregon (2011), p. 105 *et seq.*

<sup>63</sup> The first part of the Agreement defines the implementation of the general principles of the international trade, which is the national treatment (art.3) and the treatment of the most favorite nations (art. 4). In the second part, there are the copyrights, patents, trademarks, industrial projects, confidential information or the so-called know-how and geographical information, which European countries are very interested to protect.

<sup>64</sup> Annex 2 of the Agreement Establishing the WTO.

<sup>65</sup> The Agreement includes a safety clause in the art. 2 which integrates Berne and Paris Conventions on the intellectual property. Moreover, it refers to the specialized institute of the United Nations, the WIPO, as an international organization with competence in this field.

multilateral agreement, in order to avoid that an inadequate protection of intellectual property rights became an obstacle to international trade<sup>66</sup>.

This is the only agreement within the WTO framework that does not only impose obligations of “*non facere*”, but also defines positive conducts States must respect in their own internal rules<sup>67</sup>.

Members of the WTO have the obligation to conform to the minimal standards imposed by the Agreement and to implement/transfer them at national level, with the possibility to raise them. One of the main novelties of the agreement is about the execution procedure (*enforcement*) in the Part III of the Agreement (art. 41-61 of the TRIPS Agreement). Indeed, TRIPS Agreement is the only international convention describing the execution of intellectual property rights in detail<sup>68</sup>.

Moreover, in order to facilitate the adaptation of developing countries (including Arabic countries), the Agreement establishes some transition periods, differently from the OMC agreements which became law on the 1<sup>st</sup> of January 1995<sup>69</sup>.

Several criticisms<sup>70</sup> have been raised against the new agreement on the protection of intellectual property. First of all, some criticisms have been raised towards developed countries which exerted a strong pressure to make less developed countries to participate to the World Trade Organization and therefore to TRIPS Agreement, in order to respect the worldwide standard principles. Essentially, less developed countries mainly complain about the fact that the Agreement represents a worldwide harmonization: a sort of social engineering planned by the big multinational companies to limit the competition in less

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<sup>66</sup> Elena Sciso, *Appunti di diritto internazionale dell’economia e dell’ambiente*, Terza Edizione Giappichelli Editore (2017) p. 309 *et seq.*

<sup>67</sup> *Ibid.*

<sup>68</sup> It states that courts must have the right, under certain conditions, to decide the disposal or destruction of goods infringing intellectual property rights. “Willful trademark counterfeiting or copyright piracy on a commercial scale must be subject to criminal offences. Governments also have to make sure that intellectual property rights owners can receive the assistance of customs authorities to prevent imports of counterfeit and pirated goods”. WTO, *Understanding the WTO*, World Trade Organization (2008), p. 43. [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm), accessed August 26, 2019.

<sup>69</sup> Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing countries. The TRIPS Agreement and Policy Options*, Zed Books (2002), p. 95 *et seq.*

<sup>70</sup> Zdenek Drabek (ed), *Is the World Trade Organization Attractive Enough for Emerging Economies? Critical Essays on the Multilateral Trading System* (Palgrave MacMillan, 2010).



developed areas. Basically, although it does not represent a form of protection of social engineering, the harmonization of intellectual property offered by TRIPS Agreement results inappropriate, considering the inhomogeneity of the other adhering nations<sup>71</sup>.

Before proceeding with the analysis of the case study, it is important to classify 3 different categories of Arabic countries in relation to their intellectual property system:

1. TRIPS-Minus, which includes countries that did not join the TRIP and are observer members of the WTO;
2. TRIPS-Compatible, which includes Arabic countries which joined the TRIPS and revised the laws on intellectual property from the middle of 90’s of the last century;
3. TRIPS-Plus, including Arabic countries which on one side joined the TRIPS Agreement and on the other side signed an FTA with United States and/or European Union, raising the levels of the protection of the intellectual property standards decided by the TRIPS Agreement<sup>72</sup>.

### 3.1. A focus on Saudi Arabia stance

Nowadays the influence of Islamic Shari’a Law on the modern legislations widely varies depending on the degree of social pressure and the public policy adopted by Government. In Arabic countries, the position of Shari’a in the juridical system can be classified into two categories. The first category is represented by countries in which Qur’an and Sunna represent the law and the only source of legislation. One of these countries is Saudi Arabia, the only country adopting the Qur’an and the Sunna as substantial laws and

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<sup>71</sup> Indeed, non-developed countries need politics of intellectual properties adapted to their own necessities and not a uniform politic adapted to everyone’s needs. Chad M. Cullen, *Can TRIPS Live in Harmony with Islamic Law - An Investigation of the Relationship between Intellectual Property and Islamic Law*, 14 SMU Science & Technology Law Review 45, no. 1 (2011), p. 57 *et seq.*

<sup>72</sup> Mohammed El Said, *The Development of Intellectual Property Protection in the Arab World*, (Edwin Mellen Press, 2008), p. 119 *et seq.*

main sources of public order<sup>73</sup>. The second category – representing the majority of Muslim countries – is the one in which Shari’a is one of the main sources of legislation<sup>74</sup>. The country choice fell on Saudi Arabia because it is the country with the largest number of Muslim citizens and with the highest influence of Shari’a on the juridical system and, consequently, on the everyday life of its population<sup>75</sup>.

The principle aim of this analysis is to understand how Saudi Arabia – a country characterized with strong Muslim religious beliefs – can carry out and fulfill the strict requirements of intellectual property rights established by the TRIPs. In other words, we will investigate the ways that Saudi legislators used to be compliant with TRIPS agreements granting at the same time the respect of their traditional laws, mainly based on Shari’a.

Saudi Arabia became member of the World Trade Organization in 2005. This caused *ipso facto* the application of all WTO agreements, included the one concerning intellectual property. Also, Saudi Arabia has recently (in 2016) adopted the so-called Vision 2030 with the objective of raising a higher attention towards the international trade, trying to get more benefits from its geographical position aiming to be “*an epicenter of trade and door to the world*” connecting three continents: Africa, Asia and Europe<sup>76</sup>.

Although Shari’a omits any reference about intellectual property, it states the obligation to respect international agreements. In more details, the Qur’an states that “*freedom from obligation from Allah and his messenger toward those of the idolaters with whom ye made a treaty*”<sup>77</sup>. Moreover, referring to the importance of respect agreements and contracts: “*Excepting those of the idolaters with whom ye have a treaty, and who have since*

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<sup>73</sup> See articles 1 and 7 of the Basic Law of Saudi Arabia, Alnizam Alasasi Lil Hokm, issued by Royal Decree No. A/90 dated 27/08/1412 H, 1992. Moreover, it must be specified that the Islamic juridical system (Sharia) includes some elements of the Egyptian, French and other secular rights. Moreover, trade controversies are managed by special committees ruled by the Islamic law.

<sup>74</sup> For instance, article 2 of the Egyptian Constitution states that Islamic Jurisprudence is the principal source of legislation; article 2 of the Constitution of Bahrain states that Islamic Shari’a shall be a main source of legislation; article 3 of the Constitution of the Republic of Yemen of 1994 states that Islamic Shari’a is the source of all legislations.

<sup>75</sup> Abdulrahman Yahya Baamir, *Shari’a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Routledge, 2010), p. 32.

<sup>76</sup> Message from HRH Prince Mohammed Bin Salman Bin Abdulaziz Al-Saud. Available at: <https://vision2030.gov.sa/en/vision/crown-message>, accessed August 28, 2019.

<sup>77</sup> The Holy Qur’an at 9:1 (Pickthall trans.).

*abated nothing of your right nor have supported anyone against you. Fulfill their treaty to them till their term. Lo! Allah loveth those who keep their duty*<sup>78</sup>.

The obligation imposed by Shari’a law to each Islamic country to fulfill signed international agreements led Saudi Arabia to apply series of royal decrees in order to be able to respect international agreements:

- Royal Decree Nr. M/51 of 26 Rajab 1435 (May 26<sup>th</sup>, 2014) approving the Trademarks Law of GCC States (2016);
- Law of Patents, Layout-Designs of Integrated Circuits, Plant Varieties, and Industrial Designs (promulgated by Royal Decree Nr. M/27 of 29/5/1425H (July 17<sup>th</sup>, 2004));
- Copyright Law (promulgated by Royal Decree Nr. M/41 of 2 Rajab, 1424 (August 30<sup>th</sup>, 2003));
- Law of Trademarks (promulgated by Royal Decree Nr. M/21 of 28 Jumada I 1423 (August 7<sup>th</sup>, 2002));
- Commercial Names Law (promulgated by Royal Decree Nr. M/15, 12 Sha'ban 1420 (November 20<sup>th</sup>, 1999))<sup>79</sup>.

Saudi Arabia revised and modernized its regulatory framework and the administrative infrastructures for the protection of intellectual property. When Saudi legislators enacted the abovementioned decrees for the adaptation to the international agreements, they verified the compatibility of these new regulations with the historical Islamic principles: for example, they don’t grant protection to the patent in case its purpose contradicts the principles of Shari’a. Moreover, Islamic law is applied in case of claim of damages for copyright infringements, requesting a cause-effect relation between illegal activities and effective

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<sup>78</sup> The Holy Qur’an at 9:4 (Pickthall trans.).

<sup>79</sup> For more information: <https://wipo.int/en/legislation/profile/SA>, accessed August 28, 2019.

damages directly caused by them, dramatically decreasing the probability that Saudi tribunals grants the compensation<sup>80</sup>.

Although the enacted laws are compatible with Shari’a, they have not been actually well enforced by the State. Several Islamic States adopted laws protecting intellectual property (Egypt, UAE, Qatar, Bahrain, Jordan etc), but they remain ineffective. Indeed, intellectual property is often perceived as a concept born and developed in the Occidental world and this general thought has negatively affected its implementation in Islamic countries. It’s interesting that Islamic people are inclined to pirate American softwares and music, occidental lyrics and media, but they don’t pirate their local copyrighted contents, demonstrating a strong respect for what is born within the Islamic community<sup>81</sup>.

Saudi Arabia<sup>82</sup> did much more than issuing laws: through the Grand Mufti of Saudi Arabia, the highest religious authority of the country, there have been issued religious decrees concerning the protection of intellectual property, but the practical results were minimal<sup>83</sup>. According to the Special Report 301, United States includes Saudi Arabia in the Watch List 2019, classifying it as one of the countries with highest bootlegging, both online and streaming, and with no respect of the intellectual property rights<sup>84</sup>.

Already in 2017, Saudi Arabia tried to face these enforcement problems by establishing the Saudi Authority for Intellectual Property (SAIP), which is responsible for

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<sup>80</sup> Kasada Intellectual Property, Frequently Asked Questions. *Copyright Protection in Saudi Arabia*. Available at: [http://www.kadasa.com.sa/publications/100?type=Copyright\\_Protection\\_in\\_Saudi\\_Arabia](http://www.kadasa.com.sa/publications/100?type=Copyright_Protection_in_Saudi_Arabia), accessed August 28, 2019.

<sup>81</sup> Chad M. Cullen, *Can TRIPS Live in Harmony with Islamic Law - An Investigation of the Relationship between Intellectual Property and Islamic Law*, 14 SMU Science & Technology Law Review 45, no. 1 (2011), p. 60.

<sup>82</sup> Abdulaziz Aljabre, *Understanding Software Piracy in Saudi Arabia and the Need for Change*, 3 Journal of Emerging Trends in Computing and Information Sciences, no. 11 (2012), pp. 1516-1520.

<sup>83</sup> At this purpose, it is good to recall the recent case started in the Dispute Settlement Body of the WTO (DS567: Saudi Arabia — Measures concerning the Protection of Intellectual Property Rights). The 1st of October 2001, Qatar requested to consult Saudi Arabia about the supposed failure of Saudi Arabia to guarantee a proper protection of the intellectual property rights, with location in Qatar. The BeoutQ Sports, a Saudi broadcasting station, takes the signal of the Qatar broadcasting station BeinSports – holder of several championships and the Champions League – and broadcast it, for free, to the whole world, and most of all to Asia and Africa. The Panel in the WTO has been formed on the 18<sup>th</sup> of February 2019. For update information about the case, visit the website: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds567\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm), accessed August 28, 2019.

<sup>84</sup> Office of the United States Trade Representative, *Special 301 Report* (2019), p. 57 *et seq.*

all the procedures referring to intellectual property matters, from the the registration of copyrights, trademarks, industrial projects and patents to the dispute resolution arisen. United States acknowledges in their report the positive cooperation between SAIP and US Patent and Trademark Office, which ended with the signing of a protocol agreement in September 2018<sup>85</sup>.

On the harmonization theory, the TRIPS Agreement is a form of social engineering which was supposed to provide developed countries and multinational a higher protection of the intellectual property rights in the adherent, but *de facto* it has only increased Islamic community’s rights helping the local innovation process, rewarding inventors and artists<sup>86</sup>. Although the TRIPS Agreement provided a higher protection of the intellectual property rights, it did not manage to improve the foreigners’ conditions, failing in the objective to provide everyone for a basic standard protection for creations of the mind. However, this is not due to a conflict between TRIPS and Sharia law, but between two different cultures<sup>87</sup>.

#### 4. A possible connection between IP infringements and religiosity rate

This study based on the consistent doctrine shows that despite Islamic countries have enacted acts regarding intellectual property rights together with their implementation in judges ‘rulings and religious statements there are still problems of piracy. One determining factor could be the scarce social awareness considering the lack of consciousness referring to the negative consequences of IP infringements on creative industries<sup>88</sup>. On this purpose, there are some studies<sup>89</sup> which try to elaborate possible tools aiming at reducing web piracy

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<sup>85</sup> Christiane Bou Khater, *Intellectual property rights in the light of the Saudi Arabia’s vision 2030*, 4 International Journal of Law, no. 2 (2018), pp. 154-156.

<sup>86</sup> Chad M. Cullen, *Can TRIPS Live in Harmony with Islamic Law - An Investigation of the Relationship between Intellectual Property and Islamic Law*, 14 SMU Science & Technology Law Review 45, no. 1 (2011), p. 47 *et seq.*

<sup>87</sup> Bashar H. Malkawi, *The Alliance Between Islamic Law and Intellectual Property: Structure and Practice*, 10 University of St. Thomas Law Journal, no. 3 (2013), p. 641 *et seq.*

<sup>88</sup> Patricia H. Schneider, *International trade, economic growth and intellectual property rights: a panel data study of developed and developing countries*, 78 Journal of development economics, no. 2 (2005), pp. 529-547.

<sup>89</sup> See Nora El-Bialy and Moamen Gouda, *Can Shari’a be a deterrent for intellectual property piracy in Islamic countries?*, 14 The journal of World Intellectual Property, no. 6 (2011), pp. 441-466; Salaiman Al-Rafee and

in developing countries that measure the impact of the law, the religion and the social awareness on the internet user behavior. According to Al-Rafee and Rouibah’s conclusions awareness<sup>90</sup> and religion were found to have a significant effect on the respondents’ intention to pirate digital material; however, the law factor was not found to be significant, probably due to the general perception that laws are not always being enforced in these countries<sup>91</sup>. According to El-Bialy and Gouda’s study<sup>92</sup> Islamic countries have the highest rate of religiosity and they also have the primate for IPR piracy<sup>93</sup>. Considering these two key information, religion could be used as an enforcement mechanism creating a set of social or religious-based sanctions that could increase the marginal cost of IP violations<sup>94</sup>. Many Muslims seek to ensure that everything they do is consistent with Shari’a, which plays an important role in every sphere of life. According to behavioral studies, more religious people that find suspect behaviors as being unethical are not inclined to perform those conducts<sup>95</sup>. Therefore, it is crucial that any law which is supposed to be effective complies with the principles of Islamic law.

From this perspective, a religion that views IPRs piracy as a malevolent act is able to support the enforcement of IP laws. In fact, if the majority of people of a community is inclined to follow a certain ideology (even if this ideology is religious-based rather than coming from the legislator) that recognizes and gives protection to intellectual property

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Kamel Rouibah, *The fight against digital piracy: an experiment*, 27 *Telematics and Informatics*, no. 3 (2010), pp. 283-293; Paul Cronan and Salaiman Al-Rafee, *Factors that influence the intention to pirate software and media*, 78 *Journal of Business Ethics*, no. 4 (2008), pp. 527-545; Charles W.L. Hill, *Digital piracy: causes, consequences and strategic responses*, 24 *Asia Pacific Journal of Management*, no. 1 (2007), pp. 9-25.

<sup>90</sup> The study showed that participants in the group were lectured briefly the negative effects of digital piracy, as well as the future ramifications of such actions registered the highest drop in the digital piracy intention of the study, higher than the religious treatment too. See Al-Rafee and Rouibah, *supra* note 45.

<sup>91</sup> One study conducted in China showed that one of the main reasons why people pirate digital material is the poor enforcement of IP laws, coupled with disrespect for the legal system. See Kin-wai Lau, *Factors motivating people towards pirated software*, (Qualitative Market Research, 2006).

<sup>92</sup> El.Bialy and Gouda (2006), *supra* note 45.

<sup>93</sup> Trevor Moores, *An analysis of the impact of economic wealth and national culture on the rise and fall of software piracy rates*, 81 *Journal of Business Ethics*, no. 1 (2007), pp. 39-51.

<sup>94</sup> Steven D. Jamar, *The protection of intellectual property under Islamic law*, 21 *Capital University Law Review*, no. 1 (2010), p. 1079.

<sup>95</sup> Tim Goles and Bandula Jayatilaka and Linda Parsons and Valrie Chambers, *Softlifting: exploring determinants of attitude*, 77 *Journal of Business Ethics*, no. 4, (2008), pp. 481-499.

rights, then there will be a greater respect for author’s rights and the enforcement level will be higher<sup>96</sup>. In developing countries, law could be viewed null if it contradicts the teachings of the dominant religion and this latter could be used as an effective tool to guide people towards separating what is right from what is wrong<sup>97</sup>.

More than European countries there is a need of an interplay between social awareness, religion and new laws<sup>98</sup>. Our recommendation for making law effective is to enact religious-based law against the “westernization” of copyrighted contents, giving people a stronger motivation for buying legitimate products, rather than increasing the piracy market.

On the other hand, we should take into consideration another important factor: in poor countries, sometimes piracy is the only solution to have access to creative products because of the excessive high prices. In this regard, Hill<sup>99</sup> examined and discussed strategies to counter digital piracy including lowering prices, offering extras to legal owners of digital material and increasing the penalties for web pirates. In fact, low-income countries need tailored solutions: one way could be to try to make people buy original goods or services at a reasonable price making social awareness on the negative consequences of IP infringement with a religious-based recognition of a fair compensation for the intellectual effort in order to justify the higher cost.

## 5. The opportunity of contamination between Muslim and European solutions

A pragmatic and flexible approach to intellectual property rights might help developing countries – including Muslim ones – to maximize the potentials of their intellectual property laws<sup>100</sup>.

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<sup>96</sup> Rachel M. McCleary and Robert J. Barro, *Religion and political economy in an international panel*, 45 *Journal for the scientific study of religion*, no.2 (2006), pp. 149-175.

<sup>97</sup> Oscar Alafranca and Wallace E. Huffman, *Aggregate private R&D investments in agriculture: the role of incentives, public policies, and institutions* (Economic development and cultural change, 2003).

<sup>98</sup> El-Bialy and Gouda (2011), *supra* note 45.

<sup>99</sup> Hill (2007), *supra* note 45.

<sup>100</sup> European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Trade, growth and intellectual property – Strategy for the protection and enforcement of intellectual property rights in third countries*, COM (2014) 389 final.

In the European environment, the Lisbon agreement has changed the right of the European Union in the field of intellectual property. Essentially, by giving to the European Charter of Fundamental Rights the juridical *status* of the international agreements, an importance is given to what art. 17, par. 2 states: “*the intellectual property must be protected*”. Although the Lisbon Agreement does not confer further power to the EU in the field of intellectual property, it represents a declaration of political intents and a commitment to obtain the communitarian patent<sup>101</sup>.

At the beginning the European Community did not explicitly refer to intellectual property but art. 30 of the Treaty of Rome recognized “*the protection of the industrial and commercial property*” as reason to limit the free circulation of goods. At the time in which the Lisbon Agreement came into force in 2009, the EU became explicitly competent in the field of intellectual property rights (art. 114 and 118 of the TFEU), with the goal of guaranteeing a uniform protection of these rights and to establish authorization, coordination and control regimes, centralized at European level<sup>102</sup>.

Despite the progresses of legislation at the international level, the technological development and the internal exchanges created the premises for the violation of intellectual property rights, becoming a global phenomenon which needed a global intervention. On this purpose, the European Union has adopted the directive 2004/48/CE, concerning the respect of the intellectual property rights, in order to reinforce the fight against piracy and counterfeiting, bringing the national legislation closer through a centralized European management. Nowadays, the new Regulations (n. 608/2013)<sup>103</sup> about the intellectual

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<sup>101</sup> Justine Pila, *Intellectual Property as a Case Study in Europeanization: Methodological Themes and Context*, in Ansgar Ohly and Justine Pila (eds.), *The Europeanization of Intellectual Property Law. Towards a European Legal Methodology*, (Oxford University Press, 2013).

<sup>102</sup> An example is the creation of the European Union Intellectual Property Office (EUIPO) in charge of managing trademarks and industrial design for the EU internal market, called Office for harmonization in the internal market (OHIM) until 23<sup>rd</sup> of March 2016. For further information see European Parliament Factsheet, *La proprietà intellettuale, industriale e commerciale*, (2019). Available at: [www.europarl.europa.eu](http://www.europarl.europa.eu), accessed August 28, 2019.

<sup>103</sup> The following detail specifications can be found in the Regulation (EU) nr. 608/2013: list by typology of intellectual property rights and expected violations; provisions for the right owners, in relation to the modalities to request protection to the customs; detailed procedures that the customs need to follow in case of identification of goods suspected to violate an IPR; establishment of the cooperation and exchange of information between customs and right owners; and lastly, measures to guarantee the protection of the interests



property rights have been implemented, and establish procedural rules for customs authorities, granting a stronger respect of IPRs<sup>104</sup>.

European Union has adopted several interventions about intellectual property rights, since they represent a relevant engine for growth, innovation and employments. In fact, countries presenting a solid regulatory framework allows the growth of innovative companies, attracting foreign investors<sup>105</sup>.

During the years, European Union has created the right conditions to establish a strong sensibilization and harmonization of regulatory provisions about intellectual property rights, in order to facilitate future negotiations with other countries and create a solid and defined base to start bilateral and multilateral agreements<sup>106</sup>. What comes to light from a careful analysis of the Directives and Regulations adopted at the European level, is the constant raise of interventions promoting intellectual property rights.

Therefore, the jurist had to reply to the demand of clearness and modernization of the law, which in Italy resulted in the new “Code of the industrial property”, collecting all the rules about patents and trademarks, excluding only the regulation on copyright, dated back to 1941<sup>107</sup>.

Moving from the European experience we recommend that the Islamic juridical law schools continue the path towards a better protection of intellectual property trying to create

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of the legal retailers. For more information about the legislation, visit the website: [https://ec.europa.eu/taxation\\_customs/business/customs-controls/counterfeit-piracy-other-ipr-violations/legislation\\_en](https://ec.europa.eu/taxation_customs/business/customs-controls/counterfeit-piracy-other-ipr-violations/legislation_en), accessed August 28, 2019.

<sup>104</sup> The European Committee prepares and shares a report per year, describing the customs detention of goods, which are suspected to violate the intellectual property rights (IPR), such as trademarks, copyrights and patents. Statistics provide useful elements supporting the analysis of the violations of the IPR, which affect the EU market and the development of appropriate countermeasures. European Commission, *Report on the EU customs enforcement of intellectual property rights: Results at the EU border*, (Taxation and Customs Union, 2017).

<sup>105</sup> Evisa Kika and Nico S. Groenendijk, *The Governance of European Intellectual Property Rights: Toward a Differentiated Community Approach*, (2009), p. 2.

<sup>106</sup> The EU has specifically requested to include the protection of the commercial secret during the last negotiations.

<sup>107</sup> Legislative Decree of 10<sup>th</sup> february, 2005 no. 30 “Codice della proprietà industriale, a norma dell'articolo 15 della legge 12 dicembre 2002, n. 273”. The new Code, characterized by a realistic approach tends to relate the IPRs protection to what is valuable on the market, finding a new balance between monopoly and competition, different from the original principles on which the Code claim to take inspiration from. .

their own legal categories, without distorting the Muslim tradition. Otherwise, a strict imposition of European solutions might be seen as an unjustified intrusion from the Occidental world<sup>108</sup>.

Muslim countries can take as models the Regulation no. 608/2013 cited above, and the Regulation 2017/1001 about the European trademark<sup>109</sup>.

However, a reflection needs to be made: Muslim countries, having a tradition which is deeply different by the Occidental one and basing their law on the holy Qur’an, need to develop and integrate the concept of IP following their traditions<sup>110</sup>.

Therefore, a bigger external and internal jurisdictional effort is needed. From an external viewpoint, for tangible assets it would be possible to consider an international agreement (for example European Union and Gulf Countries) to promote the respect of intellectual property rights through a tighter control at frontiers. Indeed, the key problem is that these countries are located in a strategic position between Orient and Occident and this makes them an easy port for counterfeit products that could be introduced in the European market. In fact, according to the European Commission<sup>111</sup>, the counterfeiters use zones of free exchange, mostly the ones located in the United Arab Emirates to produce, store and transship counterfeited goods towards different destinations, like the European Union, camouflaging the production origin and/or the departure point.

Another possible solution might be the settlement of an agreement establishing an intensification of controls and a bigger exchange of information between customs and copyright owners in order to trace the movement of original goods and have more information about the volume of trade with the European Union, thanks to the higher degree of control.

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<sup>108</sup> Rami M. Olwan, *Intellectual Property and Development. Theory and Practice*. (Springer, 2013), p. 185 *et seq.*

<sup>109</sup> The Regulation (EU) 2017/1001 came into force on October 1<sup>st</sup>, 2017 as a consolidated version of the 2016 European Union Trademark Regulation. <https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A32017R1001>, accessed August 28, 2019.

<sup>110</sup> Ezieddin Elmahjub, *An Islamic Vision of Intellectual Property. Theory and Practice*, (Cambridge, 2018), p. 43 *et seq.*

<sup>111</sup> European Commission, *Commission Staff Working Document Counterfeit and Piracy Watch List*, SWD(2018) 492 final.

European Union, thanks to a strategy started in 2004, set the goal of increasing the respect and expansion of intellectual property rights in several developing countries<sup>112</sup>. At this regard, the Commission has drawn up a list of Priority Countries, among which Indonesia, Turkey, Malaysia, India, United Arab Emirates, with the goal of intensifying the dialogue between these countries and fill the gaps in the field of IPRs<sup>113</sup>.

In addition to this external input, an internal push needs to be added. In fact, if we analyze the Islamic model, it is easy to understand that an interpretative commitment of the highest religious figures is necessary, since these countries are at least formally theocratic. Series of homogeneous declarations coming from religious authorities can easily influence the Muslims choices, explaining how piracy and several counterfeit products must be considered against the Shari’a law and therefore not acceptable.

Indeed, it is evident that *siyasa* - which has a big application at cultural and social level in contrast to Shari’a law - has led to several violations of the intellectual property rights<sup>114</sup>.

## 6. Conclusions

Finally, our research outcome evidences that categories of IP are not just a Western phenomenon imposed to Arabic countries, but they can be traced back to internal concepts found in Shari’a fundamental sources. In fact, analyzing property under principles of Islamic law, it appears that IP is not alien to Islamic principles<sup>115</sup>, being a complementary part of it.

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<sup>112</sup> Xavier Seuba, *The Global Regime for the Enforcement of Intellectual Property Right*, (Cambridge, 2017), p. 175 *et seq.*

<sup>113</sup> European Commission, *Commission Staff Working Document. Report on the protection and enforcement of intellectual property rights in third countries*, SWD (2018) 47 final, p. 6 *et seq.*

<sup>114</sup> *Siyasa* represents the “political-governmental function with a broad margin of regulatory discretion”, although respecting the limits imposed by Shari’a law. For further information see Carmela Decaro Bonella, *Le questioni aperte: contesti e metodo*, in Carmela Decaro Bonella (ed.), *Tradizioni religiose e tradizioni costituzionali. L’Islam e l’Occidente*, (Carocci Editore, 2013), p. 35 *et seq.*

<sup>115</sup> Alireza Milani and Amir Ahmadi, *The legitimacy of intellectual property rights in the light of Islamic law (Sunni and Shia Fiqh)*, 1 Sri Lankan Journal of Arabic and Islamic Studies, no. 2 (2018) pp. 1-19.

Indeed, Islam does not allow that the efforts of others could be taken away from them or could be used without their consent. As Holy Qur’an clearly mentions "*And do not eat up your property among yourselves for vanities, nor use it as bait for the judges with intent that ye may eat up wrongfully and knowingly a little of (other) people's property*"<sup>116</sup>.

According to the current state of knowledge, even if there is not a legal provision that expressly recognizes intellectual property, we could say that *de facto* creators can benefit a protection in case of IP infringements<sup>117</sup>.

A culture-specific approach is desirable, where each culture is studied and analyzed to provide tailored solutions to fight digital piracy within that culture. For instance, law intervention in European countries could produce positive effects on curbing piracy rather than a hypothetical religious one. Vice versa, in Islamic countries a religious intervention could be more efficient due to its strong influence.

Lastly, considering Saudi Arabia stance, its government should sensitize people about the economic advantages deriving from intellectual property rights and their use as instrument to promote the development of infrastructures and industrialization. Despite the amount of Islamic States establishing laws on intellectual property, compliant with TRIPS, these laws are not implemented, and it contributes to increase the public perception of the absence of sanctions for IP infringements. If people are properly instructed about the benefits of IPRs and understand that it is not against the Shari’a law, Islamic countries will start promoting the protection of them<sup>118</sup>.

What can be suggested is surely the creation of study and interpretation groups, which promote intellectual property rights with a bottom-up approach, starting from the daily life of the single Muslim person to spread to the wider community. Only in this way it will be possible to have a bigger sense of responsibility and therefore adaptation to the international regulations.

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<sup>116</sup> Qur’an, 2:188.

<sup>117</sup> Khan Iqbal, *Intellectual property right in Islam: a perspective*, 3 SSRN Electronic Journal, no. 1 (2013), pp. 2249-2496.

<sup>118</sup> Samia Hassan, *The Compliance of National Legislation with the TRIPS Agreement in the Kingdom of Saudi Arabia*, 8 Humanities and Social Sciences Review, no. 2 (2018), pp. 233-240.

As emerged from this analysis, the enforcement problems of intellectual property rights lie in the formal institutions, which are not able to make Muslim people respectful of IPRs, with difficulties to create a sense of morality and responsibility. Regrettably, Muslims tend to not respect IPRs related to foreign properties<sup>119</sup>. Islam can easily find the balance between authors’ rights and public interests in its religious principles in order to seek adequate instruments to support the protection of authors, rewarding their hard work and creativity.

In conclusion, another possible recommendation could be the intensification of the high level dialogue on IP within Arabic countries and international organizations like WIPO, WTO and EUIPO in order to influence the new commercial policies, through which it will be possible to find out further solutions to problems caused by digital piracy and counterfeiting. In this optic, Muslim countries might take advantage of the know-how of the competent international organizations to implement programs of technical assistance aiming at a stronger implementation and enforcement of IP principles.

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<sup>119</sup> Abdulaziz Aljabre, *Understanding Software Piracy in Saudi Arabia and the Need for Change*, 3 Journal of Emerging Trends in Computing and Information Sciences, no. 11 (2012), pp. 1516-1520.