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MALAYSIAN INTELLECTUAL PROPERTY LAW AND ISLAMIC PERSPECTIVES ON COUNTERFEIT TRADE

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Abstract

Innovation-based businesses and intellectual property rights (IPRs) increasingly play a remarkable role in driving economic growth of a country including Malaysia. The prevalence of counterfeit trade devalued the innovation and IPRs thus becoming an inevitable challenge for businesses particularly operating internationally. Alas, the existence of law in many countries is seen as less effective thus far in countering counterfeit trade. Malaysia is committed in addressing the issue. Taking into account the background and economic situation of the country, the evaluation of Islamic principle in this context should also be considered along with necessary improvements towards existing law from time to time. This study examines how the existing Malaysian IP law and Islamic principles deal with counterfeit trade. The study identified that both substantive laws and legal procedures and remedies are adequate in protecting IPRs. The study recommends that by nurturing the consumers with legal and Islamic knowledge may reduce their desire for buying counterfeit goods. This would increase in demand for genuine products and encourage producers to provide consumers with extended range of choices with cheaper price. Consequently, this will enhance the protection of IPRs regime thus sending a positive signal to those investors, inventors and IPRs-holders about an environment in Malaysia that is conducive for investment and inventive activities.

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Keywords: Business, counterfeit trade, intellectual property law, Islam, Malaysia.



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1. Introduction

The global economy in recent years is progressively focuses towards a knowledge-based, innovation-driven model. One of the key drivers of innovation is intellectual property (IP) because innovation flows mainly from invention that is protected under IP rights (IPRs) regime. Both the developed and developing nations thus far have their economic growth benefited from IP-intensive industries which contributing substantially in terms of jobs and value added to their gross domestic product (GDP) (Oswald and Pagnattaro, 2015; Lim, Azmi and Alavi, 2009).

In competitive and globalized business atmospheres, sound business environment with sufficient legal protection of IP rights (IPRs) play an important role for the businesses to operate abroad as a strategy to secure their rights and enforcing them if violations are discovered. As such, appropriate protection of IPRs is crucial to encourage innovation by rewarding the inventor through a limited period of exclusive rights and to provide a conducive business environment which encourages the inflows of foreign direct investment (FDI), technology transfer and business investment in technology and in knowledge-based capital into a country.

The Malaysian government considered IP and innovation as one of the essential elements in transforming the economy and therefore introduced relevant policies to encourage FDI inflows and technological transfers into the country in stimulating the country's economic growth. These include the National Intellectual Property Policy (NIPP) in 2007, the National Science, Technology and Innovation Policy (NSTIP) 2013-2020 and the 11th Malaysia Plan 2016-2020, all of which provide strategic guidelines and measures aimed at enhancing innovation in preparing for the country's transition to a high income, innovation-based economy by 2020. Since the growth of counterfeit trade may hinder those efforts, the Malaysian government has strengthened and improving the relevant laws and enforcement of IPRs to fulfil the international standards and to attract the foreign investment which is important for the country's future economic growth.

2. Problem Statement

A new joint study by the Organization for Economic Cooperation and Development (OECD) and the European Union Intellectual Property Office (EUIPO) which based on analysis of customs seizures worldwide indicates that counterfeit trade has increased by over 80% in a five-year period from 2008 to 2013 with the value of imported counterfeit goods are worth around 2.5% (USD 461 billion) of global imports a year (OECD/EUIPO, 2016). Counterfeit trade has flourished into the world's most fastest growing industries in recent years regardless of appropriate legal implementation by the WTO member countries that met with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requirement (Mohamed, 2012; WCO, 2015; European Commission, 2015; OECD, 2016; USTR, 2016). Apart from TRIPS Agreement, Article 27 of the United Nation Universal Declaration of Human Rights also recognizes the fundamental human rights to IP by providing the protection of both the "moral and material interests" of those who create "scientific, literary or artistic" works. However, the growing trend of counterfeit trade has caused an inevitable challenge for legitimate businesses to expanding and operating their businesses in the international markets.

Several studies found that counterfeit goods have been produced and consumed virtually in all economies (OECD/EUIPO, 2016; WCO, 2015; European Commission, 2015). While China remains as the largest producing market, Malaysia is found vulnerable due to its location in the main producing region of counterfeit goods. Few reports have identified Malaysia as the main country of provenance for specific product categories such as counterfeit electrical equipment, body care items, clothing, packaging materials and media box-based piracy (USTR, 2015; European Commission, 2015). This not only creates a negative image for the country and discourage investors and rights holders from investing and introducing their products onto Malaysian markets (BNM, 2010; Mohamed, 2012), but also may obstruct the government's efforts and policies to become a high income nation by year 2020.

Malaysia is committed in addressing counterfeit trade. Several amendments into relevant IP legislation such as the Trademark Act (TMA) 1976 and Trade Description Act (TDA) 2011 have been made from time to time. Taking into account the background and economic situation of the country, the evaluation of Islamic principle in this context is also explored and being considered along with necessary improvements towards existing law from time to time.

3. Research Questions

The premise of this study concerns the following questions:

1. What is the extent of counterfeit trade in Malaysia?
2. Are the national and international provisions concerning measures and procedures for enforcing IPRs up to the task of preventing and punishing counterfeiting?
3. What options should be explored to improve the legal framework systems?

4. Purpose of the Study

The aim of this study is to examine how the existing Malaysian IP law deals with counterfeit trade. The discussion focuses on trademark related-matters and therefore assessing the relevant laws as provided in the TMA 1976, TDA 2011 and the applicable Regulation and Order on counterfeiting. Assessment to the relevant laws is made with the objective to identify the protected rights under the substantive laws and the available legal procedures and remedies in enforcing such rights. Islamic principle concerning the business ethics is explored to assess the extent to which it may interact with the existing laws in offering support to the protection of IPRs. The purpose is to complement the existing law by providing some possible solutions from the Islamic perspective in countering counterfeit trade in Malaysia.

5. Research Methods

This study employs doctrinal legal research in examining the relevant existing laws in Malaysia dealing with counterfeiting issue. One of the prominent features of doctrinal approach is that it is more concerned with an accurate and coherent description of the law rather than scientific theories about it (Samuel, 2008). In legal research, doctrinal approach is claimed to be qualitative as it does not involve statistical analysis of the data (Dobinson and Johns, 2007; Peczenik, 2008). As such, it emphasizes the conception of law as autonomous (Conry and Beck-Dudley, 1996; Cownie, 2004) through analysing court

judgments and statutes (McConville and Wing, 2007). In contrast with the sources of data in social research, primary data sources in legal research refer to the texts of laws that are produced by the legal institution and process that become the authoritative statements of law (Yaqin, 2007; Elias, 2012; Mohamed, 2016; Chatterjee, 2000). Thus, for the purpose of this study, the following types of legal documents are examined:

- the TRIPS Agreement;
- the Malaysian Trademark Act 1976 and Trade Description Act (TDA) 2011

Data sources for Islamic principles in this study are referred to the Qur'an and Sunnah, the two primary sources in Islamic law that possess supreme character and authority (Zahraa, 2003; Baderin, 2005; Raslan, 2007). Sunnah and Hadith (used interchangeably in this study) are meant to complement the rules set out in the Qur'an and are often useful as context clarification.

6. Findings

6.1. Definition of Counterfeiting

Counterfeit trade may affect any products protected by IP laws. In general, IP laws protect creative and innovative works through legal rights such as copyrights, patents, designs and trademarks. Of all these types of IPRs, trademarks are identified to be the most frequent violated rights every year (OECD/EUIPO, 2016; WCO, 2015). Violation of IPRs generally arises when any person uses or exploits those rights without authorization from their registered proprietors.

Article 51 Footnote 14(a) of the TRIPS Agreement provides that “counterfeit trademark goods” shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question, under the law of the country of importation. In Malaysia, section 70C of the TMA 1976 defines counterfeit trademark goods in a similar way to the TRIPS Agreement, which also includes the infringing actions of trademarks rights. Section 38(1) of the TMA 1976 provides that an infringement may arise when unauthorized person uses a mark which is identical with or so nearly resembling with the registered trademark as is likely to deceive or cause confusion in the course of trade in relation to goods or services in respect of which the trademark is registered.

The requirement of the element “to deceive or cause confusion” on the part of the alleged offender was applied in the case of *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 CLJ 1153, where the court held that a registered trademark is infringed by a person who uses a mark which is identical with it; or so nearly resembling it as is likely to deceive; or so nearly resembling it as is likely to cause confusion. However, the question of whether or not this requirement is mandatory in trademark infringement cases was decided as immaterial in subsequent cases of *Acushnet Company v Metro Golf Manufacturing Sdn Bhd* [2006] 7 CLJ 557. In this case, Ramly Ali J made an observation that:

“It is not necessary that it should be intended to deceive or to cause confusion. We do not have to look into the mind of the user to see what he intended. It is its probable effect on ordinary people which we need to consider. The user may have no such intention and was completely honest. But, he may still be guilty of infringement if his usage of the trademark is likely to deceive or to cause confusion on the ordinary people”.

Thus, counterfeiting can be concluded to include the unauthorized use of a protected trademark which is falsely presented as the genuine product. The requirement that counterfeit goods must infringe the rights of IP proprietors renders the term counterfeit as a subset of IPRs infringement. In this context, the court made it clear that as long as the element of deception or confusion exists, the infringement offence is committed regardless of whether that person has intention or knowledge of such infringement.

6.2.The Extent of Counterfeit Trade in Malaysia

Counterfeiting activities in Malaysia are identified to have taken place at three levels: local production, importation and exportation. Apart from locally produced for local consumption and export, counterfeit goods are sometimes brought into the country to be assembled or reworked locally, or packaging or labelling may be done in the country and re-exported (USTR, 2015; European Commission, 2015). There are few contributing factors causing counterfeiting in Malaysia. They include the world-class port facility attracting the illegal transactions associated with counterfeit trade, its geographical location within counterfeit goods production region and the growth of industrialization in other low cost manufacturing countries such as China and Vietnam which assist the increase of counterfeit goods entering the country (Mohamed, 2012). All these factors had turned Malaysia into an international hub for counterfeit trade.

In assessing the extent of counterfeit trade, this study used seizure data obtained from the MDTCC reports alone as no such information is compiled by the Malaysian customs authorities. Table 01 illustrates the results of seizures of counterfeit goods in Malaysia for the last ten years from 2006 - 2015. It is worth to note that the data might be limited since it only estimates figures based on reported cases. Thus, there is a possibility that the extent of counterfeit trade in Malaysia might be understated if unreported cases are also sizeable. This is due partly to the illegal nature of this trade which renders the probability of bias in the data sources. However, while the selection of data is not exhaustive, it does cover the most important and relevant issue for the purpose of examining the extent of counterfeit trade in this study.

Table 01. Seizure of counterfeit goods in Malaysia by number of cases and seizure value

Year	No. of cases	Seizure Value (RM)
2006	2,018	42,686,237
2007	1,936	56,169,682
2008	1,528	23,463,304
2009	409	3,570,857
2010	1,328	13,783,735
2011	3,250	21,074,722
2012	2,367	20,485, 129
2013	2,092	11,459,430
2014	2,359	13,340,270
2015	2,029	23,168,812

The data showed the total value of counterfeit trade accounting to millions of ringgit annually. Although the numbers fluctuate every year, such a huge amount could have a significant impact on the country's economic growth as a whole. Large losses are not the only concern as the report for both 2014 and 2015 also indicate the invasion of this trade into food and medicine along with the substantial number on counterfeit clothes and other items (MDTCC Annual Report 2011-2015).

It is worth to note at this point how counterfeit trade may negatively impacts all the relevant stakeholders. The legitimate owner of IPRs business will have a direct economic impact in terms of the loss of profit and deterioration of the quality and value of their trademark that may tarnish their reputation. Subsequently, this may damage consumers' confidence and market reliability of their names and products. The direct economic impact may lead to a significant indirect impact when counterfeiting could also possibly destroy honest jobs, thus affecting the revenues of governments, foreign investment, trade and innovation. For example, legitimate business may have to spend a huge amount for litigation purposes in protecting their rights while such cost could effectively be spent for innovation development to produce competitive and affordable products for consumers. In addition, consumers' health and safety will be at risk when counterfeiting infiltrates into household products including foodstuff, pharmaceutical and medicine due to the fact that counterfeit products may contain dangerous substances because they are not subjected to the rigorous quality control as required for genuine ones (Mohamed, 2012).

Against this background, it is essential to provide appropriate legal protection and enforcement to counter counterfeit trade. It is argued that, while effective enforcement is crucial for ensuring the sustainability of the business of rights-holders and in developing national economies like Malaysia, it is also fundamental in supporting consumer choice in purchasing goods, protecting their safety and preventing any anticipated further harm.

6.3.Malaysian IP Law in Countering Counterfeit Trade

The growth in counterfeit trade demands for governments' interference to step up the protection and enforcement of IPRs. The World Intellectual Property Organization (WIPO) has stressed that the IP protection system is only worthwhile if the right-owners are capable of effectively enforcing their rights (WIPO, 2004). These include the right to take action against counterfeiters not only to recover the losses

incurred, but also to be able to call on the state authorities to deal with counterfeiters to prevent further violation.

In Malaysia, the general administration of IP matters is managed by the Intellectual Property Corporation of Malaysia (MyIPO) while the competent authority for their enforcement is the Ministry of Domestic Trade, Co-operatives and Consumerism (MDTCC). The implementation of enforcement of IP matters involves several government agencies according to the provisions of which IP statutes they are enforcing and these include the Enforcement Division of the Ministry itself, the customs and police as well as the local authorities. The specialized IP court established in 2007 with the Sessions Court and the High Court both conferred with criminal and civil jurisdictions respectively, deals primarily with counterfeiting and piracy cases.

The legislation in Malaysia which provides for protection and enforcement in counterfeiting cases includes the TMA 1976, Trade Marks Regulations (TMR) 1997, the TDA 2011 and Price Control (Labelling by Manufacturers, Importers, Producers or Wholesalers) Order (PCO) 1980. The law provides for the enforcement of rights by the trademark owner who has the options to take action either through judicial measures of civil redress or criminal enforcement, administrative action or border measures.

The main provisions providing a framework for protection of trademark rights contain in the TMA 1976. Section 36 of the Act provides for the enforcement of civil remedies by the registered proprietor while for unregistered trademark, the proprietor may take passing off action under the principle of common law. Civil proceedings have a complementary function in the sense that they have been used to determine which party is in the right, and thus the party in the wrong must then compensate the other for any loss or damage. The various remedies available under civil proceedings include a claim for damages, accounts of profit, injunction, order for delivery up and order for disposal.

Criminal sanctions for counterfeiting are available under the TDA 2011. Section 5 of the Act provides for penal consequences where any person applies a false trade description to any goods or supplies or offers to supply any goods, or exposes for supply or has in his possession, custody or control for supply any goods to which a false trade description is applied. In cases where the offending trademark is not identical to the registered trademark, section 9 requires the proprietor to obtain a Trade Description Order (TDO) from the High Court before lodging a complaint with the Enforcement Division of the MDTCC. Once granted, a TDO is valid for one year and can be renewed. This order is declaratory in nature but, pursuant to section 9(4), it is admissible in evidence in any proceedings under section 8 (prohibition of false trade description to trademark) in which it is relevant as conclusive of a false trade description.

If a person is found guilty, the penalty under section 5B is a fine not exceeding RM100,000 and/or imprisonment for a term not exceeding 3 years and for a repeat offender, a maximum fine of RM250,000 and/or imprisonment for a term not exceeding 5 years applies. In cases where the infringer is a corporate body, section 5A states that the fine is up to RM250, 000 and double that amount for a subsequent offence.

Apart from judicial measures, administrative action is also available for the trademark owner. In certain situation such as when a trademark is used on signboards without authorization, the owner may notify the local city councils to stop such use as they are responsible for the licensing and approval of

signboards. Other than the city councils, a complaint may also be lodged to the Malaysia Advertising Standards Authority, an independent self-regulatory body which is responsible for promoting and enforcing high ethical standards in advertisements including prohibition of advertisements containing matters infringing IPRs.

Part XIVA of the TMA 1976 also empowers Customs authority and IPRs owner to take action at the border. The owner may apply to the Registrar of Trademarks for an order to intercept counterfeit goods at the point of entry to the country. A few other government agencies are also involved in enforcing border measures including the Enforcement Division of the MDTCC, the Royal Police Department and the local authorities. However, border measures have been underutilized thus far due to many onerous prerequisites and criteria to be fulfilled by the IPRs owner thus hinder the application of these provisions.

The Enforcement Division of the MDTCC is also empowered to enforce provisions under the PCO 1980 which imposes a mandatory requirement for goods to have details of the manufacturer, importer, wholesaler, producer and in the case of imported goods, the name of country of origin. Products found with inaccurate information of this requirement may be seized under the order.

6.4.Islamic Perspective on Counterfeit Trade

In Malaysia, along with the provisions in specific statutes, other systems such as Islamic and customary laws are concurrently influencing certain aspects of the law. The Malaysian Federal Constitution (FC) 1957 clearly states that while most matters are governed by a uniform body of federal laws, the constitution also grants the power to the states to apply a version of Islamic law on certain topics enumerated in the constitution including offenses deemed to be against the precepts of Islam (Article 74 and 9th Schedule List II of the FC 1957). Being a multi-cultural and multi-religious country with Islam is recognised as the religion of the Federation (Article 3(1) of the FC 1957) and more than 60% of total population are Muslims (Department of Statistics Malaysia, 2016), it is worth to consider how Islam views the business affairs and protection against counterfeit trade. The aim is to highlight the strength of Islamic value or its ethical framework in creating ethical business environment and perhaps how it may offer some possible solutions to deal with counterfeit trade in the context of Malaysia.

In its broadest context, Islam governs all aspects of a Muslim's life through the law known as *Shariah* or Islamic law. *Shariah* is the body of norms, principles, rules and rulings that are extracted from a combination of sources. It is a divine law which is mainly based on two primary sources that are the Qur'an and Hadith and other secondary sources including the *Ijma'* (juristic consensus), the *Qiyas* (legal analogy) and the *fatwa* (rulings of Islamic scholars) in the form of Islamic jurisprudence (fiqh) (Zahraa, 2003; Aldohni, 2012). Being a divine scripture and the highest source of law, the Qur'an specifies the moral, philosophical, social, political and economic basis for Muslim to be obeyed and respected in all aspects of life. All these are covered in the three fundamental concepts of faith comprising of Islam (divine law), *Iman* (belief) and *Ihsan* (ethics and moral character) as taught and showed by the Prophet Muhammad (saw) to his followers emphasising not only the relationship of individuals with Allah (swt) but also the relationship among them.

Islamic teachings strongly stress the observance of moral principles and ethical codes in human behaviour (Olwan, 2013; Mohammed, 2013). There are numerous verses of the Qur'an and Hadith

highlighting the essential of moral code of conduct for human life. For example, in Surah Al-Baqarah: 151, Allah (swt) says, “Similarly (to complete My blessings on you), We have sent among you a Messenger (Muhammad) of your own, reciting to you Our verses (the Qur'an) and purifying you, and teaching you the Book (the Qur'an) and the Hikmah (i.e., Sunnah, Islamic laws and Fiqh - jurisprudence), and teaching you that which you did not know”. The Prophet (saw) exemplified the principles of morality and ethics embedded in the Qur'an through his practices (Sunnah) in personal and public life to establish a social system that was just, harmonious and ethical (Mohammed, 2013). In a hadith, the Prophet (saw) said: “I was sent to perfect good character” (Imam Malik's Muwatta, Hadith No: 8). Thus, the ethical system prescribed in Islam is eternally divine and forms the foundation of an Islamic society with the unique features covering all scopes and fields of human life.

Since Islam places the highest emphasis on moral values, it requires Muslims to participate in all religious and social duties as permitted by *Shariah* and refrain from all forbidden acts. Islam recognised business as a dignified occupation and encourages Muslim to earn an honest livelihood from business as a source of wealth creation. The Qur'an says that “Allah has permitted trading and forbidden riba (interest)” (Al-Baqarah: 275). Even the Prophet Muhammad (saw) has himself engaged in business before he was appointed as the messenger of Allah (swt) and said that “nine out of ten sources of income are in business”. As such, Islam requires the affairs of business to be conducted by adhering on the principles and values as derived in the Qur'an and Hadith. Islam prescribes guidelines concerning business ethics and initially sets out those permissible and prohibited conducts primarily based on the notion of halal (lawful or permissible) and haram (unlawful or prohibited) as per Islamic jurisprudence (Uddin, 2003; Mohammed, 2013; Olwan, 2013).

Permissible conduct is divided further into four sub-divisions based on the way in which they were made allowable, that are, *wajib* (obligatory), *mustahabb* (recommended), *mubah* (allowed) and *makrooh* (disliked). Generally, all business dealings are considered permissible except those that explicitly identified as prohibited in the Qur'an and Hadith. These include businesses involving the element of bribery (Al-Baqarah: 188), usurping others' property (Al-Baqarah: 188), fraud (Al-Imran: 161), stealing and robbery (Al-Maidah: 38), income from sources of vulgarity (Al-Noor: 19), gambling (Al-Maidah: 90), intoxicants or drugs (Al-Maidah: 90) and interest (Al-Baqarah: 275). Therefore, Muslims have the option of doing any categories of halal business not only to worship Allah (swt) but also as their good deeds in serving the needs of the society and have to bear in mind that they will be condemned if committing haram actions as they are forbidden by the *Shariah*.

While there is no explicit rule regulated by *Shariah* in terms of IPRs-related business, the recognition of IPRs protection was basically construed based on the justification for such type of protection. By analogy, the majority of Islamic jurists recognised the protection and ownership of IPRs as a type of protected property in Islam on the reason that the owner had spent effort, labour and expenditure in producing the IPRs so that the monetary or commercial value attach to them should be eligible for a proper protection as provided for tangible assets (Azmi, 1995; Amanullah, 2006; Beltrametti, 2010; El-Bialy and Gouda, 2011; Olwan, 2013). This is the view accepted by the most classical jurists, including Shafii's, Malikis, Hanbalis and later Hanafis, and most of the modern jurists (Azmi, 1995; Amanullah, 2006; Olwan, 2013). With the recognition of IPRs as protected property, any

violation of these rights is considered as misappropriation of property, similar to the protection afforded to those physical properties such as land, houses and so forth. Thus, the application of *Shariah* principles prohibiting any violating conduct against other's property in this regard may be extended to cases of infringing the IPRs.

There are a number of arguments in the Qur'an and Hadith confirming the prohibition against misappropriation of property. Allah (swt) says in surah Al-Baqarah: 188, "And eat up not one another's property unjustly (in any illegal way, e.g., stealing, robbing, and deceiving), nor give bribery to the rulers (judges before presenting your cases) that you may knowingly eat up a part of the property of others sinfully". The verse clearly prohibits people from acquiring illegal benefits from someone else's property by using various dishonest methods such as bribery, fraud, cheating, or other malicious means. By definition, counterfeit trade falls under this category not only because it contains the element of "deceiving" or "to cause confusion" to the public as provided in section 38(1) of the TMA 1976, but also of the fact that counterfeiters are actually acquiring illegal profits for free or at a lower cost on the expense of legitimate IPRs' owners who had invested time, money and effort to develop their products and reputation.

Allah (swt) even reiterate the prohibition on His servants not to be involved or helping one another in sinful actions. The Qur'an in surah Al-Maidah: 2 states, "And help one another in Al-Birr and At-Taqwa (righteousness and piety), but do not help one another in sin and transgression. And fear Allah; Verily, Allah is severe in punishment". The Prophet (saw) said that "No man seizes the wealth of a Muslim unlawfully by means of his (false) oath, but Allah will deny Paradise to him and will doom him to Hell." A man among the people said: "O Messenger of Allah, even if it is something small?" He said: "Even if it is a twig of an Arak tree." (Sahih Muslim, Hadith No: 252). Association or helping one another in sinful actions in this context may include those who are involved either directly or indirectly in the supply-chain of counterfeit trade, from the supplier of raw materials to manufacturer, to retailer and to the end consumer. For example, consumers who are aware and intentionally buy counterfeit goods may be classified into this category of helping others to do prohibited conduct.

However, Islam also sets out clear rule indicating that there is no harm in commercial transactions that transpire between the buyer and the seller with mutual consent, so that any income or wealth earned from these transactions are lawful. In surah An-Nisaa': 29, Allah (swt) says, "O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you". The Prophet (saw) said, "The feet of the son of Adam shall not move on the Day of Judgment until he is asked about five things: about his life and what he did with it, about his youth and how he led it, about his wealth and how he earned it and where he spent it, and what he did with what he knew." (Jami` at-Tirmidhi, Hadith No: 2417).

In essence, Islam pronounces that incomes from the sale of such illegal transactions are unlawful (*haram*) and must not be part of a Muslim's earning (Mohammed, 2013). Muslims are reminded of their responsibility to strive for earning halal income not only as a religious obligation in order to be blessed by Allah (swt), but also not to cause harm to others. In another hadith, the Prophet (saw) says: "A Muslim is the brother of a Muslim: he does not oppress him, nor does he fail him, nor does he lie to him, nor does he

hold him in contempt. *Taqwa* (piety) is right here (and he pointed to his chest three times). It is evil enough for a man to despise his Muslim brother. The whole of a Muslim is inviolable for another Muslim: his blood, his property, and his honour" (An-Nawawi's 40 Hadith, Hadith No: 35). This indicates the ways and manners of how Muslims should act and interact in society. Muslims should always be conscious of not harming others, concern of their needs and are responsible to take precautions to prevent any kind of harm, mentally or physically. If any harm takes place, efforts should be done either in order to bring it to an end or at least to minimize the harm.

By analogy, the objective of *Shariah* in this context is in parallel with the general law, that is, to facilitate social order and preventing harm to the society so that people may live and interact in an organized and harmonious way (Williams, 2006). People in any society create rules and regulations on how to conduct themselves in a manner accepted by the majority of the population. In terms of social life, the purpose of law is supposed to be for the protection of society. Counterfeit trade may cause harm to many aspects of life - from businesses whose goods are counterfeited, to governments who lose the revenue but have to spend on enforcement efforts and to the public as a whole. The poor quality of counterfeit products and their confusion with genuine ones will lead to a deterioration of the rights-holders' or manufacturers' reputation and harms their economic gain as well as risk the consumers' health and safety with the use of lower quality or potentially dangerous ingredients. All these types of harm inflicted from counterfeiting, therefore, should be prohibited.

All human's actions in Islamic perspective including any commercial pursuits are either rewarded or punishable in the sense that any conducts lead to welfare of the individual or society are morally good and whatever is injurious is morally bad (Saeed, Ahmed and Mukhtar, 2001; Mohammed, 2013, Olwan, 2013). This shows how Islam places a greater emphasis on duties than on rights where the wisdom is that if duties (relating to justice and trusteeship, for example) are fulfilled by everyone, then self-interest is automatically held within bounds and the rights of all are undoubtedly safeguarded (Rice, 1999). Given that commercial transactions are part and parcel of people's daily lives, Islam views the undertaking of every transaction represents a task that must be executed in accordance with Islamic law and teachings.

In Islam, economic and business activities are considered at par with any other forms of worship to Allah (swt) and people should therefore be prohibited from inflicting injury or causing harm while engaging in such dealings (Saeed et.al, 2001, Ahmad, 2010; Elmahjub, 2015). In fact, commentators pointed out that throughout the Islamic literature and fatwas, misappropriation of IPRs property is judged to be Haram, that is, the highest degree of prohibition in *Shariah* which clearly shows that Islam basically backs up laws and regulations that prohibits any kind of violation against IPRs (El-Bialy and Gouda, 2011).

7. Conclusion

The existing legal provisions in Malaysia and Islamic perspective clearly prohibit the dealings in counterfeit trade. The law is sufficient both in terms of meeting the international standards to address the issue and the penalty imposed to prevent further violation. Establishment of specialized IP enforcement unit and cooperation from all relevant authorities at all levels in enforcing such law were also proven

fruitful particularly when they conducting raids against counterfeit goods. Despite all these developments, counterfeit trade remains rife. The question to consider now is how the legal provisions and the Islamic teachings could complement to enhance the effectiveness of enforcement effort in reducing or deterring counterfeiting in the long term given the illegal nature of the trade and those who are involved have belittle the law, let alone to respect the religious duties.

This study recommends that cultivating public awareness should equally be emphasised along with the effective enforcement. The public as a whole should be made aware that both the law and the Islamic teachings prohibit counterfeit trade and thus by purchasing counterfeit goods, they are actually supporting the industry. While the law at the moment has no provision to punish the purchasers, Islamic teachings however clearly state that any involvement in committing a wrongdoing is sinful and therefore is prohibited. In other words, the *Shariah* has regulations which ensure that harm cannot be carried out in a society. In fact, ethical principles laid down by *Shariah* do play a major role in shaping and encouraging the behaviour of people in their aspects of life in a society.

By nurturing the public with awareness of the illegality of their actions and disregard for potential harm to the legitimate stakeholders, it is believed that the knowledge may influence and diminish their intention to buy counterfeit goods. Taking into account that more than 60% of total population in Malaysia are Muslims, their understanding on the issue and the negative impacts counterfeit trade may cause to the society as a whole may have a significant influence in changing their attitude towards counterfeit goods.

It is argued that, knowledge and awareness of the public on their duties, both under the law and the Islamic teachings, will reduce the desire for buying counterfeit goods and in the long term making it harder for counterfeiters to market and selling their products. Simultaneously, continuous effort on the part of legal authority in enforcing the law will increase the cost of counterfeit trade, thus diminishing the motivation for producing and marketing such products in the market. Reduction in the supply of counterfeits would cause an increase in demand for genuine products and perhaps encourage producers of high-end products to provide consumers with an extended range of choice and offer goods with cheaper price as an alternative for consumers.

It is believed that concerted efforts from all parties will enhance the protection of existing IPRs thus sending a positive signal to those investors, inventors and IPRs-holders about an environment conducive for investment and creative activities. Thus, efforts to improve IPRs regime in countering counterfeit trade should be viewed as protecting all the relevant stakeholders as well as to secure long-term investments for the purpose of economic development and society.

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