



## DYNAMICS RESPONSE OF INDONESIAN ISLAMIC LAW TO THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

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**Abstract:** Every work of innovation is a valuable intellectual property that should be protected by the state, according to Law No. 24 of 2014. However, Intellectual Property Rights are not adhered to by the public as there is much piracy. This is evident in the proliferation of websites providing pirated music, photocopies of books, and uploading songs that are sung again without permission from the creator. This necessitates a study related to the protection of Intellectual Property Rights (IPR) from the perspective of Islamic law. Building on the theory of *maqasid sharia*, the study shows that Islamic law views copyright as protected property because it is *haq al-ibtikar* containing the creator's exclusive, economic, and moral rights. From a fiqh perspective, the solution should be based on moral and economic demands. Therefore, it is necessary to strictly enforce the law against violations of Intellectual Property Rights because it is based on the appreciation and protection of creative rights, which signify professionalism.

**Keywords:** protection of intellectual property rights, Islamic law, elasticity of Islamic law, dynamics of Islamic law, intellectual property rights.

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### Introduction

SCIENCE, technology, art, and literature development must be addressed. Various works from these fields increasingly enhance the usefulness of science, make life easier, and beautify a room's design and even the environment. Collectively, these positively impact the standard of living and civilization. Furthermore, the developments in some of these fields are also supported by an individual's ability and intellectual maturity to think and harness

energy, time, and funds. These resources help to produce intellectual works that render economic value and benefits.<sup>1</sup>

Intellectual Property Rights protect findings, scientific works, or studies that manufacture products in various fields. The human ability to think, observe, and analyze should be protected to bring about change and innovation.<sup>2</sup> Intellectual property is formed from a long process that involves specific, rational, and emotional thinking. Not everyone has the privilege to utilize the brain maximally in terms of intellect and reason; therefore, not everyone can generate intellectual property.<sup>3</sup> Furthermore, Intellectual Property Rights consist of copyrights and industrial property rights, patents, brand rights, industrial product rights, prevention of unfair competition practices, layout designs of integrated circuits, and trade secrets. The significance of the developments of science and technology includes the production of intellectual property, which requires protecting its rights.

Globally, the issue of intellectual property rights (IPR) began to be studied in the 18th century, specifically in Europe. In England, it was enacted that a creator should be seen as an individual with a right to his/her work.<sup>4</sup> Eventually, the topic of Intellectual Property Rights began to occupy a strategic position with the formation of WIPO (*World Intellectual Property Rights Organization*) under the auspices of the United Nations. WIPO was formed to protect Intellectual Property Rights in the international market. The WIPO Convention emphasizes that those included in the scope of the IPR should fulfill two elements, namely Industrial Property Rights, which include patents, industrial designs, and trademarks. Furthermore, Copyright also covers literature, photography, music, and cinematography.

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<sup>1</sup> Anggoro Adhi Priambodo, "Intellectual Property Rights at A Glance," *SIP Law Firm* (blog), May 9, 2022, <https://siplawfirm.id/intellectual-property-rights-at-a-glance/>.

<sup>2</sup> Husein bin Ma'luwi al-Shahrani, *Huquq al-Ikhtira'i wa al-Ta'lif fi al-Fiqh al-Islami* (Riyad: Dar al-Tayyibah, 2004), 9.

<sup>3</sup> O.K. Saidin, *Aspek Hukum Hak Kekayaan Intelektual (Intellectual Property Rights)*, (Jakarta: PT. Raja Grafindo Persada, 2015), 11.

<sup>4</sup> Syahmin A.K., *Hukum Dagang Internasional: Dalam Kerangka Studis Analitis*, (Jakarta: PT. Raja Grafindo Persada, 2007), 133.

Eventually, weaknesses were observed in the WIPO Institution, where Intellectual Property Rights became the scope of the General Agreement on Tariffs and Trade (GATT) forum. In 1948, GATT was a multilateral trade agreement that created economic growth and development and enhanced community welfare.<sup>5</sup> In the GATT, the TRIPs (Trade-Related Aspects of Intellectual Property Rights) agreement regulated the issue of Intellectual Property Rights.<sup>6</sup>

Furthermore, the World Trade Organization (WTO) assumed the enactment of Intellectual Property Rights from GATT. Official intellectual property rights issues were then regulated under the WTO, an international organization designed by company founders to oversee the liberalization of international trade.<sup>7</sup> This is the only international institution that regulates trade issues between countries. Furthermore, TRIPs-WTO aims to:

1. Protect products traded for Intellectual Property Rights.
2. Implementation procedures should be regulated to ensure that intellectual property rights do not impede trade.
3. Formulate rules and supervise implementation related to the protection of Intellectual Property Rights.
4. Supervise and develop implementation rules for the protection of Intellectual Property Rights.
5. Overcome problems and settlement mechanisms for international cooperation, piracy, and counterfeiting problems.

Indonesia is one of the countries that has ratified the formation of the WTO through "*Law Number 7 of 1994*". Therefore, the country's laws and regulations should be aligned with WTO provisions.<sup>8</sup>

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<sup>5</sup> Syahmin A.K., 41.

<sup>6</sup> Syahmin A.K., 328.

<sup>7</sup> Zulfikri Zulfikri and Zulkarnaini Zulkarnaini, "Legal Protection of Intellectual Property Rights: What Is Urgency for The Business World?," *Jurnal IUS Kajian Hukum Dan Keadilan* 10, no. 1 (April 17, 2022): 14, <https://doi.org/10.29303/ius.v10i1.940>.

<sup>8</sup> Afrillyanna Purba, Gazalba Saleh, and Andriana Krisnawati, "TRIPs-WTO Dan Hukum HKI Indonesia: Kajian Perlindungan Hak Cipta Seni Batik Tradisional Indonesia" (Jakarta: Rineka Cipta, 2005), 1.

In Indonesia, the study of Intellectual Property Rights began in the 1840s, precisely in 1844, when the Dutch colonial government introduced the law on Intellectual Property Rights. Furthermore, in 1885, the Dutch Government enacted the Trademark Law, the Patent Law in 1910, and the Copyright Law in 1912. After independence, the study of intellectual property rights continued to experience significant developments, and legalities were obtained through promulgation.

The laws that were enacted include; "Law No. 19 of 2002 concerning Copyright, Law No. 15 of 2001 concerning Trademarks, Law No. 14 of 2001 concerning Patents, Law No. 31 of 2000 concerning Industrial Designs, Law Number 32 of 2000 concerning Trade Secrets, Law Number 29 of 2000 concerning Plant Variety Protection, and others".

Intellectual property rights issues are included in the new study category of Islam and Islamic laws. This is because, in ancient times, the widely developed science was Islamic science, whose teaching and dissemination became *fardu kifayah*, or shared responsibility.<sup>9</sup> The problems that exist in Islam regarding Intellectual Property Rights occur due to differing responses between intellectuals and the Muslim community. Muslims view this right as a western product that is capitalist and constitutes a monopoly of knowledge. On the other hand, Intellectual Property Rights are a legal reality that should be implemented and protected.

Regardless of the pros and cons, many Muslims do not understand the importance of protecting Intellectual Property Rights. Therefore, limited studies of this subject in Islamic law cause society to act a priori. The implication is that they remain apathetic due to pirating, copying, and diverting someone's work without permission. These actions are prohibited and appropriately regulated in Islam, but in *maqasid* studies, these rights can be categorized as an aspect of *daruriyat khamsah*.

Due to the development of an increasingly advanced intellectual world, Intellectual Property Rights in all aspects have

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<sup>9</sup> Asmuni Mth., "Hak Milik Intelektual Dalam Islam," *Al-Mawarid* IX (2003): 29.

strategic values that must be protected as maqasid regulates the protection of assets. These Intellectual Property Rights prevent infringement on work, such as piracy, counterfeiting, imitation, unauthorized use, and others. This is important because these rights contain an economic value for the owner; therefore, the thief or plagiarist can be identified as a criminal.<sup>10</sup>

The perceptions of people are broad on intellectual property. Islam came as a solution and guidance for humans until the end of time. Therefore, Islamic law remains relevant and perfect in every era. Each Islamic rule provides more benefits than drawbacks, while violating Islamic prohibitions may entail risks. Imam Shafi'i stated that everything of economic value can be traded, and if others damage it, they should pay the value, even though the value may be small. According to Imam Shafi'i, property is helpful in anything, whether in the form of objects or the use of an asset.<sup>11</sup>

The international respect and recognition of one's intellectual property rights, including ownership of trademark rights, do not conflict with fiqh, and this recognition has brought many benefits to humans. Therefore, jurists believe a brand is an intellectual property with many benefits and economic value.<sup>12</sup>

Islam aims to protect the rights of every human being, including the rights of every owner. If others violate their rights, the owners can receive or demand compensation. Furthermore, authorities and intellectual property rights must enforce strict laws against individuals who violate them.

Based on the background described above, this study aims to determine how fiqh responds to the dynamics of Intellectual Property Rights. Second, what are the sanctions for violations of Intellectual Property Rights from a fiqh perspective? Third, what is the methodological framework for developing fiqh regarding Intellectual Property Rights?

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<sup>10</sup> O.K. Saidin, "Aspek Hukum Hak Kekayaan Intelektual (Intellectual Property Rights)," 15.

<sup>11</sup> Alimin and Muhammad, *Etika dan Perlindungan Konsumen Dalam Ekonomi Islam* (Yogyakarta: BPFE Yogyakarta, 2004), 145.

<sup>12</sup> al-Shahrani, *Huquq al-Ikhtira'i*, 17–19.

Various studies on intellectual property rights can be mapped based on the tendency of the issues studied, such as explaining these rights from a perspective and drawing conclusions based on the perspective used. The perspective generally used Islamic law, Islamic economics, or normative juridical. This constitutes the novelty of this study as the response of fiqh to the dynamics of intellectual property rights globally<sup>13</sup> and Indonesian-ness. Furthermore, a novel, contemporary fiqh approach with *maqasid* analysis was applied.

In Jurisprudence, Intellectual Property Rights contain two subjects to establish law: benefit rights and intellectual property rights as morals, including *al-huquq al-ma'nawiyah* or immaterial rights.

### Benefit Rights

Intellectual work includes descriptions of abstract ideas and thoughts that need to be in book form. There is an element of *al-ibda*, or discovery, in work, constituting its originality as this work has never been produced. This also acknowledges that new work cannot be separated from previous studies.<sup>14</sup>

### Intellectual Property Rights as Moral Rights

Moral rights and copyrights are related, as every copyright contains moral rights according to copyright protection.<sup>15</sup> Moral rights are attached to copyright because every work deserves to be awarded and respected. Therefore, other people cannot easily change a work's content, form, and essence simply because they do not like it.<sup>16</sup>

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<sup>13</sup> David Llewelyn, Llewelyn Cornish, and Tanya Frances Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, Classics Series (London: Thomson Reuters, trading as Sweet & Maxwell, 2019), 101.

<sup>14</sup> Asmuni Mth., "Hak Milik Intelektual Dalam Islam," 29.

<sup>15</sup> Caterina Sganga, "Multilevel Constitutionalism and the Propertisation of EU Copyright: An Even Higher Protection or a New Structural Limitation?," in *Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive Rights*, ed. Jonathan Griffiths and Tuomas Mylly (United Kingdom: Oxford University Press, 2021), 261, <https://doi.org/10.1093/oso/9780198863168.003.0011>.

<sup>16</sup> Gatot Supramono, "Hak Cipta Dan Aspek-Aspek Hukumnya" (Jakarta: Rineka Cipta, 2010), 46.

The Copyright Law contained in Articles 24, 25, and 26 of 2002 state that the creator's moral rights are;<sup>17</sup>

- a. If the creator's name is included in the work, the creator or heirs can prosecute.
- b. Even though the copyright has changed hands, each work may not be changed without the consent of the creators or heirs.
- c. The creators can change the work of their creation by adjusting to the community's suitability.
- d. It is prohibited to omit copyright management information in electronic information.
- e. If the copyright has been transferred to another party, it remains with the creator, provided that it is not submitted in its entirety.
- f. The same seller cannot sell the copyright a second time, whether in whole or part.

In its early development, copyright, such as written works in the form of books created by someone who was an intellectual creation of scholars, was seen as a social charity for good in teaching and developing religious knowledge which was benevolent as a social charity to obtain rewards that continued to flow even after death. However, in subsequent developments, according to the level of human life, it has become a right that must be protected so that copyright holders should be respected. Copyright, as a type of intellectual property right, is a property right that receives legal protection. Any form of violation of intellectual property rights but not limited to using, disclosing, making, using, selling, importing and exporting, circulating, handing over, providing, announcing, reproducing, plagiarizing, falsifying, pirating, the intellectual property rights of others without Rights are a form of injustice and the law is haram.

In this regard, it also includes intellectual property rights of joint assets in marriage, regarding the division of joint assets in the event of divorce. Therefore, joint marital assets will be divided equally between both parties (husband and wife). This is based on

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<sup>17</sup> Gatot Supramono, "Hak Cipta Dan Aspek-Aspek Hukumnya."

the provisions of Article 128 of the Civil Code, which states that "After the dissolution of the union, the unitary assets are divided between husband and wife, or between their respective heirs, regardless of which party it is from." he got those things." Meanwhile, inherited and acquired assets remain automatically the personal property of each individual and do not need to be shared jointly. Apart from that, joint property must also be based on aspects of justice for each party, which does not discriminate against any one party. The interests of each party need to be prioritized first. On that basis, before marriage, couples should make a prenuptial agreement so that disputes due to divorce can quickly be resolved.

In the book *Maqashid Al-Shariah As a Philosophy Of Islamic Law: A System Approach*, Jasser Auda asserted that the paradigm shift in the study of Islamic law from a maqasid perspective lies at the pressure point between the old and the new maqasid theories. The emphasis of the old maqasid mainly involves protection and preservation, while the new maqasid emphasizes development and rights, which is what this research is currently developing.<sup>18</sup>

The theory for studying Islamic law regarding Intellectual Property Rights also involves *Ibtikar*. In fiqh, *Ibtikar* can be understood as a creative right or copyright that someone innovates for the first time. The term *ibtikar*, if translated, can be referred to as copyright.<sup>19</sup> This definition of copyright is not found in classical fiqh literature. Furthermore, in-depth studies of Islamic jurists on *ibtikar* still need to be available. Discussion of these rights can only be found in studying contemporary fiqh books. Copyright can be explained as a thought pattern produced by a scientist through thinking and analytical abilities in which the result is a discovery or creation.<sup>20</sup>

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<sup>18</sup> Jasser Auda, *Maqashid Al-Shari'ah As Philosophy Of Islamic Law: A System Approach*, (London: The International Institute Of Islamic Thought, 2007), 45. See also Mutawali Mutawali, "Maqāshid Al-Sharī'a as the Foundation of Islamic Moderation: Theo-Philosophical Insight against Extreme Religious Ideology," *Ulumuna* 27, no. 1 (July 15, 2023): 341–66, <https://doi.org/10.20414/ujis.v27i1.560>.

<sup>19</sup> Nasrun Haroen, *Ushul Fiqh I* (Jakarta: Logos, 1996).

<sup>20</sup> Haroen.



Based on the above, the theory of Islamic law on Ibtikar rights is appropriate to the *ijtihad* of economists in Indonesia, who believe that Intellectual Property Rights are a policy tool that influences economic development.<sup>21</sup> Furthermore, Intellectual Property Rights require legal protection because these are intellectual works birthed from human creativity.<sup>22</sup>

This is a literature study involving a heuristic model. The method involved exploring, identifying, and classifying various sources of library books, journal articles, and other sources related to intellectual property rights.<sup>23</sup> Meanwhile, the approach used in this study is socio-historical and philosophical.

### Copyright and Copyleft

Protecting intellectual property rights in today's society is necessary because every creator and individual who uses it has one voice. Therefore, the uniqueness of every work should be protected. For example, pirated CDs (Compact disks) used in YouTube audio are a continuous problem. Therefore, in-depth studies are necessary to understand these rights and their scope better. In this study, essential findings are expected to resolve the issue of Intellectual Property Rights from an Islamic point of view. The results highlighted the presence of groups that currently protect intellectual property rights, namely copyright and copyleft. The protection of property rights in Indonesia and the views of Islamic organizations in Indonesia regarding copyright and copyleft, as well as other findings, are described below.

According to French and American philosophy, copyright protects the creator's interests. However, this idea has weaknesses that may not align with the creator's interests. Various countries

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<sup>21</sup> Departemen Perindustrian Direktorat Jenderal Industri Kecil Menengah, *Hak dan Kewajiban Pemerintah dalam Penerapan UU No. 7/1994 tentang Ratifikasi TRIP'S* (Jakarta: Kementerian Perindustrian Republik Indonesia, 2007), 9.

<sup>22</sup> Departemen Perindustrian Direktorat Jenderal Industri Kecil Menengah, *Perlindungan Merk di Indonesia* (Jakarta: Kementerian Perindustrian Republik Indonesia, 2007), 12.

<sup>23</sup> Joko Sayono, "Langkah-langkah Heuristik dalam Metode Sejarah di Era Digital," *Sejarah dan Budaya: Jurnal Sejarah, Budaya, dan Pengajarannya* 15, no. 2 (December 31, 2021): 370–75, <https://doi.org/10.17977/um020v15i22021p369-376>.

supported the idea of copyright in the Berne Convention. All members agreed that copyright is a natural privilege that the creator exclusively enjoys. However, there are responses that copyright does not benefit the community.<sup>24</sup>

In general, creators cannot publish their work, and automatic copyright recognition causes many unpublished copyrighted works. This continued until adherents of American philosophy opposed the view of copyright with the premise that a constitution granting copyright is a concession for progress. Furthermore, copyright is a natural right of the creator, but if not supported by registration and publication, then there is no benefit.<sup>25</sup>

The application of copyleft is carried out on software. Copyleft is a method that enhances copyright by considering the public interest but without harming the author's interests.<sup>26</sup> The purpose of copyleft is the opposite of copyright but does not render it proprietary and detrimental. However, it allows the modification, copying, and distribution of the modified software freely.<sup>27</sup> Aside from software, copyleft can also be applied to fields within the scope of copyright.

The public increasingly accepts the concept of copyleft because copyright only benefits countries with a good publication and registration system. Meanwhile, in countries with disorganized copyright mechanisms, creators may be reluctant to go through a tedious process, which is highly detrimental. Copyleft is a solution and a choice for the community. As creators, their intellectual property is still recognized and unaffected even though copyright is relaxed.<sup>28</sup>

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<sup>24</sup> Akash Kamal Mishra, *Intellectual Property Rights In Cyberspace* (India: Cyberlekh Publication's, 2019), 21.

<sup>25</sup> Muhammad Ikhsan Lubis, "Copyleft Dalam Perspektif Hukum Islam dan Kaitannya Terhadap Perkembangan Copyright (Hak Cipta) pada Masyarakat Islam Indonesia" (Thesis, Medan, Program Magister Ilmu Hukum Fakultas Hukum Universitas Sumatera Utara, 2011).

<sup>26</sup> Mishra, *Intellectual Property Rights In Cyberspace*, 21.

<sup>27</sup> Sri Yulin Tuna, "Copyright, and Copyleft," mahasiswa.ung.ac.id, February 11, 2014, <https://mahasiswa.ung.ac.id/614413039/home/2014/2/11/copyright-and-copyleft.html>.

<sup>28</sup> Eva-Maria Kieninger, "Security Rights in Intellectual Property: General Report," in *Security Rights in Intellectual Property*, ed. Eva-Maria Kieninger

More specifically, what distinguishes copyleft and copyright is the release of monopoly rights to the public. The public can use a particular work freely through the economic rights of creation, and work can be duplicated, modified, and distributed. Alternatively, copyleft is not profit-oriented, and the creators can only monopolize their creations for profit alone. The use of economic rights of creation can be applied for commercial and non-commercial purposes. People can use copyleft for cheaper prices as there is no royalty withdrawal. This concept is beneficial for lower-class members of society to purchase creative works. Therefore, there are benefits for the whole community.

### **Protection of Intellectual Property Rights in Indonesia**

The protection of Intellectual Property Rights in Indonesia continues to be voiced by actors in various fields. Anji, a confident singer-songwriter, actively voices intellectual property rights through his Instagram. This is a form of support for musicians and songwriters who do not have the right to use the creator's work commercially, as well as educational material for the general community to understand Intellectual better

In Indonesia, creator rights are protected through the Law on Intellectual Property Rights, specifically Law No. 19 of 2002 concerning Copyright, Law No. 15 of 2001 concerning Trademarks, Law No. 14 of 2001 concerning Patents, and Law No. 30 of 2000 concerning Trade Secrets. According to the various Laws, full rights are given to inventors or holders to transfer their rights to anyone to take advantage of or use them with their permission.

### **Views of Islamic Organizations in Indonesia on IPR**

Copyright is one of the contemporary fiqh issues that scholars have responded to. As far as the literature can be traced, a fatwa regarding copyright has been issued by the Fatwa Commission of the Indonesian Ulama Council (MUI), the Muhammadiyah Tarjih

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(Switzerland: Security Rights in Intellus Comparatum – Global Studies in Comparative Law, 2020), 1, [https://doi.org/10.1007/978-3-030-44191-3\\_1](https://doi.org/10.1007/978-3-030-44191-3_1).

Council Commission, and the Fatwa Commission of the *Bahtsul Masa'il* Nahdlatul Ulama Assembly (NU).<sup>29</sup>

### Indonesian Ulama Council

Using a fatwa, MUI responds to the polemic on Intellectual Property Rights circulating in the community. The aim is to educate the community, especially Muslims, regarding the views of the clergy on Intellectual Property Rights and provide references regarding the unrest in the community.

The fatwa of the MUI on Intellectual Property Rights is to protect. Therefore, each party aims to encourage creativity to benefit the wider community while appreciating the creators, with all the rights attached to their creativity based on the Qur'an, hadith, and fiqh rules.<sup>30</sup>

### Muhammadiyah

As one of the largest community organizations in Indonesia, Muhammadiyah provided its opinion on Intellectual Property Rights. Islamic law enforcement on these rights is needed to ensure that it does not become a mere debate but examines the opinions of scholars.

All property is valuable in Islam, including the right to work. Although the right to work, according to intellectual property rights, is not tangible, there are property values and prices. Furthermore, piracy is the use of the benefits of an object without the owner's permission, which is tantamount to stealing.<sup>31</sup>

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<sup>29</sup> See on the comparative study on the Indonesian fatwa, Ansori Ansori, "Position of fatwa in Islamic law: the effectiveness of MUI, NU, and Muhammadiyah fatwas," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 22, no. 1 (July 29, 2022): 53–72, <https://doi.org/10.18326/ijtihad.v22i1.53-72>.

<sup>30</sup> Majelis Ulama Indonesia (MUI), "Fatwa Majelis Ulama Indonesia (MUI) tentang Perlindungan Hak Kekayaan Intelektual," Pub. L. No. 1/MUNAS VII/MUI/5/2005 (2005), <https://mirror.mui.or.id/wp-content/uploads/files/fatwa/37.-Perlindungan-Hak-Kekayaan-Intelektual.pdf>.

<sup>31</sup> Admin Tarjih, "Hukum Penggunaan Software Bajakan," *Majelis Tarjih & Tajdid PP Muhammadiyah* (blog), February 9, 2019, <https://tarjih.or.id/hukum-penggunaan-software-bajakan/>.

## Nahdlatul Ulama (NU)

The beliefs of NU scholars on this subject align with the opinions of previous scholars in classic books that examined Intellectual Property Rights in their fiqh studies. Works should be protected, not only those currently circulating but also previous works, ensuring that the scientific chain is not interrupted.

NU believes every asset with benefits, including beneficial assets, has copyrights. Islamic jurisprudence studies state that copyright infringement should be compensated. The right in question is part of *haul Adami*, where material losses should be fulfilled. If there is no compensation, this act is considered unjust. Therefore, it is not enough to just be redeemed with *istighfar*, there should be some form of justice.<sup>32</sup>

One of the critical findings related to the study of Islamic law in Indonesia is that intellectual property rights can be used as assets for *mu'awadah* (commercial) and *tabarru'at* (non-commercial) contracts, and they can also be *waqf*ed and inherited.<sup>33</sup> This is appropriate to the fatwas from MUI, Muhammadiyah, NU, and Law Number 41 of 2004 concerning *Waqf*, which stipulated that Intellectual Property Rights can be donated.<sup>34</sup>

## *Maqashid al-Shariah* on Intellectual Property Rights: An Indonesian Islamic Law Perspective

Creative work is the result of individual thinking, and fiqh scholars distinguish the results or benefits of an object into two, namely, according to its type and influence. Based on the type, the

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<sup>32</sup> Muhammad Syamsudin, "Pelanggaran Hak Cipta dalam Kajian Fiqih Islam," NU Online, September 6, 2021, <https://islam.nu.or.id/syariah/pelanggaran-hak-cipta-dalam-kajian-fiqh-islam-1m1mh>.

<sup>33</sup> Budi Agus Riswandi, ed., *Wakaf Hak Kekayaan Intelektual* (Yogyakarta: Pusat HKI FH Universitas Islam Indonesia, 2016), 29.

<sup>34</sup> Law No. 41 of 2004 concerning *Waqf* was promulgated on October 27, 2004, while the Indonesian Ulema Council on Intellectual Property Rights fatwa was enacted on July 28, 2005. Although they may be discussed simultaneously, Law No. 41, in 2004, concerning *Waqf* was formally promulgated before the stipulation of a fatwa.

benefits of an object, such as a house, rice field, fruit, garden, animal, vegetable, tree, or vehicle, both movable and immovable assets, are material. Meanwhile, those that come from thoughts in the form of works, creations, innovations, ideas, and songs based on *ibtikar* are not tangible or visible.

Furthermore, based on its influence, an outcome with benefits will constitute a benchmark for its existence. For example, the influence of thought is expressed in books, songs, scientific works, and other media. Therefore, the benefits can be felt widely. The influence of this thought process can be a momentum for civilizational change that aims to explore natural resources to fulfill human needs.<sup>35</sup>

The study of *ibtikar* or copyright is a novel study of Islamic law,<sup>36</sup> especially in Indonesia. Scientific progress due to the studies of Islamic law brings development that benefits the community, one of which is the study of *ibtikar*. In terms of meaning, *ibtikar* involves ownership of the uniqueness of human thought and deserves to be rewarded financially and morally.<sup>37</sup>

Hanafiyah scholars emphasize that if *Iftikhar* is associated with property according to Islamic law, then the property is an object that can be stored and used sparingly. Objects are referred to as assets if they fulfill two criteria: can be stored and utilized. Stored means that objects can be kept for a specific time. If objects cannot be stored, they cannot be called assets.<sup>38</sup> Meanwhile, it is useful for the owner and other people. If the object is not valid, it is not included in the category of property. According to Hanafiyah scholars, assets are objects that exist and can be seen;

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<sup>35</sup> Riswandi, *Wakaf Hak Kekayaan Intelektual*, 39–40.

<sup>36</sup> al-Shahrani, *Huquq al-Ikhtira'i*, 63–65; Sutisna Sutisna and Mukhtar Mukhtar, "Pandangan Hukum Islam Terhadap Hak Cipta," *Mizan: Journal of Islamic Law* 5, no. 1 (June 18, 2021): 1–16, <https://doi.org/10.32507/mizan.v5i1.927>.

<sup>37</sup> Dimyauddin Djuwaini, *Pengantar Fiqh Muamalah* (Yogyakarta: Pustaka Pelajar, 2008), 296.

<sup>38</sup> Naerul Edwin Kiky Aprianto, "Konsep Harta dalam Tinjauan Maqasid Syariah," *Journal of Islamic Economic Lariba* 3, no. 2 (2017): 65–74, <https://journal.uui.ac.id/JIELariba/article/view/9655>.

therefore, they are helpful. If something cannot be seen, then it is not considered property.<sup>39</sup>

Jumhur Ulama stated that property has value and that if damaged, it should be replaced or someone should be responsible. Imam Syafii defines *al mal* (property) as something of value that can be traded or exchanged for something of value, and there are consequences if it is destroyed. Therefore, *al mal* can be measured in monetary units and may represent financial value.<sup>40</sup> Islamic law views copyright as *al mal*, and protected copyright is a property that does not conflict with Islamic law (copyright is exclusive but not absolute).<sup>41</sup>

Intellectual Property Rights are influenced by the right to ownership, a fundamental human right.<sup>42</sup> Therefore, these assets are tangible and abstract, referred to as property rights over intangible assets as a result of human intellect.

The discussion on Intellectual Property Rights involves a specific scope. Fiqh has literature on the scope of copyright including *al-huquq al-adabiyah*,<sup>43</sup> including other rights related to creative works. Moreover, *al-huquq al-ibtikar* has a wider scope that includes rights related to *al-adab* and individual *property rights*.

The assets regulated in Intellectual Property Rights are products generated from human intellect, and the benefits are to be enjoyed economically. Therefore, Intellectual Property is objects in property law that also involve the right to ownership of intangible assets. Although the object is invisible or tangible, the law recognizes intellectual property as a form of property. This is because intellectual property can also be a source of income for creators or owners, which may involve selling property rights,

<sup>39</sup> Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, vol. 4 (Beirut: Dār al-Fikr, 1997), 2875–77.

<sup>40</sup> al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu*.

<sup>41</sup> Budi Agus Riswandi, *Pidato Pengukuhan Guru Besar: Teknologi Blockchain, Hak Cipta, dan Islam* (Yogyakarta: Universitas Islam Indonesia, 2022), 17.

<sup>42</sup> Sulasi Rongiyati, "Hak Kekayaan Intelektual Atas Pengetahuan Tradisional," *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan* 2, no. 2 (2011): 213–38, <https://jurnal.dpr.go.id/index.php/hukum/article/view/214>.

<sup>43</sup> Miftakhul Huda, "Konsep Dan Kedudukan Hak Kekayaan Intelektual Dalam Hukum Islam," *Salimiya: Jurnal Studi Ilmu Keagamaan Islam* 1, no. 1 (March 19, 2020): 35–48, <https://ejournal.iaifa.ac.id/index.php/salimiya/article/view/87>.

duplicating, and placing advertisements on their creations. Therefore, Intellectual Property originates from human thought and benefits creators or rightful owners.<sup>44</sup> This right can be transferred or traded in legally permissible ways, such as buying and selling, lending, and grants. Because of the right to this material, the sale and purchase or transfer process is considered valid. The rightful owner or creator is advised to register their work and then supervise it to ensure that it is not used illegally to the detriment of various parties.

The legal basis of Intellectual Property Rights in Indonesia is Law No. 28 of 2014 on Copyright. An explanation of copyright is seen in Article 1 as an exclusive right that arises automatically for the creator. This is based on the declarative principle that a work has been created in a form recognized as intellectual property without reducing restrictions by statutory provisions. Furthermore, intellectual property is described as a part of the legal regime by legal experts<sup>45</sup> and may take the form of trademarks, patents, and copyrights.

*The property* or wealth of an object is generally bound in ownership by documentary evidence, and the owner can utilize the wealth as needed under binding rules. Furthermore, the ownership of wealth becomes an absolute right. Therefore, it cannot be used without the owner's consent.

Wealth has 3 types<sup>46</sup> Namely, movable assets, including cars or vehicles, watches, *branded* bags, and *branded* shoes. Because of the rules of exclusive rights, no one can wear them except the owner. However, according to the agreement, the owner can lend or allow other people to use these items. If these items are utilized without the owner's consent, it can be categorized as illegal.

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<sup>44</sup> Muhamad Iqbal, "Apa Itu Hak Kekayaan Intelektual," *Lindung Hutan* (blog), November 12, 2022, <https://lindungihutan.com/blog/apa-itu-hak-kekayaan-intelektual/>.

<sup>45</sup> STP IPB, "Pengertian KI Dan HKI," *IPB* (blog), November 12, 2022, <https://dik.ipb.ac.id/ki-hki/>.

<sup>46</sup> Wati Rahmi Ria, "Harta Kekayaan Dalam Perspektif Hukum Ekonomi Islam," *Justicia Sains: Jurnal Ilmu Hukum* 6, no. 2 (2021): 203–16, <https://doi.org/10.24967/jcs.v6i2.1582>.



Second, fixed assets include houses, land, shops, warehouses, boarding houses, or permanent buildings. Fixed asset ownership entails restrictions or rules that should be adhered to, such as building permits, ownership documents, etc. Third, intellectual property is categorized as property because it originates from human intelligence. It has various forms, including music, books, videos, scientific works, designs, etc.

Intellectual property rights are natural rights to products and assets originating from thought processes, referred to as human intellect. They are exclusive rights that only the creator has and are bound by law. The existence of an underlying legal force means that the owner can receive legal assistance from the state. Therefore, a country's intellectual property rights system can determine the quality of its concern for its people.

The use of intellectual property rights is subject to limitations to facilitate a balance between private interests and the interests of society. This interest is based on the *principle of natural justice*<sup>47</sup> which is explicitly described in intellectual property rights. However, creators should be protected, and their creations maintained for public access, such as utilizing and duplicating as needed without harming the creators.

Furthermore, an economic principle (*the economic argument*) exists for property ownership. This is the nature of the human economy, as properties are required for the necessities of life. Therefore, the economic principle of intellectual property is a natural phenomenon.<sup>48</sup>

There is also the principle of culture (*the cultural argument*), which aims to increase, develop, and improve the quality of life of

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<sup>47</sup> Ata Ur Rehman, "Principle of Natural Justice 'Audi Alteram Partem,'" Pakistan Lawyer, March 27, 2021, <https://pakistanlawyer.com/articles/story/principle-of-natural-justice-audi-alteram-partem>.

<sup>48</sup> Mark A. Lemley, "The Economics of Improvement in Intellectual Property Law," SSRN Scholarly Paper (Rochester, NY, September 1, 2008), <https://papers.ssrn.com/abstract=1274199>.

human civilization.<sup>49</sup> Every intellectual work has a mission to either change for the better or produce inventions that are used to advance culture and quality of life. Furthermore, social principles (*the social argument*) emphasize that work should have benefits not only for oneself but also for society in general.

Wealth is the ownership of valuable assets, which are divided into tangible (*material*) and intangible (*immaterial*) assets. Intellectual property is included in the category of intangible property. Article 499 of the Criminal Code states that tangible assets, called goods, can be touched and seen including cars. Intangibles are assets that have no physical presence, such as intellectual property. Intellectual Property Rights may also encompass tangible assets, which are further referred to as absolute rights.

The study of *copyleft* and *copyright* in Muslim communities in Indonesia refers to copyright law, namely protection for owners of innovative ideas for which authenticity can be accounted. Although copyright appears automatically on creation, a copyright registration system is still enforced by the law (*legal right*).

This is also related to *copyleft*, where there is the freedom to utilize a piece of work according to binding regulations and maintain moral rights.

Islamic law views copyright as *mal* (property), and the utilization of this property is exclusive to the owner but not absolute. The existence of copyright is protected as long as it does not violate the rules of Shari'a. Meanwhile, *copyleft* in Islamic law entails a form of charity or endowment effort to the public, which is a noble character. The waqf legal approach in *copyleft* is appropriate, and the use of copyright in *copyleft* is a form of waqf.<sup>50</sup> Therefore, *copyleft* is a solution to copyright infringement and contributes massive protection.

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<sup>49</sup> Tenny Sudjatnika, "Nilai-Nilai Karakter Yang Membangun Peradaban Manusia," *Al-Tsaqafa: Jurnal Ilmiah Peradaban Islam* 14, no. 1 (2017): 127–40, <https://doi.org/10.15575/al-tsaqafa.v14i1.1796>.

<sup>50</sup> Rusdan Rusdan, "Rekonstruksi Paradigma Hak Cipta Sebagai Objek Wakaf," *Jurnal El-Hikam* 14, no. 1 (June 26, 2021): 30–66, <https://ejournal.iainh.ac.id/index.php/elhikam/article/view/88>.

Copyright laws in Indonesia should consider the socio-cultural plural society and create down-to-earth regulations. *Copyleft* legislation should also be an important factor in copyright law to ensure that creators who wish to relinquish their monopoly rights have a legal basis.

#### Intellectual Property Rights as Joint Assets

In addition, related to the discussion of intellectual property rights, this is joint property in marriage. Discussion of this issue has yet to receive much attention in studying intellectual property rights in Indonesia. As a guideline for determining whether an asset can be categorized as joint property between husband and wife, it is determined based on the property factor obtained during the marriage between husband and wife. Unless the property comes from an inheritance or gift obtained by one of the parties, this type of property becomes personal property due to its status as inherited property controlled by each party, as long as there is no other agreement in the marriage agreement. Therefore, to determine the assets that are included in the scope of joint assets,<sup>51</sup> it can be described below.

Property purchased together during the marriage.

This first guideline determines whether an item is included in the category of joint property objects based on the purchase.<sup>52</sup> So, every time an item is purchased during marriage, the property becomes joint property regardless of whether the wife or husband purchased it or whether the property is registered in the name of the husband or wife. In other words, every property or item purchased during the marriage bond automatically becomes joint property. However, it must be emphasized that goods purchased using inherited assets are not considered joint assets. Regarding joint property objects and intellectual property rights, of course, there are different ways of obtaining them, namely through creation and intellectual creation, which is then followed by a registration process by the creator or inventor to obtain an intellectual property rights certificate. As an exclusive right, it has

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<sup>51</sup> Muhammad Syukri Albani Nasution, *Filsafat Hukum Islam* (Jakarta: Rajawali Pers, 2013), 302.

<sup>52</sup> Nasution, 303.

moral and economic rights, so it will be seen from two sides, namely from the juridical and economic aspects.

Assets purchased after divorce are financed from joint assets.<sup>53</sup>

Whether an item is an object of joint property is determined by the origin of the money used to purchase the item, even after a divorce occurs. This second guideline illustrates that, for example, a husband and wife have savings in a bank that the husband or wife controls as joint assets. Then, a divorce occurs but is not shared; the husband or wife who controls the saved money buys goods with the saved money, which becomes joint property.

Proven assets obtained during marriage.<sup>54</sup>

This guideline aligns with the rules of joint property law, namely that all property acquired during the marriage bond is joint property. However, the guidelines for determining whether an item is included as a joint property object or not are determined by ability and success through proof. Because ownership rights are usually transferred based on purchase, inheritance, and gift rights, this is also important if the object of joint property consists of intellectual property rights of various types.

Income from joint property and inherited assets.<sup>55</sup>

This guideline determines that both income comes from joint assets and income comes from the personal property of the husband or wife. Thus, the function of personal assets in marriage help support and improve family welfare. Even though the rights and ownership of personal property are absolutely within the control of the owner. It will be even clearer that the object of joint property consists of intellectual property rights, which are intangible movable property, but the function of the private property is inseparable from the family's interests. In other words, the basic goods cannot be contested, but the results that grow from them become joint assets. All personal income of husband and wife.

The above guidelines stipulate that as far as the husband and wife's income is concerned, separation does not occur, and even

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<sup>53</sup> Nasution, 304.

<sup>54</sup> Nasution, 305.

<sup>55</sup> Nasution, 306.

merging into joint property occurs automatically. The aggregation of personal income automatically occurs according to law as long as the husband and wife do not determine otherwise based on the marriage agreement. In the case of the object of joint property intellectual property rights, even though the moral rights remain attached to the creator or the inventor, the momentum to obtain economic rights will occur in combination with the acquisition of non-intellectual property rights assets such as salaries or wages earned for work. However, royalties for intellectual property rights have to be calculated and recorded.

Intellectual property rights are to be analyzed regarding whether or not they can be inherited as explained in each of the transfer arrangements for each area of intellectual property rights, and it can be confirmed that by the explanation in these articles, intellectual property rights can be inherited. However, in this discussion, no legal regulation explains in detail how intellectual property rights like this can be inherited. This is the reason for creating regulations regarding intellectual property rights as joint property of husband and wife.

Understanding that joint assets are all acquired and owned during the marriage period, whether tangible or intangible assets and from the results obtained by one of the parties or the husband and wife together. Like other distribution models of tangible assets (material assets), the right to ownership of immaterial intellectual property rights also has similarities in distribution. However, it remains within the rights corridor, which will later have economic value from using these rights. Article 97 of the Compilation of Islamic Law (KHI) states that "divorced widows or widowers each have the right to half of the joint property as long as it is not specified otherwise in the marriage agreement."

Based on the explanation above, it is clear that the assets owned by the couple after the divorce need to be recorded and then divided in half for each partner. The wife gets half of the total assets, and the husband gets half. Likewise, assets are in the form of intellectual property rights because, after being analyzed, they are included in the category of a person's assets and can be categorized as joint property. Therefore, the division is like the division of movable property divided by two. Half is the

husband's portion, and the other half is the wife's right. In other civil law materials in marriage regarding the distribution of joint assets in the Compilation of Islamic Law, there is a ½ (half) division for the husband without questioning who is looking for it. On the one hand, this kind of division is seen as unfair because it does not matter who is looking for it; it is only guided by shared assets obtained while in a marriage bond.

If examined from the side of legal justice, it is fair because, in essence, in a household based on marriage between husband and wife, they have a balanced position of responsibility. After all, the activities carried out by the husband as a man and the wife as a woman naturally bear the responsibility of the same weight and balance. If the husband works in an office and the wife is at home, they also have activities at home that are no less important and even determine the husband's successful role as the head of the household.

The distribution of joint assets resulting from disputes from divorce for all assets acquired during the marriage agreement is outside the scope of inheritance. Therefore, assets a husband or wife obtains through their business are joint property. Although the division of joint property is not arbitrary, the division of joint property is regulated by the rules of marriage law and Islamic law, and the distribution of joint property must be carried out through the judiciary. Proceedings before the Inquisition in which both parties had to be present. If the joint assets are split due to divorce, the division is usually done by dividing equally, each person receiving the shared assets. This is by the provisions of Article 97 of Kompilasi Hukum Islam and the provisions of the Civil Code.

The explanation above clearly shows that the distribution of inheritance of copyright, which is also included in Intellectual Property Rights, follows the provisions for all types of tangible and intangible property, including copyright. In the distribution of copyright inheritance, what is inherited is royalties or income obtained from the sale of copyright. To carry out inheritance distribution, all pillars and conditions must be fulfilled before the inheritance can be divided. In practice, if the royalties are paid out immediately after the copyright owner dies, all assets obtained from the royalties will be collected. However, there is a receipt of

royalties for the second time. In that case, it is recommended that the royalties be distributed directly to the existing heirs to avoid conflicts within the family or between families. Thus, the principles of inheritance distribution that apply in Islamic law will be applied directly in the distribution of copyright inheritance. This aims to maintain harmony in the family and prevent disputes that could harm the parties concerned.

The vital contribution and novelty of this article is its implication that in the study of jurisprudence from the perspective of Maqasid Jasser Auda, apart from every discovery in the field of science and technology, it is necessary to respect and appreciate the moral rights as well as the economic rights of the creator or discoverer.<sup>56</sup> However, in Islamic jurisprudence, it is necessary to grant the public access rights to utilize the findings of science or technology for development. Likewise, rights need state intervention and protection with strict laws for industrial development.<sup>57</sup> Apart from that, the provisions on Inheritance Rights for temporary intellectual property rights are limited to 60 years after the creator or discoverer dies and need to be reviewed,<sup>58</sup> meaning that based on the economic value and benefits of a finding, the economic benefits may be given to the heirs for more than 60 years or determined based on state law.<sup>59</sup> Thus, the critical position of this jurisprudence article is the middle

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<sup>56</sup> Jasser Auda, "Maqashid Al-Shari'ah As Philosophy Of Islamic Law," several reprints: 2008-14. Translated into Arabic, Bosnian, Italian, Turkish, Malaysian, and Indonesian. Various publishers: 2010-15.

<sup>57</sup> Erna Tri Rasmala Ratnawati and Rizqi Samera Al Farizi, "Protection of Intellectual Property Rights in the Perspective of Islamic Law," *Millah: Journal of Religious Studies*, August 28, 2023, 337-408, <https://doi.org/10.20885/millah.vol22.iss2.art4>.

<sup>58</sup> Aang Asari et al., "Theory of Rights in Islamic Economic Law and Its Relation to Intellectual Property Rights," *Al-Iktisab: Journal of Islamic Economic Law* 6, no. 2 (November 1, 2022): 169, <https://doi.org/10.21111/al-iktisab.v6i2.8384>.

<sup>59</sup> Ali Moshrefi, Amir Mollah Mohammad Ali, and Mahmoud Ghayoumzadeh, "Intellectual Property from the Perspective of Islamic Jurisprudence and Law" (Economic Yurisprudence Studies, March 7, 2023), [https://journal.ihrci.ir/article\\_190852\\_28ca5927e0a28cb136a721994a98606a.pdf?lang=en](https://journal.ihrci.ir/article_190852_28ca5927e0a28cb136a721994a98606a.pdf?lang=en).

ground between the copyright school of thought and the copyleft school of thought.<sup>60</sup>

## Conclusion

Based on the entire description, analysis, and discussion, this study concluded that:

The explanation of fiqh dynamics regarding intellectual property rights, including *copyright* and *copyleft*, shows that fiqh can respond creatively to the dynamics of thought and demands for protection. Therefore, the solution to the issue of Intellectual Property Rights should be based on moral and economic demands.

The methodology for developing Intellectual Property Rights Jurisprudence, generally and specifically in Indonesia, should be based on a universal ethical paradigm and hierarchy of values. This will integrate a fiqh study model that is prescriptive and descriptive simultaneously. Therefore, contemporary fiqh is very dynamic and responsive to protecting intellectual property rights, and it appreciates human innovative creativity.

From the fiqh perspective, strictly enforcing the law against violations of Intellectual Property Rights is necessary. This is to ensure the appreciation and protection of the creative rights of creators by professionalism, according to the demands of the contemporary, juridical and international world.

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<sup>60</sup> Mohammad Reza Kameli, "Knowledge Protection: A Comparative Study of the Foundations and Development of Intellectual Property Rights Under Islamic Law, the English Common Law, and the Chinese Legal System," *Creighton International and Comparative Law Journal* 13, no. 1 (April 21, 2023), <https://creighton-intl-comp-law-journal.scholasticahq.com/article/74694-knowledge-protection-a-comparative-study-of-the-foundations-and-development-of-intellectual-property-rights-under-islamic-law-the-english-common-law>; Aip Piansah, "Comparison of the Conception Of Property Rights in Terms of Islamic Civil and Civil Law," *Zona Law And Public Administration Indonesia* 1, no. 2 (September 1, 2023): 131–42, <https://ejournal.zona-edu.org/index.php/ZLPAI/article/view/29>.



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