

The Legitimacy of Intellectual Property Rights the Light of Islamic Law (Sunni and Shia Fiqh)

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Abstract:

Islam does not allow any violation against people's rights, whether material or intellectual. Therefore, it does not allow that the efforts of others be taken away from them or be used without their consent. However, some scholars contend that intellectual property rights were not directly regulated by Sharia but the others say that the principles of Sharia can be construed to provide support for such protection. Nevertheless, an analysis of the definitions and classifications of property under principles of Islamic law reveals that the concept of intellectual property is not alien to Islamic law of property; rather it is an integral part of it.

General principles extracted from the sources of Islamic law and outlined by Muslim jurists have squarely encompassed it as a usufruct (manāfi') property, which is recognized as object of right that could be exclusive only to the individual that has right over it.

This article assesses the stance of Islamic Law, known as Sharia, concerning the protection and enforcement of intellectual property rights in Islamic Law and culture.

Keywords: Intellectual Property Rights- Islamic Law –Sunni Fiqh- Shia Fiqh -Legitimacy.

1- Introduction

Intellectual property is an ancient concept. Protection for original authorship in pre-Islamic societies was recognized for poets, who were compensated for the publication and distribution of their work.(Khoury, 2003) Fine poetry was deeply regarded in the Arab world and authors enjoyed an enhanced social standing and respect

Lesser poets who plagiarized their work in an attempt to free-ride on their reputation were harshly condemned and cast from cultural society.(Khoury, 2003) This shows that copyright protection was a recognized concept dating back to pre-Islamic civilizations.

With the advent of the Islamic rule some of the rights pertaining to authorship were further advanced.(Vikør, 2005) The state started to commission scholars to write about topics of interest and bought these works back from them once ready; the author would forfeit his rights in the work in exchange for compensation. Although pre-Islamic recognition of intellectual property rights was subsequently strengthened by the Islamic rule this recognition was never explicitly formulated but remained an accepted social norm.(Beltrametti, 2009)

In pre-Islamic societies, works of the mind were valued matters and may have qualified as a form of intellectual property – especially moral rights – though this recognition was rudimentary.(Malkawi, 2013) Early Muslim-Arab society continued the practices of the pre-Islamic period and even broadened them. Sharia law includes several considerations whose effects are similar to those of modern intellectual property laws.(Yamani, 1979)For example, the Caliphs – religious and political leaders who are successors of the Prophet Muhammad (s.a.w) – would buy books they considered important and make copies of them after paying an adequate compensation to the author.(Raslan, 2006)

The process of recitation and mentioning the name of the author constituted a basic form of moral rights. An unauthorized use could have been seen to show disrespect to the poet and, for this reason, might well have led to the public outcry. The process of public recitation in that era is akin to the present time right of disclosure.

Prophet Muhammad (s.a.w) stated ‘A Muslim who achieves something before other Muslim who has not achieved is entitled to that.’ (A. H. Muhammad, 2003)Prophet Muhammad (s.a.w) is also reported to have said ‘Who revives dead land, it is for him’.(Imam Malik’s AI-Muwatta, 1951)

These sayings of the Prophet, as quoted, indicate that land, among other things, is the end product of a person’s labor, and that the person who exerts effort in developing these things should have the results of their labor. Furthermore, at the Prophet’s time, religious teachings and many of the Prophet’s sayings were transmitted orally, and in order to ensure its exactness and authenticity these sayings needed to be attributed to the correct source.(Abdal-Haqq, 2002)

Religious teachings and sayings of the Prophet were traced back to the Prophet Muhammad (s.a.w) establishing intermediate links to provide authenticity. These teachings and sayings had been handed down orally in an unbroken chain, Isnad, from witnesses who heard, saw or knew the Prophet.(Feldman, 2002)

The Isnad, or chain of transmission, creates a knowledge path taken by a text and determining if there were any gaps or weaknesses. Any false attribution, especially to the Qur'an or Sunnah, is prohibited.(Platt, 2009) Many teachings were attributed to the Prophet Mohammed (s.a.w). Acknowledging the source of information or the chain of transmitters through which information was handed down through generations is the method Muslims have inherited through the system of Hadith preservation. Thus, Sharia (Islamic Law) demands both the right of attribution and the right of integrity whenever a person refers to Sharia.

As these rights of attribution and integrity have been recognized in relation to Sharia itself, the question that arises is whether these rights can be extended to individual authors. Nothing in Sharia prevents extending the right of attribution and right of integrity to individual authors. Indeed, in Islamic seminaries, the author had to authorize a copy of his book that was taught to students, who in turn were permitted to narrate and transmit that text without misrepresentation and to hold a copy of the book.(Makdisi, 1981)

This shows that for Muslims, the publication of an unauthorized work or distortion of a work

was considered at the very least morally dubious. The hadiths imply that Sharia requires source attribution for individual authorship as well. Early Islamic authors did not have legally-protected moral rights and no cases are on record in which authors brought legal charges against other parties for violating their authorities or falsely claiming authorship of their works. However, interests of Islamic authors were protected by social norms governing ethics and honor. Any information passed must be trustworthy, that is, information should be preserved in the original format and protected from any distortion. (Malkawi, 2013)

If past was reviewed, a Period would be faced that there was no certain rule and regulation on subject of Intellectual Property Right in Iran, while if an event occurred, it was limited to a blame and moral disapproval. Therefore, Artistic and Literary Properties are not phenomena, which can be traced in primary societies of Iranian Land. However, the affaires such as quoting quotations of others, while their sources were not declared and distributed to themselves were existed in the past too. For example, Abol-hassan Ali Ibn Ossman Jollai Hojveiri Ghaznavi writes in introduction of his book, *Kashf-ol Mahjoub*,: "someone asked me for my Divan of Poetry and returned it back. But its original version was not with it. He changed that sentence and removed my name from the book and my sufferance was lost. Lord forgives him. I also wrote another book on subject of Sufism, titled *Menhaj-ol Din* (a Guideline for Religion). One of claimer removed my name from book and pretended before public that he wrote it.(Rokni Dezfouli SM, 2006)

There are different opinions from side of lawyers and history writers on subject of existence or appearance of Intellectual Rights of author in ancient societies. For example, Ander Moriow writes:(Mina Sheikh & Ali Ravanan, 2015)

“Intellectual Rights of author was existed from time that humankind could take hair pen and write. The origination of such right is disappeared in darkness of historical eras. Plagiarize was blamed and disapproved from side of public as literature created, while its committer punished as regulations were classified.(Rokni Dezfouli SM, 2006)

Today, various works have been entered in different social rings in grace of significant progresses. Therefore, owners of intellectual works may consider as groups, which need legal supports more.(Ahangaran MR, Zand HR, & Zargar Pour F, 2013)

In view of this historical development some basic forms of intellectual property rights can hardly be denied a claim under Sharia, but since the advent of Islam the concept of intellectual property has expanded to include trademarks and patents and more sophisticated forms of copyright. What these intellectual property rights have in common is that they grant limited exclusive rights in exchange for the commercialization of an original creation that benefits society and they allow the owner to stop any unauthorized use by a third party. This expansion of intellectual property and the new challenges associated with new technologies, innovation and globalization render its justification under Sharia law more complicated. (Beltrametti, 2009)

Islamic religion and law have influences to varying degrees, on the general laws and policies of each of Islamic countries especially Iran. It is therefore imperative, when studying a legal aspect of one of these countries, to consider Islam's stance on the particular topic of concern.

Islam from the very beginning has encouraged all those who claimed to have acquired new forms of knowledge and at the same time has stressed its dissemination in a fair system. Islam does not allow any violation against people's rights, whether material or intellectual. Therefore, it does not allow that the efforts of others be taken away from them or be used without their consent.

But, both in analogy (fiqh) and related Islamic legal literature on property here is no specific mention of the term "Intellectual Property". However, some scholars contend that intellectual property rights were not directly regulated by Sharia but the others say that the principles of Sharia can be construed to provide support for such protection. Nevertheless, an analysis of the definitions and classifications of property under

principles of Islamic law reveals that the concept of intellectual property is not alien to Islamic law of property; rather it is an integral part of it.

No doubt Intellectual property is a very old concept but after the advent of the Islamic rule some of the rights pertaining to authorship were further advanced and some more rules based on Islamic laws were added to the already existing copyright system.

General principles extracted from the sources of Islamic law and outlined by Muslim jurists have squarely encompassed it as a usufruct (manāfi') property, which is recognized as object of right (haqq) that could be exclusive only to the individual that has right over it. That means all transactions related to intellectual property in terms of assignment and licensing are valid provided the general principles of contract in Islam are met. Copyrights and patent can be dealt in the same manner. For on a trademark to be lawful however, the mark must move to the other party along with the quality it represents or the good will so that misrepresentation and uncertainty are avoided.

This article assesses the stance of Islamic Law, known as Sharia, concerning the protection of intellectual property rights in Islamic Law. Here, various legal concepts of Islamic law provide a firm moral and conceptual basis for intellectual property protection. In the historical factual context, this paper sheds light on various manifestations of intellectual property protection within the Islamic Law.

2- Intellectual property rights and Islam

Islamic law did not regulate intellectual property rights per se by having detailed and precise rules, such as in the case of spiritual duties or inheritance. The concept of IP, its recognition and protection from an Islamic perspective has been a subject of debate amongst the contemporary commentators on Islamic Sharia.(Price, 2007) Generally, there are two different camps.(Raslan, 2006)

One contends that the sources of Sharia oppose, to different degrees, notions of IP, while the other camp argues that the sources of Sharia strongly support IP. However, the following sections trace their arguments and critically analyze the integrity of these arguments.

different sources of law in Sharia contain many rules and examples which help in drawing the connections between intellectual property and Islamic law. The following section examines the birth and development of intellectual property norms meeting the needs of that time and analyses the arguments and counter-arguments for providing intellectual property protection under Sharia.

2-1- Objections to Intellectual Property Rights

The most extreme opinion on IP in Islamic literature holds that Sharia does not accept IP as it is a tool imposed by the West, which would be of no benefit to the Muslim community. (Mahafzah, Melhem, & Haloosh, 2009)

The strictest view against the protection of intellectual property under Sharia insists on the fact that nowhere in the Qur'an or the Sunna intangible properties are expressly treated as subject matter of private ownership. Intangible rights can be implied but they are never explicitly mentioned, and this may suggest that property can be uniquely intended as tangible property. (Khoury, 2003)

An aspect of this approach was summarized by Mufti Taqi Usmani (who supports IP protection) as claiming that the primary sources of Sharia and the juristic views of Muslim scholars have not supported the protection of intangible objects. Furthermore, knowledge in Sharia cannot be subject to private ownership. In that vein, the late Mufti of Pakistan, Sheikh Muhammed Shafe'e, issued a legal opinion (fatwa) stating that authorship and inventions are acceptable as a means of income, but it is not permissible to exclude others from using them, as they represent only an abstract right which is not protected according to Sharia's rules. However, as we traverse opinions objecting to IP, we will note that this opinion is the weakest and that the sources of Islamic Sharia do not support it. (E. M. Elmahjub, 2014)

There are at least four objections to IP that can be identified from the relevant Islamic literature. These objections are based on the assumption that there are underlying inconsistencies between various injunctions within the Qur'an and Sunnah and notions of IP. (Jamar, 1992) These inconsistencies might affect the nature and scope of the protection afforded to some forms of IP. This section examines these objections and considers whether they can be justified. (E. M. Elmahjub, 2014)

2-1-1- Intellectual Property and the Concealment of Knowledge

The Qur'an contains various ayat (verses) that disapprove of the concealment of anything that is good for society (For instance see the following ayat (verses) in the Holy Qur'an, 2:42, 2:140, 2:174 and 371) .(E. Elmahjub, 2015)

With regard to ilm (knowledge), it has been reported that the Prophet warned Muslims against the concealment of knowledge as it is the common property and the shared heritage of all humankind, the owner

of which is God. The Prophet is reported to have said ‘the one who conceals knowledge would appear on the day of resurrection as reined in a bridle of fire.’ (E. Elmahjub, 2015)

A broad initial reading of this hadith (saying) suggests that every person who attains knowledge that would benefit other members of the society must disclose such knowledge and share it with them without any restrictions. This hadith is particularly relied upon by some scholars to reject copyright protection, as it might entail the concealment of knowledge. (Amanullah, 2006)

Moreover, Al-Mundhiri (d. 1258 CE) reports several ahadith (sayings) in which the Prophet encourages sharing and the dissemination of knowledge. In one of these ahadith the Prophet considers knowledge which is being disseminated the best form of saddaqa (charity). (Azmi, 1996)

Does IP fall within the prohibition of the concealment of knowledge according to the traditions of the Prophet (pbuh)? In other words, does the protection of knowledge underlying patents and copyright lead to the concealment of knowledge from an Islamic perspective?

The modern concept of IP is based on property rights over ideas or forms of expression that give the right holder time-limited monopolies. (Azmi, 1996)

These monopolies are embodied in the form of exclusive rights over the subject matter (which could be thought of as knowledge) to exclude others from using the intellectual products without permission or monetary compensation. According to some commentators this might contradict the Islamic prohibition of the concealment of knowledge.

However it is inaccurate to conclude that IP leads to the concealment of knowledge in the meaning of the above-quoted hadith (saying of the prophet). (Azmi, 1996)

A closer look into the mechanisms of IP reveals that the overall structure and rules of IP does not lead to the concealment of knowledge which is prohibited under the hadith. (Azmi, 1996)

Individuals who use their intellect to write a software program or invent a machine should be entitled to benefit financially from their creations. And to do so, a certain degree of protection is required, to be able to prevent others from making use of the intellectual item in a way that prejudices the legitimate interests of the creator. However, this protection does not necessarily prevent others from accessing the relevant intellectual creation. Accordingly, the prohibition against the concealment of knowledge in Islamic Sharia should not involve the prohibition of transactions involving knowledge (Azmi, 1996) as it is possible to both disseminate knowledge and take money for it simultaneously. (Amanullah, 2006)

Nevertheless, this does not mean that the current regulation of IP is fully consistent with Islamic Sharia principles, including those aspects related to the dissemination of knowledge. Islamic Sharia's prohibition of the concealment of knowledge and encouragement of its dissemination may raise certain challenges for the current regulation of IP as laid down in its international framework.

2-1-2-Indefiniteness

"It is forbidden to sell the fruit on the trees before it is ripe, because the buyer does not know if all the fruit will ripen or what its weight will be. (Qur'an at 5:90)

The concept of indefiniteness or speculative risk, gharar, commands that any transaction is to be devoid of uncertainty and speculation. This means that both contracting parties must have perfect knowledge of what is being exchanged in their transaction. The precise measures and values are required.(Warde, 2000)

An element of risk seems to be permissible as long as the division of risk is decided in advance and the transaction appears to be fair. Vogel and Hayes (Vogel & Hayes, 1998) explain that as long as the parties have full knowledge of the characteristics and value of the subject matter which is being contracted, the subject matter does exist at the time the transaction is entered into and the parties exert effective control over the property and the execution of the contract -- the transaction will avoid gharar. (Vogel & Hayes, 1998)

Overall this concept has not overly restricted the development of commercial law and some standards have developed that enable the parties to a transaction to avoid gharar (Vogel & Hayes, 1998): an acceptable degree of clarity will be assumed if licensing agreements occur in writing and are registered with the competent authority. However, even if the parties know how to value an intellectual property resource and have control over it, in some cases licensing such rights may be problematic. There are some instances where the subject matter being contracted is not clear from the outset; usually parties contracting to buy technological know-how and trade secrets do not know the exact parameters of it. Disclosing trade secrets and knowhow before a contract is concluded would deter the parties to conclude the contract. (Raslan, 2006)This means that disclosure of full knowledge of what is being contracted might be problematic in some cases when this specific intellectual property subject matter is being licensed. A possible counter-argument might be that because of the effort involved in developing such technologies Sharia recognizes its value and the required degree of certainty can be achieved through the contracting between the parties.(Raslan, 2006)

2-1-3- Sharia prohibits profit without effort and labor

Although the Qur'an provides that *"there is no fault in you that you should seek bounty (honest profit) from your Lord"* (Qur'an at 3: 194). Disproportionate profits are held not to be honest: *"Woe to every defamer, slanderer, who amasses wealth and hoards it! He thinks that this wealth is going to make him live forever"*. (Qur'an at 104:1-4) This verse condemns the accumulation of excessive wealth and this applies in some intellectual property cases when minimal effort can yield extra-ordinary profits. This is clear if we think of novel writers who have extraordinary success and earn enormous amounts of royalties after a limited amount of time input. The same might happen with the development of a new medicine which proves an enormous achievement or advertising of a trademark that immediately becomes famous. In this cases the profit generated will be significantly disproportionate to the time and money invested initially in the development of the idea.

In recognizing the importance of trade and commerce Sharia emphasized the notion of balance: gains should be in proportion to the efforts spent in doing something. Gambling is prohibited under this head because it concerns undeserved 'easy' money and because it involves profit without work. (Mohammed, 1988) It seems that activities that can potentially yield indefinite and extraordinary profits could constitute a form of deceit.(Al Agha, 2007)

2-2- Intellectual Property as Extension of Real Property

Muslims believe that all property belongs to Allah (s.w.t). The private owner of property acts as a trustee or agent for Allah (s.w.t), the ultimate owner. Nevertheless, Islam cherishes the inviolability of private property. The Qur'an states:

And do not eat up Your property among yourselves For vanities, nor use it As bait for the judges, With intent that ye may Eat up wrongfully and knowingly A little of (other) people's property.(Qur'an 2:188)

Prophet Muhammad (s.a.w) in his farewell pilgrimage said 'No property of a Muslim is lawful to his brother except what he gives him from the goodness of his heart, so do not wrong yourselves'. (Al-Ghazali, 1997) Sharia, thus, takes a middle way between communal property rights and personal rights and property based on Western ideas, English and North American, in particular.(Shi, 2010)

As to the recognition of intellectual property as specie of property, most schools of law in Sharia are in agreement about this issue. The exception is the Hanafi School which varies on how it thinks of property. This is primarily the result of a disagreement about the proper criterion for what could be considered mal

(money). According to the Hanafi School line of thinking, heiaza (physical possession) is the only acceptable criterion for money. They accept only tangibles as maland eventually property.(Islam, 1999)

Thus, the Hanafi School concentrates, in absolute terms, first and foremost on material objects

as property that can be experienced by one of the five senses. Because of the nature of ideas as incorporeal objects, there can be, according to Sharia no legal rights to them as intellectual property. On the other hand, the Malki, Shafie, and Hanbali Schools all agree that the proper criterion should be manfa'a (usefulness).(Islam, 1999)

These latter schools accept both tangibles and intangibles as property. Property can be anything that is useful and of value. It follows then, that protection of intellectual property would fall into the category of permitted action.Under Sharia, ownership of real property can be acquired through contractual agreements or by appropriation.(Jamar, 1992)

Under the appropriation right, one may acquire title to vacant real property by developing it and making it productive. Ownership of personal property can be also acquired through extracting and possessing materials from the earth or public land. This resembles Locke's labor theory and 'sweat of the brow' standard in intellectual property rights.(Byrne, 1999; Drassinower, 2008) As such, ownership is rewarded to an individual who exerts efforts in developing materials and so they are thus entitled to the fruits of their labor. The Prophet Muhammad (s.a.w) was reported to have said:

Nobody has ever eaten a better meal than that which one has earned by working with one's own hands. The Prophet of Allah, David used to eat from the earnings of his manual labor. (Bukhari, 1987)

An individual who spends time and energy creating new works – physical or otherwise – should be entitled to the value of their works. Sharia accepts the concepts of separation of title and third party use.(El-Bialy & Gouda, 2011)

These concepts can be construed as to allow a titleholder to divide ownership and use by granting a third party the right to use the property without transferring ownership. Separation of title for property in Sharia parallels the current practice of licensing intellectual property rights.³⁴

Although Sharia does not explicitly protect intellectual property, the protection of intellectual property can be inferred through it not being prohibited. Indeed, there are no express provisions in the basic texts of Sharia that limit ownership to tangible objects. Terms such as property in Sharia can have more than one meaning and one must look beyond classical definitions. Sharia can evolve to accommodate new realities by affording protection to intellectual property.(Koscher, 2009; Winston, 2006)

2-2-1-The Permissibility of Gaining Profits

Traditionally, intellectual property protection has been about incentivizing innovation. The economic incentive theory allocates to the authors or inventors for a limited period of time the exclusive right to make copies of their works.(Landes & Posner, 1989; McClure, 1996)

Intellectual property owners are entitled to fully enjoy the benefits of their creativity. Holders of intellectual property rights may sell their right to others who may value them more. Nevertheless, the economic incentive theory is only partially true. There is a strong aspect of natural rights in intellectual property as well. A person who labors upon resources that are either un-owned or held in common has a natural property right to the fruits of his or her efforts and the state has a duty to respect and enforce that natural right.(Hughes, 1988)

Moving from the justification based on property and hard work, intellectual property can also be justified on the basis of trade and making profits. Trade not only involves physical products but also includes trading in intellectual property products for the purpose of making profits. Sharia encourages trade subject to some exceptions. (Qur'an 5:3, 2:219, 2: 275–8)

Making profits apply to all sorts of trade and apply to intellectual property as well. Creators should be able to have a tangible return on their investment of time and labor. Making profit does not justify intellectual property per se but allows it. Indeed, making profit is consistent with the economic incentive theory of intellectual property.

The pursuit of profit is not inferior but an honorable matter. The Qur'an states 'there is no fault in you that you should seek bounty (honest profit) from your Lord'.(Qur'an 3:194)

It also states 'O ye who believe! Eat not up your property among yourselves in vanities; But let there be amongst you traffic and trade by mutual good will'.(Qur'an 4:29)

The Qur'an also provides that: 'O my people! Give full measure and full weight in justice, and wrong not people in respect of their goods. And do not evil in the earth, causing corruption'.(Qur'an 11:85)

These verses signify the possibility of generating profits. By all estimates, many authors during the early Islamic period earned their living through their works. Caliphs would also hire authors to write books in return for payments. (Raslan, 2006) Emirs – a title of high office typically translated into English as prince – would pay poets who praised them. (Malkawi, 2013) Those payments were legally binding – not an

honorarium – for completing an intellectual work in a manner similar to the modern concept of works made for hire.

Dedications had a long tradition as well. Financially needy authors dedicated their works to Emirs or wealthy individuals in the hope of receiving a monetary gift or reward. Financial motives were primary in that period. The Maliki, Shafi'i, and Hanbali schools of law permit rewards for financial contracts, such as lease.

Intellectual property contracts include financial elements and holders of intellectual property rights can recover investments from their creations. However, scholars of the Hanafi school of law argue that knowledge or science cannot be equated with trade or industry.

A person should dedicate himself to spreading his knowledge without the expectation of financial reward. There should be no obstruction to the duplication of original materials, since the most widespread dissemination of knowledge is for the good of all.(Malkawi, 2013)

In other words, these Hanafi scholars hold the view that certain kinds of idea-based property should be pure public goods and that knowledge, and its products, should be used for the benefit of all humankind.

On the other hand, it is recognized that creativity does not flourish if a person is not compensated fairly for his or her efforts. Most Sharia schools of law recognize it as permissible to gain profit from one's efforts. Even the Qur'an, the Sunna, and the unique marks and symbols of faith such as mosque and the greeting of assalam-u-alaikam (peace be upon you), together constitute a unique form of intellectual property. (Khan, 2000)

Therefore, the works of individuals ought to be protected and commercially exploited. A question can be asked whether, under Sharia, an author or inventor can recover more than the initial investment on his work. Nobody can argue that an author or inventor cannot recoup his initial investment.(Ng, 2007)

However, in some cases, holders of intellectual property rights could accumulate wealth excessively. This may lead to the issue of riba. Under Sharia, gaining profits without exerting efforts over extended periods of time is considered riba. The Qur'an states 'Allah has made buying and selling lawful and usury unlawful'. (Qur'an 2: 275–278)

The prohibition against riba is complicated. Does riba include interest in any form or usurious interest? Riba is translated into English as usury, which signifies only an extortionate interest.(Seznec, 1999)

However, riba is of two kinds: riba al-fadl, in which a person acquires an unlawful, excessive profit, and riba al-nasi'a, a form of gharar, in which a person gains an unlawful advantage by speculating on uncontrollable risks.(Seznec, 1999)

Although the concept of riba arises generally in financial transactions, such as loans and derivatives, it can also be relevant to monetary transactions other than loans.(El-Gamal, 2006)

Hence, profits generated through licensing fees of intellectual property rights may be tantamount to riba so that the application of riba in the context of intellectual property could prove problematic with practical repercussions. Investing money leads to either an increase or decrease in the principal value of the financial capital at stake. In the context of investing, increase is permissible. Under Sharia, an increase is not unacceptable per se. Rather, the moral issue appears in obtaining an increase without exerting effort or being exposed to business risk. Clearly, intellectual property holders invest time and money in producing their works and are thus entitled to reap any financial return.(Layne-Farrar, 2011)

Some classical Muslim jurists define riba broadly to include any increase in capital in excess of the original amount, however slight.(Seniawski, 2000)

On the other hand, modernist jurists define it narrowly to include excessive interest or doubling only.(Siddiqi, 2004)

If the position of classical Muslim jurists is adopted, a holder of intellectual property rights cannot be compensated beyond his or her initial investment. However, it seems logical and in line with modernist jurists to allow a holder of intellectual property right to recover an amount that goes beyond their initial investment as long as that amount is fair and balanced with the time and effort exerted. In other words, the construction of interest and its application to intellectual property should not be too rigorous.

2-2-2- Intellectual Properties as Usufructs

An intellectual innovation of whatever form is the physical consequence of an entrenched ability in one's brain and not the intellect itself. It emerged out of the mind or intellect, and as such, this element must be central in our legal adaptation of intellectual property when extracting out its relevant legal injunctions from the sources of the Sharia. (Y. A. Muhammad, Shettima, & Hassan, September 2016)In addition, as al-Izz has put it, usufructs are the obvious purpose of all properties and they would not have had any value without such benefit in them. In addition, just like the usufructs of tangible property which are acquired from using such properties, usufructs of intellectual properties are also acquired from using such property.(Y. A. Muhammad et al., September 2016)

For instance, only if one opens a book and reads it that one can gain something out of it and as a result, one can only benefit from it as one uses it momentarily and thus, they are consequences of such products. Intellectual Invention (al-ibtikār al-dhihnī) as intangible abstract form, an effect of knowledge or ability of its inventor or creator is comparable to the benefits of fruits detached from its source, the inventor or author and settled in a medium: the book or invention. There is however a difference between the benefits that are obtainable from an intellectual creation and tangible property like landed or movable properties. On the source of these benefits, while the source of benefit in tangible properties is the properties themselves, in intellectual property like patent, the source is the creative intellect of the Inventor or Author. However, in both instances the benefits derived from them are intangible. In other words, they are fruits of man's intellectual labour.(Y. A. Muhammad et al., September 2016)

On the effect of these benefits, it is obvious that benefits or usufruct are the evident objectives of acquiring all properties according to Al-'Izz bin Abdussalam. In fact, it is the indicator or determinant of valuing their sources.(Abdulsalam, 1999)

The value of the intellect has been under-estimated despite its role in the emergence of remarkable civilization in the last few centuries. It is the level of intellect and practical application of its resulting effect that created disparity between individuals and nations.

Therefore, benefits enjoyed from knowledge far surpass that which is enjoyed from tangibles as usufruct. Allah, the Most High said:

"Are those equal, those who know and those who do not know?"(Qur'an 39:9) .

Another authority that confirms intellectual creation as a benefit (manfa'ah) is the saying of the Prophet, peace be upon him:

"Whenever the son of Adam dies, his deeds terminates with the exception of three: continuous alms, knowledge being benefited from or a righteous child that prays for him."

In describing the intellectual ability of man, Ibn Qayyim Al-Jauziyyah has this to say:

"Allah, the Glorious, gave man the ability of the intellect and directed him to use it in a manner that will be useful for him in this world and in the Hereafter. It is through this process (of deploying the intellectual ability) that man was able to create skills, crafts, sciences, construct cities, residential quarters and agricultural products. If not because of the intellectual ability, man would not have been able to acquire benefits and prevent harms; and this is among the greatest bounties and absolute Divine care."(Y. A. Muhammad et al., September 2016)

3- Legitimacy of Intellectual Property Rights in Shia Fiqh

As said in the above sections, the debate of copyright has not been found in any jurisprudence chapters and in the works of the old Islamic jurists, and also there is no Hadith in this regard. Hence, this right is among the new issues which called ‘updated issues’ by contemporary Islamic jurists. (Gorji, 1992)

In the last generation of contemporary Shia jurists, there is a few who believe in intellectual and moral property rights. Among these jurists, it can be referred to the founder of the Islamic Republic of Iran, Imam Khomeini, who considered the intellectual property rights as illegal.

Arguing for the updated issues, Imam Khomeini said in his book ‘Tahrir al-Vasilah’: what is known as copyright among people is not a legitimate right and eliminating the domination of people upon their property, without stipulating any condition or making any contract, is not allowed and just writing the sentence ‘copyright reserved’ neither creates any right to the creator of the work nor obliges other to follow it; therefore, other people can copy and publish it and no one can prevent them from doing it. Also what is known as ‘patent for invention’ and prevents other from imitating the inventor or and from copying his/her invention, is not legally binding and no one can be forbidden from imitating him/her or trading the invention. Also no one can prevent others from dominating his/her own properties. Also what people know as ‘monopolizing the trade of a specific commodity’ by a company or a number of traders is not legally binding and preventing others from lawful trading and industry and monopolizing it for some specific individuals is not allowed. (Pirhaji, Khodapanahandeh, & Rafiei, 2013)

Also it can be pointed to Ayatollah Khomeini and Ayatollah Safi Golpayegani, as to other instances of the contemporary Shia jurists who do not consider moral property right as valid. (Safi, 1984)

Issuing Fatwa on moral property right and answering the then Minister of Culture, Ayatollah Khamenei, the religious leader of Iran, said: “believing in the intellectual property right for the domestic authors and composer, is quite a rational matter but concluding contract with other countries regarding copyright is not advised; rather it is harmful and contrary to the interests of the country” .(Yazdani, 2003)

In contrast, some other Islamic scholars have accepted the moral property right. In response to a request for legal formal opinion (Estefta), Ayatollah Makarem Shirazi, one of the major Grand Ayatollahs of Shia, has said: “we believe that the copy right and patent for invention are legal rights and should be respected in the view of Islam.” The rationale for such a claim is that

we always take subjects from the custom, and judgments from Islamic Law. For example, when we say gambling is prohibited, the word prohibition has taken from Quran and Hadith (tradition)but what is the subject of gambling? It depends on the custom. The same is true in the case of intellectual property right. Islam says that oppressing other people and violating their rights is prohibited. This law has taken from Islam; while its subject, oppression and violation of rights, should be taken from custom; and today, almost all of the scholars in the world consider intellectual property as a right and believe that violating it is a kind of oppression.(Rouhani, 1993)

According to mentioned cases, it seems that in current circumstances, there is no ambiguity about the validity of literary and artistic properties in Islamic law and also by removing the legal and religious doubts; this branch of law science is evolving gradually. (Amiri, 2009)

4- CONCLUSION

Islam is a balanced religion which stands point in the middle. Its (economic) laws never take side

on each extreme role. Although doctrines state that all properties belong to God, but Islam acknowledges the rights of human beings to enjoy the result of their hard work and creativity. Islam is protecting the individual ownership rights as well as guarding the benefits of the public interest. Therefore, it is crucial that any law which is to be effective complies with the principles of Islamic law. As the analysis above has shown, an accurate understanding of the principles of Sharia can be construed to provide support for the protection of intellectual property law. Islamic law though does not explicitly address protection of intellectual property however the various Islamic legal principles discussed above can be taken as a vantage point to conclude that intellectual property has in fact been recognized and respected in Islam.(Iqbal, 2013)

After in-depth analysis of Islamic law one can safely contend that basic legal concepts and principles within Islam plainly justify and encourage intellectual property rights. The way Islam has set out the guidelines for doing trade, has prohibited unfair competition, has recognized the importance of private property one can lead to the conclusion that Islam does not stand idle on issue pertaining to IPR and their protection.

REFERENCES

- Abdal-Haqq, I. (2002). Islamic law-an overview of its origin and elements. *J. Islamic L. & Culture*, 7, 27.
- Abdulsalam, A.-I. (1999). *Qawa'id Al-Ahkam fi Masalih Al-Anam*. Beirut: Dar al-Kutub al-'Ilmiyyah.

- Ahangaran MR, Zand HR, & Zargar Pour F. (2013). Exploring legitimation basis for Intellectual Property and Penal Policy Evolution Trend in keeping of its dominance. *Journal of Jurisprudence Research*, 14, 1-28.
- Al-Ghazali, M. (1997). Muslim's Character. International Islamic Federation of Student Organizations, Riyadh: International Islamic Publishing House.
- Al Agha, S. (2007). Money laundering from Islamic perspective. *Journal of Money Laundering Control*, 10(4), 406-411.
- Amanullah, M. (2006). Author's copyright: An Islamic perspective. *The Journal of World Intellectual Property*, 9(3), 301-315.
- Amiri, H. A. (2009). *Enforcement of industrial property right in WTO regulation & Iranian law*. Tehran: Mizan legal foundation.
- Azmi, I. M. A. G. (1996). Basis for the recognition of intellectual property in light of the Shari'ah. *IIC-INTERNATIONAL REVIEW OF INDUSTRIAL PROPERTY AND COPYRIGHT LAW*, 27(5), 649-674.
- Beltrametti, S. (2009). The legality of intellectual property rights under Islamic law. *The Prague Yearbook of Comparative Law*, 55-94.
- Bukhari, I. (1987). *Sahih al-Bukhari. Kitab Bhavan, New Delhi, India*.
- Byrne, D. M. (1999). Locke, Property, and Progressive Taxes. *Neb. L. Rev.*, 78, 700.
- Drassinower, A. (2008). From distribution to dialogue: remarks on the concept of balance in copyright law. *J. Corp. L.*, 34, 991.
- El-Gamal, M. A. (2006). *Islamic finance: Law, economics, and practice*: Cambridge University Press.
- El-Bialy, N., & Gouda, M. (2011). Can Shari'a be a Deterrent for Intellectual Property Piracy in Islamic Countries? *The Journal of World Intellectual Property*, 14(6), 441-466.
- Elmahjub, E. (2015). An Islamic Perspective on the Theories of Intellectual Property *Copyright Perspectives* (pp. 51-84): Springer.
- Elmahjub, E. M. (2014). *Protection of intellectual property in Islamic Shari'a and the development of the Libyan intellectual property system*. Queensland University of Technology.
- Feldman, S. (2002). Reason and analogy: A comparison of early Islamic and Jewish legal institutions. *UCLA J. Islamic & Near EL*, 2, 129.
- Gorji, A. (1992). Moral Property and its Award. *Informatics*, (3&4).
- Hughes, J. (1988). The philosophy of intellectual property. *Geo. LJ*, 77, 287.
- Imam Malik's AI-Muwatta. (1951). Book of Judgmen *Dar Al-kutub Al-I'lmiyah*, 346.
- Iqbal, K. J. (2013). Intellectual Property Rights in Islam : A Perspective. *SSRN Electronic Journal*.

- Islam, M. W. (1999). Al-Mal: The Concept of Property in Islamic Legal Thought. *Arab Law Quarterly*, 14(4), 361-368.
- Jamar, S. D. (1992). The protection of intellectual property under islamic law. *Cap. UL Rev.*, 21, 1079.
- Khan, A. (2000). Islam as Intellectual Property. *Cumb. L. Rev.*, 31, 631.
- Khoury, A. H. (2003). Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks. *IDEA*, 43, 151.
- Koscher, R. J. (2009). A Patent Pool's White Knight: Individual Licensing Agreements and the Procompetitive Presumption. *DePaul J. Art Tech. & Intell. Prop. L.*, 20, 53.
- Landes, W. M., & Posner, R. A. (1989). An economic analysis of copyright law. *The Journal of Legal Studies*, 18(2), 325-363.
- Layne-Farrar, A. (2011). An Economic Defense of Flexibility in IPR Licensing: Contracting around First Sale in Multilevel Production Settings. *Santa Clara L. Rev.*, 51, 1149.
- Mahafzah, Q. A., Melhem, B. M., & Haloosh, H. A. (2009). The Perspective of Moral and Financial Rights of Intellectual Property in Islam. *Arab Law Quarterly*, 23(4), 457-468.
- Makdisi, G. (1981). *The Rise of Colleges. Institutions of Learning in Islam and the West*: ERIC.
- Malkawi, B. H. (2013). Intellectual property protection from a Sharia perspective. *S. Cross UL Rev.*, 16, 87.
- McClure, D. M. (1996). Trademarks and competition: the recent history. *Law and Contemporary Problems*, 59(2), 13-43.
- Mina Sheikh, & Ali Ravanan. (2015). Evolutions of Intellectual Property Rights in Iran Regarding International Documents. *International Journal of Law*, 1(4), 91-95.
- Mohammed, N. (1988). Principles of Islamic contract law. *The Journal of Law and Religion*, 115-130.
- Muhammad, A. H. (2003). Authorship Right : The Islamic and Legal Aspects According to the New Intellectual Property Protection Law. *Dar Al-jame'ah Al-jadedah (in Arabic)*, 19.
- Muhammad, Y. A., Shettima, M., & Hassan, A. S. (September 2016). Basis of Intellectual Property Protection in Islam and Its Legal Effects *International Journal of Humanities and Social Science*, 6(9).
- Ng, A. (2007). Copyright's Empire: Why the Law Matters. *Marq. Intell. Prop. L. Rev.*, 11, 337.
- Pirhaji, M., Khodapanahandeh, S., & Rafiei, M. (2013). Legitimacy of Intellectual Property in the Law of Iran. *Asian Social Science*, 10(1), 283.
- Platt, R. (2009). A comparative survey of moral rights. *J. Copyright Soc'y USA*, 57, 951.
- Price, D. (2007). The Dynamics of intellectual property protection in the Arab Gulf states. *International Review of Business Research Papers*, 3(1), 147-161.

- Raslan, H. A. (2006). Shari'a and the Protection of Intellectual Property-the Example of Egypt. *IDEA*, 47, 497.
- Rokni Dezfouli SM. (2006). Comparative evaluation Intellectual Property in Law of Iran and World Trade Organization. *Journal of Marefat*, 106, 58-70.
- Rouhani, M. S. (1993). *Updated issues* (1 st ed.). Qom: Dar al-kitab Publication.
- Safi, L. A. (1984). *Altazir Anvae Va Molhaghaat*: Institute of Islamic Publication.
- Seniawski, B. L. (2000). Riba Today: Social Equity, the Economy, and Doing Business Under Islamic Law. *Colum. J. Transnat'l L.*, 39, 701.
- Seznec, J.-F. (1999). Ethics, Islamic Banking and the Global Financial Market. *Fletcher F. World Aff.*, 23, 161.
- Shi, W. (2010). Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?
- Siddiqi, M. N. (2004). *Riba, bank interest and the rationale of its prohibition*: Islamic Research and Training Institute Jeddah.
- Vikør, K. S. (2005). *Between God and the sultan: A history of Islamic law*: Oxford University Press, USA.
- Vogel, F. E., & Hayes, S. L. (1998). *Islamic law and finance: religion, risk, and return* (Vol. 16): Brill.
- Warde, I. (2000). *Islamic finance in the global economy*: Edinburgh University Press.
- Winston, E. I. (2006). Why Sell What You Can License-Contracting around Statutory Protection of Intellectual Property. *Geo. Mason L. Rev.*, 14, 93.
- Yamani, A. Z. (1979). The Eternal Sharia. *NYUJ Int'l L. & Pol.*, 12, 205.
- Yazdani, A. (2003). Copyright in the thoughts of contemporary Shia jurists. *Journal of Islamic books*, 9.