

Intellectual Property Rights in the Light of Islamic Law and Man-made Regulations

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Abstract: Intellectual property means the publication that is protected and remains as an exclusive right of its author. It is divided into two types. The first kind is auditory such as: sermons and lectures and its alike that are delivered orally. Customarily the right of this type of intellectual property belongs to all Muslims without any restriction. The second type is publication which means written material and documents in any field of sciences regardless of whether it belong to the theoretical science such as principles of Islamic jurisprudence sciences of Qur'an, tradition sciences of history, etc. or belonging to the experimental sciences such as Chemistry, Physics, Geometry, Medicine Pharmaceutical Science, etc. Scholars have used various terms that implies intellectual property, for example, the right of publication, the right of novelty, right of innovation or creativity, the right of intellectual benefits, the moral right, right of thought and the right of intellectual product.

Key words: Rights, intellectual property, Islamic law, man-made regulations, publication, Malaysia

INTRODUCTION

From the perspective of Islamic law, intellectual property right can be divided into two types; individual one and common one. Individual intellectual property right exclusively belongs to its innovator or initiator and those take part in publication or his heirs. On the other hand, the common right of intellectual property is represented by the entitlement of the ummah to drawing benefit from the intellectual product. The justification for such entitlement lay in the fact that intelligence is a gift from Allah (SWT). Furthermore, the owner of the thought whoever it might be indeed has benefited from the experience, information and the thought of his/her predecessors, specially the predecessors of his/her society's descendent. In fact, it is acknowledged by classic scholars as they have clearly expressed that intellectual endeavors can not remains as the private possession of individuals.

The common right of intellectual property belongs to the society as a whole and is represented in varieties of rights, the most obvious of which are: the right of quotation, the right of translation in accordance with its terms and conditions so as to generalize the benefit of the publication and the right of the authority or the roller in publishing the relevant intellectual product when it is deemed to be useful or the author refuses to publish it. Moreover, the right of preventing such writing when it is deemed to cause harm of any kind to the society. This is justifiable on the ground of the jurisdiction of the public authority based on principle of the Islamic law which aims at the preservation and protection of public rights and interests and the removal of harm.

Individual rights are those rights that originally belong to the owner of the intellectual property; author. They are represented by two main rights: literary or moral right and financial right. Literary/moral right means the right of authorship of the publication and the approval of its publication or the right of blocking its publication or the right of its censorship by its original author and the right of correction either by way of addition or omission of its contents.

Financial right is financial benefit or gain obtained by the author through the publication of his/her writing or publication. The financial benefit obtained by the author is not the price of his thought but as a reward for his effort spent in organization and accumulation and hence derivation of certain conclusion based on his ideas. Financial right is divided into; financial right during author's life time and financial right of the author after death that is enjoyed by his/her heirs. Because it is a financial right that is inherited by his/her children and relations due to the fact that they are the most deserving people to this due to their close bond of relationship with the author (Ahmed, 2006).

Man-made law related to the intellectual property right have differed as regards to the duration of the benefits that the inheritor can draw from the authors intellectual property. Some say 70 years while other say 50 years. The view point is that the entitlement of the children and other inheritors to this right should be limited to 60 years only. Because the maximum period that Islamic jurisprudence set for permission of monopolizing a land for the purpose of improving it is up to 60 years (Fathi, 1984).

After the expiry of this period, the ownership of the intellectual property revert from individual right to public right belonging to the public authority. But, the individual moral or literary right is still reserved for the author for it resembles to the document of lineage.

FINANCIAL RIGHT OF INTELLECTUAL PROPERTY

The right is an established thing that the lawgiver has bestowed upon a person and remain in his/her possession, exclusively. This can be related to property, any thing that can be possessed and has a legally valid value (Ahmed, 1989).

Individual's right of property implies his/her ownership of the property. Ownership is a legal entitlement that is attached to corpus of the property or its utility which requires authorization of the owner to derive utility from it. Majority of the jurists consider utility derived from the corpus of the property as property too, based on the logic of proprietorship which is derivation of benefit or utility. However, the Hanafi school of thought does not agree with majority's view in this regard. For, they do not consider something as property unless its possession is possible. Therefore, according to them, utility and rights due to absence of the element of possession cannot be considered as property.

Custom is the avenue where the intellectual property has its root. Custom according to jurists is the source of the law where no specific text is available. Public interest also can be used to serve the same end. Intellectual property can be compared to trees and their fruits or its alike from the aspect that all of them are utilities derived from their principal. It cannot be compared to the utilities derived from real estate and immovable property for their utility are such that cannot be separated from them. Therefore, the contract of sale and purchase is applicable to them and not that of lease or hiring (Fathi, 1984).

Modern jurists with regard to the issue of intellectual property right has been divided into two groups: those in favour of the permissibility of intellectual property right and those against such permission. Those in favour of intellectual property right base their argument on the different reasons:

Intellectual property is the right possessed by its owner by virtue of its original possession. Originally, the publication and innovation, the product of intellect is a right that is equally available to the qualified individuals. Hence, whoever precede others in production of intellectual property, it becomes his sole right, therefore entitled to the its financial proceeds (Baker, 1996).

It is narrated by Ibn Abbas that the Prophet (Peace Be Upon Him) said:

The most deserving thing for which you are authorized to take payment is the Book of Allah

If the Prophet (PBUH) has permitted taking payment for teaching the Holy Qur'an then to take payment for other things should be permissible too without any objection (Al-Bukhaari, 1987).

Sahl Ibn Saad Al-Saadi narrates; A woman came to the Messenger (Peace Be Upon Him) of Allah and said: O' Messenger of Allah, I offer my self in marriage to you, then the Prophet (PBUH) looked up to her then lowered his head when the woman saw that he did not say anything, she sat down. In the meantime, a man stood up from among his companions and said, O' Messenger of God if you do not need her marry her to me. The Prophet (PBUH) said: Do you possess anything? The man replied no then the Prophet (PBUH) asked to go home and look for something. He went to his house and returned to the Prophet (PBUH) empty handed saying, i could not find anything oh' Messenger (PBUH) of Allah, the Prophet (PBUH) said; even a ring made of metal. He went home again to look for a metal ring then returned and said; by Allah, I could not find even a metal ring but this, izar a piece of cloth for lower part of body half of it for her. The Prophet (PBUH) said; if you wear your izar she would not have something to wear if she wears it you would have nothing to wear. The man sat down for quite sometime then he got up. When the Prophet (PBUH) observed him leaving, he asked him to wait and told him you have anything from the Quran, he replied I have so and so of the Chapter of the Quran. The Prophet (PBUH) asked have you memorized them he said yes. The Prophet (PBUH) told him now she is in return for teaching her the Quran (Al-Bukhaari, 1987). If the Messenger of Allah has permitted the teaching of Quran to substitute the dowry in this case, it should definitely be allowed to take payment for teaching as well as spreading knowledge through publication.

Intellectual property embodies physical and mental efforts. The Prophet (PBUH) was asked which kind of earning is best? His reply was the work which a person carry out with his hands, physical effort and a good conduct of sale and purchase. Thus, all the permissible efforts carried out with hands and is the source of one's income is the best kind of his earning (Hanbal, 1989).

Books and writings of scientific value can be considered as property. As a matter of principle property belongs to its rightful owner, there is no evidence to the effect of which this principle can be restricted. Therefore, intellectual property right cannot be denied.

There is a legal maxim which states: warding off evil precedes the attainment of benefits. Also the legal

principle of blocking the means leading to evil, both collectively imply concession of financial right for the owner of the intellectual property. This is because if such concession is not made for the author's publication, nobody in the contemporary era would like to be engaged in publication and assimilation of knowledge except few. Therefore, the provision of financial incentive, financial right for authors become necessary. For, this would facilitate a conducive environment for the authors and researchers to carry out their endeavor with convenience and peace of mind, hence leading to enhancement of knowledge and its assimilation (Baker, 1996; Ahmed, 2006). However, the opponents of the intellectual property right have their own reasons as follow:

The endeavors of authors and innovators are intellectual efforts which are intangible, do not have physical entity, therefore cannot be possessed as such they cannot be considered as property. This view is held by the classic scholars of the Hanafi school of thought and those of the contemporary scholars influenced by them (Fathi, 1984).

Publication and innovations both are a kind of *ijtihad*, mental exertion, therefore, cannot be considered as an object of possession.

Consideration of intellectual property as financial right implies that if the author does not take his financial right, it is permissible for him to prevent his knowledge from being spread, this is tantamount to hiding knowledge an act condemned by Allah (SWT) and His apostle as is stated in Qur'an:

Those who conceal the clear (Signs) We have sent down and the Guidance, after We have made it clear for the People in the Book, on them shall be God's curse and the curse of those entitled to curse (Qur'an, 2:159). Except those who repent and make amends and openly declare (the truth): To them I turn; for I am Oft-Returning, Most Merciful (Qur'an, 2:160)

And also the tradition narrated by Abu Hurairah that the Prophet (Peace Be Upon Him) said: He who conceals his knowledge that he learn from other will appear in the resurrection day his mouth bridled with a piece of fire (Hanbal, 1989).

Innovation and publications is a duty of every capable person. It is considered as *ibadah*, an act of worship by Allah (SWT). It entitles one to reward from Allah (SWT) both in this world and the next world. Thus, a thing of such nature cannot be made as a source of financial return in this world, for it invalidates its status as an act of worship, hence lead to the deprivation from reward in the hereafter.

Preferrable opinion: The first view which holds the owner of intellectual property to be entitled to financial right is preferable. This is the view of the majority of the classic and contemporary scholars. However as regard to the arguments of the opponants of intellectual property right, their evidences can be refuted as described in this study:

REFUTATION OF THE OPPONENTS EVIDENCES

Refutation of the first evidence: Specialization in many cases of the Shari'ah rulings is deemed to represent physical entity. For example, debt is an abstract thing does not have physical entity, not something physical but abstract that is established for a person. This is because some property can be possessed physically while other cannot due to its nature and kind. Therefore, Islamic law does not make physical possession as a sole criterion for its validity, for such a requirement would place it next to the impossible which is negated from legal obligation. As long as the possibility of derivation of benefit from it is there, it should be given legal consideration. Islamic law means by specialization the benefits that substitute physical possession (Ahmed, 2006). Thus, intellectual property or output is of the latter type where specialization substitute physical possession. In addition, some of the latest scholars of the Hanafi school have permitted financial compensation in lieu of retirement, a fact that implies consideration of moral right as property.

Refutation of the second evidence: Intellectual effort or thinking is not exchangeable, for, it is a gift from Allah (SWT). In other words, intellectual output being the result of intellectual exercise is something different from the intellect itself as is the case with tree and its fruits. Thus, the right of authorship of intellectual property is related to the intellectual exercise which is the act of intelligence. Rather, it is related to the outcome of these efforts that manifest in innovations that human intellect produces.

Refutation of the third evidence: The verse and the Hadith cited by the opponents of the intellectual property right do not contain any prohibition of financial right for intellectual property. They only warn against hiding knowledge due to the fear from a cruel ruler/sultan or because of his own whim and desire. However, financial right of intellectual property is acknowledged by Islamic law. The demand for such right is not tantamount to hiding knowledge or its monopoly. Not taking financial right for intellectual property will gradually lead to abandonment and neglect of knowledge, hence its loss.

Refutation of the fourth evidence: Intention is the basis of acceptance of worship of God and its reward by Him. When a person perform an act for the sake of Allah, he will be rewarded for it both in this world and the hereafter. There is no harm in intending two things in an act of worship as long as it does not violate legal norms. Therefore, the financial right of intellectual property does not contradict its being an act of worship and good deed. It rather can be considered as blessing of Allah (SWT), a source of derivation of author's livelihood. It resembles to struggle in the path of Allah (SWT) which does not negate a struggler's entitlement to the bounties and spoils of war. This can also be likened to payment of leading prayer or undertaking the call for it and the teaching of Qur'an and the similar act of worship. Since, all these are permissible the financial right of intellectual property should also be considered permissible based on this analogy.

THE POSITION OF ISLAMIC FIQH COUNCIL

The Islamic Fiqh Council in its 5th session, held in Kuwait in 1409 AH, 1988 in the light of researches and documents presented by members and experts of the council regarding moral right, made the following decisions:

- Business name, address, trade mark, publication, innovation and creativity are private property of their owners. In the contemporary usage and custom, they have financial value due to incurring financial cost, therefore are legally valid, hence cannot be violated
- Possession of business name, trade mark and business address and their transfer with a financial return, provided causing no harm or involving no cheating and deception is legally permissible due to their consideration as financial rights
- Intellectual property rights; copy right, invention and innovation are protected legally. Their owners are entitled to their use and possession exclusively, therefore cannot be violated

INTELLECTUAL PROPERTY RIGHTS AND GLOBALIZATION

Globalization as a new world order has shown a great interest in intellectual property right. It has established various agreement for the protection of intellectual property. The earliest agreement established in this regard was in Paris in 1883 which included the protection of intellectual property. Subsequently, it was emended with some other international resolutions. This was followed

by Rome agreement in 1961 and Berlin agreement in 1986 and the Washington agreement in 1989. Henceforth, came the GATT agreement in 1993 at (Stockholm) recognizing the protection of intellectual property right. A total of 142 countries participated in this year agreement from among them were 12 Arab countries.

The latest international agreement for the protection of intellectual property right which is the most evident and significant in the history of globalization is (TRIPS) agreement. Its importance lays in the fact that it included 68 articles all relating to the protection of intellectual property right. And the business section of the Uruguay agreement which lead to the establishment of World Trade Organization (WTO) (Abdul-Sattar, 1998).

The most evident criteria representing or underscoring intellectual property right are as follow:

- Dealing decisively with the violators of intellectual property right and working out the more effective ways to prevent such crime and deterring them
- Procedural fairness and simplification with reduced cost and long terms objective not short terms ones without due justification
- Publicity of relevant judiciary decisions and its excessibility with ease
- Getting on with legal procedures even in the absence of the litigent party and the confiscation of the illegally produced material and imposition of heavy penalties on violaters

Various quarters have been tasked with observing and monitoring the situation to make sure that all articles of the the GATT agreement are implemented by all member countries. And to monitor the extent of the compliance of the member countries with their obligation as is stated in Article 68 of the TRIBS agreement. It is significant to remember that the agreement provided for two important things namely:

- Consideration of Computer (PC) as literary rights
- Prevention of renting computer software programs

It seems that the enclosure of computer programs within the literary works primarily aim at long term benefits from projection of such legal protection. For, the developing countries are spending enormous amount of money for importing advance technology in order to embark on scientific development (Mustafa, 1999).

Egypt is the first Arab country which have focused on enacting laws for protection of intellectual property rights. This is clear from the issuance of the law relating to intellectual property rights for the first time in 1954,

represented in Article 354 and it was amended in 1992 by some provisions, provided by Article 38 of and its executive order (Abdul-Sattar, 1998).

INTELLECTUAL PROPERTY RIGHTS AND ISLAMIC ECONOMIC SYSTEM

It is a dominant trend of globalization to spread a specific global culture with certain characteristic, sabotaging other cultures of deep historical and civilizational backgrounds. Since Islamic culture is not an exception to such a trend, it therefore become imperative on Muslims to look for alternatives that suit to their context and not to be melted in the alien culture of no civilizational characteristic. There is no justification for not doing so, considering the enormous scale of human, natural, moral and literary resources that Muslim nations possess.

It is hoped that this could serve as factor motivating the Muslims through out the world to capitalize on the sources available to them. And improve their skill and invest in the field of knowledge. For, investment in field of scientific research is the most profitable one. If we look at developed countries, we find that they spend generously in the field of scientific research while Muslim countries spend a very insignificant amount in the field of scientific research. A recent report published by a researcher show that Arab countries spend 1USD per each person in the field of scientific research whereas the United States of America spend 700USD per person in the field of scientific research. And the European countries spend 600USD for every individual citizen in this field.

In order to address these problems in the light of Islamic economy, it is necessary to address the pattern of luxurious consumerism that globalization is embarked on its promotion, especially in the area of publication creativity and innovation. This hideous monopoly by countries possessing modern technology and skills should serve us as a wake up call to work harder for attainment of a fully developed system of technological advancement in this era of globalization, An era marked with ever increasing economic challenges, regionalism and nationalism.

Being under the siege of global pleasure, Muslim nations should work out on provision of conducive environment for innovation of their own and should not resigned to indifference and take active part in this respect. This is because the international factors of competition represent this tendency even in the most advanced countries of the world. It is from this vantage

point that the enhancement of this tendencies become pressing strategically and constitute priority in every country. Innovation and advancement become one of the basic element of educational program. The primary objective of these programs is to stir attention of the children and students by using supporting education means, experimental steps, informational principles, logical approaches and finally fully developed innovational examples (Abbas, 1999).

CONCLUSION

After an exhaustive analysis but interesting study of the topic, it can be concluded that Islamic law and its counter part, man-made law, respect and recognize intellectual property right from both moral and financial aspects irrespective of the place of its origin whether it is in Muslim, Arab countries or in the Western countries. The literary right of intellectual property is undisputedly acknowledged in the past and at the present. Whereas, the financial right of intellectual property is an agreed upon matter not in Arab and Muslim world but also in West, even the whole world. Globalization is striving to dominate the whole world through the control of the economy and by paying attention to enactment of laws and signing agreements to benefit from both technological and cultural superiority of others. Islamic economics caution against attempts that try to circumvent the capabilities of the ummah and the elimination of the signs of its identity. It, therefore, provide some solutions by suggesting adaptation of the positive aspects of the globalization and the eradication of its negative aspects. Islamic economics draws attention to the manipulation of existing technological disparity by developed country in destabilizing the market in developing countries from among which is Muslim world. It is for this reason that Islamic economics draw attention to the importance of investment in scientific research and the modernization of educational system to enhance the instinct of innovation and creativity and hence stand up to the challenges.

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