

Theory of Rights in Islamic Economic Law and Its Relation to Intellectual Property Rights

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Abstract

The study of the theory of rights in Islamic economic law and its relation to intellectual property rights is an outpouring of ideas from the author. That in this research, although the term Intellectual Property Rights (IPR) is not known in the turats books, basically this is part of the theory of rights in fiqh muamalah, namely haq al-ibtikar. Haq al-ibtikar is an extraordinary privilege for a creation that was first created by a scientist through his way of thinking or his analysis as outlined in a work. For example, such as writing, books, videos, or other media. The research method used in this article is a qualitative approach, which is done by researching library materials which are secondary data and then described based on the analysis of the data. The results of this research are that copyright is legally protected from an Islamic point of view, and copyright infringement is seen as a violation of property or assets, so the legal sanctions are the same as sanctions for theft of property or property belonging to others. However, it should be emphasized that in Islam only recognizes and protects copyrighted works that are in harmony with the norms and values contained in them. If the copyrighted work is contrary to Islamic values, then it is not recognized as a copyrighted work, even protection for copyrighted works does not even exist and is not legal

to protect. In Indonesia, the rules regarding haq al-ibtikar are regulated in UUU No. 28/2014 concerning Copyright.

Keywords: *Theory of Rights; Islamic Economic Law; Copyright*

Abstrak

Kajian tentang teori hak dalam hukum ekonomi syariah serta kaitannya dengan hak kekayaan intelektual merupakan sebuah curahan dan gagasan pemikiran dari penulis. Bahwasannya dalam kajian ini, walaupun istilah Hak Kekayaan Intelektual (HKI) tidak dikenal dalam kitab-kitab turats, pada dasarnya ini merupakan bagian dari teori hak yang ada dalam fiqh muamalah, yaitu haq al-ibtikar. Haq al-ibtikar adalah suatu keistimewaan yang luar biasa atas suatu ciptaan yang pertama kali dibuat yang dihasilkan oleh seorang ilmuwan melalui jalan pemikirannya atau analisisnya yang dituangkan dalam suatu karya. Misalnya seperti tulisan, buku, video, atau media lainnya. Metode penelitian yang digunakan dalam artikel ini adalah dengan pendekatan kualitatif, yang dilakukan dengan cara meneliti bahan pustaka yang merupakan data sekunder lalu kemudian dideskripsikan berdasarkan analisis data tersebut. Hasil dari kajian ini adalah secara hukum hak cipta dalam sudut pandang Islam dilindungi keberadaannya, dan pelanggaran terhadap hak cipta dipandang sebagai pelanggaran terhadap properti atau harta kekayaan, sehingga sanksi hukumnya sama seperti halnya sanksi terhadap pencurian harta atau benda milik orang lain. Namun perlu dipertegas bahwasannya dalam Islam hanya mengakui dan melindungi karya cipta yang selaras dengan norma dan nilai yang ada di dalamnya. Jika karya cipta tersebut bertentangan dengan nilai-nilai Islam, maka ia tidak diakui sebagai karya cipta, bahkan perlindungan terhadap karya cipta pun tidak ada bahkan tidak sah untuk dilindungi. Di Indoensia aturan tentang haq al-ibtikar di atur dalam UUU No. 28/2014 tentang Hak Cipta.

Kata Kunci: *Teori Hak; Hukum Ekonomi Syariah; Hak Cipta*

Introduction

Before someone starts living with society and before the relationship between one individual and another develops, maybe we will not know what called rights. Every human being who lives in society needs each other in dealing with various kinds of needs. To meet these needs, someone needs to find what they need, whether they are obtained from themselves, or obtained from other people's property. Thus, conflicts will arise.

So to manage the interests of each need the rules that regulate human needs. The goal is that these humans do not violate the rights

of others, nor do they violate the independence of others. The rules that are needed are rules that regulate human rights so that human needs are not violated by others, and so that humans do not violate the rights of others.¹

Islamic jurisprudence has established several rules, and several laws, both of which are basic rules and branches in a very perfect way that has never been known by other *tasyri'*. One of them is *nazariyatul haq* or it can be said also with the term *fikriyaftul haq*.²

Theoretically, the notion of rights is the specificity set by the *syara'* on power.³ In *fiqh muamalah*, the discussion of rights is always juxtaposed with the concept of property in Arabic termed "*al-milk*". Etymologically means mastery of something or something that is owned (wealth).⁴ The definition of ownership is the specificity of the property of an object according to the *syara'* to act freely to take advantage of the goods as long as there is no *syara'* barrier. This means that if someone already has the right to own an asset, then that person has the power and authority to take action on the property he owns.⁵

Property rights in the context of *fiqh*, it has been widely discussed in various Islamic legal literature, both in classical *fiqh* books, as well as modern *fiqh* books. However, one aspect of business law that has not been touched much is intellectual property rights, which in Indonesian translation means intellectual property rights or what is currently better known as Intellectual Property Rights (IPR). In general, IPR can be understood as the right that an individual has over his intellectual work, including to enjoy the material and/or non-material consequences of that work.⁶ For example, copyright in

¹Nita Triana, "Menggagas Hak Kekayaan Intelektual Perspektif Hukum Islam Ke Dalam Hukum Nasional," *Al-Manahij: Jurnal Kajian Hukum Islam* 12, no. 2 (2018): 181, <https://doi.org/10.24090/mnh.v12i2.1747>.

²Miftakhul Huda, "Konsep Dan Kedudukan Hak Kekayaan Intelektual Dalam Hukum Islam," *Salimiya: Jurnal Studi Ilmu Keagamaan Islam* 1, no. 1 (2020): 39, <https://ejournal.iaifa.ac.id/index.php/salimiya/article/view/87>.

³Abdul Rahman Ghazaly, *Fiqh Muamalat* (Jakarta: Kencana Prenada Media Group, 2012), 96.

⁴*Ibid.*

⁵Andri Soemitra, *Hukum Ekonomi Syariah Dan Fiqh Muamalah Di Lembaga Keuangan Dan Bisnis Kontemporer* (Jakarta: Kencana Prenada Media Group, 2019), 22.

⁶Irma Sylviyani Herdian, "Sengketa Kepemilikan Hak Kekayaan Intelektual Sebagai Harta Bersama Dalam Kasus Perceraian," *Aktualita: Jurnal Hukum* 3, no. 1 (2020):

composing, composing music, creating books, producing scientific publications, and so on so that the royalties from the results of the song or book become the rights of the creator of the song or book.⁷

So related to the above background, the researcher will explain the theory of rights in Islamic economic law and its relation to Intellectual Property Rights (IPR). It is important to explain, because intellectual property rights are closely related to other legal aspects, such as technological, economic, and artistic aspects. there's even an Italian model designer named Pierre Cardin,⁸ who came to Indonesia to ask the Indonesian government to pay more attention to someone's work not to piracy "*what I want*". In general, Intellectual Property Rights (IPR) in Indonesia are protected and there is a legal standing. For copyright, there is UU No. 28/2014, regarding patent rights, there is UU No. 13/2016, regarding trademark rights, there is UU No. 20/2016, regarding trade secrets, there is UU No. 30/2000, and so on.⁹

In this regard, the researcher will focus this research on the theory of rights in Islamic law and the discussion of intellectual property rights regarding copyright only, does not discuss intellectual property rights as a whole. The formulation of the problem that can be taken in this research is, what is the view of copyright in the study of Islamic economic law? Is copyright pre-regulated in classical books or Islamic literature and what are the challenges of Islamic law regarding copyright?

This research must be discussed to serve as reference material and discussion material for academics and also as implementation material for practitioners, especially practitioners in the field of Islamic business law. This paper begins by discussing the origins of rights in the study of Islamic economic law, discussing the terms and pillars of rights, and the various rights in Islamic law. Next, discuss Intellectual Property Rights (IPR) in general, then discuss the

398, <https://doi.org/10.29313/aktualita.v0i0.6038>.

⁷Indonesia, "Undang-Undang Republik Indonesia Nomor 28 Tahun 2014 Tentang Hak Cipta," Direktorat Jenderal Peraturan Perundangan-Undangan, 2014, <https://peraturan.go.id/common/dokumen/ln/2014/uu28-2014bt.pdf>.

⁸Farida Hasyim, *Hukum Dagang* (Jakarta: Sinar Grafika, 2018), 184.

⁹DJKI, "Kompilasi Peraturan Perundangan Hak Kekayaan Intelektual (HKI)," Direktorat Jendral Kekayaan Intelektual Kementerian Hukum & HAM R.I., 2022, <https://www.dgip.go.id/unduh/kompilasi-pp?kategori=merek>.

distribution of Intellectual Property Rights (IPR) in Indonesian law, and finally discuss more specifically copyright and its legal basis in Indonesian laws and regulations.

Methodology

The research method used is a qualitative approach. The qualitative research method is inductive to gain understanding or meaning, developing theories, and describing complex realities, so that they include views on the reality of the object under research.¹⁰ While the type used in writing this journal is library research. Research with this method uses the process of collecting library data from several books and legal articles,¹¹ which discuss the theory of *haq al-ibtikar*, the law on Intellectual Property Rights (IPR), especially those related to copyright, journals, and other scientific works by reading, recording, and process this research material with related literature.¹²

The use of this literature study method is based on the condition of secondary data sources which are static and not limited by space and time. Secondary data from libraries that are ready to use are certainly very helpful for this research. Based on this method, the data collection used the documentation method.¹³ The analysis process is carried out continuously from start to finish.¹⁴ The analysis process in question includes data interpretation, language translation, word editing, and compiling them in a logical systematic way, so that the

¹⁰Hartijo Soemitro Ronny, *Metode Penelitian Hukum* (Yogyakarta: Thafa Media, 1994), 34.

¹¹Muhammad Irkham Firdaus et al., "Implementation of the Qardh Agreement on the Financial Technology Lending Platform in the Development of Small and Medium Enterprises (SME) in Indonesia," *Al-Iktisab: Journal of Islamic Economic Law* 6, no. 1 (2022): 67, <https://doi.org/10.21111/al-iktisab.v6i1.7774>.

¹²Sumadi Suryabrata, *Metode Penelitian* (Jakarta: PT Raja Grafindo Persada, 2011), 22.

¹³Devid Frastiawan Amir Sup, "Cessie Dalam Tinjauan Hukum Islam," *Jurisprudensi: Jurnal Ilmu Syariah, Perundangan-Undangan Dan Ekonomi Islam* 11, no. 1 (2019): 51, <https://doi.org/10.32505/jurisprudensi.v11i1.995>.

¹⁴Devid Frastiawan Amir Sup, "Government Efforts to Prevent Potential Violence Against Women During the Covid-19 Pandemic in Indonesia," *Syariah: Jurnal Hukum Dan Pemikiran* 21, no. 1 (2021): 106, <https://doi.org/10.18592/sjhp.v21i2.4146>.

resulting description can become a complete concept building that is easy to understand.^{15 16} Furthermore, ideas and rational expectations are the next steps in journal analysis by comparing the two different points of view, which is a method in journal writing analysis so that a conclusion is obtained to get the ideas in this research.

Results and Discussion

According to etymology, rights have several meanings, namely, they can be interpreted as objects, property, form, real, true, what is guarded, essence, or can also be concluded as permanent and mandatory or certain.¹⁷ In terminology, rights have two main meanings. *First*, “A collection of sharia rules and regulations that govern human relations with the obligation to obey human beings, both regarding personal and property”. According to the above definition, rights have the same meaning as the legal definition according to *fiqh* scholars, namely the decree of the maker of *syara’* or *al-qanun* (rules/laws).¹⁸ *Second*, “Power (over something) determined by *syara’* or obligatory demands for someone over another person”. This second understanding is what is meant by the provisions “The buyer has the right to return the goods he bought if it turns out that there is a disability and the legal actions of minors are the rights of his guardian”. This definition is the object of this research.¹⁹

The *fiqh* scholars argue that there are two pillars of rights, namely the owner of the right (the person who has the right) and the object of the right, both material and debt. The owner of the rights, in the view of Islamic law, is Allah Swt., whether it concerns religious rights, personal rights, or legal rights, such as associations, foundations, or what in *fiqh* terms is called *al-syakhsiiyyah al-i’tibariyyah*.

¹⁵Devid Frastiawan Amir Sup, “The State’s Efforts in Preserving the Environment Through Regulation,” *Sustainability: Theory, Practice and Policy* 1, no. 2 (2021): 204.

¹⁶Devid Frastiawan Amir Sup et al., “Dinamika Regulasi Sertifikasi Halal Di Indonesia,” *JESI (Jurnal Ekonomi Syariah Indonesia)* 10, no. 1 (2020): 37, [https://doi.org/10.21927/jesi.2020.10\(1\).36-44](https://doi.org/10.21927/jesi.2020.10(1).36-44).

¹⁷Ghazaly, *Fiqh Muamalat*, 45.

¹⁸Masduna Abdurrahman, *Pengantar Dan Asas-Asas Hukum Perdata Islam* (Surabaya: Central Media Surabaya, 1992), 70.

¹⁹*Ibid.*, 72.

A human being, according to the provisions of *syara'*, has had personal rights since he was a fetus and these rights can be fully utilized if the fetus is born into the world safely. These God given personal rights will expire with the death of the owner of the rights.²⁰

Various rights according to Islamic law: (1) In terms of the owner or terms of benefits: (a) God's right, are rights whose general use is comprehensive and not specific. To be associated with the name of Allah is because of its great importance and its benefit to all mankind. Obligations of servants to Allah through sharing good deeds, such as performing prayers, *zakat*, fasting, hajj, and admonishing good and evil; (b) Human rights, are a benefit or power that is intended for the special interests of the owner. For example, the right to receivables, the seller's right to the price of the goods sold, and the right to a living for the wife and others; (c) Shared rights, a combination of God's rights and human rights. *First*, namely mutual rights between God's rights and human rights but God's rights are more numerous, such as the "*qadzap*" punishment (accusations of adultery). *Second*, shared rights between God's rights and human rights but human rights are more numerous. Like "*qishas*" (*qishas* demands for revenge); (2) Judging from the point of view of whether or not it can be aborted. Rights are divided into two, namely rights that can be aborted and rights that cannot be aborted. Rights that can be aborted include *syuf'ah* rights, *khiyar* rights, namely the right to cancel or continue the sale and purchase agreement because of defects, *qishas* rights, and so on. Rights that cannot be aborted such as rights that cannot be aborted because the rights of other parties are still concerned, for example, *hadhanah* (childcare) rights for mothers who cannot be aborted because on the child's side they have the right to be cared for; (3) In terms of whether or not inheritance is possible, rights are divided into rights that can be inherited and rights that cannot be inherited. Inherited rights such as the seller's right to hold the goods sold before the price is paid off, the pawnee's right to hold the mortgaged goods, and so on. As for the rights that cannot be inherited, such as *syuf'ah* rights, *hadanah* rights, and guardianship rights; (4) In terms of its relationship with the domicile or owner, the

²⁰Mardani, *Hukum Bisnis Syariah* (Jakarta: Prenadamedia Group, 2014), 110.

rights are divided into *mujaradah* rights and *ghairu mujaradah* rights. *Mujaradah* rights are rights that are not determined at their domicile and will disappear with the abandonment, so depending on the owner it is used or not, such as *syuf'ah* rights, rotating rights for the wife. The rights of *ghairu mujaradah* are rights that are not like the *qishas* rights, the special rights of a husband over his wife; (5) Judging from the aspect of its relevance, namely whether it is related to objects or not, rights are divided into two, namely *maliyah* rights and *ghairu maliyah* rights. *Maliyah* rights are rights related to concrete objects, debts, and benefits. While the *ghairu maliyah* rights are rights that are not related to objects, such as the rights of guardians over children or people under guardianship, political rights such as the right to vote and be elected, human rights such as the right to independence. The right of *maliyah* is divided into two, namely the right of *syakhshi* and the right of *'aini*. First, the right of *syakhshi* is a demand that is determined by the *syara'* for someone against another person. This right is sometimes related to the obligation to carry out an action that has value for the benefit of the owner of the right, such as in a sale and purchase agreement, the seller has the right to the price that must be submitted by the buyer and the buyer himself has the right to the goods that must be submitted by the seller. These two rights are rights that arise because of the direct relationship between a person and a certain object. An example of this right is, for example, property rights. The owner of the object has direct power over the object owned. Therefore, there is no need for another party, just the owner and the object. So this right has two elements, namely the owner of the right and the object of the right, namely objects. In contrast to the *syakhshi* rights, in addition to these two elements, a third element is needed, namely the party being sued (the debtor).²¹

When we talk about ownership, we also talk about rights at the same time, considering that ownership means the rights that a person has over an object or property. The terms rights and property are two terms that cannot be separated from each other. Rights are part of a person's possession of an object that he can use according to his needs

²¹Soemitra, *Hukum Ekonomi Syariah Dan Fiqh Muamalah Di Lembaga Keuangan Dan Bisnis Kontemporer*, 23.

without the need to ask permission from others to use it. So in familiar language, we often mention the term “*property*”. *Al-milk* comes from Arabic which etymologically means mastery of something. *Al-milk* also means something owned.²² Meanwhile, in terms of ownership, the property is manifesting power in a person over the wealth he has by using a certain mechanism, so that ownership is made as a right according to *syara’* given to someone.²³

Ownership in Islam can be divided into three groups, namely individual ownership, public ownership, and state ownership. The researcher will describe in detail related to this ownership category in: (1) Individual ownership, in English referred to as “*private property*”, is a sharia legal provision that applies to certain substances or benefits (services), which allows anyone who gets them to take advantage of the goods, as well as obtain compensation when the goods are used by other people. others, such as being rented or purchased from the item. Another understanding of ownership is to manifest power over the wealth it has by using certain mechanisms so that ownership becomes a *syara’* right given to someone. Therefore everyone can have wealth with certain causes or ways of ownership; (2) Public ownership, in English referred to as “*collective property*”, is a *syar’i* permission to a community to jointly use objects. Objects that are included in the category of public ownership are objects that have been declared by Allah and *Rasulullah* that these objects are for a community where they each need each other. Objects that are included in public ownership are as follows: (a) Objects that are public facilities. If it does not exist in a country or a community it will cause difficulties. For example water, fire, and sea; (b) A very large amount of minerals; (c) Objects whose formative nature prevents them from being owned only by individuals;²⁴ (3) State ownership, assets that include state ownership are assets that are the rights of all Muslims whose management is under the authority of the state. In its management, the state can give to some citizens according to its policies. The meaning of management by the state is the power

²²Ghazaly, *Fiqh Muamalat*, 46.

²³Fathurrahman Djamil, *Hukum Ekonomi Islam: Sejarah Teori Dan Konsep* (Jakarta: Sinar Grafika, 2013), 196.

²⁴*Ibid.*, 201.

possessed by the state to manage it, for example, property *fai*, *kharaj*, *jizyah*, and so on.²⁵ If in the current context of Indonesia, such as tax management, APBN, BUMN, and so on.

The *fiqh* scholars state that there are several ways to own property that are prescribed by Islam, including the following: (1) Through the control of assets that are not owned by a person or other legal institutions which in Islam are called permissible assets. Examples are rocks in a river that are not owned by a person or legal institution. If someone takes the stones and sand from the river and brings them to his house, the stones and sand become his, and other people cannot take the stones and sand that he has mastered; (2) Through a transaction that he does with other people or legal institutions, or it can be said through a contract. such as buying and selling, grants, leases, and waqf. This transaction is often used by the community so that the object becomes theirs. Ownership can be obtained through transactions made by one person with another. The transactions carried out can be in the form of transactions in the form of exchanges or transactions in the form of mixtures; (3) Through one's legacy, such as receiving an inheritance from his deceased heirs. Inheritance is a means of obtaining ownership. Whoever receives the inheritance then legally has the right to the property. A person who gets property through inheritance is free to use his property according to his will because he already has the inheritance; (4) The results/fruits of property that a person has, whether the results come naturally, such as the fruit of a tree in the garden, a calf born from its mother, or through an owner's business. Such as the results of his efforts as a worker, as an employee, and as a thinker who produces a creation or trade profits obtained from a trader;²⁶ (5) Voluntary giving is one of the causes of ownership. Voluntary giving is a gift from a person or one party to another without compensation for any assets or labor but based on the willingness of the party who gives. The provision can be in the form of a grant contract, *infaq*, waqf gifts, and so on by sharia provisions.²⁷

²⁵*Ibid.*, 208.

²⁶Ghazaly, *Fiqh Muamalat*, 48.

²⁷Djamil, *Hukum Ekonomi Islam: Sejarah Teori Dan Konsep*, 216.

Intellectual property rights in classical *fiqh* literature are not as well known as those in the current Indonesian legislation, so we will not find the study in the *turats* books.²⁸ But this intellectual property right was born in the west after the invention of the printing press. The birth of IPR was due to a business competition between book publishers at that time, so to maintain the originality of a book and not just print it en masse, the author's works were protected by the term copyright.²⁹ The Berne Convention for the Protection of Artistic and Literary Works in 1886 AD was the first to regulate copyright issues between sovereign countries. In this convention, it is granted automatically to copyrighted works and authors do not have to register their works to get copyright. As soon as a work is printed or stored in one medium, the author gets exclusive copyright rights to the work, until the author explicitly states otherwise or until the copyright period expires.³⁰

In the context of Indonesia, in general, IPR is divided into two types, namely copyright and industrial property rights. Copyright is regulated in UU No. 28/2014. However, there are several parts of industrial property rights, including patent rights regulated in UU No. 13/2016, trademark rights are regulated in UU No. 20/2016, industrial design is regulated in UU No. 31/2000, integrated circuits are regulated in UU No. 32/2000, trade secrets are regulated in UU No. 30/2000, and plant varieties are regulated in UU No. 29/2000.³¹

The researcher, in describing this article, will focus more on the discussion of intellectual property rights regarding copyright only. The researcher does not further discuss intellectual property rights in general. Such as industrial property rights, which include trademark rights, patent rights, trade secret rights, and so on.

Copyright in Islamic studies is known as *haq al-ibitakar*.³² This word consists of two series of words, namely the pronunciation of

²⁸Ahmad Sarwat, *Ensiklopedia Fikih Indonesia: Muamalat* (Jakarta: PT Gramedia Pustaka Utama, 2018), 429.

²⁹*Ibid.*, 432.

³⁰*Ibid.*, 433.

³¹DJKI, "Kompilasi Peraturan Perundangan Hak Kekayaan Intelektual (HKI)."

³²Yandi Maryandi, "Sanksi Pelanggaran Hak Cipta Menurut Hukum Pidana Islam Dan Hukum Positif Di Indonesia," *Tahkim: Jurnal Peradaban Dan Hukum Islam* 2, no. 2 (2019): 23, <https://doi.org/10.29313/tahkim.v2i2.5113>.

"*haq*" and "*al-ibtikar*". Among the meanings of "*haq*" is the specificity possessed by a person or group of people or a newly created creation (*al-ibtikar*). The word "*al-ibtikar*" etymologically comes from Arabic in the form of *masdar isim*. The past tense verb (*fi'il madhi*) of this word is "*ibtikara*" which means to create. If it says "*ibtikara al-shai'a*" it means that he has created something. Meanwhile, according to terminology, *haq al-ibtikar* is "*the privilege of a creation that was first created*".³³ According UU No. 28/2014 concerning Copyright, it is stated that, "*Copyright is the exclusive right of the creator that arises automatically based on declarative principles after a work is realized in a tangible form without reducing restrictions by the provisions of laws and regulations*".³⁴

Ownership of copyright in this copyright law is essentially the right to become the copyright holder is the creator. The party considered as the creator is the person whose name is registered in the general register of creation at the directorate general of the Ministry of Law and Human Rights of the Republic of Indonesia. If a creation consists of several separate parts created by two or more people, then it is considered as the creator is the person who leads and oversees the completion of the entire creation. However, if there is no such person, then the one who is considered the creator is the person who collected it without reducing the respective copyrights for that part of his creation.³⁵

In classical Islamic law, there is no discussion of copyright, especially at the beginning of the formation of Islamic law. Basically, in the past, scholars and scientists worked with one goal, namely seeking the pleasure of Allah Swt. Without wanting to get profit or wealth. The history and development of copyright took place outside the Islamic world, namely at the beginning of the 19th century AD. This is what makes Muslim scholars claim that the concept of copyright comes from capitalists who are too concerned with material. In its early history, several Islamic countries have issued

³³Fathi Al-Duraini, *Haq Al-Ibtikar Fi Al-Fiqh Al-Islami Al-Muqaran* (Beirut: Mu'assasah Al-Risalah, 1984), 20.

³⁴Indonesia, "Undang-Undang Republik Indonesia Nomor 28 Tahun 2014 Tentang Hak Cipta."

³⁵Burhanuddin S., *Hukum Bisnis Syariah* (Yogyakarta: UII Press, 2011), 213.

regulations regarding copyright protection, among these countries are: (1) The Ottoman Caliphate in 1910 had issued the *Qonun Haq Al-Ta'lif* (writing copyright law); and (2) Morocco 1916 enacted the *Qonun Al-Maghribi* (Morocco Law). Because there is no discussion from classical scholars, contemporary Muslim scholars (new things at this time) discuss it within the scope of *masail fihiyah* (contemporary *fiqh* studies). Fathi Al-Dhuraini discusses specifically in his book *Al-Fiqh Al-Islami Al-Muqaran Ma'a Al-Mazahib* in the chapter *Haq Al-Ibtikar Fi Al-Fiqh Al-Islami Al-Muqaran*. He said that there had not been a single scholar who discussed this issue in detail in previous times, except for Imam Al-Qarafi (d.684 H/1285 AD) in the book of *Al-Furuq*.³⁶

Based on its history, the concept of copyright is the product of a thought that grew and developed in non-Islamic areas, where at first it was only protection for book publishers, but after being dominated by capitalist understanding.³⁷ This concept then spread to all corners of the world and entered the treasures of Islamic law. Islam with its universal legal character provides answers to this problem. Islam has its concept of copyright which is different from other ideologies.³⁸

The majority of scholars from the *Imam* schools of thought, such as Maliki, Syafi'i, and Hanbali believe that copyright for original creations and benefits are classified as valuable assets as objects if they can be used according to *syara'* (Islamic law).³⁹ About authorship rights (*haqq al-ta'lif*) as part of copyright, Zuhaili asserts, "*Based on the case (that the right of authorship is a right protected by syara' (Islamic law) based on qidah istihlah, reprinting or copying a book (without legal permission) is considered a violation or crime against the author's rights, in the sense that the act is a disobedience*", which causes sin in the view of *syara'* and constitutes theft which requires compensation for the author's rights to the manuscript which was printed unlawfully and unjustly, as well as causing moral loss to him.⁴⁰

³⁶Al-Duraini, *Haqq Al-Ibtikar Fi Al-Fiqh Al-Islami Al-Muqaran*, 20.

³⁷Huda, "Konsep Dan Kedudukan Hak Kekayaan Intelektual Dalam Hukum Islam," 36.

³⁸Sarwat, *Ensiklopedia Fikih Indonesia: Muamalat*, 432.

³⁹Al-Duraini, *Haqq Al-Ibtikar Fi Al-Fiqh Al-Islami Al-Muqaran*, 20.

⁴⁰Wahbah Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu Juz 4* (Damascus: Dar al-Fikr, 2008), 2862.

In Indonesia itself related to intellectual property rights, the Indonesian Ulema Council (MUI) issued a *fatwa* on the protection of intellectual property rights at the VII National Meeting on 19-22 Jumadil Akhir 1426 H. Coinciding with 26-29 July 2005 AD. The *fatwa* stated that violation of intellectual property rights is an injustice and the law is unlawful. In the *fatwa*, intellectual property includes various intellectual property rights including protection of copyrights because intellectual property rights are seen as one of the *huquq maliyyah* (property rights) that receive legal protection (*mashum*) as *mal* (wealth).⁴¹

As for the legal basis for the enactment of intellectual property rights, including in the Qur'an surah An-Nisa' verse 29, "O you who believe, do not eat each other's property in a vanity way, except by way of commerce which is carried out with mutual consent between you. And do not kill yourself, verily Allah is most merciful to you". In the *hadith*, «A Muslim is a Muslim brother (another), he should not oppress and insult him". In another *hadith*, violation of the rights of others is a criminal act, emphasized by the Prophet, "Every Muslim against another Muslim is forbidden his blood, wealth, and honor".⁴²

The concept of copyright in Islam is different from the concept of copyright in other systems. Islam as a religion that is by human nature always prioritizes the benefit of humans,⁴³ so that everything that will damage human nature then Islam takes preventive action in the form of a prohibition to approach it or provide justification that it is prohibited (*haram* or *makruh*).

From this, it can be said that Islam only recognizes and protects copyrighted works that are in harmony with the norms and values contained in them.⁴⁴ If the copyrighted work is contrary to Islamic

⁴¹MUI, "Fatwa Majelis Ulama Indonesia Nomor: 1/MUNAS VII/MUI/5/2005 Tentang Perlindungan Hak Kekayaan Intelektual (HKI)," Majelis Ulama Indonesia, 2005, <https://mui.or.id/wp-content/uploads/files/fatwa/37.-Perlindungan-Hak-Kekayaan-Intelektual.pdf>.

⁴²Muslim, *Shahih Muslim* (Beirut: Dar Al-Fikr, 1993), 517.

⁴³Ade Hidayat, "Konsep HAKI Dalam Hukum Islam Dan Implementasinya Bagi Perlindungan Hak Merek Di Indonesia," *Adliya: Jurnal Hukum Dan Kemanusiaan* 8, no. 1 (2020): 176, <https://doi.org/10.15575/adliya.v8i1.8626>.

⁴⁴MUI, "Fatwa Majelis Ulama Indonesia Nomor: 1/MUNAS VII/MUI/5/2005 Tentang Perlindungan Hak Kekayaan Intelektual (HKI)."

values, then it is not recognized as a copyrighted work and there is no protection for the copyrighted work.

For example, creative works that lead to polytheism, such as idols, paintings that reveal genitalia, books containing various shirks, deifications, inviting major sins, songs that invite disobedience, and others. All these types of “*invented works*” are not recognized as copyrighted works in Islam, more specifically, these copyrighted works must be kept away from and destroyed from Islamic society. Thus the protection of copyright in Islam has conditions that must be met so that a copyrighted work can be recognized as ownership rights over the property. These requirements are closely related to the copyrighted work which is a medium for pouring out the creator’s ideas.

Among the conditions are: (1) It does not contain *haram* elements in it such as *khamr*, usury, gambling, pork, blood, and carrion; (2) Do not cause damage to society such as pornography, violence, inviting people to sin, destroying the environment, and so on; (3) Does not conflict with Islamic law in general, such as making idols to be worshiped by humans, pictures that damage morals, books that teach heretical teachings, deviations from *manhaj*, invites to shirk, and others.

The current challenge of contemporary Islamic law related to copyright is how contemporary Islamic law makes a full contribution to maximizing the application of criminal law in Indonesia. Because if you look closely, the enforcement of law in Indonesia about copyright has not been fully maximized. Therefore, to maximize the application of the law, it is necessary to formulate Islamic law that is by the Indonesian context, which is then proposed as material for national law. The opportunity for Islamic law to contribute to the formation of national law will be very large if the formulation of Islamic law offered can be accepted by the (majority) of the Indonesian people.

Legislation in the civil sector is already quite a lot that comes from Islamic law, although most of it only applies to Muslims. While in the criminal field, Islamic law has not contributed, because the criminal law that applies in Indonesia still uses the law of the Dutch colonial heritage. Besides that, criminal law, unlike civil law

where there is a choice, must be applied uniformly and unified for all Indonesian people.⁴⁵ However, this does not mean that there is no opportunity for Islamic criminal law to become or at least become material for the formation of a national criminal law.

Several factors influence people to violate copyright, which includes the following: (1) As a shortcut to get the maximum benefit from copyright infringement. This is what makes the background for the birth of the copyright act currently in force in Indonesia; (2) Some people are proud when their work is imitated by others so the copyrighted works they make do not need to be registered with the Director General of Intellectual Property Rights of the Ministry of Law and Human Rights to protect their creations; (3) The violators consider that the legal sanctions imposed by the courts have so far been too light and even no preventive or repressive measures have been taken by law enforcers; (4) People don't pay attention to whether the goods they buy are genuine or fake, what is important for them is that the price is cheap and affordable with economic capacity; (5) By committing a violation, the tax on the product resulting from the violation does not need to be paid to the government.⁴⁶

Sanctions that can be imposed by copyright law are civil and criminal. If a work in the field of literature and art that has been protected by copyright law is violated, the copyright holder has the right to file a lawsuit to claim compensation from the district court, without prejudice to the state's right to file criminal charges against the copyright infringement.

Based on this consideration, to prevent greater losses to the party whose rights have been violated, at the time of examination of the case, the judge is given the authority to order the violator to immediately stop all activities of making, reproducing, broadcasting, distributing, and selling the work by the beliefs he obtained during the examination.

Criminal legal threats according to the law can be grouped into four groups, namely as follows: (1) Those who commit the act

⁴⁵Khoiruddin Nasution, *Isu-Isu Kontemporer Hukum Islam* (Yogyakarta: Suka Press, 2007), 124.

⁴⁶Maryandi, "Sanksi Pelanggaran Hak Cipta Menurut Hukum Pidana Islam Dan Hukum Positif Di Indonesia," 29.

of announcing or reproducing a work or giving permission for it will be punished with imprisonment for a maximum of seven years and/or a fine of a maximum of Rp 100.000.000,- (one hundred million rupiahs); (2) If they intentionally act in the form of broadcasting, exhibiting, distributing, or selling to the public, the threat is five years imprisonment and or a maximum fine of Rp 50.000.000,- (fifty million rupiahs); (3) After hearing the considerations of the Copyright Council, violating government policies in the fields of state defense and security, morality, and public order, the punishment is a maximum imprisonment of three years or a maximum fine of Rp 25.000.000,- (twenty five million rupiahs); (4) In case of violating the copyright on a portrait of a person, the threat is imprisonment for a maximum of two years and/or a fine of a maximum of Rp 15.000.000,- (fifteen million rupiahs).⁴⁷

Conclusion

From the explanation above, it can be concluded that right is power (over something) that is determined by *syara'* or demands that are obligatory for one person over another. In contemporary Islamic law, there is a name copyright. This word consists of two sets of words, namely the words "*haq*" and "*al-ibtikar*". Among the meanings of "*haq*" is the specificity possessed by a person or group of people or a newly created creation (*al-ibtikar*). The word (*ibtikar*) etymologically comes from Arabic in the form of *masdar isim*. The past tense verb (*fi'il madhi*) of this word is "*ibtikara*" which means to create. If it says "*ibtikara al-shai'a*" it means that he has created something. Meanwhile, according to terminology, *haq al-ibtikar* is a "*privilege of a creation that was first created*", copyright in the Islamic perspective is protected for its existence, and violation of this right is considered a crime against property. The challenge faced by contemporary Islamic law is the need to contribute Islamic legal thought in the Indonesian context to maximize the application of national criminal law because the product of national criminal law is still adopted by law from the Dutch.

⁴⁷Hasyim, *Hukum Dagang*, 194.

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