

**Foundations and Conditions of Copyright in
Islamic Law**

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**Submitted to University of Wales in fulfillment of
the requirement for the Degree of Doctor of
Philosophy**

University of Wales, Lampeter

2008

Abstract

This thesis presents a study on the legal and moral foundations of copyright in the “*Sharī‘a*” (Islamic Law), with reference to various schools of “*fiqh*” (Islamic Jurisprudence). By following the methodological principles and proofs in the sources of *Sharī‘a*, the study provides the main authoritative groundings for copyright. Examination of copyright in the *Sharī‘a* was performed by collecting and investigating the available references and citations relating to the subject. The material was obtained from various Islamic sources and through the *fiqh* terminology.

Accordingly, the concepts of “*ḥaqq*” (right), “*milkiyya*” (ownership), “*māl*” (wealth) and “*manfa‘a*” (utility) and their definitions made by the leading scholars, were examined in order to understand the precise standing of copyright in *Sharī‘a*. The analyses of these essential definitions revealed that the key factor of these concepts is the approval of *Sharī‘a*. Under *Sharī‘a*, however, copyright may be considered as *ḥaqq* whose classifications in *fiqh* can be applied to copyright. Copyright is *manfa‘a* and *māl* and can be owned. This understanding can provide an enough room for copyright in *Sharī‘a*.

This study investigated evidence of copyright starting from the original sources of *Sharī‘a* Qur‘ān and Sunna (the prophetic traditions and practices), and the subsidiary sources such as “*Qiyās*” (the analogy). The study argues for the legitimacy of copyright on the ground that it reflects principles of justice and honesty, respects right and property, and reduces injustice enrichment. There are some “*aḥādīth*” (Prophet’s traditions) which may support the idea of copyright. The application of *qiyās* showed some clear cases which can be applied to copyright. An investigation on the supplementary sources of *Sharī‘a*; “*Maṣlaḥa*” (the public interest) “*Urf*” (custom) and “*al-Qawā‘id al-Fiqhiyya*” (legal maxims) supports copyrights. Therefore, copyright has received support from separate and cooperative evidence. The religious approval of copyright can only be gained, if a given work meets necessary conditions of originality, legality and the public interest. The duration of copyright leaves some scope for differences of view as to whether copyright should be eternal or for specified limited periods, with a discrepancy in theoretical and practical reasoning but the view of perpetual copyright appears to be more evident according to *Sharī‘a*.

The range of arguments dealt with in the study ought to dispel any doubt about the acceptance of copyright in Islamic law. The introduction of copyright within Islamic law is an extension and a logical part of “*ijtihād*” (conscientious reasoning) of *Sharī‘a*. Copyright may be governed by the principles of *Sharī‘a* inasmuch as it is strengthened. Finally, the research shows how *Sharī‘a* is a responsive and evolving system and provides guidance to serious and complex issues such as copyright with its international burden and interest.

Declaration

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

This thesis is the result of my investigation, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references.

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STATEMENT 2

I hereby give consent for my thesis, if accepted, to be available for photocopying and for inter-library loan, and for the summary to be made available to outside organizations.

Signed

Date 6.11.08

Acknowledgments

In making acknowledgments, my thanks must first go to He Who created me from non-existence, taught me and to Whom I will return.

I also wish to express my gratitude to those who were the cause and the means of my life and teaching: my parents, Fatima and Ali who passed away during the preparation of this study. I hope this work is a token of gratitude to them. For my establishment in *fiqh* and Islamic studies I am indebted to my first Sheikhs Mustāfa al-Ṭarbulsī and Sālim Bashāsha. I owe an eternal debt to them for my intellectual development.

My great and special thanks to Sheikh Dr. Muḥammed al-Maqūz and Sheikh Prof. al-Ṣādiq al-Gharyānī and his son Sheikh Suhayl for their reading and useful comments and corrections of the first draft.

It gives me the greatest pleasure to express my sincere gratitude to my supervisor Dr. Mawil Izz Dien for his invaluable help, infinite encouragement and constructive criticism during all stages of this research. My thanks are also due to Mr. Yusef Noden, Dr. Muḥammed al-Thowabitī, Dr. Muḥammed ‘Ammārī Mr. Marwān al-Ddallāl and Dr. Ramdhan Abukenisha for helping me to edit this study sincerely, patiently and voluntarily. Really, I learnt enormous amounts from their fruitful discussions and comments.

My thanks to Kathy Miles for providing me a large number of books and materials. I want to thank all who have encouraged and supported me to complete the work and those who were praying for me all the time. Thanks are due to my families in Libya; Ahdash and in-law Būshhaima for their support.

Finally, thanks to my wife for her moral support and for undertaking the onerous responsibility of taking care of our children during the preparation of this study. Thanks also to my children Fatima, Zainab, Nusieba, Hajer, Ali and Abdusalam for their patience and understanding.

Table of Contents

Abstract.....	2
Declaration.....	3
Acknowledgments	4
Table of Contents	5
Note of Transliteration.....	10
Introduction	11
1.1 Research Objectives	11
1.2 The Significance of this Study.....	12
1.3 The Scope of the Research	15
1.4 Research Methodology	16
1.5 Thesis Outline.....	18
1.6 Notes on Sources	20
1.7 An Analytical Review of Literature on Copyright in <i>Sharī'a</i>	22
1.7.1 Islamic Educational Traditions and Copyright	22
1.7.2 Copyright in contemporary writings on <i>fiqh</i>	25
1.7.3 Copyright as applied to <i>fiqh</i> in legal textbooks.....	39
1.7.4 Copyright applied to <i>fiqh</i> in English works	41
1.7.5 Summary	43
1 Chapter one <i>Ḥaqq</i> and its Classifications in <i>Sharī'a</i>	45
1.1 Introduction	45
1.2 Meanings of <i>Ḥaqq</i> :	45
1.3 Technical Definitions of <i>Ḥaqq</i> :	47
1.4 Definitions of <i>Ḥaqq</i> with reference to “ <i>ikhtisāṣ</i> ” (exclusivity).....	51
1.5 Some remarks on defining <i>Ḥaqq</i> with reference to <i>ikhtisāṣ</i>	54

1.6 Definitions of <i>Ḥaqq</i> with reference to “ <i>maṣlaḥa</i> ” (the interest).....	56
1.7 Some remarks on defining <i>Ḥaqq</i> with reference to <i>maṣlaḥa</i>	57
1.8 The combination of <i>maṣlaḥa</i> and <i>ikhtisāṣ</i> approaches	60
1.9 The “linguistic approach”	60
1.10 Classifications of <i>Ḥuqūq</i> under <i>Sharī‘a</i>	64
1.11 The classification of <i>ḥuqūq</i> according to the holder.....	65
1.12 The classification of <i>ḥuqūq</i> according to their subjects	68
1.13 The classification of <i>ḥuqūq</i> according to their financial conditions.....	69
1.14 The classification of <i>ḥuqūq</i> according to their ranks.....	71
1.15 The classification of <i>ḥuqūq</i> according to their enforceability	72
1.16 The classification of <i>ḥuqūq</i> according to inheritability	74
1.17 Summary.....	77
2 Chapter Two The Related Terms to <i>Ḥaqq</i>	81
2.1 Introduction	81
2.2 “ <i>Milkiyya</i> ” (Ownership).....	81
2.2.1 Meanings of “ <i>Milkiyya</i> ” or “ <i>Milk</i> ”	82
2.2.2 Technical Definitions of “ <i>milk</i> ” (Ownership)	83
2.2.3 Classifications of Ownership	90
2.3 <i>Māl</i>	91
2.3.1 Meanings of “ <i>Māl</i> ”	91
2.3.2 Technical Definitions of “ <i>Māl</i> ”	92
2.3.3 The View of the Majority of <i>fuqahā’</i>	93
2.3.4 The <i>Ḥanafīs’</i> View	96
2.3.5 Classifications of <i>Māl</i>	98
2.4 The question of “ <i>Manfa‘a</i> ”	99
2.4.1 Are Intellectual works <i>māl</i> under <i>Sharī‘a</i> ?	104
2.5 The Nature of Copyrights.....	106

2.5.1	Intangible nature.....	107
2.5.2	Property Applicability.....	108
2.5.3	Personal Characteristic.....	110
2.5.4	Exclusivity and Usability.....	112
2.6	Summary.....	113
3	Chapter Three Evidence from the Original Sources.....	115
3.1	Introduction	115
3.2	Evidence of copyright from the Qur'ān.....	116
3.2.1	The First Evidence	117
3.2.2	The Second Evidence.....	126
3.2.3	The Third Evidence.....	129
3.2.4	The Fourth Evidence	130
3.2.5	The Fifth Evidence.....	132
3.3	Evidence of Copyright from the <i>Ḥadīth</i>	133
3.3.1	The First Evidence	134
3.3.2	The Second Evidence.....	137
3.3.3	The Third Evidence.....	139
3.3.4	The Fourth Evidence	141
3.3.5	The Fifth Evidence	144
3.3.6	The Sixth Evidence	145
3.3.7	The Seventh Evidence.....	149
3.4	Summary.....	150
4	Chapter Four Evidence of Copyright from the Secondary Sources	154
4.1	Introduction	154
4.2	Evidence of Copyright from <i>Qiyās</i>	154
4.2.1	The case of cultivation of barren land.....	158
4.2.2	The case of prohibition of listening without permission.....	161

4.2.3	The case of receiving money for reciting and teaching Qur'ān	164
4.2.4	The case of getting money for sale and hiring a copy of Qur'ān	168
4.2.5	The case of approving teaching Qur'ān as dowry	170
4.2.6	The case of selling or waiving some rights for money	171
4.3	Evidence of Copyright from " <i>Maṣlaḥa</i> " (the Public Interest)	175
4.4	Evidence of Copyright from ' <i>Urf</i> '	184
4.5	Evidence of Copyright from <i>al-Qawā'id al-Fiqhiyya</i> (Legal Maxims)	189
4.5.1	The rule: " <i>wad' al-yad</i> " the appropriation of permitted things	190
4.5.2	The rule relating to a necessary condition for the fulfillment of an obligation	193
4.5.3	The rule relating to public or private " <i>ḥāja</i> " (need) being treated as " <i>ḍarūra</i> " (a necessity)	196
4.5.4	The rule of removing of harm	199
4.5.5	The rule that: "A person, who is owner of a thing, is owner also of things which are indispensable for that thing"	201
4.6	Summary	202
5	Chapter Five The Conditions of Copyright	205
5.1	Introduction	205
5.2	Legality	206
5.3	Originality	213
5.4	The protection of <i>maṣlaḥa</i> (the Public Interest)	216
5.4.1	The issue of freedom of expression	222
5.5	The duration of copyright	225
5.5.1	The position under laws	226
5.5.2	The proposal for a temporary copyright in <i>Sharī'a</i>	227
5.5.3	The proposal of permanent copyright	230
5.6	Summary	232

6 Chapter Six Objections against Copyright	236
6.1 Introduction	236
6.2 First Objection: being abstract rights	236
6.3 Second Objection: being an obstacle to the widespread dissemination of knowledge	239
6.4 Third Objection: being contrary to ownership	246
6.5 Fourth Objection: reproduction of works is not genuine threat to copyright	250
6.6 Fifth Objection: Copyright has not emerged from Islamic history	255
6.7 Sixth Objection: being alien to <i>Shari'a</i>	258
6.8 Summary.....	260
7 Summary and Conclusion.....	263
8 Glossary	271
9 Bibliography	278
A. Arabic Resources	278
B. English Resources	289
C. Internet Resources.....	293

Note of Transliteration

The following transliteration will be used in this thesis:

Arabic	Symbol	Arabic	Symbol
ا	A	ط	Ṭ
ب	B	ظ	Ẓ
ت	T	ع	‘
ث	TH	غ	GH
ج	J	ف	F
ح	Ḥ	ق	Q
خ	KH	ك	K
د	D	ل	L
ذ	DH	م	M
ر	R	ن	N
ز	Z	هـ	H
س	S	ا	A
ش	SH	و	W
ص	Ṣ	ي	Y
ض	Ḍ	ء	’

Short vowels:

اَ	A
اِ	I
اُ	U

Long vowels:

اَ	ā
اِ	ī
اُ	ū

“Ta marbūṭa” will be represented as (a) unless another word comes after it in which case it will be represented as (t). “Alif mammdūda” or “Alif maqṣūra” will be represented as (a).

Introduction

1.1 Research Objectives

The study is structured on the hypothesis that “*fiqh*” (Islamic Jurisprudence) has enough sources and tools to accommodate modern concepts such as copyright. *Fuqahā'* consider that *Sharī'a* is a total and indivisible system that covers religion, law and morality, where all matters are governed directly or indirectly by general rules. Agreeing with many verses,¹ *Sharī'a* can provide appropriate solutions for contemporary issues if a systematic and comprehensive study is made.

Therefore, the research aims to answer a number of important questions regarding the support or otherwise of copyright in Islamic teachings: has *Sharī'a*² provided scope for copyright or at least sufficient understanding for the concept of copyright. What could be the basis of copyright in *Sharī'a*? How far can copyright be recognized under *Sharī'a* and how far can *Sharī'a* recognize the idea of copyright. Should authors or copyright-owners be able to rely on *Sharī'a* in combating the violation of their rights when the man-made law and technologies fail to provide protection? Should *Sharī'a* recognize copyright in the same way as it clearly does for other rights? Are there conditions in *Sharī'a* that intellectual works must comply with in order to attain copyright recognition? Does *Sharī'a* make intellectual products more accessible for those who are willing to use them in order to maximize the widespread dissemination of knowledge?

Answering these questions may help in resolving other related questions such as whether *Sharī'a* could in general be expected to provide appropriate solutions to contemporary difficult issues as such? How can *Sharī'a* tackle serious and difficult issues such as copyright in the modern sense. Such questions may divide jurists,

¹ For more detailed evidence on that, see p.120 in this thesis.

² *Sharī'a* “designates the rules and regulations governing the lives of Muslims, derived in principal from the Qur'ān and ḥadīth” which is closely associated with *fiqh*”. See Encyclopaedia of Islam, (Leiden, E.J.Brill. 1971) (Second Edition) *Sharī'a* Entry, hereinafter; EI².

because they touch upon some of the fundamental principles governing rights, property and the organization of *ijtihād* in a modern society.

Although the focus of this study is primarily on copyright, copyright is only one example of how our understanding of arguments using *Sharī'a* and its tools can be clarified by approaching such cases. It presents how *fiqh* might be applied to the issue of copyright and the adequacy of traditional arguments in dealing with new cases.

Supplementary to this, the discussion of terminology may reveal some interesting differences between *fiqh* schools which can contribute to the comparative studies in *fiqh*. Moreover, the research will produce a body of materials and findings accompanied by a discussion, which may contribute to a building foundation on which other researchers can work more effectively towards a full and coherent Islamic system of copyright.

1.2 The Significance of this Study

The importance of this study stems from both *Sharī'a* and copyright and, therefore, the combination of these subjects has a much greater significance.

Copyrights or copyright is defined as “The exclusive right to reproduce or authorize others to reproduce artistic, dramatic, literary, or musical works”.³ However, copyright occupies a significant position in the modern era and in view of rapidly developing communications and technologies, the question of copyright can be expected to become increasingly more important.

Generally, in the Muslim world, copyright has not received as much attention as it has had in the writings of the Western scholars. Scholars have given relatively little attention to copyright in spite of the fact that the position of copyright in *Sharī'a* comes to be seen as a source of uncertainty in *fiqh*. In fact, the legitimacy of copyright and the concept of the right to intellectual property in *Sharī'a* is still, to a

³ Martin, Elizabeth, *Oxford Dictionary of Law*, (Oxford University Press, 1997), p.110, hereinafter Martin, *Oxford Dictionary of Law*.

large degree if not completely so, a matter of debate.

Compared with other subjects, such as family law, there has been relatively little literature on copyright under Islamic law. The role of *ijtihād*⁴ is what is mostly needed for new problems such as copyright in order to find Islamic solutions in a systemic way.

Copyright receives a substantial level of protection from national and international laws and legal machinery, but copyright is subject to denial in many ways. Successful works in every field have been subject to piracy, to the extent that in many cases the true owner often does not receive a monetary gain. In the Arab publication world and Arab academia, the widespread piracy of the works of Sayyid Quṭb has been seized upon by many writers as a notable example of the scale and impact of the violation of copyright.

Despite the wide recognition and universal acceptance of copyright laws, copyright requires the realization and elaboration of its position within the context of *Sharī'a* by a comprehensive elaboration. Muslim lawyers can contribute hugely to the development of *fiqh* if they proceed from a basis founded in *Sharī'a*. The demand for an elaboration on the Islamic view of copyright is one that is often more discussed than fulfilled.

Copyright needs to be understood in both its religious and legal context. Using the distinctive sources of Islamic law and systematically applying its methodology can contribute more effectively towards recognizing copyright, without offending Islamic principles.

The religious approval of copyright is crucial to its recognition and protection, especially where judicial authority and the enforcement of law are weak or unavailable. The religious question regarding infringement of copyright is needed, when people attempt circumvention of “fair dealing” or similar exceptions. Moreover, in the Muslim world companies produce computer programs that cannot

⁴ The process of deriving legal rules from the sources of the Islamic law. See Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*, Kuala Lumpur, ILMIAH Publishers, (Third Edition) (2000). p.366, hereinafter: Kamali, *Principle of Islamic Jurisprudence*.

be opened unless the user affirms their legality by oath.⁵

The continuous usage and reliance on oath in various legal systems demonstrates the potential significance of the religious and ethical factor to protect rights of individuals and institutions. This indicates that the religious roots of copyright are even longer and probably more important in their historical effect than it first appears. The ethical framework of *fiqh* has more scope for the investigation of copyright, since law has been equated with morality in *Sharī'a*.

The importance of this subject is perhaps most keenly appreciated when the question rises regarding the ability of *Sharī'a* to govern a modern society. Though *Sharī'a* is often an important factor in Muslim countries, there is some criticism that it is outdated and incompatible with the ideals of modern life. Nevertheless, it is reasonable for a researcher to seek justification for copyright from *Sharī'a* in the same way as other researchers seek justification for it from Locke's theory. Research on the normative foundations of copyright in *Sharī'a* is needed to identify an Islamic theory of copyright.

Besides the historical and theoretical aspects, this study also can be of practical importance. The question of whether or not copyright can be recognized under *Sharī'a* is very important because Muslim States possess the sovereignty to apply *Sharī'a* as a domestic law. Most of Muslim States declare in their Constitutions that Islam is the official religion of the state and *Sharī'a* is the only source or one of the main sources of legislation.

Sharī'a has a considerable influence on legislation as well as the daily life of more than one billion Muslims worldwide even though many Muslim States do not apply it fully. Presumably, a decision by a Muslim State to enact copyright based on *Sharī'a* would definitely have an impact in safeguarding intellectual property.

In addition, if the idea of copyright is established on religious grounds and accepted on that basis, this study will help in resolving at least a part of the

⁵ See al-Mawsū'a al-Dhahabiyya lil al-Ḥadīth al-Sharīf, CD, 1996, First Issue, Jeddah, Ṣakhr Computer Programs' Company. Hereinafter: Al-Mawsū'a al-Dhahabiyya.

international problem, namely, how to prevent the violation of copyright in theory. The Islamic resolution of copyright may serve national and international interests. The internationalization of copyright has been expanding to a large degree by the strong pressure that began after the agreement of TRIPS.⁶ The debate touches upon the issue of what one can consider as an international dimension and which requires every culture and society to address carefully. Therefore, the researcher is required to present the views and solutions advanced by *Sharī'a* to resolve this international issue. It is argued that the discussion of copyright in *fiqh* plays a much more central role than is commonly thought.

Therefore, there is significance in recognizing copyright as one of the first steps for researchers to claim protection and finally arrive at their full system in *Sharī'a*.

1.3 The Scope of the Research

It is imperative to identify an appropriate copyright regime in *Sharī'a*. However, first, it is necessary to eliminate or reduce the legal uncertainty of copyright in *fiqh*. This study attempts to explore roots to copyright in *Sharī'a*.

This study considers the question of the *fiqh* of copyright at its most basic level and is not meant to be a definitive work which expounds all aspects of copyright according to *Sharī'a*. In addition, the research will not cover all schools of *fiqh* but will be confined within the mainstream schools of *fiqh*. The scope of the study will be limited by the following objectives:

1. To provide an overview of the literature review on copyright in chronological order with necessary comments.
2. To analyze the concept of right in *Sharī'a* which is fundamental to the subject.
3. To analyze the definitions of ownership, wealth and utility which are very highly relevant to copyright.

⁶ An abbreviation of an international agreement (Trade Related Aspects of Intellectual Property Rights) was reached in Uruguay by the World Trade Organisation (WOT) in 1994.

4. To identify evidence on copyright from the original sources of *Sharī'a*.
5. To identify evidence on copyright from the supplementary sources of *Sharī'a*.
6. To identify any condition or qualification for copyright in *Sharī'a*.
7. To examine the objections to copyright raised by some scholars poses.

1.4 Research Methodology

The plan is to identify and present evidence regarding copyright and to do so objectively and dispassionately according to the "*uṣūl al-fiqh*" (principles of Islamic jurisprudence). Research on copyright within *Sharī'a* will be approached by its own methodology. With *Sharī'a*, the order of research follows the rank of its sources. According to the famous "*ḥadīth*" (prophetic tradition) of Mu'ādh,⁷ the standard for researching copyright is by pursuing them in the original sources of *Sharī'a*, i.e. the Qur'ān and the Sunna first and then in the secondary sources.

Therefore, this study first to the elaboration of the all related words to copyright, such as "*ḥaqq*" (right), "*milkiyya*" (ownership), "*māl*" (wealth) and "*manfa'a*" (utility). The clearest way to approach copyright based on *Sharī'a* is to study it deeply through its own language and terms. Copyright must be stated in terms acceptable and recognizable to *fiqh* and must be judged according to Islamic principles.

Then the study explores the Qur'ān and the Sunna to identify the basic framework upon which copyright may be built. The plan is to use all related texts as much as possible. Secondly, by using the rules of *uṣūl al-fiqh* the study will apply the supplementary sources of *Sharī'a*, namely "*Qiyās*" (the analogy), "*Maṣlaḥa*" (the public interest) "*Urf*" (custom) and "*al-Qawā'id al-Fiqhiyya*" (legal maxims) to copyright.

This study attempts a comprehensive examination of the possible foundations of

⁷ For the full text of this *ḥadīth*, see p.115.

copyright in *Sharī'a* by using the tools of analytical research and critical examination provided by *uṣūl al-fiqh*. An exact understanding of theoretical and applied *uṣūl al-fiqh* gives one a better grasp in the enquiry of copyright. It is therefore, necessary to examine all *Sharī'a* sources on which copyright should be based and evaluate the justifications for each piece of evidence. This can achieve the systematization of copyright according to the rules of *Sharī'a*.

As far as methodology is concerned, this study will be committed to the mainstream jurisprudential tools and to the standard method in *fiqh*. This study will be consistent with the rules of *uṣūl al-fiqh* that *fuqahā'* from al-Shāfi'ī onward have articulated and applied. Detailed and acknowledged rules have to be followed by the researcher in order to build the right foundations and to avoid mistaken results.

By using the rules of *fiqh* and evidence from *Sharī'a*, this study will examine copyright within that framework and without discarding its principles. This will be the process of applying the theoretical principles of *Sharī'a* and its tools to copyright without adopting concepts or methods that are contrary to such sources. Arguments for and against copyright must only be derived from *Sharī'a*.

In addition, this study is not a proposal for the Islamic justification of Western ideas on copyright or an apology. *Sharī'a* and other legal systems have resulted from inhabiting different mental and historical backgrounds which lead, inevitably, to taking different approaches to many matters.

Despite many commonalities existing between *Sharī'a* and modern laws, there is no need to make a comparison between Islamic law and other laws as regards copyright because there is no complete counterpart based on Islamic law. It would also appear to be far too early to make such comparison.

It is important to say that the research will not be confined to a particular Muslim country because the issue at hand is still in an abstract and theoretical phase. There is no essential difference in principle or in results if a study focuses on a particular country. It is incorrect to assume that the law of a Muslim State represents the Islamic view of copyright simply because it is from that country. The current attitudes of legislative authorities in many Muslim States do not refer to *Sharī'a*

when enacting laws regarding copyright. Admittedly, there is no demand for copyright, even from within Islamic or academic societies, to be compliant with *Sharī'a* in the same way as we have seen, for example, with regard to the demand for financial services.

This study is mostly devoted to the discussion of technical terms within Islamic Jurisprudence but an introductory section in each chapter will benefit those who want to learn about the subject in a general way. These introductions give a cursory assessment of the research and arguments within the framework for reference established.

It should be mentioned that the study is not written with a faith-oriented community in mind. This approach has the advantage of being academically approved in both Muslim and non-Muslim circles. Finally, it should be noted that, as in traditional textbooks of *fiqh* references to the male gender includes also the female unless otherwise mentioned.

1.5 Thesis Outline

The research is designed to provide a systemic study to deal with copyright. In addition to the introductory chapter, this thesis is divided into a further six chapters. In general, each chapter starts first by providing a general introduction to the topic and ends with a brief summary.

At the beginning of this study, there will be a survey of the various opinions by contemporary scholars on the subject of copyright together with their approaches and accompanied by some concluding remarks. The survey will recount the development of copyright in *fiqh* in order to enhance a full understanding and support a further treatment.

Chapter one will review the definitions of “*ḥaqq*” (right), because “*ḥaqq*” is the core of copyright. In order to study copyright in *Sharī'a*, it is necessary to explore the notion of right and its classifications in *fiqh*. Another issue in this essential chapter is how to apply these definitions and classifications correctly to

copyright to provide the central structure upon which copyright can be investigated and to prevent one from drawing wrong conclusions.

Chapter two will support the previous chapter by surveying the terms relate to the notion of copyright, namely, property, wealth and utility in *Sharī'a*. This task is to clarify these terms to reduce its legal uncertainty in *Sharī'a*. The chapter will present a collection of the key concepts necessary for providing a ruling on copyright in *Sharī'a*. The chapter will conclude by recognizing the nature of copyright which underlies and affects its ruling in *Sharī'a* and the difficulties it entails. Once these fundamental issues are clarified, it is possible to research the main problem by applying the method described above.⁸

In **chapter three**, the study will attempt to find guidance regarding copyright in the original sources, i.e. Qur'ān and *Sunna*. Therefore, this chapter is divided into two sections. The first one will seek evidence from Qur'ān and the second will present evidence from *Sunna*.

Chapter four will pursue other arguments from supplementary sources of *Sharī'a* for copyright, namely "qiyās" (analogy) "maṣlaḥa" (the public interest) "urf" (custom) and "al-Qawā'id al-Fiqhiyya" (legal maxims). Therefore, the focus will be on cases, aspects or rules in *Sharī'a* which can be implemented. Accordingly, this chapter is divided into three main sections.

In **chapter five**, the study will seek to find conditions and qualifications for copyright to harmonize its recognition and its use with other rights and interests. The chapter will seek to identify conditions regarding originality of a work, legality and its duration from general evidence.

Chapter six will review the critical observations of copyright that are made by some scholars and based on some indications in *Sharī'a*. The various objections to copyright within *fiqh* will be discussed carefully throughout this chapter.

⁸ See p. 16 of this thesis.

1.6 Notes on Sources

In preparing this study, the most relevant research literature in Arabic and English will be consulted. The materials related to copyright is scattered widely in the vast wealth of Islamic sources. The following are the most important sources used in this study and a specific list of sources is set out at the end of the study.

While recognizing the difficulty of translating Qur'ān, the study will consult "The Holy Qur'ān English translation of the meaning and Commentary" by Abdullah Yusuf Ali, which has been accepted by many scholars. The translation of the Qur'ān is quoted by identifying the chapter and the verse numbers.

In order to obtain deeper insight into interpretations of specific texts, one has to consult the most authoritative commentaries, such as *Tafsīr al-Ṭabarī* and *Tafsīr al-Qurṭubī* in Qur'ān and *Sharḥ Ṣaḥīḥ Muslim* by al-Nawawī and *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī* by Ibn Ḥajar in Ḥadīth.

The study has been based on the standard collections of Ḥadīth such as *Ṣaḥīḥ al-Bukhārī*, *Ṣaḥīḥ Muslim*, *Sunan Abū Dawūd* and so on, combining their available translations with the observation of the Arabic texts closest to the meaning. Translations of the collections of Ḥadīth on <http://www.muslimaccess.com/sunnah/hadeeth>, made by Professor Ahmad Hasan, have been consulted. 'Aḥadīth are quoted by identifying their resource and number.

To arrive at satisfactory applications of *uṣūl al-fiqh* tools on many different occasions there is a line of authorities which supports the study such as *al-Baḥr al-Muḥīṭ* by al-Zarkashī, *al-Furūq* by al-Qarāfī, *Qawā'id al-'Aḥkām* by al-'Izz Ibn 'Abd al-Salām and *al-Muwāfaqāt* by al-Shātibī.. Reference will be made to *Majallat al-'Aḥkām* and its translation by Tyser.

Unless otherwise indicated, this study is based on the authoritative original Arabic textbooks in *fiqh*. For *fiqh* details, reference has been made to specialist books in the field from various schools of *fiqh*, such as *al-Mudawwana* by Suḥnūn, *Badā'i' al-Ṣanā'i'* by al-Kāsānī, *al-Majmū'* by al-Nawawī, *al-Mughnī* by Ibn Qudāma, *al-Muḥallā* by Ibn Ḥazm and others. Reference is also made to the

Encyclopedia of Islam as well as *al-Mawsū'a al-Fiqhiyya* by the Ministry of Awqāf and Islamic Affairs in Kuwait.

The research has used many modern writings such Ḥaqq al-Ibtikār by al-Diraynī, Fiqh al-Nawāzil by Abū Zayd, Mudawwanat al-Fiqh al-Mālikī by al-Ghiryānī, Intellectual Property Laws and Islam in Malaysia by Azmi, Principle of Islamic Jurisprudence by Kamali and other books. It must be acknowledged that this study has benefited from these sources and all previous works on the subject in a variety of ways and to different degrees.

In addition, it should be noted that *Sharī'a* does not have the equivalent divisions and terms as other legal systems as regards common law or civil law. Paying insufficient attention to special terminology may mean that results elude the researcher.

There will be engagement with Arabic linguistic books such as *Tāj al-Lughā* by al-Jawharī and terminology books such as *al-T'arifāt* by al-Jurjānī to provide precise understanding of words relating to the topic.

In this study the author faced two difficulties. First, there is a shortage of sources in English on the Islamic law. As a result, the author arrived at a second obstacle, which was the translation from Arabic to English with the attendant problematic comparison of terminology between legal systems. In general, the author has translated the Arabic materials unless otherwise stated. It is important to remind the reader that a translation can not fully capture the sense of the original.

Whenever an Arabic word is first introduced, it appears in quotes with its translation in English in brackets then it appears without translation. In some cases when it will be thought helpful to remind the reader of the English translation, the English translation is repeated.

1.7 An Analytical Review of Literature on Copyright in *Sharī'a*

1.7.1 Islamic Educational Traditions and Copyright

This section aims to introduce readers to copyright within *Sharī'a* and to trace the evolution of its understanding through the documented history. This brief account chronicles the history of copyright in Islamic writings. This account is indispensable to exploring the position of copyright in *Sharī'a*. As far as can be seen in available documentation, copyright, as perceived today, is not found in *Sharī'a*. However, the root of the idea of copyright and many elements it encompasses are not recent, even if the terms (intellectual property, copyright and author's rights) did not emerge until modern time.

Based on solid evidence from *Sharī'a*, there are well-established Islamic educational traditions that emphasize the importance of honesty and demand that only the creator of a literary work was entitled to praise and honor.⁹ There is no doubt that scientific honesty is long established and its significance was widely acknowledged. However, no copyright, as it exists in its current form, was sought. Furthermore, under Islamic principles, plagiarism is religiously sinful, morally condemnable and socially disreputable.¹⁰

This is in a context that all aspects of knowledge, teaching, writing and learning are connected firmly with the religious precept of deeds and charity. As *Sharī'a* emphasizes, many *fuqahā'* are keen to ensure a maximized widespread dissemination of knowledge,¹¹ as matter of piety. For example, al-Shāfi'ī (d.204

⁹ Al-Būṭī, Muḥammad, *Qaḍāyā Fiqhiyya Mu'āshira*, Damascus, Maktabat al-Fārābī, (1992) (Fourth edition), p.82 and post, hereinafter: al-Būṭī, *Qaḍāyā Fiqhiyya Mu'āshira*.

¹⁰ Ibn Ḥajar, Aḥmad, *Intiqād al-I'tirād*, Ḥamdī al-Salafī and Ṣubḥī al-Sāmīrā'ī, (eds.), Riyadh, Dār al-Rushd, (1993) (First Edition). Al-Suyūṭī, Jalāl al-Dīn, *Al-fāriq bayn al-Muṣannif wa al-Sāriq*, Qāsim al-Sāmīrā'ī (ed.), Riyadh, *Majallat 'Ālam al-Kutub*, 4th Feb.1982 /Rabī' al-Thānī 1402 AH, vol.2nd, issue. It is referred to in Abū Zayd, Bakr, *Fiqh al-Nawāzil*, Jeddah, Maktabat al-Ṣadīq, (1409AH/1988) (First edition), vol. 2, p.91- p.98.p.128, hereinafter: Abū Zayd, *Fiqh al-Nawāzil*.

¹¹ Shalaby, Ahmad, *History of Muslim Education*, Beirut, Dar al-Kashshaf,(1954),p.165.,hereinafter:

AH/820) said: "I wish I had taught this knowledge without being attributed to me".¹² Many *fuqahā'* give a general "ijāza" (authority or license) for any Muslim directly to narrate their books, for example, al-Nawawī (d.676AH/1278).¹³

From a financial perspective, it is to be noted that beside teaching and authorship, many authors had other professions such as merchants, judges, copyists or craftsmen. Other authors were sponsored by caliphates, princes and the institutions of "Awaqāf" (endowments).¹⁴ Another relevant point is that in Arabic literature, the reproduction of works was the job of "warrāqīn or nussākh" (copyists).¹⁵ It required time, skills and expense that are similar to the production of the work itself. It was an arduous task and one of low income.

Furthermore, religious and customary respect for scholars was practiced and defended by the public. Thus, in Muslim societies copyright is some extent protected pursuant to general standards of morals particularly that of honesty.¹⁶ Indeed, there is a distinction between these general standards on the one hand and the establishment of relevant laws which protect copyright, on the other. However, the ethical treatment of copyright needs to be appropriate to its time, condition and society.¹⁷

Only after the invention of the printing press was there a clear need for the

Shalaby.

¹² Ibn al-'Imād al-Ḥanbalī, 'Abd al-Ḥayy, *Shadharāt al-Dhahab*, Beirut, Dār Iḥyā' al-Turāth al-'Arabī, (N.D), vol.1, second division, p.10.

¹³ *Ijāza* is an authority or license to narrate a *ḥadīth*, book or *fatwa*. See EI², Entry: *Ijāza*. *Al-Mawsū'a al-Fiqhiyya*, Kuwait, Dhāt al-Salāsīl, Wizārat Awqāf wa al-Shu'ūn al-Islāmiyya, (1409AH /1990) (Second Edition), vol.1, p. 310, *Ijāza* entry, hereinafter: *al-Mawsū'a al-Fiqhiyya*. Dr Ma'tūq, Ṣāliḥ, al-Ijāza al-'Āmma wa Isti'māl al-Muḥaddithīn lahā, Dubai, *Majallat al-Dirāsāt al-Islāmiyya wa l-'Arabiyya*, 5 issue, (1413AH/1992), p.99 and post, hereinafter: Ṣāliḥ, al-Ijāza. Al-Ṭaḥḥān, Maḥmūd, *Taysīr Muṣṭalaḥ al-Ḥadīth*, Riyadh, Maktabat al-Ma'ārif, (1417AH /1996) (Ninth edition), p.156, hereinafter: al-Ṭaḥḥān, *Taysīr*.

¹⁴ Shalaby, p.34, p.167. Abū Zayd, *Fiqh al-Nawāzil*, vol. 2, p.112, p.98.

¹⁵ Abū Zayd, *Fiqh al-Nawāzil*, p.80-83. Shalaby, p.89. Azmi, Dr. Mohammad Mustafa, *Studies in Early Ḥadīth Literature*, Indiana USA, American Trust publications, (1992) (Third Edition), p.195, hereinafter: Azmi *Ḥadīth Literature*.

¹⁶ Habib, Mustafa Salman, Copyright under Islamic Law, an article available online at <http://www.geocities.com/Eureka/Concourse/5023/page3.html>, hereinafter: Habib, Copyright under Islamic Law.

¹⁷ Habib, Copyright under Islamic Law. Al-Būṭī, *Qadāyā Fiqhiyya Mu'āṣira*, p.84. Abū Zayd, *Fiqh al-Nawāzil*, p.103.

protection of copyright. The attention to copyright came at a time when technology could enable the reproduction of works at a level never before imagined. Increasingly, the rapid scientific development that has led to reproduction and distribution of works on a massive scale has made the resolution of the issue of copyright in Sharī'a very pressing. These developments have given genuine authors and publishers a strong incentive to establish rights based on Islamic justifications¹⁸ beside ordinary legal protection.

This demand by authors and others also presents a challenge in that *Sharī'a* did not treat this subject in the same way as other legal systems: it has its own approach, terms and divisions. Copyright will not be found ready-made under one or more common headings.

Various Islamic sources have provided a rich source of literature on principles, indications and rules relating to copyright. For example, lengthy discussions took place in on *fiqh* and *al-ḥadīth* about the validity of the consideration for teaching Qur'ān and "*al-ḥadīth*" (the prophetic tradition).¹⁹ This may cover the grounds of economic orientation of copyright.

Moreover, other sources of literature of "*Ilm Muṣṭalah al-Ḥadīth*"²⁰ appear to constitute the foundations of moral rights. For example, the institution of "*ijāza*", which is particularly relevant to the protection of moral rights of authors, has been established in the Islamic educational traditions. To a large extent, the rules of *ijāza* have also been applied to *fiqh*, history, literature books and medicine²¹ in order to

¹⁸ See the publisher's introduction of al-Diraynī, Fathī and others, *Ḥaqq al-Ibtikār fī al-Fiqh al-Islāmī al-Muqārīn*, Beirut, Mu'assasat al-Risāla, (1400 AH/1981) (First edition), hereinafter: Al-Diraynī, *Ḥaqq al-Ibtikār*.

¹⁹ Al-Qurtubi, Muhammad b. Ahmad al-Ansari, *Tafsir al-Qurtubi*, the first volume translated by Aisha Bewley, London, Dar Al-Taḥqwa, (2003), I, p.228., hereinafter: Bewley, *Tafsir al-Qurtubi*. In Arabic see al-Qurtubī, Muḥammad b. Aḥmad al-Anṣārī, *al-Jāmi' li-'Aḥkām al-Qur'ān*, Muṣṭafā al-Badrī (ed.), Beirut, Dār al-Kutub al-Ilmiyya, (1420 AH/2000) (First Edition) vol.1 p.229, hereinafter: Al-Qurtubī, *al-Jāmi'*. Ibn Rushd, the second, Abū al-Walīd Muḥammad b. Aḥmad, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, translated by Nyazee, Imran Ahsan Khan, *The Distinguished Jurist's Primer*, Reading, UK. Garnet Publishing Ltd. (2003) (First Edition), vol. II, p.268, hereinafter: Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee.

²⁰ The science comprises a collection of rules, measures and terminology that can verify the authenticity of the prophetic traditions and classify them. EI², Entry: Ḥadīth.

²¹ Shalaby, p.149.

reach correct scientific and authentic conclusions and establish a proper profession. As required by this discipline, there are very detailed and critical rules on the reception, narration and transmission of traditions *aḥādīth*.²²

1.7.2 Copyright in contemporary writings on *fiqh*²³

The research will review the most outstanding contributions of scholars and researchers regarding copyright in *Sharī'a* in Arabic and in English. In attempting to address copyright as a modern institution in *Sharī'a*, some contemporary scholars and researchers have written significant works on it, albeit attracting some criticism.

In the beginning, some scholars were dismissive of copyright, while others were silent. Muftī Muḥammad Shafī²⁴ stated that according to *Sharī'a* a registration of copyright or a transaction in it is invalid because copyright is not property. Therefore, it was argued, authors have no right to prevent others from publishing their works unless the person who copies the work changes or distorts it. In his reasoning, the registration of copyright leads to hoarding which is clearly prohibited in *Sharī'a*.²⁵ Indeed, *Sharī'a* prohibits any action which causes hoarding or harm to the public, but there are no justifications for the claim that copyright is not property. Balance can, however, be achieved between copyright and the public interest.

This line of thought has also been expressed in the draft constitution produced by *Ḥizb al-Taḥarīr*. Article 175 of this constitution states that, "Once a book has been printed and published, nobody has the right to reserve the publishing and printing rights, including the author."²⁶ Here, not only the absence of evidence prevents researchers from discussing this particular article but also the political dimension of the whole constitution eclipses its merits or demerits.

²² Azmi, *Ḥadīth Literature*, p.188 and post.

²³ In the 1900 and post.

²⁴ Former Mufti of Pakistan d. 1986.

²⁵ Abū Zayd, *Fiqh al-Nawāzil*, vol. 2, p. 93-94. (This *Fatwā* is issued in 1362 AH/1943).

²⁶ An-Nabahani, Taqiuddin, *The System of Islam*, London, al-Khilafah Publications, (1423 AH/2002), p.160.

Similarly, in his rhetorical article, al-Kurdī reaches the conclusion that there is no justification to claim copyright under Islamic Law.²⁷ His argument assumes that because copyright lead to monopoly over knowledge and to the concealment of knowledge, both are prohibited in Islam. Also, his contention is that copyright is a mere right which cannot be subject of exchange. Accordingly, he has concluded that the economic consideration for copyright is void. He explained that once an author publishes his work delivering up his knowledge, he no longer has an exclusive right over it. With slight change, al-Kurdī has confirmed this understanding in his recent *fatwa* which provides that intellectual works can be copied and published unless the state, with its discretionary power, orders otherwise and the public is obliged to abide by laws.²⁸

It can be argued that contrary to al-Kurdī's conclusion, the recognition of copyright does not necessarily produce those prohibited results, that is, monopoly over and concealment of knowledge.²⁹ Although the prohibition of the sale of an abstract right is controversial in *fiqh*, there is a question of whether or not copyright can be classified as an abstract right. This conclusion is very far from being the only justified answer.

This "anti-copyright" view expressed by al-Kurdī has been challenged by Dr al-Nāhī who wrote an essay supporting the legitimacy of copyright in Islamic Law.³⁰ The essay tends to focus on "‘urf" (custom) without starting to research the subject in the original sources, that is Qur'ān and the Sunna. According to the rules of *uṣūl al-fiqh* (the principles of Islamic jurisprudence), the resort to 'urf is only authorized if a judgment of the new case cannot be found in those original sources.

²⁷ Al-Kurdī, Ahmed, *Hukm al-Islām fī Huqūq al-Nashar wa al-Taṣnīf wa al-Tawzī'*, Amman, *Huda al-Islām Majallat* (1401 AH/1980) vol. 25 p. 58-64., hereinafter: al-Kurdī.

²⁸ Available online at: http://www.islam.gov.kw/demo/fatwaa/fatwaa_detail.php?fatwaa_id=1542, dated on 17/12/2005.

²⁹ Al-Diraynī, *Ḥaqq al-Ibtikār*, p.100.

³⁰ Al-Nāhī, Ṣalāḥ, *Ḥaqq al-Mu'allif fī al-Qawānīn al-Waḍ'iyya al-Mua'āṣira wa fī al-Sharī'a al-Islāmiyya*, Amman, *Huda al-Islām Majallat* (1401 AH/1980), vol. 25 p.37-57. Hereinafter: Al-Nāhī, *Ḥaqq al-Mu'allif*.

Defending publishers' rights Mu'assasat al-Risāla³¹ initiated a project which aimed to examine copyright from the *Sharī'a* standpoint. The project had sought to engage a number of scholars in this subject through their research in order to present the findings in one collective book.

The project was a good attempt but the outcome consisted of only a few replies. Mu'assasat al-Risāla published a collection of these essays written by some interested scholars under the title "*Ḥaqq al-Ibtikār fī al-Fiqh al-Islāmī al-Muqārin*".³² Obviously, there are sound educational benefits and religious justifications for institutional attempts to reach a ruling on copyright. It has found appreciation both academically and popularly. From this point, it seems that copyright in modern *fiqh* is beginning to show signs of development.

One of the essays published by Mu'assasat al-Risāla was the work of al-Diraynī, which is one of the most perceptive studies on copyright. Following the heading chosen by al-Zarqā,³³ al-Diraynī grouped the full range of intellectual property (patent, copyright, trademark, trade name and industrial design) under one common heading "*Ḥuqūq al-Ibtikār*" (the rights of invention). However, he defined generally and convincingly "*ibtikār*" (the invention) as the source of these rights. Without defining "*ḥaqq*" (right), which is more important, the study submitted a brief survey of the definitions of wealth, ownership, and utility through the various schools of *fiqh*.

In addition, al-Diraynī tried to qualify jurisprudentially the productions of mind distinctive from the expression instrument or method used to convey them. He considered that the productions of mind, including copyright, could be regarded as money capable of exchange and described them as an absolute and real right.³⁴ He suggests that the term of protection of copyright after death of the author should be

³¹ An Arabic publisher situated in Beirut.

³² Al-Diraynī, *Ḥaqq al-Ibtikār*. The book took its title from the major and most important essay undertaken by Faṭḥī al-Diraynī.

³³ Al-Zarqā, Muṣṭafa, *al-Madkhal ilā Naẓariyyat al-Iltizām al-Āmma fī al-Fiqh al-Islāmī*, Damascus, Dār al-Qalam, (1420AH/1999) (First Edition), p.31, hereinafter: Al-Zarqā, *Naẓariyyat al-Iltizām*.

³⁴ Al-Diraynī, *Ḥaqq al-Ibtikār*, p.39 and 43.

sixty years. To justify this conclusion, “*qiyās*” (the analogy) was drawn to the maximum term given by *Sharī‘a* to an individual to use an “*waqf*” (endowment) of land or a house.³⁵ The research did not endeavor to extract the judgment of copyright on the basis of evidence found in the Islamic sources systemically. Al-Diraynī’s approach may be questioned because the examination of a new issue in *fiqh* should start from the Qur’ān, the *Sunna*, “*ijmā‘*” (the consensus) and *qiyās* in that order. The study by al-Diraynī remains influenced by the civil law classifications of rights. Despite their popularity in Arabic law textbooks, these classifications are not entirely Islamic. It is not clear whether al-Diraynī considers that rights are wealth or not.³⁶

Al-Diraynī’s opinion on the duration of copyright seems to be compatible with the term given by copyright laws (fifty to seventy years), more than from the correct application of *qiyās*. It is somewhat inaccurate because there is no similarity or rationale to support this application of *qiyās*. Without enough evidence, al-Diraynī claims that al-Qarāfī (d.684 AH/1285) disapproved the financial value of “*ijtihadāt*” (legal opinions) and invention or being capable of being the subject of inheritance.³⁷

Another shortcoming with al-Diraynī’s work is that, it did not distinguish copyright clearly from other branches of intellectual property. The study would have done better if it had treated these various branches distinctly.

Although al-Diraynī’s study has not gone unchallenged, it remains a highly enlightening work and distinctive contribution to copyright in Islamic Law and one that has influenced a number of writers on this topic. It introduces copyright to *Sharī‘a* for the first time.

Al-Sanbahlī wrote the article “*Wijhat Naẓar Ḥawl al-Ḥukm al-Sharī li-Ḥaqq al-Taṣnīf*”³⁸ in the same book (*Ḥaqq al-Ibtikār fī al-Fiqh al-Islāmī al-Muqārīn*),

³⁵ Ibid, p.121. This issue will be treated in greater detail in Chapter 5.

³⁶ Compare between al-Diraynī, *Ḥaqq al-Ibtikār*, p.78 and p.88.

³⁷ Al-Diraynī, *Ḥaqq al-Ibtikār*, p.55, 58. Abū Zayd, *Fiqh al-Nawāzil*, vol.2 p.91.

³⁸ Al-Sanbahlī, Burhān al-Dīn, Muḥammad *Wijhat naẓar ḥawl al-Ḥukm al-Sharī li-Ḥaqq al-Taṣnīf*, al-Diraynī, *Ḥaqq al-Ibtikār*. p. 149-159. It was an essay written under the supervision of Sheikh Abū al-Ḥasan al-Nadawī. Al-Sanbahlī, Burhān al-Dīn, Muḥammad ,*Qaḍāyā Fiqhiyya Mua’āshira*,

recognizing only a single justification for copyright under *Sharī'a*. It is an analogy which was drawn between an author and an artisan who combined his physical with mental work and time spent and which deserves legitimate ownership of the work. Accordingly, the author is entitled to benefit from his work. It is not different from the Locke's³⁹ theory that some Western commentators have used to justify intellectual property.⁴⁰

Secondly, there is some confusion in the claim by al-Sanbahlī that a publishing contract is invalid because it contains "*gharar*" (uncertainty or risk) which is prohibited.⁴¹ *Sharī'a* requires that the price and the consideration of a contract must be precisely described, known and fixed at the time of concluding the contract. According to al-Sanbahlī's argument a publishing contract is uncertain because it depends on the percentage of the number of books sold. Therefore, the common contract for publication of a work is void for *gharar*. It seems that the reasoning is literal. A publishing contract can be categorized with other acceptable contracts, if one accepts the claim of *gharar* as well-founded.

Another point, which is disputable, relates to the application of *qiyās*. Al-Sanbahlī likened copyright after death of the author to "*walā'*" (patronage or allegiance).⁴² Then he claimed that because the right of inheritance cannot be sold the heir of an author cannot obtain a return for copyright. He considered that the heir receives a mere right.⁴³ Therefore, the heirs can only sell a work in the original draft that the author has not sold. The permission to publish, it is argued, cannot be sold because the prophetic *ḥadīth* indicates that *walā'* cannot be subjected to sale. This

Damascus, *Dār al-Qalam*, (1988) (First Edition), p. 36-48. *Majallat al-Majma' al-Fiqhī al-Islāmī*, Jeddah, *Rābi'a al-'ālam al-Islāmī*, (1409AH / 1988) (First Edition) Issue5, vol.III, hereinafter: *Majallat al-Majma'*.

³⁹ The English philosopher John Lock 1632-1704.

⁴⁰ Bently, Lionel and Sherman, Brad, *Intellectual Property*, London, Oxford University Press, (2004) (Sixth Edition), p.34, hereinafter: Bently, and Sherman, *Intellectual Property*. Drahos, Peter, *A Philosophy of Intellectual Property*, Aldershot. Brookfield USA, (1996), p.41 and post, hereinafter: Drahos, *A Philosophy of Intellectual Property*.

⁴¹ Schacht, Joseph, *An Introduction to Islamic Law*, Oxford UK, (1979) (Second Edition), p.146

⁴² A relationship established between a master and a slave after emancipation which confers some mutual rights on them, for example the former can inherit from the latter in some cases. See EI², Entry: *walā'*.

⁴³ Al-Diraynī, *al-Ibtikār*, p.153.

judgment seems to be inconsistent with the correct application of *qiyās*.

In 1409AH/1988, the theoretical analysis of copyright under Islamic Law made significant progress as expressed in a number of studies. The *Fiqh Academy*⁴⁴ discussed papers presented by many scholars regarding branches of intellectual property.⁴⁵ This approach appears to be ill-conceived because these branches have grown and become more sophisticated, independent, and each area has its own subject, function and characteristics. Any study should treat each branch as distinguishable even though they possess some common grounds, not least the fact that they are parallel to tangible property. In addition, there is the educational and practical interest that one cannot set out the whole of intellectual property without dividing it into different parts. This type of generalization across the various branches of intellectual property may result in mistaken judgments.

After lengthy discussion, the *Fiqh Academy* concluded that patent, copyright, trademarks and industrial design are private, protected and legitimate rights. Also, they said that these rights have financial value, their owners are free to deal with them and the violation of these rights is prohibited.⁴⁶ With this decision, the trend towards the approval of copyright was further strengthened. However, the decision needs to be followed by other steps in order to develop common guidelines that may lead to the establishment of an Islamic intellectual property system. Later on, the Islamic *Fiqh Academy* of India reached a similar conclusion that the sale of modern rights, such as patents and copyright, is generally permissible.⁴⁷

With this generalization, copyright was approached by the *Fiqh Academy* in three essays by *fuqahā'*. One of them was al-Būṭī's essay.⁴⁸ At the beginning he used

⁴⁴ The council consisting of scholars has been appointed by Muslim states. The ministers of Foreign Affairs of the Organization of Islamic Countries OIC established this council in their twelfth conference held in Baghdad 2.6.1981.

⁴⁵ In its fifth session in Kuwait in 10th –15th December 1988. See *Majallat al-Majma'*, Issue 5, vol.III, p.2267-2579.

⁴⁶ *Majallat al-Majma'*, Issue p.2267-2579.

⁴⁷ In its third session in Bangalore, India, in 8th –11th June 1990, http://ifa-india.org/english/decision_Sale_of_Rights.html

⁴⁸ *Majallat al-Majma'*, *Ḥaqq al-Ibtikār aw al-Ibdā'*, Issue 5, vol.III, p2398-2406. Al-Būṭī, Muḥammad, *Qaḍāyā Fiqhiyya Mu'āṣira*, p.82.

the definitions of al-Zarqā and al-Diraynī of right which have met with criticism on many jurisprudential grounds.

Al-Būṭī confirmed that it is an established principle in the *Sharī'a* that authorship bestows intellectual property rights upon the author. He pointed out briefly that copyright can be established on several clear and fundamental values such as the prohibition against plagiarism, the rules related to honesty and the approval of 'urf of copyright. He argued that it is new situation when an author claims to derive economic benefits from intellectual property. The significance of this work lies in the analogy made between many old and new cases. For example, al-Būṭī made an analogy between, on the one hand, a book or a tape which conveys an idea or interest and, on the other, a container which contains substance. He argued that the object of a sale contract of a book is the book itself but not the ideas included in the book.

Next we must consider the study made by Usmani, under the title "*Bay' al-Ḥuqūq al-Mujarrada*", which means the sale of abstract rights. Usmani only spent a few pages on copyright and the majority of the study is devoted to present his detailed classifications of "*ḥuqūq*" (rights), without an elaboration on the meaning of "*ḥaqq*", which is the key issue of copyright.

However, Usmani did recognize copyright relying on a single *ḥadīth*, and reached to the conclusion that it is permissible to sell copyright basing this on 'urf. Usmani did not provide other grounds to support copyright in *Sharī'a*. His study mentioned some of the criticisms leveled against the acceptance of copyright under *Sharī'a* but successfully refuted them.⁴⁹ It is interesting to note that he is the son of Muftī Muḥammad Shafī' who rejected the notion of copyright,⁵⁰ and Usmani took the opportunity to respond to his father's objections to copyright.

An influential study and one which is comparative with the law is the study of

⁴⁹ *Majallat al-Majma'*, Issue 5, vol.III, p2357-2388. Usmani, Muhammad, *Buḥūth fī Qaḍāyā Fiqhiyya Mu'āṣira*, Damascus, *Dār al-Qalam*, (1419 AH /1998) (First Edition), p.77-126. Usmani, Muhammad Taqī, *Contemporary Fataw*, Lahore, Idara-e-Islamiyat, (2001),p188, also available online at: <http://www.albalagh.net>.

⁵⁰ See p.25 here.

al-Nashmī entitled “*al-Ḥuqūq al-Ma‘nawiyya al-Ism al-Tijārī*”.⁵¹ It started with the definition of *ḥaqq* in law and *Sharī‘a* and proceeded to categorize copyright (as patents and trademarks) under the title of “*al-Ḥuqūq al-Ma‘nawiyya*” (moral rights). He asserted that there is no difficulty in categorizing copyright under “*ḥuqūq ‘yniyya*” (real rights).⁵² The rationale behind this classification is not apparent. *Fiqh* does not have the same civil law classification of rights. Nonetheless, al-Nashmī concludes with an approval of the sale of this kind of right as a general rule and applied and extended this reasoning to trade names and to computer programs.⁵³

With helpful historical background, Abū Zayd approached this subject in a chapter of his book “*Fiqh al-Nawāzil*”.⁵⁴ It provides a useful starting point for a brief survey of the printing press and copyright in Islamic history and jurisprudence up to the time of his publication.

Instead of attempting to define *ḥaqq*, Abū Zayd discussed briefly copyright notices, copyright registration, copyright infringement and fair use. Then he suggested that the correct terminology for copyright is “*milkiyyat al-t’āliff*” (the ownership of authorship). The issue of a correct term for copyright remains outstanding as his suggestion may lead to unnecessary ambiguity.

A further point of notice is that Abū Zayd briefly referred to some *aḥādīth* and some useful rules of *fiqh* for the purpose of recognizing an author’s economic rights. No authority, however, is given to support the recognition of “*al-ḥaqq al-‘ādabī*” (the author’s moral rights). The study presented arguments disapproving of an author’s economic rights without setting out replies to or commenting on them. Abū Zayd concludes by advising the authors of religious books not to seek to profit from their works unless they are in need.

The judgment on copyright is left somewhat vague in Abū Zayd’s work. It is

⁵¹ Al-Nashmī, Ajyl, *al-Ḥuqūq al-Ma‘nawiyya al-Ism al-Tijārī*, *Majallat Majma’*, Issue 5, vol.III, p.2271-2349. Al-Nashmī, Ajyl, *al-Ḥuqūq al-Ma‘nawiyya li al-Barāmij wa ‘Aḥkām Naskhihā*, al-Majlis al-Awrubbī, Dublin, The European Council for Fatwa and Research (First issue) (June 2002), p.120 and after. Also available online at: <http://www.e-cfr.org/eng/index4.shtml>

⁵² Al-Nashmī, *al-Ḥuqūq al-Ma‘nawiyya li al-Barāmij wa ‘Aḥkām Naskhihā*, p.171.

⁵³ Ibid, p.120 and after.

⁵⁴ Abū Zayd, *Fiqh al-Nawāzil*, vol.2, p.77 and after.

necessary to point to the fact that the boundaries of what is ethically desirable and what is legally enforceable must be certain. However, Abū Zayd's essay is important as it enables researchers to confirm and add to their information and knowledge on the subject.

Starting with a strict reply to al-Kurdī's article, Abū al-Khayr wrote a book of "*al-Ḥaqq al-Mālī lil-Mw'allif fī al-Fiqh al-Islāmī wa al-Qānūn al-Maṣrī*".⁵⁵ In spite of its title, the entire work is based mainly on Egyptian copyright law with limited reference to copyright in *Sharī'a*. After presenting some of al-Diraynī's arguments that accommodate copyright in Islamic jurisprudence, he added other evidence very briefly. Following al-Diraynī' opinion, Abū al-Khayr argued that copyright should last for 60 years after an author's death, which is not accurate. He did not give evidence on why he defined "*ibtikār*" (invention) with "*ijtihād*" (conscientious reasoning).

As an official religious institution, the Permanent Committee for "*Iftā'*" (Islamic Rulings) answered questions regarding copyright. It is worth mentioning the question and the answer. "Is the copying of software which I did not buy on my hard drive for my own use permissible or not? Answer by the Permanent Committee for *Iftaa* (Islamic Rulings), chaired by Sheikh Abdul-Aziz bin Bāz: It is not permissible to copy software without permission from the original author or the copyright holder based on the following three ahadeeth of the Prophet,: (1) "Muslims are to honor their agreements (with others);" 2) "A Muslim's wealth is forbidden for others to use without his permission and,,"; (3) "Whoever is the first to acquire a *mubah* (something lawful to acquire) is entitled to keep it." This, of course, applies to both Muslims and non-Muslims alike, because the right of a non-believer is respected in the same manner as a Muslim's right."⁵⁶

⁵⁵ Abū al-Khayr, 'Abd al-Samī', *al-Ḥaqq al-Mālī li al-Mu'allif fī al-Fiqh al-Islāmī wa al-Qānūn al-Miṣrī*, Cairo, Maktabat Wahba, (1988) (First Edition).

⁵⁶ Fatāwa al-Lajna al-dā'ima lil-Iftā', Aḥmad 'Abd al-Razzāq al-Dwīsh(ed.) Riyadh, al-Ri'āsa al-Āmma lil-Iftā' wa al-Baḥūth, (1421AH/2000) (Third Edition), vol.3, p.188, Fatwa No.18453, dated on 12/1/1417AH, hereinafter: Fatāwa al-Lajna al-dā'ima. The translation of the first fatwa is by al-Jumua Magazine, vol.11, Issue 2, (May June 2000).

Another *fatwa* stated that it is permissible to copy or sell useful tapes or books without the consent of the original authors or the copyright holders unless the original owner explicitly does not allow that.⁵⁷ This *fatwa* is not, however, of itself a ground or the result of the Saudi Copyright Laws (1410AH) or (1423AH) although, ‘Izzāt attempted to justify the Saudi Copyright Law in his book based on some of the previous studies looked at here.⁵⁸ In fact, apart from referring to the succession according to *Sharī‘a* and the lunar calendar, the Saudi Law is no different from other secular laws.

Answering the question of whether it is obligatory to abide by the standard notice in modern books that "*rights of publications are reserved to the author or publisher*" al-Sistānī stated that to abide by the notice is not obligatory but it is preferable to seek permission, especially from the author.⁵⁹ On the same theme, al-Tabarīzī stated that copyright is not a "*Sharī‘ī*" (religious) right but a believer should not do anything which deprives another of his work. However, he argues that if copyright has been infringed the author is not allowed to claim remedies.⁶⁰ There are two serious problems with this approach. First, no authority or evidence is given to support these *fatāwa*. Second, they reduce copyright to a marginal status.

A similar position was taken by al-Khalīlī set out in more detail but less extremism. He concluded that there is no justification for the hoarding of knowledge and thus no need to abide by the notice. He went on to say that, if the reproduction or copying of a work would harm an organization which has been established for the dissemination of knowledge, copyright should be observed. However, he argued that this is only applicable to those who want to copy for profit and there was no restriction on people who wanted to copy for learning.⁶¹

⁵⁷ Fatwa No.18845 dated on 30/5/1417AH.

⁵⁸ ‘Izzāt Maḥmūd Muḥammad Farīd, *Niẓām Ḥimāyat Ḥuqūq al-Mu‘allif*, Riyadh, the University of Imām Muḥammad b. Sa‘ūd al-Islāmiyya (1992/1413AH), hereinafter: ‘Izzāt, *Niẓām*.

⁵⁹ Al-Sistānī, ‘Alī al-Husaynī, *al -Mustaḥdāthat min al-Masā‘il al -Shar‘iyya*, London, *Mu‘assasat al-Imām ‘Alī*, (1996/1416AH) (Second Edition), p.28. These *fatāwa* translated by Hamid Mavani. It is also available online at: <http://www.al-islam.org/laws/contemporary/index.html>.

⁶⁰ Al-Tabarīzī, www.TABRIZI.ORG, The official website of Grand Ayatolla Jawad Tabrizi’s Office

⁶¹ Al-Khalīlī, Aḥmad Ibn Ḥamad, *Fatāwa al-Mu‘āmalāt*, Oman, Dār al-Ajyāl, (1423AH/2003),

According to the *fatāwa* of al-Sistānī and al-Khalīlī, copyright is redundant because respecting it is only recommended not compulsory. Most importantly, experience has shown that such a view could lead to the encouraging the denial of copyright and to the epidemic of piracy. This approach also ignores the fact that piracy has major consequences for daily life. And there is no inevitable conflict between copyright and the dissemination of knowledge.

Although these *fatāwa* are not detailed studies, but they have great significance for Islamic societies because they arise from authoritative quarters in the name of religion and "the Islamic *Sharī'a* is, in our terminology, both a code of law and a code of morals."⁶²

Al-Najjār attempted to qualify the concept of moral rights of the author in *fiqh* in his book "*al-Himāya al-Muqarrara li-Huqūq al-Mw'allifiyyin fī al-Fiqh al-Islāmī Muqārana bil-Qānūn*".⁶³ He presented the high religious and social position given to the sciences and scholars in the Qur'ān and the Sunna. Indeed the author's moral rights and the high religious position given to sciences and scholars are close to each other but not identical. Therefore, the arguments for them cannot be identical. Al-Najjār also tried to explain the nature of the author's moral rights but he stated the social and economic consequences of authorship. He associated "*isnād*"⁶⁴ (the chain of the narrators) with the author's right of attribution or paternity. The evidence provided by al-Najjār in establishing *isnād* does not support copyright totally. However, al-Najjār represents strong arguments for the recognition of copyright even though this was dealt with only briefly and not in a systematic way.

In a few pages of his book, *al-Mu'āmalāt al-Māliyya Mu'āşira fī al-Fiqh al-Islāmī*, Shubīr summarized some of the previous studies regarding copyright in *Sharī'a* without any addition to support either the recognition of copyright or

p.124.

⁶² Coulson, Noel J., *Conflicts and Tensions in Islamic Jurisprudence*, The University of Chicago & London, (1969) p.79.

⁶³ Al-Najjār, 'Abd Allah, *al-Himāya al-Muqarrara li-Huqūq al-Mw'allifiyyin fī al-Fiqh al-Islāmī Muqārana bi-lqānūn*, Cairo, Dār al-Nahḍha, al-'Arabiyya(1990) (First Edition).,hereinafter: Al-Najjār.

⁶⁴ EI², Entry: *Isnād*.

definition of *ḥaqq*. Shubīr applied the definition of *ibtikār* to be the definition of *ḥuqūq al-ibtikār* attributing that to al-Diraynī.⁶⁵

Al-Shanqīṭi devoted one chapter in his book “*Dirāsa Shar‘iyya li-’Aḥamm al-’Uqūd al-Māliyya al-Mustaḥdatha*” to a discussion of the transfer of financial rights (including copyright).⁶⁶ He drew no distinction between the author’s moral rights and his economic rights. As regards the sale of copyright, he restated al-Diraynī’s arguments. The study produced a good flowchart of rights as well as strong arguments in favor of the succession of copyright. This indicates that there is a considerable advance towards the confirmation of copyright in Islamic Law.

Subsequently, the development of the notion of copyright under *Sharī‘a* seems to have reached some degree of “maturity” with a discussion during the Seventh Seminar on Contemporary *zakāt* Issues 1417AH 1997 of *zakāt* (alms) on intellectual property which included copyright.⁶⁷ The investigation was based on an initial premise which implied that copyright was recognized and well established in *fiqh*.

The seminar concluded, however, that the owner of intellectual property is not obliged to pay *zakāt* on intellectual property, unless the proceeds of intellectual property reach the level of *niṣāb*⁶⁸ or above. One needs to bear in mind that, the difference among scholars as to whether *zakāt* is payable immediately or, alternatively, after the passage of one lunar year in which the money is held in possession.

It must be pointed out those arguments in other modern writings counter the ones set out so far and lead to some uncertainty and resistance to the concept of copyright. For example, Samāra wrote an essay arguing that intellectual property is a

⁶⁵ Shubīr, Muḥammad ‘Uthmān, *al-Mu‘āmalāt al-Māliyya Mu‘āshira fī al-Fiqh al-Islāmī*, Amman, Dār al-Nafā’is, (1418AH/1998) (Second Edition), p. 47 and after. ,hereinafter: Shubīr, *al-Mu‘āmalāt al-Māliyya*.

⁶⁶ Al-Shanqīṭi, Muḥammad Muṣṭafa, *Dirāsa Shar‘iyya li-’Aḥamm al-’Uqūd al-Māliyya al-Mustaḥdatha*, al-Madīna al-Munawwara, Maktabat al-’Ulūm wa al-Ḥikmm, (1422 AH/2001) (Second Edition), vol.2, p.739 and post, hereinafter: al-Shanqīṭi.

⁶⁷ Bayt al-Zakāt al-Kuwaytī, *The Works and the Studies of the Seventh Seminar on Contemporary Zakāt Issues*, Kuwait, 22-24/12/1417AH 29/4-1/5 1997, p.593 and post, hereinafter: Bayt al-Zakāt Seminar. Al-Qaradāghī, ‘Alī, *Buḥūth fī al-Mu‘āmalāt al-Māliyya Mu‘āshira*, Beirut, Dār al-Bashā’ir al-Islāmiyya, (1422 AH/2001) (First Edition), p. 393 and post, hereinafter: al-Qaradāghī.

⁶⁸ *niṣāb* is a minimum amount of a given kind of wealth for which *zakāt* alms is due.

Western idea designed with the purpose of supporting the imperialist enterprise and to spread Western values and thus incompatible with *Sharī'a*.⁶⁹

Another example is the book "*Huqūq al-Milkiyya al-Fikriyya fī al-Manzūr al-Islāmī*" by Murād who summarized many of the previous studies in a somewhat confusing way.⁷⁰ The book made no effort to distinguish between different branches of intellectual property. Murād accepted the international protection of intellectual property⁷¹ but described this protection as a colonialist idea⁷² and Western "*bid'a*" (innovation).⁷³ Murād referred to the argument that developing countries would benefit from joining the international protection of intellectual property as that would encourage the scientific research and development⁷⁴ but dismissed this connection as false.⁷⁵

Murād refers to the abuse of intellectual property made by some companies⁷⁶ and the negative impact on poor countries of the International Agreements.⁷⁷ He agreed that intellectual property generally have been used to a large extent as instrument by powerful countries and companies but that intellectual property is not exclusive to such countries and companies for ever.

From this perspective, al-Ḥuşayn doubts the validity of the basis of an author's economic rights.⁷⁸ Al-Ḥuşayn described copyright as an alien concept in the Islamic legal system, one created by law and not by *Sharī'a* and one borrowed from the

⁶⁹ Samāra, Ihsān, Mafhūm *Huqūq al-Milkiyya al-Fikriyya wa Dawābiṭihā fī al-Islām*, Jordan Jarash, *Kulliyat al-Sharī'a*, (2001).

⁷⁰ Murād, Dr Barkāt Muḥammad, *Huqūq al-Milkiyya al-Fikriyya fī al-Manzūr al-Islāmī*, Riyadh, *Mu'assasat al-Yamāma*, (1423AH/2003) (First Edition). Hereinafter: Murād.

⁷¹ Ibid, p. 21.p119.

⁷² Murād, p.43.

⁷³ Ibid, p.139 and post. *bid'a* means disapproval innovation in religion.

⁷⁴ Ibid, p.39

⁷⁵ Ibid, p.45.

⁷⁶ Ibid, p.134.

⁷⁷ Ibid, p.130. For a discussion of the problems associated with this issue, see General Evaluation of The Uruguay Round Agreements With Special Reference to The Impact of Trade Related Trade Related Investment Measurements (TRIMs) and Intellectual Property Rights (TRIPs) on Islamic countries which is made by ICCI Islamic Chamber of Commerce and Industry, Karachi, Pakistan; an affiliated organ of the Organisation of the Islamic Conference. *Journal of Economic Cooperation Among Islamic Countries* 16,1-2 (1995),176-178.

⁷⁸ Al-Ḥuşayn, Ṣāliḥ, *hal li al-Ta'ālīf Haqq Mālī*, an article at www.islamtoday.net, dated on 1/6/1423AH. Hereinafter: Al-Ḥuşayn.

capitalism environment. Al-Ḥuṣyyn argues, however, that *Sharī'a* must govern copyright and considers that this means that the protection should be granted to works that do not conflict with *Sharī'a*, provided the author clearly requests protection of copyright for his work. According to al-Ḥuṣyyn's view, these conditions only apply to non-religious works whilst religious books must be available freely to all Muslims. In general, he aligns more closely with the conclusion reached by Abū Zayd.

Apart from the condition of the legitimacy of works, the conclusion of al-Ḥuṣyyn appears to be arbitrary and unjust. The author considers the error of this approach is in its confusion between the basis and source of rights and the discovery and regulating of those rights. Copyright is conferred on people from different backgrounds. The article by al-Ḥuṣyyn indicates that copyright has not been completely recognized or accepted by some religious circles and the argument seems to threaten to render copyright redundant.

It is useful to mention here that al-Ghiryānī issued a *fatwa* permitting only the copying of scientific programs or essential computer programs without the consent of the company owner, if the latter unlawfully refuses to sell those programs.⁷⁹ The distinction of this *fatwa* is the analogy that was made between the technical protection of programs and "*ḥirz*".⁸⁰ *Ḥirz* generally means any measure designed to restrict access to or prevent unauthorized reproduction of works such as a password. One should bearing in mind here that the destruction of "*ḥirz*" in order to steal goods is one of the clear conditions applicable in a decision to amputate a thief's hand as a "*ḥadd*" (punishment).

In accordance with Abū Zayd's approach, al-Shahrānī wrote a dissertation entitled "*Ḥuqūq al-Ikhtirā' wa al-Tā'lif fī al-Fiqh al-Islāmī*".⁸¹ This dissertation

⁷⁹ Al-Ghiryānī, al-Ṣādiq, *Fatāwa wa Taḥqīqāt fī Masā'il Fiqhiyya Takthur al-Ḥājatu 'ilayhā*, Muṣarata, Dār wa Maktabat al-Sha'ab, (2003) (First Edition), p.166-170.

⁸⁰ *Ḥirz* means a reasonable place or custody which an owner can keep his property usually according to its value and nature.

⁸¹ Al-Shahrānī, Ḥusayn b, Ma'lawī, *Ḥuqūq al-Ikhtirā' wa al-Tā'lif fī al-Fiqh al-Islāmī*, Riyadh, Dār al-Ṭibā'a li al-Nashar wa al-Tawzī' (1425AH/2004) (First Edition). Hereinafter: Al-Shahrānī.

surveyed copyright terminology in Islamic and legal studies but this had nothing to advance or oppose the establishment of copyright in *Sharī'a*. The study focused on the lexical interpretation of “*al-tā'lif*” (authorship) and “*al-ikhtirā*” (invention). After providing a useful survey of the term “right” and definitions of ownership al-Shahrānī chose what he thought were most appropriate for defining copyright and ownership.

Al-Shahrānī tried carefully to deduce Islamic judgments based on different ingredients of copyright. The study cannot avoid being drawn into a discussion on copyright by assuming that what has been said about copyright is applicable to all intellectual property, whereas there is clear distinction between each branch of intellectual property. As stated before, the biggest criticism of this approach concerns its over-generalization.

The title of al-Shahrānī's work may lead a reader to think that its subject matter covers both copyright and intellectual property branches but copyright is considered more than any other branch. In this study, also, one might notice that the emphasis is on a consideration of copyright as applied to religious writings. The most significant element of al-Shahrānī's study is the application of “*ta'zīr*”⁸² to different forms of infringement of copyright.⁸³

1.7.3 Copyright as applied to *fiqh* in legal textbooks

The picture of the growth of copyright in *fiqh* would be incomplete if we did not mention those Arabic legal textbooks which have considered this subject. Many books have been written on the subject of copyright but none have studied the subject in the *Sharī'a*. These textbooks have not provided or mentioned an Islamic

⁸² *Ta'zīr* means “discretionary punishment to be delivered for transgression against God, or against an individual for which there is neither fixed punishment nor penance (*kaffāra*)”, see El-Awa, Mohamed, *Punishment in Islamic Law*, Indianapolis, American Trust Publications, (1998/1418H) p.96. See also EI², Entry: *Ta'zīr*.

⁸³ Al-Shahrānī, p.527 and post.

framework or source for copyright. In fact, these writings are mostly types of commentary on secular copyright laws and expressive of civil law and Western scholarship.

The reason for this may be that since the publication of “*Qānūn Ḥaqq al-Mu'allif*” (The Author's Right)⁸⁴ in 1908/1326AH Muslim States have attempted to legislate for copyright to align themselves with more internationally acceptable practices but have ignored the possibility of deriving copyright from *Sharī'a* itself.

The notable absence of contributions regarding copyright in Islamic Law since al-Sanhūrī⁸⁵ is eased somewhat by Kan'ān's book “*Ḥaqq al-Mwa'liff*”.⁸⁶ Yet there are some references in these works to copyright in *Sharī'a*, but no sustained arguments. Some attention to Islamic Law is indicated.

In a few pages, Kan'ān summarized some of the previous studies, with some mistakes such as inaccurate citations and referring to some quotations made by *fuqahā'* (jurists) as *ḥadīth*. A few pages of Turkey Şaqar's book “*Ḥimāyt Ḥuqūq al-Mwa'liff, bayn al-Nazariyyti wa al-Taṭbīq*” provides another exception, with the same mistakes in one and half page.⁸⁷

One might consider here the fact that works of the quality represented by these books can be interpreted as evidence of the ignorance and disinterest with which Islamic Law is treated in many academic circles. It is not surprising, therefore, to find no mention of *Sharī'a* or its sources in the Arabic Treaty of the Authors' Rights Protection.⁸⁸

⁸⁴ 'Izzāt, *Nizām*, p.85.

⁸⁵ Al-Sanhūrī, 'Abd al-Razzāq, *al-Wasīṭ fi Sharḥ al-Qānūn al-Madanī al-Jadīd*, Cairo, Dār al-Nahḍa al-'Arbiyya, (1967).vol.8.

⁸⁶ Kan'ān, Nawāf, *Ḥaqq al-Mu'alif, al-Namādhj al-Mua'āşira li-Ḥaqq al-Mu'alif wa Wasā'il Ḥimāyatihā*,(2004) (First Edition) Amman, Dār al-Thaqāfa, p. 23-33.

⁸⁷ Şaqar, Turkey, *Ḥimāyt Ḥuqūq al-Mu'alif, bayn al-Nazariyya wa al-Taṭbīq*, Damascus, Manshūrāt Itihād al-'Arab (1996).

⁸⁸ The 3rd session of the conference of the ministers of culture affairs held in Baghdad 2.11.1981, *Majallat al-Nāshir al-'Arabi*, p203, 2nd issue, Feb. 1984, Tripoli, Itihād al-Nāshirīn al-'Arab.

1.7.4 Copyright applied to *fiqh* in English works

As stated in its abstract, the major concerns of Azmi study's are to "evaluate the intellectual property laws in Malaysia" according to Islamic law, and "to prove that a coherent conceptual framework of ownership of intellectual property can be derived from an Islamic perspective", that satisfies international treaties and Islam.⁸⁹

These aims are inconsistent with an approach which assumes that "there a vacuum exists in authentic sources as to the basis of intellectual property",⁹⁰ whereas there is good authoritative evidence indicating the flexibility and capability in accommodating intellectual property in Islamic jurisprudence. Azmi's work does not provide a literature review and relies mainly on al-Diraynī's direction.

Azmi's study contains some interpretations which has attracted criticism. For example, the claim that the Qur'ānic verse that praises those who have knowledge and the prophetic *ḥadīth* that allows a person to be selective of the recipient of information would support the notion that 'ideas' "can become the subject of private property".⁹¹ Also, it is difficult to claim that "Muslim scholars argued that the duration of copyright is 60 years after the demise of the author".⁹² Azmi did not set out convincing arguments to support the suggestion that there should be a readjustment of an agreed price for an authors' work by a judicial body if the work proved to be more successful than the parties thought. Despite these remarks, Azmi has provided a valuable source of reference for the English reader.

Similarly to the approach of Abū Zayd and al-Ḥuṣyyn, the Advanced Legal Institute⁹³ questioned whether the earlier Muslim jurists would have upheld

⁸⁹ Azmi, Ida Madiha Abdul Ghani, *Intellectual Property Laws and Islam in Malaysia*, a dissertation submitted to the Queen Mary & Westfield for the degree of D.Phil. in 1995. p.i and p.3, hereinafter Azmi, *Intellectual Property*.

⁹⁰ Ibid, p.309.

⁹¹ Ibid, p.79.

⁹² Azmi, *Intellectual Property*, p.87.

⁹³ Advanced Legal Studies Institute, Islamabad, Pakistan.

intellectual property rights as they are understood and implemented today”.⁹⁴ The Institute pointed out that a form closer to Islamic intellectual property rights is the Open Publication License, where any material is free without any restrictions whilst acknowledging the sources.⁹⁵

The Institute argued that some well-known *fuqahā'* such as al-Suyūṭī (d.911AH/1505) were transmitting from each other the original work of “*al-Ashbāh wa al-Nazāi'r*” by al-Karkhī (d.340AH/951/2).⁹⁶ However, the rest of this statement (with each subsequent author making his own contribution)⁹⁷ could be used against the argument. Nevertheless, assuming that the transmission as asserted is true, it cannot stand as a strong argument in *Sharī'a* for violating copyright.

Moreover, this approach rests upon the assumption that the Open Publication License will help the research and to promote knowledge. In this respect it is likely that copyright provides a stronger incentive than the Open Publication License does.

Jamar tried in an article to apply some of the basic principles of Islamic law to general standards of intellectual property protection.⁹⁸ He compared and tested Egyptian law to see how consistent it was with Islamic law as regards many aspects of intellectual property.

Jamar used the principles of *Sharī'a*: “*maṣlaḥa*” (the public interest), the sanctity of property and contract and, even Islamic criminal law, as he understood these concepts and rules to fashion a framework which provided a rigorous protection to intellectual property for foreign clients in Muslim countries. It would appear that Jamar subconsciously thinks more of this type of protection than of the position of copyright in *Sharī'a*. As result of that, Jamar was unnecessarily drawn into a discussion of some areas which requires a fuller exploration. For example, the question of whether a Qur'ānic provision may be ignored, modified or interpreted to

⁹⁴ Available online at: <http://www.nyazee.com/index.html>

⁹⁵ Ibid.

⁹⁶ Available online at: <http://www.nyazee.com/index.html>.

⁹⁷ Ibid.

⁹⁸ Jamar, Steven D., (The Protection of Intellectual Property Under Islamic Law) *Capital University Law Review*, Washington, Howard University School of Law, (1992). vol. 21 1079-1106, hereinafter: Jamar.

be consistent with *maṣlaḥa* or “*urf*” (custom).

Without accurate investigation or authentic evidence Jamar reached some dubious conclusions such as “Royalties are not *riba*, or interest or usury, and the contract is not uncertain so this provision should withstand Shari’a scrutiny“. This article can be used as a modern example of what Strawson described when he stated: “English texts do not present Islamic Law, they construct it”.⁹⁹

It is sufficient in the present context to refer very briefly to the Habib page on the Internet. Habib approached the subject in a sympathetic way and translated some of the above- mentioned works into English.¹⁰⁰

It should be acknowledged that the European Council for *Fatwa* and Research recently endorsed broadly the same decision as the *Fiqh* Academy, adding computer software programs.¹⁰¹

1.7.5 Summary

This literature review sets out the historical development of copyright and its religious context. The position of copyright in *Shari’a* has many difficulties to be resolved. This is because it is a new issue that *Shari’a* does and has not addressed directly. There are, however, some elements of copyright which are treated under various headings of *fiqh* and *ḥadīth*. For example, *isnād* and *ijāza* can be seen as supplying roots for the foundations of copyright.

Although copyright has not been addressed adequately in the same way as other similar subjects in *fiqh*, the idea of copyright has developed in the *fiqh*. In contemporary writings on *fiqh*, there are some serious studies and *fatāwa* on copyright, but no single full account of applying the *uṣūl al-fiqh* to this issue has been attempted.

Many studies treated copyright generally under intellectual property. This

⁹⁹ Strawson, John, *Islamic Law and English Texts, Law and Critique*, vol.5, PT 1, p21-38.

¹⁰⁰ Habib, *Copyright under Islamic Law*.

¹⁰¹ In its eighth session in Spain in *Jumādā al-Akhira* 1422 AH/July 2001. available online at: <http://www.c-cfr.org/cng/index4.shtml>

generalization is to be disputed to secure the urgent need for a detailed and specific treatment of the subject. The uncertainty of copyright in *fiqh* should be dealt with by a deep and profound study.

Some studies have not found any clear text in the Qur'ān and the Sunna dealing with the subject. Other works do not apply some particular constructive rules of *fiqh* and *uṣūl al-fiqh* systematically. Examining these studies in depth goes beyond the scope of this section but remarks on each of them indicate that the subject needs more analysis and elaboration. Despite the remarks and difference of perspectives, the previous studies enrich our understanding of the issue of copyright in *Sharī'a*.

As we have seen, there are a number of *fuqahā'* who have strongly called for the recognition of copyright whilst others seem generally sympathetic to such a call without expressly supporting the recognition of copyright and a third group that is more cautious about the legitimacy of copyright pointing out, for example, the disadvantages and the conflict with other rights and considerations that a recognition of copyright would cause.

This section contains several matters for debate and many differing views that will continue to be expressed. What cannot be doubted is that we are seeing the concept of copyright in *fiqh* progress and evolve from a point of weakness to a point of strength. *Fuqahā'* have not been very favorable to copyright but they have slowly strengthened the usage of copyright. This progress arises despite some continuing criticism that copyright reduces the widespread dissemination of knowledge.

Clearly, the question as to whether copyright can have deep-rooted place in Islamic Law requires "*ijtihād*" (conscientious reasoning). *Ijtihād* on copyright should be exercised according to the terms, conditions and principles of Islamic jurisprudence. One is required, therefore, to discover Islamic solutions necessary for the possibility of an effective recognition of copyright.

Chapter one

Ḥaqq and its Classifications in *Sharī‘a*

1.1 Introduction

This chapter aims to cover two main objectives. The first is to give a comprehensive review of the definitions of “*Ḥaqq*” which can loosely be translated as “right”; by inspecting its notion, factors and applicability to copyright in general. The second is to review the main classifications of *ḥaqq* used in *fiqh* to examine whether they can be employed or extended to include copyright.

“*Ḥaqq*” is a term which can be observed in every aspect of life. Various legal systems locate the notion of right at the centre of their attention. It is one of the most important concepts of substantive law.

The following chapter will provide some structure to the understanding of *ḥaqq* in *fiqh*. Defining the key term *ḥaqq* is important to the start of researching copyright and other new rights in *Sharī‘a* within its boundaries. The precise answer to the question whether or not copyright can have place under *Sharī‘a* depends on the analysis of the construction of *ḥaqq*. A study of copyright under *Sharī‘a* must begin with what is meant by *ḥaqq* in order to establish or reject copyright according to the *Sharī‘a*. Only after this task is undertaken, can copyright begin to be considered on conceptual grounds within the classifications of *ḥaqq* in *fiqh*.

To achieve these objectives, it is necessary to retain familiarity with the fundamentals of *fiqh* and *uṣūl al-fiqh* and it is also useful to remind the reader that the Islamic law ultimately is product of religion.

1.2 Meanings of *Ḥaqq*:

It is necessary to start with the word meaning in the Arabic language as it is the

language of *Sharī'a*. The word *ḥaqq* (pl. *ḥuqūq*) occurs in the Qur'ān¹ and Islamic traditions as in the pre-Islamic literature referring to these following meanings: (1) "thābit": real, established, fact, true, truth (2) "wājib": due to Allah or man obligation, duty (3) "mawjūd": exist (4) "ṣaḥīḥ": correct, straight, accurate, appropriate, justice, legitimate, virtue, suitable, honorably ethical, (5) "māl": wealth, money, property, share (6) "khuṣūma": dispute, claim, litigation (7) the antonym of "bāṭil" which means falsehood, invalid, error or moral wrong.²

The word *ḥaqq* had another meaning after the revelation of the Qur'ān, which is one of "al-Asmā' al-Ḥusnā" (the ninety-nine Divine names of Allah) and one of His almighty attributes which reflects its value. After a rigorous scrutiny of the various meanings for *ḥaqq* in Arabic one can conclude that it implies the two essential meanings: certainty and obligation.³ These two meanings are more present and highly valued in usage than other meanings which could be regarded as synonyms of or substitutes for the first two meanings. It appears that all instances of the word employ the two meanings in different ways and it is only subsequent expansion of this word that gives it other additional meaning.

It is not a vague word but it does cover several meanings. Any actual usage of the word *ḥaqq* will be connected to a specific meaning from this previous spectrum of possible meanings. This diversity of meanings can be taken as a sign of fertility and perceived in its terminology and not as evidence of ambiguity. Therefore, there

¹ *Ḥaqq* is mentioned 283 times in the Qur'ān, but it never comes in plural.

² Abū al-Ḥusayn Aḥmad bin Fāris, *Mujmal al-Lughā*, Zuhayr Sulṭān (ed.), Beirut, *Mua'ssasat al-Risāla*, (1984) (First Edition), vol. 1, p.210. hereinafter: *Mujmal al-Lughā*. Al-Jawharī, Ismā'īl bin Hamad, *Tāj al-Lughā wa ṣiḥāḥ al-'Arabiyya*, Aḥmad 'Abd al-Ghafūr(ed.), Beirut, Dār al-'Ilm, (1987) (Fourth Edition), vol.4, p.460., hereinafter: Al-Jawharī. Al-Aṣḥānī, al-Rāghib, *al-Mufradāt fī Gharīb al-Qur'ān*, Muḥammad Kaylānī, (ed.), Beirut, Dār al-Ma'rifa, (N.D) p.125, hereinafter: al-Aṣḥānī, *al-Mufradāt*. Al-Zamakhsharī, Maḥmūd, *Asās al-Balāgha*, Muḥammad Bāsil 'Uyūn al-Sūd (ed.), Beirut, Dār al-Kutub al-'Ilmiyya, (1998) (First Edition), vol.1, p.203, hereinafter: al-Zamakhsharī, *Asās al-Balāgha*. Ibn Manẓūr, Muḥammad b. Makaram, *Lisān al-'Arab*, Beirut, Dār Ṣādir, (1994) (Third Edition) vol. 10, p. 49, hereinafter: Ibn Manẓūr. Al-Zāwī, al-Ṭāhir, *Tarṭīb al-Qāmūs al-Muḥīṭ*, Tripoli, Dār al-'Arabiyya li al-Kitāb, (1980) (Third Edition), vol. 1, p.679.hereinafter: al-Zāwī, *Tarṭīb al-Qāmūs*. Al-Sharabāshī, Aḥmad, *al-Mu'jam al-Iqtisādī al-Islāmī*, Beirut, Dār al-Jīl, (1401AH/1981), p. 117, hereinafter: al-Sharabāshī.

³ Kamali, Muhammed Hashim, *Fundamental Rights of the Individual: An Analysis of Ḥaqq (Right) in Islamic Law*, available on line at: <http://www.thefiqh.org/article.>, hereinafter: Kamali, *Fundamental Rights*.

is no real evidence to claim that the original meaning of the root *ḥaqq* in Arabic became obscured,⁴ or “that there is no standard meaning of the term *ḥaqq*.”⁵ In fact, *ḥaqq* in the context of *Sharī‘a* has a wider interpretation than in its legal meaning. However, it is commonplace to point to the fact that a translation cannot fully transfer the meaning of the Arabic original with all its nuances.

1.3 Technical Definitions of *Ḥaqq*:

Although, the word *ḥaqq* and its forms appeared ubiquitously in the Qur’ān and the *aḥādīth*, there is no specific technical definition of *ḥaqq* in these sources. Generally, *fuqahā’* used the word *ḥaqq* to refer to everything that human kind might be entitled to do, to have or to claim.⁶ This included money, salary, wages, property, the legitimate capacity or entitlement such as “*ḥaḍāna*” (right of custody), utility or interest and the right of option or ownership.⁷ It was also used to refer to the contract’s obligations, the contract’s rights,⁸ the right of way or right to air, and abstract.

In fact, the majority of *fuqahā’* were not engaged in the process of defining *ḥaqq* terminology, but they used it very often to refer to all its literal meanings. Thus *fuqahā’* use *ḥaqq* as wide as the Arabic language would support the usage whether *ḥaqq* is for exclusiveness or for common, referring to interest, usufruct, assets or profit.⁹ They are considered to be simply a set of occurrences with different degrees of strength. ‘Īsawī observed that the *fuqahā’* use the word *ḥaqq* to refer to

⁴ EI², Entry: “Ḥakk”.

⁵ Azmi, *Intellectual Property*, p.102.

⁶ *Al-Mawsū‘a al-Fiqhiyya*, vol.18, p. 10, *Ḥaqq* entry. *ma* means everything that a person entitles to have not the entitlement itself. See Kamali, Muhammad Hashim, *Freedom of Expression in Islam*, Cambridge, UK Islamic Texts Society, (1979) (Revised Edition). p.263, hereinafter: Kamali, *Freedom of Expression*.

⁷ *Al-Mawsū‘a al-Fiqhiyya*, vol.18, p.11.

⁸ Al-Sanhūrī, ‘Abd al-Razzāq. *Maṣādir al-Ḥaqq fī al-fiqh al-Islāmī*, Cairo, Arabic States League, (1954) (First Edition), p.9-10., hereinafter: al-Sanhūrī, *Maṣādir al-Ḥaqq*.

⁹ Al-Khafīf, ‘Alī, *al-Milkiyya fī al-Sharī‘a al-Islāmiyya bi’l-Muqārana bi al-Sharāi’ al-Waḍ‘iyya*, Cairo, Arabic States League, (1966) (First Edition) vol.1, p.2, hereinafter: al-Khafīf, *al-Milkiyya fī al-Sharī‘a*.

everything relating to interest, property, utility and abstract things.¹⁰

The reason for this lack of technical definition is the clarity and diversity of its various linguistic meanings. Also it might be asserted that *fuqahā'* were not very favorable to the notion of defining *ḥaqq*. Therefore, the technical definition of *ḥaqq* did not exist in the greater part of the early writings such as al-Muwatta'.

Beside that, there have been a few attempts to define *ḥaqq* by some earliest *fuqahā'*. For example, al-Mirwazī (d.462AH/1069) defined *ḥaqq* as the exclusive possession of something, which represents the legitimate objects of it.¹¹ His definition introduced the concept of "*ikhtiṣāṣ*" (the exclusivity) to light for the first time. This can be of value not only to the researcher who seeks to define *ḥaqq*, but also to the legal historian.¹²

Choosing one of its meanings, al-Aṣbahānī (d.535AH/1140) defined *ḥaqq* as the actual existence or the inevitable existence in future of any thing.¹³ This definition brings us to the linguistic meanings without any addition.

According to al-Qarāfī (d.684AH/1285), the right of Allah is His commands and His prohibitions while the rights of a human are "*maṣāliḥuh*" his interests.¹⁴ This is close to a classification rather than a definition, but it draws attention to the importance of a "*maṣlaḥa*" (interest) at an early stage. Copyright represents an author's interest, while the relevant commands of Allah should be observed in accommodating copyright in *Sharī'a*.

Referring to the philosophical debate on the subject of existence, 'Alā' al-Dīn al-Bukhārī (d.736AH/1335) chose to define *ḥaqq* as any thing that exists entirely

¹⁰ 'Īsawī, Aḥmad, *al-Madkhal li'l-Fiḥ al-Islāmī*, Cairo, Maṭba'at al-Ta'ālīf, (1963) (First Edition), p.337, hereinafter: 'Īsawī.

¹¹ Al-'Abbādī, 'Abd al-Salām, *al-Milkiyya fī al-Sharī'a al-Islāmiyya*, Amman, Maktabat al-Aqṣa, (1394AH/1974) (First Edition), footnote p.96, vol.1. , hereinafter: al-'Abbādī.

¹² Al-Nashmī, *Majallat Majma'*, Issue 5, vol.III, p.2293, footnote No.4.

¹³ Al-Nawawī, Muḥyī al-Dīn b. Sharaf, *Sharḥ Ṣaḥīḥ Muslim Muḥammad 'Abd al-Bāqī*, (ed.), Beirut, Dār al-Kutub al-'Ilmiyya, (1421AH/2000) (First Edition), vol. 1, p.204. hereinafter: al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*.

¹⁴ Al-Qarāfī, Aḥmad b. Idrīs, *al-Furūq*, Khalīl al-Manṣūr, (ed.), Beirut, Dār al-Kutub al-'Ilmiyya, (1418 A.H /1988) (First Edition), vol.1 p.256, hereinafter: *al-Furūq*.

without doubt about its existence.¹⁵ It is very similar to al-Aṣbahānī's definition.

In addition, in his collection of definitions, al-Jurjānī (d.816AH/1413) defined *ḥaqq* as the corresponding judgment to the reality and which could be used in opinions, beliefs and religions.¹⁶ Largely, this definition seems to be designed from the point of view of philosophy rather than a legal view. However, copyright had not emerged substantially as we know it today but there is no doubt about its existence and significance in the present age.

A wider definition of *ḥaqq* is suggested by al-Dusūqī (d.1230AH/1814) as a general classification consisting of money, "*khiyār*" (option), "*qiṣāṣ*" (legal retaliation), guardianship, "*walā'*" (patronage or allegiance) and so on.¹⁷ It seems to be a descriptive rather than a normative definition. While it presents the familiar view prevailing among *fuqahā'*, it can be used to include copyright as a group of rights, wealth and options.

From another perspective, the scholars of *uṣūl al-fiqh* (the principles of jurisprudence) debated whether *ḥaqq* must be unique or whether it could be a number of decisions.¹⁸ Here, they considered that *ḥaqq* refers to "*ḥukm*" resulting from the process of "*ijtihād*" (conscientious reasoning) made by a "*mujtahid*" (an independent jurist) on the basis of evidence found in the sources of the *Sharī'a*. It is not surprising that "*mujtahidūn*" (independent jurists) differ in their conclusions, when they try to detect or formulate *ḥukm*. However, it is not accurate to subsume

¹⁵ Al-Bukhārī 'Alā' al-Dīn, *Kashf al-Asrār 'an Uṣūl Fakhr al-Islām* al-Bazdawī, Beirut, Dār al-Kitāb al-'Arabī (1974) (First Edition), Vol. 4, p.134, hereinafter: al-Bazdawī.

¹⁶ Al-Jurjānī, Abū al-Ḥasan Alī b. Muḥammad, *al-Ta'rīfāt*, Muḥammad Bāsil 'Uyūn al-Sūd, (ed.), Beirut; Dār al-Kutub al-'Ilmiyya, (1421AH/2000) (First Edition), p.94., hereinafter: al-Jurjānī, *al-Ta'rīfāt*. Al-Anṣārī, Zakariyya b. Muḥammad al-Qādī, *al-Ḥudūd al-Daqīqa wa al-Ta'arīfāt al-Anīqa*, Māzin Mubārak, (ed.) Beirut, Dār al-Fikr al-Mu'āṣir, (1991) (First Edition), p.75. Al-Kafawī, Abū al-Baqā' Ayyūb b. Mūsā, *al-Kulliyāt*, 'Adnān Darwīsh and Muḥammad al-Miṣārī, Cairo, (eds), Dār al-Kitāb al-Islāmī, (1992) (Second Edition), p.237, vol.2, hereinafter: al-Kafawī. Abū Jayb, Sa'dī, *al-Qāmūs al-Fiqhī Lughatan wa Iṣṭilāḥan*, Damascus, Dār al-Fikr, (1402 AH/ 1982) (First Edition), p.94.

¹⁷ Al-Dusūqī, Shams al-Dīn Muḥammad 'Arafa, *Ḥāshiyat al-Dusūqī 'alā al-Sharḥ al-Kabīr*, Beirut, Dār al-Fikr, (1423AH/2003), vol. 4, p.710., hereinafter: *al-Dusūqī*.

¹⁸ Al-Ghiryānī, al-Ṣādiq. *Taṭbīqāt Qawā'id al-fiqh*, Sabhā, *Maṭābi'* al-Jamāhiriyya (1422AH) (First Edition), p.73.

ḥaqq under the concept of *ḥukm*¹⁹ or vice versa. *Ḥaqq* and *ḥukm* meet in many varieties but each concept has its own scope, applications and meanings.

In addition, the scholars of *uṣūl al-fiqh* classified “*maḥkūm fih*” (the subject matter of judgment) into “*ḥuqūq Allah*” (rights of Allah), “*ḥuqūq al-‘abd*” (rights of the individual) and “*ḥuqūq Allah wa al-‘abd*” (rights of Allah and the individual). Here *ḥaqq* can be action, obligation, duty, benefit, claim, privilege or a recommendation that is contained in the “*ḥukm*”. In this classification, “*ḥuqūq Allah*” means rights of Allah that include prayer and Allah’s penal ordinances, in contrast to “*ḥuqūq al-‘abd*” which means rights of man such as debts or goods. *Ḥuqūq Allah wa al-‘abd* means rights of Allah and man conjointly such as “*qiṣāṣ*”. There is generally some difference in determining whether a particular judgment manifests a right of Allah, a right of the individual, or a combination of both.

Reflection on these previous attempts at definition might bring one to the conclusion that some contemporary studies are mistaken in claiming that “classical jurists have not articulated a juridical definition for *ḥaqq*, but have relied on the lexical meaning of the word”.²⁰ Obviously the previous definitions refute this claim even, they meet neither consensus of all *fuqahā’* nor widespread among them. Other studies have rejected this criticism viewing it as a form of slighting of the *Sharī‘a*.²¹ It has been suggested that this reticence does not reflect any intellectual hesitation or inability but pertains to the will of wide ranging use of the word *ḥaqq*.

Bearing in mind that copyright is a new institution, it is essential to recognize the definitions of *ḥaqq* in modern Islamic jurisprudence. A great intellectual effort has been made by some contemporary *fuqahā’* to define *ḥaqq* terminology. From this attempt, four different approaches for defining *ḥaqq* have been proposed and developed gradually. The central difference is between *fuqahā’* who think that “*ḥaqq*” is based solely on “*ikhtisāṣ*” (exclusivity), and *fuqahā’* who think that “*ḥaqq*” is “*maṣlaḥa*” (interest). The range of *ḥaqq*’s definitions in modern writings

¹⁹ Kamali, *Freedom of Expression*, p.265. Kamali, *Fundamental Rights*.

²⁰ Kamali, *Freedom of Expression*, p.263, and see Azmi, *Intellectual Property*, p.104.

²¹ Ṭammūm, Muḥammad, *al-Ḥaqq fī al-Sharī‘a al-Islāmiyya*, Cairo, al-Maktaba al-Maḥmūdiyya al-Tijāriyya, (1398AH/1978) (First Edition), p.32., hereinafter: Ṭammūm.

is very broad; therefore, this chapter will mention briefly the most outstanding ones.

1.4 Definitions of *Ḥaqq* with reference to “*ikhtisās*” (exclusivity)

This approach to define *ḥaqq* has been adopted by many modern scholars. It transfers and limits the meaning of *ḥaqq* to the meaning of “*ikhtisās*”. One must therefore consider the precision of the *ikhtisās* used in this approach.

The word “*yakhts*” (derived from *ikhtisās*) is mentioned in Qur’ān several times and has the meaning of “making something exclusive for someone”. Some verses using this word can be translated as: “But Allah will choose for His special mercy whom He will-for”.²² *Ikhtisās* can be translated as “exclusive appropriation”, “exclusive possession” or “exclusive assignment” in order to preclude any thing that is for the public generally or with some qualifications or conditions.

Fuqahā’ use the word “*ikhtisās*” to describe the exclusive relationship between the right bearer and the subject matter of his right that gives him sole absolute authority to use, dispose or take advantage of the subject matter and which prevents others from having any of these privileges without his consent.

According to this approach, the essence of “*ḥaqq*” is “*ikhtisās*” the exclusiveness in favor of the right owner to eliminate what is “*ibāḥa*” (at liberty) or “*idhn*” (permission). This view is emphasized by al-Zarqā (d.1420AH/1999), who defined *ḥaqq* as “*ikhtisās*”. In his statement “*ḥaqq* is an exclusive assignment established by the *Sharī’a* in a form of “*sulṭa*” (authority or power) or “*taklīf*” (command or commission.”²³ In fact, al-Zarqā endorsed and renovated the definition of “*milk*” (ownership) proposed by al-Qudsi²⁴ as the definition of “*ḥaqq*”.

This definition was developed by al-Diraynī who added: “...in order to achieve

²² Qur’ān 2.v. 105 and 3.v.74. See: The Holy Qur’ān English Translation of the Meaning and Commentary, Abdullah Yusuf Ali.

²³ Kamali, *Fundamental Rights*. Al-Zarqā, *Nazariyyat al-Iltizām*, p.18.

²⁴ Al-Khafif, *al-Milkiyya* vol.1, p.64.

a certain interest “*maṣlaḥa*”.²⁵ However, this addition was made whilst he had rejected the notion of defining *ḥaqq* by *maṣlaḥa*.²⁶

Following this doctrine, al-‘Abbādī defined *ḥaqq* with the slight addition “as an exclusive assignment established by the *Sharī‘a* in the form of “*sulṭa*” given to man over another or “*taklīf*” imposed for the sake of Allah upon people”.²⁷

With adherence to the *ikhtiṣāṣ* approach, Ṭammūm attempted to combine *ḥuqūq* of Allah with *ḥuqūq al-‘abd* in one definition. He defined *ḥaqq* as “a legitimate relationship that provides the exclusiveness of “*sulṭa*” or “*taklīf*” imposed on a person accompanied by the compliance of another person whether it is compulsorily or voluntarily”.²⁸ However, even with this amendment, the definition prescribes a new meaning to *ḥaqq*. It remains difficult to define right as relationship without evidence from *Sharī‘a*. Furthermore, it is apparent that the compliance of a person with *ḥaqq* is not an essential element of *ḥaqq*.

Finally, the drafters of the Arabic Unified Financial Transactions Bill propose that *ḥaqq* is “*ikhtiṣāṣ*”; “an exclusive assignment established by law to provide a person with “*sulṭa*” or “*taklīf*” whether it is financial or not”.²⁹ The drafters of the Bill refer to *ḥaqq* in which the emphasis on *ikhtiṣāṣ* has been specifically mentioned.

According to al-Zarqā’s analysis, *ḥaqq* is *ḥaqq* only if it corresponds to something allocated to the right-bearer to the exclusion of everyone else. *Ḥaqq* must entitle its bearer a special advantage exclusively, which is called *ikhtiṣāṣ*. It is a relationship existing between the right owner and the subject matter and established by “*al- Shāri‘*” (the lawgiver), whether this right personal or financial.³⁰

Ḥaqq is an absolute and special privilege conferred upon a person by a virtue of

²⁵ Al-Diraynī, Fathī, *al-Ḥaqq wa Madā Sulṭān al-Dawla fī Taqyīdihī*, Beirut, *Mu’assasat al-Risāla*, (1400 AH/1981) (First Edition), p.139. Hereinafter: Al-Diraynī, Fathī, *al-Ḥaqq wa Madā Sulṭān al-Dawla*.

²⁶ Al-Bakkā’, ‘Adanān, *al-Ḥukm wa al-Ḥaqq bayn al- Fuqahā’ wa al-Uṣūliyyīn*, Najaf, *Maṭab ‘at al-gharī*, (1976) (First Edition), p.155.

²⁷ Al-‘Abbādī, vol.1, p.103.

²⁸ Ṭammūm, p.38.

²⁹ Al-Zarqā, *Nazariyyat al-Iltizām*, p.310, article 137 of the Arabic Unified Financial Transactions Bill in 1984.

³⁰ Al-Zarqā, *Nazariyyat al-Iltizām*, p.20.

Sharī'a that no one has liberty, permission or license to its subject matter other than the right bearer. The association to the right bearer and avoidance of others are both essential to the functioning of the *ḥaqq*. *Ḥaqq* is exclusive. It is to exclude people from using, benefiting and disposing of its subject-matter absolutely without the consent of the right bearer.

The advocates of this approach, from al-Zarqā onwards, thought that the exclusiveness is necessary for *ḥaqq* to be distinguished clearly from “*ibāḥa*” (liberty) or “*idhn*” (permission), which are established generally for anyone. Subsequently, it is necessary to confine the subject matter of *ḥaqq* entirely in favor of the right owner in particular.

Al-Zarqā justified the emphasis on (*ikhtisāṣ*) "exclusiveness" that as: (it is essentially impossible to recognize *ḥaqq* unless it provides a privilege exclusively to the right owner which is unauthorized for others ...there is no *ḥaqq* without the exclusiveness which is the key element of *ḥaqq*).³¹ The basic assumption is that if there is no exclusivity, there is no right at all. He is content that *ḥaqq* is reducible to a relation of *ikhtisāṣ* between a person and a thing (ownership) or between two persons or more (debt or work). Therefore, *ikhtisāṣ* is the identity character of *ḥaqq* which distinguishes it from other concepts such as *ibāḥa* and *idhn*.

In line with this approach, al-Diraynī's agreed that the core concept of *ḥaqq* is the exclusivity stating that “...*ikhtisāṣ* the exclusiveness is necessary for the definition because it is the main foundation of *ḥaqq* as it is the relationship between the right owner and the subject matter”.³²

In addition, the principle of exclusiveness is expressed and reflected in many ways in copyright. There is a direct link between the notion of exclusiveness of a right and exploitation of copyright. The view that right is to be perceived essentially as *ikhtisāṣ* is useful in that, copyright must be recognized, protected and reserved only to owners.

³¹ Al-Zarqā, *Nazariyyat al-Iltizām*, p.20.

³² Al-Diraynī, *al-Ḥaqq wa Madā Sulṭān al-Dawla* p.139.

Observing *ikhtiṣāṣ* and other factors al-Bakkā' defined *ḥaqq* as "the exclusive relationship established by *Sharī'a* in the form of "*sulṭa*" specified in certain limits and capable of renouncement".³³ There is some ambiguity as to what constituted "specified in certain limits" that leads to an imprecise definition. Another objection is that, the capability of renouncement is not a necessary condition or ground to establish *ḥaqq*.

This definition is similar to that states "*Ḥaqq* is a power, whether material or spiritual, that the law has granted to a person over another person, over property, or over both".³⁴ In these definitions, *sulṭa* means power granted to the right-bearer over an object, property or a person.

Defining *ḥaqq* as power is not supported by original Islamic evidence. Equally inaccurate is the assertion that *ḥaqq* means law.³⁵ A distinction must be drawn between *ḥaqq* and other concepts such as power or law, even if they are closely related. Therefore, it cannot be said that *ḥaqq* has been defined clearly in this approach.

1.5 Some remarks on defining *Ḥaqq* with reference to *ikhtiṣāṣ*

This doctrine of the definition of *ḥaqq* has been subject to criticism. As we have seen, *ḥaqq* is not defined in the Islamic sources, but it is used ubiquitously to indicate all its meanings that are linguistically acceptable.

In the first place, there is no sound evidence in Islamic sources that supports the reduction of the meaning of *ḥaqq* to exclusiveness only. The principle is that it is necessary to provide a proof of *Sharī'a* to establish *ḥaqq*. The authorization of text from *Sharī'a*, directly or indirectly, conferring *ḥaqq* is the only ground of *ḥaqq*. *Ḥaqq* can be solely the product of "*al-Shāri'*" (the lawgiver).

³³ Al-Bakkā', p.155.

³⁴ Kamali, *Fundamental Rights*.

³⁵ Kamali, *Fundamental Rights*.

This approach does not include meanings other than exclusiveness³⁶ such as *ibāḥa*, *idhn* or *maṣlaḥa* and so on. In contrast, the usage of *ḥaqq* in the Islamic sources extends beyond this limitation. *Ḥaqq* is a legitimate entitlement whether it is referring to something to be appropriated exclusively permanently or on a temporary basis according to an order of priority.

It is evident in *Sharī'a* that *ḥaqq* is intrinsically established on recognition by the lawgiver. For example, one verse reads: "And Allah by His words doth prove and establish *ḥaqq* ".³⁷ Also, it indicates that Allah alone who has the right to legislate for mankind in general. Correspondingly, the word *ḥaqq* represents the approval which is granted only by *al-Shāri'* to a right bearer to own, do, honor or use some thing.

There is "*ijmā'*" (consensus) among Muslim scholars that only Allah is the ultimate lawgiver, the one who decides *ḥaqq* and its effects including exclusivity or commonality. In *Sharī'a* the recognition of what is to be *ḥaqq* is not left to the human judgment whether it is exclusive or common.

Al-Khafif is certainly correct when he states that "...the ultimate lawgiver approved all legitimate *ḥuqūq* including ownership, and none of their effects or provisions would be affirmed unless the lawgiver appointed that".³⁸ It is incorrect to assume that "*ibāḥa*" or "*idhn*", which are unrelated to anyone specifically, are not *ḥaqq* because rights are essentially permissions given by the lawgiver.

Secondly, the approach of exclusivity appears to be arbitrary and uncertain in its effect, as the elimination of other meanings of *ḥaqq* and the difficulty in some cases of drawing distinctions between its meanings. In general, what has been said about *ḥaqq* in the form of *ikhtisāṣ* applies to *ḥaqq* in the forms of *ibāḥa* or *idhn*. There is one related ground on which all these forms still be established and that is the approval of the lawgiver. It is only authorization upon a thing, claim, duty or concept that makes us recognize its legality. As is clear from the above discussion

³⁶ Al-'Abbādī, vol.1, p.102.

³⁷ Qur'ān, 10 .v.82.

³⁸ Al-Khafif, *al-Milkiyya*, vol.1, p.18.

the approval of *Sharī'a* through its evidence is a prerequisite for the existence of copyright.

Furthermore, a definition is supposed to concentrate on the essence of *ḥaqq* rather than on its effect, attribute or form such as exclusivity or permission. The approach has tended to focus on *ikhtisāṣ* and less attention has been paid to its essence. It is unsatisfactory to define *ḥaqq* by its effect or form because *ḥaqq* must be defined by its contents. The concern should be with what a *ḥaqq* is in essence and not in what form it is. The essence of *ḥaqq* is the approval of the lawgiver as there is no *ḥaqq* without it. *Ḥaqq* bestows standing rather than standing bestows *ḥaqq*, and *ḥaqq* can manifest in any form. Therefore, *ḥaqq* is more than an exclusive status or worth ascribed to the right-bearer. *Ikhtisāṣ* only follows from property or right.

It must be acknowledged that this approach reveals at least the significance of *ikhtisāṣ*. The notion of exclusiveness has some evidential support. Most importantly, it matches the condition of originality, which is necessary to obtain copyrights.³⁹ There is clearly a very special relationship between the *ḥaqq* and its bearer, but this relationship does not define the right.

1.6 Definitions of *Ḥaqq* with reference to “*maṣlaḥa*” (the interest)

This approach is adopted by some contemporary scholars, for example, al-Khafīf who argues for the idea that, ultimately, *ḥaqq* means *maṣlaḥa*. He states that “*ḥaqq* is rightful *maṣlaḥa* that is proven by the *Sharī'a*.”⁴⁰ The only factor referred to in this definition is *maṣlaḥa*. But al-Zarqā criticizes this definition convincingly because it produces a vicious cycle: *ḥaqq* is inferred from premises, the rightful interest of which cannot be established independently of right. It defines *ḥaqq* with a rightful interest, which in turn must be determined by right. Another doubt is that it

³⁹ This issue is addressed in Chapter 5p, 213.

⁴⁰ Kamali, *Fundamental Rights*. Al-'Abbādī, vol.1, p.97. Al-Diraynī *al-Ḥaqq wa Madā Sulṭān al-Dawla* p.188.

does not clarify all distinctive characters of *ḥaqq*.⁴¹ Given these weaknesses, this definition does not have a complete and precise legal meaning of *ḥaqq*.

Also deserving note is the other definition made by al-Khafif, “*ḥaqq* is which is established in the *Sharī‘a* for *maṣlaḥa* the benefit of a human being”.⁴² It means that only a real person (as opposed to a corporate personality) can have a right. The definition also, precludes rights that are not necessarily of the right-bearer’s interest such as “*ḥaḍāna*” (the right of custody).⁴³ The mother has a right to the custody of her child, but if she renounces this right while her child does not accept someone other than his mother, the mother is obliged to take custody, because the interest of the child comes first.⁴⁴ This means that a right does not correspond necessarily to the interest.

From a legal but not *Sharī‘a* standpoint, al-Sanhūrī proposes that *ḥaqq* is an interest, which is protected by law.⁴⁵ There is a clear difference between a *ḥaqq* and interest. The protection offered by law is necessary for *ḥaqq*, but it is not one of its elements.

Agreeing with the view of defining *ḥaqq* by “*maṣlaḥa*”, Mūsā adopts a similar definition concluding that “*ḥaqq* is a *maṣlaḥa* which *Shāri‘* the lawgiver has granted to the individual, or the community, or both”.⁴⁶ This definition is questionable, because it can be argued that *ḥaqq* is not equal to *maṣlaḥa* even they are used synonymously in many cases.

1.7 Some remarks on defining *Ḥaqq* with reference to *maṣlaḥa*

The first objection to this way of defining *ḥaqq* is that there is no authority

⁴¹ Al-Zarqā, *Nazariyyat al-Itizām*, footnotes on p.23.

⁴² Kamali, *Fundamental Rights*. Al-Khafif, ‘Alī, ‘*Aḥkām al-Mu‘āmalāt al-Shar‘iyya*, Cairo, Maṭba‘at al-Ta‘ālīf, (1944) (Second Edition). From the dates of editions it seems that al-Khafif made this definition firstly.

⁴³ Kamali, *Fundamental Rights*.

⁴⁴ *Al-Mawsū‘a al-Fiqhiyya*, vol.17, p.208, *Ḥaḍāna* entry.

⁴⁵ Al-Sanhūrī, *Maṣādir al-Ḥaqq*, p.5.

⁴⁶ Kamali, *Fundamental Rights*. Al-‘Abbādī, vol.1, p.98.

given to support the equation of *ḥaqq* with *maṣlaḥa*. Despite its scope, the validity of any definition is not self-evident. *Fuqahā'* acknowledge that in the Islamic jurisprudential studies using evidence from the *Sharī'a* sources is necessary.

This approach concentrates heavily on *maṣlaḥa*, which sometimes is the goal of *ḥaqq*, but is not the essence of *ḥaqq* itself.⁴⁷ Generally, the definition must concentrate on the essential attributes of *ḥaqq* rather than on its ultimate goal such as interest. We should identify *ḥaqq* by its essence and not by its consequences. The association between *ḥaqq* and *maṣlaḥa* in many cases cannot justify defining the first by the second.

This does not necessarily mean that *ḥaqq* cannot be based on *maṣlaḥa*, but it does mean that *ḥaqq* cannot be identified by *maṣlaḥa* solely. The question is not whether *maṣlaḥa* can ground *ḥaqq*, but whether *ḥaqq* is *maṣlaḥa*. It is clear that *maṣlaḥa* may follow or coincide from property or *ḥaqq*, but not as a component of one of them. There is nothing contrary to *Sharī'a* principles in relying on *maṣlaḥa* as a factor which may render copyright an evident concept. In addition, as will be recalled, there is no doubt that copyright has considerable *maṣlaḥa* for an author and the public.⁴⁸

Al-Diraynī states that defining *ḥaqq* with reference to *maṣlaḥa*, contrary to popular believe among contemporary scholars of law and *Sharī'a*, is quite wrong and it is firstly found in law textbooks.⁴⁹ However, al-Diraynī, as we have seen, made *maṣlaḥa* as part of his definition of *ḥaqq*.⁵⁰

This approach also does not include "*ḥuqūq Allah*" (rights of Allah), which belong to the term *ḥaqq*. *Fuqahā'* classify *ḥaqq* into *ḥaqq Allah* and "*ḥaqq al-'abd*" (right of an individual).⁵¹ As regards to copyright, there are *ḥuqūq Allah* concerning the subject matter.⁵²

⁴⁷ Kamali, *Fundamental Rights*.

⁴⁸ See this thesis p.175 and post.

⁴⁹ Al-Diraynī, *al-Ḥaqq wa Madā Sulṭān al-Dawla*, p.188.

⁵⁰ See p.51 here.

⁵¹ For a more detailed discussion on that, see p.58.

⁵² For more details see p.210 and post here.

It is right to consider on broader basis the balance of merits and demerits of these approaches to define *ḥaqq*. Firstly, the two approaches are not based on strong evidence from the *Sharī'a*. According to the general rules of *Sharī'a* the absence of *ikhtisāṣ* or *maṣlaḥa* does not mean the absence of *ḥaqq*.

One can wonder whether it is legitimate to compare these approaches with the two Western competing theories: the will/choice theory and the interest/benefit theory. Some Western scholars think that rights are always the 'reflex' of the duty, permission or power. Others think that the right has a priority over the duty, permission or power.⁵³

As we have seen defining *ḥaqq* is linked or rather shaped by the concepts of *ikhtisāṣ* and *maṣlaḥa*. *Ikhtisāṣ* is an alternative to the words of choice or power used in legal textbooks by choice theory proponents while *maṣlaḥa* means benefit or interest and is used by benefit theory proponents.

Al-Bakkā points out that these attempts may have more relevance to the influence of contemporary norms and definitions in law than to the *fiqh*.⁵⁴ However, it is worth noting that, the definitions of *ḥaqq* that concentrate on *ikhtisāṣ* had obtained some precedential reference in al-Mirwazī's definition. In contrast, the *maṣlaḥa* approach could use al-Qarāfi's definition as a reference.

⁵³ Campbell, Kenneth, The Stanford Encyclopaedia of Philosophy, available online at : <http://plato.stanford.edu/entries/legal-rights>

⁵⁴ Al-Bakkā', footnote on p.155.

1.8 The combination of *maṣlaḥa* and *ikhtiṣāṣ* approaches

An alternative approach preferred by some *fuqahā'* is a degree of combination between the previous directions *ikhtiṣāṣ* and *maṣlaḥa*. According to 'Īsawī, *ḥaqq* is an "Established *maṣlaḥa* in favor of a person in form of exclusivity which the lawgiver approved".⁵⁵ Another definition made by al-Nashamī is to suggest that "*ḥaqq* is legitimate interest that provides its holder with exclusivity or it imposes commission on someone".⁵⁶

It seems that these *fuqahā'* try to characterize *ḥaqq* by reference to both *maṣlaḥa* and *ikhtiṣāṣ* to produce a complete account of *ḥaqq*. On closer inspection, they ultimately are endorsing the "*maṣlaḥa* approach" and adding *ikhtiṣāṣ* to preclude *ibāḥa* or *idhn*. The same observations on the "*maṣlaḥa* approach" would apply to this approach. Even if this approach could be regarded as a possible way of combining *ikhtiṣāṣ* with *maṣlaḥa*, it defines *ḥaqq* more narrowly than it can be used in *fiqh*. Therefore, it differs conceptually from the approach generally followed in *fiqh*, which tends to focus on what the word might convey. It can be concluded from what we have seen that the meanings of *ḥaqq* in *Sharī'a* are more comprehensive than in law.⁵⁷

1.9 The "linguistic approach"

This has been the most preferred approach receiving the support of the majority of *fuqahā'* because it is based largely on a close linguistic analysis.

In general, *fuqahā'* used this word *ḥaqq* to indicate to the same meanings literally. They are less concerned with technical definitions. They also rely on the notion of obviousness of the meaning of *ḥaqq*. They did not see any compelling reason in favor of defining *ḥaqq* as regards its literal meanings to satisfy its juristic

⁵⁵ 'Īsawī, p.337.

⁵⁶ Al-Nashmī, al-Ḥuqūq al-Ma'nawiyya al-Ism al-Tijārī, *Majallat al-Majma'*, Issue 5, vol.III, p.2294.

⁵⁷ Al-Khafīf, *al-Milkiyya*, Vol.1.p.5.

usage.⁵⁸ They want to use all meanings of *ḥaqq* which vary from a text to another.⁵⁹

This approach is accepted by *fuqahā'* and is continually used in the *fiqh* manuals as a logical consequence of the *Sharī'a* being revealed in Arabic. Recently, it "has also prevailed in *al-Mawsū'a al-Fiqhiyya*".⁶⁰ The precise interpretation of *ḥaqq* is based on what it draws its authority from. The determined one of its meanings in a particular text, is largely a question of interpretation. The *ḥaqq* is, therefore, defined in very broad terms.

Following the prevailing view among *fuqahā'* al-Khafif defines *ḥaqq* as "that which is established and protected by the *Shāri'* lawgiver".⁶¹ With slight addition, Abū Sinnah defined it as; "that which is established in the *Sharī'a* (*hwa ma thābit fī al-Shar'*) for a human being, or for Allah, over someone else."⁶²

According to Ḥammād, *ḥaqq* is defined as "every privilege or capacity established for a person whether it is financial or not."⁶³ This definition appears to exclude rights of Allah from its scope when it refers to "a person".

These definitions are based on "*thubūt*" (establishment) because it is one of the key elements of *ḥaqq*. Abū Sinnah's definition has been criticized as it reveals the subject matter of *ḥaqq* but not the essence of *ḥaqq* itself.⁶⁴ It can be argued that the same comment can be applied to Ḥammād's definition as well. As with many of the technical definitions, *ḥaqq* did not fall outside the linguistic meanings.

In the light of the survey in this section, it can be concluded that the approach of the majority of *fuqahā'* appears to be more precise and less susceptible to error in at least three different respects. Firstly, *ḥaqq* is clearly an abstract idea, which is difficult to define as so any axiomatic rule.⁶⁵ It might be considered that the

⁵⁸ Kamali, *Freedom of Expression*, p. 263.

⁵⁹ Al-Khafif, *al-Milkiyya*, p.2, vol.1.

⁶⁰ Kamali, *Freedom of Expression*. p.271.footnote No.5.

⁶¹ Al-Khafif, *al-Milkiyya*, p.2, vol.1.

⁶² Kamli, *Fundamental Rights*. Al-'Abbādī, vol.1, p.98.

⁶³ Ḥammād, Nazīh, *Mu'jam al-Muṣṭalahat al-Iqtisādiyya, Lughat al-Fuqahā'*, p.121.referred to in Shubīr, *al-Mu'āmalāt al-Māliyya*, p.47.

⁶⁴ Al-Diraynī, *al-Ḥaqq wa Madā Sulṭān al-Dawla*, p.190. Al-'Abbādī, vol.1,p.102.

⁶⁵ Al-Kabbāshī, Ṭaha, *al-Dhimma wa al-Ḥaqq wa al-Ilizām wa Ta'aththuruhā bi'l-Mawt fī al-Fiqh al-Islāmī*, Riyadh, Maktabat al-Ḥaramayn, (1989) (First Edition), p.64.

definition can do more to impede than to aid our understanding of *ḥaqq*. This discussion is not meant to imply that *ḥaqq* is self-evident, if we recall the condition of the approval of *Sharī'a*. It is to describe the use of a word in which it occurs.

Secondly, it would seem that one of *fuqahā's* aims is to keep all possible linguistic meanings of the word *ḥaqq* without arbitrary exclusion or exception. As we have seen, the employment of the word deals with several situations, therefore the technical terminology might reduce its usage to one limited form or another. *Ḥaqq* is a general word even it could be analyzed into duty, permission, power or some combination of these whether there are conditions or not. The repetitive and various use of the word shows that *Sharī'a* does not place any restrictions on the linguistic meanings of the word *ḥaqq*. Thus, it is an error to impose subsequent qualifications or limitations on *ḥaqq*, where *Sharī'a* did not clearly indicate such limitations. The later terminology cannot manipulate words appeared in the original sources of *Sharī'a*.⁶⁶

Thirdly, the issue of definition arises only where a word may have an idiosyncratic usage other than linguistic meanings such as in “*ṣalāh*” (prayer) and “*zakāt*” (alms). This is not the case, however, with the word *ḥaqq* as it serves the same usage in *Sharī'a*. There is little if anything for technical terminology to contribute.

One needs to remember that the *Sharī'a* is a divine law which contains standards outside those that constitute law in the modern sense. It includes all universal and moral principles as well as details of how man should perform all aspects of human life. In addition, it is characteristic of *Sharī'a* that the legal principles, duties and norms often express themselves in religious terms and are intimately connected with moral rules. The legitimacy of the linguistic interpretation is established because it adopts the meanings from the language that the *Shāri'* (lawgiver) revealed the text in the first place. Therefore, the standard definition that

⁶⁶ Al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, vol. 5, p.63-64. Ibn Ḥajar, Aḥmad, *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, 'Abd al-'Azīz Ibn Bāz, (ed.), Beirut, Dār al-Kutub al-'Ilmiyya, (1421AH/2000), vol.3,p.318. Hereinafter: Ibn Ḥajar, *Fath al-Bārī*.

fuqahā' are interested in is one that applies to all aspects of the word. This conception of *ḥaqq* works very well for accommodating copyright and other new rights.

Al-Shāṭibī (790AH/1388) points out that the words of the Qur'ān and '*aḥādīth* must be interpreted linguistically because that is the preferential interpretation of a text.⁶⁷ He is content that in general any absolute and unquestionable definition is beyond reach since conformity with its requirements is not a simple task.⁶⁸ It has been said that no definition will be free from criticism and an infallible definition has never been reached.⁶⁹ The assumption that it is safe not to define *ḥaqq*, can explain why al-Shāṭibī explained what is meant by the right of Allah,⁷⁰ without defining it.

The linguistic approach's proponents can justifiably rely upon these considerations that give them a certain degree of legitimacy and priority over other approaches. This is not to underestimate early or contemporary *fuqahā'* for adopting a definition, because the reason to do so was to produce concept, terms and limits. The process of drafting a comprehensive definition usually faces substantial obstacles.

⁶⁷ Al-Shāṭibī, Ibrāhīm b. Mūsa , *al-Muwāfaqāt fī Uṣul al-Sharī'a* , 'Abd Allah Drāz, (ed.), Beirut, Dār al-Kutub al- ' Ilmiyya, , (N.D) vol. 2.p.38., hereinafter: al-Shāṭibī, *al-Muwāfaqāt*.

⁶⁸ Al-Shāṭibī, *al-Muwāfaqāt* , vol. 2.p.40.

⁶⁹ Al-Shāṭibī, *al-Muwāfaqāt* , vol. 2.p.40.

⁷⁰ Ṭammūm, p.26 and post.

1.10 Classifications of *Ḥuqūq* under *Sharī'a*

Since the notion of copyright is a term related to *ḥaqq*, it is necessary to achieve a thorough understanding of the structure of *ḥaqq*. We also need to ensure a systemic study to deal comprehensively with copyright in *Sharī'a* because the clearest way is to examine copyright deeply through the classifications of *ḥuqūq* in *Sharī'a*, even this endeavor is not without difficulties.

Whilst not wishing to complicate the matter, there are different types of *ḥaqq*. Instead, this will provide us with more explanation of the term *ḥaqq* and it avoids equating the term with right in modern writings. We need to explore the applications of the term *ḥaqq* that are important in implementing it in copyright.

In *fiqh*, there has been a reluctance to define *ḥaqq*. This is ameliorated to some extent by its detailed classification. *Fuqahā'* are concerned with the classification and implementation of *ḥuqūq* more than the theoretical debate. The suggestion that the classification of *ḥaqq* is more important than the issue of definition is supported by the practical attitude in the *Sharī'a*, where all matters are governed specifically or by inclusive texts and general rules.

This view must be carefully noted, because it has a major practical and theoretical impact. Additionally, as we have seen, *ḥaqq* in *Sharī'a* means claim, permission, duty, authority and so on. That is why *Sharī'a* has its own classifications of *ḥuqūq* which vary greatly from the law textbooks' classifications. Accordingly, copyright must have its own moral and legal position within *Sharī'a*.

In *fiqh*, there is possibility to classify *ḥuqūq* in many ways according to the chosen consideration of categorization, such as whose they are, what their nature is and so on. Recently al-Shanqīṭī makes a very instructive flow chart of rights with such classifications.⁷¹ The main concern here is the accurate and objective exposition of the categories of *ḥuqūq* under *Sharī'a*.

⁷¹ Al-Shanqīṭī, vol.2, p.698.

1.11 The classification of *ḥuqūq* according to the holder

According to al-Qarāfī *ḥuqūq* are grouped into only two broad classifications: “*ḥaqq Allah* is His commands and his prohibitions while the rights of a human are “*maṣālihuhu*” (his interests).⁷² The majority of *fuqahā’*, however, hold to the view that, *ḥuqūq* are classified in three groups; “*ḥaqq Allah*” (right of Allah), “*ḥaqq al-‘abd*” (right of the individual) and “*ḥaqq Allah wa ḥaqq l-‘abd*” (right of Allah and the individual).⁷³

It might be said that this general classification had come from the famous *ḥadīth* which reads: “Your Lord has a right on you, your soul has a right on you, your family has a right on you; so you should give the right of all those who has a right on you.”⁷⁴

The former refers to rights of Allah, “...which pertains to the general good for the world, so it is not to be an exclusive to anyone in particular. The attribution to Allah here is to honor what has great significance, very benefit and common good which all people make use of it...”.⁷⁵ These rights are representative of certain high religious values and concern the public interest. Their nobility stems from these considerations.

This category of *ḥuqūq Allah* includes belief, compulsory worship and all prohibitions against disbelief, homicide, fornication and so on. It includes also any right, which does not belong to a particular right-bearer, such as a “*waqf*” (endowment) for a charitable purpose.⁷⁶ Some *fuqahā’* of the *Ḥanafī* school sub-

⁷² *Al-Furūq*, vol.1 p.256.

⁷³ Kamali, *Fundamental Rights*. Al-Zuhaylī, Wahbah, *al-Fiqh al-Islāmī wa adillatuhu*, Damascus, Dār al-Fikr (1418AH/1997) (Fourth Edition), vol. 4, p.2843. Hereinafter: al-Zuhaylī.

⁷⁴ Al-Bukhārī, Abū ‘Abd Allah Muḥammad b. Ismā‘īl, *Ṣaḥīḥ al-Bukhārī*, translated by Dr. Muḥammad Muhsin Khān, *The Translation of the Meaning of Ṣaḥīḥ al-Bukhārī*, Beirut, Dar al-‘Arabiyya, (N.D) vol. 3, p.108, Ḥadīth No.189, hereinafter: *al-Bukhārī*, tr.

⁷⁵ Al-Bazdawī, vol. 4, p.134.

⁷⁶ Kamali, *Fundamental Rights*. Tāj al-Sharī‘a, ‘Ubayd Allāh b. Mas‘ūd, *al-Tawḍīḥ fī Ḥallī Ghawāmiḍ al-Tanqīḥ*, Beirut, Dār al-Kitāb al-‘Arabī, (N.D), vol.2,p.151.

divided *ḥuqūq Allah* into several sections,⁷⁷ but this is highly controversial.⁷⁸ However, there is no a practical need for that sub-division in the subject currently under discussion.

The second category refers to “*ḥaqq al-‘abd*” (rights of the individual) which bestow a claim by, duty or benefit to individuals. For example, obligations regarding the payment of money; debts, prices and maintenance which individuals have to honor. This constitutes an open-ended category that “covers claims of private individuals in their dealings with each other”.⁷⁹

The third category is “*ḥaqq Allah wa l-‘abd*” which concerns the rights of Allah and human together. These are also known as the shared rights. For example, “*qiṣāṣ*” (legal retaliation) which is a punishment fixed by *Sharī‘a*, but at the same time, victims or their relatives have the right to waive *qiṣāṣ* with or without financial consideration. This category exists even though a *ḥaqq* of Allah or *ḥaqq* of an individual prevails over the other in some cases. Some *fuqahā’* split this category into two divisions according to who has priority.⁸⁰

The special status of *ḥuqūq Allah* is recognized in their treatment in many aspects, because they have much greater significance. Firstly, the most important difference is that, *ḥuqūq Allah* are non-negotiable. They cannot be compromised or waived. The *ḥaqq al-‘abd* is generally negotiable and subject to waive or compromise.⁸¹ There are, however, some exceptions regarding the extent to which an individual can abandon or forego his rights. The distinction between the two kinds remains the fact that the main purpose of *ḥuqūq al-‘abd* is wealth, while the main purpose of *ḥuqūq Allah* is obedience.⁸²

Secondly, *ḥuqūq Allah* are not subject to inheritance, but *ḥuqūq al-‘abd* can, in

⁷⁷ *Tāj al-Sharī‘a*, vol.2,p.151. Hoexter, Miriam, *Ḥuqūq Allah and Ḥuqūq Al-‘abd as reflected in the Waqf institution, Jerusalem Studies In Arabic And Islam*, 1995, vol. 19,p 134. Hereinafter: Hoexter.

⁷⁸ Sha‘bān, Zakiyy al-Dīn, *Uṣūl al-fiqh al-Islāmī*, Benghazi, University of Gāryūnus Publications, (1989) (Fifth Edition), p.268, hereinafter: Sha‘bān.

⁷⁹ Hoexter, p 134.

⁸⁰ Ibid. Al-Qarāfī, vol. 1, p.256.

⁸¹ Al-Qarāfī, vol. 1, p.256.

⁸² Al-Bazdawī, vol.4, p.237.

general, be inherited. Thirdly, the enforcement of rights of Allah is a duty of the state, which needs to implement them directly or through a request of an individual “*hisba*”.⁸³ In contrast, the state generally has no direct concern to enforce individuals’ rights unless the state is required to do so.⁸⁴

There is generally some difference in determining whether a particular case manifests chiefly as a right of Allah or a right of the individual. Some rights do not fit easily into any of these groups. For example, “*qadhf*” (slander).⁸⁵

It is worth noting that the distinction has no effect on the jurisdiction of a judge to hear any case brought before the court, whether it concerns *ḥuqūq Allah* or *ḥuqūq al-‘abd*.⁸⁶

Despite this classification, *ḥuqūq Allah* and *ḥuqūq al-‘abd* should not be considered as two unrelated categories of *ḥuqūq*. They are closely related to each other. There is a correspondence between *ḥuqūq al-‘abd* and *ḥuqūq Allah*. More precisely, *ḥuqūq al-‘abd* are generally protected and traceable to *ḥuqūq Allah*. *Ḥuqūq al-‘abd* are protected by *ḥuqūq Allah*, i.e. the duty on everyone to respect others’ rights. Al-‘Izz (d.660AH/1262) states that every *ḥaqq* belonging to an individual, which can be waived with consent, contains a *ḥaqq* of Allah.⁸⁷ Similarly, al-Qarāfī states that: “there is no human right in total isolation of Allah’s right”.⁸⁸ This means that *ḥuqūq al-‘abd* must be respected as a duty of obedience to Allah. This view imposes a duty upon everyone to respect others’ rights, which invests rights of the individual, such as copyright with religious status in addition to the legal protection.

Having applied this classification, copyright contains three kinds of rights: *ḥaqq Allah*, *ḥaqq al-‘abd* and *ḥaqq Allah wa l-‘abd* and this is the case, whether they are

⁸³ *Al-Hisba* means enjoining good and preventing evil voluntarily within the community.

⁸⁴ Kamali, *Fundamental Rights*.

⁸⁵ Al-Qarāfī, vol.4, p.173. See Al-Qurṭubī, *al-Jāmi’*, vol.12, p.177.

⁸⁶ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II. p.555.

⁸⁷ Ibn ‘Abd al-Salām, al-‘Izz, *Qawā‘id al-‘Aḥkām fī Iṣlāḥ al-Anām*, Dr Nazīh Ḥammād and Dr ‘Uthmān Dumayriyya, (eds), Damascus, *Dār al-Qalam*, (2000/1421 AH) (First Edition), vol.1, p.238, hereinafter: al-‘Izz.

⁸⁸ Kamali, *Fundamental Rights*.

economic or moral rights. The rights of an author on attribution and integrity rights of the work and economic rights can be classified under *ḥaqq al-‘abd*.

The right of publication of the work and the right of revocation are mostly of *ḥaqq al-‘abd*, unless the work is necessary to the public interest in which case they are *ḥuqūq Allah*. And the fair use of works for the public interest such as review, research or educational purposes is *ḥuqūq Allah*.

1.12 The classification of *ḥuqūq* according to their subjects

Some of the *Ḥanafī* school classify *ḥaqq* in this respect to “*ḥuqūq mujarrada*” (abstract rights) in contrast to “*ḥuqūq mutaqqarrira*” (concrete rights). The classification suggests a difference between rights from the perspective of their consequences. The distinction between the two rights is actually concerned with deducing and applying rulings more than the theoretical aspect, even though at first sight it may have been seen differently.

Accordingly, the term “*ḥuqūq mujarrada*” refers merely to a *ḥaqq* that does not have a conceived subject. In such case there are no consequences if the right bearer renounces the right. For example, “*ḥaqq al-shuf‘a*”⁸⁹ will not have effect if “*shafī‘*” (the beneficiary) of this *ḥaqq* decides not to use it, because the ownership remains with the purchaser of the property as it was before.⁹⁰ In other words, the *ḥaqq mujarrad* has effect only if it has been used and not if it has been waived.

On the other hand, the “*ḥaqq mutaqqarrir*” (concrete right) refers to what has a conceived subject so there is a consequence if the right bearer waives the *ḥaqq*. For example, in the case of the right of *qiṣāṣ*, if the relatives of the victim waive their right of *qiṣāṣ*, the life of the murderer becomes protected.⁹¹

⁸⁹ *Shuf‘a* the right of pre-emption is a right of priority to purchase a property which is a subject to sale, given to (*shafī‘*) the neighbour, co-sharer or partner in the real property.

⁹⁰ Al-Zuhaylī, vol.4, p.2852.

⁹¹ *Al-Mawsū‘a al-Fiqhiyya*, vol.18, p. 40-41.

Although this way of classifying rights is not completely satisfactory even among the *Hanafi* school, it is a classification with a purpose.⁹² The significance of this classification according to the *fuqahā'* who make it appears in a number of consequences. *Huqūq mujarrada* cannot be subject to sale, reimbursement, gift, donation or exchange and there is no compensation if these rights have been damaged. In contrast, *huqūq mutaqarrira* can be exchanged, reconciled, or compromised.⁹³ The renouncement of a right can be conditional or unconditional.

The classification is open to some objections. Firstly, it is difficult, even artificial, to distinguish between what forms *ḥaqq mutaqarr* and what forms *ḥaqq mujarrad* in the strict sense. And any classification should not be arbitrary. Secondly, in fact, *Sharī'a* recognizes *ḥaqq mujarrad* and approves the transfer of some rights to others for some monetary considerations such as the right of *qiṣāṣ*.

The rights of an author on publication, revocation of the work and economic rights can be classified under *huqūq mutaqarrira*. While the attribution, paternity and integrity rights can be classified under *huqūq mujarrada*. Arguably, some modern *fuqahā'* apply this classification to intellectual property and think that such *huqūq* can be categorized within *huqūq mujarrada*.⁹⁴

1.13 The classification of *huqūq* according to their financial conditions

This classification explores *huqūq* from their financial claims. Some *fuqahā'* classify *ḥaqq* in this way into six categories.⁹⁵ *Huqūq* vary greatly in their financial conditions.

The first group of *huqūq* refers to financial *huqūq*, which are substantially

⁹² Dr. Madhkūr Muḥammad, *al-Madkhal li'l-fiqh al-Islāmī*, p.430.431, cited in al-Kabbāshi, p.77. Footnote No.1.

⁹³ Al-Kāsānī, 'Alā' al-Dīn Abū-Bakr b. Mas'ūd, *Badā'i' al-Ṣanā'i' fī Tarfīb al-Sharā'i'*, Beirut, Dār al-Kitāb al-'Arabī, (1982) (Second Edition), vol. 6, p.189-190, hereinafter: al-Kāsānī. Ibn 'Ābdīn, Muḥammad Amīn, *Radd al-Muḥtār 'alā al-Durr al-Mukhtār*, Damascus, Dār al-Fikr, (1979), vol.4, p.518, hereinafter: Ibn 'Ābdīn. Al-Zuḥaylī, vol. 4, p.2853.

⁹⁴ Ṭuhmāz, 'Abd al-Ḥamīd, *Ḥaqq al-Ta'līf wa al-Nashar wa al-Tarjama*, in al-Diraynī, *Ḥaqq al-Ibtikār*, p.179.

⁹⁵ *Al-Mawsū'a al-Fiqhiyya*, vol.18, p. 40-41. Al-Zuḥaylī, vol. 4, p.2849.

money and they can be exchanged by money such as *zakāt*, debts, or prices. The rights of an author on publication, and revocation of the work and other economic rights can be classified under this group.

The second refers to financial *ḥuqūq*, which are not in consideration of money such as “*mahr*” (dower) and “*nafaqa*” (maintenance) given by a husband to his wife.

The third refers to non-financial *ḥuqūq*, which pertain to money, although they cannot be subject to compensation such as *shuf'a*.

The fourth refers to non-financial *ḥuqūq*, which do not pertain to money but they can be subject to reimbursement such as *qishās* and “*khul'*”.⁹⁶

The fifth refers to non-financial *ḥuqūq*, which do not pertain to money but they cannot be subject to reimbursement such as “*nasab*” (lineage), “*qadhf*” (slander) or “*ḥudūd*” (punishments). The author’s rights of attribution and paternity can be classified under this subdivision.

The sixth which is very controversial refers to “*manāfi'*” (utilities). They are considered as money by all schools except the *Ḥanafī* school.⁹⁷

This classification is made to clarify which *ḥuqūq* can be affirmed by oath and *ḥuqūq* which cannot be affirmed by oath in proceedings before a court. It is obligatory for a judge to decide dispute on its own sufficient evidence. The test relates to the reliability of an oath in proceedings before a judge, which he can decide accordingly.

The standard of proof in cases of financial *ḥuqūq*'s cases is normally that parties can prove their claims or defenses by oath, while the oath has limited role in non-financial rights. This is the case whether some *ḥuqūq* are inheritable or not and whether they are negotiable or not.⁹⁸ Each *ḥaqq* has to be identified as to whether it

⁹⁶ *Khul'* : an agreement between husband and wife terminating the contract of marriage.

⁹⁷ *Al-Mawsū'a al-Fiqhiyya*, vol.18, p. 40-41.

⁹⁸ Ibn Qudāma, *Muwaffaq al-Dīn, al-Mughnī*, Beirut, Dār al-Kitāb al-'Arabī,(N.D) vol.12, p.127, hereinafter: *al-Mughnī*. Al-Nawawī, Muḥyī al-Dīn b. Sharaf, *al-Majmū' Sharḥ al-Muhadhdhab*, Beirut, Dār Iḥyā' al-Turāth al-'Arabī, (1995/1415AH), vol. 23, p.144, and vol.12,p.182. Hereinafter: *al-Majmū'*. Al-Ḥusaynī, Taqīyy al-Dīn Abū Bakr, *Kifāyat al-Akhyār fī Ḥalli Ghāyāt al-Ikhtisār*,

is capable of financial exchange or not. Clearly, that has the potential to create a good deal of dispute.

1.14 The classification of *ḥuqūq* according to their ranks

Not all rights are of the same strength. They range from a high status to a lower one. Accordingly, some *fuqahā'* divided *ḥaqq* into three divisions: "*al-ḥaqq al-mubāḥ*" (the permissive right), "*al-ḥaqq al-thābit*" (the imperfect right) and "*al-ḥaqq al-mū'akkad*" (the perfect right).

The threshold of rights is *al-mubāḥ*. It is a term to denote those actions, which fall within the domain of the indifference and legal neutrality. This means that every person who possesses legal capacity is entitled to act or not to act. *Sharī'a* in general leaves every person at liberty within its margins to make bargains or to dispose of his own property as he chooses.

The next grade of rights is known as "*al-ḥaqq al-thābit*" (the imperfect right). It means that a person can exercise his unilateral will. For example, if a person has received an offer to have an object with or without consideration he has an imperfect right. If he decides to own that object, he acquires the perfect right, which is at the pinnacle of this classification.

The most important is "*al-ḥaqq al-mū'akkad*" (perfect right). It has much greater significance in terms of inheritance, claim, exchange, enforcement and protection, while other rights have limited range of these privileges or even none of them.⁹⁹ In other words, *al-ḥaqq al-mubāḥ* has weak competence as compared to other rights. Within *al-ḥaqq al-mū'akkad* group, their strength also varies with the grounds of each *ḥaqq*.

There is debate among schools of *fiqh* as to what balance should be taken

Beirut, Dār al-Kutub al-'Arabiyya, (N.D), vol.2, p.280. Hereinafter: *Kifāyat al-Akhyār*.

⁹⁹ Kamali, *Fundamental Rights. Al-Mawsū'a al-Fiqhiyya*, vol.18, p. 41.

between these rights if they exist collectively or in conflict in a particular case?¹⁰⁰ The schools of *fiqh* differ in balancing the order of priority of *ḥuqūq Allah* and *ḥuqūq al-‘abd*. For example, if the deceased did not pay “*zakāt*” (alms) or “*kaffāra*” (expiation) or he did not perform “*ḥajj*” (pilgrimage), is the heir obliged to honor these duties despite the deceased not having made a “*waṣiyya*” (bequest) for them?¹⁰¹ The answer varies from one school to another.

Al-Shāfi‘ī school believes that *ḥuqūq Allah* must have a categorical priority in weight over any of *ḥuqūq al-‘abd*. In contrast, al-Mālikī school states that *ḥuqūq al-‘abd* should surpass *ḥuqūq Allah* because *ḥuqūq al-‘abd* are always on competitive bases and subject to conflict while *ḥuqūq Allah* are easier to be forgiven.¹⁰² It should be noted, however, all schools agree that if *ḥuqūq Allah* result in “*ḥudūd*” (punishments) then *ḥuqūq Allah* must prevail over *ḥuqūq al-‘abd*.¹⁰³

The moderate view is that copyright is “*ḥaqq mū‘akkad*” a (perfect right) if it can be asserted in *Sharī‘a*. This means that copyrights can be subject to inheritance, claim, exchange, enforcement and protection.

1.15 The classification of *ḥuqūq* according to their enforceability

One of the meanings of *ḥaqq* is a judgment.¹⁰⁴ The classification deals with the question of the truthfulness of a judgment, since a judge may apply rules and decide according to evidence, but the judgment does not achieve justice in reality.

It is helpful here to refer to the famous *ḥadīth* which is reported by Umm Salama (d.61AH/681) in which he said in the meaning: (I am only human being, and

¹⁰⁰ *Al-Mawsū‘a al-Fiqhiyya*, vol.18, p. 22-23, *Ḥaqq* entry.

¹⁰¹ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.409.

¹⁰² Al-Qārānshāwī, ‘Abd al-Jalīl, *Dirāsāt fī al-Sharī‘a al-Islāmiyya*, Benghazi, University of Gāryūnus Publications, (1989) (Second Edition), p.25, 26, hereinafter: al-Qārānshāwī.

¹⁰³ Saḥnūn, Abū Sa‘īd ‘Abd al-Salām, *al-Mudawwana al-Kubra*, Aḥmad ‘Abd al-Salām, (ed.), Beirut, Dār al-Kutub al-‘Ilmiyya, (1994/1415AH) (First Edition), vol.4 p.549, hereinafter: *Al-Mudawwana*.

¹⁰⁴ See here, p.46.

you people (litigants)¹⁰⁵ come to me with your cases; and it may be that one of you can present his case eloquently in a more convincing way than the other, and I give my verdict according to what I hear. So if ever I judge (by error) and give the right of a brother to his other (brother), he should not take it, for I am giving him only a piece of Fire).¹⁰⁶

Corresponding almost exactly to the above *ḥadīth* and to the general dispute about whether a judge's decision can permit the prohibited and prohibit the lawful or not,¹⁰⁷ three variants have been proposed to subdivide *ḥaqq*. Firstly, that *ḥaqq* is "*wājib diyānatan*" (religious obligation). Secondly, that *ḥaqq* is "*wājib qaḍā'an*" (juridical order). Thirdly, that *ḥaqq* is "*wājib diyānatan wa qaḍā'an*" (religious obligation and juridical order).

The *wājib diyānatan* is a right authorized by *Shar'ī* ruling or contractual obligation, but there is insufficient evidence. For example, a court cannot enforce a judgment confirming "*ṭalāq*" (divorce), if a wife cannot establish the evidence by witnesses or a proper document. Also, a judge cannot enforce many of the *ḥuqūq* Allah such as "*ḥajj*" (pilgrimage) and "*nadhr*" a (vow) and so on.

The "*wājib qaḍā'*" arises if a case can be proven and enforced by a court, but it does not correspond to the truth. For example, if someone divorces his wife for a third time, the marriage is terminated "*diyānatan*" (religiously), but if the wife cannot prove this divorce by witnesses or by document the marriage is valid before a court. This means that it is open to the husband, but sinful to return to his wife. "Similarly, if a debtor denies a creditor's right to repayment and the creditor is unable to prove his/her case in court, the court cannot enforce the creditor's right".¹⁰⁸

"*Wājib diyānatan wa qaḍā'an*" is a right authorized by a ruling of *Sharī'a* or a contractual obligation and can be proven and enforced by a court.¹⁰⁹

This can be used as evidence that legal rights are separated from religious rights

¹⁰⁵ The original translation is opponents.

¹⁰⁶ *Al-Bukhārī*, tr., vol. 9, p.212. No.281.

¹⁰⁷ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.555.

¹⁰⁸ Kamali, *Fundamental Rights*.

¹⁰⁹ *Al-Mawsū'a al-Fiqhiyya*, vol.18, p. 41-46, cf. Kamali, *Fundamental Rights*.

in *Sharī'a*.¹¹⁰ The former can be adjudicated by a judge and many of the latter cannot be adjudicated by a judge.¹¹¹ For example, those stated in the *ḥadīth*: (The rights of Muslim on the Muslims are five; To return the greeting, to visit the sick, to follow the funeral processions, to accept invitation and reply the sneezed).¹¹²

The *ḥadīth* illustrates that the distinction between the religiously commendable and the legally enforceable has been clearly made in *fiqh*, because of *Sharī'a*'s comprehensive nature and its practical method. Since *Sharī'a* does not have an exact equivalent in modern terms we should elaborate its meaning by looking at its terms, norms and principles.

This is supported by the fact that *Sharī'a* contains many rights which cannot be enforced. If they are violated, no action can be taken to impose a penalty or seek a remedy. In contrast, there are rights, which should be treated not only as morally fundamental but also as legally enforced.

It follows that if copyright has been established in the *Sharī'a* it becomes "*wājib diyānatan wa qadā'an*". Copyright should be legally enforced to protect an author's economic and moral rights and the public interest. In addition, if copyright cannot be protected by the state or the judicial authority for any reason, a Muslim is required to honor copyright, because it is *wājib dayāanta*. Understood in this way, the approach adopted by some *fuqahā'*, which limits copyright to the meaning of recommendation, removes its obligatory nature and impact. This approach weakens the position of copyright.¹¹³

1.16 The classification of *ḥuqūq* according to inheritability

According to this standard, *ḥuqūq* can be divided into two groups. Inheritable *ḥuqūq* which are heirs inherit from deceased relatives. For example, a pledge, right

¹¹⁰ Kamali, *Fundamental Rights*.

¹¹¹ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p. 571.

¹¹² *Al-Bukhārī*, tr., vol. 2, p.187, 188.

¹¹³ See here p.25 and post.

of water or right of way.

Non-inheritable *ḥuqūq* which heirs cannot inherit from deceased relatives' include the rights of divorce or custody. The reason for non-inheritability is that they are essentially attributed to an individual and which begin during their lives, end at death and are linked only to a specific person.¹¹⁴ Therefore, they are purely personal rights which do not form part of the estate.

There are some *ḥuqūq* which may fall into the first or second category.¹¹⁵ This includes "*khiyār al-sharṭ*"¹¹⁶ "*khiyār al-ru'ya*"¹¹⁷ "*khiyār al-majlis*"¹¹⁸ and *qiṣāṣ*. The majority of *fuqahā'* argue that in general, rights are inherited in the same way as other wealth by virtue of the absence of any rule to the contrary and because they are subject to reimbursement. The *Ḥanafī* school considers that these rights cannot be subject to inheritance because they pertain to the deceased person.¹¹⁹ It can be argued in such a case that author's economic rights are inheritable, while author's moral rights are not inheritable.

According to Ibn Rajab (d.795AH/1393), there is a classification of *ḥuqūq* into five categories.¹²⁰ *Ḥuqūq* can be divided into "*ḥaqq al-milk*" (the right of ownership), "*ḥaqq al-tamluk*" (the right of a father to appropriate his son's property), "*ḥaqq al-intifā'*" (the right of utilization) such as the right of neighbor to put a stick on the wall of his neighbor's wall, "*ḥaqq al-ikhtisāṣ*" (the right to exclusive appropriation of the subject matter of his right) which prevents others from sharing the subject matter with the *ḥaqq* holder. This *ḥaqq* is not subject to exchange, such as the right to sit in a mosque. Finally, "*ḥaqq al-ta'aluq listifā' al-*

¹¹⁴ *Al-Mawsū'a al-Fiqhiyya*, vol.18, p. 37 and after. Al-Zuhaylī, vol. 4, p.2848.

¹¹⁵ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.253. Al-Zuhaylī, vol. 4, p.2849. *Al-Majmū'* vol.11, p.393. Ibn Rajab, 'Abd al-Raḥmān, al-Ḥanbalī, *al-Qawā'id fī al-Fiqh*, Ṭaha Sa'd, (ed.), (First Edition) (1972), p.341, Hereinafter: Ibn Rajab, *al-Qawā'id*.

¹¹⁶ The right of both parties of a contract to withdraw from the contract during a specific period if that party stipulated that. See The Mejlle, Article 300, p.44.

¹¹⁷ The right of the buyer to rescind or ratify a sale contract upon visual inspection. See The Mejlle, Article 320, p.46.

¹¹⁸ The right of both parties in a business transaction to withdraw as long as they have not separated. Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p. 205.

¹¹⁹ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p. 253. Al-Qārānshāwī, p.20,21.

¹²⁰ Ibn Rajab, *al-Qawā'id*, p.188.

ḥaqq” (the right to execute or to enforce a right).

This classification is not more widely acknowledged or applied than other classifications. However, the author’s economic rights fall under the categories both of *ḥaqq al-milk* and of *ḥaqq al-ikhtisās* while the public right to have access to useful works for research or education fall under the category of *ḥaqq al-intifā’*. The right of attribution and acknowledgment fall under *ḥaqq al-ta’aluq li-istifā’ al-ḥaqq*.

In contemporary writings on *fiqh*, Usmani provides his account of classifications of *ḥuqūq* in *Sharī’a* in some detail.¹²¹ The overarching goal of his classifications is to distinguish which rights can be subject to financial exchange. He divides *ḥuqūq* into two main categories; “*ḥuqūq Shar’iyya*” (legal rights) and “*ḥuqūq ‘urffiyya*” (customary rights). The first division of “*ḥuqūq Shar’iyya*” are rights affirmed by direct or indirect text from “*al-Shāri’*” (the lawgiver). The second division of “*ḥuqūq ‘urffiyya*” are established by custom and then approved by *Sharī’a*.

The group of *ḥuqūq Shar’iyya* is sub-divided into two kinds of *ḥuqūq*. Firstly, those *ḥuqūq* which are conferred by the *Shāri’* upon the owner to a remedy for some forms of damage, such as “*shufa’a*” and “*ḥaḍāna*”. This kind of *ḥaqq* is not subject to financial exchange by way of transaction. The second sub-division refers to rights that are conferred to the owner other than as a remedy such as “*qiṣāṣ*” or the right of inheritance. A sale, gift, or inheritance cannot transfer those *ḥuqūq*, but they can be the subject of compromise or reconciliation.

Carrying this classification further, *ḥuqūq ‘urffiyya* can be sub-divided into three categories. Firstly, “*manāfi’*” (utilities) such as the right of way or right to air. Secondly, a right arising from a contract such as a tenant’s right to remain on *waqf* land during the term of his tenancy. Thirdly, the right of priority being a right to prevent anyone other than the priority holder such as (land, water or animals) from

¹²¹ Usmani, *Buḥūth fi Qaḍāyā Fiqhiyya Mu’āṣira*, p.78-85.

claiming ownership of that thing.¹²² Usmani concluded that the rights of *manāfi'* are generally allowed to be sold, while other rights are not saleable but can be settled. According to this classification, copyright is one of the *ḥuqūq 'urffīyya*.¹²³

There are two problems with Usmani's conclusion on copyright. First of all, copyright can stand with the direct texts of *Sharī'a*¹²⁴ and there is no reason to believe that copyright is not "*manfa'a*" (a utility).¹²⁵ Secondly, if the copyright owner decides to exchange his work for an amount of money the difference between sale and settlement is of theoretical not practical consequences.

1.17 Summary

The "*fiqh*" (Islamic jurisprudence) has its own concept of *ḥaqq* and its own approach although there are many commonalities between *Sharī'a* and other legal systems. The precise understanding of *ḥaqq* in *Sharī'a* is important for researching of copyright regardless of which definition of *ḥaqq* is more accurate.

The word *ḥaqq* has many senses in Arabic and in Islamic literature including the meanings: real, truth, adherence to fact, duty, correct judgment, accurate, justice, legitimate, money, claim and litigation.

There is no a particular technical definition of *ḥaqq* in the Qur'ān, the '*ahādīth*' or other *Sharī'a* sources. Most *fuqahā'* give it all its linguistic meanings, but some definitions had been articulated early than others. However, there is a difference in defining *ḥaqq* depending on whether it is an *ikhtisāṣ*, *maṣlahā* of an individual or a combination of both or whether the word should be left as it means.

It is suggested that the absence of a single definition of *ḥaqq* in the original sources of *Sharī'a* and the difference in defining of *ḥaqq* is much less of a problem for the purpose of recognizing copyright. It is not necessary to invent a definition of

¹²² Usmani, *Buḥūth fī Qaḍāyā Fiqhiyya Mu'āṣira*, p78-85.

¹²³ Ibid.

¹²⁴ See this thesis p.115 and post.

¹²⁵ See this thesis, p.99.

ḥaqq because its linguistic meanings are valid in *Sharī'a*. *Ḥaqq* needs not necessarily be a clear-cut construct. Nor can it be understood in a vacuum detached from the language or the conceptual structure of *Sharī'a*. The two basic elements of *ḥaqq* in *Sharī'a* are: the state or the ability of “*thābūt*” (existence) in the future and the approval of *Sharī'a*.¹²⁶ The second factor determines its grounds. This shifts the definitional problem onto the approval of *Sharī'a*. *Ḥaqq* is more heavily dependent on the approval of *Sharī'a* than any other consideration. Hence, there is a practical consensus regarding these elements where theoretical agreement on a single definition is lacking. *Ḥaqq* is entirely made by the *Shāri'* who chooses which form is used and on which form an adequate security is given.

This chapter presents that to be *ḥaqq* it must be approved by evidence of *Sharī'a* whether the *ḥaqq* is of Allah or human or both, ruling or contractual obligation, financial or non-financial, inheritable or non-inheritable, welfare or option, claim or liberty, abstract or concrete, unilateral or bilateral, *in rem* or *in personam*, mandatory or discretionary.

Flowing from this, copyright requires the approval of *Sharī'a* to be a recognized *ḥaqq*. This approval will be researched and discussed in more detail in subsequent chapters. It would appear to be possible to detect copyright's foundations within the concept of *ḥaqq*. This is the case whether a definition is needed or not and regardless of which particular definition of *ḥaqq* applies or is valid. Copyright can be found within the broader framework of *ḥaqq*.

The lack of definition of *ḥaqq* in the original sources has been redeemed somewhat by an intensive “*ijtihād*” (conscientious reasoning) to clarify *ḥaqq*. This is evident when the *fiqh* has produced objectively many classifications of *ḥuqūq*, which give more precise and detailed statements of them. *Ḥuqūq* in their manifestations are extensively discussed and recognized by *fuqahā'* noting that there is a good deal of overlap between these various categories. *Fuqahā'* have provided a rich literature of various rules and conditions, enabling rights to be ranked in general

¹²⁶ Kamali added, without enough evidence, the right-bearer (*ṣahib al-ḥaqq*) as an element of *ḥaqq*. Kamali, *Fundamental Rights*.

and within each category.¹²⁷ *Ḥuqūq* under *Sharī'a* can be classified according to the holder, their subjects, their financial conditions, their ranks, their enforceability and to their inheritability. A review of the various ways in which *ḥuqūq* are classified is useful for researching copyright in *Sharī'a* and in determining which of these classifications is applicable to copyright. Generally then, these broad categories can be applied to copyright.

The assertion in this chapter is that this typology of rights made by *fuqahā'* can be employed and extended to include copyright. It can be argued that *Sharī'a* deploys the basic concept of *ḥaqq* from which copyright in the modern sense, can be deduced and framed. The application of the framework has shown that copyright is a "bundle" of various *ḥuqūq*.

Sharī'a approves the transfer of several intangible rights to others for some monetary considerations. It is legitimate to question whether this judgment might apply to copyright. This might grant the author the full option of a waiver, whether conditional or unconditional. It may accordingly consider the general approach of rights when deciding if copyright is inheritable.

These classifications of *ḥaqq* reveal the general Islamic attitude; the precision, and empiricism at the expense of theoretical considerations. As we have seen, *ḥuqūq* have existed and been recognized in a piecemeal manner but which can be presented in a reasonably coherent body of identifiable and complete rights. Some contemporary scholars concluded that "[t]his distinction between rights, made by Muslim jurists at an early stage, had no parallel in Roman law"¹²⁸ nor common law. This provides a counter to some conclusions that Islamic law "does not present a notion of the rights of the individual".¹²⁹ In contrast, it is possible to infer that

¹²⁷ Al-'Izz. vol. 1 p.217-258. *Al-Mawsū'a al-Fiqhiyya*, vol.18, p.20 and after.

¹²⁸ Kamali, *Fundamental Rights*. compare with Piscatori J. P. "Human Rights in Islamic Political Cultures," in: *The Moral Imperatives of Human Rights* (Washington, American University Press, 1980), p. 142 and post.

¹²⁹ Piscatori J. P. "Human Rights in Islamic Political Cultures," in: *The Moral Imperatives of Human Rights* (Washington, American University Press, 1980), p. 144. Urfan Khaliq, "Beyond the Veil?: An Analysis of the Provisions of the Women's Convention and the Law as Stipulated in Shari'ah", *Buffalo Journal of International Law*.1995 VOL 2OT2 p. 1-47.

copyright could have a proper position in the *Sharī'a*'s system of *ḥuqūq*.

After achieving the clarification of *ḥaqq* and its classifications, copyright would profit from research on other terms relating to *ḥaqq* in *Sharī'a* and the nature of intellectual works.

Chapter Two The Related Terms to *Ḥaqq*

2.1 Introduction

Since the primary interest is in testing copyright in *Sharī'a*, it is necessary to build a comprehensive and appropriate analytical framework of copyright to highlight the related terms to "*ḥaqq*" (right). This chapter is devoted to the study of the definitions of "*milkiyya*" (ownership), "*māl*" (wealth) and "*manfa'a*" (utility). In addition, we will describe the relationship between copyright and these terms and briefly review the basic features of intellectual works.

Two preliminary points must be made. Firstly, these terms are conceptually pivotal to copyright because copyright can be traceable to them. An understanding of these terms is required for a correct decision on the *Sharī'a* position regarding copyright. Different approaches to determining these terms and their applications have a direct impact on copyright. Secondly, copyright can be more soundly elaborated in *Sharī'a*, if terms related to *ḥaqq* are understood and fully connected.

Needless to say a translation cannot ever fully capture the sense of the term in its Arabic original form.

2.2 "*Milkiyya*" (Ownership)

In *Sharī'a* *ḥaqq* encompasses what is approved whether as to "*ikhtiṣāṣ*" the (exclusiveness) of its owner, or as the "*idhn*" (permission) for some people with certain qualifications or as to "*ibāḥa*" (liberty) for everyone. Therefore, *ḥaqq* is more comprehensive than "*milkiyya* or *milk*" (ownership) because the latter is one of sub-divisions of the former.¹

Rooted in the Islamic creed is the belief that only Allah has the attribute of

¹ Al-Khafif, *al-Milkiyya*, vol.1, p.1. Al-Diraynī, *Ḥaqq al-Ibtikār*. p. 88, footnote No.1.

complete, ultimate and absolute ownership. A Muslim must believe that the heaven and the earth, which includes all individuals and their properties, are essentially and ultimately in Allah's ownership and that what is divided and held by humankind as a trust.² There are many verses of the Qur'ān and numerous "aḥādīth" (the prophetic traditions) which establish this aspect of the creed.³ This belief is held with an emphasis and plainness that Allah has a right to delineate the general rules of how people hold, use and dispose of property.

What follows from this is that the nature and role of private and public ownership in Islamic law must be understood within this context. This has led to the conclusion that authors and their works belongs to Allah, and that the ownership of copyright will be granted and controlled by *Sharī'a*.⁴

2.2.1 Meanings of "Milkiyya" or "Milk"

Milkiyya or *milk* literally means ownership, property, possession, control and action as referred to in the Qurānic verses.⁵ It means an exclusive right to keep, use or dispose of a property.⁶ "It is derived from a root [*milk*] that implies the idea of possession and acquisition of objects".⁷ *Milkiyya* is the exact modern equivalent to *milk*. Early *fuqahā'* used *milk* while the contemporary *fuqahā'* use *milkiyya*.⁸

² Al-Arabi, M.A., *Private Property and its limits in Islam*, Al Azhr, Academy of Islamic Research, Cairo, The First Conference of Academy of Islamic Research, March 1964, p.106. Al-Miṣrī, Dr Rafīq Yūnus, *Uṣūl al-Iqtisād al-Islāmī*, Damascus, Dār al-Qalam, (1999) (Third Edition), p.35.

³ Qur'ān, 2. v. 284, 3 v.189, and 57 v.7.

⁴ See this thesis, p.206.

⁵ *Mujmal al-lughā*, vol. 3, p.840. Al-Zamakhsharī, *Asās al-Balāgha*, vol.2, p.227. Ibn Manẓūr, vol. 10, p. 491. Al-Sharabāshī, p. 441.

⁶ Al-Sayis, M.A., *Ownership of Land and its Benefits in Islam*, Al Azhr, Academy of Islamic Research, Cairo, The First Conference of Academy of Islamic Research, March 1964, p.129., hereinafter: al-Sayis, *Ownership of Land and its Benefits in Islam*.

⁷ El Khafeef, Aly, *Individual Property and its limits in Islam*, Al Azhr, Academy of Islamic Research, Cairo, The First Conference of Academy of Islamic Research, March 1964, p.79.

⁸ Al-Khafif, *al-Milkiyya* vol.1, p.64, footnote 1. *Al-Mawsū'a al-Fiqhiyya*, vol.36, p.31, *Milk* entry.

2.2.2 Technical Definitions of “milk” (Ownership)

When we are considering “milk” (ownership), there is debate amongst *fuqahā'* as to how it should be defined. It is not controversial to say that the majority of *fuqahā'* recognize that it is essentially difficult to identify “milk” reliably.⁹ This might lead some contemporary *fuqahā'* to conclude that there had been no precise definition of *milk* in *fiqh*.¹⁰

However, there are some definitions of “milk” which are closely related to the lexical interpretation, but the focus will be on technical clarification.

Some *fuqahā'* considered that ownership could be analyzed in terms of legitimate judgment, capability or relationship being granted by the lawgiver to an owner.¹¹ They justified that on the basis that ownership is entirely the creature of the lawgiver and Allah provides the owner an adequate authority over the owned thing.

A coherent statement of this opinion was made by al-Qarāfī and al-Subkī who defined “milk” as “a *ḥukm shar'ī* (legitimate judgment) that has been proposed in a thing or *manfa'a* (utility) conferring on its owner an authority to take advantage of or exchange it”.¹² Ownership is essentially a *ḥukm shar'ī* (legitimate judgment) because it is based on “*shar'ī* (legitimate) grounds. Al-Jurjānī defines it as a “*ittiṣāl shar'ī*” a legal relationship between “*insān*” (a person) and “*shay'*” (a thing) which allows that person to dispose of it to the exclusion of everyone else”.¹³ In fact, al-Jurjānī mentioned in specific the word “*taṣarruf*”, which can loosely be translated as authority or control.

Following this logic, al-Sayis (d.1396AH/1976) defines it as “the relative relationship between the owner and the thing owned, through which the owner is exclusively entitled to control the thing owned, except in case of inexpediency or

⁹ *Al-Furūq*, vol.3 p.364.

¹⁰ Al-Khafīf, *al-Milkiyya*, vol.1, p.59.

¹¹ *Ibid.* vol.1, p.66

¹² *Al-Furūq*, vol.3 p.364. Al-Suyūṭī, Jalāl al-Dīn, *al-Ashbāh wa al-Nazā'ir*, Muḥammad Ḥasan al-Shāfī'ī (ed.), Beirut, Dār al-Kutub al-'Ilmiyya, (1419AH/1998) (First Edition), vol.2, p.155, hereinafter: al-Suyūṭī, *al-Ashbāh*.

¹³ EI², Entry: “*Milk*”. Al-Jurjānī, *al-T'arifāt*, p.226.

any other legal hindrance pertaining to public or private interest.”¹⁴

A new definition proposes that “*milkiyya*” is “*ittiṣāl sharʿī*” (a legal relationship) between a person and a “*shayʿ mamlūk*” (an owned thing) which initially provides the owner “*intifāʿ*” (utilization) of and “*taṣarruf*” (authority or control) unless a constraint operates.¹⁵ The fundamental characteristic of ownership which affects its existence and which is vitally important to consider, is that “*sharʿī*” (legitimate) approval. Whilst this is true, other factors need to be considered, because focusing on a relationship or judgment will not explain ownership.

Accordingly, ownership of copyright creates a legal relationship or an authority between an author and his work. Conversely, there is no a legitimate relationship or an authority between an imitator and copied works.

Another group of *fuqahāʾ* favored the view that, ownership is to be analyzed as the notion of authority, with the addition of other criteria. The analysis rests upon a supposition that ownership means a legitimate authority to dispose.

In presenting this view, Ibn Taymiyya (d.728 AH/1328) described “*milk*” as “*al-Qudrat al-Sharʿiyya*” (the legitimate ability) to “*taṣarruf*” (control). This ability is similar to the physical ability.¹⁶ Likewise, Ibn al-Humām (d.861AH/1457) defined it as the legitimate control to dispose essentially established by *Sharīʿa*.¹⁷ Al-Zarkashī (d.794AH/1391) insisted that the essence of “*milk*” is the ability to do any action with property in which there is no liability or sin arising in the course of exercising this authority.¹⁸

It should be noted that ownership means more than the legitimate authority. In fact, ownership bestows legitimate authority but it is not ownership itself.¹⁹ An

¹⁴ Al-Sayis, *Ownership of Land and its Benefits in Islam*, p.131.

¹⁵ Al-Muṣliḥ, ‘Abd Allah, *Quyūd al-Milkiyya al-Khāṣṣa*, Riyadh, Dār al-Muʿayyad, (1415AH/1995) (Second Edition), p.39, hereinafter: al-Muṣliḥ.

¹⁶ Ibn Taymiyya, Aḥmad, b. ‘Abd al-Ḥalīm, *Majmūʿ Fatāwā Shaykh al-Islām*, Riyadh, ‘Abd al-Raḥmān Qāsim (eds.), vol. 29.p.178. Hereinafter: Ibn Taymiyya Fatāwā.

¹⁷ Ibn al-Humām, Muḥammad b.‘Abd al-Wāḥid, *Sharḥ Faṭḥ al-Qadīr*, Beirut, Dār Iḥyāʾ al-Turāth al-‘Arabī, (N.D) vol.5,p.456.

¹⁸ Al-Zarkashī, Badr al-Dīn, Muḥammad b. Bahādir, *al-Manthūr fī al-Qawʿid*, Kuwait, the Ministry of Awqāf and Islamic Affairs, (N.D), vol.3, p.224, hereinafter: al-Zarkashī, *al-Manthūr*.

¹⁹ *Al-Furūq*, vol.3 p.364.

individual may possess property even though he has no control over its disposal and vice versa. There are some cases where there is no liability or sin arising in disposing of a property and there is no ownership. Therefore, it is clear that the definition is uncertain and the legitimate authority is only an indicator as regards ownership.

However, the presentation of legitimacy in these definitions prevents unlawful ownership of copyright and ownership of unlawful works.

In order to give exhaustively an exact definition, Ibn 'Arafa (d.803AH/1400) suggested that "milk" is "istiḥqāq" (the entitlement) of "taṣarruf" to dispose or use of an owned thing with any lawful act without need of another person's authority.²⁰ The definition shows that "istiḥqāq" (entitlement) is the very essence of the concept of ownership. This "istiḥqāq" can only be established by *Sharī'a*.

The terminology regarding ownership has shifted with the term entitlement. The emphasis on entitlement is consistent with the general rules of *Sharī'a*. The reason is that, the existence of ownership is conditional upon the approval of *Sharī'a* and provides the direct and absolute ability to execute any lawful act on a property. Therefore, the approval of *Sharī'a* must be acknowledged, because it provides authority to the owner.

Although, ownership can in part be explained by reference to such a concept but not fully, however, the entitlement of attribution, change, exploitation and reproduction of works are reserved only to authors.

Some scholars add to the definition some points such as (unless a constraint operates), and (subject to any restrictions on the owner's right imposed by *Sharī'a*) or similar wording added to their chosen definitions because, for example, incapable person can own property but not have capacity freely to sell or dispose of it.²¹

It seems that these conditions are necessary for any right or concept to be in accordance with other considerations and conditions stipulated by *Sharī'a*.

²⁰ Al-Raṣṣā', Abū 'Abd Allah Muḥammad, *Sharḥ Hudūd Ibn 'Arafa*, Muḥammad Abū al-Ajfan and al-Ṭāhir al-Ma'mūrī,(eds.), (1993) (First Edition),vol.2,p.605.

²¹ Al-Kafawī, p.853. Al-Muṣliḥ, p.39.

From a different viewpoint, *Majallat al-'Aḥkām al-'Aadliyya* defines ownership by stating; "it is a thing of which man has become the owner,"²² whether it is corporeal thing or utility.²³ It is explained briefly in *Majallat al-'Aḥkām*, that ownership is anything that can be owned by a human which provides for exclusivity in the transaction.²⁴

Obviously, there is a close connection between ownership and the thing owned, but they do not share the same identity, which a definition should address. Similarly, copyright is different from works.

Even with mention of exclusiveness in the explanation, it is still inaccurate to define ownership by its subject matter. The definition has to go to the essence of the *milkiyya* itself. There is no a simple equivalence between the concept and its applications.

According to al-Zarqā, "*milkiyya*" (ownership) is a legitimate and an exclusive assignment "*ikhtiṣāṣ shar'an*" that provides an owner with authority to make any transaction unless a constraint operates.²⁵ He said that he created this definition by extracting it from several definitions, describing it as the most comprehensive and concise definition.²⁶ In fact, al-Zarqā developed the definition of al-Qudsī who stated "*al-milk ikhtiṣāṣ ḥājiz*".²⁷

Ikhtiṣāṣ means an exclusive relationship between an owner and an owned thing that gives him absolute authority to use, dispose or take advantage solely and prevents others from having any of these privileges without his consent. This definition depends on his definition of *ḥaqq*, which is "*(ikhtiṣāṣ)* exclusivity

²² *The Mejelle*, p.18, Article No. 125.

²³ Ḥaydar 'Alī, *Durr al-Ḥukkām Sharḥ Majallat al-Aḥkām*, Translated into Arabic by Fahmī al-Ḥusaynī, Riyadh, Dār 'Ālam al-Kutub, (2003/1423AH) (Special Edition), vol.1.p.115, Article No. 125. Hereinafter: Ḥaydar.

²⁴ Ibid.

²⁵ Al-Zarqā, Muṣṭafa, *al-Madkhal al-Fiqhī al-'Ām*, Damascus, Dār al-Qalam, (1418AH/1998) (First Edition), vol.1, p.333., hereinafter: al-Zarqā, *al-Madkhal*. Many contemporary scholars such as Muḥammad Abū Zahra favour this definition or try to improve it. See al-'Abbādī, vol.1 p.103. Al-Nashmī, *al-Ḥuqūq al-Ma'naūyya li al-Barāmij wa 'Aḥkām Naskhihā*, p.199.

²⁶ Al-Zarqā, *al-Madkhal* vol.1, p.333.

²⁷ Al-Khafif, *al-Milkiyya*, vol.1, p.66

established by the *Sharī'a* in the form of authority (*sulṭa*) or commission (*taklīf*).²⁸ The logic of both definitions is the same.

Applied to copyrights, "*ikhtisāṣ*" retains extensive scope for application in two areas of copyright. First, ownership is an exclusive assignment, which prohibits other than the owner to using or dealing with property without the owner's consent. Second, it bears a strong relation to the condition of originality to obtain copyright.

Here, ownership has been viewed in terms of exclusiveness. Even al-Zarqā stipulates a condition that it must be "*shar'ī*" (legitimate). It is suggested that this definition is applicable to ownership, rights and physical objects. It is claimed that the exclusiveness is detrimental to the ownership, but without reference to the approval of *Sharī'a*.

From the point of view of the majority of *fuqahā'*, this approach is criticized as the definition is applicable to temporary and permanent types of *ikhtisāṣ*. For example, the ownership of a borrower falls short of exclusiveness, even though the ownership is established.²⁹ *Ikhtisāṣ* is different from ownership because *ikhtisāṣ* gives a limited right of "*taṣarruf*" over a "*manfa'a*" (utility) only but *milkiyya* gives an absolute right on a property or *manfa'a*.³⁰

However, it would be irrational to deny or underestimate the exclusiveness relying on the literal nature of the definition. On other hand, exclusivity should not be thought of as being ownership itself but as a part of the very essence of the concept of ownership.

In the light of the previous discussion, it is beneficial to apply the definitions of ownership and their interpretation to copyright. There are some conclusions, which provide some basis for copyright in *Sharī'a*.

Firstly, evidence from *Sharī'a* is necessary to establish ownership on anything, which would otherwise be unidentified. *Sharī'a* recognizes that individuals have rights to particular property which they have obtained legally and grants them rights

²⁸ Kamali, *Fundamental Rights*. Al-Zarqā, *Nazariyyat al-Iltizām*, p.18.

²⁹ Al-Zarqā, *Nazariyyat al-Iltizām*, vol.1, p17, 18.

³⁰ Al-Nashmī, *al-Ḥuqūq al-Ma'nawiyya li al-Barāmiy wa 'Aḥkām Naskhihā*, p.205.

of free use, possession, and disposition within *Sharī'a*'s limits. Ownership is entirely and solely the creature of *Sharī'a* which provides a legal relationship between an owner and a thing.

This implies that ownership, because it is, in essence, created by *Sharī'a*, should be protected by it. As ownership is created by *Sharī'a*, it is accordingly, ceased by *Sharī'a*. The majority of *fuqahā'* agree that the abandonment of property by the owner does not terminate its ownership.³¹ Therefore, authors do not lose their copyright, if they do not use or exploit it over time.

Secondly, "*shay'*" *mamlūk* (the owned thing) has been generalized in its applications to include wealth, utility and right. This area of ownership can also be expanded to encompass intellectual property including copyright. With the analogy of material things, it is not hard to see the terminology of ownership extending to immaterial things.

The only condition related to an owned thing is to be permitted interest and it does not belong to another person.³² Thus, it can be argued that ownership applies to large extent to copyright. Copyright represents ownership of a work that cannot be legally copied and published by someone else other than the author. It might be held that ownership in the sense of *Sharī'a* is wide because it does not stipulate that the subject matter must be a material thing.³³ The subject matter of property can be anything beneficial and approved by *Sharī'a* whether tangible, intangible, movable or immovable. Physical substantiality or control is not an essential element for ownership of something or its financial value.

Thirdly, the baseline rule of *Sharī'a* is that, the modes of acquisition of ownership must be acceptable by *Sharī'a*. Ownership should be viewed as a legitimate authority established by *Sharī'a* if it corresponds to its conditions and modes of acquisition of it. Any means of an illegal possession such as theft, piracy or usurpation does not render ownership valid nor acquire an advantage in *Sharī'a*,

³¹ Al-'Izz, vol.2, p.326. Al-Khafif, *al-Milkiyya*, vol.1, p.77.

³² *Al-Furūq*, vol.3 p.383.

³³ Al-'Abbādī, vol.1,p.198.

even though they are widespread. The same is true for copyrights.

Fourthly, ownership means that an owner is the only person given total control over a thing originally, whether the owner exercises control directly or indirectly. It also means the exclusion of everyone other than the owner to use, possess or dispose of property without the owner's permission. The ownership rights are total and fully enforceable by the owner against others within the boundaries of *Sharī'a*. Ownership and wealth is sacred to the extent, a person who is killed while protecting his property is a martyr.³⁴ The exceptions to the owner's rights are that the owners must not use their property to harm others or the community by "*iḥtikār*" (hoarding) because these practices are forbidden.³⁵

Ownership and the authority to dispose are not necessarily identical. This is equally applicable to the relationship between ownership and possession. Therefore, if the owners cannot take advantage of their property or to use their authority, because of lack of legal capacity for example, a minor or mentally incapable person or because of "*ghaṣb*" (usurpation) or theft, their ownership is not affected.

Ownership by an author implies that the owner is at liberty to exchange, use or dispose of his property directly or indirectly, whether in consideration of a sum money or not, within the boundaries of *Sharī'a*. It also means that the author has the right to use his work and the right to dispose of it directly or indirectly, whether in consideration of a sum money or not.

Sharī'a evokes that each person is required to respect the property that other people have. Accordingly, *Sharī'a* protects private ownership by imposing punishments and civil penalties on any intentional violating or taking of other's property without permission or lawful cause. Any kind of intentional taking, using of other's property or interference with the owner's property without his consent is prohibited. Article 96 of the Mejlle states that" The dealing by one person with the

³⁴ *Al-Bukhārī*, tr., vol. 3, p.397, Ḥadīth No.660.

³⁵ See this thesis, p.219.

property of another, without his leave, is not lawful”.³⁶

Al-Diraynī thought that al-Qarāfī disapproved of the financial value of “*ijtihādāt*” (opinions) and being subject to inheritance.³⁷ In fact, the position of al-Qarāfī on this point is difficult to ascertain, because it is not one he addressed directly. Abū Zaīd stated rightfully that al-Diraynī misinterpreted al-Qarāfī’s statement.³⁸ It is clear that a work consists of the expression of the thoughts and the thoughts “*ijtihādāt*” underlying it. When al-Qarāfī’s statement is looked at closely, it is seen that he meant rightly that there is no property in the ideas.³⁹

2.2.3 Classifications of Ownership

In *fiqh*, ownership can be categorized into two ways: absolute ownership and or imperfect ownership.⁴⁰ The first is when the owner has full authority over an owned thing and use of it. The second is when the owner only has some authority or use of an owned thing. For example, in a lease contract, the tenant cannot sell the home or the car, but he can use it and the owner cannot use it during the contract.⁴¹ It can be argued that authors have an absolute ownership over their works, but their heirs have imperfect ownership, as the heirs cannot change the inherited works.

From another perspective, ownership is also of two kinds, public ownership and private ownership. The former refers to what the public owns so that it is not to be exclusive to someone in particular. For example, the sea, rivers and mountains are publicly owned. In contrast, private ownership means what an individual owns.⁴² The same classification might be applied to copyright. Similarly, ideas are free for everyone, but once they are captured in some particular form that form becomes a

³⁶ The Mejlle, p.15.

³⁷ Al-Diraynī, *al-Ibtikār*, p.55 ,58.

³⁸ Abū Zayd, *Fiqh al-Nawāzil*, vol.2 p.91.

³⁹ Ibid. vol.2 p.91.

⁴⁰ Al-Sayis, *Ownership of Land and its Benefits in Islam*, p.131.

⁴¹ Al-Khafīf, *al-Milkiyya*, vol.1, p.53. *Al-Mawsū'a al-Fiqhiyya*, vol.39, p.33 and post. Al-Nashmī, *al-Huqūq al-Ma'nawīyya li al-Barāmij wa 'Aḥkām Naskhihā*, p.200.

⁴² *Al-Mawsū'a al-Fiqhiyya*, vol.39, p.37

private property.

2.3 *Māl*

Milkiyya is more comprehensive than “*māl*” (wealth) because every portion of *māl* is a portion of *milkiyya*, but not the other way round.⁴³ “[*M*]āl is naturally the subject matter of ownership;”⁴⁴ There is mutual dependence of these concepts upon each other. It is important to ascertain whether copyright is kind of *māl* or not to determine the standpoint taken by *Sharī‘a* about copyright.

2.3.1 Meanings of “*Māl*”

The word “*māl* pl. *amwāl*” means camels, cattle, sheep, land, clothes gold and silver or “all things one might own”.⁴⁵ In the Qur’ān the word *māl* refers to a gift.⁴⁶ As pointed out in some *aḥādīth*, food, clothes, property and gold are *māl*.⁴⁷ The second caliph ‘Umar Ibn al-Khaṭṭāb (d.23AH/643) described land as *māl*.⁴⁸ Wealth, property and wealth carry joint and comparable meanings referring to what is considered capital, estate or valuable goods and services in exchange. “Ibn al-Athīr says that the original meaning of the word *mal* referred to owned gold and silver but then it became generalized to include all material things that are obtained and

⁴³ Al-Kafawī, p.835.

⁴⁴ Islam, Muhammad Wohidul, Al-Mal: the Concept of Property in Islamic Legal Thought, *Arab Law Quarterly*, Issue: Vol. 14, Number 4, p.361.

⁴⁵ Ibn Manẓūr, vol. 11, p. 635. Al-Aṣḥānī, *al-Mufradāt*, p.478. Al-Jawharī, vol.5, p.125, al-Zāwī, *Tarīb al-Qāmūs* vol. 4,p.298. Al-Zabīdī, Muḥammad Murtaḍa, *Tāj al-‘Arūs*, Benghazi, (ND), vol.8, p.121, hereinafter: al-Zabīdī. Al-Sharabāshī, p. 448-451.

⁴⁶ Qur’ān, 27.v35.36.

⁴⁷ Al-Bāz, ‘Abbās Aḥmad, *‘Aḥkām al-Māl al-Ḥarām*, Amman, Dār al-Nafā’is, (1424AH/2004) (Second Edition),p. 26. ,hereinafter: al-Bāz, *‘Aḥkām al-Māl al-Ḥarām*. Al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, Ḥadīth No:2958,vol. 18,p.74.

⁴⁸ Al-Bāz, *‘Aḥkām al-Māl al-Ḥarām*, p. 27. Al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, Ḥadīth No:1632,vol. 11,p.72.

owned”,⁴⁹ even though Arab Bedouins used to measure wealth with reference to camel.⁵⁰ This is what is meant by saying that someone has wealth, but “in any case to concrete things”.⁵¹

2.3.2 Technical Definitions of “*Māl*”

In line with the general approach to the sources of *Sharī‘a*, there is no specific technical definition of *māl* in the Qur’ān nor the Ḥadīth.⁵² Moreover, the leading books on *fiqh* in general or on property in particular such as *Kitāb al-Amwāl*⁵³ or *Kitāb al-Kharāj*⁵⁴ had never worked out a definition of *māl*. Therefore, there is no unanimity on what is a proper definition of *māl*, which places limits on the extent of its application.

As to the practical importance, *fuqahā’* have discussed the issue of definition of *māl* in order to explain what is allowed to be a subject matter of a contract of sale, dividing inheritance⁵⁵ and for the purpose of interpreting and applying *zakāt*.⁵⁶ Also, *fuqahā’* have described *māl* when dealing with the question of what should be regarded as the breach of an oath, if a person took an oath that he does not have *māl*.⁵⁷ The answers of *fuqahā’* to this question reflect their views on *māl*. It is an objective test.

In deciding what is *māl*, the majority of *fuqahā’* have said that, any kind of wealth such as coin, furniture, estate, animal or debt is *māl*. They have frequently

⁴⁹ Al-Qardwi, Dr. Yusuf, *Fiqh Az-Zakat*, translated by Dr. Kahf, Monzer, London, Dar Al-Taqwa, (1999), p.66-67, hereinafter: al-Qardawi, *Fiqh Az-Zakat*.

⁵⁰ EI², Entry: “*Māl*”.

⁵¹ Ibid.

⁵² Al-Diraynī, *al-Ibtikār*, p.128.

⁵³ Ibn Sallām, Abū ‘Ubayd al-Qāsim, *Kitāb al-Amwāl*, translated by Imran Ahsan Khan Nyazee, Readin U.K, Grane Publisingt, (2002) (First Edition)., hereinafter: Ibn Sallām.

⁵⁴ Qadi Abu Uusaf, *Kitab ul-Kharaj*, English Translation, by Ali, Dr. Abid Ahmad, Lahore, Islamic Book Centre, (1979), (First Edition).

⁵⁵ EI², Entry: “*Māl*”.

⁵⁶ Al-Qardawi, *Fiqh Az-Zakat*.p.66.

⁵⁷ *Al-Mudawwana*, vol.1 p.608.

used the term *māl* in the looser sense of the word. The most accepted view is that whatever can be converted to *māl* is like *māl*.⁵⁸

The *Ḥanafī* school suggested that *māl* exists only where *zakāt* is applicable, which means that debts are not *māl*.⁵⁹ It is not surprising that there are many rights of financial value, but they are not money essentially. On the same bases, *zakāt* is not payable on other valuable things, such as land, furniture and work tools unless they are traded.⁶⁰

According to the Seventh Seminar on Contemporary *zakāt* Issues,⁶¹ the owner of copyright is not obliged to pay *zakāt* on them automatically, but only on their profits if they comply with other requirements of *zakāt*. This indicates that copyright are not *māl*. It is consistent with the *Fiqh* Academy's decision that copyright is a legitimate right, which has financial value.⁶²

Determining the estate of a deceased person might be the most crucial indicator of the attitudes of schools of *fiqh* to define *māl*, because it obliges *fuqahā'* to decide what thing is ultimately to be *māl* in order to distribute the estate among the beneficiaries. As stated before, the author's economic rights can be inherited like any kind of wealth and the author's moral rights cannot be accounted for the estate, because they are like personal rights.⁶³

2.3.3 The View of the Majority of *fuqahā'*⁶⁴

There are serious attempts to grasp with the problem of defining *māl* from the practical view and the absence of any provision to the contrary.

⁵⁸ Zarrūq, Aḥmad Ibn Muḥammad, *Sharḥ al-Risāla*, Beirut, Dār al-Fikr, (1982), vol.2,P.281. In English at: <http://ourworld.compuserve.com/homepage/ABewley/RisShahat.html>

⁵⁹ *Al-Mawsū'a al-Fiqhiyya*, vol.36, p.32. *Al-Mughnī*, vol. 10, p.53.

⁶⁰ *Al-Mawsū'a al-Fiqhiyya*, vol.23, p.193.

⁶¹ Bayt al-Zakāt Seminar, p.593 and post. Al-Qaradāghī, p. 393 and post.

⁶² *Majallat al-Majma'*, issue5, vol. III, p. 2579, Resolution No.43.

⁶³ See this thesis, p.74.

⁶⁴ The three schools of *fiqh* other than the *Ḥanafī*.

The position in the *Mālikī* school is that there are three factors, which render an object *māl*: desirability, usefulness and legality. In trying to explain what has a value, so that the amputation might be applicable to a person who steals wealth, Ibn al-‘Arabī al-Mālikī (d.543AH/1148) defined *māl* as what is worthy of desire, and can be useful normally and lawfully.⁶⁵ Also, al-Shāṭibī defined *māl* as everything which can be owned if the owner acquires it legally and where the owner has exclusive control over it.⁶⁶

It is similar to the linguistic meaning with the addition of being legal acquired, which is necessary to avoid recognizing illegal possession such as theft or usurpation. The first general rule of ownership in *Sharī‘a* is that unlawful things cannot be *māl* and cannot be considered among ownership.⁶⁷ Consequently, wine and pork are not *māl* for a Muslim,⁶⁸ because they are not permissible in *Sharī‘a*.⁶⁹ In addition, it means that illegal possession of a lawful thing will not validate its ownership. It seems that there is no difficulty in considering intellectual works as *māl*, because they are desirable and useful, provided they are acquired legally.

Al-Shāfi‘ī states that the word “*māl*” is designated only for what has a value on sale, and the person who causes damage to it or loses it is obliged to pay compensation.⁷⁰ This foundational concept can be applicable to intellectual works because they have financial value and if one causes damage to them, he is liable to compensate the owner.

Following the founder of the al-Shāfi‘ī school, al-Zarkashī defined *māl* in a general statement as every useful thing.⁷¹ Also al-Suyūṭī confirmed the definition of al-Shāfi‘ī when he defined it as what people never get rid of it even it is small in

⁶⁵ Ibn al-‘Arabī, Abū-Bakr, Muḥammad, ‘Abd Allah, ‘*Aḥkām al-Qur’ān*, ‘Alī al-Bījāwī,(ed.) Beirut, Dār al-Ma‘rifā,(N.D), vol.2,p.607. hereinafter: Ibn al-‘Arabī,

⁶⁶ Al-Shāṭibī, *al-Muwāfaqāt*, Vol. 2.p.14.

⁶⁷ Al-Qurṭubī, *al-Jāmi’*, vol.2 p.328. Al-Bāz, ‘*Aḥkām al- Māl al-Ḥarām*, p. 40 and post.

⁶⁸ Wine is *māl* for Christian and Jews. See *Al-Mudawwana*, vol.4 p.189. Ibn Sallām, *Kitāb al-Amwāl*, p.112.

⁶⁹ *Al-Mawsū‘a al-Fiqhiyya*, vol.36, p.34.

⁷⁰ Al-Suyūṭī, *al-Ashbāh*, vol.2, p.171.

⁷¹ *Al-Mawsū‘a al-Fiqhiyya*, vol.36, p.32.

value.⁷² Authors never get rid of their works even it is small piece of work or has been subject to criticism.

However, it is necessary to ascertain whether people agree to ascribing value to something or not. The value of any article is socially determined and may change largely, but its usability must be permissible. Al-Suyūṭī points to the fact that “‘urf” (custom) has been a source of value,⁷³ especially in the field of commerce. It is true that the value of anything is changed when custom or its usability changes. Many commodities or services rarely sold in the past are now traded for a great deal of money, because their acceptability of exchange and usability has changed.⁷⁴ These justifications are found in intellectual works. Al-Khafīf stated rightly that according to the majority of *fuqahā’*, intellectual property is *māl* because ‘urf recognizes it as *māl* although intellectual property is not a material thing.⁷⁵

Some *fuqahā’* of the *Hanbalī* school define *māl* as everything which is allowed to be used indefinitely.⁷⁶ This includes money, commodities, utilities and services if they have a permitted benefit and are traded for exchange. Accordingly, wealth is what can be utilized and recognized in *Sharī’a*. This is what connects *māl* to the permissible usability.⁷⁷ It is consistent with their definition of contract of sale: “A sale is the exchange of property or utility for property or utility”.⁷⁸ This definition constitutes an open-ended category, which contains intellectual works simply.

There is an appeal in these definitions because they are rational, based on practical usage and not idealistic in approach. In concluding this view, Anderson said that *māl* is “those corporeal, usufructuary and other rights of any kind the exchange of which is customary are to be regarded as property *māl* of commercial

⁷² Al-Suyūṭī, *al-Ashbāh*, vol.2, p.171.

⁷³ Al-Diraynī, *al-Ibtikār*. p. 24.

⁷⁴ Ibid. p. 27,28.

⁷⁵ Al-Khafīf, *al-Milkiyya*, vol.1, p.16.

⁷⁶ Al-Bahūṭī, Manṣūr, *Sharḥ Muntaha al-Irādāt*, Riyadh, Idārat al-Buhūth al-‘Ilmiyya, (N.D), vol.2, p.142. Al-Diraynī, *al-Ibtikār*. p. 25, 26.

⁷⁷ Ibid. p. 26.

⁷⁸ *Al-Mawsū’a al-Fiqhiyya*, vol.9, p7, *Bay’* entry.

value”.⁷⁹ Perhaps the addition of the condition of legality is another essential element, which has been made in the most modern and comprehensive definition in whatever contains a legitimate interest for a human being.⁸⁰

2.3.4 The *Hanafī*’ View

Adhering to the *Hanafī* school, Ibn Nujaym (d.970 AH/1562) states that, *māl* is what can be obtained and saved to be used at the time of need.⁸¹ As well as, Ibn ‘Ābidīn (d.1252AH/1836) who said that “*māl* is a thing which is naturally desired by man and can be stored for times of necessity”⁸² whether it is movable or not.⁸³

On the same line of thought with some amendments, al-Zarqā defines *māl* as every corporeal thing that has financial value in the public point of view.⁸⁴ The definition is explained by stating that the financial quality of anything is established through the usage of people, the evaluation of goods against it and the legality of its use.⁸⁵ Anything that is not desired by anyone has no value on the market.

Therefore, the sole source of value of everything comes from the practice but its permissibly depends on *Sharī‘a*. Apart from the assertion that *māl* “can be stored” these definitions are not the subject of any dispute.

Al-Khafīf explained the view of the *Hanafī* school by stating that “*māl* is something capable of being possessed, physically acquired, where normal enjoyment is possible in ordinary times”.⁸⁶ The definition of the *Hanafī* school implies that *māl*

⁷⁹ Anderson, J. Norman D., International Encyclopaedia of Comparative Law, Property and Trust, *Islamic Law*, vol. VI, Frederick H. Lawson, (ed.) (Tubigen: Mohr, 1976), p.103, 104. Azmi, *Intellectual Property*. p.61.

⁸⁰ Al-Bāz, *‘Aḥkām al- Māl al-Ḥarām*, p.37.

⁸¹ Al-Qardawi, *Fiqh Az-Zakat*. p.66.

⁸² *The Mejelle*, p. 18, Article No. 126.

⁸³ Ibn ‘Ābidīn, vol. 4, p.510, vol.5, p.50. The same definition is used in Article 126 of *Majallat al-Aḥkām*, see Ḥaydar vol.1.p.115.

⁸⁴ Al-Zarqā, *al-Madkhal*, p.127.

⁸⁵ Ibid.

⁸⁶ Azmi, *Intellectual Property*, p. 63. Here, al-Khafīf did not define *māl*.

must be a material thing, because non-material things cannot be obtained'.⁸⁷ The precondition for its being saved is materiality.⁸⁸

This approach appears to narrow the conception of *māl*. Therefore, *manfa'a* is not *māl*, because it cannot be saved.⁸⁹ Also, al-Khafīf concluded correctly that according to the *Hanafī* school, intellectual property can not be regarded as *māl*.⁹⁰

From a textual standpoint, there is no sound proof from the *Sharī'a* to support these conditions that *māl* must be a material thing and capable of being saved.⁹¹ On the contrary, there is evidence in *Sharī'a* to sanction incorporeal or dependent things such as *manfa'a* within the broad meaning of wealth. In addition, some critics argue that the definition precludes perishable goods because they cannot be saved, while they are valuable and tradable.⁹² It would be difficult to justify such a result.

Acknowledging the undoubted link between the wealth and the financial value, the drafters of the Arabic Unified Financial Transactions Bill define *māl* as everything, utility or right that has a financial value on transaction.⁹³ This wording shows a reasonable degree of flexibility by attempting to include *manfa'a* and intellectual property.

A more modern version proposes that *māl* is everything that has financial value approved in *Sharī'a* and capable of exchange.⁹⁴ This view is to keep the essential features of what constitutes *māl*. Accordingly, no goods or tokens are money unless it can satisfy all three criteria. The application of this test results in asserting intellectual property *māl*.

We can extract two basic grounds, which are necessary to the existence of *māl* according to the majority of *fuqahā'*: the usefulness and the approval of *Sharī'a*.

⁸⁷ Al-Qardawi, *Fiqh Az-Zakat*, p.66. Al-Zuhaylī, Wahbah, *Majallat al-Majma'* issue5, vol.III,p.2575.

⁸⁸ Al-Diraynī, *al-Ibtikār*. p. 97.

⁸⁹ Ibid.

⁹⁰ Al-Khafīf, *al-Milkiyya*, footnote on vol.1, p.9. Cf. Azmi, *Intellectual Property*, p.60.

⁹¹ Al-Diraynī, *al-Ibtikār*. p. 31.

⁹² Ibid.

⁹³ Al-Zarqā, Mustāfa, *al-Madkhal ilā Nazariyyat*, p.309. Article 130 of the Arabic Unified Financial Transactions Bill in 1984.

⁹⁴ Al-Būṭī, Muḥammad Tawfīq, *al-Buyū' al-Shā'i'a*, Damascus, Dār al-Fikr, (1998) (First Edition), p.203., hereinafter: Al-Būṭī, Tawfīq, *al-Buyū'*.

While according to the *Ḥanafī* school the grounds are value of something because of its financial quality, and “physical or corporeal goods which can be possessed, acquired and stored.”⁹⁵

On balance, the two versions coincide in the first condition of usefulness and the value. The conception is expressed in different ways. These versions differ as to the second condition as regards the approval of *Sharī‘a* and its materiality. In general, conformity with *Sharī‘a* should be seen as part of every concept, to be rooted and protected by *Sharī‘a*.

This is not meant to imply that according to the *Ḥanafī* school *māl* may not comply with the requirement of legality. Rather, the *Ḥanafī* school shares the general idea of legality but adopts a special classification for unlawful *māl*. The condition of the legitimacy is supported by the general rule that no one should benefit from his own wrong and that unlawful *māl* will not be considered as part of his property.⁹⁶

The approach of the majority of *fuqahā’* is capable of adapting itself to all other forms of property, including intellectual works. It leads to a broader generalization that copyright can be sold, exchanged or assigned. This understanding provides some basis for the correct treatment of copyright in *Sharī‘a*.

2.3.5 Classifications of *Māl*

Māl can be categorized in different ways. The most important division is between “*māl mithlī*” (fungible or standard property) and “*māl qiymī*” (non-fungible or remediable property). “*Māl mithlī*” refers to “objects that have an equal value on the market without there being any disputable differences”.⁹⁷ “[T]hings that are measured, weighed or counted, as each individual item is no different in

⁹⁵ Cf: Al-Diraynī, *al-Ibtikār*, p.96. Islam, Wohidul, Al-Mal, p.365. Azmi, *Intellectual Property*, p. 63.

⁹⁶ Al-Qurṭubī, *al-Jāmi’*, vol.2 p.328.

⁹⁷ El-Sawy, Dr. Salah, *Financial Contracts I*, Translator Inās Farīd, Falls Church, The American Open University, (2002) p.74-75. Hereinafter: El-Sawy. See The Mejlle, Article No. 145, p. 19. Ḥaydar, vol.1.p.121, Article No. 145. *Al-Mawsū‘a al-Fiqhiyya*, vol.36, p.36.

value from the other, such as cereals, eggs,...etc.”⁹⁸ “*Māl qiymī*” refers to “objects that have no equivalent in the market”⁹⁹ or they have equivalent but with a huge difference in value, such as animals, buildings and hand-made works.¹⁰⁰ This classification belongs more properly to that of compensation. When someone has caused loss or damage to another’s property, if it as regards fungible property that the tortfeasor is liable to provide similar property, but if it is non-fungible property, the tortfeasor is liable to provide its value.¹⁰¹

An intellectual work should be considered as an abstract form of *māl qiymī* because it has usually a personal print. But when it takes some material form such as a book or CD, it becomes *māl mithlī*.

According to the *Ḥanafī* school, *māl* is divided into “*māl mutaqūm*” where its usability is permissible under *Sharī‘a* and “*māl ghayr mutaqūm*” where its usability is not permissible, such as pork or wine.¹⁰² The majority of *fuqahā’* do not consider unlawful item as *māl* in essence.¹⁰³ Therefore, works contain unlawful materials are *māl ghayr mutaqūm*.

Further, property can be classified into two kinds: “*‘aqār*” (immovable) and “*māl manqūl*” (movable). Movable property includes everything that can be moved from one place to another such as coins, animals and commodities. Immovable property consists of land and buildings.¹⁰⁴

2.4 The question of “*Manfa‘a*”

It is suggested that the discrepancy of considering “*manfa‘a*” as kind of “*māl*”

⁹⁸ El-Sawy, p.75.

⁹⁹ Ibid. The Mejjelle, Article No. 146, p. 19.

¹⁰⁰ *Al-Mawsū‘a al-Fiqhiyya*, vol.36, p.36.

¹⁰¹ *Al-Mawsū‘a al-Fiqhiyya*, vol.36, p.36.

¹⁰² Ḥaydar, vol.1.p.116, Article No. 127.

¹⁰³ *Al-Mawsū‘a al-Fiqhiyya*, vol.36, p.34.

¹⁰⁴ The Mejjelle, Article No. 128 and 129,p. 18. Ḥaydar, vol.1.p.116, 117 for the same articles. *Al-Mawsū‘a al-Fiqhiyya*, vol.36, p.36.

is a problem for the recognition of copyright.¹⁰⁵ The discussion regarding *manfa'a* is fruitful to conclude the position of copyright in *Sharī'a* about. The disagreement regarding the definition of *māl* is analytically and closely connected to the question of whether *manfa'a* is to be considered as *māl* or not.

The popularity and importance of analyzing *manfa'a* stem from the possibility that it may establish copyright within its definition. However, many contemporary scholars incline to the view that copyright is simply an extension of the concept of *manfa'a*. It may be that the correct way of understanding copyright is to draw a distinction between *manfa'a* and copyright. Copyright contains a great deal of *manfa'a*, but is essentially a right.

It would be inaccurate to suppose that *māl* in the Arabic language includes *manfa'a*. Otherwise there is no reason for dispute between the majority of *fuqahā'* and the *Ḥanafī* school.¹⁰⁶ *Manfa'a* is not *māl* in the way the word is used.

Manfa'a (pl. *manāfi'*) in the terminology of the *fuqahā'* means any kind of utility, service, or enjoyment obtained from any thing, right (for example authorship) or permission.¹⁰⁷ In general, it is an antonym of hurt, harm, injury etc.¹⁰⁸ Habitation in a home, riding a horse, usage of a car and reading a book are kinds of *manfa'a*.¹⁰⁹ It is defined as "a temporary benefit that is derived from an object through use of it".¹¹⁰ In other words, it "refers to the collateral of tangible property and hence treated as incidentals to physical property".¹¹¹ The usual correlation between objects and their usability might support al-Qarāfī when he said that objects which have no *manfa'a* cannot be owned.¹¹²

It may not be an easy task to determine the question posed by al-Zarkashī,

¹⁰⁵ *Majallat al-Majma'*, issue5, vol. III, p.2267-2579.

¹⁰⁶ Islam, Wohidul, *Al-Mal*, p.361.

¹⁰⁷ *Al-Mawsū'a al-Fiqhiyya*, vol.36, p.32, *māl* entry, and vol.39.p.102, *manfa'a* entry.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Yanagihashi, Hiroyuki, *A History of The Early Islamic Law of Property*, Brill, Leiden, (2004), p.45.

¹¹¹ Azmi, *Intellectual Property* .p. 61.

¹¹² *Al-Furūq*, vol.3, p.384.

whether *manfa'a* can be called as *māl* or not, because of its nature. After presenting some examples of the application of the word, he stated that the word essentially refers to tangible things and then only to *manfa'a* as a metaphor and as a supplementary issue.¹¹³

To answer this question, the majority of *fuqahā'* consider *manfa'a* as wealth, while the *Ḥanafī* school stated that *manfa'a* is not *māl* unless it becomes the subject matter of a contract.¹¹⁴ A related and more controversial points is whether *manfa'a* like any kind of wealth, can be inherited, guaranteed or be the subject of compensation.¹¹⁵

In fact, the difference does not refer to two concepts of wealth. It stems from the different attitude towards dealing with “*ghaṣb*” (usurpation) whether a person usurps someone’s property and uses it is liable for the use, even he does not consume that property or cause damage to it while it is in his illegal possession but usurps its *manfa'a* only. The majority of *fuqahā'* said that a person is liable for any illegal usurpation, while the *Ḥanafī* school incline to the view that he is not liable.¹¹⁶

The *Ḥanafī* scholars think that *māl* must be corporeal, independent and acquirable. Right and *manfa'a* should not be deemed as *māl*, because they are abstract, dependent and it is not possible to capture them. *Manfa'a* and rights might be in consideration of a sum of money in a contract such as hire or “*qiṣāṣ*” (legal retaliation), but they cannot be *māl* in themselves.¹¹⁷ Considering *manfa'a* as *māl* in a contract is presented by the late *Ḥanafī* scholars as a link between the early *Ḥanafī* school and the majority of *fuqahā'*.

The *Ḥanafī* school have argued that the duty of the payment of *zakāt* cannot be fulfilled by giving a poor person any thing of value such as a right (inhabiting a

¹¹³ Al-Zarkashī, *al-Manthūr*, vol.3,p.189.

¹¹⁴ *Al-Mawsū'a al-Fiqhiyya*, vol.36, p.32, *māl* entry, and vol.39.p.102, *manfa'a* entry.

¹¹⁵ Ibid.

¹¹⁶ *Al-Mawsū'a al-Fiqhiyya*, vol.39,p.103. Al-Sayis, *Ownership of Land and its Benefits in Islam*, p.130.

¹¹⁷ For more details on this difference see these books; Abū Zahra, Muḥammad, *Nazariyyat al-'Aqd wa al-Milkiyya fī al-Sharī'a al-Islāmiyya*, Cairo, Dār al-Fikr al-'Arbī, (N.D), p.52. Al-Diraynī, *al-Ibtikār*. p.20 and after, al-Nashmī, *al-Ḥuqūq al-Ma'nawiyya li al-Barāmij wa 'Aḥkām Naskhihā*,p.137 and post, p.181 and post. Al-Būfī, Tawfīq, *al-Buyū'*, p.202,203.

house), service (traveling by car) or utility (reading a book). Similar support can be drawn from the fact that the duty of the payment of *zakāt* cannot be imposed on those possessing rights, services or utilities.

The majority of *fuqahā'* observe that *māl* includes commodities, goods and *manfa'a*. There is a good deal of overlap between *manfa'a* and *māl*. This means that according to the majority of *fuqahā'* *māl* includes more than that as defined by the *Ḥanafī*. What is of special interest here is that *fuqahā'* made these definitions not regarding them as infallible.

There are some arguments in defense of the idea of regarding *manfa'a* as wealth. Firstly, the leading argument is that there is no evidence in *Sharī'a* that *māl* does not include *manfa'a*. "Islamic Law does not strictly define the object of property as a tangible thing".¹¹⁸ Therefore, the criteria for what constitutes *māl* should not be prescriptive or stringent.

Secondly, teaching the Qur'ān is acceptable as a "*mahr*" (dower) which is an essential condition for a marriage contract to be valid.¹¹⁹ Specifically, it means that teaching the Qur'ān is equivalent to a sum of money provided by the husband to his wife as a *mahr*.

This has been generalized in its application by an analogy being drawn between teaching Qur'ān which is *manfa'a* and any permissible *manfa'a*. In exchange for *manfa'a*, the demand for a certain profit is generally accepted. However, *manfa'a* must be legal to be approved as *māl*, because the legality is an absolute condition.

Thirdly, with the more reasonable approach that *māl* is what has use or utility, the recognition of *manfa'a* as wealth is obviously justified. Valuable things, whether tangible or not, are those which everyone would accept as wealth. *Manfa'a* has purchasing power, as does any commodity because it is permissible and everyone agrees that it is valuable. The worth of *manfa'a* can hardly be denied.

Advocates of this view claim that, "*urf*" (custom) which is one of the

¹¹⁸ Schacht, Joseph, *An Introduction to Islamic Law*, Oxford UK, p.134.

¹¹⁹ This argument is further discussed in p.170 of this thesis.

authoritative references in *Sharī'a*, considers *manfa'a* as wealth.¹²⁰ 'Urf internationally recognizes that wealth refers to tangible property such as houses, automobiles, books, and clothing as well as intangible property such as rights, benefits, privileges and concessions.

Therefore, extending *māl* to include *manfa'a* is justified because *manfa'a* is a significant purpose of *māl*, and is often in higher demand than other categories of *māl*.¹²¹ Specifically, the association between *manfa'a* and *māl* is evident. Highly relevant is the notion that *māl* is related to utilitarian conditions.

There is a sound argument in al-Shāṭibī's statement that all scholars agreed that Allah alone is the ultimate proprietor of all things but that the purpose of human ownership is the obtaining of their utility or advantages. Things such as a piece of land or some clothes have no value in themselves, but have value because they contain their related utilities and advantages.¹²² If these utilities and advantages are diminished or reduced, they lose or lessen their values respectively.

From an economic perspective, al-Zanjānī (d.656 AH/1258) from the al-Shāfi'i school disputed the *Ḥanafī*'s opinion saying on the contrary that *manfa'a* deserves to be called *māl* more than anything else because something must have a value to be wealth.¹²³ Utilitarianism is the most obvious standard for an examination of the value of anything. The waiving of *manfa'a* from the definition of *māl* is legally destructive even if logically possible. The *Ḥanafī* school position on *manfa'a* might figure as elements in an academic argument rather than as practical justifications. But, *Sharī'a* rulings essentially concern a practical life more than take abstract matters.¹²⁴

Recently, al-Qaraḍāwī concludes correctly that "the definition of the *Ḥanafī* school seems to be closer to the lexical meaning given in the dictionaries and more

¹²⁰ I will bring up further discussion about 'Urf later, see p.185 and post.

¹²¹ Al-'Izz, vol.1.p.269. c.f with Azmi, *Intellectual Property*, p.62.

¹²² Al-Shāṭibī, *al-Muwāfaqāt*, vol. 3, p.125.

¹²³ Al-Zanjānī, Maḥmūd b. Aḥamd, *Takhrīj al-Furū' 'alā al-Uṣūl*, Muḥammad Ṣāliḥ (ed.), Beirut, Mu'assasat al-Risāla, (1982) (Fourth Edition).p.225, 226.

¹²⁴ Al-Zanjānī, *Takhrīj al-Furū' 'alā al-Uṣūl*, p.225, 226.

sensible with regard to the application of the texts on *zakāt*, since it is material assets and not services that *zakāt* must be paid on”.¹²⁵

The viewpoint of the majority of *fuqahā*'s view has been more widely adopted and accepted than the *Hanafi*'s opinion, even within the *Hanafi* school itself. The utility derived from a commodity is measured by units of money and compared with another utility or commodity. Any permissible commodity, utility or service that has value in exchange is wealth whether corporeal or not. *Manfa'a* and rights need not to be conceived as two unrelated categories of *māl* even if some of them are removed from exchangeable property for some reason. Money is not an empty container but, instead must carry some amount of permitted utility.

There is nothing in al-Diraynī's book appears to support the suggestion that “there is a critical conceptual gap between the understanding of the concept of *manfa'a* in classical works and al-Diraynī 's view”.¹²⁶ In fact, al-Diraynī argues to support the majority of *fuqahā*'s view refuting the arguments made by the *Hanafi* school to exclude *manfa'a* from being a kind of *māl*.

2.4.1 Are Intellectual works *māl* under *Sharī'a*?

Understanding what *māl* means under *Sharī'a* will yield only one answer to this question. The logic leads to the view that copyright is simply a form of ownership which has a value that can be assessed and recognized even it is an intangible. According to the majority of *fuqahā*'s view of *māl*, intellectual property in general is considered as a kind of *māl*, provided that *manāfai'* contained in them are permitted.¹²⁷

The criteria of what constitutes *māl*, which includes *manfa'a*, is more effective

¹²⁵ Al-Qardawi, *Fiqh Az-Zakat*, p.66.

¹²⁶ Azmi, *Intellectual Property*. p. 61.

¹²⁷ Al-Diraynī, *al-Ibtikār*, p.20.

in copyright.¹²⁸ Pieces of information, knowledge, entertainment or experience represent *manfa'a*. A supporting argument can be found in the legal maxim which states: "A judgment is in accordance with what the object of an act may be".¹²⁹ A judgment on a thing depends very much on the purpose of that thing. There is certainly connection between the value of any thing and its *manfa'a*. Therefore, if *manfa'a* is the essence of *māl* and *manfa'a* is included in intellectual works, considering copyright as *māl* under *Sharī'a* is approved.

It follows from all these that authors have ownership over their work, which permits them to exchange or dispose of their work as they see suitable. In addition, it means that any act which might have the effect of causing the damage or destruction to this kind of wealth or disturbing the exercise of it must be prohibited. Today copyrights are vital business asset. This kind of wealth can be the subject matter of a transaction or an acquisition.

There is no valid argument in *Sharī'a* to preclude intellectual works from being a form of ownership or property if the legal requirements are met. In principle, everything that is not expressly forbidden to possess or use in *Sharī'a* is permitted to be *māl*. Using this principle as a structure, one can acknowledge that intellectual works are *māl* and authors own the products of their mental and labor. The onus should be upon those who deny copyright to be a kind of property, to make their case.

If, as is customarily argued, property was once limited to material things and only gradually expanded to include *manfa'a* then it is only logical and really quite progressive to keep expanding the circle to include intellectual property.

Finally, Ibn Rushd, the first divided objects into what cannot be owned and what can be owned. What cannot be owned cannot be sold such as wine etc. What can be owned is subdivided into two kinds; the first is what cannot be sold because *Sharī'a* prohibits its sale for one reason or another such as sale of "*waqf*"

¹²⁸ Ibid , p.33..

¹²⁹ Tyser C.R, *The Mejelle*, Lahore, Law Publishing Company, (N.D.) Article 1. p.3, hereinafter:*The Mejelle*.

(endowment) or the sale of astray camel which cannot be delivered. The second is what *Sharī'a* permits for trade unless it is carried out in unlawful way.¹³⁰ If we apply this classification to copyright, we will find that the author's economic rights can be owned and sold.

The majority of the Islamic *Fiqh* Academy of India is from the *Hanafi* school, but they decided that in accordance with contemporary practices, copyright constitutes a commodity that is subject to sale provided that the copyrighted work does not have any conflict with the *Sharī'a*.¹³¹

In this respect, it might be possible to draw an analogy with the calls that were made for the consideration of the banknotes as *māl* for the application of *zakāt*, where for many commentators *māl* is not an inflexible concept and the *Sharī'a* principles are not unsuited to the changes of life. In fact, some scholars are reluctant to use the principles in a sufficiently broad manner.¹³²

2.5 The Nature of Copyrights

After reviewing the classification of rights, we should identify the basic and general characteristics of copyright. This is because the uncertainty about copyright in *fiqh* originates partly from the fact that intellectual property is essentially different from physical property.

Also, it is an established principle of *Sharī'a* that a ruling on any case should not be issued unless all relevant information, circumstances and evidence of the case in question are available before those who issue the ruling. Therefore, a coherent and justified Islamic treatment of copyright depends on an accurate understanding of the nature of intellectual property. Otherwise the researcher might reach an incorrect

¹³⁰ Ibn Rushd the first, Abū al-Walīd Muḥammad b. Aḥmad d.520AH/1126), *al-Muqaddimāt al-Mumahhidāt*, Sa'īd A'rāb,(ed.), Beirut, Dār al-Gharb al-Islāmī, (1408AH/1988), vol.2,p.62.,hereinfter: Ibn Rushd *al-Muqaddimāt*.

¹³¹ Decision No.11, in third session in iyli Bangalore, India, in 13th - 16th *Dhī al-Qa'da* 1410 AH/8th - 11th June 1990, http://ifa-india.org/english/decision_Sale_of_Rights.html

¹³² See al-Qardawi, *Fiqh Az-Zakat*,p.172.

conclusion on copyright in *Sharī'a*.

There is nothing contrary in *Sharī'a* in recognizing of the precise nature of intellectual property through legal textbooks that explain the important features of intellectual works. The researcher should benefit from the perspectives made by legal textbooks, which are common in all legal systems. In addition, *Sharī'a* contains many rights which are by their nature abstract, intangible and of personal attribute comparable to copyright.

It is agreed that intellectual property is significantly different from physical property or other rights in terms of being defined, used and protected. More precisely, copyright is distinguished by certain characteristics, which have allowed it to face difficulty and differences on treatment. Therefore, this section is devoted to addressing the most important aspects of the nature of copyright to facilitate our researching of copyright in *Sharī'a*.

2.5.1 Intangible nature

Property is classified into tangible and intangible property. Intangible property means something which has no physical substance.¹³³

The first significant distinction between copyright and physical property is that, copyright is an intangible right resulting from intellectual effort. The material forms, that is, book or CD, which conveys an idea is separate property and can be sold without concern over copyright.¹³⁴ The most perceptive truth about copyright lies in intellectual its creation embodied in a work.¹³⁵ It generally refers to imaginary creations such as a book, poem or picture. Copyright subsists within rather than exists as part of a work, because it is an intangible property.

The material form is necessary to establish the theoretical works that contain the

¹³³ See Drahos, *A Philosophy of Intellectual Property*, p.16.

¹³⁴ Azmi, *Intellectual Property*, p.89.

¹³⁵ *Ibid*, p.85.

ideas or information because there must be certainty as to what those immaterial things are and make them accessible.¹³⁶ For example, an author owns a certain work giving rise to the copyright.

Unlike tangible property, absolute determination of intellectual works is not a simple task achievable to everyone. An intellectual work can be understood in the ideational configuration of which they it is part.

2.5.2 Property Applicability

Although, copyright has its distinctive role in our life but in terms of ownership it is a more controversial than other rights because of its nature. For various reasons the concept of ownership in the property sense is somewhat weak in intellectual works. Some scholars have viewed copyright as an artificial man-made law property and because of its nature.¹³⁷

The intangible nature of intellectual works should not be perceived as an obstacle to their ownership, but it can change the course of application of traditional property rules so as they related to copyright. In general, intellectual products are less capable of being protected because of a lack of physical possession or control.

It should be noted that property rights can be applied to different types of subjects. The details of property rights vary from subject matter to another. For example, there are many different rules relating to property rights in land as opposed to movable objects. Further, many rights fall short of either exchange or possession. For example, debt falls short of possession, but the creditor still has a right.¹³⁸ The same is true for intellectual property, which also falls short of possession because of its nature. This kind of property does not provide unconditional possession of its

¹³⁶ Drahos, *A Philosophy of Intellectual Property*, p.17. Cornish, W.R., *Intellectual Property*, London, Sweet& Maxwell, (1999). p.399., hereinafter: Cornish, *Intellectual Property*.

¹³⁷ Al-Ḥuşayn.

¹³⁸ Al-Diraynī, *al-Ibtikār*. p. 53.

subject matter because of its special nature.

Tangible possession is only a pointer to ownership it is not the right itself. Ownership does not necessarily correspond to possession. Once authors publish their works they no longer have an exclusive possession of them. However, it is not justified to deny property ownership to intellectual works simply because there is no physical possession. The ownership of copyright is similar to a bill of lading, deeds to a debt or shares in company stock because of the intangible character in each of these cases. Moreover, electronic trade is based mostly on documentary intangibles.

From another standpoint, if the buyer has no physical control over goods the contract of sale becomes void.¹³⁹ However, *fuqahā'* do not regard the selling of the airspace above property as void¹⁴⁰ because the handover must be compatible with the goods. This means that rights, obligations and terms must be processed according to the nature and particularities of the specific subject-matter.

It might be argued that the non-exclusive nature of intellectual works conflicts with absolute ownership. The purpose and indication of ownership of physical objects, their seizure, while it is the presentation and broadcast in the case of intellectual works according to their nature. There are some *fuqahā'* who consider that ownership does not subsist in materials in any way, but in their "*manāfai*" (utilities).¹⁴¹ However, it is not fair to assume that the nature of intellectual works will lead authors being prevented from exercising every potential aspect of property rights.

A major equivalence between intellectual and physical property is that they have the financial worth, so that they can be bought, exchanged or disposed of like any tangible property. Property in intellectual works is similar to the financial value of tangible objects. Indeed, on many occasions intellectual works can sometimes outweigh other property. The need for recognition of private property in intellectual

¹³⁹ Ibn Rushd, *Bidāyat Al-Mujtahid*, tr. Nyazee, vol. II, p.206.

¹⁴⁰ *Al-Dusūqī*, vol.3, p.21. Al-Ghiryānī, al-Şādiq, *Mudawwanat al-Fiqh al-Mālikī*. Tripoli, *Tashārukiyyat al-Maqarī*,(2005) (First edition), vol.3, p.257, hereinafter: al-Ghiryānī, *Mudawwanat*.

¹⁴¹ Al-Diraynī, *al-Ibtikār*. p. 54.

works rights is as important for tangible objects. In addition, infringement of copyright reveals the situation where an “abstract object is taken”.¹⁴²

The application of traditional ownership of intellectual works is controversial because of their nature. Therefore, it may be wise to recognize and apply potential aspects of property right only. Copyright means, relatively, some rules of ownership but not a complete set of comprehensive rules as in the case of physical objects. An investigation into the nature of copyright might offer more guidance regarding which aspect of copyright should be regarded as property and which not. Not all copyright is of the same nature. Some copyright is of a commercial nature, whilst others are only moral right. Copyright gives the owner the right to prevent others from claiming authorship of the work, or of copying all or substantial parts of it or exploiting it without permission.¹⁴³

2.5.3 Personal Characteristic

One of the distinctive features of authorship is that it is attached to its author as an extension of the personality. Authors try to create a body of work behind that is unique to them and that personifies them as individuals, works that speak of something about what that person was or did. And generally a work gives a personal profile of its author.¹⁴⁴

Intellectual works have a strong personal attribute. Intellectual ability and creation is the most significant features of human being. Clearly, it is true on many occasions that intellectual works, or some of them, outweigh other property in importance. They express human identity. They can sometimes be justifiably outweighed even by considerations of personal preference. Similarly, intellectual works may prevail based on considerations of the general interest.

¹⁴² Drahos, *A Philosophy of Intellectual Property*, p.154.

¹⁴³ Azmi, *Intellectual Property*, p.92.

¹⁴⁴ Drahos, *A Philosophy of Intellectual Property*, p.79.

It is evident that ideas occupy a significant position in both private individual life and public life. They are abstract in nature similar to personal rights.

It is very difficult to distinguish one person's intellectual contribution from another's. Copyright can be based on ideas that attach to the author personally. A work is sometimes called the author's "brainchild". The paternity relationship between an author and his work provides that an author shall have responsibility and control over the authorship of his work. An author deserves the results of his work in the world and the hereafter, whether they are good or evil.¹⁴⁵

The effects of many works and words subsist in the world for a long time often after the death of their creators. The fundamental significance of words was widely acknowledged in the Qur'ān. As one verse reads: "Not a word does he utter but there is a vigilant guardian."¹⁴⁶ It is also reported that the Prophet pointed out to the importance of a word by saying: "A slave (of Allah) may utter a word which pleases Allah without giving it much importance, and because of that Allah will raise him to degrees (of reward); a slave (of Allah) may utter a word (carelessly) which displeases Allah without thinking of its gravity, and because of that he will be thrown into the Hell Fire".¹⁴⁷

Copyright are of fundamental importance to intelligent people since they constitute the basis of their spiritual, cultural and social identity and because they are an economic source. It would only be fair to treat ideas, thoughts and words at least as equally as the treatment of other materials.

Any work appears to reflect the author's personality, since it customarily lends itself to giving free reign to one's assets, knowledge, expertise and creative imagination. Authors usually protest strongly regarding any kind of distortion or derogatory treatment of their works. The reason is that their privilege and reputation are built on their works.

¹⁴⁵ Al-Būṭī, *Qaḍāyā Fiqhiyya Mu'āṣira*, p.82.

¹⁴⁶ Qur'ān, 50.v 18.

¹⁴⁷ *Al-Bukhārī*, tr., vol. 8, p.223. Ḥadīth No.9485.

2.5.4 Exclusivity and Usability

The concept of exclusiveness in the property sense is almost problematic to apply to intellectual works. Unlike physical property intellectual works are normally intended for public use. Intellectual products are incompatible with physical exclusivity because they will only be successful if they spread out. According to their nature, intellectual works depend on circulation, dissemination and use. Intellectual works have been created to disseminate thoughts and knowledge. The dissemination of works gives them their life. Obviously, intellectual works have no existence without the necessary spread by which people are able to recognize and use them.

The property of authors of their works is limited by their nature, which needs to provide access to the public. Intellectual products are less capable of being protected because of a lack of physical possession or control. Once authors publish their works, they can no longer have exclusive possession of them.

This description should not necessarily involve disadvantage to the intellectual works. This aspect of nature should not conflict with the exclusive rights of authors to their works. It is not justified to deny property on intellectual works because there is no physical possession or exclusiveness. The nature of openness of intellectual works is the source of weaknesses in the concept of their property. The property of authors of their works has limited applications. Authors cannot prevent others from using information ideas or facts, provided in their works but at the same time, authors have exclusive rights to prevent others from copying or selling their works. Copyright are relatively exclusionary for the purposes of presentation and commerce.

Another consequence comes from the fact that intellectual works cannot be exhausted or diminished by use, intellectual works can be used everywhere at the same time without fear of consumption or termination. Although usage of property is obviously one of the most important of its consequences, it is not applicable to intellectual property.

The unique characteristic of intellectual products needs to have a powerful

moral perception besides the law. The ethical treatment with regard to copyright has to be considered under *Sharī'a*.

2.6 Summary

This chapter has been devoted to present an overview of the terms related to *ḥaqq* in order to clarify all possible foundations of copyright in *Sharī'a*. There is a strong relationship between *ḥaqq*, *milkiyya*, *māl* and *manfa'a*, which has an effect on the legal assessment of copyright. These definitions are important resources that enhance the background in considering copyright. Different understandings of these definitions will yield different answers to the question of copyrights in *fiqh*. Once the research has addressed these terms, one might think that *fiqh* is ready to move on to find evidence for a new form of *ḥaqq*, *milkiyya*, *māl* and *manfa'a*.

As the case with *ḥaqq*, there are no technical definitions in the sources of *Sharī'a*. Therefore, most *fuqahā'* resort to lexical meanings to keep all of the meanings a word. Some scholars, however, attempt to give precise definitions.

Although the majority of *fuqahā'* recognize the difficulty of defining "milkiyya" (ownership), there is no justification to claim that there has been no precise definition of ownership in *fiqh*. *Fuqahā'* differ as to whether *milkiyya* should be analyzed in terms "ḥukm shar'ī" (legitimate judgment), "al-Qudrat al-Shar'iyyat" (ability), "ittiṣāl shar'ī" (relationship) "istiḥqāq" (the entitlement), or "taṣarruf" (control or authority) granted by the lawgiver to the owner. Other *fuqahā'* say that ownership is "ikhtiṣāṣ shar'an" (legitimate exclusive assignment) which is crucial to its existence. The definitions of ownership have been criticized for relying more on some factors than others.

From this chapter it appears that the *Hanafī* school stipulates that the materiality of anything is a condition of it being "māl" (wealth), while the majority of *fuqahā'* think that its usefulness and the approval of *Sharī'a* are their only conditions. In considering several subjects such as the distribution of inherited estate, *fuqahā'* have discussed the definition of *māl*.

The majority of *fuqahā'* consider "manfa'a" (utility) as *māl*, while the *Hanafī*

school states that *manfa'a* is not *māl* except in rare cases. There is no evidence in *Sharī'a* to exclude *manfa'a* from the broad meaning of *māl*. *Manfa'a* in copyright is an intangible interest whether it represents a piece of information, knowledge, entertainment or experience.

It can be argued that since *Sharī'a* says nothing about copyright, there can be no conflict in recognizing it as wealth and property. Copyright ought to be recognized as those things which contain *manfa'a*. Intellectual works provide some kind of *manfa'a* which must be within the boundaries of *Sharī'a* to obtain copyright on it.

However, there is consensus among the *fuqahā'* is that the legitimacy of the contents of property or wealth is an essential condition. The approval of *Sharī'a* has always been an essential part of every concept. The discussion of terminology reveals some interesting results including the possibility of recognizing copyright as *milkiyya*, *manfa'a* and *māl*. According to *Sharī'a* any lawful thing which is beneficial and is undertaken by a person can be owned and considered as *māl*. Parts of copyright are mere rights and other parts can be seen as wealth.

The arguments set out in this chapter clarify that copyright is simply a form of ownership and *māl* in *Sharī'a* because *Sharī'a* does not stipulate that the subject matter of ownership or *māl* must be a material thing or under physical control. There is no reason to impose limitations or conditions on these terms that *Sharī'a* has not expressed clearly.

As the owner is at liberty to exchange, use, or dispose his property within the boundaries of *Sharī'a*, the author has the same rights over his work, whether in consideration of a sum money or not.

Although the debate on the recognition of copyright in *Sharī'a* continues, certain features are common to all legal systems. Addressing the precise nature of copyright is necessary to facilitate our understanding of it and to give the correct judgment in establishing of copyrights on *Sharī'a*. Copyright is an intangible and abstract property, exclusionary and of personal attribute.

Chapter Three

Evidence from the Original Sources

3.1 Introduction

As shown in the previous chapters, clarification has been achieved in the underlying components of copyright. This chapter will explore the possibility of copyright evidence from the original sources of *Sharī'a*. It starts with introducing evidence from Qur'ān that supports copyright. In the subsequent section, other evidence from the *Sunna* will be presented.

As the following *ḥadīth* indicates, the process of finding a ruling on something in *Sharī'a* is by approaching its sources sequentially. It is reported that “When the Apostle of Allah intended to send Mu'ādh Ibn Jabal (d.18 AH/639) to the Yemen, he asked: How will you judge when the occasion of deciding a case arises? He replied: I shall judge in accordance with Allah's Book (Qur'ān). He asked: (What will you do) if you do not find any guidance in Allah's Book (Qur'ān)? He replied: (I shall act) in accordance with the Sunna of the Apostle of Allah. He asked: (What will you do) if you do not find any guidance in the Sunna of the Apostle of Allah and in Allah's Book? He replied: I shall do my best to form *ijtihād* an opinion and I shall spare no effort. The Apostle of Allah then patted him on the chest and said: praise be to Allah Who has helped the messenger of the Apostle of Allah to find something which pleases the Apostle of Allah”.¹

Few Qur'ānic verses and '*ahādīth* deal with issues in comprehensive wording which is termed by scholars of *uṣūl al-fiqh* and exegesis as “'Āmm” (general).² The *fuqahā'* have stated that those texts provide general principles which can go beyond particular cases.

¹ *Sunan Abū Dawūd*, <http://www.muslimaccess.com/sunnah/hadeeth/abudawud/024.html> , Book 24, Number 3585.

² 'Āmm means a word that applies to unlimited things. See Kamali, *Principles of Islamic Jurisprudence*, p.104.

To facilitate the study, the judgment of copyright can also be inferred from the general texts and principles laid down by the original sources if there are no specific texts dealing directly with the topic. In fact, there will be a privilege if a general text of copyright is available.

Accordingly, it is not necessary that the research should aim to find only a specific text of copyright in the original sources. It is not correct to assume that the ruling on a case requires that materials be essentially “*khāṣṣ*”³ (specific).

The prescribed steps in the *ḥadīth* of Mu‘ādh will be followed in researching copyright in this study. The proper starting point for establishing a correct judgment of copyright is the reference to the Qur’ān, the first source of *Sharī‘a*. Therefore, this chapter will collect and examine a number of arguments for copyright derived from the Qur’ān and *Sunna*.

3.2 Evidence of copyright from the Qur’ān

According to the *Sharī‘a* every matter has its own ruling, whether the ruling is “*wājib*” (an obligation), “*mandūb*” (recommended), “*mubāḥ*” (indifferent), “*makrūh*” (reprehensible) or “*ḥarām*” (forbidden). Qur’ān says that, “the command is for none but Allah.”,⁴ “Whatever it be wherein Ye differ, the decision therefore is with Allah.”⁵ and “If ye differ in anything among yourselves, refer it to Allah and his Messenger”.⁶ Therefore, the difference of opinion about copyright is to be resolved by reference to *Sharī‘a*.

Moreover, the verse: “...To thee the Book explaining all things, a guide a mercy ...”⁷ and the verse: “This day have I perfected your religion for you,

³ *Khāṣṣ* means a word that applies to limited things. See Kamali, *Principles of Islamic Jurisprudence*, p.105.

⁴ Qur’ān, 12.v 40.

⁵ Qur’ān, 42.v 10.

⁶ Qur’ān, 4.v 59.

⁷ Qur’ān, 16.v 89.

completed my favor upon you, and have chosen for Islam as your way religion”⁸ indicate the perfection of the *Sharī‘a*. The entire law is to be derived from *Sharī‘a* whether a case is regulated directly by a “*khāṣṣ*” (specific) text or in comprehensive wording “*‘āmm*”.

In Qur’ān, certain rulings such as inheritance shares or family affairs are stated in “*khāṣṣ*” (specific) texts, while most rulings are normally provided in “*‘āmm*” (general) texts.⁹ Therefore, a ruling can be inferred from “*‘āmm*” (general) texts and supported by other evidence, indications and references. These supporting materials lead to the discovery of what a ruling might be on a case of question. This enables the *fuqahā’* to promote the law through the process of “*ijtihād*” (conscientious reasoning) when they face a new situation.¹⁰ This was also meant to provide a fertile field of discourse for constructive readings. When the *fuqahā’* apply a general verse to cover a new situation it is normally thought of as implementing the verse.

The researcher will firstly resort to the main source of *Sharī‘a*, that is, Qur’ān and its commentaries to find any guidance on a new issue such as copyright. There are sketchy references and citations relating to the issue of copyright in Qur’ān and Qur’ānic commentaries. Each verse represents a distinctive cluster of values and attitudes capable of directing juristic approach to new cases.

3.2.1 The First Evidence

Since copyright has been located within the Islamic broader framework of right, ownership and wealth, as stated before, there can be no conflict in recognizing copyright as trust. *Sharī‘a* pointed out through many unequivocal statements to the importance of “*amāna*” (honesty or trust) and “*adl*” (justice). The reference to these principles appears as a regular theme in the Qurā’n and the Sunna. From the

⁸ Qur’ān, 5.v 3.

⁹ Sha‘bān, p.48. Al-Zarqā, *al-Madkhal*, vol.1, p.74.

¹⁰ Sha‘bān, p.48. Kamali, *Principle of Islamic Jurisprudence*, p.366 and post.

Qurā'n, the main verse is "Allah doth command that you to render back trusts to those to whom they are due And when ye judge between man and man, that ye judge with justice ...".¹¹

It is important to review the interpretations placed on this verse by the highly acknowledged Qur'ānic commentators. Al-Ṭabarī (d.310AH/922) stated that the verse was revealed, when the Prophet took the keys of the "Ka'ba"¹² from its custodian 'Uthmān Ibn Ṭalḥa (d.41AH/661),¹³ so the verse commanded him to return the keys. Therefore, the Prophet did.¹⁴

Although, the verse came in response to the issue of keys of the *Ka'ba*, but the actual wording is "āmm" (general). The famous rule in *uṣūl al-fiqh* is that a text should be interpreted and determined by its comprehensive wording not by its own "asbāb al-nuzūl" (the occasions of its revelations).¹⁵ Al-Rāzī is correct in confirming that the occasion of the revelation of this verse should not restrict its applications, Allah instructs believers to honor all their responsibilities, whatever they would be, religious or worldly.¹⁶

This generalization is supported by the "ijmā'" that, the command is to return the trusts to their owners whether they are righteous or sinful.¹⁷ The *ijmā'*, which is one of the main sources of *Sharī'a* removes any doubt about the broad interpretation of the verse or its continuous applicability.

The word "amāna", mentioned in the verse, means trust, honesty, responsibility, probity all the duties which Allah has ordained upon humans whether

¹¹ Qur'ān, 3.v 58.

¹² The Holy Ka'ba is the cub building in the al-Masjid Al-Ḥarām at Makkah.

¹³ Al-Dhahabī, Muḥammad bin Aḥmad, *Siyar A'lām al-Nubalā'*, Beirut Mu'assasat al-Risāla, (1419AH/1998) (Eleventh Edition), vol.3, p.12, hereinafter: al-Dhahabī.

¹⁴ Al-Ṭabarī, Abū Ja'far Muḥammad Ibn Jarīr, *Tafsīr al-Ṭabarī*, Beirut, Dār al-Kutub al-'Ilmiyya, (1999) (Third Edition), vol.4, p148, hereinafter: al-Ṭabarī. Al-Mubarkpuri, Shaykh Safiur-Ruhman et. al, *Tafsīr Ibn Kathīr* (Abridged), Riyadh, Darussalam, (2000) (First edition), vol.2p., 493,494, hereinafter: *Ibn Kathīr*.

¹⁵ Al-Ṭabarī, vol.4, p 148. Kamali, *Principles of Islamic Jurisprudence*, p.111.

¹⁶ Al-Rāzī, Fakhr al-Dīn b. 'Umar, *al-Tafsīr al-Kabīr* (Also known as *Mafātiḥ al-Ghayb*), Beirut, Dār al-Kutub al-'Ilmiyya, (AH1421/2000) (First Edition), vol.10, p.111. Hereinafter: al-Rāzī.

¹⁷ Ibid. Al-Zamakhsharī, Maḥmūd, *al-Kashshāf*, Bierut, Dār al-Kutub al-'Ilmiyya, (1995) (First Edition), vol.1, p.512, Hereinafter: al-Zamakhsharī, *al-Kashshāf*. Ibn al-Mundhir, Abū Bakr, *al-Ijmā'*, Dr Fu'ād 'Abd al-Mun'im (ed.) Alexandria, (AH1402) (Third Edition), p.102.

they be commands or prohibitions, their trusts or their covenants. This *amāna* is a general obligation binding a person to deal with every right, property, duty or such which he has a connection with justly and in good faith. "Trust embraces all the responsibilities which are imparted to someone because he is trusted...It might also consist of personal or collective property..."¹⁸

According to many Qur'ānic commentaries, the verse imposes honesty upon every person in all the circumstances. Everyone is required to act honestly in any matter in which they are involved. This includes rulers, judges, scholars and every person who is in position of trust to carry out his duty, whether the trust is connected to world affairs or the hereafter.¹⁹

The command of trust is worded in such a way that trust is identified as the key essence of every matter and individuals are obliged and expected to act honestly in their life. This deep-seated principle of honesty means no activity or aspect of life can escape its reach.

This verse is the most comprehensive statement that imposes the obligation to deal honestly and justly with everyone on everything.²⁰ There is nothing in the words used in the verse, which restricts its application. There is no express provision in Qur'ān or Sunna which restricts honesty to tangible objects only.

Moreover, the principle of honesty occupies a significant position in *Sharī'a* and it is reflected in many verses of Qur'ān and numerous *aḥādīth*. For example, one verse praises the Prophet Moses by saying "truly, the best of men for thee to employ is the man who is strong, the trusty,"²¹ in another verse Allah praises the Angel of Revelation by saying "With authority there, and faithful to his trust"²² and a third verse praises believers who are "Those who faithfully observe their trusts and their

¹⁸ Ansari, Zafar Ishaq, Towards Understanding the Qur'ān, English Version of Tafhīm al-Qur'ān by Sayyid Abul A'lā Mawdūdī, Leicester, The Islamic Foundation, (1994), vol. III, p.148.

¹⁹ Al-Ṭabarī, vol.4, p149.

²⁰ Al-Qurṭubī, *al-Jāmi'*, vol.5, p.165 and post.

²¹ Qur'ān, 28.v. 26.

²² Qur'ān, 81.v. 21.

covenants”.²³ More traces of the principle of trust are to be found in the *ḥadīth*. For example, it is reported that the Prophet said: “Return the trust to those who entrusted you, and do not betray those who betrayed you”.²⁴ The command of *amāna* can provide a solid foundation for copyright.

This evidence supports the meaning that honesty is compulsory and it has a significant reach over everything.²⁵ These texts are not abrogated or unequivocal. Therefore, the list of trusts can always be open and updated and every individual is within the terms of each trust in which he is involved. Contemporary *fuqahā'* have, so far as possible, applied these verses to new norms and needs with similar effect.

The principle of honesty constitutes an integral part of the Islamic education system. In this context, Muḥammad ‘Abduh (d.1905) stated that the general command of trust means the recognition of any right whether it is related to a tangible or intangible object. He stated that trust means a thing entrusted to the care of a person on the behalf of another, such as money or knowledge whether there is verbal or special agreement or not. Then he extended the notion of honesty to cover a scholar, who must return “*ilm*” (knowledge) to people, to a trustee who must return money to its owner, pointing out that there is an actual agreement to achieve that. Without this agreement between scholar and student, no sound knowledge can take place. In his understanding, the fulfillment of the obligation of “scientific trust or honesty” depends on disclosing the methods which lead to the discovery of knowledge.²⁶

Scientific honesty is a particular application of honesty, because the concept of trust in *Sharī‘a* is not confined to tangible objects only. Accordingly, many contemporary *fuqahā'*²⁷ approve the concept of “scientific trust”.

The main goals of scholars and researchers are discovery, teaching and

²³ Qur’ān, 23.v. 8.

²⁴ Muslim b. al-Ḥajjāj, *Ṣaḥīḥ Muslim*, translated by Ṣaddīqī, Abdul Ḥamid, Lahore, Sh. Muhammad Ashraf, (1990), vol.I.A, p.48., hereinafter: *Muslim*, tr. Ṣaddīqī.

²⁵ Al-Qurṭubī, *al-Jāmi'*, vol.5, p.165.

²⁶ Riḍā, Muḥammad Rashīd, *Tafsīr al-Qur’ān al-Ḥakīm* (also known as *Tafsīr al-Manār*, Beirut, Dār al-Ma’rifa, (1993), vol.5p.170. Hereinafter: *al-Manār*.

²⁷ Abū Zayd, *Fiqh al-Nawāzil*, vol. 2, p.98.

dissemination of scientific truth and honestly. The principle of honesty is connected to the concern of “*isnād*” (the chain of the narrators).²⁸ The obligation of honesty requires the reader to attribute a quotation to its true author. Quoting the references and documenting the texts are important duties of scientific honesty.

Establishing copyright under the broad umbrella of honesty is justified by the flexibility and breadth of the definition of honesty. The concept of honesty is vast in scope inasmuch as it covers every deed. It is, however, particularly useful in copyright, because copyright is covered by the command of honesty and may advance its effectiveness.

The outcome is that copyright is one of trusts that must be observed. This broad interpretation of the verse and the *ijmā'* on its generalization can connect copyrights to the general principle of honesty. Accordingly, it can be argued from these agreed foundations that copyright must be protected and attributed to its owners.

The term trust is here used in a wide sense. All rights, obligations and duties towards Allah or people are simply based on trust. Honesty is the basic moral principle without which a healthy society is not possible. We can then use these arguments to demonstrate that, copyright are trusts that must be acknowledged and returned to the author, not least because a copyright has financial value.

Moreover, the possible application of the verse to copyright can be supported by other pieces of evidence which prohibit mistrust. One verse reads “For Allah loveth not the treacherous”.²⁹ Another verse confirms that: “o ye that believe Betray not the trust Of Allah and the Messenger, Nor misappropriate knowingly Things entrusted to you”.³⁰ These verses adopt the same meaning as the first verse by prohibiting the opposite conduct, that is, dishonesty.

Not only has Qur’ān condemned dishonesty, but the Prophet condemned also dishonesty when he said: “The signs of a hypocrite are three... if you trust him, he

²⁸ For more details on that, see p.148 and post.

²⁹ Qur’ān,8.v.58.

³⁰ Qur’ān, 8.v.27.

proves to be dishonest".³¹ This understanding is supported by other 'ahādīth such as "... Anyone who cheats us is not one of us."³² This ḥadīth rejects a fraudster's inclusion as a member of society. *Sharī'a* castigates mistrust and dishonesty for destroying society, their harmful consequences and regards them as one of the most serious crimes.³³ It is also, reported that the Prophet said "...your properties are sacred to each other, and for every betrayer there will be a flag to expose him on the Day of Resurrection."³⁴ A flag is a defamatory sign of betrayal.

This is a further indication in that not only is the prohibition of all forms of dishonesty established but also the prohibition of any action leading to dishonesty, mistrust or fraudulence in general and this is a central rule in the *Sharī'a*. As regards to our present subject, violation of copyright is contrary to honesty. The recognition and exploitation of works contrary to the command of honesty would be unethical and illegal.

There is no obstacle in Qur'ān, in the Sunna or in the *fiqh* to extending the prohibition of dishonesty to intangible objects. If a person uses others' writing without sufficient acknowledgment and attribution, and even passes them off as his, he is committing a kind of dishonesty. He does not return back the trust, which is the writing to the real owner.

In addition, the reproduction of work without its owner's consent destroys public trust. It is repugnant that this kind of mistrust leads to profitable results, awards and fame attained at the real author's expense. He betrays the author's rights and betrays people when he dishonestly obtains moral and economic advantages that he does not deserve.

The obligation of honesty is a legitimate and has a wide variety of applications that can provide sound foundations for recognition and protection of copyright. Al-Shāfi'ī will perhaps regard infringement and violation of copyright as a kinds of

³¹ *Al-Bukhārī*, tr., vol. 1, p.31, Ḥadīth No.32,33.

³² *Muslim*, tr. Ṣaddīqī, vol.I.A,p.67.

³³ Al-Mawardi, Abu al-Hasan 'Ali, *al-Ahkam as-Sultaniyyah*, trans. Dr Asadullah Yate, London, Ta-Ha Publisher,(1416/1996),p.355., hereinafter: al-Mawardi.

³⁴ *Al-Bukhārī*, tr., Vol 9,p.79. Ḥadīth No.96.

“*khiyāna*” (mistrust or breach of confidence) because he defines it as taking another’s property unlawfully.³⁵ According to al-Jaṣṣāṣ (d.370AH/980-1), from the *Ḥanaḥī* school, “*khiyāna*” means reduction of someone else’s right in an undisclosed manner.³⁶

Thus, it is a kind of “*khiyāna*” and “*ghish*” (deception) to take an existing work and to claim its copyright. *Khiyāna* occurs if a person makes a false claim of authorship over another’s work because he pretends to be a scholar or righteous.³⁷ Also when a publisher reproduces works without the consent of their authors or exceeds the copies of a work over the agreed number with the author, he makes *khiyāna*. Article 34 of the (Qānūn Ḥaqq al-Mu’allif) prescribed the punishment of mistrust on such publishers.³⁸

Moreover, *khiyāna* includes the editing and breaking up of one transcript of a book into several books without scientific purpose and is a form of misrepresentation and deception. The changing of titles of books written by outstanding scholars and pretending that they are different books is another form of *khiyāna*. Also the preference of commercial profit in editing or publishing works at the expense of scientific and ethical considerations is a kind of *khiyāna*. Indeed it is impossible to enumerate all the forms in which dishonesty can appear.

An associated argument is the clarification of other related terms to benefit our discussion of this issue. “*Ta’addī*” (transgression) is defined as “benefiting from the property of another person without entitlement and without the intention to acquire ownership of its substance, or by destroying it or part of it without the intention to acquire ownership [of its substance]”.³⁹ Similarly, “*ghaṣb*” (usurpation) is defined thus “the willful seizure and appropriation of another’s property without the use of

³⁵ Al-Shāfi’ī, Abū ‘Abd Allah Muḥammad b. Idrīs, *al-Umm*, Beirut, Dār al-Ma’rifā, (1393AH/1973)(Second Edition),vol. 5, p.105.

³⁶ Al-Jaṣṣāṣ, Abū-Bakr Aḥmad b. ‘Alī al-Rāzī, *Aḥkām al-Qur’ān*, Muḥammad al-Ṣādiq Qamḥāwī (ed.), Beirut, Dār Iḥyā’ al-Turāth al-‘Arabī,(1405AH) vol. 1, p.282.

³⁷ Al-Nafarāwī, Aḥmad b. Ghunaym, *al-Fawākih al-Dawānī*, Beirut, Dār al-Fikr, (1415AH), vol.2,p.284.

³⁸ ‘Izzāt, *Nizām* .p.88.

³⁹ *Al-Dusūqī*, vol.3, p.683. *Al-Mughnī*, vol.5, p.238. Yanagihash, *A History of The Early Islamic Law of Property*, p.40.

arms”.⁴⁰ Al-Māwardī (d.450AH/1058) defined *ghaṣb* as the prevention of a person from ownership and using the property without a right cause.⁴¹ One almost comprehensive definition by al-Nawawī (d.676AH/1278) reads: “*ghaṣb*” is the appropriation of one’s right without a right cause”.⁴²

These definitions of usurpation can apply to a person appropriating a work or part of it and claiming authorship. However, both definitions can be applied to the case where a publisher benefits from a work beyond the number specified in the contract, which gives the publisher the right to distribute.

When considering these prohibited actions, as to how they should be analyzed, some are essentially a kind of “*khiyāna*” (mistrust or breach of confidence) “*ghish*” (deception), and so on, whilst other actions are basically “*ẓulm*” (oppression), “*ghaṣb*” (usurpation) or “*ta’addī*” (transgression). The negative consequences of a wide spread uptake of these prohibited actions need not to be demonstrated. It leaves rights with no special status in practical life and can lead to great injustice and wrongful enrichment.

The second strand of the same verse is justice⁴³ and the verse reads: “And when ye judge between man and man, that ye judge with justice”.⁴⁴ The commandment requiring justice appears in many verses such as: “O ye who believe! stand out firmly for justice as witnesses to Allah even as against yourselves or your parents or your kin and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts) lest ye swerve and if ye distort (justice) or decline to do justice verily Allah is well-acquainted with all that ye do.”⁴⁵ “And whenever ye speak, speak justly,”⁴⁶ “... Be just: that is next to piety”⁴⁷ and “Allah

⁴⁰ *Al-Dusūqī*, vol.3,p.683. F. H. Ruxton, Maliki Law, a Summary from French Translation of the Mukhtaṣar of Sidī Khalīl, p.217.

⁴¹ *Al-Majmū’*, vol.14, p.341.

⁴² *Al-Majmū’*, vol.14, p.338. *The Mejelle*, p.137.

⁴³ Al-Diraynī, *al-Ibtikār*. p. 105.

⁴⁴ Qur’ān, 3.v 58.

⁴⁵ Qur’ān, 4.v 135 and, 5.v 8.

⁴⁶ Qur’ān, 6.v 152.

⁴⁷ Qur’ān, 5.v 8.

commands justice,”⁴⁸

From the Ḥadīth, it is reported that the Prophet praised “... those who do justice in their rules, in matters relating to their families and in all that they undertake to do”.⁴⁹

Conversely, it is strictly prohibited for someone to commit any form of injustice whether it is obvious or obscure and regardless of the subject or how much of something there is. It is reported that the Prophet said: “Allah, the Exalted and Glorious, said: My servants, I have made oppression unlawful for Me and unlawful for you, so do not commit oppression against one another”.⁵⁰ Warning in his last sermon, the Prophet said: “Verily your blood, your property are as sacred and inviolable as the sacredness of this day of yours, in this month of yours, in this town of yours.”⁵¹ It is also reported that he said: “Be on your guard against committing oppression, for oppression is a darkness on the Day of Resurrection.”⁵² There are severe punishments prescribed for oppression in this world and the hereafter.

Therefore, the rule is that a Muslim must achieve justice and avoid oppression in every matter he undertakes. Al-Qurṭubī (d.671AH/1273) stated that as the case with honesty, it is an obligation upon everyone including rulers, judges and scholars to strive to achieve justice in all aspects of life.⁵³

Recognizing copyright is one basis of achieving practical justice. An author is like a laborer who is entitled to appropriate and exploit the fruits of his work. Justice can only be achieved in response to the reality of authors creating their works and society and individuals recognizing copyright. In fact, authors are the only people who deserve to exploit their works. The denial of copyright leads to great injustice.

⁴⁸ Qur’ān, 16.v 90.

⁴⁹ *Sahih Muslim*, Book 020, Number 4493, available online at: <http://www.muslimaccess.com/sunnah/hadeeth/muslim/020.html>.

⁵⁰ *Sahih Muslim*, Book 032, Number 6246, available online at: <http://www.muslimaccess.com/sunnah/hadeeth/muslim/032.html>.

⁵¹ *Sahih Muslim*, Book 07, Number 2803, available online at: <http://www.muslimaccess.com/sunnah/hadeeth/muslim/020.html>.

⁵² *Sahih Muslim*, Book 032, Number 6248, available online at: <http://www.muslimaccess.com/sunnah/hadeeth/muslim/032.html>.

⁵³ Al-Qurṭubī, *al-Jāmi’*, vol.5p.258.

There is no need to elaborate on the widespread injustice to authors if copyright is not restricted to them.

This principle is seen in all the teachings of the *Sharī'a*, with an emphasis and a clarity applied to every case. The concepts of honesty and justice are universal and they can be located in every case. Within the broad meaning of these principles, copyright can be accommodated within *Sharī'a*. Another observation is that “ḥaqq [right] is inextricably linked with justice and benevolence (*a'dl wa ihsān*)”.⁵⁴

A deeper understanding of these principles needs to be implemented and developed in response to changing factors such as time and society and so on. In our time, observing copyright is consistent with honesty and justice. The ethical use of intellectual works, respect and protection of the economic interests of authors are covered by the general rules of justice and honesty.⁵⁵ Otherwise, the principles of trust and justice are at risk.

By applying the general principles of justice and honesty it is possible to build *ijmiā'* to recognize and protect copyright especially where administrative and technical measurements fail. This is not only an ethical approach because the implementation of the *Sharī'a* means that matters not in accordance with honesty are sinful as well as illegal. More precisely, infringement or violation of copyright can be punishable under the Islamic institution of *ta'zīr* because in the *Sharī'a* the state is vested with discretionary powers to discipline those who neglect the religious principles.⁵⁶

3.2.2 The Second Evidence

In Qur'ān, the second authority for copyright is the verses: “...nor withhold from the people the things that are their due...”⁵⁷ and: “And withhold not things

⁵⁴ Kamali, *Freedom of Expression*, p.263.

⁵⁵ Abū Zayd, *Fiqh al-Nawāzil*, vol.2, p.103.

⁵⁶ Abū Zayd, *Fiqh al-Nawāzil*, vol.2, p.103. El-Awa, *Punishment in Islamic Law*, p.114. See also EI², Entry: *Ta'zīr*.

⁵⁷ Qur'ān, 7.v. 85. and 11.v.85.

justly due to men,”⁵⁸

These verses prohibit, through the Prophet Shu‘ayb’s words to his people, the diminution of peoples’ things in transactions. This occurred when giving short weight, measure, qualifications, considerations or otherwise.⁵⁹ But the word “peoples’ things” should be taken as unlimited in that covers properties, wealth, rights and anything of value, whether tangible or intangible.⁶⁰ And the principle is that, property is protected, no matter how much it is worth.

There is consensus that it is not allowed for anyone to take another’s property, without permission. There is no doubt that anyone who contradicts this principle commits a “*ḥarām*” (forbidden) deed and he is a sinner.⁶¹

Therefore, this universal principle is applicable to copyright because copyright is just another intangible form of property.⁶² Copyright is property belonging to those who create something and are the only ones who can exchange or dispose of them. A diminution of copyright can take many forms. There is the diminishing of an author’s rights where violation or infringement of copyright arises. The deprivation of a person’s copyright can be considered as a form of theft,⁶³ diminution and oppression.⁶⁴ In this respect, piracy and plagiarism amount to diminution of copyright. Further, a publisher is not allowed to exploit the author or to publish his work more than the parties agree. Such a practice is a form of diminution of peoples’ things and economic rights.

There are many verses concerning the prohibition of taking another’s property such as; “Eat not up your property among yourselves in vanities”⁶⁵ and “Eat not up your property among yourselves in vanities: but let there be amongst you traffic and

⁵⁸ Qur’ān,26.v. 183.

⁵⁹ Al-Rāzī. vol.14, p.142.

⁶⁰ *Al-Manār* vol.8, p.255.

⁶¹ Al-Qurṭubī, *Al-Jāmi’*, vol.2,p.227.

⁶² Al-Diraynī, *Ḥaqq al-Ibtikār*, p. 147. For more details, see also Chapter 2 here.

⁶³ Ibn Qayyim, al-Jawziyya, Muḥammad b. Abī-Bakr, *I’lām al-Muwaqqi’īn*, Ṭaha Sa’d, (ed.), Beirut, Dār al-Jīl, (1973),vol.3,p.332, hereinafter: *I’lām al-Muwaqqi’īn*. It is cited by Abū Zayd, *Fiqh al-Nawāzil*, vol.2, p.100. Al-Diraynī, *Ḥaqq al-Ibtikār*, p.147.

⁶⁴ Al-Diraynī, *Ḥaqq al-Ibtikār*, p. 147.

⁶⁵ Qur’ān,2.v. 188.

trade by mutual good-will”⁶⁶ and ”but if ye shall have your capital sums deal not unjustly and ye shall not be dealt with unjustly”.⁶⁷

These verses were followed by the report that the Prophet said: “A Muslim’s *māl* (wealth) is forbidden for others to use without his permission...”⁶⁸ and “it is not lawful for a person to take his brother’s stick except with his good will”.⁶⁹

Al-Qurtubī pointed out that “Things included in this judgment are gambling, fraud, usurpation, denying someone’s just right and anything the owner is not happy about or things which the *Sharī’a* forbids, even if the owner is happy with them, such as money from prostitution, fees for [producing a slanderous poem] and money from wine and pigs and others.”⁷⁰ “Whoever obtains someone else’s property in a manner other than permitted by the *Sharī’a* has consumed it by false means”.⁷¹

This line of authorities confirms a general ruling that applies to all situations. It is prohibited to take another’s things irrespective of their value, whether the property is physical or intellectual. Principles of honesty and justice do not permit a compromise in this respect.

On a wide interpretation violation or infringement of copyright is a kind of personal, educational and economic oppression. There is no doubt that an author will be unhappy when someone infringes his copyright.

Therefore, violation or infringement of copyright are forms of diminution and can be grounds of legal liability and under “*ta’zīr*” punishment, which is left to the

⁶⁶ Qur’ān,4.v. 29.

⁶⁷ Qur’ān,2.v. 279.

⁶⁸ Al-Ḥākim, Muḥammad Ibn ‘Abd Allah, *Al-Mustadrak ‘ala al-Ṣaḥīḥayn*, Muṣṭafa ‘Aṭā,(ed).Beirut, Dār al-Kutub al-‘Ilmiyya, (1411AH/1990) (First Edition), Ḥadīth No: 318,vol.1,p.171,hereinafter: *al-Mustadrak*. Al-Shawkānī, Muḥammad Ibn ‘Alī, *Nayl al-Awṭār*, Cairo, Dār al-Ḥadīth (N.D), Ḥadīth No: 2425. vol.5, p.378. Hereinafter: *Nayl al-Awṭār*. Al-Albānī, Nāṣir al-Dīn, *Ṣaḥīḥ al-Jāmi‘ al-Ṣaḥīḥ*, Beirut al-Maktab al-Islāmī, (1988/1408AH) (Third Edition), vol.2, p.1268, Ḥadīth No.7662,hereinafter: al-Albānī, *al-Jāmi‘ al-Ṣaḥīḥ*. The translation is taken from: Al Jumah Magazine, Madison, Contemporary Fatawa, vol.11, issue 2 1420, p.11.The Permanent Committee for *Iftā’*, in Saudi Arabia, Fatwa No.18452, dated on 12/1/1417AH.

⁶⁹ Ibn Hajar, Al-Hafiz Al-Asqalani, *Bulugh al-Maram*, Dar-us-Salam tr. Riyadh, Dar-us-Salam, (1996/1416AH) (First Edition), p.307. Hereinafter: *Bulugh al-Maram*.

⁷⁰ Bewley, *Tafsir al-Qurtubi*, I, p.485.

⁷¹ Ibid.

state's discretionary power.⁷²

3.2.3 The Third Evidence

A further verse which has not received due attention from previous writings of copyright,⁷³ states: "Think not that those Who exult in what they Have brought about, and love To be praised for what They have not done, Think not that they can escape the Chastisement. For them is a Chastisement is Grievous indeed."⁷⁴

In order to give further background, al-Bukhārī (d.256AH/869) reported that the occasion of the revelation of this verse was that "it was only that the Prophet called the Jews and asked them about some thing, and they concealed the truth and told him something else and seemed to deserve praise for the favor of telling him the answer to his question, and they became happy with what they had concealed".⁷⁵ They tried to increase their reputation for work they had not done or knowledge they did not possess.

The verse is introduced by another verse which states: "And remember Allah took a covenant from the people of the Book to make it known and clear to mankind. And not to hide it. But they threw it behind their backs, and purchased with it some miserable gain and vile was the bargain they made"⁷⁶

Commenting on this main verse (188), al-Shawkānī (d.1250AH/1834) stated that one can, so far as is possible, interpret the verse as applicable to everyone who wants to be praised for what he has not done.⁷⁷ It condemns anyone who masquerades as something he is not, particularly in a given character or position that has serious consequences such as those of scholars or authors. The false claim might have a significant effect on the professional field to which he belongs and the whole

⁷² Al-Shahrānī, p.527 and post.

⁷³ See p.25 and post.

⁷⁴ Qur'ān, 3 v. 188.

⁷⁵ *Al-Bukhārī*, tr., vol. 6, p.74, Ḥadīth No.91.

⁷⁶ Qur'ān, 3 v. 187.

⁷⁷ Al-Shawkānī, Muḥammad Ibn 'Alī, *Faṭḥ al-Qadīr*, Aḥmad 'Abd al-Salām, (ed.), Beirut, Dār al-Kutub al-'Ilmiyya, (ND), vol.I, p. 515. hereinafter: al-Shawkānī, *Faṭḥ al-Qadīr*.

of society.

The verse can be taken as rejection of false appearance in general but it particularly condemns the willingness of being considered as scholars whilst they are not scholars.⁷⁸ Usually, if the Qurā'n warns people to avoid doing some action with the direst punishment in the hereafter (as with this case), it implies that the exercising of that action is prohibited⁷⁹ and it arguably would itself be a crime or a civil wrong.

Consequently, this implies that only real knowledge deserves honor, awards and wealth. If we move from materials to ideas, the verse imposes that only the author should deserve praise, honor and profit from authoring a work or creating something.

It is therefore quite in conformity with the purpose of this verse to reject all false claims to authorship. It can be argued that the verse condemns scientific cheating. It confirms that those who hold knowledge are obliged to explain their knowledge to the public. It is the duty of the scholars to make the *Sharī'a* clear to all people. Equally, the duty of scholars is to disseminate any piece of knowledge which is useful to humankind. The duty of dissemination of knowledge is approved and supported by the related duty of the preventing false claims to knowledge or authorship.

3.2.4 The Fourth Evidence

One verse provides a basic standard of prohibition of false claims. In the conversation between Allah and the Prophet Jesus, the verse reads: "Never I could say what I had no right (to say)".⁸⁰ In other words, he could never make a claim to what does not justly belong to him.

⁷⁸ Al-Jawzī, Abū al-Faraj Jamāl al-Dīn, *Zād al-Masīr fī 'Ilm al-Tafsīr*, (1407 AH/1987), Beirut, al-Maktab al-Islāmī, vol.1, p. 523.

⁷⁹ Sha'bān, p.52.

⁸⁰ Qur'ān, 5.v. 116

Al-Shawkānī commenting on this verse said that it means “I must not claim for myself what I am not entitled to”.⁸¹ The text’s message is simple, universal and general that a person is prohibited from making a false claim to anything. A person is duty bound by *Sharī‘a* to tell the truth.

It has to be read together with the verse: “and shun the word that is false”.⁸² The verse prohibits literally saying “*zūr*” which means falsity, laying and similar meanings. It prohibits not only false testimony but also any sort of false speech, whether written or heard. Similarly, Ibn al-‘Arabī stated that (*zūr*) means a lie and the difference between the degrees of a lie appears in what the lie is about.⁸³

These verses are particularly relevant to copyright. The general meaning of these texts can be applied without qualification. Truthfulness is part of the basic religious and legal duties of a Muslim. It is a requisite and coherent statement, presented in any form told, written down or recorded.

Therefore, many forms of violation of copyright can be seen as making a false claim. For example, if one copies a work claiming that he is the author, he makes a false statement about his knowledge or intellectual assets and, therefore, the verse applies to his actions. In addition, if one copies a work and exploits it without proper consent, he appropriates what is not his own. It is accordingly necessary to consider that what is worth claiming is worth protecting. Therefore, the verse is certainly applicable to copyright.

It is to be noted that the correct way of understanding this verse is to combine it with the previous verses. The rule as so stated applies to the case in question: copyright as well as other branches of intellectual property. Therefore, it provides that only an author shall have the right to be identified as the creator of his work.

According to Ibn al-‘Arabī, there are different kinds of lies and each of them should be treated with its own need of prohibition at different levels. Because knowledge and authorship are highly valued in *Sharī‘a* and of great influence on

⁸¹ Al-Shawkānī, *Fath al-Qadīr*, vol.II, p. 95.

⁸² Qur’ān, 22.v 30.

⁸³ Ibn al-‘Arabī, vol.3, p.287.

life, the lies in relationship to authorship and copyright will be heavily criticized and condemned. It can be argued that false attribution of copyright, which can take many forms, is prohibited under this verse. These conclusions are based on the direct meaning of these verses.

3.2.5 The Fifth Evidence

The verse “Ye are the best of peoples, evolved for mankind. Enjoining what is right, forbidding what is wrong, and believing in Allah,”⁸⁴ gives general evidence for copyright. The overarching goal of the Muslim society is to establish and maintain moral standards and to prevent the outbreak of corruption and oppression.

Moreover, it is narrated that the Prophet said: “The religion is *naṣīḥa* sincerity (or advice) and well wishing. Upon this we said: For whom? He replied: For Allah, His Book, His Messenger and for the leaders and the general Muslims”.⁸⁵

This *ḥadīth* assigns to everyone in the community the duty to advise others sincerely for enjoining good and forbidding evil. For its wider interpretation and applications, al-Nawawī described this *ḥadīth* as a central Islamic principle that has a great significance.⁸⁶

Sincerity can be considered here a wide conception. It is imposed as a common positive religious practice to achieve the individual and public good and to reduce the level of evil and dishonesty in the community in general. The applications that follow from the principle of sincerity are not necessarily exhausted by any existing set of duties,⁸⁷ but new duties can be created as circumstances appear or change.

Carrying this verse further, it can be argued that respect for copyright is one of the right deeds which should be enjoined and any infringement of copyright is

⁸⁴ Qur’ān, 3.v. 110.

⁸⁵ *Muslim*, tr. Ṣaddīqī, vol.I.A,p.45. Also available online at <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html>, Book 001, Number 0098.

⁸⁶ Al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, Ḥadīth No: 55,vol. 2, p.32.

⁸⁷ *Ibid.*

wrong and should be forbidden. It is clear that the duty of sincerity harmonizes with the respect of copyright. On the other hand, the violation or infringement of copyright can be seen as against the principle of sincerity.

This understanding supports copyright. As al-Nawawī stated: “it is a matter of sincerity to attribute the admired quotation to who originates it, and it is the manner which people of knowledge and nobility still follow”.⁸⁸ Therefore, there is a valid claim on society to protect copyright and to prevent infringement on them. This task can be achieved by enforcing suitable laws and by education.

3.3 Evidence of Copyright from the *Ḥadīth*

The Sunna is the second principal source of *Sharī‘a* after Qur’ān. It is defined as the Prophet’s sayings, actions and his tacit approvals of the sayings and actions of others.⁸⁹ The Sunna is of divine authority. Its authority is established by many verses such as: “whatsoever the messenger ordains you should accept and whatsoever he forbids you should abstain from”⁹⁰, “But nay, by your Lord, they will not believe until they make you the judge of what is in dispute between them, then they shall find in themselves no dislike of that which you have decreed, and submit in full submission.”⁹¹ “he who obeys the messenger obeys Allah”⁹² and “...And We have sent down Unto thee also the Message; That thou mayest explain clearly To men what is sent For them, and that they May give thought.”⁹³

Additionally, the Sunna is considered to be a commentary on Qur’ān and supplementary to its rulings.⁹⁴ Therefore, the Sunna can provide special decisions which were not mentioned in Qur’ān. The order of research for ruling on any case is

⁸⁸ Al-Nawawī, Muḥyī al-Dīn b. Sharaf, *Bustān al-‘Ārifīn*, Beirut, Dār al-Kitāb al-‘Arabī, (1985)(First Edition), p.15.

⁸⁹ Kamali, *Principles of Islamic Jurisprudence*, p.44.

⁹⁰ Qur’ān, 59.v. 7.

⁹¹ Qur’ān, 4.v. 65

⁹² Qur’ān, 4.v. 80.

⁹³ Qur’ān, 16.v. 44.

⁹⁴ Kamali, *Principles of Islamic Jurisprudence*, p.44.

reported in the *ḥadīth* of Mu‘ādh cited above when he stated that he would judge in accordance with the Sunna if he did not find any guidance in Allah's Book (Qur‘ān).⁹⁵

Following the logic of *uṣūl al-fiqh*, we can start to move forward to the next stage of research. There are some materials calling for approval of copyright. Admittedly, we will find that *‘aḥādīth* are more specific than the Qur‘ānic verses.

3.3.1 The First Evidence

The status of “‘ilm” (knowledge), scholars and students in *Sharī‘a* is very high to the extent that teaching and learning are forms of worship and obedience to Allah. Many scholars devoted a chapter⁹⁶ or even a book to refer to this high position.⁹⁷ The significance of ‘ilm is rooted in many verses and *‘aḥādīth*. There are many Qur‘ānic verses that praise the status of knowledge and scholars. These include: “Say: My Lord! Increase me in knowledge”,⁹⁸ “Say: “Are those equal, those who know and those who do not know?”⁹⁹ and “Allah will Raise up, to (suitable) ranks (And degrees), those of you who believe, and those who have been granted knowledge”¹⁰⁰.

It is reported that the Prophet said: “If anyone travels on a road in search of knowledge, Allah will cause him to travel on one of the roads of Paradise. The angels will lower their wings in their great pleasure with one who seeks knowledge, the inhabitants of the heavens and the Earth and the fish in the deep waters will ask forgiveness for the learned man. The superiority of the learned man over the devout

⁹⁵ *Sunan Abū Dawūd*, <http://www.muslimaccess.com/sunnah/hadeeth/abudawud/024.html> , Book 24, Number 3585.

⁹⁶ See for example; Mālik in *al-Muwatta‘a*, al-Bukhārī, Muslim, in their collections, al-Nawawī in *Riyāḍ al-Ṣāliḥīn* and many others.

⁹⁷ Ibn ‘Abd al-Barr, Abū ‘Umar Yūsuf b. ‘Abd Allah, *Jāmi‘ Bayān al-‘Ilm wa Fadliḥ*, Damascus, Dār al-Fikr, (N.D).

⁹⁸ Qur‘ān, 20v. 114.

⁹⁹ Qur‘ān, 39v. 9.

¹⁰⁰ Qur‘ān, 58v. 11.

is like that of the moon, on the night when it is full, over the rest of the stars. The learned are the heirs of the Prophets...".¹⁰¹ It is also reported that the Prophet said: "..., and he who treads the path in search of knowledge, Allah would make that path easy, leading to Paradise for him ...".¹⁰² Consequently, knowledge and scholars occupy the highest religious and social status.¹⁰³

Ilm does not only apply to religious knowledge or a specific field, but it includes all beneficial studies for human being. There is no indication that knowledge is limited to religious studies, but it generally includes any field of beneficial knowledge, science and technology.¹⁰⁴

It is reported that the Prophet said: "When a man dies, his acts come to an end, but three, recurring charity, or knowledge (by which people) benefit, or a pious son who prays for him (for the deceased)".¹⁰⁵ It means that "knowledge is recognized by Islam as being of continuous benefit that outlives the author, even after death and the cessation of the property right".¹⁰⁶

Al-Nawawī interpreted this *ḥadīth* that after death the good deeds of the deceased person will terminate, and the hereafter rewards will not continue except for those three kinds of actions. One of these unceasing actions is knowledge that can be beneficial to others. This is because the deceased person is the producer of these results of beneficial knowledge or a righteous descendant. Beneficial knowledge includes teaching others and authorship.¹⁰⁷ Being beneficial provides knowledge with continuity after death but it is not a condition of ownership of any work. Also, being beneficial can be for the public, the author or both.

The previous *ḥadīth* provides ample evidence for copyright. Firstly, the

¹⁰¹ *Sunan Abū Dawūd*, <http://www.muslimaccess.com/sunnah/hadeeth/abudawud/025.html>, Book 25, Number: 3634.

¹⁰² *Sahih Muslim*, <http://www.muslimaccess.com/sunnah/hadeeth/muslim/035.html>, Book 035, Number 6518.

¹⁰³ Shalaby, p.127 and p.162.

¹⁰⁴ Shalaby, p.53. Quraishi, Mansoor, *Some Aspects of Muslim Education*, Lahore, Universal Books, (1983), p.8 and p.36. Habib, *Copyright under Islamic Law*.

¹⁰⁵ *Muslim*, tr. Ṣaddīqī. vol.III/A, p.83. *Sahih Muslim*, <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html>, Book 013, Number 4005.

¹⁰⁶ Habib, *Copyright under Islamic Law*.

¹⁰⁷ Al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, Ḥadīth No:1631, vol. 11. p.71.

paternity right was enshrined for the first time in this *ḥadīth*. It can be argued that the paternity right, which was mentioned in previous *ḥadīth*, is directly linked between the creator of the work and the work. The author has the right to have a work which belongs to him, to be attributed to him.

The author gives his name to his work and his descendants on the grounds that he has made the assertion of his paternity of both. The parents of righteous offspring and the holder of beneficial knowledge are similar in this respect because, it is not an easy task to achieve the criterion of being righteous or beneficial. In the same way that people bring up their children, authors also develop their ideas. This attribution to the author applies to works in a similar way as attribution of upbringing is to descendants. An author might be honored by his beneficial work, which is similar to honoring a parent for bringing up righteous offspring. In this respect, the *ḥadīth* may be supported by another *ḥadīth*; "... your sons are part of your labor".¹⁰⁸ On a broad interpretation of gain, offspring fall within gain, because under *Sharī'a*, children are obliged to maintain their poor parents.¹⁰⁹ This understanding of these *'aḥādīth* can find further support in the previous classification of rights made by Ibn Rajab, which gives a parent a right to appropriate his son's property.

The above *ḥadīth* (When a man dies) means that as a general rule; after death a person no longer receives credit for good deeds. There are only three good deeds which remain capable of providing credit for the deceased person after death. One of them is knowledge, which is used by and benefits people. For example, where an author writes a beneficial and informative book its rewards remain after his death.

Secondly, the *ḥadīth* considers knowledge as a type of work and which gives its holder the entitlement to both rewards in this world and the hereafter.¹¹⁰ There is nothing in *Sharī'a* that prohibits the combination of the work for rewards for business and the hereafter.

¹⁰⁸ Cited at Habib, Copyright under Islamic Law. In Arabic, see al-Tirmidhī, Abū 'Īsā Muḥammad, *Sunan al-Tirmidhī*, Maḥmūd Muḥammad Naṣṣār, (ed.), Beirut, Dār al-Kutub al-'Ilmiyya, (First Edition), (1421AH/2000). Ḥadīth No: 1358, Vol.2, p.347. Hereinafter: al-Tirmidhī.

¹⁰⁹ Al-Ghiryānī, *Mudawwanat*, vol.3, p.131.

¹¹⁰ Al-Diraynī, *Ḥaqq al-Ibtikār*, p.14, p.73.

Also, there is nothing contrary to the principles of *Sharī'a* in recognizing financial rewards and rewards in the hereafter for the same work. All kinds of deeds can be subject to continuity or termination according to their usefulness.

Habitual daily actions such as eating, sleeping, exercise and so on are “*mubāḥāt*” (neutral whether done or not). But these actions may be considered as kind of worship, if the believer does them with the correct intention and this includes even those actions done for the sake of the self. The intention of a person is decisive in the acquisition of the reward. The actions with good intention become sound and deserve reward in the hereafter, whether they are exchangeable in this world or not.¹¹¹

3.3.2 The Second Evidence

It is reported that the Prophet said: “If anyone reaches (*mā*) whatever has not been approached before by any Muslim, it belongs to him”.¹¹² As to its authenticity, Abū Dāwūd (d.275AH/888), al-Mundhirī (d.656AH/1258),¹¹³ al-Maqdisī (d.643AH/1245),¹¹⁴ Ibn Ḥajar¹¹⁵ (d.852AH/1448) and al-Suyūṭī¹¹⁶ reported the same *ḥadīth*. While other *fuqahā'*¹¹⁷ have pointed out that there are a number of '*aḥādīth* that support this *ḥadīth*.

¹¹¹ *Al-Bukhārī*, tr., vol. 1, p.47, Ḥadīth No.:52.

¹¹² Available online at: <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html> Book 19, Number 3065. In Arabic see Abū Dāwūd, Sulaymān b. al-Ash'ath, *Sunan Abū Dāwūd*, 'Izzat al-Da'ās and 'Ādil al-Sayyīd, (eds.), Beirut, Dār al-Ḥadīth, (1971), Ḥadīth No: 3071, Vol. 3, p.452, hereinafter: Abū Dāwūd.

¹¹³ Al-Mundhirī, Abū Muḥammad 'Abd al-'Aẓaīm Ibn 'Abd al-Qawī, *Mukhtaṣar Sunan Abī Dāwūd*, Aḥmad Shākir and Muḥammad al-Faqī, (eds.) Beirut, Dār al- Ma'rifa, (1980), Ḥadīth No:2947, vol.4, p.264.

¹¹⁴ Al-Maqdisī, Muḥammad b 'Abd al-Wāḥid, *al-'Aḥādīth al-Mukhtāra*, 'Abd al-Malik Dahash, (ed.), Makka al-Mukarrama, Maktabat al-Nahḍa al-Ḥadītha, (1991/1411AH) (First Edition), vol.4, p.227, 228.

¹¹⁵ Ibn Ḥajar, Aḥmad, *Talkhīṣ al-Ḥabīr fī Takhrīj 'Aḥādīth al-Rāfi'ī al-Kabīr*, Hāshim al-Yamānī, (ed.), Beirut, Dār al- Ma'rifa, (1384AH), vol.3, p.63.

¹¹⁶ Al-Manāwī, 'Abd al-Ra'ūf, *Fayḍ al-Qadīr Sharḥ al-Jāmi' al-Ṣaghīr lil-Suyūṭī*, Beirut, Dār al-Ma'rifa, vol.7, p.148.

¹¹⁷ Al-'Ajlūnī, Ismā'īl, *Kashf al-Khafā'*, Aḥmad, al-Qallāsh (ed.), Beirut, Mu'assasat al-Risāla, (1408 AH/1988) (Fifth Edition), vol.2, p. 330. Al-Mullā 'Alī Qārī, *al-Asrār al-Marfū'a fī al-Akḥbār al-Mawḍū'a*, Muḥammad al-Sa'id, (ed.), Beirut, Dār al-Kutub al- 'Ilmiyya, (N.D), p.232.

These *fuqahā'* mention the following *'ahādīth*: "He who cultivates land that does not belong to anybody is more rightful (to own it)"¹¹⁸, "If anyone brings barren land into cultivation, it belongs to him, and the unjust vein has no right",¹¹⁹ and in more detailed narration "the land is the land of Allah, and the servants are the servants of Allah. If anyone brings barren land into cultivation, he has more right to it."¹²⁰

The first *ḥadīth* uses the word "*mā*" which means whatever, anything and everything. Under the broad meaning of this word "*mā*", this conception is expressed in a general and knowable way equally applicable to material and immaterial things. The validity of the priority right is supported by these *'ahādīth* together with the first *ḥadīth* to the effect that who first comes to anything is most entitled to it. These *'ahādīth* sanction ownership to the first acquirer in a broader generalization of priority. And the priority right demonstrates the religious factor to protect rights.

Moreover, people are equal and at liberty to own free and lawful things, but whoever is the first to appropriate any of them is entitled to own them. Al-Bayhaqī (d.458AH/1066) and Ibn Ḥajar confirmed that right of priority or priority right is an established principle in *Sharī'a*.¹²¹ This priority right bears a strong relation to the principles of justice and the stability and security of rights, because the priority gives the first holder of something, which has not been previously owned a certain ground of ownership over competing claimers. According to *Sharī'a* principles; priority is decisive as to the question of ownership if there is no other evidence of ownership.

¹¹⁸ *Al-Bukhārī*, tr., vol. 3, p.306, Ḥadīth No.:528.

¹¹⁹ Available online at: <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html> Book 19, Number 3067. In Arabic see: *Sunan Abū Dāwūd*, Ḥadīth No: 3073, Vol. 3, p.453. Al-Zarqānī, Muḥammad, *Sharḥ Muwaṭṭa' al-Imām Mālik*, Beirut, Dār al-Kutub al-Ilmiyya, (1990) (First Edition), Ḥadīth No: 1495, Vol.4, p. 37, hereinafter: al-Zarqānī, *Sharḥ Muwaṭṭa'*. Al-Tirmidhī, Ḥadīth No: 1378, Vol.2, p.364. Ibn Ḥanbal, Aḥmad, *Musnad al-Imām Aḥmad*, Muḥammad Salīm, (ed.), Beirut, Dār al-Maktab al-Islāmī, (1993)(First Edition), vol.3, p.382 and post. hereinafter: *Musnad Aḥmad*.

¹²⁰ Available online at: <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html> Book 19, Number 3070.

¹²¹ Al-Bayhaqī, Abū Bakar, *al-Sunan al-Kubrā*, Beirut, Dār al-Ma'rifa, (1992), vol.10,p.139. Ibn Ḥajar, *Fath al-Bārī*, vol.1,p.74, Ḥadīth No:6270.

Priority right is one of the lawful ways to acquire ownership. The general principles of *Shari'a* make clear certainties about the authenticity and the generality of the first *ḥadīth*.

Therefore, these '*aḥādīth*' along with other arguments create the result of acquiring ownership based on priority. These '*aḥādīth*' and principles can be used to extend the right of priority to include intellectual and scientific priority.¹²² In like manner, authors are to be treated as the first acquirer of previously un-owned things and so are entitled to ownership provided by the first *ḥadīth* directly and in express terms. This *ḥadīth* thus resolves the problem of priority which is the essences of copyright.¹²³

3.3.3 The Third Evidence

Islam attaches honor and praise to "*aml*" (labor). There are many verses demonstrate its elevated position.¹²⁴ A particularly important prophetic tradition is: "Nobody has ever eaten a better meal than that which he has earned by working with his own hands..."¹²⁵ and "The best of what you would eat is that derived through your labor ..." ¹²⁶

These '*aḥādīth*' indicate clearly that the labor is the best factor which has the highest weight in *Shari'a* in acquiring ownership of something. This principle can be applied to copyright because "the author combined with his physical and mental work and time spent, all place the author in the rank of an artisan who has the right to enjoy the ownership of the rights for his work".¹²⁷

¹²² Fatāwa al-Lajna al-dā'ima, vol.3, p.188, Fatwa No.18453, dated on 12/1/1417AH, Fatwa No.18845, dated on 30/5/1417AH. Habib, Copyright under Islamic Law.

¹²³ See p.214 here.

¹²⁴ Azmi, *Intellectual Property*, p.112 and post.

¹²⁵ *Al-Bukhārī*, tr., vol. 3, p.162, Ḥadīth No.:286.

¹²⁶ Cited at Habib, Copyright under Islamic Law. In Arabic al-Tirmidhī, Ḥadīth No:1358, Vol.2, p.347.

¹²⁷ Habib, Copyright under Islamic Law.

Al-Nawawī stated that the labor by hands is the best way of earnings on which to live and the best kind of work is agriculture because it implies the complete reliance on Allah, and because it carries benefit to humans and animals.¹²⁸ It can be argued that authorship of useful things which, also has these benefits, is among the best ways of earnings.

Labor need not be restricted to where tangible products are obtained. The broad understanding of texts extends the concept of labor to authorship. The entitlement of rewards in the hereafter based on authorship of valuable things does not conflict with financial reward in this life.

This supports the principle that whoever applies mental labor in order to invent something or who has written a book, is the exclusive owner of the fruits of his labor.¹²⁹ One's work represents the fruits of a great deal of labor. A work can be characterized as the flesh and blood of an author who carried out the work to realize it.

Intellectual property can be justified and established on this theory of “*aml*” (labor) which applies to mental and physical endeavor.¹³⁰ It is obvious that intellectual creations are, at the very least, similar to other products. The combination of mental and physical labor found in these works should not diminish the recognition and the protection they deserve.¹³¹

The legitimacy and preference of the appropriation of things on the basis of one's labor as provided for by *Sharī'a* is similar to Locke's¹³² theory, which is used to justify the ownership of intellectual property.¹³³ According to this theory, each individual has an exclusive right to his own body and its actions. By mixing his labor with other actions one has legitimate grounds for appropriating things as his

¹²⁸ Ibn Hajar, *Fath al-Bārī*, vol. 4, p.381.

¹²⁹ Usmani, Muhammad, <http://www.albalagh.net>.

¹³⁰ Azmi, *Intellectual Property*, p.113 and post.

¹³¹ Al-Diraynī, *Ḥaqq al-Ibtikār*, p. 105. Azmi, *Intellectual Property*, p.125.

¹³² See Al-Diraynī, *Ḥaqq al-Ibtikār*, p. 149-159. Azmi, *Intellectual Property*, p.95.

¹³³ Bently, and Sherman, *Intellectual Property*, p.34. Drahos, *A Philosophy of Intellectual Property*, p.41 and post.

own personal property.¹³⁴ The same principle was extended by scholars to apply to intellectual works in the Western writings.

This ownership implies that only the author has the right to exchange, use, or dispose of his property in a similar way to the owner of material products. The author can dispose of his rights directly or indirectly, in consideration of a sum money or not, and conditional or unconditional within the bounds of *Sharī'a*.

3.3.4 The Fourth Evidence

Where the *Sharī'a* applies, it is not only prohibited to claim ownership of something, if it is not true, but it is also prohibited to pretend to be an owner of something.

‘Narrated Asmā’ (d.73AH/692): Some lady said: O Allah’s Apostle My husband has another wife, so is it sinful of me to claim that he has given me what he has not (in order to tease her)? Allah's Apostle said: The one who pretends that he has been given what he has not, is just like the (false) one who wears two garment of falsehood’.¹³⁵ The *ḥadīth* condemns giving false impression in social affairs, but many scholars said it is generally applicable to everyone who makes a false impression or statement of having or owning anything which in fact he has not’.¹³⁶

In order to achieve practical justice, the *ḥadīth* prohibits ‘unjust appearance’ even where there is no harm or injury caused to others. The *ḥadīth* has been held to apply to cases where the false statement is an attempt to acquire social gain among peers.

Sharī'a also condemns both unjust enrichment and unjust appearance where the

¹³⁴ Locke, John, *Two Treatises of Government*, Adler, Mortimer J. (ed), London, Britannica, Great Books of The Western World, (1991), vol.33. Chapter, v, p.30 and post.

¹³⁵ *Al-Bukhārī*, tr., vol. 7, p.109, Ḥadīth No:146. *Muslim*, tr. Ṣaddīqī, vol.III/B.,p.420. Sahih Muslim available online at: <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html>, Book 024, Number 5311, 5312.

¹³⁶ Al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim* vol. 14. p.93, Ḥadīth No:2129. Ibn Ḥajar, *Fath al-Bārī*, vol. 9. P.397, Ḥadīth No:5219.

truthfulness is not perceived. People are incapable of drawing a distinction between real and false enrichment. One can make a false claim to having wealth, knowledge, honor or piety for different reasons. In some cases, the external appearance of people and things has a great importance as well as the reality. It is therefore in conformity with the purpose of *Shari'a* to reject all false claims.

This creates an environment in which honesty is fostered, perceived and rewarded, and dishonesty and falsity is castigated and eradicated. Authors and scientists who make false claims, deny the rights of the real authors and researchers and unfairly gain the reputation of the works they have not created and these actions fall within the meaning of this *hadith*.

In its plain terms, the text broadly prohibits the giving of false appearance or making false statements. This applies to any claims made in order to obtain some benefit such as reputation, wealth, awards, and fame. In every field, there are a number of people, who appear to be qualified but who are not, trying to use such appearances for their purposes.

It is a juristic task to apply the general text's holding to all new cases. According the direct meaning of this *hadith*, it is prohibited to plagiarize a work because it gives a false impression that someone other than the real writer created the work, and to claim its rewards. It is prohibited to claim authorship of something and pass it off as one's own work, when, in fact, belongs to someone else.

It becomes a deception (a legally constructed term) that applies even if the only thing "taken" is fame of knowledge. If a person usurps someone's copyright and attributes the work to him, he makes a false statement and allegation of doing some work and claiming that he is the scholar or author while he does not deserve that reputation. An analogy is made between, on the one hand, someone who makes a false allegation or statement of having or owning anything and, on the other hand, false witness. This is because in both cases they wrong themselves, the real owners and the public.¹³⁷

¹³⁷ Ibn Hajar, *Fath al-Bārī*, vol. 9. P.397, Hadīth No: 5219. Al-Hākim, Muḥammad Ibn 'Abd Allah,

In reality, it is worse than giving a false impression to violate or infringe an author's copyright. The damage of false allegation as regards copyright, or in science or knowledge generally is more devastatingly harmful than in many other aspects of life. Indeed, a person can obtain many advantages by violation or infringement of someone's copyright when he commits deception to the public.

This understanding is supported by the *ḥadīth*: "... he who made a claim of anything, which (in fact) did not belong to him, is not amongst us..."¹³⁸ and "... he who made a false claim in order to increase (his wealth), Allah would make no addition but that of paucity, and he who perjured would earn the wrath of God."¹³⁹ Therefore, whoever claims copyright without being entitled to falls within the terms of this *ḥadīth*.

For these reasons, the *fuqahā'* condemn the practice of "*tadlīs*" describing it as "the brother of mendacity".¹⁴⁰ "*Tadlīs*" means fraud or deception, but in the terms of "*ilm muṣṭalaḥ al-ḥadīth*" it is to change or modify *ḥadīth* so as to prevent the recognition of its true chain of narrators.¹⁴¹ In the case of "*ḥadīth mudallas*", a person narrates from his contemporary and does not meet him, or met him but he did not listen to him, as if he said :(an anonymous person said...¹⁴² The scholars of the discipline of *ḥadīth* were acting as protectors or detectives to restrain cheating and eliminate dishonest narrators, describing them as charlatans and frauds.¹⁴³ There are special books which collected and exposed the names of people who were "accused or suspected of *tadlīs*".¹⁴⁴

There are many reasons why someone might commit *tadlīs*. It can be to impress

Ma'rifat 'Ulūm al-Ḥadīth, Mu'ẓm Husīn,(ed).Beirut, Dār al-Kutub al-Ilmiyya, (1397AH/1977) (Second Edition), p.103.,hereinafter: *Ma'rifat 'Ulūm al-Ḥadīth*.

¹³⁸ *Muslim*, tr. Ṣaddīqī, vol.I/A,p.49.Sahih Muslim <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html>, Book 01, Number 0118.

¹³⁹ *Muslim*, tr. Ṣaddīqī, vol.I/A,p.72. Sahih Muslim <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html>, Book 01, Number 0202.

¹⁴⁰ EI², Entry: *tadlīs*.

¹⁴¹ Al-Ṭaḥḥān, *Taysīr*, p.83. *Ma'arifat 'Ulūm al-Ḥadīth*, p.107.

¹⁴² Al-Ṭaḥḥān, *Taysīr*, p.80. *Ma'arifat 'Ulūm al-Ḥadīth*, p.108,109.

¹⁴³ *Ma'rifat 'Ulūm al-Ḥadīth*, p.103.

¹⁴⁴ EI², Entry: *tadlīs*.

one's peers by presenting himself in a series of chain of narrators.¹⁴⁵ However, equally it can be argued that many forms of infringement of copyright are *tadlīs*.

3.3.5 The Fifth Evidence

The concept of copyright has met huge support for ethical reasons. There are 'ahādīth which clearly prohibit making a proposal of sale if one's brother has already made a proposal regarding the same thing.¹⁴⁶

The first is "Narrated Ibn 'Umar (d.74AH/693): the Prophet decreed that one should not try to cancel a bargain already agreed upon some other persons (by offering a bigger price)."¹⁴⁷ Another ḥadīth is that, "Abū Huraira (d.57AH/676) reported Allah's Messenger as saying: A Muslim should not purchase (in opposition) to his brother."¹⁴⁸

Moreover, Abū Huraira reported that the Prophet said: "Don't nurse grudge and don't bid him out for raising the price and don't nurse aversion or enmity and don't enter into a transaction when the others have entered into that transaction and be as fellow-brothers and servants of Allah. A Muslim is the brother of a Muslim. He neither oppresses him nor humiliates him nor looks down upon him... All things of a Muslim are inviolable for his brother in faith: his noble blood, his wealth and his honor".¹⁴⁹

The prohibition of these actions is justified by the mere fact that they provoke injustice, enmity and hatred in the community, and they deny the right of priority. These negative consequences can be induced by the infringement or violation of copyright. By analogy, it is prohibited to perform any act that would amount to an

¹⁴⁵ Al-Ṭahhān, *Taysīr* .p.83. Kamali, *Principle of Islamic Jurisprudence*, p.74.

¹⁴⁶ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.198.

¹⁴⁷ *Al-Bukhārī*, tr., vol. 7, p.56, Ḥadīth No.:73

¹⁴⁸ Sahih Muslim <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html>, Book 010, Number 3619.

¹⁴⁹ Sahih Muslim <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html>, Book 032, Number 6219.

infringement or violation of copyright such as the reproduction or the use of a work or a substantial part of a work for the commercial purposes by other than its real owner without his consent.

What follows from the above discussion is that, it is forbidden claim or use copyright, which one does not own. This means that copyright should be treated not only as morally fundamental, but also as legally enforceable. *Sharī'a* attaches importance to the moral aspect as well as to the legal aspect.

3.3.6 The Sixth Evidence

By using evidence from *Sharī'a* and its principles such as honesty, the discipline of *ḥadīth* has been well established over time. The discipline of *ḥadīth* has two parts; “*matn*” (the text) and “*isnād*” (the chain of the narrators).¹⁵⁰ The concern of *isnād* is one of the religious duties and noble characters of Islamic civilization.¹⁵¹ As we have seen, the concern of *isnād* is an application of the obligation of honesty.¹⁵²

The approval of an *ḥadīth* is dependent upon the analysis of the validity of both its *isnād* and *matn*. There is a particular established order of rules according to which *'aḥādīth* should be dealt with to examine their authenticity. The scholars of *ḥadīth* developed a list of factors which need to be considered when deciding whether an *ḥadīth* is authentic or not. The rules regarding the discipline of *ḥadīth* enable scholars to check how an *ḥadīth* has come down to them by providing a series of the names of the narrators and the transfer of the onus of responsibility of their references.

The concern and need for scientific honesty started very early in Islamic civilization. Sufayān al-Thawrī (d.161AH/778) said that “attribution of a useful

¹⁵⁰ EI², Entry: *Isnād*.

¹⁵¹ *Ma'rifat 'Ulūm al-Ḥadīth*, p.6. Naṣr, al-Ṣiddīq Bashīr, *Ḍawābiṭ al-Riwāya 'ind al-Muḥaddithīn*, Tripoli, Manshūrāt, Kulliyat al-Da'wa, (1412AH/1992) (First Edition), p.59. Hereinafter: *Ḍawābiṭ al-Riwāya*.

¹⁵² See p.122 and post.

quotation to its originator is an aspect of honesty and gratitude for knowledge, while ignorance of this attribution is kind of dishonesty and ingratitude".¹⁵³

Al-Shāfi'ī explained that "He who seeks learning without references [*Isnād*] is like him who gathers firewood by night, he may carry a bundle of firewood in which there is a snake that will bite him without his being aware that it is there".¹⁵⁴ "Ibn al-Mubārak (d.181AH/797) said: "*isnād* is a part of the faith, without it, anyone might say whatever he wished".¹⁵⁵

Ibn Ḥazm (d.456AH/1064) confirmed that "the knowledge of *ḥadīth* is an Islamic established science exclusive to Muslims regarding the Prophet's traditions which has no counterpart in other civilizations, and it is not possible for a sinner to add any alteration ".¹⁵⁶

Islamic civilization is famous for being the first to adopt measurements for recording in scientific methods. One of the most notable achievements in the history of Islamic civilization have been that the knowledge of *ḥadīth* and '*ilm muṣṭalah al-ḥadīth*, which were compiled in the collections. A wide variety of experimental techniques plus a working knowledge of '*aḥādīth* are crucial tools in establishing the authenticity of any *ḥadīth*. Techniques were developed to pursue and ensure the *ḥadīth* material as regards their attribution to the Prophet.¹⁵⁷

Therefore, *isnād* can be seen as the root of what is known as author's right of attribution and paternity.¹⁵⁸ As we have seen, *isnād* was used to combat false attribution. Similarly, this objective (combat of false attribution) is required throughout contemporary copyright.

There are rules developed by scholars that govern reception, narration,

¹⁵³ Al-Ḥaṭṭāb, Muḥammad b. Muḥammad, *Mawāhib al-Jalīl fī Sharḥ Mukhtaṣar Khalīl*, Damascus, Dār al-Fikr ,(N.D),vol.I,p.4,hereinafter: al-Ḥaṭṭāb.

¹⁵⁴ Zafar, Abdul Rauf, *Transmission of Ḥadīth and Biography, Islamic Quarterly*, Vol. xxxv.No.2, London, The Islamic Culture Centre, AH1411/ 1991. p.119.

¹⁵⁵ Ibdī, p.118. *Ma'rifat 'Ulūm al-Ḥadīth*, p.6. Al-Ṭaḥḥān, *Taysīr*, p.181.

¹⁵⁶ Ibn Ḥazm, Abū Muḥammad 'Alī, *al-Fiṣl bayn al-Ahwā' wa al-Niḥal*, Beirut, Dār al-Kutub al-Ilmiyya, (1996) (First Edition), vol.1, p.336.

¹⁵⁷ Al-Ṭaḥḥān, *Taysīr* .p.15.

¹⁵⁸ Al-Najjār, p.6.

attribution and documentation of *ḥadīth*.¹⁵⁹ One of these rules is that “Every student, before utilizing any verbal or written material, had to obtain it through the proper channel otherwise it is considered to be a forgery or theft of material.”¹⁶⁰

There are eight ways of “*taḥmmul al-‘ilm*”¹⁶¹ by which one can receive or narrate *aḥādīth*.¹⁶² Students must follow special conduct and rules to gain the right to convey or narrate *aḥādīth*. *Ijāza* is one of these ways to obtain the license of narration.¹⁶³

Ijāza lexically means permission, license, authorization or endorsement. In terminological terms it means a diploma, certificate or accreditation awarded by a scholar to his student to narrate books (whether they are his works or which he has the authority to narrate).¹⁶⁴ The certificate that records this permission is called *ijāza*.¹⁶⁵

Ijāza is a system of narration, handing down *ḥadīth* and knowledge from any book through permission. If someone wishes to obtain a *ḥadīth*, book of *aḥādīth* or any book one learns from a scholar, who already had the chain of authorities to transmit a book from each person in that chain backdated to its original author. *Ijāza* contains details of the places, dates and the attendance of class devoted to a particular book.¹⁶⁶ There is a comprehensive analysis of these issues to minimize the level of uncertainty as regards the narration of *ḥadīth*.

The methodology of *isnād* is not only for “the texts of *ḥadīth*, of *fiqh* or of “*tafsīr*” (commentary on Qur’ān), but also theological, mystical, historical and philological works, and even literary collections, of both prose and poetry”¹⁶⁷ This rigorous system is designed to ensure the scientific honesty and to be exhaustively

¹⁵⁹ Azmi *Ḥadīth Literature*, p.183 and post.

¹⁶⁰ Ibid, p.204. ‘Abd al-Mannān, Ḥassān, *al-Sariqāt al-‘Ilmiyya*, Beirut, Dār Ibn Ḥazm, (1996) (First Edition), p.53, hereinafter: *Al-Sariqāt al-‘Ilmiyya*.

¹⁶¹ Azmi *Ḥadīth Literature*, p.183 and post.

¹⁶² Al-Ṭahhān, *Taysīr*, p.158.

¹⁶³ EI², Entry: *Ijāza*. *Al-Mawsū‘a al-Fiqhiyya*, vol.1, p.303, *ijāza* entry. Ṣāliḥ, *al-Ijāza*, p.99 and post. Al-Ṭahhān, p.156 and post.

¹⁶⁴ Al-Ṭahhān, *Taysīr*, p.160. EI², Entry: *Ijāza*.

¹⁶⁵ Shalaby, p.147.

¹⁶⁶ EI², Entry: “*Ijāza*”.

¹⁶⁷ Ibid. Shalaby, p.149.

precise.

In case of conducting oneself outside of or contrary to this system, the punishment is harsh. The label of dishonesty is widely disseminated in public and in academic circles. The punishment was defamation in derogatory terms such as infringer, cheater, rapist, thief and pretender etc.¹⁶⁸ Ibn al-Qayyim (d.751AH/1350) described them as thieves who are using their pens and using their appearance.¹⁶⁹ This widespread and popular usage of the term of defamation indicates a generally held belief that these rules are obligatory, well established and common.

It is reported that the Prophet said:” May Allah brighten a man who hears a tradition from us, gets it by heart and passes it to others as he hears it”.¹⁷⁰ In another *ḥadīth* the Prophet taught one of his Companions a special prayer before sleep. The Prophet asked him to repeat it to be sure that he learned it well. The Companion changed a word by a synonym. The Prophet enunciated it to him again with the original word.¹⁷¹ Commenting on this *ḥadīth* Ibn Ḥajar stated that the accuracy can be achieved if the narrator preserves the exact wording as heard the first time especially when there is uncertainty in the expression by using alternative words.¹⁷²

There is an emphasis on keeping the same wording as heard the first time accurately. There is an interesting difference regarding the permissibility or otherwise of narrating a *ḥadīth* by using synonyms. A narrator can, arguably, express it in similar words provided he has full knowledge of the Arabic language to enable him to do so. However, no one is allowed to amend or correct any written material with his own words. If he cannot remember the word exactly, he can use similar words, but with a precise indication that a quotation is to the best of his knowledge.¹⁷³ Usually a reader finds variant narrations or readings of one *ḥadīth* in

¹⁶⁸ Abū Zayd, *Fiqh al-Nawāzil*, p.103. Habib, Copyright under Islamic Law. *Al-Sariqāt al-‘Ilmiyya*, p.41 and post.

¹⁶⁹ See Abū Zayd, *Fiqh al-Nawāzil*, vol.2, p.100.

¹⁷⁰ *Nayl al-Awṭār*, Ḥadīth No: 1. vol.1, p.13.

¹⁷¹ Ibn Ḥajar, *Fath al-Bārī*, vol. 11. p.135. Ḥadīth No: 6311. *Al-Bukhārī*, tr., vol. 8, p.217, Ḥadīth No: 323.

¹⁷² Ibn Ḥajar, *Fath al-Bārī*, vol. 11.p.135. Ḥadīth No:6311. *Ḍawābiṭ al-Riwāya*.p.152 and post.

¹⁷³ *Al-Ṭaḥḥān*, *Taysīr*, p.172.

the collections of *ḥadīth*.

Also, as part of this methodology there are detailed rules to correct errors or misspellings, if they appear in the *ḥadīth* itself.¹⁷⁴ The scholars set out clearly their bibliographies in the beginnings or the endings of their books.¹⁷⁵ They are concerned with clarity and credibility, when they use quotations or when they move between each quotation and their own words.¹⁷⁶

All these rules from *'ilm muṣṭalah al-ḥadīth* are intended to protect scientific honesty, precision and an author's moral rights. These rules can be applied to contemporary situations and refined in order to provide a strong basis for the recognition of copyright.

3.3.7 The Seventh Evidence

There is a widespread and deep conviction in *Sharī'a* that responsibility of actions should accompany benefits. The true connection of these two concepts aims at confirming justice.

It is reported that the Prophet said: "*al-kharāju bil-ḍamān*".¹⁷⁷ *Kharāju* means income, return, profit, gain¹⁷⁸ and *ḍamān* means liability, responsibility, charge.¹⁷⁹ It means that the gaining of profits from any property is in consideration of assuming the risk of its damage, loss or liability. This *ḥadīth* became a leading legal maxim.¹⁸⁰ This ruling is important because, the owner of an object is entitled to all

¹⁷⁴ Azmi *Ḥadīth Literature*, p.196.

¹⁷⁵ Ibid, p.205. Al-Ḥalwājī 'Abd al-Sattār, *Dirāsāt fī al-Kutub wa al-Maktabāt*, Jeddah, Maktabat Miṣbāh,(1988) (First Edition), p. 33. Hārūn, 'Abd al-Salām, *Qutūf Adabiyya*, Cairo, Maktabat al-Sunna, (1988) (First Edition), p.22, hereinafter: Hārūn.

¹⁷⁶ Azmi *Ḥadīth Literature*, p.203. Al-Ḥalwājī, *Dirāsāt fī al-Kutub wa al-Maktabāt*, p. 33. 136. Hārūn, 'Abd al-Salām, *Tahqīq al-Nuṣūṣ wa Nashruhā*, Cairo, Maktabat al-Sunna,(AH1410) (Fifth Edition), p.47.

¹⁷⁷ Ibn Hajar, *Bulugh al-Maram*, p.286. It is also available online at: <http://www.muslimaccess.com/sunnah/hadeeth/abudawud/023.html>, Ḥadīth No: 3501.

¹⁷⁸ EI², Entry: *Kharāju*. *Al-Mawsū'a al-Fiqhiyya*, vol. 19, p.36. *kharāj* entry.

¹⁷⁹ EI², Entry: *ḍamān*. *Al-Mawsū'a al-Fiqhiyya*, vol. 28, p.191. *ḍamān* entry.

¹⁸⁰ The Mejjelle, p. 14, Article No. 85. Ḥaydar, vol.I, p.88, article No.85 article No.87, and article

profits arising from it as well simultaneously assuming liability for all risks related to it.

For example, if a buyer returns a commodity to the seller for any reason, the seller cannot claim profits from the buyer during the period from the sale up to the time of return. The reason is that during this period, only the buyer is liable for all risks related to the goods. According to this rule, the owner has a right to retain the fruits of his property, corresponding to the fact that he becomes the loser if the property is subject to any damage or loss.

On balance, besides the advantage of being an owner of something, including the entitlement of its fruits, he must bear its risks. It is clearly right that an author assumes complete religious and legal responsibility for all injury or liability arising from his work.¹⁸¹ This *ḥadīth* and maxim can be used to similar effect in that a copyright represent economic value that should be given only to authors.

3.4 Summary

Sharī'a principles are not inherently unsuited to the recognition and protection of copyright. In fact, researchers are recruited to use and develop these principles in a sufficient and systemic manner to reveal whether there is room for copyright in *Sharī'a* or not.

Following the order of research reported in the *ḥadīth* of Mu'ādh, Qur'ān is the standard starting-point, the principal source of *Sharī'a*, for a researcher pursuing and examining guidance on copyright. After the consultation with the Qur'ān, one moves on to the Sunna.

There is not a single agreed text that argues directly and specifically for copyright but there is a whole range of evidence each piece of which argues for copyright in a different way. In establishing a correct judgment regarding copyright, research can rely on the actual wording of a verse rather its historical occasion

No.88.

¹⁸¹ Al-Būḥārī, *Qaḍāyā Fiqhiyya Mu'āṣira*, p.82. Shubīr, *al-Mu'āmalāt al-Māliyya*, p. 49.

without there being any arbitrariness or uncertainty. The first part of this chapter introduced pieces of five pieces of evidence from Qur'ān.

Firstly, the principles of “*amāna*” (honesty, trust) and “*‘adl*” (justice) occupy significant positions in *Shari‘a*. The Qurā’n requires honest and just dealing with everyone on everything. The word *amāna* means trust, which is a general obligation binding a person to deal with every right and property justly. This principle embraces copyright and reserves for authors praise, honor and profit from authorship.

If a person uses another’s writing without sufficient acknowledgment and attribution, and even, passes off that work as his, he commits a kind of “*khiyāna*” (mistrust), “*ghish*” (deception), “*ta‘addī*” (transgression) and “*ghaṣb*” (usurpation). It can be argued that copyrights are trusts that must be acknowledged and returned to the authors and violation of copyright is against honesty and justice.

Secondly, according to Qur’ān, one is not allowed to diminish copyright which is just an intangible form of property. There is no doubting that piracy and plagiarism amount to diminution of copyright. It can be argued that a violation of copyright is a kind of educational and economic oppression, which is prohibited.

Thirdly, another Qur’ānic verse condemns obtaining reputation from work or knowledge a person has not done. Fourthly, a Qur’ānic verse referred to condemn and prohibit making false claims, expressing a general ruling that applies to all situations, even if the only thing claimed is knowledge or authorship. This supports the notion of copyright in that only an author shall have the right to claim authorship of the work. Fifthly, a Qur’ānic verse states a general ruling that commands enjoining right deeds and forbidding wrong actions in all situations including the approach to dealing with copyright. The violation or infringement of copyright is clearly against this central principle from which the religion is based, namely, on sincerity and advice. The outcome is that the interpretation of these verses provides a basic standard of recognition of copyright.

After presenting the significant status of knowledge and scholars in *Shari‘a* the second part of this chapter introduced some materials from *ḥadīth* and *‘ilm muṣṭalah*

al-ḥadīth calling for approval of copyright. This position is not confined only to a religious knowledge but it includes every branch of knowledge which is beneficial for human beings.

The first *ḥadīth* provides that the author has the right to have his work attributed to him and regards knowledge as a type of ongoing work which gives its owner rewards in the hereafter. This does not conflict with financial return in this life. The second *ḥadīth* establishes the general rule of acquiring ownership by priority right and, therefore, the principle of the right of priority can be applied directly to copyright.

The third *ḥadīth* prohibits giving a false impression and this is applicable to untruthful claims of authorship of another's work. "Unjust appearance" is prohibited even where there is no apparent harm or injury caused to others. Therefore, it is more so if it leads to "unjust enrichment". Scholars of the discipline of *ḥadīth* in particular condemn the practice of *tadlīs* in which *ḥadīth* is changed or modified to misrepresent who is in the chain of narrators.

The fourth *ḥadīth* stated that labor which one's own hand is the best way of earning a living and this can be applied to copyright because author applies his physical and mental labor to create a work. Fifthly, there is a group of '*aḥādīth* prohibiting the making of a proposal of any contract if another brother has already made a proposal for the same thing. This is to prevent injustice, enmity and hatred among community.

Sixthly, the knowledge of '*ilm muṣṭalaḥ al-ḥadīth*, provides a set of rules and techniques according to which '*aḥādīth* should be received, narrated and how to correct errors or misspellings if those errors appear. These rules are used to examine and pursue the authenticity of '*aḥādīth* and their attribution to the Prophet. In this discipline, there is *ijāza* in which a scholar gives permission to his student to narrate *ḥadīth*. This principle was applied to all knowledge, materials and branches to ensure clarity and credibility of any person or book.

Finally, the *ḥadīth* and leading legal maxim "*al-kharāju bil-ḍamān*" (the gaining of profits from any property is in consideration of assuming the risk of its

damage, loss or liability) can be applied to include copyright, because copyright represents economic value that should be given to authors who also assume all responsibilities arising from their works. The common thread running through these pieces of evidence from Qur'ān and the *ḥadīth* supports the idea of copyright.

Chapter Four

Evidence of Copyright from the Secondary Sources

4.1 Introduction

Having explored the original sources, the work presented in this chapter is devoted to the investigation of copyright in the secondary sources of *Sharī'a*, namely; *qiyās*, *maṣlaḥa* and *'urf*.

These sources are justified, because Qur'ān and Sunna obviously do not contain a full or ready draft of rulings for all new cases and norms of life. Therefore, scholars exercise their own search and judgment on new cases when evidence is not found in the original sources directly.

This chapter will start first by applying the method of *qiyās* using several cases found in *Sharī'a*. Subsequently, *maṣlaḥa* and *'urf* will be used as evidence for supporting copyright. The chapter will conclude by employing some *al-Qawā'id al-Fihiyya* "legal maxims" to our subject matter.

4.2 Evidence of Copyright from *Qiyās*

According to the majority of *fuqahā'*, *qiyās* is the fourth standard basis on which Islamic Law is built. The literal meaning of *qiyās* is measuring and comparison. "Technically, *qiyās* is the extension of a *Sharī'ah* value from an original case, or *aṣl* to a new case, because the latter has the same effective cause as the former. It is by virtue of the commonality of the effective cause, or *'illah*, between the original case and the new case that the application of *qiyās* is justified."¹

¹ Kamali, *Principle of Islamic Jurisprudence*, p.197. El², Entry: *qiyās*, also see Izz Dien, *Islamic Law*, p.52-63.

As a general rule, there is overwhelming evidence from Qur'ān and Sunna which instruct people to think, consider and reflect on things and praise those who think and reflect.

For example, verses state: "...are signs for a people that are wise"² "He granteth wisdom to whom pleaseth; and who he to whom wisdom is granted receivth indeed a benefit overflowing; but non will receive admonition but men of understanding"³ and "Verily in this is a Message for any that has a heart and understanding or who gives ear and earnestly witnesses (the truth)"⁴. Therefore, the authority for *qiyās* is derived from these verses because it is a kind of reflection and reasoning.

In the textbooks of *uṣūl al-fiqh* it is also widely recognized that the common authority for *qiyās* is the verse: ", take warning, then, O ye with eyes (to see) "⁵. All these verses use the application of the meanings of the text being examined and apply those meanings to other situations, that is, by *qiyās*. It is a necessary juristic tool to understand and promote Qur'ān's message.

From the Sunna, there is the well known prophetic tradition of Mu'ādh stating: "I shall do my best to form *ijtihād* an opinion and I shall spare no effort."⁶ *Fuqahā'* consider that *ijtihād* includes *qiyās*, al-Shāfi'ī stated that *ijtihād* and *qiyās* refer to the same substantive source of law.⁷

Also, it is related that " 'Umar Ibn al-Khaṭṭāb said to the Prophet: I have done a big deed; I kissed while I was fasting. He said: What do you think if you rinse your mouth with water while you are fasting, I said to him: There is no harm in it. He said: Then what? ⁸ The Prophet made *qiyās* between rinsing the mouth with water while fasting and kissing while fasting. Some *fuqahā'* regard the answering of the

² Qur'ān .2.v. 165.

³ Qur'ān .2.v. 269. Qur'ān .3.v. 7.

⁴ Qur'ān .50.v. 37.

⁵ Qur'ān .59.v. 2.

⁶ *Sunan Abū Dawūd*, <http://www.muslimaccess.com/sunnah/hadeeth/abudawud/024.html> , Book 24, Number 3585.

⁷ Al-Shāfi'ī, Muḥammad Ibn Idrīs, *al-Risāla*, translated by Majid Khadduri, Cambridge, UK, The Islamic Texts Books Society, (1987) (Second Edition) p.288.

⁸ *Sunan Abū Dawūd*, <http://www.muslimaccess.com/sunnah/hadeeth/abudawud/013.html>, Book 13, Number 2379.

question in this way carries in its formulation guidance on the usage of *qiyās*.⁹

It might be said that the clearest support for the legitimacy of *qiyās* comes from the practice of the Companions of the Prophet who applied it in many cases.¹⁰ By *qiyās* a jurist adopts the meanings of texts which had the authority to create a ruling in the first place. It suggests that the Islamic Law is capable of being developed to meet new circumstances by *qiyās*. It creates the possibility of a knowable interpretation of text, and which can be applied in a non-arbitrary fashion to new cases.

It can happen that a statement applied in its special context may also have been meant to be taken as general statement. The process of *qiyās* can produce many equally valid applications which, avoids the imperfection and narrowness that would follow if only one interpretation was meant. To some extent, the reliance on *qiyās* is similar to the reliance on precedents in common law, where a court creates a legal principle that applies to subsequent cases with similar issues. *Fuqahā'* start with decided cases as their source, using them as general statements of principle and work out the law from there.

The majority of *fuqahā'* use *qiyās* as a means of applying the law to new cases which are not yet available. Only a minority of *fuqahā'* point to the invalidity of using *qiyās*.¹¹

Fuqahā' held to the fact that the sources of *Sharī'a* are definite in their quantity, while the events of life are indefinite. In other words, the texts of *Sharī'a* are final, while people's cases are limitless. The limited texts which are revealed to guide humankind cannot cover every particular case in a detailed manner. Thus, for the determination of rulings on new cases, we require the applicability of the principles of *Sharī'a* to new cases in an analogous way.

Qiyās has four essential factors; "*asl*" (the original case) recorded in the text,

⁹ Al-Zarqānī, *Sharḥ Muwaṭṭa'*, Ḥadīth No: 654, Vol.2, p. bb. Sha'bān, p.120.

¹⁰ Sha'bān, p.126.

¹¹ Al-Zarkashī, Badr al-Dīn, Muḥammad b. Bahādir, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, Dr 'Abd al-Sttār Abū Ghudda, (ed.) Kuwait, the Ministry of Awqāf and Islamic Affairs, (1413AH/1992) (Second Edition) vol.1, p.16. Sha'bān, p.117. Al-Zarqā, *al-Madkhal*, vol.1.p.79.

“*far*” (a new case such as copyright), “*illa*” (the effective cause) of the ruling, which exists exactly in the original and the new case and “*ḥukm*” (the ruling) given to the original case in the text and considered to be applicable to the new case.¹² *Illā* is similar to the Latin legal phrase “*ratio decidendi*”, which means “the reason for the decision”.¹³

The conditions required to apply *qiyās* correctly can be summarized as follows. The original case “*aṣl*” must be found in Qur’ān and Sunna. There is disagreement between *fuqahā’* if it is found in *ijmā’* or *qiyās*. The original case must not be extraordinary as *qiyās* cannot be drawn on exceptional rulings or considerations. *Qiyās* is dependent upon substantial equality between “*aṣl*” (the original case) and “*far*” (the new case).¹⁴ The “*illa*” of the “*ḥukm*” of the original case must be accessible to human rationale. It is necessary to discover the exact reason for the ruling. The effective causes of ritual performances such as the number and times of prayers cannot be identified.¹⁵

As for sound analogy, we must appeal to texts according to the extent to which we recognize their effective causes to be able to ascertain a known and previous ruling to a new case which has not any particular ruling. *Qiyās* must be based on a form based on where it drew its authority from: Qur’ān, Sunna and *ijmā’*. The use of the source of *qiyās* is regulative and constructive; therefore, the task of legislation can never be brought to termination. By this method of representing law, *Sharī’a* adapts itself to changed conditions or in response to new factors.

In addition, copyright needs consideration not only by the technical method of *qiyās* in those cases, but also through *ijtihād* as regards the sources of *Sharī’a*. It has been sometimes impossible to achieve exhaustively exact uniformity between every two cases where *qiyās* is applied. For example, the two cases which came for *qiyās* in the *ḥadīth* of ‘Umar regarding fasting were not exactly alike. Rinsing water in mouth does not equal a kiss but there is some similarity in that both are considered

¹² Kamali, *Principle of Islamic Jurisprudence*, p.200. El², Entry: *qiyās*.

¹³ Martin, *Oxford Dictionary of Law*, p.381.

¹⁴ Kamali, *Principle of Islamic Jurisprudence*, p.206. El², Entry: *qiyās*.

¹⁵ *Ibid*, p.203.

to be the sign of the beginning of something breaking the fast; sexual intercourse.

There are many rulings cases in which *qiyās* can be employed in extracting and determining the judgment of copyright. For the purposes of exposition, each case is examined separately but it may well be that a combination of all of them proves to the legitimacy of copyright.

4.2.1 The case of cultivation of barren land

Given the high position of “*aml*” (labor), it is reasonable to grant ownership rights to those who cultivate waste land.¹⁶ There are *’ahādīth* dealing with the issue of acquiring ownership of barren land which can be used by the process of *qiyās*. It is reported that the Prophet said: “If anyone brings barren land into cultivation, it belongs to him, and the unjust vein has no right”.¹⁷ “He who cultivates land that does not belong to anybody is more rightful (to own it)”¹⁸ and “If anyone brings barren land into cultivation, it belongs to him,..”.¹⁹

These *’ahādīth* support each other and establish clearly that cultivation of barren land is a rightful method of acquiring ownership. The person who revived a piece of waste land was lawfully the person who owned it.²⁰ The texts use the word “*aḥya*” which means give life to or restore to life. *Fuqahā’* use the term “*iḥiyā’ al-mawāt*”, which means the revival of the dead.²¹

The effective cause of this entitlement and ownership is bringing life, survival and productivity to the dead land. This gives to the first person who brings anything to life a high degree of priority of it, over others. *Sharī’a* clearly explains that

¹⁶ See this thesis, p.139.

¹⁷ <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html> Book 19, Number 3067: In Arabic see *Sunan Abū Dawūd*, Ḥadīth No: 3073, vol. 3, p.453. Al-Zarqānī, *Sharḥ Muwaṭṭa’*, Ḥadīth No: 1495, vol.4, p. 37. Al-Tirmidhī, Ḥadīth No: 1378, vol.2, p.364.

¹⁸ *Al-Bukhārī*, tr., vol.3, p.306, Ḥadīth No: 528. <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html> Book 19, Number 3070:

¹⁹ *Musnad Aḥmad*, vol.3, p.382 and post.

²⁰ Ibn Sallām, p.279 and post.

²¹ EI², Entry: *mawāt*. The Mejlle.p.207.

ownership of barren land is based on *iḥiyā'* (because it makes the land useful and productive) and an analogy can be drawn with intellectual works which have a similar effective cause. "Thus, the creative act of making something useful is recognized as a means of acquiring ownership even of real property."²² The analogy is supported by the general principle of right priority, which is affirmed by many sources of *Sharī'a*.

The criterion of what constitutes ownership in barren land can be found in copyright. The concept of "*iḥiyā'*" can be found in authorship. Intellectual works actually breathe new life into a society. There are remarkable similarities between physical revival and intellectual revival. The spreading of knowledge is an obvious revival undertaking in a society. New scientific discoveries change the world and people's views.

Similarly, any new study or work, which has not yet been identified as such before, deserves recognition and should also belong to its real owner. Both of these initiators introduce into the existence a new work, which is available to the public by interactive means. Renaissance of the arts and sciences results in activating intellectual life in general and generates advancements.

The similarity is that both of them by their effort brought previously un-owned and unused things into use. It is common knowledge that ideas will move about in the mind, unless and until those ideas have been captured and produced by someone. As a result of this similarity, the judgment appears to be the same. These concepts are a broad interpretation and application of the principle.

A single work of valuable knowledge may be recollected for decades. Many successful works brought a life of knowledge to those who learned about it. A farmer, who plants a tree that provides shade and beauty for people, is similar to an author who writes a book which provides knowledge or enjoyment. One may consider here the difference between abstract and practical meaning. However, the difference must not conceal the correct application of *qiyās*. It is clear that, apart

²² Jamar, p.1083.

from difference in physical embodiment there is no essential difference in principle.

As part of the correct application of *qiyās* the criterion is not exceptional, but it is applicable to new cases. It appears that the grant of ownership rights is based on a well-defined, common, visible and rigid criterion. That is, the living, survival of land. It is not difficult to subject this measure to examination.

The principle of being the rejuvenator of land, work or study who acquires ownership through such rejuvenation, is established in order to achieve a degree of widespread justice and certainty in transactions and this is of great importance for *Sharī'a*. This principle encourages and respects one's labor. The rationale of living, survival and renaissance can be extended to include the editing and publication of manuscripts and is not confined only to the revival of land.

The *'ahādīth* do not seem to indicate that bringing to life, survival or revival should only be applied to cases involving land. The objective of legislation in conferring ownership on barren land by its revival is the public interest and to encourage individual and economic efficiency. This supports the possibility of application of *iḥiyā'* to intellectual works.

An analogy can be drawn between rejuvenation of barren and uncultivated land and rejuvenation of some idea as it adopts the rationale of the text. The rediscovery and presentation of ancient writings that have lain dormant for hundreds of years and in some cases unknown work is a kind of revival.

It might be argued that *qiyās* between the revival of barren land and the revival of an idea is "*qiyās ma' al-fāriq*",²³ which is not valid according to *uṣūl al-fiqh*. Because there is no equivalence between the two cases. The very foundation of this mode of ownership which can be applied to copyright is this, namely, that the owner is the one who gives life to property.

It seems that *qiyās* between the revival of a barren land and an idea is rather *qiyās al-awlā*.²⁴ "*Illa*", which is giving life to dead thing, is present in authorship

²³ Kamali, *Principle of Islamic Jurisprudence*. p.206.

²⁴ Kamali, *Principle of Islamic Jurisprudence*. p.214 and 215.

more than in cultivation of barren land. The cases share not only a common cause (the giving of life to something whether physical or immaterial) but commercial value.

As the first legal maxim suggests “A judgment is in accordance with what the object of an act may be”.²⁵ Copyright is justified because it is the means of making a livelihood similar to cultivating land. *Sharī'a* always gives significance to intrinsic meanings more than forms or words.

In terms of property, copyright seems more subject to controversy than other forms. In general, there is a preference for physical property over intellectual property, because it is more present and it is often more highly valued than intellectual property. Moreover, the first *ḥadīth* prohibits any kind of intentional interfering, taking or using of such property without permission. The prohibited activity is, literally, oppression. It is a persuasive example as far as newer classes of property, such as copyright, is concerned. The *ḥadīth* shows the sanctity of ownership. And *qiyās* establishes ownership of a copyright. Infringement, therefore, of copyright should be viewed as an illegitimate action.

4.2.2 The case of prohibition of listening without permission

According to *Sharī'a* what should be taken as property or a right is that which has been obtained lawfully. As a general rule, *Sharī'a* requires lawful means for producing property, legal status, situation or evidence. It is a dominant position that, the means as well as the ends must be legitimate.

There is plenty of evidence in *Sharī'a* which affirms this principle. *Sharī'a* imposes restrictions that bar people from using any right or property without permission from its owner. For example, there is a Qur'ānic verse addressed to the believers not to eavesdrop.²⁶

Moreover, it is reported that the Prophet said: “..., If anyone listened to the talk

²⁵ *The Mejelle*, p.3, Article 1.

²⁶ Qur'ān .49.v. 12.

of some people, when they do not like him (to listen) or they run away from him, then molten lead will be poured into his ears on the Day of Resurrection".²⁷

The meaning of this *ḥadīth* is that, a person, who secretly listens to the private conversations of others, where they would not like him to listen, is committing sin. It is punishable on the Day of Resurrection by the pouring of molten lead into his ears.

This *ḥadīth* impresses upon the seriousness of eavesdropping; the considerable respect for privacy and that the acquisition of information and ideas must be lawful. The penalty in this world for that is not prescribed in the *ḥadīth*. It is punishable, therefore, under discretionary powers under the wide category of *ta'zīr*.

In addition, the Prophet said: "Meetings are confidential except in three instances: those for the purpose of shedding blood unlawfully, or committing fornication, or acquiring property unjustly."²⁸

The *ḥadīth* imposes restrictions that bar the people involved in meeting from disclosing that meeting unless it relates to crimes such as homicide, fornication or usurpation of other people's property. In a similar manner, this right provided in this *ḥadīth* may be extended to copyright in that authors have not given permission to hackers or unauthorized publishers to narrate, use, produce or copy their works for the public.

This *ḥadīth* provides authors privacy right and control over their works and this is part of copyright. It also, provides them, generally with a right to authorize, select or prohibit the audience and the distribution of their works.²⁹ Therefore, an author is entitled to determine his works' course. This implies that authors have right over the disposition of their works. The hacker of copyright can be seen as unauthorized person who secretly copies or records works of authors in cases where they do not wish him to do that. Publication of copies of a work over and above the agreed number can be regarded as an unlawful action because the author did not intend for

²⁷ *Al-Bukhārī*, tr., vol. 9, p.134, Ḥadīth No: 165.

²⁸ *Sunan Abū Dawūd*, <http://www.muslimaccess.com/sunnah/hadeeth/abudawud/041.html>, Book 41, Number 4851. In Arabic see *Sunan Abū Dawūd*, Ḥadīth No: 4869, vol. 3, p.268

²⁹ See Azmi, *Intellectual Property*, p.76 and post.

those additional copies.

This conforms to Qur'ānic verses which command the seeking of permission before entering another's house.³⁰ The Prophet stated the reason: "Asking for permission to enter has been enjoined so that one may not look unlawfully".³¹ It is also reported that the Prophet said: "He who sees a *kitāb* of his brother without his permission, sees Hell-fire".³² In Arabic, "*kitāb*" means a book or a letter. Some scholars have stated that the principle which this *ḥadīth* laid down is general, so that nobody has any right to read a book or letter without its owner's permission.³³

Similarly, this reason is applied to copyright, because it is kind of property. The one who views intellectual works without permission can be considered as an unlawful intruder. In many cases, the mere sight by an expert of a work is sufficient to copy and exploit it or appropriate a substantial part of it. Also, some works lose their privacy or inspiration once they are shown.

Further, it is beyond any doubt that permission is needed for publishing a book even more than reading it. *Qiyās* here is a kind of "*qiyās al-musāwī*".³⁴

According to these verses, following the general "*maqāṣid*" (objectives) of *Sharī'a* and combining these *aḥādīth*, it can be argued that no one should use, enjoy or benefit from an intellectual work without the lawful permission of its owner.

This generalization is illustrated in the *fatwa* of Aḥmad (d.241AH/855), when he was asked whether a person, who found a paper, containing a group of *aḥādīth*, can copy then return it.³⁵ The answer is that, he should take permission then copy it. Al-Ghazālī explained the *fatwa*, there are doubts about whether the owner of that paper gives his permission or not, and therefore it becomes prohibited.³⁶ The *qiyās*

³⁰ Qur'ān .24.v.28 and v.58.

³¹ *Al-Bukhārī*, tr., vol. 9, p. 31, Ḥadīth No: 38.

³² *Sunan Abū Dawūd*, <http://www.muslimaccess.com/sunnah/hadeeth/abudawud/041.html>, Book 8, Number 1480.

³³ 'Abādī, Muḥammad Shams al-Ḥaqq, *'Awn al-Ma'būd*, Beirut, Dār al-Kutub al-'Ilmiyya, (1415 A.H), vol.4, p.250.

³⁴ Kamali, *Principle of Islamic Jurisprudence*, p.215.

³⁵ Al-Ghazālī, Abū Hāmid Muḥammad, *Iḥyā' 'Ulūm al-Dīn*, Beirut, Dār al-Jīl, (1412AH/1992) (First Edition), vol.II, p.168, cited in al-Būṭī, *Qaḍāyā Fiqhiyya Mu'āṣira*, p.89.

³⁶ Al-Ghazālī, *Iḥyā' 'Ulūm al-Dīn*, vol.II,p.168.

supports the author's moral rights.

4.2.3 The case of receiving money for reciting and teaching Qur'ān

The legality of the author's economic rights can be justified on *qiyās* with two accepted rulings: the approval of obtaining pecuniary rewards for reciting Qur'ān and for teaching it.

In this respect, there is narration of some of the Companions of the Prophet who treated a patient by reciting “*Sūrat-al-Fātiḥa*” over him in exchange for financial consideration. The patient was cured and his tribe gave the companions a flock of sheep. The Companions were different on the legality of getting money for reciting Qur'ān but the Prophet approved this transaction.³⁷ In another *ḥadīth*; the Prophet said:” You are most entitled to take wages for doing a *Ruqya*³⁸ with Allah's Book”.³⁹

The majority of *fuqahā'* approved the validity of the payment for teaching Qur'ān and *ḥadīth*.⁴⁰ Mālik (d.179AH/796) confirmed that it is not forbidden to hire someone to teach children Qur'ān,⁴¹ saying that he had not known of a case where the *fuqahā'* rejected it.⁴² From the Mālikī school al-Qurṭubī said that “... [M]ost scholars permit accepting a wage for teaching, based on the words of the Prophet in the *ḥadīth* of Ibn 'Abbās (d.68AH/687/688) who stated “you are most entitled to take a wage for the book of Allah”. Following the rule that is: (It is not permitted for lawyers to strive to arrive at the meaning of a point of law or religion, where there is a decisive text)⁴³, the *ḥadīth* is evidence of legality of receiving money in such circumstances. This *ḥadīth* is an evidential criterion which removes any dispute and

³⁷ *Al-Bukhārī*, tr., vol. 7, p.424, Ḥadīth No: 632.

³⁸ *Ruqya* is Qur'ānic recitation and making supplications to Allah for seeking a cure for any illness.

³⁹ *Al-Bukhārī*, tr., vol. 7, p.425, Ḥadīth No: 633. It is better to be translated as “You are most entitled to take wages for the Book of Allah”.

⁴⁰ Al-Qurṭubī, *al-Jāmi'*, vol.1 p.229. Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.268.

⁴¹ *Al-Mudawwana*, vol.3 p.432.

⁴² Ibn Abī Zayd, Abū Muḥammad al-Qayrawānī. *al-Nawādir wa al-Ziyādāt 'ala mā fī al-Mudawwana*, Muḥammad al-Dabbāgh, (ed.), Beirut, Dār al-Gharb, (1999) (First Edition). vol.7 p.58.

⁴³ The Mejelle. Article:14, p.4.

can be relied upon.”⁴⁴

Al-Nawawī from the Shāfi‘ī school stated that, the *ḥadīth* makes a clear statement about the validity of getting a wage for Qur’ānic healing and teaching Qur’ān.⁴⁵

From the *Ḥanbalī* school, Ibn Qudāma (d.620AH/1223) stated that any work that is not exceptionally regarded as a form of worship can be hired and priced, such as teaching literacy and numeracy, the construction of houses, mosques and bridges, cultivation of trees and also teaching Qur’ān and *ḥadīth* because all these acts can be done either religiously or non-religiously.⁴⁶

The early *fuqahā’* of the *Ḥanafī* school and some of the other schools forbade the receipt of money for teaching Qur’ān, because they “hated the notion”⁴⁷ regarding it, as an issue of unethical use of Qur’ān. However, “the normal procedure”⁴⁸ and the later prevailing opinion of the *Ḥanafī* school is to approve of the hiring of people for the purpose of teaching Qur’ān and *fiqh*, “*imaāma*” (leading prayer) and “*adhān*” (raising the call to prayer).⁴⁹

In the same way, there is approval for hiring a specialist scholar in traditions⁵⁰ to narrate *ḥadīth* in exchange for payment. Ibn al-Ṣalāḥ (d.643 AH/1245) pointed out that some scholars were moderate towards this issue comparing it with hiring for teaching Qur’ān. However, he held to the opinion that hiring is traditionally regarded as contrary to noble characteristics, and might draw suspicion, unless the scholar devotes his time to narrating and studying *ḥadīth* and has no actual wealth to support himself and his family.⁵¹ In biographical literature, however, there are many reports about a number of scholars were used to demand wages for narrating *ḥadīth* or

⁴⁴ Bewley, *Tafsir al-Qurtubi*, I, p.228.

⁴⁵ Al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*. Ḥadīth No: 2201, Vol. 14, p.157.

⁴⁶ *Al-Mughnī*, vol.5, p.325.

⁴⁷ Shalaby, p.131.

⁴⁸ *Ibid*, p.133.

⁴⁹ Kamali, *Principle of Islamic Jurisprudence*, p.294. Al-Zayla‘ī, Zayn Ibn Ibrāhīm, *al-Baḥr al-Rā‘iq*, Beirut, Dār al-Ma‘rifā, (N.D) vol.3, p.168.

⁵⁰ It is called *muḥaddith*. See Al-Ṭaḥḥān, *Taysīr*, p.17.

⁵¹ Al-‘Irāq‘ī, Abū al-Faḍl Zayn al-Dīn ‘Abd al-Raḥīm, *Fath al-Mughīth bi-Sharḥ ‘Alfiyyat al-Ḥadīth*, Maḥmūd Rabī’ (ed.), Cairo, al-Dār al-Salafiyya li al-Nashar, (1410AH), p.167. Hereinafter: *al-‘Irāq‘ī, Fath al-Mughīth*.

teaching Qur'ān and other subjects.⁵²

Moreover, Ibn Taymiyya (d.728 AH/1328) issued a *fatwa* in response to a question concerning a scholar who refused to teach others unless he was paid. He concluded that according to some direction in the *Hanbalī* school, it is allowed only for the poor and in cases of necessity and this is similar to position of a guardian of an orphan⁵³. The reference was made to the verse "...If the Guardian is well-off, let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable".⁵⁴

A strong argument for copyright can be derived from the above discussion by *qiyās*. The reason behind the entitlement to a return for reciting or teaching Qur'ān is applied to authorship. It is difficult to find any essential difference between hiring for the purpose of teaching Qur'ān, *Ḥadīth* or other branches of the knowledge of *Sharī'a*. *Qiyās* can be drawn between receiving money for reciting and teaching Qur'ān and the author's economic rights.⁵⁵

Some *fuqahā'* have argued that there are three main reasons why the hiring of a teacher of Qur'ān, *Ḥadīth* and other sciences has been permitted: firstly, although these actions are categorized as religious, they are not individual obligations, such as prayer or fasting during the month of Ramḍān. Therefore, an author is not obliged under religion personally to write or teach.

Teaching Qur'ān is similar to works that pertain to the public interest, and the dissemination of knowledge. It cannot be considered an individual act such as personal prayer or reciting Qur'ān. Second, teaching Qur'ān need not necessarily be done exclusively for charitable purposes. This kind of action can be done for the purpose of profit as well, because it is not compulsory worship. Leading the prayer, calling to prayer and teaching the Qur'ān are categorized as purely religious duties.

Lastly, a scholar who devotes his time to teaching cannot support himself and

⁵² Azmi *Ḥadīth Literature*, p.198. Abū Zayd, *Fiqh al-Nawāzil*, vol.2, p.110. Al-Dhahabī, vol. 11 .p.426, vol. 12, p.322, vol. 16 .p.327, vol. 17, p.619 and vol. 18 ,p.372.

⁵³ Ibn Taymiyya, *Fatāwā*, vol. 30 .p.204,205.

⁵⁴ Qur'ān .4.v. 6.

⁵⁵ Habib, Copyright under Islamic Law.

his family, while he is required to maintain himself and people under his care. He should receive the same compensation that a lay person would receive, if he commits his life to serving the people. Such people are attending to the spiritual, moral, and educational needs of the community. The shortage of “*ḥafīzah*” (people who memorize the Qurā’n) is to be expected if there is no sufficient recompense set for them.

The same “*‘ilal*” (effective causes) is not confined only to teaching the Qurā’n, but it can be applied to copyright. In an analogous way, an author like a teacher is not obliged religiously to write. Therefore, he is allowed to receive compensation for authorship. Scholars can earn from their knowledge through teaching or authorship. Authors like teachers must be paid for the cost of their authorship, regardless of the method of payment. There is no conflict between the financial consideration for authorship and rewards in the hereafter.

It can be argued that this might be applicable to teachers and authors of Islamic studies but not to others such as authors of fiction. It would be rational to give the same ruling to teaching of sciences as to teaching the Qurā’n because the labor and effort of teaching in both cases is similar.

The similarity between teaching and authorship is that, both of them lead to teaching, explaining or conveying some knowledge art or experience to others. Authorship can be seen as a form of teaching. Because of this parallel between them they should be equal in judgment.

However, we must be careful not to confuse the entitlement of an author to financial consideration with the legality of ingredients of authorship, which should be examined separately. The issue here is to present the legitimacy of entitlement to financial profit separate from authorship as general rule. The evidence which approves copyright also recognizes the potential for exploiting it. Once authorship has been accepted in *Sharī‘a*, its subsequent economic rights are acknowledged.

Authorship pertains to the public interest, and the dissemination of knowledge. It is not an individualistic compulsory worship. It can be done for charitable purpose, the profit motive or both. In addition, a scholar who devotes his time to

authorship cannot support himself and his family. The explicit validity of hiring someone to teach Qur'ān, which is more exclusive and closer to the ritual nature, is sufficiently strong to justify the validity of hiring someone to teach other sciences in a variety of forms. Similarly, the validity of hiring someone to teach other sciences can be established by *qiyās*.

Teaching can be achieved in any format such as authorship or distance learning. It does not require another ruling, when methods of teaching change from time to time, in accordance to changed circumstances, needs or other factors.

4.2.4 The case of getting money for sale and hiring a copy of Qur'ān

Fuqahā' assert that there is no prohibition in Qur'ān or *Sunna* as regards the sale, purchase, rental, lease, or lending of copies of Qur'ān to the public.⁵⁶ Ibn 'Abbās issued a *fatwa* that, there is no harm in selling copies of Qur'ān, because copiers deserve compensation for their labor.⁵⁷ Ibn 'Abbās explained that, the effective cause of this ruling is the copier's labor.

Another point is that, the majority of *fuqahā'* have agreed that amputation of the hand of a thief can be inflicted for stealing any book or a copy of Qur'ān. This judgment is based on valid reasons because the copy has a marketable value, it can be a subject matter of a contract of sale and its owner has property rights over it.⁵⁸

It can be argued that these rulings regarding the approval of the sale and hire of a copy of Qur'ān and the amputation of the hand of a thief of a copy of Qur'ān, are established although Qur'ān is the word of Allah, and the owner of copy has not created it. Indeed, the authorship of a book has considerably more influence and financial value than a copy of a book or CD. Like any commodity, intellectual works

⁵⁶ *Al-Mudawwana*, vol.3 p. 429.

⁵⁷ *Al-Majmū'*, vol. 9, p.302.

⁵⁸ *Al-Mudawwana*, vol.4 p. 536. Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol.II, p.542. *Al-Mughnī*, vol. 10, p.249. Ibn Ḥazm, Abū Muḥammad 'Alī Ibn Aḥmad, *al-Muḥalla*, Beirut, Dār al-'Āfāq al-Jadīda (N.D) vol.11, p.337, hereinafter: *al-Muḥalla*.

are distinct in value terms.

Therefore, authors have ownership rights over the products of their mental and labor works which entail them to exchange or dispose them as they see suitable. It might be possible to draw an analogy between the ownership and financial value in both cases.

Although Ibn al-Qayyim pointed that there are some thieves who are using their pens and their appearance,⁵⁹ and some contemporary writers would argue that violation of copyright can be criminally prosecutable,⁶⁰ the foregoing discussion is only to realize that the authorship of any work has financial value which is separated from its container, i.e. book, CD, etc. Therefore, authorship and its financial value must be ascertained to their owner. In addition, the deprivation of person's copyright could be conceived as a form of theft, although it is an unconventional kind of property, or the amputation cannot be applicable.

Further support can be found in many *fatāwa* pointing that documents have different legal values are moved to financial considerations. For example, it is lawful to sell a document that gives its holder a quotation of food or money.⁶¹ According to Ibn Taymiyya, it is allowed to sell a document, issued from "*sultān*" (the ruler) that exempts its holder from paying tax.⁶² The *fatwa* pointed to that the value of document belongs to its function (the official order) not to the paper. This is expressed in the ruling, which endorses that a person is liable for destroying a document proves a claim that cannot be proved otherwise, whether this destruction intentionally or not.⁶³ This would end up with the conclusion that financial value and exchange of copyright are accepted in *Sharī'a*.

⁵⁹ See Abū Zayd, *Fiqh al-Nawāzil*, vol.2, p.100.

⁶⁰ Al-Shahrānī, p.527 and post. Jamar, p.1086.

⁶¹ Al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, vol.10,p.146. *Al-Majmū'*, vol.9, p.322.

⁶² Ibn Taymiyya *Fatāwā*, vol. 29, p.230, 231.

⁶³ *Al-Mawsū'a al-Fiqhiyya*, vol.28, p.305.

4.2.5 The case of approving teaching Qur'ān as dowry

Approval of economic rights of authors can be held as the approval of financial value of teaching Qur'ān. The general rule in *Sharī'a* is that the contract of marriage imposes "*mahr*" (a dowry) given by the husband to the wife as a necessary condition. The *mahr* can be an amount of money, land, property or any valuable things.

The majority of *fuqahā'* recognize the validity of teaching Qur'ān as a *mahr*,⁶⁴ which the husband, in such a case, is required to pay to the wife upon the contract of marriage. This is based on the *ḥadīth*; "...the Prophet said I have married her to you for what you know of Qur'ān"⁶⁵ The Prophet, in this case, agreed to marry one of his Companions to a woman and made teaching her Qur'ān as her *mahr*.

The approval of teaching Qur'ān as a *mahr* implies that teaching Qur'ān has a financial value, which can be exchanged in any contract.⁶⁶ In other words, teaching Qur'ān cannot be *mahr* unless it can be money. Therefore, it is evident that there is a commercial value of that knowledge.

This point of view is best illustrated and supported by one of the rules of *fiqh*, which says that: an appointed alternative thing can stand as the conventional one, carrying its position and its rulings.⁶⁷ Therefore, teaching Qur'ān can be the subject matter of any contract, although *Sharī'a* gives emphasis to the significance of Qur'ān over anything else.

There is no difficulty in comparing the work of a teacher and that of an author, which refers to both labor, and the economic rights, which are created by them, and therefore that financial reimbursement is legitimate. Authorship and writing is simply a method and means of recording what people teach. This ruling is not confined to teaching Qur'ān, but is shared with the teaching of other sciences. For

⁶⁴ Ibn Hajar, *Fath al-Bārī*, vol.9, p.256, p.265 Ḥadīth No: 5149.

⁶⁵ *Al-Bukhārī*, tr.,vol. 7, p.39, Ḥadīth No:54,58, 63 and 66.

⁶⁶ Al-Diraynī, *al-Ibtikār*. p. 104.

⁶⁷ Ibn Rajab, *al-Qawā'id*, p.188. Al-Sarkhasī, Muḥammad Ibn Aḥmad *al-Mabsūṭ*, Beirut, Dār al-Ma'rifa, (1406AH/1986), vol. 21,p.93. Ibn Taymiyya, *Majmū' Fatāwā* , vol. 35.p.345.

example, al-Shāfi‘ī is stated that teaching a poem can be “*mahr*”.⁶⁸

Having agreed upon this assertion, the same may be said for teaching other subjects whether teaching is oral, the writing of books, recording tapes or other means. The financial value in copyright is evident as in teaching, and it is clear in education or entertainment as in teaching Qur’ān. As has been argued, the legitimacy of economic rights of authorship can be seen as part of the legitimacy of economic return for education.

Copyright can be treated as teaching Qur’ān, therefore the author is entitled to determine the course of his work. To facilitate this *qiyās*, measuring the economic return of copyright by the number of copies which have already been practiced seems to be the only logical step to take. And there is an equivalent in the number of students in a class.⁶⁹

4.2.6 The case of selling or waiving some rights for money

There are many practical needs which *Sharī‘a* considers in dealing with different rights. These needs may subject to rights of sale, renouncement, reimbursement, exchange, or compromise whether conditional or unconditional.⁷⁰ The legal validity for the waiver of some rights for financial exchange is derived from Qurā’n as these rights are conferred by *Sharī‘a* on the owners of those rights.

It may be helpful to mention the materials used in order to illustrate this validity by these examples. Firstly, the verse regarding “*khul*” gives this meaning: “.., if ye judges do indeed Fear that they would be unable to keep the limits ordained by Allah, There is no blame on either of them if she give something for her freedom”⁷¹

According to *Sharī‘a*, “*khul*” is an agreement between a husband and wife

⁶⁸ *Al-Mawsū‘a al-Fiqhiyya*, vol.26, p. 91.

⁶⁹ al-Būfī, *Qadāyā Fiqhiyya Mu‘āṣira*, p.86.

⁷⁰ See this thesis, p.64 and post.

⁷¹ Qur’ān. 2.v.239.

terminating the contract of marriage. Wife initiates *khul'* when she fears that she will not be able to observe her duties toward her husband, while he is fulfilling his duties toward her. The wife may return the *mahr* or some of her property in exchange for this divorce, but the husband is at liberty whether to accept anything back from her.⁷² Also, a wife can obtain *khul'* by renouncing her right of "*ḥadāna*" custody of children or "*nafaqa*" maintenance.⁷³

Ibn 'Abbās narrated that the wife of Thābit Ibn Qays came to the Prophet to ask him a solution for her problem with her husband. The Prophet ordered her to return back the *mahr* to her husband, which in this case was a garden, and ordered him to divorce her.⁷⁴ The husband has the unilateral right of divorce, but by *khul'* he may waive this right by settlement. The husband's right of divorce is purely a personal right, but it can be subject to waiver and reimbursement.

Secondly, "*shuf'a*" (pre-emption) is defined as the right of a co-owner in immovable property to redeem that part of property which has been sold to a stranger by another of the co-owners, with the same agreed consideration. The reason behind the right of "*shuf'a*" is the expectation of conflict or inconvenience with a new co-owner. There is a discussion as to whether a co-owner is allowed to waive his right of *shuf'a* in consideration of money. According to the Mālikī school *shuf'a* can be subject to inheritance or sale.⁷⁵

It is similar to the waiver of "*qiṣāṣ*" (the right of retaliation) by the next of kin of a murdered person in consideration of a sum of money. The next of kin, who has the right to demand retaliation, may waive it by settlement with the murder for "*diya*" (the blood-money). It is another personal right, which is prescribed by the verse; "And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness."⁷⁶

⁷² Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.79.

⁷³ Al-Ghiryānī, *Mudawwanat*, vol.2, p.689.

⁷⁴ *Al-Bukhārī*, tr., vol. 7, p.150, Ḥadīth No: 197. In Arabic see: Ibn Ḥajar, *Fath al-Bārī*, Ḥadīth No: 5273, Vol. 9, II, p.494. Abū Dawūd, Ḥadīth No: 2227, vol. 3, p.677.

⁷⁵ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.315.

⁷⁶ Qur'ān. 2.v.178.

Moreover, *fuqahā'* allowed selling the airspace above a property which is only a right and the buyer has no physical control over the subject matter of the contract.⁷⁷

Another rationalist and a recognized principle in *Sharī'a* is "*ṣulḥ*" (settlement or mediation). It is reported that the Prophet said: "Conciliation between Muslims is permissible, except the conciliation which makes lawful unlawful and unlawful lawful."⁷⁸ Therefore, the majority of *fuqahā'* agreed on the validity of *ṣulḥ*.⁷⁹ It consists of concluding a dispute between parties by agreement. It is made usually by the giving of a sum of money or concession to a right or claim.⁸⁰ Only "*ḥaqq al-'abd*" (rights of an individual) are in general negotiable and subject to settlement, waive or compromise.⁸¹ A person can offer a sum of money or property or waive his right to something to avoid appearance in court or being involved in a dispute.⁸² Also, an heir is allowed to make a settlement with other heirs by which they pay a sum of money or give property in consideration of his provision in the estate.⁸³

It is possible to use the principle of *ṣulḥ* to recognize the contract between an author and a publisher, where the author waives his right to publish works in favor of the publisher in exchange of money.

These examples are indications that the waiver of some rights for financial exchange is, in essence, legal. The conclusion derives from the above rulings is that *Sharī'a* contains many rights which are in their nature exchangeable in that, when they are waived, compensation can be taken. Many *fuqahā'* share the general idea of the exchange of rights even though they differ in the exchange of some rights. This can be understood when read with the rule that it is a case of sale if anything has

⁷⁷ *Al-Dusūqī*, vol.3,p.21. Al-Ghiryānī, *Mudawwanat*, vol.3, p.257.

⁷⁸ *Sunan Abū Dawūd*: <http://www.muslimaccess.com/sunnah/hadeeth/abudawud/041.html>, Book 24, Number 3587.

⁷⁹ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.353. *The Mejelle*, p.254. Al-Ghiryānī, *Mudawwanat*, vol.3, p.706. Ḥaydar, vol.4, p.7 and post.

⁸⁰ Al-Ghiryānī, *Mudawwanat*, vol.3, p.706.

⁸¹ Al-Zuhaylī, vol.6,p. 4351.

⁸² Ibid, vol.6, p. 4334. Al-Ghiryānī, *Mudawwanat*, vol.3, p.713.

⁸³ Al-Zuhaylī, vol.6, p.4368. Al-Ghiryānī, *Mudawwanat*, vol.3, p.716.

been exchanged for payment.⁸⁴

The concept of approval of the waiver of some rights is particularly functional in copyright, because it supports the notion of the transfer of the economic rights, which subsist in the work. Approval of waiving of economic rights of authors is even greater than the approval of waiving of these rights.

This provide some basis for copyright in *Sharī'a*, although the “*ilal*” (effective causes) behind these various rulings are different. The technique of *qiyās* is not confined to cases where there is exact equity between a known injunction and a new injunction. There is a realization that the waiver of rights is possible and instituted especially in the context of the economy. In comparison, it seems that the economic bearing attends in copyright more closely than the rights of *khul'*, *qiṣāṣ* and *shuf'a*.

The principle of the waiver and reimbursement can be applied to copyright. Not all copyright will reach the same position. If the right of the attribution of works is not assignable, however, the right of publishing, production or performance of a work can be transferred. Authors can waive or sell their rights subsisting in their works for a monetary gain. This *qiyās* proves the recognition of authors' economic rights, which is an important part of copyright.

Another endorsement for this conclusion drawn from *qiyās* can be found in “*istiḥsān*”. In Arabic, “*istiḥsān*” means “to approve or to deem something good”.⁸⁵ Technically, *istiḥsān* involves choosing “the stronger of two indications”.⁸⁶ Some *fuqahā'* consider *istiḥsān* as a kind of *qiyās* asserting that the difference is that “*illa*” in *qiyās* is apparent but not so in *istiḥsān*.⁸⁷

It is juristic preference for one of possible rulings on a new case. It is not a personal choice as the precision of the word might indicate. It is, however, based on special text, *qiyās* or other evidence. This usually occurs when a case has several equally valid rulings, and the jurist supports a single ruling, because it adopts the

⁸⁴ Ibn 'Abd al-Barr, Abū 'Umar Yūsuf b. 'Abd Allah, *al-Kāfi fī Fiqh al-Madīna*, Beirut, Dār al-Kutub al-'Ilmiyya, (N.D), p.304.

⁸⁵ Kamali, *Principle of Islamic Jurisprudence*, p.246.

⁸⁶ Ibid, p.249.

⁸⁷ Ibid, p.259. EI², Entry: *Istiḥsān*.

ultimate principles of *Sharī'a*.⁸⁸ *Istihsān* is a kind of exceptional knowledge in *Sharī'a* which applies its principles on theoretical and practical reasoning not as rigidly as given in authoritative texts in every case. The point which needs to be emphasized here is that *fiqh* requires consideration not only of the technical method of *qiyās* in a given case, but also of the objectives of *Sharī'a*. *Istihsān* can be based on that which is beneficial and it is not opposed to principle or text. *Istihsān* is an additional instrument for the administration of justice.

If there are doubts remain about applying *qiyās* in copyright or if there is any *qiyās* or evidence that can lead to the contrary conclusion in the recognition of copyright, as some contemporary *fuqahā'* suggested, *istihsān* gives certainty to copyright. *Istihsān* supports copyright because of numerous citations and evidence that prove that *Sharī'a* aims at confirming rights and properties. Moreover, there are neither practical difficulties nor scientific grounds which preclude the possibility of recognition of copyright under *Sharī'a* or the exchange of the author's economic rights.

4.3 Evidence of Copyright from “*Maṣlaḥa*” (the Public Interest)

Copyright are recognized, not only because they are backed by the authority of many strong texts directly and indirectly but also as it will be explained copyright are justified on *maṣlaḥa* grounds.

Maṣlaḥa (pl. *maṣāliḥ*) means benefit, interest and its synonyms. Technically, “*maṣlaḥa mursalah* is defined as a consideration which is proper and harmonious ...with the objectives of the Lawgiver; it secures a benefit or prevents a harm; and the *Shari 'a* provides no indication as to its validity or otherwise”.⁸⁹

Qur'ān and Sunna indicate that the concept of *maṣlaḥa* can be a ground for legislation, although scholars are divided as to whether *maṣlaḥa* is a form of “*qiyās*”

⁸⁸ Sha'bān, p.174.

⁸⁹ Kamali, *Principle of Islamic Jurisprudence*, p.267.

(analogy), a part of “*istiḥsān*” (juristic preference) or independent source.⁹⁰ The role of *maṣlaḥa* in the realm of *ijtihād* is supplementary, designed to relieve the limitation of texts leading the public closer to good and further away from evil as much as possible.

Sharī‘a aims to maximize utility in this world and the hereafter, and lessens harm at large.⁹¹ Al-Ghazālī (d.505AH/1111) stated that *maṣlaḥa* in a broad sense is the ultimate purpose of the *Sharī‘a*.⁹² Legislation according to *maṣlaḥa* is simply a reflection and an application of the fundamental principles of *Sharī‘a*.

The aim of *Sharī‘a* is to enable humans to live under its sovereignty without harm by protecting the five principles “*maqāṣid*”. These are religion, life, intellect, lineage and property. Al-‘Izz presented a similar viewpoint stating that the comprehensive examination of the vast majority of cases in *Sharī‘a* illustrates that the underlying premise of *Sharī‘a* is the preservation of the *maṣlaḥa*.⁹³ He stressed the conclusion that *Sharī‘a* is always “*maṣāliḥ*” (interests) and it is to protect against corruptions and to provide interests.⁹⁴

Sharī‘a is enacted to promote *maṣāliḥ* and to combat “*mafāsīd*” (corruption acts) as much as possible on behalf of the public. In principle, “Any measure which secure these values falls within the scope of *maṣlaḥa*, and anything that violates them is *mafsadah* (‘evil’), and preventing the latter is also *maṣlaḥa*”.⁹⁵ Understanding *Sharī‘a* leads to this conclusion.⁹⁶

There are many rulings derived from the source of *maṣlaḥa*, for example, Qur’ān was not collected in the format of “*muṣaḥf*” (one book) during the life of the Prophet, but because of *maṣlaḥa* the Companions agreed on collecting Qur’ān despite the fact that there was no text or analogy on that. Similarly, under the

⁹⁰ Izzi Dien, Mawil, *MAṢLAḤA in Islamic Law: A Source or Concept?* Studies In Honour of Clifford Edmund Bosworth, Muntar of the East Arabic and Islamic Studies (2000), vol.1,p. 348.

⁹¹ Al-‘Izz, vol.1, p.39. Al-Shāṭibī, *al-Muwāfaqāt*, vol. 2.p.4,42.

⁹² EI², Entry: *maṣlaḥa*. Al-Zarqā, *al-Madkhal*, vol.1.p.99 and post.

⁹³ Al-‘Izz. vol.2, p.314.

⁹⁴ Ibid. vol.1, p.14.

⁹⁵ Kamali, *Principle of Islamic Jurisprudence*, p.267.

⁹⁶ Al-‘Izz. vol.2, p.314.

maṣlaḥa the companions added a second “*adhān*” on the day of “*Jumu‘a*” (Friday) and established “*diywān*” (an official register) etc.⁹⁷

According to the majority of *fuqahā’*, in order to secure the public interest, the government can impose taxes, if the state needs, prescribe the minimum wages for employees and regulate the prices of necessary commodities, if traders raise them unjustifiably.⁹⁸

The role of the legislator is to secure the five principles and to prevent anything that is against them. This authorizes *fuqahā’* to issue relevant rulings for the purpose of promoting the five principles. Things which ought to be so protected are those which concern the *maqāṣid* of *Sharī‘a*.

The reliance on *maṣlaḥa* as a subsidiary source of legislation is agreed by the majority of *fuqahā’* for producing rulings that help in increasing beneficial opportunities and reducing harmful opportunities. Moreover, if there are gradations of evils or a conflict between benefits it is an obligation to choose "the lesser of two evils" and "the greater of two benefits".⁹⁹ The measure of the degree to which any thing, act or concept is “*Shar‘ī*” (legitimate) is the degree to which it adheres to these principles of *Sharī‘a*.

Maṣlaḥa varies from one social context to another and from time to time within the scope of *Sharī‘a*. Through *maṣlaḥa fuqahā’* are granted more flexibility and a wider discretion to meet the needs and the challenges of the modern age.

The principle of *maṣlaḥa* is flexible because it is constantly subject to reassessment on the basis of cultural norms, new needs and scientific knowledge. *Maṣlaḥa* is now claimed for a wider range of judgments than ever before.¹⁰⁰ In principle, everything that was not expressly forbidden or leading to forbidden can be *maṣlaḥa*.

This generalization is not to suggest that all interests can be considered

⁹⁷ Sha‘bān, p.165.

⁹⁸ Ibid, p.170.

⁹⁹ Al-‘Izz vol. 1.p.9. Ibn Taymiyya, Fatāwā, vol. 20.p.48.

¹⁰⁰ EI², Entry: *maṣlaḥa*. EI², Entry: *Istiṣlāḥ*.

maṣlaḥa. According to *uṣūl al-fiqh*, the test relates to its compatibility with the main *maqāṣid* of *Sharī'a*,¹⁰¹ it does not conflict with other “*naṣṣ*” (text), *ijmā'* or *qiyās* that deals in specific with a case in question¹⁰² and jurists have to weigh *maṣlaḥa* against other *maṣlaḥa* that might override it or any harm that might be caused.¹⁰³ These five-fold conditions must be carefully observed. *Maṣlaḥa* is recognized, not because benefits will be expected if a law is issued accordingly but because it is backed by these stated conditions.

Fuqahā' work out these conditions from *Sharī'a* to avoid the uncertainty and arbitrariness that would follow were *maṣlaḥa* to be used for providing rulings without qualification. Without these conditions it is possible to draw up rulings in accordance with desires rather than *Sharī'a*. Instead, *Sharī'a* condemns the following of cravings and vain desire in many verses and *aḥādīth*. For example, “...Nor follow thou the lust (of thy heart), for it will mislead thee from the Path of Allah [*Sharī'a*].”¹⁰⁴ Otherwise, the general *maṣlaḥa* in trust, stability, certainty, and security of rights would be at risk.

The *maṣlaḥa* and its conditions as so stated apply to copyright. The approval of copyright serves the *maqāṣid* of *Sharī'a* in religion, intellect and property. Copyright are justified by many fundamental considerations as working to serve the *maṣlaḥa* in several ways. There are several pieces of evidence from *maṣlaḥa* which provide a strong basis for approval of copyright in *Sharī'a*.

First of all, the protection of religion, which is the first “*maqāṣid*” principle of *Sharī'a*, can be assisted by upholding copyright. The violation or ignorance of copyright would allow pseudo scholars to hold a high status by virtue of their alleged knowledge of *Sharī'a*. Usually, a society rewards a person who writes a work by addressing them by the title of author or a scholar or by offering them a position. There are many negative consequences, if usurpation and appropriation of

¹⁰¹ Al-Būṭī, Muḥammad, *Ḍawābiṭ al-Maṣlaḥa fī al-Sharī'a al-Islāmiyya*, Beirut, Mu'assasat al-Risāla, (1986) (Fifth Edition), p.119. hereinafter : al-Būṭī, *Ḍawābiṭ al-Maṣlaḥa*

¹⁰² Ibid, p.129, p.161 and p.246.

¹⁰³ Al-Būṭī, *Ḍawābiṭ al-Maṣlaḥa*, p.248.

¹⁰⁴ Qur'ān. 38.v. 26.

an authors' rights are applied to works regarding the knowledge of *Sharī'a*.

The pseudo scholar causes "*fitna*" (confusion or disturbance) for people about religion and misleads them. He misleads the people into the belief that he is a scholar.

Religious leadership is a very important issue. According to Ibn al-Qayyim, the injury of an ignorant *mufī*¹⁰⁵ is greater than the injury of an ignorant physician.¹⁰⁶ This leads to serious results for the religion and the community. It is demoralizing, if those who preach or issue *fatwa* are unqualified. They betray a trust and cause mischief. In *Sharī'a*, an unqualified person is most definitely not allowed to give *fatwa*. Therefore, the stability, certainty and improvement of the body of knowledge regarding *Sharī'a* is achieved by recognizing copyright.

Secondly, in terms of the principle of protection of property in *Sharī'a*, the property of authors, who have sacrificed their time and effort would become meaningless or at least at risk, if others could appropriate their intellectual works.

It is of the *maqāṣid* of *Sharī'a* that the precise beneficiary of a right must be readily determined so as, to prevent risks of conflict within a society.¹⁰⁷ Authors can achieve their economic rights arising from writings only through the recognition of copyright and this is based on *maṣlaḥa*.

The call for the appropriation of copyright for creators of works would seem to fit with the *maqāṣid* of *Sharī'a* regarding the protection of rights. Copyright should be conceived as protection of the public interest and the rights of ownership of authors.

Practically, the question of whether or not copyright, especially its economic orientation, can be ascribed correctly to its rightful owner under *Sharī'a* has much greater significance because of the exploitation of their works is ongoing. Protection of rights is an essential *maṣlaḥa* and *fuqahā'* have utilized it in order to provide

¹⁰⁵ One who gives *fatwa*.

¹⁰⁶ *I'lām al-Muwaqqi'īn*, vol.3, p.78 and vol.4 p.229.

¹⁰⁷ Ibn 'Āshūr, Muḥammad al-Ṭāhir, *Maqāṣid al-Sharī'a al-Islāmiyya*, Muḥammad al-Ṭāhir al-Mīṣāwī (ed.), Amman, Dār al-Nafā'is (1421AH/2001) (Second Edition), p.421.

resolutions for new rights and issues. The special status held by copyright is essential to its establishment as a right and to its unique role that it performs in our life. The state has to foster creative intellectuals by protecting their rights.

Thirdly, it can be argued that copyright should be approved for the sake of scientific advancement and humanity's future both of, which are of the *maqāṣid* of *Sharī'a*. The importance of copyright stems from the fact that it may steer a new course for the scientific life of society. For the sake of scientific development and humanity's future, copyright must be supported, not merely by the justice system that has been instituted, but also by the accepted priorities that inspired them. It is a religious obligation upon a Muslim nation to strive to improve its efficiency and capabilities in all aspects of life. This cannot be done without the encouragement of scientific life, which in turn depends on the recognition of copyright.

It seems that the protection of science, that is, the principle of intellect, as one of the *maqāṣid* of *Sharī'a*, can only be achieved by protection of copyright. The bodies of knowledge in the arts and sciences in any forms of presentation is *maṣlaḥa*.

On reflection, there is an association between copyright and scientific progress. The recognition of copyright respects rights and encourages scientific efficiency. Thus, it strengthens the objectives of *Sharī'a* by promoting knowledge and rewarding scholars. Therefore, the recognition of copyright serves the *maqāṣid* (principles) of *Sharī'a*.

Fiqh can recognize and protect copyright, without necessarily relying on a particular text. That is something which would act as a positive reason in favor of *maṣlaḥa*. Recognition of copyright is a very efficient way of benefiting the whole of society and encouraging beneficial intellectual works. A society should facilitate the good of an author for the purposes, overall, of the *maqāṣid*. Asserting copyright is the primary mode by which society can achieve development and prosperity, which are part of the *maqāṣid* of *Sharī'a*.

It is obvious that educational and scientific developments within society have a close bearing upon an authors' ability to benefit from his works. The evidence for

this promotion is so overwhelming that it is now considered an established fact and not merely a theory.

Copyright is based on the interest that the protection of copyright encourages the scientists to publish their works and that these works develop and enlighten society.¹⁰⁸ Copyright is needed in order to stimulate individuals to create new literature and useful knowledge. Copyright is necessary as an incentive for the promotion of intellectual works, which are, in turn, necessary for advancing the public interest. Copyright can be seen as compensation for the expected risk of failure of publishing works, since the author does not know whether his work will succeed.

The endorsement of copyright does not conflict with other *naṣṣ*, *ijmā'* or *qiyās* dealing with it. In stead, as we have seen, the recognition of copyright is consistent with the original sources of *Sharī'a*. Copyright does not conflict with other *maṣlaḥa* or cause illegitimate harm to others. Copyright cannot be seen as causing damage to any other general interest.

By ignorance of copyright, anyone can acquire scholarship, social and economic advantages, under the guise of authorship. Generally, in every branch of knowledge and technology, usurpation of copyright can be seen to have damaging effects.

An endorsement can also be raised from the fact that, the protection of property (one of the *maqāṣid* of *Sharī'a*) can be harmed by the violation on economic rights of authors. If the objectives of *Sharī'a* are to maximize the public interest, it seems that the recognition and protection of copyright is required as of necessity.

It would be a mistake to suppose that approval of copyright will lead to the erosion of the bonds of public interest. In fact, failing to uphold copyright would subject such bonds to usurpation and appropriation by infringers and hijackers.

The infringement of copyright leads to misleading the public about the scientific authority of knowledge the prevention of rightful authors from achieving

¹⁰⁸ Habib, Copyright under Islamic Law.

the posts that they deserve and the exploiting of their works by unauthorized production. The conclusion of upholding copyright is that no one shall usurp it, pretend to be an author or a scholar or acquire undeserved advantage.

It is advisable for a *mujtahid* to do a search and review the sequences and effects of a particular ruling, he wants to issue, with a careful consideration before confirming that ruling.¹⁰⁹ This will ensure the quality of a ruling. The more precise a consideration of the general direction of *Sharī'a* is, the better a ruling it will produce that is relevant to a particular case. For example, the following questions should be asked; does this ruling advance the *maqāṣid* of *Sharī'a*? Do the results of this ruling conform to those principles? These questions are made objectively to secure the balance in the treatment of any subject. *Sharī'a* does not require dealing with new cases just in terms of principles, but also with practical observation.

This provides a mechanism whereby scholars evaluate the appropriateness of a particular ruling and decide whether it should be applied to the case in question. These considerations provide strong grounds on which to think that it would be legitimate to approve or deny copyright.

The justifications for copyright are also derivative from the principle of "*sadd al-dharā'i'*" (blocking the means of evil). It is one of the main functions of *Sharī'a* to block the sources of causing harm, damage or breach to the interests or rights of people.¹¹⁰ This principle supports the preventive policy by the lawful means.

The denial or absence of copyright would have many negative consequences for both authors and scholars and the society. The rapid development of new technology should support the eradication of plagiarism and piracy because it prevents the real owners from enjoying the fruits of their works. Those who infringe copyright, exploit technologies in order to maximize the opportunities of having the proceeds of their unauthorized production of works without the copyright owners' consent. Authors, scientists and publishers complain constantly regarding a selfish group of pretenders exploiting the fruits of their labor.

¹⁰⁹ Al-Shāṭibī, *al-Muwāfaqāt*, vol. 4, p.140.

¹¹⁰ Kamali, *Principle of Islamic Jurisprudence*, p.310.

The infringement of copyright by academics results in unlimited damage to scientific life and reputation. In addition, the fraud could remain undiscovered for some time. Absence of copyright can create the real risk of preventing future authorship. The greatest challenge in intellectual and scientific circles is piracy in authorship and publishing. This means that copyright should be protected by law to prevent such harmful consequences.

The waiving of copyright would be destructive to individuals and deprive a community of legitimate principles and needs and indeed of means of survival and development. Chaos would follow from failing to recognize and protect the works of creative and scientific individuals.

The absence of copyright would lead to deprivation and would discourage genuine researchers and authors in the pursuit of their legitimate goals. This would be contrary to the public interest.¹¹¹ Scholars would lose a great deal of motivation, researchers would become hopeless and rightful works may prove unprofitable. Science, literature, art and other useful works would, thus, diminish or disappear over time.

Denial of copyright would be catastrophic for both authors and scholars who strive hard to develop their society as well as themselves. A society can achieve development by approval of copyright and indeed its absence would deprive a community of one of the means of improvement.

It is against the *maṣlahā*, for someone to infringe, appropriate and exploit a piece of work, whilst the rightful author is deprived of his work completely or in part.

Authors have a valid claim that society recognizes and protects their works and this allows them to reciprocate by giving a commitment to devote their lives to research, study, and authorship and assist in community projects generally. They will be encouraged and rewarded to give to society their knowledge and intellect as much as their rights are recognized and protected.

¹¹¹ Al-Diraynī, *Ḥaqq al-Ibtikār*.p.137.

Copyright helps scholars to operate and disseminate knowledge without fearing that their useful works will be stolen and that they will not be able to recover the cost of funding the research to produce it.

Copyright is based not on the *maṣlaḥa* or the need of the copyright holder but on the worth of what there is an interest or need for. Reciprocity can be observed between the recognition of copyright and encouragement of development in sciences, arts and so on. The fact is that, in general, if authors are unable to reap economic rewards from authorship in the market place they will be unwilling to produce works. As a practical result, they will have no incentive to start or continue their works because of the lack of recognition and protection of their rights.

No doubt, the security of authors' rights over their works would support the progress of knowledge and science. The expected problem is that without the protection of copyright not enough works will be produced.

There has been a *maṣlaḥa* in protecting national works by copyright from misappropriation by international companies. There is relationship between copyright and national growth, if the state is to use a modern instrument such as intellectual property law and international agreements to protect and benefit intellectual products.

Finally, the notion that authorship is in the public interest can be demonstrated in recognizing and protecting copyright. Given that caveat, copyright is located successfully within the framework of *maṣlaḥa*.

4.4 Evidence of Copyright from 'Urf

It is agreed that, "'Urf literally means that which is known"¹¹² about the common usage in speech or in action in a particular country or society. It results from a consistent practice of the public. Technically, 'urf means that "recurring

¹¹² Kamali, *Principle of Islamic Jurisprudence*, p.283. Al-Zarqā, *al-Madkhal*, vol.1.p.141 and post.

practices which are acceptable to people of sound nature”.¹¹³ According to the discipline of *uṣūl al-fiqh*, *fuqahā'* are concerned with the perception of '*urf*' for changing rulings or deciding cases where there is a correspondence between a ruling and '*urf*'.¹¹⁴

Its authority originated essentially from the primary sources of *Sharī'a*. That is Qur'ān and Sunna. The word '*urf*' is mentioned in the Qur'ānic verse "..., and command what is right '*urf*'."¹¹⁵ Many Qur'ānic commentators interpret '*urf*' as righteousness¹¹⁶ and the observance of good characters and morals.¹¹⁷

The second endorsement of this source is found in Sunna. It is reported that "what the Muslims deem to be good is good in the sight of Allah".¹¹⁸ It means that if the Muslim community considers something acceptable is indication that Allah approves it. This rule is to nullify any practice if it shocks or offends the conscience of the Muslim community.

Sharī'a clearly specifies that one should return many matters to '*urf*'. For example, commanding the good,¹¹⁹ living well with one's wife¹²⁰ and "*mut'a*" (the gift of consolation).¹²¹ It is this '*urf*' that allows a judge to take into account standard to determine the cost of living and maintenance level, to define words and signs of defamation and other similar matters.

The reliance on '*urf*' is articulated in many acceptable and well established legal maxims such as, "What is proven by '*urf*' is like that which is proven by a *sharī* proof"¹²² and "What is proven by '*urf*' is like that which is proven by an agreed

¹¹³ Kamali, *Principle of Islamic Jurisprudence*, p.283.

¹¹⁴ *Ibdi*, p.293.

¹¹⁵ Qur'ān.7.v. 199.

¹¹⁶ *Ibn Kathir*, vol. 4, p. 241.

¹¹⁷ For a more detailed discussion on its authoritativeness, see Kamali, *Principle of Islamic Jurisprudence*, p.292.

¹¹⁸ Kamali, *Principle of Islamic Jurisprudence*, p.292. *Al-Mustadrak*. Ḥadīth No: 4466, vol.III, p.84. *Musnad Aḥmad*, vol.1, p.379.

¹¹⁹ Qur'ān.7.v. 199.

¹²⁰ Qur'ān.4.v. 19.

¹²¹ Qur'ān.2.v. 236 and 2.v. 241.

¹²² Kamali, *Principle of Islamic Jurisprudence*, p.284.

condition”.¹²³ Both maxims provide custom with the rank of a binding stipulation imposed by *Sharī‘a* or by an explicit agreement. Other maxims say: “Custom is of force”¹²⁴ “The use of men is evidence according to which it is necessary to act”¹²⁵ indicates that a judge or jurist can use custom as a source for rulings in the absence of other sources or an applicable contractual provision. These maxims are indications of the significance of ‘urf’. This binds people to follow ‘urf and which provides decisive and authoritative rulings.

Fuqahā’ use ‘urf to endorse the validity of many commercial contracts such as “*istiṣnā’*” (contract of manufacture), “*al-bay‘ bil-ta‘āfī*” (sale or exchange of commodities by code gestures without positive proposal), “*muḍāraba*” (contract of partnership) which used to happen.¹²⁶ It is ‘urf that shows the flexibility of *Sharī‘a* and its capability of adapting itself to new circumstances unless it conflicts with other rules in *Sharī‘a*.

Obviously, not all customs can be accepted and there are the qualifications that connect the ‘urf to *Sharī‘a*. According to *uṣūl al-fiqh*, what gives weight to ‘urf is its complying with three conditions.¹²⁷ Firstly, it must be something common to popular practice not a personal choice. Secondly, it has continued to exist continuously. Thirdly, it must not conflict with *Sharī‘a*.¹²⁸ In the view of *Sharī‘a*, ‘urf is an obligatory law only in these conditions. Demands for approving any case of ‘urf can be met and satisfied by the examination of these conditions.

‘Urf constitutes a binding source of law if no contradiction exists between ‘urf and Qur‘ān and Sunna. Any action or practice which is prohibited by *Sharī‘a* cannot be recognized on the basis of the custom ‘urf whether it has a local or worldwide usage. Instead, ‘urf rules which are inconsistent with *Sharī‘a* must be ignored.

The role of ‘urf in the realm of copyright is substantial and this has lead to a

¹²³ Ibn Rushd *al-Muqaddimāt*, vol.2, p.466.

¹²⁴ *The Mejelle*, Article 36, p.7.

¹²⁵ *Ibid*, Article 37, p.8.

¹²⁶ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol.2, 284. EI², Entry: *muḍāraba*.

¹²⁷ *Al-Mawsū‘a al-Fiqhiyya*, vol.30, p. 42, ‘Urf’ entry.

¹²⁸ Kamali, *Principle of Islamic Jurisprudence*, p.286 and post.

number of scholars having argued for the applicability of '*urf*' to copyright.¹²⁹ For example, the *Fiqh* Academy's decision pointed to the '*urf*' dimension in recognizing copyright¹³⁰ and Usmani concluded that copyright is *ḥuqūq 'urffiyya*.¹³¹

'*Urf* and its conditions retain large scope for application to copyright. Copyright is based partly on '*urf*'. As to the first condition, the existence of customary international law with regard to copyright is undeniable. Copyright is entrenched in laws, constitutions and international agreements. This '*urf*' regarding copyright is internationally accepted, well established and reciprocally enforced. In '*urf*' copyright has developed considerably in both depth and specificity.

Though *Sharī'a* is an independent system, it intersects with useful customary and international laws and norms in various ways. There are many international copyright conventions, but the most widely accepted is the Berne Convention of 1886 as most nations have joined it. The agreement has been revised several times since 1886 to set the duration of copyright, expand the scope of the Convention to include newer technologies, prohibit formalities as a prerequisite of copyright protection and recognize the moral rights of authors and artists, giving them the right to object to modifications or to the destruction of a work in a way that might prejudice or decrease the artists' reputations.

Also, the World Intellectual Property Organization (WIPO), which is part of the UN system, was established in 1967 to promote the protection of intellectual property throughout the world and sponsor the various agreements dealing with intellectual property such as TRIPS, which has a very great impact on international trade law. Muslim states participate in the binding international agreements to protect copyright.

Secondly, the practice of recognizing and protecting copyright has a universal and continued usage. '*Urf*' approves that authors have rights over their works which

¹²⁹ Al-Nāhī, Ḥaqq al-Mu'allif. Al-Diraynī, *Ḥaqq al-Ibtikār*. p. 83.

¹³⁰ In its fifth session in Kuwait in 10th –15th December 1988, see *Majallat al-Majma'*, issue5, Vol. III

¹³¹ Usmani, *Buḥūth fī Qaḍāyā Fiqhiyya Mu'āṣira*, p78-85.

enables them to exchange or dispose of them as they see them suitable. One might say that copyright is a contract between society as a whole and an author and is supported by *'urf*.

For the third condition, the *'urf* of respect for copyright has not been in conflict with the injunctions and the principles of *Sharī'a maqāṣid*. Copyright has clear reasons for approval, in that it represents honesty and justice that should be respected by human beings. Nothing in *Sharī'a* prevents the public from respecting copyright if people consider it appropriate to the public interest. Copyright is in accordance with *Sharī'a* precepts in recognizing and protecting authors' rights. There is a realization that copyright is a just institution.

The core of copyright can be found in the institution of *ijāza*, which is well-established in Islamic *'urf*. The legitimacy of governing the circulation of knowledge by *ijāza* and the principles of justice and honesty became a conclusive *'urf*. It was an integral part of the academic life, which was protected from any kind of criticism.

In the literature on *'ilm al-ḥadīth*, there is a debate amongst scholars as to how *al-ḥadīth* should be received and transmitted.¹³² As it has been indicated before, there is a detailed and determinate set of rules governing the correction, editing and narration of *al-ḥadīth*.¹³³ There is certain *'urf* in the Muslim academic community that governs transmission of knowledge. The recent of copyright is a kind of revival, expansion and development of the old institution of *ijāza* which is rightful *'urf*. It is the historical groundings for modern copyright in *'urf*.

In addition, the *'urf* that the sources of writings should be acknowledged for the purposes of public benefit is demonstrated in the extensive Islamic literature.¹³⁴ Therefore, *'urf* condemns piracy and plagiarism and regards them as serious offences against authors and public interest. *'Urf* points to the stigma of violation and infringement of copyright. The violation of this *'urf* leads to condemnation and to exclusion from academic life. According to *'urf*, the hacker is

¹³² Azmi *Ḥadīth Literature*, p.182 and post.

¹³³ See p.147 and post.

¹³⁴ Hārūn, p.22.

called as a thief, dishonest and a fraud even if the only thing "taken" is a piece of knowledge or art.¹³⁵

The development of modern 'urf considers copyright as a kind of wealth that can be subject to exchange even if the work is abstract in nature. 'Urf has expanded the area of property to encompass subjects that have never previously fallen to be considered by *fuqahā'*.

The acceptance of copyright based on 'urf is not meant to imply that all works must be accepted without qualification. A special chapter will present the necessary conditions for works to be protected in *Sharī'a*.¹³⁶

4.5 Evidence of Copyright from *al-Qawā'id al-Fiqhiyya* (Legal Maxims)

Aimed at researching copyright systemically, this section devotes itself to applying *al-Qawā'id al-Fiqhiyya* to copyright. "The maxims of *fiqh* refer to a body of abstract rules which are derived from the detailed study of the *fiqh* itself. They consist of theoretical guidelines in the different areas of *fiqh* such as evidence, transactions, matrimonial law, and so on and they are an integral part of *fiqh*. The name "*al-Qawā'id al-Fiqhiyya*" may resemble the expression *uṣūl al-fiqh*, but the former is not a part of the latter and the two are totally different from one another".¹³⁷ Some of these rules are essentially 'ahādīth but they are recognized and used by *fuqahā'* as a set of rules. They are described as a body of rules, governing the study of *fiqh* and facilitating the process of *ijtihād*. *Fiqh* rules were used to not

¹³⁵ *I'lām al-Muwaqqi'in*, vol.3, p.332, cited by Abū Zayd, *Fiqh al-Nawāzil*, vol.2, p.100.

¹³⁶ See this thesis p.206 and post.

¹³⁷ Kamali, *Principle of Islamic Jurisprudence*. p. 5. Al-Zarqā, *al-Madkhal*, vol.2.p.965 and post.

only to explain the relations between the settled rulings but also to reach rulings to new cases.

It is important that the researcher should be not only familiar with the *fiqh* rules, but also be able to apply them to new cases with the requirements of *ijtihād*. *Fuqahā'* can start with elegant statements of rules and work out the rulings from them, and develop solutions in response to demonstrated new problems. While recognizing the advantages of these rules, our focus here is on how they might need to be applied, to provide support for copyright.

4.5.1 The rule: “*wad' al-yad*” the appropriation of permitted things

In *Sharī'a* there are certain rules and conditions laid down as to how to acquire ownership. One of the approved modes for the acquisition of ownership is the prior occupation of “*al-mubāḥāt*” (permitted things) amounts to its ownership. For example, the capture of fish or wild animals is sufficient to acquire its ownership. It is known in *fiqh* as the rule of “*ḥiayāza*” or “*wad' al-yad*”, which means literally “put hand”. Priority is one of the ways that establishes ownership. It gives who finds something its ownership. The priority right provides that a first acquirer of something is entitled to its ownership.¹³⁸

There are many items in nature, which are available to everyone without restrictions such as air, water, fire or grass. According to *Sharī'a*, it is called “*al-mubāḥ* pl. *al-mubāḥāt*” which is any lawful thing that is not owned by anyone else. In principle, everything that was not expressly forbidden was permitted. It is an underlying principle of *Sharī'a* that if an object is not already possessed or taken then it may be owned. Therefore, a person acquires property rights in anything that is not formerly owned.

Allah created everything on the earth for human beings and its ownership is

¹³⁸ See this thesis p.137 and post.

vested in common among all members of humanity equally.¹³⁹ Allah ordained that, if an individual appropriates an object then it belongs to him¹⁴⁰ and the owner is provided with an adequate authority over the owned thing. The right of priority is based on direct texts of *Sharī'a*¹⁴¹ although, Usmani made it under *ḥuqūq 'urffiyya* which are based on acceptable *'urf*, in his classification of rights.¹⁴²

In its articles 1248 and 1249 *Majallat al-'Aḥkām* establishes the acceptable modes of ownership. These articles state that appropriation of any "*mubāḥ*" (permitted thing) which is not owned by anyone else gives the right to its ownership.¹⁴³ The acquisition of ownership of something can be by the physical control over it directly or it can be deemed in such a way by any act, which is appropriate to the nature or condition of that thing. An example given in the explanation of these articles is the water seller who collects water from a river. The river and the water are *mubāḥ* for everyone. The container belongs to the collector. Therefore, the water collector should be given property rights over the water because of this lawful appropriation.¹⁴⁴

The possession of something is a decisive to its ownership, such as taking water from a river using container. Al-Būṭī considered a book, CD or tape as a container, which captures an idea, information or interest.¹⁴⁵ The property can then be passed to others in lawful ways such as a sale, gift, and inheritance and so on.

Human kind is at liberty to own whatever is not prohibited. This means that legal possession of anything will validate its ownership. The argument is that the expressions presented in a work are like previously un-owned things and that the author appropriated them. Authorship is legal possession of thoughts in some form, which then validates its ownership.

¹³⁹ Ibn al-'Arabī, Abū-Bakr, *'Aḥādīth al-Aḥwadhī Sharḥ Ṣaḥīḥ al-Tirmidhī*, Beirut, Dār al-Kutub al-Ilmiyya, (1418AH/1997) (First Edition), vol.6, p.117

¹⁴⁰ Ibid

¹⁴¹ See this thesis p.137.

¹⁴² Usmani, *Buḥūth fī Qadāyā Fiqhiyya Mu'āṣira*, p78-85.

¹⁴³ Ḥaydar, vol.3 p. 257,258. *The Mejelle*, p.203.

¹⁴⁴ Ḥaydar, vol.3 p. 259.

¹⁴⁵ Al-Būṭī, *Qadāyā Fiqhiyya Mu'āṣira*, p.84.

The recognition of copyright is justified on the grounds that only the author should deserve, praise, honor and profit from authoring the work because he is the first one to capture of the creative work.

Sharī'a recognizes that individuals are entitled to particular items based on the appropriation by which they acquired the ownership granting them the right of use and disposal of owned things.

Under this rule, therefore, it is possible to be the owner of an idea that takes a material form, fixed in writing or otherwise, provided that it has not been previously appropriated.

When we are applying this rule of ownership to copyright, ideas are *mubāḥāt* and are available for everyone. The author is similar to a hunter or collector of these *mubāḥāt*, and a book or computer program is similar to a container or net in which these *mubāḥāt* can be preserved or captured.

The appropriation of an idea is the right to which all people have equal access. Authors, however, are the only ones who are entitled to this right. The reason is that authors capture ideas and convert them into readable or noticeable forms according to their own choice.

Unless and until the idea takes some material form, its ownership cannot be ascertained for anyone. The possession of anything is determined according to its nature and condition. Therefore, possession can be actual or in law. It is not necessary for there to be physical control over something that is not possessed or owned by anyone to acquire ownership of it.

An individual may own property even though there is no actual control over its possession. For example, the airspace above a property can be sold even the owner has no physical control over it. Also, as we have seen physical possession is neither property itself nor its inevitable condition. This type of ownership necessarily corresponds to the legal position which gives the owner exclusive rights of use and disposal of that which is possessed and owned.

The principle, however, has the same application in relation to ideas,

information, sciences and arts with some qualifications.¹⁴⁶ It seems there is no reason why copyright in a work should not be recognized by *Sharī'a*, if it satisfies the conditions of ownership subsisting in it.

The works of authors, once established, cannot be equated with *mubāḥāt*, because they have been possessed and owned despite the fact they are produced of ideas which were essentially and originally free in their nature.¹⁴⁷

It is consistent with the public interest, to accept the International Standard Book Number (ISBN) to manage and secure the priority.¹⁴⁸ Interestingly some current writers have compared the (ISBN) system with an old traditional system of "*takhlīd*" (to be an eternal) where authors send their works to the official library of Baghdad to be preserved forever.¹⁴⁹ It can be argued that these systems are similar to "*diywān*" (the official register) which was established in the public interest.¹⁵⁰

This rule is simple and profound and argues that the first possessor of a thing, which currently has no owner, becomes the owner of that thing. As it is a reflection of the universal value of justice, this principle is known by the Roman law concept of *Res Nullius* and in European thought as the Locke's theory of property.

4.5.2 The rule relating to a necessary condition for the fulfillment of an obligation

This rule is one of the famous and common rules of both the maxims of *fiqh al-Qawā'id al-Fiqhiyya* and the principles of jurisprudence *uṣūl al-fiqh*. The rule is known and debated in the textbooks of *uṣūl al-fiqh* under the heading of "*muqaddimat al-wājib*" (a prerequisite for command).¹⁵¹ There is "*ijmā'*"

¹⁴⁶ See p.214 and post here.

¹⁴⁷ Habib, Copyright under Islamic Law.

¹⁴⁸ Al-Diraynī, *Ḥaqq al-Ibtikār*.p.93.

¹⁴⁹ Abū Zayd, *Fiqh al-Nawāzil*, vol. 2, p.102.

¹⁵⁰ See this thesis p.175.

¹⁵¹ Al-Āmidī, Sayf al-Dīn 'Alī b. Abī 'Alī(d.630AH/1232), *al-Iḥkām fī Uṣūl al-Aḥkām*, (1402AH), Beirut,al-Maktab al-Islāmī, (Second Edition), vol.1, p.111. Al-Zarkashī, Badr al-Dīn, Muḥammad b. Bahādir, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, Shaykh 'Abd al-Qādir al-'Ānī,(ed.) Kuwait, the Ministry of Awqāf and Islamic Affairs, (1413AH/1992) (Second Edition), vol.1, p.223 and post. Ibn

(consensus) that it is an obligation to provide what is regarded as a preliminary condition for the fulfillment of religious duties.¹⁵²

The rule means that what is deemed essential to the obligations sanctioned by *Sharī'a* must be achieved and that whatever promotes these obligations has the same mandatory rank as the obligations themselves.

For example, "*wuḍū'*" (ritual ablution) is necessary for prayer, walking to the mosque is necessary for Friday congregational prayer, travel to Mecca is necessary for performing pilgrimage, and so on. Therefore, ablution, walking to the mosque and travel to Mecca are commands. The common rule is that humans are required and are responsible to prepare and provide only what they are capable of doing. A preliminary condition required in order to obey a command or follow a recommendation, then, carries the same weight as the command or recommendation itself.

Al-Āmidī (d.631AH/1233) stated that the scholars of all schools had reached to a consensus to the effect that all necessary qualifications and conditions for establishing a command must be fulfilled.¹⁵³ The physical, mental and *Shar'iyya* legal requirements and conditions that are necessary to achieve something commanded by *Sharī'a* have the same position as the command itself.

The means that are devised to achieve objectives of *Sharī'a* acquire the same status as the objectives themselves. Therefore, the tool of the best objectives is the best tool and the tool of the lowest objectives is the lowest tool. There is a parallel relationship between the objectives and the tools. Therefore the tools are classified according to the classification of the objectives.¹⁵⁴

It is useful to apply "*al-'ahkām al-khamsa*" (the quintuple classification) carefully to means. This implies that means can be "*wājib*" or "*farḍ*" (obligatory), "*mandūb*" (recommended), "*mubāḥ*" (indifferent), "*makrūh*" (reprehensible) or

Taymiyya, *Fatāwa*, vol.20, p.161.

¹⁵² Al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*, vol.1, p.111.

¹⁵³ Ibid, vol.1, p.111.

¹⁵⁴ Al-'Izz, vol.1,p.74.

“*ḥarām*” (forbidden).

Al-Qarāfī, whilst endorsing this view in general, stated that the means can be legalized or prohibited to suit the objectives of *Sharī‘a*.¹⁵⁵ Tools which are necessary to achieve the objectives of *Sharī‘a* are *farḍ* or *wājib*. At the opposite, tools, which are against these objectives, are *ḥarām*. There is a genuine connection between objectives and tools.

The notion of *muqaddimat al-wājib* can be used when defining copyright because copyright is necessary for development and this is “*wājib*” (an obligation). Copyright, therefore, is a straightforward *wājib*.¹⁵⁶

The account of necessary conditions is particularly appropriate in dealing with copyright. The recognition of copyright is *wājib*, because of its significant role in that it functions in educational and industrial life. It is not possible for a society to achieve or maintain the public good in development without the approval of scholars and authors’ rights. Copyright must be so recognized and protected because it is deeply concerned with the development of arts, science and technology, and is therefore fundamentals to human wellbeing. Copyright is made necessary because of interests of society pushing towards improvement.

On the other hand, the harmful consequences of the violation or infringement of copyright are already evident from the earlier discussion.¹⁵⁷ The disapproval of copyright creates long-term developmental problems such as the weakness of educational institutions, declining researching standards and lack of scientific progress. These factors have contributed to or aggravated the problem of development in many countries.

The gap that has existed between the ideal standard of development and the actual practice in many Muslim countries can be partly resolved and ratified by the recognition of copyright in accordance with the precepts of *Sharī‘a*.

In general, this rule requires that an Islamic state should enact the laws that

¹⁵⁵ *Al-Furūq*, vol.2 p.62. Izzi Dien, *MAŞLAḤA* in Islamic Law, vol.1, p. 352.

¹⁵⁶ Abū Zayd, *Fiqh al-Nawāzil*, vol. 2, p.136.

¹⁵⁷ See this thesis p.182 qnd post.

achieve the public interest and protect society against the sources of harm or unlawful practices. According to this rule, enacting copyright laws is one of the primary conditions for a society to achieve their legitimate goals of development.

4.5.3 The rule relating to public or private “*ḥāja*” (need) being treated as “*ḍarūra*” (a necessity)¹⁵⁸

The rule is expressed in the article 32 of the *Majallat al-Aḥkām*, and is translated as: “whether a want be general, or whether it be special, it is reduced to the degree of necessity”.¹⁵⁹ In case of emergency, unlawful food can be eaten to save one’s life,¹⁶⁰ but according to this rule, scholars consider that “*ḥāja*” (need) can have the same legal consequence as “*ḍarūra*” (a necessity).

Ḥāja can be translated as a need, want or requirement. The scholars of *uṣūl al-fiqh* use *ḥāja* to refer to suffering by people from the absence of something despite the fact that they can live without it.¹⁶¹ In general, any act or thing that might cause difficulties to people must be prohibited, and any act or thing that might lead to facilitating the life of people must be permitted. A need means a lack of or an insufficient amount of something and which creates difficulties for human beings.

There is a Qur’ānic verse that states: “Allah intends every facility for you: He does not want to put you to difficulties.”¹⁶² Another verse contains the same direction “and [he] has imposed no difficulties on you in religion”.¹⁶³ Along with other evidence these verses lay down clearly a general attitude of *Sharī’a*, which is the consideration of human needs or requirements. *Sharī’a* upholds the human needs, interests and necessities and facilitates life so that it meets new circumstances of every age in an empirical way. Rulings can be legalized under certain conditions in answer to some need or to remove difficulty or hardship.

¹⁵⁸ Haydar, vol.1 p.42.

¹⁵⁹ *The Mejelle*, p.7.

¹⁶⁰ Qur’ān 2.v. 173.

¹⁶¹ Kamali, *Principle of Islamic Jurisprudence*.p.398

¹⁶² Qur’ān 2.v. 185.

¹⁶³ Qur’ān 22.v. 78.

There are some commonalities exist between this rule and the concept of *maṣlaḥa*.¹⁶⁴ Anything that can be compatible with “*al-maqāṣid al-khamsa*” the five principles of *Sharī‘a* of religion, life, intellect, lineage or property can be legalized. Measures are required to remove any difficulty.

With a view to fulfilling the public need, many *fuqahā’* chose this rule to issue rulings in respect of new needs. For example, the state can acquire land owned by someone for the purpose of widening a public road or extending a mosque, with a fair compensation being paid to the owner. Also the legitimacy of contracts of “*ijāra*” (lease or hire) “*salam*” (advance sale) and “*istiṣnā’*” (the manufacture of goods) is established the basis of public need.¹⁶⁵ Moreover, a patient can expose the private parts of his or her body to a doctor for treatment.¹⁶⁶

To emphasize the profundity of this rule in *fiqh*, al-‘Izz went on to say that an individual necessity is similar to a public interest.¹⁶⁷ Thus, the rule provides the government with wide powers to impose regulations in order to respond to the needs.

The theoretical position is that *Sharī‘a* is not a static law or one which brings harshness to human beings. Therefore, it is a duty upon *fuqahā’* to explore existing needs and suggest whether a public or individual need should be viewed, as a permitted, forbidden or obligatory.

Within the scope of *Sharī‘a*, many systems such as copyright can be established for the sake of the public interest. This rule provides economic efficiency for authors and aims to fulfill the public need. There is a great public need for recognition of copyright. It is needed in order to reassure authors that their works are protected and profitable.

Obviously, authors need to exploit their works to live on otherwise the life of the science research and authorship would be meaningless for them and they would

¹⁶⁴ See this thesis p.175 and post.

¹⁶⁵ Kamali, *Principle of Islamic Jurisprudence*, p.340.

¹⁶⁶ Ibn Hajar, *Fath al-Bārī*, vol. 10. p.341.

¹⁶⁷ Al-‘Izz, vol.2,p.314

have to strive to find other ways of earning money. The recognition of copyright is based on the fact that without it, authors would face difficulties in their lives and society would see a shortage of authors. The economic rights flowing from authorship should be protected for authors' needs and this is part of the public need and interest. Copyright is justified on the grounds that authors need profits from authoring and researching, which they devote their lives to. Therefore, society should support them for the attainment of public need.

Copyright is based not only on the interest or the need of the copyright holder but also on the worth of what is in it. The crucial public need of stimulating research and development leads to the recognition of copyright. Arising from public and private needs, we can equally correctly say that copyrights can be ordained by *Shari'a*.

On the other hand, the recognition of copyright would serve both the public need in general and a private need of authors. What the rule amounts to is that lawful public or private needs should be fulfilled as far as possible to minimize its negative consequences.

The public interest of intellectual capital and life is only achieved when its resources namely, authors, are secured. The failure of the fulfillment of this need is likely to increase the number of scientists and academics emigrating and this would have a large impact on society. The widespread degeneration in many countries is an indicator that there is a vital need for that society to recognize and protect the rights of scholars and authors.

It is likely that the recognition of copyright will augment research and development and help most developing countries in education and technology. The rule focuses on both the public need and authors' need for legislative recognition of copyright. It seems that copyrights can be introduced purely for perceived public and private need without recourse to other juristic arguments. *Shari'a* fosters rather than disrupts copyright for both authors and the public good.

4.5.4 The rule of removing of harm

Sharī'a aims at achieving the mercy and the interest of all humanity. It is confirmed by the verse: "We have not sent down Qur'ān to thee to be (an occasion) for thy distress".¹⁶⁸ This rule is consistent with the principle that *Sharī'a* seeks "*maṣlaḥa*" (the public interest) by attaining advantages as much as possible and diminishing evils as much as possible.

It is reported that the Prophet said: "*la ḍarar wa-la ḍirār*" "There is no injury nor return of injury."¹⁶⁹ According to the rules of *uṣūl al-fiqh*, the prohibition of *ḍarar* is general, because the actual wording is general. It can be applied to every case where there is injury without permission. The exemption to this general rule can only be found in judicial orders or cases of self-defense. Generally, it means that an injury is not justified and must not be initiated nor can it be accepted in return for another injury. This *ḥadīth* prohibits any kind of intentional injury of others whether it is launched or it is merely reactionary.¹⁷⁰ It is to prohibit any harm caused to an individual or caused to the public. Therefore, any act might which have the effect of injury of anyone is prohibited in *Sharī'a*.

There are several rules driven from the main *ḥadīth* and rule, such as the rule that *ḍarar* cannot be prevented by its like¹⁷¹ and *ḍarar* "is repelled as far as possible"¹⁷² and so on.

It is impossible to give an exhaustive account of the kinds of "*ḍarar*" (injury or harm). This is why Abū Dāūd and al-Nawawī stressed that this *ḥadīth* is one of the

¹⁶⁸ Qur'ān.20.v. 2.

¹⁶⁹ Anas, Mālik, al-Muwatta', translated by Professor Ahmad Hasan. <http://www.muslimaccess.com/sunnah/hadeeth/muwatta/036.html>. Book 36, Number 36.26.31. The Mejjelle, p.6, Article No.19. In Arabic: Al-Zarqānī, *Sharḥ Muwaṭṭa'*, Ḥadīth No: 1500, vol.4, p. 40. Ibn 'Abd al-Barr, Abū 'Umar Yūsuf b. 'Abd Allah, *al-Istidhkār*, 'Abd Al-Mu'ṭī Qal'ajī, (ed.), Damascus, Dār Ibn Qutayba, (1993) (First Edition), vol.22, p.221. Hereinafter: Ibn 'Abd al-Barr, *al-Istidhkār*. Ḥaydar, vol.1 p.36, Article No.19. See *The Mejjelle*, Article:19,p.6. Ḥaydar, vol.1 p.36.

¹⁷⁰ Al-Zarqānī, *Sharḥ al-Muwaṭṭa'*, vol.4,p. 40.

¹⁷¹ *The Mejjelle*, Article:25,p.6.

¹⁷² *Ibid*, Article: 31, p.7.

most important 'ahādīth that religion and *fiqh* in particular rely on.¹⁷³ Ibn 'Abd al-Barr said that this *ḥadīth* and rule in particular has an unlimited scope in applications.¹⁷⁴ *Fuqahā'* use this rule heavily and effectively to prohibit new products or actions such as drugs and cigarettes which cause injury where there is no text dealing with them directly or indirectly.

This *ḥadīth* is highly efficient on both sides, for being absolute and sound *ḥadīth* which can be used as independent evidence and for being a central rule that copyright can be grounded on. If copyright fall for consideration under this rule, it is evident that the denial of copyright has tended to lead to individuals and public injury and unjust results.

The consideration relates to the practical effects of the denial of copyright to authors and the public. There is "ḍarar" (harm) to authors when their works have been misappropriated or exploited without proper consent which also injuriously affects the interests of the community. It prevents genuine scientists and authors from benefiting from their works and leading the intellectual life in society. As a consequence research and the authorship decline because they are unauthentic, unpromising and unprofitable. Consequently, it diminishes the incentive of research or authorship.

The harm reaches beyond the violated work in question and causes the concept of ownership and responsibility to become obscure. It contributes to the diseased condition of society in many ways. It encourages unjust enrichment, if the person who violated or infringed copyright benefits from that. It is likely to cause academic dishonesty to spread and discourage people from striving for promising developments and prosperity. This precludes scholars from contributing to the task of nation building. It creates an environment in which research, education and authorship are corrupted.

¹⁷³ Ibn Rajab, 'Abd al-Raḥmān, *Jāmi' al-'Ulūm wa al-Ḥikam*, Shu'ayb al-Arnā'ūṭ and Ibrāhīm Bākhūs, (eds.) Beirut, Mu'assasat al-Risāla, (1999/1419AH) (Eighth Edition), vol.2, p. 211. Al-Albānī, Nāṣir al-Dīn, *Ṣaḥīḥ Sunan Ibn Mājah*, Beirut, al-Maktab al-Islāmī, (1988/1408AH) (Third Edition), vol.2, p.39, Ḥadīth No:1895.

¹⁷⁴ Ibn 'Abd al-Barr, *al-Istidhkār*, vol.22, p.223.

This will in turn, for example, encourage more scholars to migrate from developing countries. This threatens intellectual and human capital, which are the principal resources of development. All these lead to deterioration, backwardness, poverty and their destructive effects, which can be categorized under the rule of removing *ḍarar*.

Therefore, copyright should be established to remove the definite harm. On the contrary, recognition and protection of copyright has a tremendous influence on the scientific community and consequently on the public.

4.5.5 The rule that: “A person, who is owner of a thing, is owner also of things which are indispensable for that thing”.¹⁷⁵

This rule is set out in article 49 of *Majallat al-Aḥkām*.¹⁷⁶ The right of a property has no application without the necessary rights and easements by which one could use the subject matter of the property. Another baseline rule of Islamic law is that to own property is to have the right to own everything, which is necessary to that main property.

The rationale is that not possessing such necessarily related things to that property would mean that the owner would be practically incapable of using of his property. The property has no sense in the absence of necessarily related things to the subject matter of the property. The object of this rule is to ensure and enable owners to use their property.

For example, the owner of land owns consequentially all necessary rights appertaining to it, such as the right of way. The right to a property has no application without the necessary arrangements by which one could use the subject matter of the property. When *Sharī'a* recognizes someone's right to, it imposes a corresponding

¹⁷⁵ *The Mejelle*, p.9. Ḥaydar, vol.1 p.53.

¹⁷⁶ It has been translated also as: “A person, who is owner of a thing is owner also of things which are indispensable for that thing.” *The Mejelle*, p.9.

duty on others to respect this right within its borders.¹⁷⁷

Sharī'a does not aim at achieving futility or anarchy but at securing its principles "*al-maqāṣid al-khamsa*" in religion, life, intellect, lineage and property by using the relevant legal and religious machinery. Recognizing copyright is an important instrument for protecting these principles of *Sharī'a*.

As stated previously, *Sharī'a* does not stipulate that the subject matter of ownership must be a material thing.¹⁷⁸ It allows a broader definition on which ownership can be claimed. Therefore, the rule is applicable to copyright.

Likewise, it would be necessary to grant certain exclusive rights (copyright) to authors. The recognition of copyright requires the recognition of all complementary rights, which are related to them for ensuring their existence. Owners have a legitimate claim and interest to ensure that their works cannot be assigned to others.

This rule leads to the approval of all the author's rights such as the right of paternity, the right of integrity, the right of economic exploitation, the right of disclosure of a work to the public and the right of withdrawal from the distribution. These rights are the ingredients of the ownership of copyright.

The recognition of copyright without them is insufficient to ensure the attainment of the purpose of copyright, and thus copyright would become meaningless. If authors cannot exercise control over their copyright, it is inappropriate to think of their possessing copyright. It cannot be said that copyright exists if anyone can share in or prevent authors from using these rights. Alternatively, copyright is granted to authors only in name, not in fact. This rule has been used only to ensure the ownership of copyright.

4.6 Summary

A recourse to the second sources is warranted by Qur'ān, the Sunna and *ijmā'* to find rulings for new cases. *Qiyās* has been established to apply the meanings of

¹⁷⁷ 'Īsawī, p.338.

¹⁷⁸ Al-'Abbādī, *al-Milkiyyai*, vol.1, p.198.

the texts in other places provided that the conditions of *qiyās* and “*illa*” (the effective cause) can be fulfilled. Therefore, there are many decided cases in *Sharī‘a* which *qiyās* can provide a strong basis for copyright.

The case of acquiring ownership of barren land by its cultivation can be used by the process of *qiyās*, because ownership which is based on survival and productivity can be extended to intellectual works. The spreading of knowledge is an obviously reviving process in society and generates future advancements because in *Sharī‘a* intrinsic meanings are more present and more highly valued than forms or words.

Sharī‘a requires lawful access to property, legal status, situations or evidence and prohibits using any thing, right or property without permission from its owner.

It is reported that the Prophet prohibited listening to the talk of people, who do not want people to listen. This is combined with another *ḥadīth* which imposes restrictions that bar people involved in a meeting from disclosing that meeting. It can be argued that these *‘ahādīth* are applicable to a hacker or unlawful publisher who produces or copies a work for the public without permission. These two cases prove ownership of copyright especially moral rights.

An analogy was drawn between, on the one hand, the teaching and reciting of Qur’ān and Sunna or “*ruqya*” which entitles the one who does this task to a reward with, on the other hand, authorship which entitles the author to a reward. Similarly, hiring people to teach Qur’ān, *ḥadīth* and *fiqh*, leading prayer and raising the call to prayer is approved. This can be applied to copyright because an author, like a teacher, is allowed to receive compensation for authorship regardless of the subject of authorship, the method of payment and the rewards in the hereafter.

It can be argued that if it is rational to give a sufficient return not only to the one who copies Qur’ān, which is word of Allah, but also to the copier who has no role other than writing it, then similarly, authors who create works are entitled to sell them.

Teaching Qur’ān can be a dowry, which implies that teaching Qur’ān has a financial value. This approves of a commercial value for knowledge and this includes the economic rights of authors.

There are many rights conferred by *Sharī'a* to the owners of rights which can be the subject to sale, waiver, reimbursement, exchange, or "*ṣulḥ*" (settlement, compromise) whether conditional or unconditional. For example, "*qiṣāṣ*", "*khul*", "*shuf'a*", "*ḥadāna*", "*nafaqa*" and the sale the airspace above property. There is no difficulty in treating copyright in the same way as these rights for financial exchange, therefore, generally, the waiver and reimbursement of copyright is valid. These three cases prove the author's economic rights. "*Maṣlaḥa*" (the public interest) which is used by the majority of *fuqahā'* for protecting the five principles "*maqāṣid*" of *Sharī'a* is applicable to copyright.

It can be argued that copyright should be recognized in order to promote scientific advance and humanity's future and to encourage scientific efficiency and serve the property of authors and scholars who are working for the *maṣlaḥa*. These objectives are derive from the principle of *Sharī'a* "*maqāṣid* of intellect.

Additionally, it is possible to apply some legal maxims to copyright. First, the principle that the prior occupation of "*mubāḥāt*" (permitted things) amounts to ownership provides that copyright is justified in *Sharī'a*. The reason is that authorship is a kind of legal possession of thoughts which are *mubāḥāt* in any form.

Secondly, by applying the rule of the necessary condition for the fulfillment of an obligation of copyright this can be seen as a preliminary condition for the development of arts, science and technology and are therefore fundamentals to the public interest. Thirdly, the use of the rule that a public or private "*ḥāja*" (need) must be treated as "*ḍarūra*" (necessity) is to remove difficulty and hardship. This rule helps to support copyright in order to protect a perceived public need for stimulating research and development and the private needs of scholars and authors.

Fourthly, the rule that "if someone owns something, its ownership implies the ownership of anything that is necessary for it" leads to a recognition of copyright and all related rights. Finally, by employing the rule of removing a harm copyright can be established in that the denial of copyright has tended to lead to individual and public injury. Moreover, the approval of copyright can be established in *fiqh* through *istiḥsān* using the general principles of *Sharī'a*.

Chapter Five

The Conditions of Copyright

5.1 Introduction

Modern legal systems in general recognize some conditions on copyright with many variations. Unlike modern laws, in *Sharī'a* there is no ready-made set of terms and conditions for the existence, extent or exercise of copyrights. Likewise, in many legal systems, conditions of copyrights can be erected by *Sharī'a*. Therefore, the objective of this chapter is to present conditions and qualifications for copyright in *Sharī'a*, which can give rise to some difficulties in their applications.

It is observed that as a general rule, all rights must be originated, used and aimed within the borders of *Sharī'a*.¹ The boundaries and qualifications of copyright are analogous to a large extent to those attached to other rights. Therefore, copyrights are limited and based on conditions of *Sharī'a*. Copyright must not be treated as absolutely inviolable in all possible circumstances, but it is a kind of conditional rights.

Broadly speaking, there are certain restrictions which *Sharī'a* places upon copyright to make it in harmony with other rights and considerations. The considerations qualifying copyright are instantiations of other rights of Allah, others' rights and the public interest. As is the case with many rights in *Sharī'a*, copyright can be justifiably given less weight or even defeated by other considerations of the general interest.

One reason for the conditions is that thought is principally being given to the harmonization of "*ḥaqq Allah*" pertaining to the public interest and the author's rights "*ḥaqq al-'abd*". Moreover, copyrights in *Sharī'a* cannot be against its principles since they are themselves derived from the same source.

¹ See this thesis p. 78.

These conditions are determined and justified by *Sharī'a* for the purpose of protecting other rights, upholding public order, morality and the public interest. They are necessary to prevent contravention upon other more important rights or considerations. For example, conditions on a work serve to maintain a balance between the interests of copyright owners and the public. This is to place limits on the extent to which copyrights can be manipulated for the sake of the public interest.

Copyrights are to be exercised under certain rather restrictive conditions to be approved in *Sharī'a*. Therefore, copyrights cannot be used to injure the society, to undermine the course of morality, or to challenge the public interest.

Sharī'a establishes conditions that must be satisfied in order to possess or exercise of copyright of a work. Therefore, if a work fails to comply with these conditions, copyright cannot thereafter be asserted.

This does not mean that for each work, conditions need to be scrutinized by inspectors, but works have to be weighed and balanced against these standards to be copyrighted under *Sharī'a*. In contrast, works are premised not on prohibition, but from the general Islamic approach that what is not prohibited is allowed.

The conditions here concern the essence, use and scope of copyright. The account of conditions takes the relevant factors particularly the nature of copyrights, the importance of the purpose of that condition and its extent.

5.2 Legality

Copyright reflects in a particular legal system its standards, values and objectives. The legitimate merit of any work is one of the determining factors in finding whether or not copyright subsists. Since *Sharī'a* recognizes copyright, there must be certainty that the subject matter of copyright is lawful.

In terms of justification, when *fuqahā'* laid down conditions and terms of contract of sale, they agreed that what cannot be owned, because it is prohibited,

cannot be the subject matter or a consideration of any contract.² There is no dispute among *fuqahā'* that legality is an important factor which may render a contract, action or property invalid. As it has been stated before, the reason for not owning or dealing in some goods is that they are prohibited, regardless of whether they have financial value on market or not.³

This is consistent with many *'ahādīth* such as “The Prophet forbade the use of the price of a dog, the money charged of a soothsayer and the earnings of a prostitute.”⁴, “the Prophet ... proclaimed the trade of alcohol as illegal.”⁵ ” and He, who has forbidden its drinking, has forbidden its sale also”.⁶ Therefore, *fuqahā'* such as al-Qarāfī said generally that objects, which have “*manfa'a muḥarḥama*” (unlawful utility) such as wine, cannot be owned.⁷ The assertion of legality as a condition is justified also on the grounds that injustice enrichment would follow if an author can make profit on unlawful works.

This rule can be applied with similar results, thus works, which contain unlawful materials, support or lead to unlawful actions, cannot be owned. The subject matter of a work can be approved or rejected by all that which is indicative of it. The acceptance by the *Sharī'a*'s a work is based on its contents and the social context in which the work will be published. Therefore, if the idea underlying a work is in conflict with *Sharī'a*, the work cannot seek copyright in *Sharī'a*.

Another reason is that *Sharī'a* fixes responsibility on a speaker of any sin or harm caused by his words. This finds clear support from the verse: “Not a word does he utter but there is a vigilant guardian”.⁸ This warns people to choose their words carefully.

A further verse which clearly prohibits making a mockery of religion and

² Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.156.

³ See chapter 3.

⁴ *Al-Bukhārī*, tr., vol. 7, p.197, Ḥadīth No: 258.

⁵ *Ibid*, vol. 3, p.168, Ḥadīth No.: 297

⁶ Sahih Muslim available online at:

<http://www.muslimaccess.com/sunnah/hadeeth/muslim/010.html>, Book 010, Number 3836.

⁷ *Al-Furūq*, vol.3, p.384.

⁸ Qur'ān, 50.v 18.

refuses an apology for it, reads: "Say: "Was it at Allah, and His Signs, and His Messenger that ye were mocking... Make ye no excuses: ye have rejected Faith after ye had accepted it."⁹

To set a barrier on any sort of false statement or speech another verse reads: "and shun the word that is false".¹⁰ This is to indicate that words have a greater significance than people might think and to limit the abusive exercise of talk or writing.

A special Qur'ānic verse reads "Those who love (to see) scandal published broadcast among the Believers, will have a grievous Penalty in this life and in the Hereafter: Allah knows, and ye know not."¹¹ The verse prohibits promotion and advertising adultery or scandal which might deprave and corrupt a Muslim society.

Following these verses, it is reported that "the Prophet said a slave (of Allah) may utter a word which pleases Allah without giving it much importance, and because of that Allah will raise him to degrees (of reward); a slave (of Allah) may utter a word (carelessly) which displeases Allah without thinking of its gravity, and because of that he will be thrown into the hell fire".¹² It is established that a word, written or heard, has a great impact on a person's life whether good or evil.

Therefore, writing or publication of works containing scandals, blasphemy or features of similar category is prohibited according to *Sharī'a*. As we have seen, the right of Allah is confirmed throughout the prohibitions in *Sharī'a*.¹³ An author is bound and expected not to write a work that is against the commands and conditions prevalent in *Sharī'a*. A work lacking legality is invalid. Copyright cannot be granted for prohibited, abusive or fraudulent ends.

This is necessary in ensuring that the recognition accorded to the work does not conflict with *Sharī'a*. *Sharī'a* recognizes that no one has the right to pursue activities which aim at the destruction of any of the commands and the principles enshrined in

⁹ Qur'ān, 9.v 65 and 66.

¹⁰ Qur'ān, 22.v 30.

¹¹ Qur'ān, 24.v 19.

¹² *Al-Bukhārī*, tr., vol. 8, p.322, Ḥadīth No.485.

¹³ See this thesis p.65 and post.

it.

Broadly speaking, what is worth recognizing and protecting by *Sharī'a* is what cannot be opposing to its principles. The author's right is not worthy of recognition if it is in conflict with the rulings of *Sharī'a*.

It is unreliable to obtain legal status, take advantage of, or to derive from the *Sharī'a* a right to engage in any activity or perform any act aimed at challenging any of the principles set forth in *Sharī'a*. Otherwise, the sovereignty of *Sharī'a* and the public interest in stability would be at risk.

This principle is illustrated by the Companions during the reign of the Caliph of 'Uthmān when the Qur'ānic version became an issue of the highest concern to the Companions. The contents of the Qur'ān must be uniform because when people are in dispute about something they will refer to the Qur'ān to resolve their differences. The use of different Qur'ānic copies will lead to a marked difference, which is *ḥarām*,¹⁴ despite the common origin.

Therefore, the caliph appointed a committee to write the Authorized Version, a copy of which was to be sent to every Muslim country, and ordered to burn all other copies of the Qur'ān, which had been written in fragmentary manuscripts of other versions.¹⁵

This case can be seen as evidence since the decision to destroy copies of the Qur'ān was made after discussion, consultation and *ijmā'* among the Companions of the Prophet. Relying on that Mālik stated that the ruler should prevent anyone from selling or reciting the Qur'ān according to the manuscript which was written by Ibn Mas'ūd.¹⁶ This gives guidance that in the case of works that might lead to a clash within a nation or where legality might be an issue, the prevention and destruction of these works are considered under *Sharī'a*.

¹⁴ Ibn Ḥajar, *Fath al-Bārī*, vol. 9, p.13, Ḥadīth No.:4987. Al-Zarkashī, Badr al-Dīn, Muḥammad b. Bahādir, *al-Burhān fī 'Ulūm al-Qur'ān*, Muḥammad Abū al-Faḍl Ibrāhīm,(ed.) Beirut, Dār al-Ma'rifa, (N.D),vol.1, p.235.

¹⁵ *Al-Bukhārī*, tr., vol. 6, p.479, Ḥadīth No.:510.

¹⁶ Ibn Rushd the first, Abū al-Walīd Muḥammad b. Aḥmad, *al-Bayān wa al-Taḥṣīl*, Dr Aḥmad al-Ḥabābī and others (eds.), Beirut, Dār al-Gharb al-Islāmī, (1405AH/1985).vol.9, p.374.

Sharī'a prohibits any transaction on what can be used for the purpose of promoting crimes. For example, the sale of weapons to rebels or thieves or during civil war or the rent of place to be used as a brothel is prohibited.¹⁷

The rule is common that whatever promotes the prohibitions of *Sharī'a* must be banned even where a work meets the condition of originality. And the state must support and protect the Islamic principles and standards.

Further support can be found in the agreement of jurists on the permissibility of destroying of wine bottles, its special vessels and gambling instruments as penalty for offenders and to prevent others from getting access to them. Such a ruling might have provided the basis for destruction of works that are against *Sharī'a*.

There are many authorities which identify explicitly unlawful works as a corrupting cultural influence and a harmful force for their readers' minds. The destruction of the materials or instruments used only in crimes or wrongdoings is legally recognized.

Aḥmad issued *fatwa* that one can demolish a borrowed book, if he finds bad things in it.¹⁸ The idea behind this *fatwa* is that illegal works are not an appropriate subject-matter for property or right. Illegal materials are excluded from the security of ownership and rights. This might give guidance to the observer in cases where legality might be an issue.

Al-Māwardī stated that it is one of the qualified *muḥtasib*'s¹⁹ duties to prevent a person engaged in knowledge from contradicting the consensus or textual evidence, narrating 'aḥādīth of abhorrent meaning or giving incorrect interpretations.²⁰ Also, al-Nawawī stated that it is not allowed to sell books of atheism, blasphemy, black magic, reading future or philosophy.²¹

Ibn al-Qayyim stated that books that oppose Qur'ān and Sunna must be

¹⁷ *Al-Mughnī*, vol. 4, p.284.

¹⁸ Al-Maqdisī, Abū 'Abd Allah Muḥammad Ibn Mufliḥ, *al-Adāb al-Shar'iyya wa al-Minaḥ al-Mar'iyya*, Beirut, 'Ālam al-Kutub, (N.D.), vol.1, p.210.

¹⁹ *Muḥtasib* is a religious person who enjoins people what is right and forbids them what is wrong.

²⁰ Al-Mawardi, p.349.

²¹ *Al-Majmū'* vol. 9, p.303.

demolished, because there is no greater harm to the community than from these books, such that their destruction is of greater necessity than those utensils associated with alcohol consumption.²² In his reasoning, the harm that is caused by these books is more serious than the harm caused by other things. In addition, there is no threat of civil or criminal liability for damage or loss for the person who destroys the object that is used in the prohibited actions.²³ Numerous *fatāwa* have been issued on the same direction to secure legality within a particular culture.²⁴

According to the *Sharī'a* there are clearly negative consequences for a society, if works are allowed that propagate “*zanadiqah*” (heresy), challenge the meanings of the Qur'ān and *ḥadīth*, preach distorted interpretations of them, spread corruption, promote obscenity, or incite rebellion against the lawful authority.

It might be argued that circulation of materials encouraging people to do evil is worse than actually doing it, as the second case involves one person's sin and it is limited to him; while circulation of such material is an act of evil which affects all people who use it or become subject to it. It brings down the high standards of society.

To consider what is meant by ‘lawful’ in the light of *Sharī'a*; a work should be considered to be lawful if it does not form part of the state of “*ḥarām*” (the forbidden). The state of *ḥarām* is held to comprise everything established as prohibited or which leads to those prohibitions. The recognition and exploitation of illegal works are contrary to *Sharī'a*.

The question of whether or not the work is lawful must be answered in the affirmative and this is also the case for originality. Moral judgment regarding a work and its intended purpose have importance in determining whether it is approved. There is no copyright on a work which offends people, because it should be

²² Ibn Qayyim, al-Jawziyya, Muḥammad b. Abī Bakr, *al-Ṭuruq al-Ḥukmiyya*, Beirut Dār al-Kutub al-Ilmiyya, (1415AH/1995) (First edition), p.214 and post., hereinafter: al-Jawziyya, *al-Ṭuruq al-Ḥukmiyya*.

²³ Ibdī.

²⁴ Al-Shawkānī, Muḥammad Ibn 'Alī, *al-Fatḥ al-Rabbānī Min Fatāwa al-Imām al-Shawkānī*, Sana'a, The Publications of The High College of Justice, (1994) (First Edition) p. 202. Ibn Bāz, 'Abd al-'Zīz, *Majmū' Fatāwa wa al-Maqālāt*, Jeddah, Maktabat al-Ma'ārif, (1992) (Second Edition) vol.4, p.206.

prohibited.

According to *Sharī'a*, works which preach apostasy, criticize Islam, justify adultery, encourage indignity or racial hatred, or incite people to commit any criminal offence, are religiously aggravated offences. These works are especially dangerous because they oppose moral fundamentals, public order, and community cohesion and very often stir up hatred and violence.

Al-Qarāfī stated that it is necessary to warn the public and, in particular, vulnerable people about dangerous writings but to do so without exaggeration or false accusation.²⁵ There is the potential for a disastrous impact on relations between various religious communities. There are many instances where this has happened under the title of freedom of expression. In addition, the distinction between a believer and their beliefs, and between genuine scientific research and hatred disguised as science, is generally uncertain.

The view that the approval of *Sharī'a* is of a permanent nature, necessary and common, implies that no rights or protection should be granted to works opposing *Sharī'a*. To have copyright, a work must not contradict the rules of *Sharī'a* regarding the prevention of defamation or indecency.

Finally, there is the question of has a work which pirates another work or contains material contrary to *Sharī'a*, copyright at all? According to many Qurā'nic verses such as: "... and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just"²⁶ and *ḥadīth*: "... you should give the right of all those who has a right on you."²⁷, copyright subsists only in lawful material that originates from the author of infringed works. Furthermore, copyright cannot exist in those parts of a work which are opposed to the principles of *Sharī'a*.

²⁵ *Al-Furūq*, vol.4, p.359.

²⁶ Qur'ān, 5.v 8.

²⁷ *Al-Bukhārī*, tr., vol. 3, p108, Ḥadīth No.189.

5.3 Originality

All legal systems require some level of originality for a work to gain full recognition. Originality is regarded as a matter of principle. This condition works well for copyright. The purpose of such a requirement is to provide all valuable types of works their due recognition and protection. Having recognized this principle, these legal systems differ in terms of how they should apply it.

In spite of the apparent silence of *Sharī'a*, originality of a work can be seen as a necessary condition for receiving recognition and there are many justifications for this. The first argument for the requirement of originality is that priority is the essence of ownership and copyright is, thus, logically dependent on the originality. In terms of *uṣūl al-fiqh*, “*illa*” (the effective cause) of the priority right which provides ownership is originality.²⁸

In fact, the requirement for a work to be original is a specific prerequisite of that work because it gives an author the priority right. As stated before, the prior possession of a thing amounts to its ownership.²⁹ Originality is essential for the purpose of applying the rule of ownership to the work in question. Entitlement is based on originality. There is no priority if the work lacks originality. The notion of imaginative originality is at the core of priority.

Originality can be seen as a ground for ownership of a work. For a work to be recognized as the author's rights, it must be an original form of his or her creation. Therefore, the issue of originality precedes recognition of copyright.

Moreover, the concept of originality is a necessary safeguard of the public interest. Without this safeguard, copyright, which has some degree of monopoly, can be granted for what is already in the public domain. This standard provides copyright only for original works of authorship.

Al-Diraynī defined original intellectual production as those intellectual forms that result from the individual author's ingenuity, which have not been created

²⁸ See p.154 here.

²⁹ See p.137 here.

before.³⁰ Originality is a purely rational state, which leads the mind from the known to the unknown. It can be captured accidentally or systematically.

In the international custom and the practical life, it is a well-established principle that in authorship some degree of originality is necessary for a work to obtain acknowledgement. Arabic literature provides that a poem shall be considered to be original if it has never seen in currently pre-existing works in any way before.³¹ The priority right and prevailing ethos place great value on creativity and originality.

Moreover, as we have seen, *Shari'a* adopts the principle that no one should benefit from his own wrong, that is, violation or infringement of another's copyright. In *Shari'a*, no valid property or rights relating to property can be based on illegal possession of some thing.³² If there is no condition of originality, there would be many inconveniences and many doubtful questions of right. It prevents someone from claiming authorship and obtaining advantage for something that is owned already. It can be argued rightly that denial of the criterion of originality provides support to violation of legitimate copyright. There cannot be said to be copyright of a work that has been copied or otherwise infringed.

Originality can be absolute, in which case the works are novel and unique, or it can be relative, acquiring only a minimum degree of creativity of collection arrangement or selection.³³ This means at the very least, a work should be individually identifiable by its own features. Originality embodies some aspect of being the "mark of the author's personality".

Originality requires that: a work must owe its origin to the author and not be copied from another pre-existing work. Artistic merit or beauty is not necessary but the work must not be imitated or otherwise infringed.

The copying of the whole or a substantial part of a work is regarded as

³⁰ Al-Diraynī, *Ḥaqq al-Ibtikār*.p.9.

³¹ Al-Qayrawānī, Abū 'Alī Ibn Rashīq, *al-'Umda fī Mahāsīn al-Shi'r*, Dr. Muḥammad Qarqzān, (ed.), Beirut, Dār al-Ma'rifa, (1988) (First Edition), vol.1 p.448.

³² See p.101 here.

³³ Al-Diraynī, *Ḥaqq al-Ibtikār*, p.10. Azmi, *Intellectual Property*, p.82.

infringement of copyright and renders the new work as unoriginal. Otherwise, it would be a reproduction of previous works clothed in quotation, without real contribution or originality. As al-Shāṭibī pointed out what is permitted in part becomes prohibited when done excessively. In other words, the over-indulgence on *mubāḥāt* becomes *ḥarām*.³⁴

A second order debate has emerged about the best way to define originality. Much of this debate has focused on the themes of flexibility or certainty towards originality. The question of originality should be decided objectively, if necessary, on a case-by-case basis and by competent experts according to the field of work. This debate is undoubtedly important, but the key question is about the position of originality in ascertaining copyright in *Sharī'a*.

The condition of originality is of a general application. Therefore, in a broader generalization, whether a work is novel and unique or merely a compilation of facts in any order, copyright must be given to the earlier work.

A work is not recognized as original if it does not involve some additional contribution. A work can incorporate materials from other sources and still be considered original even if it has only minimal creativity in the selection, coordination, or arrangement of known facts.

The practical test in determining originality and recognition is whether the work is worth copying or using and is *prima facie* worth recognizing the author and protecting his rights over that work.

There is debate in every field of knowledge as to how originality should be evaluated. In most instances, an author starts from previous works and moves forward adding his or her own contributions.

Further, there is nothing contrary to the principles of *Sharī'a* in establishing that copyright does not subsist in a work unless and until that work is an original and takes some material form. One must ensure that the essence of copyright to be acquired enjoys the status of originality and takes some material form.

³⁴ *Al-Shāṭibī, al-Muwāfaqāt*, vol. 1.p.92, 93.

There is no reason to reject that when an author who has an idea he must put it in some material form in order to give the work tangible existence. Taking some material form or fixed state is necessary in order to prove the existence of the work, its rightful owner, and what the work consists of. Otherwise many people can share many ideas but an author is who seizes these ideas in material forms.

Extending priority rights means that copyright over work is confined only to truly new forms (expressions) contributed by the author in which ideas and concepts are presented. Usually ownership of aesthetic works relates to non-material objects on a spiritual or sensory basis.

5.4 The protection of *maṣlaḥa* (the Public Interest)

There is an important consideration of “*maṣlaḥa*” leading copyright on two levels: introduction and control of them. This condition is a countervailing force acting to ameliorate every individual’s rights “*ḥuqūq al-‘abd*” for the sake of the public interest.

Copyright contains both rights of Allah and rights of authors conjointly. It has been indicated in order to secure and signify its importance “*maṣlaḥa*” (the public interest) is labeled as “*ḥaqq Allah*” (Allah’s right).³⁵ As al-Qarāfi pointed out, every individual’s right has an associated right of Allah.³⁶

In *Sharī‘a*, a balance between the individual right and the public good is attainable. *Sharī‘a* recognizes that stimulating research and development by providing recognition and protection of copyright serves the public interest. Copyright concern the authors as well as the public. *Sharī‘a* strikes a balance between the public interest (the right of Allah) and the individual’s rights.

Another justification is that most intellectual works are not wholly the products of authors. There exists a continuous transfer of knowledge and culture from the preceding generation to the current one. An intellectual production is, therefore, a

³⁵ See this thesis p.65.

³⁶ See this thesis p.67.

collaborative, rather than an individual endeavor and it is most often mixed with a series of works through the generations and between nations. Authors rely on predecessors when producing their works. Of course, a work can be built on previous work. Authors can produce their works only through cooperation with previous contributors and towards a common good. Therefore, humanity has its own contribution in every individual work.

Therefore, copyright does not cover ideas and concepts which must be available to the public. Copyright does not give rise to ownership over information ideas or facts otherwise it would prevent anyone from dealing with any subject whatsoever. And this would cause great harm to the public interest.

Yet, the ideal work is one in which an author and community can benefit harmoniously. People can use all previous works created to advance education and intellectual thought provided they respect copyright. Directed toward achieving balance between different rights, copyright should work for authors, publishers and users to benefit the public at large.

According to *Sharī'a*, individual rights are of less importance in comparison with the public interest. The tendency is to place greater emphasis on public interest than on individual rights, especially in a case where there is a conflict between them. The public interest prevails over an author's rights to the extent that it might deny their validity and applicability.

Authors are required to exercise copyright in a just and honest manner. However, copyright might clash with the common good. An author cannot prevent the public from educational fair use of his works.³⁷ There is "*isti'māl al-ḥaqq lil-Idrār*" an (abuse of right), when the exercise and exploitation of an author's rights injuriously affects the public interest.³⁸

A simple example of an argument against absolute copyright is the case where

³⁷ Al-Diraynī, *Ḥaqq al-Ibtikār*.p.119.

³⁸ *The Mejelle*, Articles No. 1192 and 1197, p.194, and Articles No. 25 and post, p.6. Ḥaydar, vol.I.p.40 for the same articles and 29. Ḥaydar, vol.3.p.201, 211, Articles No. 1192 and 1197. *Al-Mawsū'a al-Fiqhiyya*, vol.28, p. 159.

an author owns a book which society needs but he refuses to publish it or demands an unjustifiably high price for it.

This approach is supported by the legal maxims of choosing the lesser of two evils. These are: "A damage cannot be put an end to by its like", "To repel a public damage, a private damage is preferred" and "Sever damage is made to disappear by a lighter damage":³⁹ This gives the judiciary the authority to require the publication of useful works, that are needed for the public even if authors or publishers refuse to do so.⁴⁰

Protection against perceived abuse of copyright is also provided by the prohibition against hoarding. With a view to protecting the public interest, the Prophet is reported to have said: "He who hoards is a sinner"⁴¹ and "There is neither injury nor return of injury."⁴² Hoarding of wealth without recognizing the rights of the poor is threatened with the direst punishment in the hereafter and is declared to be one of the main causes of the decay of societies in this world.

Not only is hoarding food prohibited but, additionally, *fuqahā'* extended the applications of its prohibition by preventing a person from hoarding any material of need or necessity. Mālik stated that hoarding can be applied to everything that disturbs the market.⁴³

The reasoning behind this prohibition (causing harm to the public) makes this *ḥadīth* applicable not only to food but also to anything that is needed by the public.⁴⁴ There are situations where the harm that is caused by the hoarding of some materials is equal or more serious than the harm caused by the hoarding of food.

Similarly, hoarding knowledge, research or information without recognizing the

³⁹ *The Mejelle*, p.6. Ḥaydar, vol.I.p.40 Article No. 25,26,27,28 and 29.

⁴⁰ Abū Zayd, *Fiqh al-Nawāzil*, vol. 2, p.126.

⁴¹ Sahih Muslim, <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html>, Book 010, Number 3910

⁴² <http://www.muslimaccess.com/sunnah/hadeeth/muwatta/036.html>. Book 36, Number 36.26.31. In Arabic see al-Zarqānī, *Sharḥ Muwaṭṭa'*, Ḥadīth No: 1500, vol.4, p. 40. Ibn 'Abd al-Barr, *Al-Istidhkār*, vol.22, p.221. *Al-Muḥalla*, vol.9.p.78.

⁴³ *Al-Mudawwana*, vol.3, p.313.

⁴⁴ Ibid. *Al-Bayān wa al-Taḥṣīl*, Vol.9, p.352. Al-Ḥaṭṭāb, vol.4, p. 227.

public interest contains a similar outcome and it is detrimental to society. The prohibition against hoarding can be applied to hoarding of helpful intellectual works made by authors or publishers. No one is allowed to deprive humanity of the basic right to fully benefit from its own creativity. This extension is to protect of the public interest and is in accordance with the *ḥadīth*. There is no general limitation clause on the extent of hoarding applications. An individual cannot hoard any necessity or need of society.

Fuqahā' have agreed that the state can enforce hoarders to sell to the public what they hold at a fair value. The state can force hoarders to sell hoarded property at 'the market rate'.⁴⁵ The state should have no hesitation in using legal means to force authors and publishers to publish useful works to the fullest extent needed for the public interest.

Similarly, if traders increase unreasonably the price of essential commodities, the state is empowered to regulate prices in order to protect the public interest. The state should legislate so as to prevent authors from misusing of their rights. It is not justifiable to infringe or violate copyright, but it is all the more unjustifiable for the authors to hoard useful works.

Where a work is useful to the public interest, the state can compel the reproduction of the work without the copyright owner's consent if the owner refuses to do so.

If there is an imbalance between copyright and public interest, then this is *prima facie* evidence that there is something wrong with the state's accountancy. A society should sacrifice the right or good of an author for the overall public right or good. The state is vested with discretionary powers to protect the public interest.

This debate has become polarized between the need for copyright to be strengthened to promote creativity and the protection of the public need to know.

However, this condition has no way at all weakened the legitimacy of copyright in the same way as any other private property. There is another rule, which says:

⁴⁵ Ibn Taymiyya, *Majmū' Fatāwā*, vol.28, p.82. Al-Jawziyya, *al-Ṭuruq al-Ḥukmiyya*, p.289.

“constraints do not destroy the rights of another”.⁴⁶ Therefore, the public need must not abrogate the authors’ rights. In the case where the state needs to acquire work owned by authors it must pay just compensation to that author and must represent the work with dignity.

The abolition of copyright is not a rational resolution of this issue. The compulsory fair licensing and pricing can mediate between public and private interests. At the same time, it must be emphasized that the public interest will not justify the reproduction of a work for commercial purpose without the copyright owner’s consent.⁴⁷ If one were to hold otherwise, many inconveniences and many doubtful questions of justice might arise.

From the perspective of *‘ilm Muṣṭalaḥ al-Ḥadīth*, a student can narrate a *ḥadīth* and attribute it to its narrator although the narrator refuses to give his consent to the student to narrate this *ḥadīth*, unless the refusal was because there is an error in the *ḥadīth* or doubts about it.⁴⁸ *Fuqahā’* think that narrating *ḥadīth* to people is a religious duty even when a scholar from whom the *ḥadīth* comes refuses to permission to narrate it. Therefore, an author cannot use copyrights to prevent others from using quotations from his work for research, review or criticism.

It is evident that the public interest which exists in works that advance the improvement of science, creativity and the arts must be protected. It is possible to say that the rights of Allah allow works to be utilized generally for the public interest such as educational or scientific purposes.

This consideration has led all modern copyright laws to provide some provisions relating to these exceptions under different labels such as “fair use” or “fair dealing” and compulsory licensing.⁴⁹ Fair abridgements, reviews and limited quotations are different forms of the public right over the work.

The public interest “*maṣlaḥa*” applies when one uses pieces of a work for a

⁴⁶ The Mejjelle, p.7.Ḥaydar, vol.1.p.42, Article No. 33.

⁴⁷ Al-Diraynī, *Ḥaqq al-Ibtikār*. p. 119.

⁴⁸ Al-‘Irāqī, *Fath al-Mughīth*. p.199.

⁴⁹ Goldstein, Paul, *International Copyright*, Oxford, Oxford Press University, (2001),p.292 and post. Cornish, *Intellectual Property*, p.434.

critique, personal use, research or non-profit purpose, which does not harm the copyrighted work.

In addition, there are rules in *Muṣṭalah al-Ḥadīth* which contain the same notion and describe how to narrate and transmit *ḥadīth*.

One of the ways of "*taḥmmul al-'ilm*" is "*wijāda*" which means; if a person finds a *ḥadīth* in a book or an article, he can narrate that *ḥadīth* on condition that he states clearly that he found it in that reference work and gives its details as much as possible.⁵⁰ Especially, after the compilation and the widespread dissemination of the main authoritative collections of *ḥadīth*, Arabic and *fiqh* and so on, the prime reliance in this field is on those works.

This authorization is articulated by *fuqahā'* usually by giving quotations from other early works for comment, teaching and criticism with full references. There must be a balance between authors' rights and users' rights, so that the public can use all previous works to advance education progress and intellectual thought. Educational purpose has a close bearing upon author's rights in order to preserve the public interest.

However, the quotation from a work must be accompanied by adequate references to prevent the circumvention of academic protective measures. An important consideration is that quoting of another's works must be accurate and within the limits that are acceptable by scholars. Al-Shāṭibī pointed out that what has been permitted piecemeal partly can be prohibited if it is done fully. The squandering on *mubāḥāt* becomes *ḥarām*.⁵¹ Otherwise, they would not infringe copyright on the earlier work.

These conditions protect copyright of the actual creators under the sovereignty of *Sharī'a* and stimulate the dissemination of useful works that are in the public interest. Before granting copyright over a given work, it is justifiable to consider these necessary conditions of legality, originality and the public interest, so that

⁵⁰ Al-Ṭaḥḥān, *Taysīr*, p.165.

⁵¹ Al-Shāṭibī, *al-Muwāfaqāt*, vol. 1.p.92, 93.

there is no contradiction between *Sharī'a* and that work.

5.4.1 The issue of freedom of expression

Perhaps the most controversial condition of copyright relates to restrictions on freedom of expression. A detailed discussion on the issue of freedom of expression is clearly beyond the scope of this study, but a brief consideration of it is necessary to adequately cover the limitations of copyright. The approach of *Sharī'a* on the question of freedom of expression has been heavily criticized in the West, primarily because it implicitly adopts a restrictive view of censorship. Many Western studies on controversial issues like this subject have tended to examine *Sharī'a* to their own Western values. It is frequently repeated in literature that "In Islam unlike their Western counterparts, there is no absolute freedom of expression of ideas."⁵²

In fact, restrictions on freedom of expression are not new or uncommon phenomena in all countries, cultures and ages.⁵³ All legal systems restrict the dissemination of works, which are perceived as opposing the public order and against general interest. Societies have different forms of censorship to one extent or another, using the criterion of public order to justify the required legislations.

There is religious, political and economic censorship although the religious censorship is more objectionable than the other kinds. For example, copyright began in the UK as a royal license granted to the publishing Stationers Company to control the spread of religious thoughts that were opposed to the crown.⁵⁴ Additionally English blasphemy law only protects the Church of England and not other faiths,⁵⁵ and this amounts to some form of censorship. The denial of historical events is

⁵² Azmi, *Intellectual Property*, p.310

⁵³ For more details on this point, see <http://onlinebooks.library.upenn.edu/banned-books.html>, and <http://www.thefileroom.org/documents/CategoryHomePage.html>

⁵⁴ Cornish, *Intellectual Property*, p.339.

⁵⁵ Smith & Hogan, *Criminal Law*, London, Butter Worths, (2002) (Tenth Edition),p.735.

punishable in many European laws.⁵⁶ Therefore, *Sharī'a* is neither exceptional nor illogical in protecting its own creed.

The main concern here is to realize how the condition of legality can be interpreted with freedom of expression. One of the conditions for the grant of copyright is that, the work must be lawful in the light of *Sharī'a*. As with most rights and principles, freedom of expression is subject to limitations imposed by *Sharī'a*. According to *Sharī'a*, in general, a work which contains or encourages a heresy or "*bid'a*" (innovation or a distorted interpretation), temptation or incitement to sensuality, corruption and obscenity or conspiracy, rebellion against lawful authorities must be forbidden, because this work is a straightforward affront to Islamic principles and standards.

In the first place, the Qurā'nic verse states: "Allah loveth not the shouting of evil words public speech, except by one who has been wronged,"⁵⁷ therefore, no one is allowed to say evil words whether these are spoken, written or in drawing except in very limited cases.

Sharī'a adopts the broader view in relation to the protection of public moral. For example, a verse states "Those who love (to see) scandal published broadcast among the Believers, will have a grievous Penalty in this life and in the Hereafter: Allah knows, and ye know not."⁵⁸ Therefore, the publication of a work, whose topic is a scandal, would come within the scope of the verse.

Another verse reads: "And those who launch a charge against chaste women, and produce not four witnesses (To support their allegations), flog them with eighty stripes, and reject their evidence ever after: for such men are wicked transgressors".⁵⁹ Accordingly, writing or drawing of material that accuses someone of "*zinā*" (fornication) leads to the punishment stipulated by this verse.

Not only must the meaning be correct but it must be expressed correctly and

⁵⁶ Austria, Belgium, the Czech Republic, France, Germany, Lithuania, Poland, Romania and Slovakia have laws against Holocaust denial.

⁵⁷ Qur'ān, 24.v 19.

⁵⁸ Qur'ān .4.v. 148.

⁵⁹ Qur'ān .24.v. 4.

accurately as the verse: "O Ye of faith Say not (to the Messenger, words of ambiguous import, but words of respect; and hearken (to him):"⁶⁰ The verse forbade using the word (*ra'inā*) which originally means listen to us, because it had been used by unbelievers as an insulting word.⁶¹ The meanings of some words change over time, therefore their rulings change accordingly whether in "*qadhf*" (slander), "*nadhr*" (vow) or other subjects. To apply this verse, if there is a doubt, the current usage should be considered in order to reach the correct interpretation of the words and in order to know its own ruling in *Sharī'a*.

The second support is derived from the famous *ḥadīth* and rule, which says: "There is no injury nor return of injury."⁶² and this applies especially if it is concerning public injury. It can be applied when a work violates *Sharī'a* such as blasphemy, spreading corruption or slander. The fear of spreading mischief is the reason for such measures. The author's right of publication and "Freedom of expression does not permit exposing the faithful to corrupt influences which violate the principles of Islamic."⁶³

The state and individuals are both required to support the commanding of good and the forbidding evil in a Muslim society. The state is required to take reasonable measures to protect society and the public interest. In order to ensure this essential matter, the state is empowered to prevent or withdraw works if they threaten the religion, morals or the public interest.

This is closely connected with the precept that *Sharī'a* prohibits works that slander idols. The Qurā'nic verse states: "Revile not ye those whom they upon call beside Allah, lest they out of spit Revile Allah in their ignorance".⁶⁴ The reason for the prohibition is that insulting idols leads to insulting Allah. The verse establishes the principle that believers are advised to prevent sources of confusion over

⁶⁰ Qur'ān .2.v. 104.

⁶¹ *Ibn Kathir*, vol.1,p.320.

⁶² <http://www.muslimaccess.com/sunnah/hadeeth/muwatta/036.html>. Book 36, Number 36.26.31.In Arabic see al-Zarqānī, *Sharḥ Muwaṭṭa'*, Ḥadīth No: 1500, vol.4, p. 40. Ibn 'Abd al-Barr, *al-Istidhkār*, vol.22, p.221. Ḥaydar, vol.1 p.36.

⁶³ Kamali, *Freedom Of Expression* 193.

⁶⁴ Qur'ān .6.v. 108.

principles and corruption. This covers any work leading to unacceptable results. Therefore, such works should be prohibited because of the serious consequences.

Also, there are other situations where the public interest should prevail over freedom of expression. The case raises some serious questions about the responsibilities of authors and publishers when given the opportunity to publish works that contain offensive material.

However, such prohibited works should be restricted to very limited and precise meanings and scope. In large measure, freedom of expression exists merely in virtue of the absence of any rule to the contrary. The assumption is that the narrower the scope of the prohibition from the permitted authorship, the greater the inducement for the authors to write.

The general rule is that people have been largely at liberty to express whatever is not proven to be prohibited. It is reasonable to consider the five categories of actions in *fiqh* which identify all human actions classified as either “*wājib*” (obligatory), “*mandūb*” (recommended), “*mubāḥ*” (permissible), “*makrūh*” (reprehensible) or “*ḥarām*” (prohibited). The first four categories cover a much larger area than final forbidden one. Therefore, a word or a work is more likely to be classified under the obligatory, desirable, neutral or reprehensible categories than to be under the prohibited category.

It must be acknowledged that there is a difficulty in some cases in distinguishing a righteous “*ra’y*” (opinion) from a misguided one. But this difficulty should not prevail over the general principle. Freedom of expression would not justify violating the law or the public interest. Nevertheless, there remains a gulf between *Sharī’a* and Western thought on this issue which many researchers believe that is difficult to bridge.

5.5 The duration of copyright

Although, recognition of copyright under *Sharī’a* is obviously very important, another contentious question is that of its duration. There is a good deal of ambiguity

about the duration of copyright under *Shari'a*. It involves at least some serious obstacles the first of which is whether the duration of copyright is legal, second, whether there a reason for believing it is needed, and, if so, for how long.

In considering the duration of copyright, if it ever terminates, researchers will build their judgment on their own understanding of *Shari'a* as there is no authority or benchmark that can be used for measuring the duration of copyright. Moreover, the research has sought to address this question through the complexity of copyright.

Duration should be determined according to *Shari'a* with the same methodology, which has been applied so far in this study. In order to properly consider this subject it is necessary to refer very briefly to the duration of copyright under law.

5.5.1 The position under laws

The duration of copyright varies greatly from one legal system to another beginning with a period of fourteen years as provided by the 1710 Statute of Anne.⁶⁵ Subsequently, the law provided for copyright to last for the author's lifetime plus 50 or 70 years after the author's death. There are different terms for each type of copyright, and it varies depending on whether the work is literary, a sound recording and other formats including computer programs. The Berne Convention (Article 6bis) and the TRIPS Agreement (Article 12) provides that the period of copyright protection is for the life of the author plus 50 years. However, the Convention's minimum term "is a floor, not a ceiling to duration of protection".⁶⁶ It is quite clear that there is an increasing tendency to extend the duration of copyright.

One might ask why the duration of copyright given by law is far longer than the term of patent which is only twenty years, whereas the same arguments might be applied to both.⁶⁷ This might cause inventors to incline to protect their works under copyright law rather than patent law if that is possible. In fact, "[t]hey seem moved

⁶⁵ Cornish, *Intellectual Property*, p.341.

⁶⁶ Goldstein, *International Copyright*, p.230. Cornish, *Intellectual Property*, p.404.

⁶⁷ Cornish, *Intellectual Property*, p.372.

by a moral desire to give creators their due - a chance of reward somehow equating with the property rights which attract to the production of material things and the making of financial gains.”⁶⁸

5.5.2 The proposal for a temporary copyright in *Sharī‘a*

In answering the question of duration, al-Diraynī stated that the term of exploitation of copyright by the heirs of the author should be sixty years after the death of the author.⁶⁹ The reason offered is that, any work has no absolute and entire novelty even though an author makes his own contribution. It usually depends on previous works that are already in the public domain. The public domain belongs to the whole nation and subsequently copyright contains *ḥaqq* Allah, which cannot be waived.⁷⁰ Therefore, ownership of copyright is not absolute or eternal. He chose this particular term after considering the maximum duration of “*ḥaqq al-ḥakr*”, as he found it in *fiqh*, which is sixty years.⁷¹

This reasoning is questionable. *Ḥaqq al-ḥakr* is significantly different from copyright. Copyright is an absolute right derived from the right of ownership while *ḥaqq al-ḥakr* is temporal right of “*intifā‘*” (utilization) arising from a contract. Apparently, there are no related grounds of similarity or consideration on which *qiyās* can be drawn between *ḥaqq al-ḥakr* and copyright. It is an unjustified analogy and a kind of “*qiyās ma‘ al-fāriq*”, which is invalid.

Secondly, *ḥaqq* Allah subsists in copyright, in that no work is copyrighted unless it fulfils the conditions imposed by *Sharī‘a*, but that does not guarantee either perpetual or temporary copyright.

In fact, copyright is often collaborative and mixed with *ḥaqq* Allah. It is not controversial to say that every work is usually based on previous works and perhaps

⁶⁸ Ibid, p.374.

⁶⁹ Al-Diraynī, *al-Ibtikār*. p.121 and p. 145 and post.

⁷⁰ Ibid, p. 146.

⁷¹ *Al-Mawsū‘a al-Fiqhiyya*, vol.18, p. 53, *Ḥakr* entry. A right based on contract under which an administrator of property, belongs to *awqāf* (endowment), can grant a tenant exclusive use of the property for an agreed term, in return of payment.

even that most works are not wholly the product of the author. Their reliance on previous works does not deprive them of legitimate ownership or impact on its enduring qualities.

Following the logic of temporary copyright, it can be argued that if *'urf* creates copyright, its terms should be left to *'urf* and in that case the law defines the duration. If we consider that copyright is property of "*manfa'a*" (utility), then we should accept that duration applies to copyright, because property of *manfa'a* has duration, albeit usually of a temporary nature.⁷²

The shift has moved from *'urf* to laws, which *Sharī'a* does not refer to. But copyright has been established mainly on many pieces of evidence from *Sharī'a* other than *'urf*. There is no evidence as to whether *Sharī'a* determines whether property of *manfa'a* is temporary or permanent.

Some additional support for the principle of duration of rights may be found in the fact that terms of rights vary from one right to another in *Sharī'a*. For example, "*khiyār al-majlis*" (the option of acceptance or cancellation of sale contract) is limited by the time of a meeting.⁷³ With slight differences, the right of "*ḥadāna*" has its own constrained term.⁷⁴ Some *fuqahā'* have said that the right of "*shuf'a*" expires immediately while other *fuqahā'* extend it for five years.⁷⁵ Therefore, it is not surprising to propose a term of duration for copyright.

The relevant legal maxim is that "the exercise of control over *Rayahs*, that is to say, over subjects, depends on what is right to be done".⁷⁶ It means that the state is bound to exercise its authority according to what is in the interest of the public. It suggests that the state should take decisions and policies which uphold *maṣlaḥa* of its subjects.

Moreover, the duration of copyright can originate from "*maṣlaḥa*" (the public interest), under the rule that the ruler can lawfully restrict what is "*mubāḥ*"

⁷² Al-Zarqā, *al-Madkhal*, vol.1, p.362. Al-Diraynī, *al-Ibtikār*. p. 49.

⁷³ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.214.

⁷⁴ Ibid, vol. II, p.66. *Al-Mawsū'a al-Fiqhiyya*, vol. I7, p.207.

⁷⁵ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.314,315.

⁷⁶ *The Mejelle*, p.11 Article 58. Haydar, vol.1, p.57.

(permissible) for purposes of the public interest.

There is a possibility of approving the duration of copyright given by law under “*Siyāsa Shar‘iyya*” (*Sharī‘a*-oriented policy). Likewise the duration of many *mubāḥāt* can be at the discretion of the state. *Siyāsa Shar‘iyya* may be applied to the duration of copyright, by imposing restrictions on what is permissible in order to secure the public interest. An analogy can be drawn from the case of granting “a woman whose husband had divorced her in order to be disinherited”⁷⁷ the right of inheritance. There are other examples which lead to the same conclusion.⁷⁸ And there is consensus on the ruling that “having held craftsmen and traders responsible for the loss of goods that were placed in their custody”.⁷⁹ In anticipation of hoarding or the misuse of copyright, the state should clearly define the duration of copyright. The state can specify a suitable term for copyright. Understood in this way, a Muslim state is obliged to consider its international interests and to honor its international agreements.

This is also convincingly supported by the explicit legal maxim that “The decision of the “*ḥākim*” (ruler or judge) terminates a dispute.”⁸⁰ Therefore, the public must abide by the decision made by the ruler regarding a particular term of duration of copyright in the same way as for other forms of property because the overwhelming evidence of *Sharī‘a* requires a Muslim to comply with those commands of a ruler that do not conflict with the rulings of *Sharī‘a*.⁸¹

Although there is some sympathy for this attractive argument it cannot be allowed to prevail. From a *Sharī‘a* standpoint, the legislation of rights is determined by *Sharī‘a* in their foundations, holders, conditions and limitations.

The state is vested with powers to protect rights granted by *Sharī‘a* not to impose restrictions on such rights. Copyright is recognized as a right of the author

⁷⁷ Kamali, *Principle of Islamic Jurisprudence*, p.270,271.

⁷⁸ Ibid, p.151,271. Al-Jawziyya, *al-Ṭuruq al-Ḥukmiyya*, p.10 and post.

⁷⁹ Kamali, *Principle of Islamic Jurisprudence*, p.271.

⁸⁰ *Al-Furūq*, vol.2, p.177, vol.4, p.112. Al-Zarkashī, *al-Manthūr*, vol.II, p.69. *Al-Mawsū‘a al-Fiqhiyya*, vol.33, p. 338, Qaḍā’ entry.

⁸¹ Qur’ān, 3.v 59. Al-Qurṭubī, *al-Jāmi‘*, vol.5p.166.

based on *Sharī'a*, not as a reward granted by the state. Also, this proposal can put the whole system of copyright at the discretion of the ruler and then authors have no actual title to them.

Public interest can also propose that the period of copyright should increase, decrease or fall, responding to changing views of the public interest. The ability to protect and promote copyright does not necessarily depend on their duration.

5.5.3 The proposal of permanent copyright

On the other hand, al-Shahrānī maintains copyrights must be eternal, because defining a term for copyright by any number of years is arbitrary.⁸² It is one fixed term given to different authors of all subjects of knowledge from different ages who have spent very dissimilar time and effort on authorship.⁸³ Despite this significant difference between various kinds of works, all of them are given the same duration.

Boundaries of the subject matter of property are necessary, while a limit on its term is left to nature, practice and experience. There is no provision in the sources of *Sharī'a* that provides that the term of any property will expire at some stage.

The general presumption is that, property embodies an aspect of the permanency a strand of continuity that secures an element of longevity within a culture. Like other forms of property, copyright must be permanent. The duration of copyright should be deemed in the same way as any property. The recognition of copyright as a right conflicts with the idea of limiting its duration in the same way as with other rights.

Like physical property, there is no general limitation clause of the extent to which copyright may be terminated. There is no clear evidence from *Sharī'a* for treating copyright differently. Special evidence needs to be given for the termination or limited duration of rights. Copyright is subject only to continuity after death prescribed by *ḥadīth* as it is reported that the Prophet said "When a man dies, his

⁸² Al-Shahrānī, p.368 and post.

⁸³ *Ibdi.*

acts come to an end, but three ... knowledge (by which people) benefit ...”⁸⁴

It can be argued that the *ḥadīth* refers to the continuity of the rewards in the hereafter after death, but not to the continuity of the work. In fact, equally the *ḥadīth* proves the continuity of a right of the owner of knowledge after his the death, because it still attributes knowledge to the one who produced it, even after death. There is no conflict between the commercial profitability of a work and it being rewarded in the hereafter. Also, this does not mean that only useful works enjoy continuity, but this is to encourage people to strive to perform good deeds as much as possible.

As a general rule, the lapse of time will not end rights. The term of duration of some rights in *Sharī‘a* is limited by the nature of the objects of these rights. For example, legitimate capacity such as right of “*ḥadāna*” (custody) or the destruction of the subject matter or the transfer of a right to another party. The view that copyright is ownership of non-material things cannot justify putting limitations on its duration.

On the grounds that copyright is a form of property having more or less the same basis for ownership, it is beyond question to treat that they should be treated as perpetual property. Therefore, copyright is a right of ownership which lasts usually for eternity.

The proposal of temporary copyright that terminates ownership over a work of authorship after some time is contrary to the assertion that ownership is usually and legally recognized as everlasting and not determined after an arbitrary period. As we have seen, copyright is a form of “*māl*” (wealth), therefore, it should be left to its nature and to the market.

It would be fair to say that copyright for whatever duration is valued by mere commerce, which is by its very nature both ephemeral and unstable. Secondly, it should be noted that the progress of science, the arts and knowledge has been and

⁸⁴ *Muslim*, tr. Ṣaddīqī, vol.III/A,p.83. Available online: <http://www.muslimaccess.com/sunnah/hadeeth/muslim/013.html>, Book 013, Number 4005

will no doubt continue to prevail over most of the works previously created. Therefore, this might deny the everlasting nature of any work in reality. The valuation of works might increase or decrease over time.

The finite nature of works is inevitable because of the constant changing nature of thought even though authors try to make their works immortal. Development in science and technology do not grind to a halt because of a collaborative and accumulative work from one generation to the next. Through the course of time, there are few successful works, which can come to mind. There is no guarantee that works will be eternal and profitable forever at the expense of newer ones.

In terms of the public interest, the enforcement of duration of copyright does not appear to support the recognition or protection of copyright. If copyright is just an incentive to encourage creation of new works, unlimited duration of copyright would further encourage authorship by rewarding an author through his or her heirs.

The divide is highly efficient in both theory and practice. Amongst the opinions, which suggest that copyright is temporary, and others that see that copyright is an eternal there is another contemporary opinion, which confines the right of republishing works to the direct heirs only, but not to those who come after them.⁸⁵

On balance, there are obviously desirable arguments for applying some term to copyrights as there are in law but these views should not prevail over what strong evidence considers being just and well founded. That is those rights and ownership are eternal as a matter of principal.

It may be better to say that a closer look will reveal that the proposal of permanent copyright can be connected easily to *Sharī'a*, with much benefit for copyright as a whole being achieved.

5.6 Summary

Although there are no general limitations and conditions on copyright, they can be detected from *Sharī'a* in order to ensure that copyright is in harmony with other rights and considerations. Islamic copyright can have conditions which bear

⁸⁵ Ghāwajī, Wahbī Sulaymān, in al-Diraynī, *Ḥaqq al-Ibtikār*, p.171.

the marks of *Sharī'a*.

Firstly, the condition of legality should be considered. In line with evidence, it is unjustified to take advantage from unlawful works or to derive approval from the *Sharī'a* for a work that conflicts with the principles set forth in *Sharī'a* or leads to clash within a given society. If copyright is granted it should only be on the basis that all the contents of a given work are decent.

Under *Sharī'a*, there is legal recognition for the destruction of works which offend people or preach apostasy, criticize Islam, justify adultery, encourage indignity, racial hatred or incite people to commit any sin or criminal offence.

The condition of originality required for a work to gain recognition is consistent with the right of priority in *Sharī'a*. Priority is the essence of copyright and thus it is in turn dependant on originality and to prevent anyone from obtaining advantage for work that is owned already. As it is often stated copyright on a work is confined only to the truly new forms (expressions), and does not cover ideas and concepts which must of necessity, be available to the public.

The public interest in the improvement of science, creativity and arts leads to a requirement that there is access for the public to useful works. However, this access should not be for commercial purposes and should be at the copyright owner's consent unless there is a case where an author refuses to publish his useful work or demands a high price for it. Conditions are needed to harmonize the use of copyright and dissemination of knowledge on the one hand with a consideration of the public interest on the other.

The necessary condition of legality prevails over freedom of expression to prevent works that bring heresy, "*bid'a*" (innovation) disbelief, temptation to sensuality and corruption or rebellion against lawful authorities. Freedom of expression leads to different forms of censorship in different legal systems using the criterion of public interest or order to justify the required restrictions over some works. Freedom of expression is located within the broader framework of *Sharī'a*. As in law, censorship is required by *Sharī'a* for the same reason. *Sharī'a* also prohibits even works that slander idols because of the serious consequences. This

can be extended to any work that results in unacceptable outcomes.

There is a good deal of ambiguity about the duration of copyright under *Sharī'a* as there is no authority providing that the term of any property will expire at some stage.

Al-Diraynī suggested that the term of exploitation of copyright by the heirs of the author should be sixty years after the death of the author, comparing it with the maximum duration of *ḥaqq al-ḥakr*, found in *fiqh* books and he also suggested that because authors usually depend on previous works, their ownership is not absolute and also copyright contains *ḥaqq* Allah. However, this analogy is invalid because *Ḥaqq al-ḥakr* is not similar to copyright. *Ḥaqq* Allah is presented in intellectual works whether copyright is perpetual or temporary.

There are some arguments for temporary copyright. Viewing copyright as property of "*manfa'a*" (utility) leads to the acceptance of some limitation on the duration for copyright, because in general, property of *manfa'a* is temporary. '*Urf* which was used to create copyright can be used for determining its duration. Some rights in *Sharī'a* are limited by different terms such as the right of *ḥaḍāna*, *khiyār al-majlis* and the right of *shuf'a*. According to *Siyāsa Shar'iyya*, a ruler can select a particular term of duration copyright as this must be respected for many forms of evidence in *Sharī'a*. By using the principle that the ruler can restrict what is permissible for the public interest, copyright can be limited by a term.

On the other hand, there is no clear evidence from *Sharī'a* to treat copyright any differently than other rights. Putting a limitation on the duration on copyright seems to be inconsistent with ownership. It can be argued that the *ḥadīth* which refers to the continuity in the rewards of the hereafter for a work, implies continuity of attribution of the author of knowledge even after death.

The limitation of copyright cannot be justified because it is an ownership of non-material objects. Any limitation on the duration of copyright appears to be arbitrary. It would be fair to say that perpetual copyright encourages authorship more than copyright with a limited duration does because of the reward to authors and their heirs. The legislation of rights, their foundations, holders, conditions and

limitations is determined by *Sharī'a*, and cannot be left to the state, custom or law.

On balance, the lack of justifications and the unanswered queries lead to rejection or at least weaken the notion of temporal copyright. The experience indicates that the valuation of works varies through the course of time and by the progress of authorship, while, according to the law, ownership over these works had been terminated. It is clear from this chapter that *Sharī'a* establishes conditions that must be satisfied in order for copyright to be established.

Chapter Six

Objections against Copyright

6.1 Introduction

After the presentation of the arguments supporting copyright in this study, it is necessary to open the subject for further discussion. This final chapter presents and examines a number of arguments against copyright derived from the sources of the *Sharī'a*. This critical discussion will shed some light on copyright and its obstacles within Islamic jurisprudence in a more specific way.

Although copyright has strong support from *Sharī'a*, there are some strong counter arguments to the establishment of copyright which need to be addressed from the perspective of *Sharī'a*. There has been a continuous debate between those who think that copyright is singled out by its evidence and opponents of copyright who see copyright as in conflict with *Sharī'a* for a variety of reasons.

Objections to the establishing copyright from *Sharī'a* can be seen as a supposed preference of other rights or considerations. Some *fuqahā'* see copyright as similar to some special rights that cannot be subject to exchange. Other *fuqahā'* think that copyright is individualistic and an obstacle to the widespread dissemination of knowledge, or perhaps a combination of many negative consequences.

The discussion here will deal with the most common objections that are often raised in modern works on *fiqh*. Also, it is also beyond the purpose of this study to engage in a political discussion on copyright.

6.2 First Objection: being abstract rights

Copyright is classified as "*ḥuqūq mujarrada*" (abstract rights), such as "*ḥaqq*

shuf'a" (right of pre-emption), "*ḥaqq al-khiyār*" (the right of the option), the right of way and the right of water as opposed to "*ḥuqūq mutaḡarrira*" (concrete rights).¹ According to *fiqh*, this kind of rights cannot be the subject matter of sale, exchange, compromise, reconciliation or compensation because such rights are purely abstract rights. Authors own their copyright but they cannot exchange them. The ownership of copyright must not prevail over or deny their nature or their classification as abstract rights. Therefore, copyright cannot be sold, hired or the subject matter of compensation.²

A simple response to this objection is that no distinction is made between *ḥuqūq mujarrada* and *ḥuqūq mutaḡarrira* in the original sources of *Sharī'a*. To justify this classification and its consequences there must be sound evidence from *Sharī'a*.

This classification has not received as much acceptance from *fuqahā'* as other classifications have in their treatises. It has been matched by the controversy³ even among the *Ḥanafī fuqahā'* who only adopt this classification. Some *fuqahā'* have suggested that the correct classification should be left to be worked out case by case and not through a general treatment.⁴ Some *fuqahā'* are dismissive of this classification while others question whether it is sufficiently comprehensive to encompass all rights.⁵

Ibn 'Ābdīn stated that it is possible to identify some exceptions to the prohibition of the sale of abstract rights in the *Ḥanafī* school. For example, the prohibition of the sale or exchange of abstract rights should not be regarded as a definitive assertion.⁶ Moreover, some *fuqahā'* of the *Ḥanafī* school tolerate the sale of the right of way, the right of water and the right of waiving a job from "*awaḡāf*"

¹ See this thesis, p.68.

² Al-Kurdī, vol. 25 p. 62-63. Ṭuhmāz, *Ḥaqq al-Ta'līf wa al-Nashar wa al-Tarjama*, in al-Diraynī, *Ḥaqq al-Ibtikār*, p.179.

³ Madkūr, Muḡammad Sallām, *al-Madkhal li al-fiqh al-Islāmī*, p.430, cited in al-Kabbāshī, p.77.

⁴ Ibid.

⁵ Ibid.

⁶ Ibn 'Ābdīn, vol.4, p.518.

(endowments) in exchange for money.⁷

It is appropriate to comment here that allowing a number of exceptions whereby a right may be sold lawfully indicates that the prohibition of sale of “*ḥuqūq mujarrada*” is neither applicable to all rights nor is it coherent.⁸ These various exceptions to the rule can give rise to uncertainty as regards to the validity of the rule. Therefore, there is no uniform use of this classification which can give a clear and reliable basis for its application to copyright.

Recently some *fuqahā'* of the *Ḥanafī* school have considered that although copyright is “*ḥuqūq mujarrada*” (abstract rights), copyright can be sold or exchanged.⁹ This departure from the standard view of the *Ḥanafī* school has been justified on the grounds that copyright is conferred by *Sharī'a*.

If we were to maintain this classification, not all copyright should be necessarily treated as *ḥuqūq mujarrada*, but some forms of copyright are *ḥuqūq mutaḡarrira*.¹⁰ In fact, authors possess two sorts of rights. Not all forms of copyright are only moral rights because some of them are also absolute legal rights. Some forms of copyright are *ḥuqūq mujarrada*, because they represent basic entitlements of human beings whereas the author's economic rights are only *ḥuqūq mutaḡarrira*.¹¹

Indeed copyright is actually a “bundle” of various rights. It is important to keep these different starting points in mind when applying the classification of *ḥuqūq mujarrada* and *ḥuqūq mutaḡarrira* to copyright. Therefore, there is no reason that can justify a common treatment for different kinds of rights.

As we have seen, the rights of an author on divulgation, attribution, integrity and revocation of a work can be classified under *ḥuqūq mujarrada*, which cannot be waived, sold, hired or the subject of compensation. These *ḥuqūq mujarrada* are separate from economic rights and they subsist in a work even after the creator has

⁷ Ibid, vol.4 p.15.

⁸ Al-Diraynī, *Ḥaqq al-Ibtikār*, p.31, footnote No.2.

⁹ Ṭuhmāz, *Ḥaqq al-Ta'lif wa al-Nashar wa al-Tarjama*, in al-Diraynī, *Ḥaqq al-Ibtikār*, p.179.

¹⁰ Al-Diraynī, *Ḥaqq al-Ibtikār*, p.40,p.64. Al-Shahrānī, p.254.

¹¹ See this thesis, p.69.

transferred his economic rights. On the other hand, the author's economic rights, which are negotiable, can be classified under *ḥuqūq mutaḡarrira*.

It is difficult to justify this objection, as *Sharī'a* approves the sale or hire of "manfa'a" (utility). Obviously the sale contract for a book, CD or a tape transfers to the purchaser only the *manfa'a* attached to that container, but it does not transfer copyright subsisting in the object.¹² It is merely a license whereby an author gives the buyer, directly or indirectly permission to benefit from the "manfa'a mubāḡha" (lawful utility) contained in an object (that is the book, CD or a tape) on the condition that the buyer will respect copyright. Therefore the author still possesses the copyright.

Moreover, the collected evidence not only recognizes copyright but also recognizes the potential for exploiting it. In the final analysis, this technical argument against copyright is incorrect and unproven.

6.3 Second Objection: being an obstacle to the widespread dissemination of knowledge

A number of *fuqahā'* have argued against the recognition of copyright because they see its existence as obstructive to widespread dissemination of that knowledge¹³ that should be free to all human beings. Those *fuqahā'* claim that copyright is used as an excuse to deny or constrain access to the widespread of knowledge. Restricting access to useful knowledge is strictly unjustified and prohibited in *Sharī'a* because this is against the public interest.

According to this view, it is difficult to demonstrate that the authors' rights are more important than the public interest of having unlimited access to knowledge. The purpose of authorship and writing is to spread knowledge and the most valuable type of knowledge is the knowledge of *Sharī'a*. The dissemination of knowledge of *Sharī'a* is intended to be a religious duty and free. The justification is that it is

¹² Al-Būḡī, *Qadāyā Fiqhiyya Mu'āḡira*, p.86.

¹³ Al-Kurdī, 58-64. Azmi, *Intellectual Property*, p.71 and post.

reported that the Prophet said: " May Allah brighten a man who hears a tradition from us, gets it by heart and passes it to others. Many a bearer of knowledge conveys it to one who is more versed than he is; and many a bearer of knowledge is not versed in it."¹⁴ The famous *ḥadīth* and maxim reads: "Knowledge that has not been spread is like a treasure that has not been spent".¹⁵ In *Sharī'a*, scholars are expected to endorse the republication of their works as widely as possible, even without their consent, in order to disseminate knowledge.

According to many sources of evidence from *Sharī'a*, the maximum dissemination of knowledge of *Sharī'a* and of scientific and useful works is necessary, highly valued and appreciated. Knowledge, education and teaching are kinds of worship¹⁶ which exist to spread. Considered from the viewpoint of *Sharī'a*, the acquisition of knowledge is more important than the acquisition of money and no one should have a monopoly on knowledge as knowledge is essential to human beings.

For the same reason, it is prohibited to conceal knowledge directly or indirectly. For example, the Qur'ānic verse states: "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 Allah's curse, and the curse of those entitled to curse, Except those who repent and make amends and openly declare (the Truth): To them I turn; for I am Oft-returning, Most Merciful."¹⁷

Al-Qurṭubī explained that, this Qur'ānic verse is used by *fuqahā'* to demonstrate that it is a duty to spread the teachings of Islam and sound knowledge must be available freely to all. The reason is that no one deserves a wage for that which is obligatory upon him by the religion. For example, no one deserves money for being a Muslim.¹⁸

¹⁴ *Sunan Abū Dawūd*, <http://www.muslimaccess.com/sunnah/hadeeth/abudawud/025.html> , Book 25, Number 3652. *Nayl al-Awṣār*, Ḥadīth No: 1. vol.1, p.13.

¹⁵ Ibn 'Abd al-Barr, *Jāmi' Bayān al-'Ilm wa Fadliḥ*, vol.2,p.147.

¹⁶ Al-Shahrānī, p.258.262 and 266.

¹⁷ Qur'ān, 2.v 159,160.

¹⁸ Al-Qurṭubī, *al-Jāmi'*, vol.2. p.124.

Another Qur'ānic verse states: "Those who conceal Allah's revelations in the Book, and purchase for them a miserable profit, they swallow into themselves naught but Fire; Allah will not address them on the Day of Resurrection. Nor purify them: Grievous will be their penalty."¹⁹

From the *ḥadīth*'s sources, the prophetic tradition states: "whoever is asked about knowledge that he has, but he conceals it, a bridle made of fire will tie his mouth on the Day of Judgment."²⁰ And it is reported that Abū Hurayra said pointing to this verse "Had it not been for two verses in the Qur'ān, I would not have narrated a single *ḥadīth* ..., then he mentioned the previous verses. "²¹

This understanding is supported by the story of the Prophet Yusūf mentioned in the Qur'ān.²² The Prophet Yusūf interpreted a vision told to him by two men who were with him in prison. Again he interpreted another vision of the king of Egypt. He disseminated knowledge charitably without requesting any price or on condition of being released from the prison in which he had been unjustly incarcerated. The story really indicates that knowledge should be given fully and freely to all.

Abū Zaīd and al-Ḥuṣayn stated that religious books must be available freely.²³ The maximum dissemination of religious knowledge is required because every Muslim is duty bound to attempt to obtain and spread knowledge of *Sharī'a* as much as he can.

This is the most popular objection in the *fiqh* literature but it is less serious than some writers suppose.²⁴ There are many remarks on this objection. First the criticism is addressed directly to copyright over religious works and it bears no reference to other works. It appears that non-religious works of other branches of knowledge such as medicine, engineering, technology and so on are not covered by this objection. They are not the kinds of knowledge that scholars must deliver to the

¹⁹ Qur'ān, 2.v 174.

²⁰ Al-Albānī, *al-Jāmi' al-Ṣaghīr*, Ḥadīth No.6284, vol.2. p.1077.

²¹ *Al-Bukhārī*, tr., vol. 1, p.88, Ḥadīth No.118.

²² Qur'ān, 12.v 36-54.

²³ Abū Zayd, *Fiqh al-Nawāzil*, vol.2, p.77 and after. Al-Ḥuṣayn.

²⁴ Al-Kurdī,58-64.

public freely. Specifically, the duty of dissemination of knowledge is only applicable to knowledge of *Sharī'a*. Therefore, authors of non-religious works deserve compensation for their works in the same way as any other job.

The above mentioned verse²⁵ prohibits concealing obligatory knowledge of religion only²⁶ because of its religious nature. The verse does not suggest that all information or branches of knowledge must be disclosed freely to everyone.

There is no material evidence in the meaning of these texts to refute copyright under the ruling of the prohibition of concealing of knowledge. More precisely, al-Shāṭibī stated that not every section of knowledge must be disseminated and there is even some knowledge of *Sharī'a* pointing out that there are some rulings of *Sharī'a*, which cannot be disclosed to some people in some situation or times.²⁷

Within the field of *Sharī'a*, there are two classes of knowledge of *Sharī'a*; compulsory and optional. Compulsory knowledge is related to the basics of belief, the rules of performance of prayers, fasting during the month of Ramaḍān, giving "zakāt" and doing "ḥajj" if a Muslim is required to do the last two ones. Also a Muslim is required to learn the rulings of whatever he wants to undertake, such as a contract or a job.

Therefore the prohibition of concealing of knowledge is confined only to obligatory knowledge of *Sharī'a*.²⁸ And this religious task is also limited to essential questions if a member of the community needs that. Apart from this division, knowledge of other subjects of *Sharī'a* becomes optional.

Moreover, a scholar is obliged by *Sharī'a* to provide a *fatwa* or an explanation of a ruling of *Sharī'a* verbally if he is asked to do so. Therefore, a scholar is not obliged to give his answer in a written form. An exception to this generalization would be where, in some cases, there is a risk of vagueness or ambiguity. In such cases a scholar is obliged to provide his answer in writing. For example, the answers

²⁵ Qur'ān, 2.v 159,160.

²⁶ Azmi, *Intellectual Property*, p.75 and p.77. Al-Diraynī, *Ḥaqq al-Ibtikār*.p.100.

²⁷ Al-Shāṭibī, *al-Muwāfaqāt*, vol. 4.p.137.

²⁸ Al-Shahrānī, p.264.

to some questions regarding the exact shares in inheritance cases because such answers cannot be understood correctly unless they are giving in writing.²⁹

As a rule, in *Sharī'a* a scholar cannot be legally enforced to provide his answer in a particular form or forced to publish everything that he knows without fair compensation.

A religious answer given by a scholar is based on implied conditions that the receiver will use the answer solely for learning or scientific research and that the answer is accompanied by a sufficient acknowledgement. It is merely a duty that a scholar gives the questioner an answer. The scholar still retains copyright. The obligatory answering and explanation of the rulings of *Sharī'a* can not conceal or infringe on copyright.

The rationale to support this elimination is that the religious nature of answers should not prevent scholars from protecting their legitimate copyright of their answers. There is a clear distinction between giving answers for people necessary rulings of *Sharī'a* and recording those answers in some form and publishing them for commercial benefits.

On the other hand, it is possible to achieve in a reasonable manner a general unity and balance between these accepted considerations without violating any of them. The obligatory widespread dissemination of knowledge of *Sharī'a* does not necessarily prevent the author exercising his economic rights³⁰ or conflict with copyright. Copyright can be well established within *Sharī'a* without it being at the expense of the widespread dissemination of the required knowledge of *Sharī'a*.

It would be mistaken to suppose that the approval of copyright necessarily leads to a concealment of obligatory knowledge.³¹ By applying the earlier conditions on copyright it is possible to ensure that copyright does not restrict dissemination of useful information. Copyright can be taken in the sense that it equally represents the rights of authors and for the sake of the required dissemination of knowledge.

²⁹ Ibn 'Ābdīn, vol.6, p.92.

³⁰ Al-Diraynī, *Ḥaqq al-Ibtikār*. p. 100.

³¹ Azmi, *Intellectual Property*, p.80.

Bearing in mind the evidence of copyright in *Sharī'a* it is irrational to suppose that *Sharī'a* recognizes copyright while being inconsistent with other commands ordained by *Sharī'a*, namely the widespread dissemination of knowledge.

Copyright cannot be established or used as an excuse for concealing knowledge of *Sharī'a*. The objection assumes wrongly that authors are dishonest and copyright is meant to be an excuse for their concealing of knowledge. In extreme cases, if an author misuses his copyright and unreasonably refuses to publish his work despite the fact that such a refusal would lead to a major or an unnecessary harm to the community, his work can be published without his consent at a reasonable price. Such exceptional cases are not to be considered as a valid ground for preventing the establishment of copyright. According to the rules of *Sharī'a* the rights of the community enjoy a significant priority in weight over those of individuals. In addition, copyright represents the author's rights as well as the right of Allah.

With open access for all, a student has the right to obtain knowledge which is restricted to learning orally³² without inferring the right to publish the teaching materials without proper permission or use them without sufficient attribution.

A careful reading of the previous Prophetic tradition: "whoever is asked about knowledge that he has, but he conceals it" means that a scholar is obliged to provide the answer only if he has been asked to provide it. Another limitation is that the duty of clarification as regards obligatory knowledge can be fulfilled orally. The religious status of some works should not revoke or prevail over their copyright.

In fact, the *ḥadīth* does not appear to support the view that there is a legal obligation on the scholar or author to provide his knowledge freely. There is no obligation to do so voluntarily. If a scholar has been asked to provide his answer in writing, he is entitled to a fair return.³³ The *ḥadīth* only prohibits the concealment of knowledge and not the financial return for it. Moreover, the prohibition against the concealment of knowledge can be interpreted to mean the prohibition of concealing the truth by telling falsehood, hoarding knowledge or other equally valid

³² *Al-Muḥalla*, vol.11, p.337.

³³ Ibn 'Ābdīn, vol.6, p.92

interpretations.³⁴ It cannot be taken for granted that the prohibition against concealment of knowledge is simply a refusal of copyright.

Secondly, we might say that the story of the Prophet Yusūf had special circumstances. According to *Sharī'a* the true vision is part of prophet-hood, and the interpretation of visions is one of the branches of knowledge of *Sharī'a*.³⁵ This understanding is based on the *ḥadīth* that the Prophet said: "The good dream of a man who is right-acting is a forty-sixth part of Prophet-hood."³⁶ The Prophet Yusūf interpreted the vision because it was only he who was obliged to do so because there was no another person who could answer the question.

Moreover, according to the story of the Prophet Yusūf, the vision pertained to the public survival and safety of the society of Egypt at that time. Therefore, the Prophet Yusūf was obliged to answer the question about the interpretation of the vision in order to save the lives of people because he saw them at risk. It was not a simply a vision relating to an individual in a case where he may not have intervened. This is different from the case of copyright.

However, in the same story, the Prophet Yusūf said to the two men in the prison: "And of the two, to that one whom he considers about to be saved, he said: "Mention me to thy lord. "³⁷ The Prophet Yusūf asked that man to mention the Prophet Yusūf to his master to free him. This can be considered as a request of a fair compensation to his interpretation. As such this is a story that would favor the establishment of copyright.

It is reported that the Prophet Muḥammad said: "if I were in his position (Yusūf) I would never tell them until I stipulate that they free me".³⁸ This Prophetic tradition seems to be consistent with the previous evidence regarding the permissibility of getting a wage for teaching the Qurā'n or for spiritual treatment by "*ruqya*". The rejection of copyright cannot be accepted on such grounds.

³⁴ Al-Diraynī, *Ḥaqq al-Ibtikār*, p. 102.

³⁵ Ibn Ḥajar, *Fath al-Bārī*, vol.12, p.437.

³⁶ Ibid, vol.12, p.448, *Ḥadīth* No.6983.

³⁷ Qur'ān, 12.v 42.

³⁸ Ibn Ḥajar, *Fath al-Bārī*, vol.12, p.473, *Ḥadīth* No.6992. Al-Ṭabarī, vol.7, p.233.

6.4 Third Objection: being contrary to ownership

It is claimed that copyright is inconsistent with or detrimental to ownership. A book should be treated as the sort of thing that can be a private property. Therefore, whoever buys a book acquires full ownership of it. Ownership necessarily corresponds to the legal position in which an owner has free use and possession and can benefit from the thing owned. Ownership grants unconditional authority for an owner over the property in question. An owner must have total, exclusive and absolute control over what he owns including the power to copy any book that he owns.³⁹

This is clearly connected with one of the facts of ownership, namely, that people who own legitimate copies of a work have the right to do with these copies whatever they see fit. When one buys a book then ownership is transferred to him. With reference to the definitions of ownership in *Sharī'a*, there is no wrong committed if the one who copies the work attributes that work to its true writer.

There is no false attribution, mis-attribution or claim of authorship of the work by other than the real author or the work is being or appearing to be in a non-integral form, all of which are prohibited in *Sharī'a*. Copying and redistribution of any material in any medium is permitted provided that the right of attribution and the right of integrity are preserved.

The prohibition against making copies of any book or selling such copies can be seen as a form of deprivation of person's property.⁴⁰ Additionally, it might be argued that it is confirmed that the Prophet said: "any condition which is not in Allah's laws is invalid even if there were a hundred such conditions."⁴¹ In another *ḥadīth* it is reported that the Prophet forbade making a combination of condition and sale.⁴² The reason why the combination is forbidden is that it is not mentioned in the

³⁹ Usmani, *Buḥūth fī Qadāyā Fiqhiyya*, p.124.

⁴⁰ Al-Shahrānī, p.256.

⁴¹ *Al-Bukhārī*, tr., vol. 3, p.558, Ḥadīth No.:889.

⁴² Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.192. *Al-Muḥalla*, vol. 8, p.415. Ibn 'Abd al-

book of Allah and because conditions in general lead to uncertainty in transactions. These 'ahādīth indicate the condition on sale that the buyer of a book or CD will not copy it on its sale becomes invalid. Therefore, this condition is not binding.

This objection seems to ignore the fact that *fuqahā'* have distinguished the difference between the form of "*tamlīk al-intifā'*" (taking property of utilization) and the form of "*tamlīk al-manfa'a*" (taking property of utility).

In the form of "*tamlīk al-intifā'*", the owner for himself only can take advantage of the owned thing given by the real owner. The owner of this form has a limited authority over the owned thing. A license usually includes restrictions on the use of the property licensed and these restrictions should be identified and respected by the beneficiary.

While in the form of "*tamlīk al-manfa'a*", the owner can take advantage of the owned thing directly or indirectly.⁴³ The owner of the second form has an adequate authority over the owned thing.

These rules can also be applied to the immediate subject matter. A purchaser of a book or CD has only "*tamlīk al-intifā'*" of that book so he can only take advantage of the book for himself given by the copyright owner. The purchaser has no entitlement to reproduce the work presented in that book.

As previously stated, the conceptual analysis of selling a book, CD or tape is that what a seller has bought is the "*manfa'a*" (utility) which is carried in the book, CD or tape and which cannot be detached.⁴⁴ An author gives all buyers directly or indirectly stipulated permission to take advantage for themselves from that object.

According to the general rule "What is known by virtue of "*urf*" is like that which is known by virtue of an agreed condition" it can be argued that copying and redistribution of any work in any medium without the consent of the owner is prohibited in *Sharī'a*. Generally, "The dealing by one person with the property of

Barr, Abū 'Umar Yūsuf b. 'Abd Allah, *al-Tamhīd*, Morocco, Wizārat Awqāf wa al-Shu'ūn al-Islāmiyya, (1387AH), vol.22,p.186.

⁴³ *Al-Furūq*, vol.1, p. 331.

⁴⁴ Al-Būḥārī, *Qaḍāyā Fiqhiyya Mu'āṣira*, p.86.

another, without his leave, is not lawful".⁴⁵

The contract transfers only the "*manfa'a mubāḥa*" (lawful utility) contained in that object which is measured against the number of copies the author or the copyright holder agrees to sell. There is no transfer of copyright in this sale. The legal title to copyright in every copy of a work will vest in its author and not with each purchaser.

The famous verse reads, "O you who believe, fulfill all your covenants".⁴⁶ A contract between a publisher and an author includes restrictions on exploitation of the economic rights and these should be honored by the publisher as well as the author. Accordingly, any number of copies that exceeds the agreed number without consent is unlawful.

Making copies of a work and selling them does not necessarily appertain to arrangements or ingredients of the ownership of the purchased work. It cannot be easily inferred from the general rules of a contract of sale or definitions of ownership. It is a new case which requires consideration by researchers. All relevant considerations should be incorporated into *ijtihād* in order to reach a correct ruling.

Thus, a contract for sale of a copy of a work cannot be rightful grounds to copy that work. The contract of sale does not grant the right to copy the work but only grants the exclusive use of the sold copy of that work. If a purchaser needs to secure the legal title to copyright, there must be an explicit agreement accordingly.

A buyer, merely because he has bought a copy of a work is not thereby authorized to copy the work if doing so would violate any stipulation of contract, or legitimate *'urf*. When someone buys a book he should use it according to what is established by custom in addition to what is stated in the contract. An owner cannot transfer more than he actually owns.⁴⁷ The written and customary condition is that the buyer must respect copyright. A buyer can lawfully utilize the ideas contained in a work and quotations of a reasonable length from the bought copy.

⁴⁵ The Mejlle, p.15, Article 96.

⁴⁶ Qur'ān, 5.v 1.

⁴⁷ Al-Diraynī, *Ḥaqq al-Ibtikār*. p. 114.

Correctly Usmani made an analogy between a buyer of a book and a buyer of currency who is entitled to use, sell, exchange, save or transfer it, but he is not allowed to copy it under the pretext of its ownership.⁴⁸ Similarly, making copies of works or tapes is prohibited in the same way as making forge notes is.

The concept of absolute ownership, whereby any use of property is accepted, is not found in *Sharī'a*. *Sharī'a* in granting ownership sets limits within which an owner is able to use it. For example, an owner cannot destroy his property or cause harm to his livestock without lawful reason.

Also, in *Sharī'a* it is not permitted to use private property at the cost of another's benefit or in a way that prevents others from exercising their rights. If a person using his property causes damage to or destroys someone else's property, he is liable for that damage. The exercising of any right is not permitted if it amounts to a crime or a civil wrong.

In addition, the permission to make copies of any book and sell them denies unlawfully the right of the author to withdraw the work if he changes his views or decides to republish the work in another form. The right of integrity of the author of a work can be affected and direct harm to the author's honor or reputation may ensue if the author has no control over the work. The permission to make copies of any work deprives a rightful owner of the legitimate control over a work. Practically, there is no middle course between the recognition of copyright and ignoring it. This objection also leads to a denial of the author's right to reproduce the work.

As regards to the validity of conditions on sale, firstly there are '*aḥādīth*' which prove the contrary assumption. For example, the Prophet bought a camel on condition that the seller should ride it until they reached Medina.⁴⁹ It may be that the best approach is to use all these '*aḥādīth*' establishing a correct balance between them.⁵⁰ The prohibited conditions are those that go against the essence of a contract

⁴⁸ Usmani, *Buḥūth fī Qaḍāyā Fiqhiyya Mu'āṣira*, p.124. Al-Shahrānī, p.256.

⁴⁹ *Al-Bukhārī*, tr., vol. 3, p.550, Ḥadīth No.:878.

⁵⁰ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.194.

such as the use of the subject-matter of the sale.⁵¹ Accordingly, the condition of non-reproduction of the sold materials on its sale contract is valid and binding on the buyer. It means that when a buyer purchases a book, he is only given a copy of the book on that condition and if he breaches the condition, he is liable even if ownership has been transferred to him.

Moreover, there are many potential consequences of corruption stemming from denial or violation of copyright. The authorization of making copies leads to the potential loss of the correct original version of that work especially in the case of scientific authoritative references. This has a negative impact on the research process. According to the general and knowable principle of “*sadd al-dharāi’*” (blocking the means of evil), it is prohibited to do what leads to unlawful practices or things.⁵²

Therefore, violation of copyright is accordingly prohibited. The printing of works without the consent of their authors violates their rights unjustly and causes serious harm to society. In considering all these arguments, a sale of a book CD or tape does not allow a buyer to make copies from that material and sell them.

6.5 Fourth Objection: reproduction of works is not genuine threat to copyright

Some *fuqahā’* have stated that the worst practical consequence of allowing people to copy any book is that it may reduce the amount of money that its author can obtain from his work.⁵³ The rule is that there is “no reliance on mere imagination”.⁵⁴ There is no real and calculable harm to an author in the publication of his book without his consent. The harm has only some degree of probability of occurring.

The expected decrease in profit of publishing a book can hardly justify obstructing the publication of the same book by others. There is a distinction

⁵¹ Ibn Rushd, *Bidāyat al-Mujtahid*, tr. Nyazee, vol. II, p.194.

⁵² Kamali, *Principle of Islamic Jurisprudence*, p.310.

⁵³ Usmani, *Buḥūth fī Qaḍāyā Fiqhiyya*, p.124. Al-Shahrānī, p.257.

⁵⁴ Ḥaydar, vol.1 p.73.

between causing harm to authors and the expected decline in return from their works. In addition, copying a book requires a degree of labor and money spent on materials in order to create copies which bestow the one who copies rights of property in respect of their copies. Many early *fuqahā'* copied and sold copied books.⁵⁵

Recently, some *fuqahā'* have stated that copying and selling useful materials are permissible if the original owner gains an adequate return from those works. It is then permitted for people to copy and sell.⁵⁶

Therefore, there is no justification in preventing people from publishing useful works⁵⁷ if they make proper attribution and put the works in reasonable format. There is no validity in obliging people to obtain permission from authors to copy their works.

The objection seems to be based more on expectation than on principles. Usmani's response to the latter objection has been to argue that the harm is real and calculable⁵⁸ to the author personally and financially if his work is published without his prior consent. There are many levels of corruption stemming from violation of copyright.

This introduces a mistaken priority, which leads to a transfer of the profit from the only person entitled, namely, the author to others and threatens the future of intellectual efforts. For authors, it means obstructing access to the economic exploitation by publishers. It is unreasonable to require authors to share with other people the exploitation of their works. Ownership gives the owner an authority to exclusively control and use what is owned. It is obvious that whoever publishes a work without the consent of its author is simply benefiting himself as well and he is harming the author. Another observation is that whoever publishes a work without the consent of its author is in the same position as one who acquires money at the

⁵⁵ Shalaby, p.89. Azmi *Hadīth Literature*, p.195. Abū Zayd, *Fiqh al-Nawāzil*, p.80 and post.

⁵⁶ Al-Shahrānī, p.523 and post.

⁵⁷ Ibid.

⁵⁸ Al-Shahrānī, p.523 and post.

expense of the rightful owner of the work.

The consequences to the potential market and the value of that work of the unauthorized reproduction of a work cannot be denied. In reality, the reproduction is not a victimless action. The fact is that making money from someone else's work without permission is a type of oppression, unlawful interference with the owner's property and prevents or blocks an owner's opportunities to do so.

If copyright is recognized in the light of evidence from *Sharī'a*, all oppressive actions against copyright is obviously unjustified and unlawful. Effective recognition must be supported by protection. Also the principle of "*la ḍarar wa-la ḍirār*" (removing of harm) may be particularly useful in answering this objection. If copyright is recognized according to *Sharī'a*, those who publish a work without the consent of the author should be treated as traders in stolen goods. The necessity for copyright results very much, if not entirely, from requirement to prevent the injustice of theft from authors and publishers.

The argument is that copyright is legitimate regardless of whether the harm of publishing works without the owner's consent is present or not. Unlawful actions are prohibited irrespective of the amount of harm that they might apparently yield.

The reason for the distinction is simple and profound. When a person copies an author's work, the person who makes the copy deprives the author of his rightful exploitation of the work. Instead, if someone simply takes either information, enjoyment or advice embodied in the work, its author still has as much use of the work as it has before. There is a significant difference between the reproduction of a limited quantity of a work to be utilized for approved and specified purposes, such as "research or private study" and the reproduction for direct or indirect commercial ends.

Basically, the exploitation of works should be reserved to people who create them, namely, authors. This is an argument based, essentially, on fairness. The owner has the right to use his property lawfully in the most absolute manner without interference from others. The owners of copyright require purchasers of copies to pay for each copy sold in order to authorize its use.

No evidence from *Sharī'a* says that people other than the owners must share their profitable belongings simply on the basis that such sharing is not, in certain cases, detrimental. This objection denies the rightful authors of their right to receive the complete and full value of what they have created. It simply ignores mental and physical labor that went into producing any work.

Sharī'a has a definite, general direction and application in respect of the prohibition of any kind of "*ghaṣb*" (usurpation), violation or infringement of rights, whether it is a major or minor right. Even the wide definition of *ghaṣb*,⁵⁹ *fuqahā'* have relied upon includes here not only any kind of intentional taking or using of another's property without permission as *ghaṣb*, but also any kind of interference with another's property or obstructing access to that property.⁶⁰

Ibn Ḥajar stated that the right of priority is a general and knowable universal principle equally applicable to all people in all cases. It has given valid ownership to whoever is the first to appropriate something. Therefore, the taking of that thing without permission becomes a kind of usurpation, which is prohibited and actionable.⁶¹

It is reported on the authority of Abu Umāma that the Prophet said: "He who appropriated the right of a Muslim by (swearing a false) oath, Allah would make Hell-fire necessary for him and would declare Paradise forbidden for him. A person said to him: Messenger of Allah, even if it is something insignificant? He (the Holy Prophet) replied: (Yes) even if it is the twig of the *Arāk* tree."⁶²

Al-Nawawī interpreted that "the right of a Muslim" in this *ḥadīth* means all rights whether they are financial or not and that wealth includes filthy things that can be used.⁶³ It is obvious that copyright is covered by this general statement. Al-Nawawī pointed out that this *ḥadīth* also prohibits the taking of another's property without false oath.

⁵⁹ See this thesis p.123.

⁶⁰ *Al-Dusūqī*, vol.3, p.683.

⁶¹ *Al-Mawsū'a al-Dhahabiyya*.

⁶² <http://www.muslimaccess.com/sunnah/hadeeth/muslim/001.html>, Book 001, Number 0252.

⁶³ Al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, Ḥadīth No. 218, vol.2, p.134-138.

The prohibition of misappropriation includes, emphatically, cases of teasing, where there is no actual intention of doing so.⁶⁴ On these grounds, the violation of another's rights wholly or partially is prohibited even as regards a trivial thing. Moreover, there are severe punishments for misappropriation of the property of others in this world and the hereafter.

It is a concept that by definition has been applied equally to the violation and infringement of copyrights. It is *ghaṣb* to take anything, money, property or right from the rightful owner without lawful reason. Copying and selling works without proper consent is a kind of *ghaṣb*. The prohibition of *ghaṣb* extends to any right or property whether the owner has any continuing need for it.

It is reported that the Prophet prevented a Muslim from making a proposal of sale if his brother has already made a proposal for it.⁶⁵ By an analogy, making and selling copies of an author's work should be prohibited, because it has the same result.

In addition, it is reported that the Prophet prohibited purchasing from suppliers before they reach the town's market place.⁶⁶ A group of middlemen or free-riders stand to benefit personally from the useful works and refuse to obtain permission or pay for the benefits they receive.

Hijackers make excessive profits from general public necessities without lawful right. Copying works and selling them has a similar impact on the free market as the prohibited purchase of articles from suppliers.

This objection might produce a state of confusion in which these principles are misapplied as to their direct meanings.

This objection is irrational because it denies the obvious harm caused by the violation of copyright. The violation of copyright leads to personal harm to authors and ultimately a major and general harm to society. The disapproval of copyright contributes towards the decline in the conditions of society in terms of justice,

⁶⁴ *Nayl al-Awṭār*, Ḥadīth No: 2424. vol.5, p.378.

⁶⁵ See here p. 144 and post.

⁶⁶ *Al-Bukhārī*, tr., vol.3, p.207, Ḥadīth No:371. *Al-Majmū'*, vol.12, p.98.

ownership, knowledge and science.

With a view to protecting the interest of both authors and consumers, copying useful works must be disallowed. It seems that this objection has turned out to be groundless, as nobody has denied that copyright is worthy of protection.

6.6 Fifth Objection: Copyright has not emerged from Islamic history

The *fuqahā'* of all schools never spoke about or discussed the issue of copyright.⁶⁷ During many centuries, there was no intention or expectation of having economic reward from intellectual productions. Copyright was not considered at the time when the movement of writing and authorship is well known and active. The knowledge in Muslim societies has been transferred through the generations without restrictions.

Instead of imposing copyright or a similar institution, there were a large number of "*warrāqīn* or *nussākh*" (copyists) in Islamic cities.⁶⁸ Despite their great importance in Islamic history copying books was very common⁶⁹ and it was a way of life for many scholars across the history.⁷⁰

From the first written works in the history of Islam onwards scholars have confined themselves to the pursuit of work intellectual production whilst at the same time no one referred to a concept such as copyright, except to the extent of the proper attribution. Instead of claiming monopoly or property over works or attempting to exploit them, scholars always encouraged people to facilitate and disseminate knowledge as much as possible and warned that it is forbidden to claim that work is one's own. In addition, this objection can explain the widespread "pirating" of intellectual works in the Muslim world.

As this account is undisputed, some scholars have interpreted silence of the early scholars on this issue as proof that a consensus gradually established itself to

⁶⁷ Al-Shahrānī, p.267.

⁶⁸ Shalaby, p.89. Azmi *Hadīth Literature*, p.195.

⁶⁹ Shalaby, p.74.

⁷⁰ Abū Zayd, *Fiqh al-Nawāzil*, p.80 and post.

the effect that copyright or a similar concept cannot be built or justified within the boundaries of *Sharī'a*.

In answer to this objection, there is no problem if copyright is to be investigated with reference to evidence in *Sharī'a*, regardless of whether it is a new case or old one. This can not be taken to suggest that the introduction of copyright is entirely alien to *fiqh*.

Historically, not all copyright is new in *fiqh*. For example, the author's right of attribution is well established and known in *fiqh*. Before modern times, the question of economic rights of authorship was not conceived. But the rapid development in technology has created the possibility of the unscrupulous exploitation of copyright as regards authorship. Copyright has been developed in response to the new situation in which authors find themselves, namely, the loss of rights and the injustices done to them rather than just intellectual diversions.

The theoretical position is that *fiqh* is flexible and constantly subject to reinterpretation to meet the change of life norms and new needs. It is a well known legal principle that rulings which are custom-based can change according to change in custom. By its plain terms, article 39 of the *Mejelle* states that "It cannot be denied which a change of times, the requirements of the law change"⁷¹ Customs that do not conflict with *Sharī'a* become binding rulings on people. In *fiqh*, rulings are based on all relevant considerations and circumstances of the milieu that produced the issue.

On closer inspection, the emphasis is on commercial interests, especially in a case where a conflict between the copyright holder and hijackers occurs. This is because the economic exploitation of works has become possible. Throughout the history, the copying of works was by hand only. This is a very difficult and long process, and economic exploitation was unlikely. Now, an rich array of new electronic machines is available to facilitate the process of copying.

The early *fuqahā'* were not gifted with the ability to foresee mass reproduction

⁷¹ *The Mejelle*, p.8. Ḥaydar, vol.1 p.47.

of works by new technology. It would have been impossible for them to have anticipated the economic exploitation of copyright that has occurred in modern times. Similarly they were unaware that many substances have several new usages⁷² and therefore works are subject to industry and commerce which were not available before.

The early *fuqahā'* could not have foresee all of the ways in which intellectual works are now used, and it could not have been expected. Hence the ruling on copyright has to be achieved by a reasonable degree of flexibility in the investigation and interpretation of the sources of *Sharī'a*. Nevertheless, the writings of early *fuqahā'* can be taken as guidelines for ascertaining the extent of rights but not as to their strict boundaries. It might be possible to draw an analogy with the case of exploitation of materials found in nature.

Several discoveries of elements and materials in the environment were made in the past but the practical significance of these discoveries was unknown or un-exploitable because of their high cost. The difficulty is as regards their availability rather than their legality.⁷³

The issue of copyright is brought to the fore for the first time by scientific developments. It cannot be deemed as a restitution of something, which has been researched before. Indeed, whilst there are some aspects of the issue which had been known previously, the whole issue as it is understood now, has never been addressed by *fuqahā'*. Copyright has emerged in circumstances which the early *fuqahā'* could not have imagined. It is unnecessary for us now to follow our *fuqahā'* in not addressing the concept of copyright, which was entirely unknown at their time. On the contrary, as we have seen, *ijtihād* leads to the conclusion that copyright is correctly established on plenty of evidence in Qur'ān and Sunna.

⁷² Al-Diraynī, *Ḥaqq al-Ibtikār*. p. 28. Al-Būṭī, *Qaḍāyā Fiqhiyya Mu'āṣira*, p.90.

⁷³ Al-Būṭī, *Qaḍāyā Fiqhiyya Mu'āṣira*, p.84.

6.7 Sixth Objection: being alien to *Sharī'a*

Some *fuqahā'* see copyright as an individualistic concept based on capitalism. They argue that copyright is a result and a model of western thought and the acceptance of copyright is an attempt to introduce an alien theory into *Sharī'a*. The argument runs that copyright is created by *de facto* man-made laws to protect commercial interests in the capitalism environment. Copyright is fundamentally incompatible with *Sharī'a* because *Sharī'a* encourages human beings to assist each other in good causes such as knowledge. The well-known verse reads "Help ye one another in righteousness and piety but help ye not one another in sin and rancor".⁷⁴ In contrast, the argument concludes, the main drive behind copyright is to help the hoarding of knowledge and the interest of industry.

Copyright needs to be understood in its modern economic context only.⁷⁵ The Western and capital society have spawned intellectual property. Copyright does not follow or generate from the criterion of Islam because it is an artificial property.

In general, it is argued, copyright and intellectual property are used by industrial countries as an excuse to maintain their superiority and obstruct developing countries from economic growth or development. In fact, the argument runs, "copyright is not the property of creative individuals; rather it is the property of massive musical corporations who are defending their position through litigation under the guise that the individual author is harmed when a copyright is stolen."⁷⁶ Only authors and publishers would prefer that the knowledge remains proprietary. The scope of copyright has been broadened and developed even more by new technologies. If a new ruling is needed to protect works from mis-attribution or misappropriation, it may be better to address this need only rather than force-fitting concepts into *Sharī'a*.

When copyright and intellectual property impede the progress of poor countries, these countries have no choice other than to eliminate copyright. Under the regime

⁷⁴ Qur'ān, 5.v 2.

⁷⁵ Samāra, *Huqūq al-Milkiyya al-Fikriyya wa Dawābiṭihā fī al-Islām*. Al-Ḥuṣayn.

⁷⁶ Halbert, *Resisting Intellectual Property*, p.80. Murād, p.36.

of intellectual property including copyright, poor countries are left at the mercy of rapacious corporations and can never afford to improve their situation. For example, international pharmaceutical companies refuse to open access to HIV/AIDS medication or at least to make it available at an affordable price to poor countries deploying the argument of intellectual property.⁷⁷

The West runs the argument, to continue seizing the grand-stand seat of international position by using international agreements as regards intellectual property.⁷⁸ Copyright leads to the concentration of various kinds of power in the hands of a few large countries and every country should have the right to knowledge, health and prosperity and to publish works and reproduce what a country needs without requiring it to obtain permission.

Finally, it is argued, the purpose of intellectual work must be to facilitate human life and enable them to be used as sources and to acquire the same interests as powerful nations. The international system of intellectual property rights including copyright does not help developing countries which pay, for example, for computer programs, medicines and seeds and so on. It is based only on the interests of industrial countries.⁷⁹

These arguments should not prevent *fiqh* from dealing with the issue and giving it suitable judgments through its own legal approach as other legal systems have done. It is worth noting that there is no complete Islamic intellectual property or copyright theory which maintains a balance between the different interests.

The role of *ijtihad* is to find Islamic solutions for new issues in a systemically way. Copyright is only representative not only of Western cultural values and traditions. Copyright establishes real rights, not an interpretation of specific commercial or social norms. Historically, copyright has been developed in response to the reality of authors suffering and to the injustices done to them and not merely

⁷⁷ Halbert, *Resisting Intellectual Property*, p.87 and post. Murād, p.134 and post.

⁷⁸ Samāra, *Huqūq al-Milkiyya al-Fikriyya wa Dawābiḥihā fī al-Islām*, p.3.

⁷⁹ The report of the Commission on Intellectual Property Rights, London, September, 2002, at: <http://www.iprcommission.org/graphic/documents/final-report.htm>

as regards Western thought. As we have seen, copyright has its roots in Islamic law and civilization.

Based on many forms of evidence the *fiqh* should recognize and provide copyright protection regardless of who bears such rights or is prevented from exploiting them. According to the general and knowable universal principles of *Sharī'a* the violation of another's rights is prohibited whether the rightful owner is rich or poor Muslim or non-Muslim. The verse reads "O ye who believe! stand out firmly for justice as witnesses to Allah even as against yourselves or your parents or your kin and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts) lest ye swerve and if ye distort (justice) or decline to do justice verily Allah is well-acquainted with all that ye do."⁸⁰

The threat of the abuse of copyright must not prevent copyright being established because any right can easily be turned into an instrument of abuse. The solution is to prevent or limit the abusive exercise of rights not threaten the existence of those rights.

It is no surprise that as a result of the lead West industry and technology, the West has dealt with these problems before other nations. So rather than adopting completely the Western approach or rejecting it entirely, it is wise to examine copyright in *Sharī'a*.

6.8 Summary

A number of *fuqahā'* have leveled criticism at copyright for its preference over other rights or considerations derived from the sources of *Sharī'a*. Copyright is considered as *ḥuqūq mujarrada*, which cannot be sold, hired or the subject of compensation. In fact, it is difficult to justify this classification of rights which is controversial even among the *Hanafi* school who made this classification.

However, copyright comprises two sets of various rights: moral rights which are *ḥuqūq mujarrad* and economic rights which are *ḥuqūq mutaqarrira*. Also, copyright

⁸⁰ Qur'ān, 4.v 135. and see Qur'ān, 5.v 8.

is conferred by *Sharī'a* on an author not as a remedy to any damage.

Some *fuqahā'* have argued against the recognition of copyright because they regard copyright as restriction on the ways in which the widespread dissemination of acquired knowledge, prohibited in *Sharī'a*. According to many sources of evidence in *Sharī'a*, a maximum dissemination of religious knowledge is required. However, this only applies to obligatory knowledge of *Sharī'a* and this religious duty can be achieved by disseminating knowledge verbally. The widespread dissemination of required knowledge of *Sharī'a* does not necessarily conflict with copyright. There is a line between exploitation of a work for commercial purposes and the use of a work for approved purposes. The exceptional case when the author misuses his copyright and refuses to publish his work unjustly cannot be a valid ground of objection to the whole copyright.

Contrary to another objection, the sale of a book, CD or tape transfers to the purchaser only the lawful "*manfa'a*" (utility) attached to that work but there is no transfer of copyright. Therefore, whoever buys a book has limited scope in using the book and the sale is based on a condition that the purchaser must respect copyright and only take advantage of the book for himself.

It is suggested that allowing anyone to print material may reduce the amount of money that an author can obtain from his work. This does not; however, justify preventing people from publishing useful works.

On balance, if copyright is recognized all actions that contravene such a right is clearly unlawful and should be treated as a kind of "*ghaṣb*" (usurpation) regardless of whether the harm is to the author personally or financially and whether the loss is real and calculable or not.

With respect to the writings of the early *fuqahā'*, copyright was not considered or discussed at the time, a time when intellectual development was well known and active. Some scholars have argued that this means that copyright or similar concept cannot be built on *Sharī'a*.

However, as we have seen copyright can be established on plenty of evidence from *Sharī'a*. Violation of copyright is prohibited regardless of the copyright holder.

It cannot be deemed as applying to something that had been researched before. Widespread and sometimes unscrupulous economic exploitation of works has now become possible in circumstances, which could not have been imagined before. *Ijtihād* is necessary in order to find Islamic solutions for new issues such as copyright.

There is a similar and related objection suggesting that copyright is an individualistic concept based on the western capitalism thought used by the industrial countries which is incompatible with *Sharī'a*. However, copyright has been developed in response to the reality of authors suffering and to the injustices done to them in any society.

Summary and Conclusion

This thesis commenced by stating that a comprehensive and systemic examination of copyright is required. Copyright can be understood in *fiqh* via its own terms, classifications and conventions by a gradual approach. In researching copyright all sources of *Sharī'a* have been examined, arguments for and against copyright have been considered, and these arguments have been set out in a systematic way based on *uṣūl al-fiqh*. The methodology of this thesis and its effectiveness lies in the fact that only genuine sources of *Sharī'a* have been consulted and the specific approach of *Sharī'a* has been used in order to construct a proper foundation for copyright.

By applying the method described above, this thesis retraced the history of copyright in *fiqh* in some detail and assessed its developments. A sound survey of Arabic and the English works on this subject is contained here in a more recent review. Previous writings on the subject have been followed and examined in order to build on the right results. The author has attempted to summarize a number of interesting conclusions derived from these studies. The literature review on copyright in *fiqh* shows the inadequacy of some approaches and the shortcomings of others. It has shown that each of the discussed works was built on specific evidence and has its own limitations.

This thesis has set out a brief and intensive analysis of the trends of defining "*ḥaqq*" (right). This is done in order to establish the basic framework upon which copyright can be built. In the early writings of the *fuqahā'* there was some reluctance in defining "*ḥaqq*", but some *fuqahā'* have attempted to define it and can be broadly categorized into two groups: those who think that right is singled out only by "*ikhtisāṣ*" (exclusiveness) and those who think that right is mere "*maṣlahā*" (interest). Some *fuqahā'* have taken the position that is intermediate between these groups with some variations. The majority of *fuqahā'* remained attached to the wide literal meanings of *ḥaqq*. Perhaps the most obvious reason for this approach is to

maintain all possible usages of the term *ḥaqq*. *Ḥaqq* is a general principle that encompasses various manifestations, whether it is *maṣlaḥa* or *ikhtiṣāṣ*. However, *fuqahā'* have held to the opinion that a right needs the approval of *Sharī'a*.

Therefore, the thesis has progressed to explore whether copyright can be established on the sources of *Sharī'a*. As elaborated in the study, the term *ḥaqq* is applied to copyright whatever the definition actually is, if it is needed at all.

It also explores how *ḥaqq* categorizations are multi-faceted, generally distinctive and definitely varied because *fuqahā'* have given a great weight to the practical classifications of *ḥaqq*.

The study applies the various definitions and classifications of *ḥaqq* to the concept of copyright. These classifications are useful in that copyright is a collection of *ḥuqūq*. The thesis concludes that some forms of copyright are *ḥaqq Allah*, abstract and cannot be inherited compromised or waived. Other rights are *ḥuqūq al-'abd*, concrete, inheritable and can be subject to exchange or consideration. The application of these classifications represents a new contribution to the subject.

The study deals with the understanding of concepts related to copyright. It presents a constructive review of the terms: "*milkiyya*" (ownership), "*māl*" (wealth) and "*manaf'a*" (utility) because this review is prerequisite for the recognition of copyright in *Sharī'a*. The Islamic concepts of right, ownership and wealth are part of a detailed framework preparing for the possible foundations of copyright. Right, ownership, and wealth are important determinants in the assessment of copyright. They are inextricably linked with each other.

Based on many sources of evidence *māl* is any lawful thing where "*urf*" (custom) confirms its commercial value, and which is usable in trade. A further point is that *milkiyya* and *māl* do not have to remain in the possession of the owner or to be physical. From this investigation, the thesis establishes that the terms *milkiyya*, *māl* and *manaf'a* are properly applicable to copyright.

Copyright represents a clear profit obtained by expenditure, intellectual effort and time. It becomes clear that the language of *fiqh* in defining these concepts provides a strong foundation for copyright.

Another important step of studying copyright is to understand the nature of copyright. There are some consequences of these characteristics, which have a profound effect on one's assessment. Copyright is in the nature of personal attribute, abstract, intangible and exclusionary. These fundamental characteristics must not deprive copyright from being recognized as a right and as property.

As the famous *ḥadīth* of Mu'ādh specifies, the search attempted to find any guidance and indications in the original sources: the Qur'ān and Sunna, and the second sources respectively. There are some new indications from *Sharī'a* which support the notion of copyright. These sources of evidence and their presentation are new additions to the subject.

Several verses of the Qur'ān together with their interpretations result in copyright becoming established in *Sharī'a*. The thesis argues for a broad interpretation and application of the verses which impose the principles of honesty and justice and consider copyright as trust. Copyright is approved on grounds of the principles of justice. Islamic teachings consider intellectual works as trusts and individuals are commanded to respect all trusts within the limits of *Sharī'a*. There is ample evidence to indicate the prohibition against oppression, mistrust, deception and injustice.

Other Qur'ānic verses prohibit the diminution of others' rights and properties, pretending to be a scholar and the making false claims. These prohibitions are applicable to all forms of violation or infringement of copyright. The generalization of these concepts does not weaken the recognition of copyright because, for the most part rulings of *Sharī'a* tend to be general and in broad statements. The role of *fiqh* is to elaborate and renew the applications of these rulings in different circumstances. General Qur'ānic references prohibit generally any kind of violation of copyright. The second source of *Sharī'a*, that is the *Sunna*, went more fully into the detail of the recognition of copyright. In the light of the fact that Islam considers knowledge, teaching, learning and authorship as acts of worship and that it gives all useful knowledge a significant position, there are several '*ahādīth* and other indications which lend support for the establishment of copyright.

In the first *ḥadīth*, there are indications that knowledge is a type of work and that there is a link between an author and his work which gives it its attribution and continuity. Copyright can be based on those *'aḥādīth* that establish that the right of priority and “*aml*” (labor) is the best way of earning and establishing ownership. Generally, the *'aḥādīth*, which impose the duty of sincerity and advice and prohibit giving false impression, give support to copyright because violation and infringement of copyright are opposed by these *'aḥādīth* specifically. One *ḥadīth* prohibits the making of proposal of sale or marriage in competition with a currently outstanding offer (unfair competition). This can be extended to the prohibition against the violation and infringement of copyright. Significantly, therefore, the disciplines of “*Ḥadīth*”, “*‘Ilm Muṣṭalaḥ al-Ḥadīth*”, and their detailed rules on narration, reception and correction of *ḥadīth* were established within the themes of *Sharī‘a*. Islamic sciences give particular attention to “*isnād*” and “*ijāza*” which can be seen as the roots of modern copyright. The recognition of economic exploitation of copyright can be based on the *ḥadīth* that provides that the earning of profits from any property is properly attributed to the assumption of the risk by authors for all responsibilities arising from their works. The original sources, therefore, are consubstantial in that they support copyright.

This thesis shows that copyright is not only based on a general, sympathetic approach or moral foundations but on concrete evidence from *Sharī‘a*. *Qiyās*, *maṣlaḥa* and *‘urf* are long-standing general sources of law that support copyright on separate strands of evidence.

By using *qiyās* the thesis argued for copyright on the basis of similarity between acceptable entitlement to a financial return for teaching, reciting, copying and hiring of the Qurā’n and Sunna with an entitlement to authorship. The case of acquiring ownership of barren land by its cultivation can be applied to copyright because the revival, which is the effective cause, is common to both cases. The prohibition against unauthorized listening can be applied to hacking and unlawful publishing of works without permission. It can be argued also that the approval of the waiver of many rights in *Sharī‘a* for financial exchange can be applied to the waiver and

reimbursement to an owner of a copyright. Moreover, according to “*istiḥsān*” (juristic preference) copyright is accepted because copyright supports the general principles of *Sharī‘a*.

Therefore, the thesis shows that *Sharī‘a* has proved sufficiently flexible to accommodate modern institutions such as copyright. A general finding of the research is that there is a distinctive and ‘authentic’ Islamic conception of copyright which can be developed.

The study proves that copyright can be convincingly established within the concept of “*maṣlaḥa*” (the public interest). Copyright reflects the “*maqāṣid*” (principles) of *Sharī‘a* as well as its spirit. It explains that because of the widespread establishment of copyright in customary national and international laws and because copyright does not contradict *Sharī‘a*, it can be considered as an acceptable ‘*urf*’ under *Sharī‘a*. Recognizing copyright through *maṣlaḥa* and ‘*urf*’ should be with considering certain conditions that seek to harmonize copyright the principles and rulings of *Sharī‘a*.

In addition, copyright has received support from several “*al-Qawā‘id al-Fiqhiyya*” (legal maxims) such as “the appropriation of permitted things gives rise to ownership in *Sharī‘a*” which justifies ownership of copyright. The legal maxim “the necessary condition for the fulfillment of obligation” and “public or private “*ḥāja*” (need) must be treated as “*ḍarūra*” (necessity)” can introduce copyright for the purposes of the perceived public need to stimulate research as a preliminary condition for scientific and art development and as a private need of scholars and authors. The legal maxim: “removing of harm” is used to prevent any kind of violation of copyright. To ensure and impose respect for copyright, the legal maxim: “A person, who is owner of a thing, is owner also of things which are indispensable for that thing” is appropriate. The ownership of authored works implies ownership of all rights related and necessary for it.

It is possible now to realize new foundations of copyright from *Sharī‘a*. The collection of arguments presented in this thesis support the recognition of copyright in *Sharī‘a*.

The study illustrates that copyright is subject to several conditions. Copyright is based on conditions and is limited by other rights and by the public interest. The author has carried out a survey of *Sharī'a* in order to identify what turns out to be three different conditions. In collective arguments, this study uses evidence from *Sharī'a* to establish copyright on clear authoritative conditions arising from the same source and without opposing its principles. The conditions presented in this form are completely original and unique.

The first condition is that the contents of a work must not be illegal or offensive to the public interest. Secondly, a work must be original (leaving some room as to how to interpret originality). The recognition of copyright requires that a work must respect the principles of *Sharī'a*. Thirdly, there must not be contradiction with public morals or interests. From the perspective of *Sharī'a*, it is necessary to achieve a balance between copyright, other rights and the users of intellectual products. The application of freedom of expression must be understood in the *Sharī'a* context.

From this study it appears difficult to justify, based on *qiyās* on "*ḥaqq al-ḥakr*", the suggestion of a term of sixty years for the duration of copyright. There is no benchmark that can be used for measuring the duration of copyright specifically. Legislation of rights cannot be left to the ruler. In considering the duration of copyright, the thesis has argued that copyright should be perpetual based on the general principles of rights and ownership for other forms of property.

Finally, the thesis has considered objections raised by some scholars to the notion of copyright in *Sharī'a*. The study reviews the critics of copyright in some details and provides robust responses to those. The objections are that copyright is "*ḥuqūq mujarrada*" (abstract rights) which cannot be subject to exchange: that copyright restricts the widespread dissemination of acquired knowledge; that copyright is inconsistent with the idea of property because property gives an owner the right to copy materials they have bought. The early *fuqahā'* reviewed did not point to copyright or some other similar institution even whilst the intellectual movement was very active. In addition, the anticipated harm of reproducing materials does not prevent someone from publishing useful works. It is also,

suggested that copyright is an individualistic concept based on western capitalism thought.

In contrast to these objections, this thesis has argued that even though the classification of copyright as such is controversial, not all forms of copyright are “*ḥuqūq mujarrada*”. This thesis has argued that copyright does not necessarily conflict with the dissemination of obligatory knowledge of *Sharī’a* or the widespread dissemination of knowledge. The purchase of a book, CD or tape does not transfer copyright. The sale is made on ‘*urf* and a written condition that the buyer must respect copyright. Any kind of “*ghaṣb*” (usurpation) of copyright is prohibited whether or not there is a harm. The harm to authors, if their works have been published without their prior consent cannot be denied. Copyright is built on many strands of evidence from *Sharī’a* notwithstanding the writings of the early scholars and whether the rightful owner is rich or poor, Muslim or non-Muslim, Western or not. As the study demonstrates, the objections to copyright have not met with support from the standpoint of *Sharī’a*. There is no reason to assert that copyright needs to be imposed by some outside authority in order to take its place within *Sharī’a* system. On the contrary, on the basis of many proofs within *Sharī’a* itself approval of copyright is the only sound legal ruling.

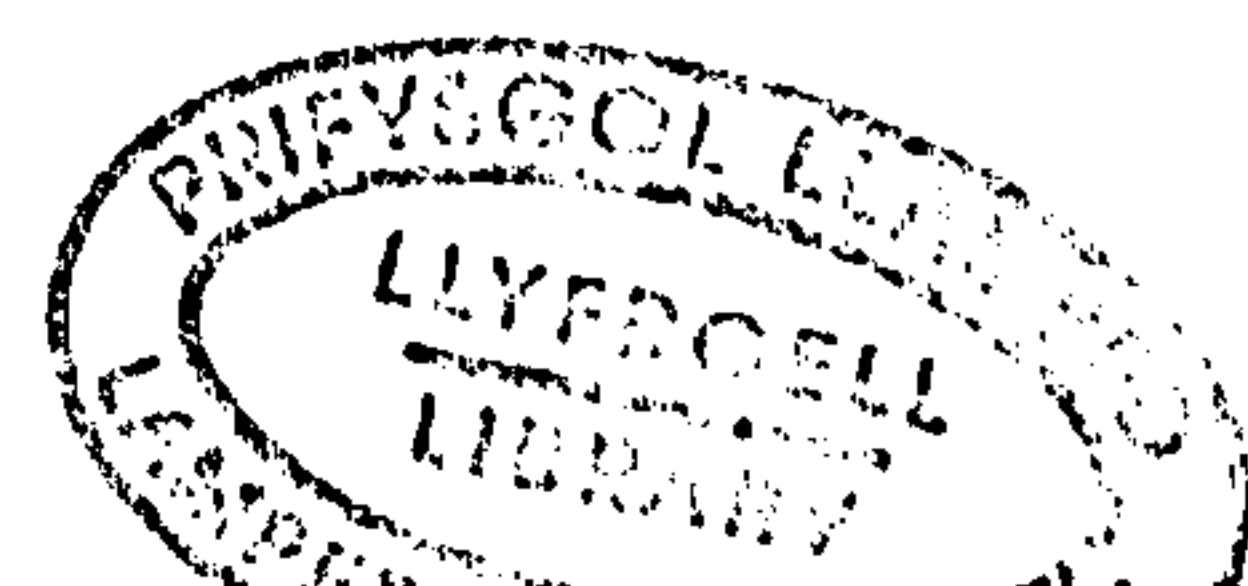
This thesis seeks to offer, therefore, a systemic approach to the subject as determined by *uṣūl al-fiqh*. Some arguments presented in this thesis might be less new than the reader might suppose. The commitment, however, to the systematic and productive approach to the subject of copyright is new. Each argument resolves part of the problem of how copyright is derived from *Sharī’a* or may assist other aspects in relation to copyright.

This thesis has been undertaken in an attempt to understand the viability of copyright under *Sharī’a*. At this point, the author asserts that copyright can no longer stay in a grey area between absolute rights, moral recommendations and indifferent matters. The position of copyright in *Sharī’a* is settled by reviewing the technicalities of *uṣūl al-fiqh* and applying them to copyright.

This thesis shows that copyright can properly be accepted within the framework

of *Sharī'a* rather than establishing it as a concept alien to *Sharī'a*. Copyright can be developed piecemeal within *Sharī'a* as a reasonable coherent body of rules based on the principles of *Sharī'a*. This thesis has shown that it is possible to generate a detailed and clear set of rules relating to copyright from *Sharī'a*.

It is hoped that this thesis will now provide a way forward for the accord of copyright within *Sharī'a*. Further work needs to be carried out in order to go beyond the current discourse of the roots and basis of copyright so as to construct an efficient and effective Islamic regime for copyright and intellectual property.



Glossary

1. *'adl* :(n) justice
2. *adhān* :(n) raising the call to prayer
3. *aḥya* : (v) means give life or restore to life
4. *'Āmm*: (n) a word that applies to unlimited things.
5. *amāna* (n) pl. *amānāt* :honesty ,trust
6. *'aqār*: (n)immovable, real property
7. *asbāb al-nuzūl*: (n) the occasions of the revelations
8. *aşl* :(n) original
9. *aşāla*: (n) originality
10. *bay'*: (n)sale
11. *Bayt l-māl*: (n) the treasury
12. *bid'a*: (n) means heresy disapproval innovation in religion.
13. *ḍamān*: security, guarantee
14. *ḍarar* :injury ,mischief, harm
15. *ḍarūra*: (n) necessity, emergency
16. *diya*:(n)blood-money
17. *diywān*: (n)official register
18. *far'* : in the process of *qiyās* it means a new case
19. *fikriyya*: (adj.) intellectual
20. *ghaşb*: (n)usurpation
21. *gharar* : (n)uncertainty or risk

22. *ḥaḍāna*: custody
23. *ḥadīth* (n) pl. *aḥadīth* :prophetic tradition
24. *ḥāja*: (n) need, want or requirement.
25. *ḥafīz*: (n) pl. *ḥufāz* people who recite and memorize the Qurā'n
26. *ḥākim* : (n) ruler or judge
27. *ḥaqq 'Ādabī*: (n) moral right
28. *ḥaqq māli*: (n) economic right
29. *ḥaqq* pl. *ḥuqūq*: (n) right, rights
30. *ḥaqq ḥakr*: (n) A right based on contract under which an administrator of property, belongs to *awqāf* (endowment), can grant a tenant exclusive use of the property for an agreed term, in return of payment.
31. *ḥarām* : (n) forbidden
32. *ḥisba*: (n) means enjoining good and preventing evil voluntarily within the community.
33. *ḥirz*: (n) means a reasonable place or custody, which an owner can keep his property usually according to its value and nature.
34. *ḥukm* pl. *Aḥkām*: (n) command, ruling, legal decision
35. *ḥuqūq mujarrada*: (n)abstract rights
36. *ḥuqūq m 'nawyya*: (n)moral rights
37. *ḥuqūq mutaḡarrira*: (n)concrete rights
38. *ḥuqūq al-mwa'liff*: (n)author's rights
39. *ḥuqūq 'yniyya*: (n)real rights
40. *ḥudūd*: (n)punishments of crimes

41. *'illah* : (n)effective cause
42. *'ilm*: (n) knowledge
43. *'ilm muṣṭalaḥ al-ḥadīth*: A science, which comprises a collection of rules, measures, and terminology that can verify the authenticity of the prophetic traditions and classify them.
44. *ibāḥa*: liberty
45. *ibtikār* : novelty, originality
46. *idhn*: permission
47. *iḥiyā' al-mawāt*: the revival of the waste land
48. *iḥtikār*: hoarding
49. *ijmā'*: consensus
50. *ijāra* : hire, lease
51. *ijāza*: authority or license of narration
52. *ijtihād*: conscientious reasoning
53. *ijtihādāt pl.*: legal opinions
54. *Ikhtirā'*: invention
55. *ikhtiṣāṣ* :exclusiveness
56. *intifā'*: utilization
57. *isnād* or *sand*: licensing chain of narrators
58. *istiḥqā* : entitlement
59. *itiḥsān*: judicial preference
60. *kaffāra* (n) pl. *kaffārāt*: expiations
61. *kāṣṣ*: means a word that applies to limited things.

62. *kharāj*: land tax , interest, return
63. *khiyāna*: mistrust, dishonesty
64. *khiyār al-majlis*: The right of both parties in a business transaction to withdraw as long as they have not separated.
65. *khiyār al-ru'ya*: The right of the buyer to rescind or ratify a sale contract upon visual inspection.
66. *khiyār al-sharṭ*: The right of both parties of a contract to withdraw from the contract during a specific period if that party stipulated that.
67. *khul'*: an agreement between husband and wife terminating the contract of marriage.
68. *māl* pl. *amwāl*: money, wealth
69. *māl manqūl*: movables
70. *māl mithlī*: standard property
71. *māl qiymī*: remediable property
72. *mṣlaḥa* (pl. *maṣāliḥ*) means interest, benefit etc.
73. *mafāsīd*: corruptions
74. *mahr*: a dowry
75. *makrūh* : reprehensible
76. *mandūb*: recommended
77. *manfa'a*: pl. *manāfi'*: means utility, advantage, interest
78. *maqāṣid*: objectives, aims
79. *matn*: textual contents of prophetic tradition
80. *al-mwa'liff* pl. *al-mw'allifiyyin* :author

81. *milkiyya*: ownership
82. *muhtasib* is a religious person who enjoins people what is right and forbids them what is wrong.
83. *mubāḥ* pl. *mubāḥāt* are 'indifferent' things are free and lawful to acquire or do
84. *mudāraba* or *qirāḍ*: contract of partnership
85. *muftī*: a scholar who gives fatwa.
86. *mut'a*: gift of consolation
87. *muzāra'a*: sharecropping
88. *nafaqa*: maintenance
89. *nadhr*: vow
90. *naṣṣ*: text
91. *niṣāb*: it is a fixed amount of money which *zakāt* alms is due.
92. *qadhf*:slander, defamation
93. *al-Qawā'id al-Fiqhiyya*: legal maxims
94. *qiṣāṣ*: legal retaliation
95. *qiyās*: analogy
96. *Ruqya* means a Qur'ānic recitation and making supplications to Allah for seeking a cure for any illness.
97. *sadd al-dharā'i'*: blocking means of evil
98. *Siyāsa Shar'iyya*: legal policy
99. *al-Shāri'*: The law-giver
100. *Shar'aī*: legal, legitimate

101. *shay'*: a thing
102. *shay' mamlūk*: owned thing
103. *shuf'a* is a right of priority to purchase a property which is for sale given to (*shafi'*) the neighbor, co-sharer or partner in the real property.
104. *ṣulḥ*: settlement or mediation
105. *sulṭa*: authority
106. *ta'addī* : transgression
107. *tadlīs*: fraud or deception
108. *tālīf*: authorship
109. *ṭalāq*: divorce
110. *taklīf*: commission
111. *taṣarruf*: authority
112. *al-t'sufī isti'māl al-ḥaqq*: Abuse of right
113. *taṣnīf*: authorship
114. *'urf*: customary law
115. *wājib*: obligatory
116. *wājib qaḍā'an*: juridical order
117. *wājib diyānatan*: religious obligation
118. *wad' al-yad*: appropriation
119. *walā'*: (patronage or allegiance) A relationship established between a master and a slave after emancipation which confers some mutual rights on them, for example the former can inherit from the latter in some cases.

120. *waqf*(n) pl. *awaqāf*: endowment

121. *waṣiyya*: a bequest

122. *zanadiqah*: heresy

123. *zinā*: fornication, adultery

124. *ẓulm*: oppression

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