

The Philosophical Foundation of Intellectual Property Rights Protection

Setyaningsih¹, Aline Gratika Nugrahani², Irene Mariane³

¹setyaningsih@trisakti.ac.id, ²rr.aline@trisakti.ac.id, ³irene.m@trisakti.ac.id

^{1,2,3}Universitas Trisakti

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Abstract

The communal system that lives in Indonesian society creates a view and culture that seems to oppose the presence of IPR because of its individuality. Enforcement of IPR protection in Indonesia is still a big homework for the Indonesian government in the midst of the communality of Indonesian society. On the other hand, the pressure of large countries has triggered the imposition of IPR regulations in Indonesia. As a result, Indonesia always holds the status of priority watch list. This paper discusses the philosophical basis for IPR protection in accordance with the character of Indonesian society. This paper will also examine how religion views the concept of IPR protection. So that IPR can be well received and grow properly in Indonesia. The writing uses normative research methods. Finally, it can be concluded that the MUI fatwa which prohibits and forbids the use of Intellectual Property Rights belonging to others without permission, is a strong foundation to sensitize Indonesian society as a religious society that is very obedient to its religious teachings to comply with the protection of Intellectual Property Rights.

1. Introduction

Humans are social creatures (*zoonpoliticon*). Aristotle's opinion describes how humans need each other with other humans, sharing, helping each other and so on. When faced with an extreme intellectual property rights (IPR) regime where the individualistic impression is very thick, the question arises, what is the nature of the provision of intellectual property rights protection? This individualistic nature is difficult to accept by most countries with communal societies, and Indonesia is one of them.

The difficulty of IPR in Indonesia is caused by several things, among others, the views and culture that exist in Indonesia. The communal system that lives in Indonesian society seems to oppose the presence of IPR with its individuality. Enforcement of IPR protection in Indonesia is still a big homework for the Indonesian government in the midst of the communality of Indonesian society which cannot accept the understanding of IPR, on the other hand, the pressure of large countries has triggered the imposition of IPR regulations in Indonesia. As a result, Indonesia always holds the status of priority watch list.

The philosophical values that underlie individual ownership of a human intellectual work in the fields of science, art and literature are incarnated in the IPR legal system. These rights are derived from western values that are incarnated in the civil law system so that sometimes the enforcement of these rights in Indonesian society creates conflict with traditional cultural values that have been institutionalized in community life. This means that there are acts that qualify as IPR violations according to the provisions of the law but in the cultural values of the community are not considered as IPR violations. Likewise, the concept concerning IPR protection is not an idea owned by the Indonesian nation.¹⁰⁶ USTR News USTR (The United State Trade Representative): To cope with IPR violations committed by China and other countries, the United States had to issue special rules to anticipate fraudulent competition by means of counterfeiting, the rule is commonly referred to as Article 301. Article 301 or Special 301 and Super 301, as well as Article VII of the US Commercial Code, are among the economic weapons of the American superpower. Super 301 authorizes the US Trade Representative, or USTR, to take action against countries deemed to be deceitful in trade or capital practices, thereby reducing the opportunity for US products to reach the market in the country concerned.

The historical and cultural background shows that most Indonesians still adhere to customary norms that do not recognize individual ownership or private ownership of intellectual works and inventions. The origin of the current IPR system did not grow from the culture of the Indonesian people themselves, but

came from western countries that have economic interests and cultural values that are very different from those of the Indonesian people. This factor plays a major role in the difficulty of IPR law enforcement in Indonesia.

Seeing the problems mentioned above and the rapid advancement of technology spurs human creativity so that intellectual works are born that have the potential to be protected by IPR, where this condition forces the world community, especially the Indonesian people, to increasingly respect the IPR of others. For this reason, it is necessary to find a strong foundation so that the concept of IPR can be accepted by the Indonesian people. So, through this paper, several philosophical foundations that affect IPR protection will be examined, so that the essence of providing acceptable IPR protection can be found. Thus, it is hoped that the understanding and appreciation of IPR and IPR owners will be better. So that IPR can be well received and grow properly in Indonesia (Gazalba, 1976). In this paper, the author also looks for how religion views the concept of IPR protection, considering that Indonesian society is classified as a religious society, and there is a view that the concept of IPR is contrary to the concept of religion, especially Islam. However, in 2005, MUI issued a Fatwa stating that it is illegal to use IPR without the owner's permission. This situation raises the question of how the nature of IPR in the view of Islamic law / philosophical Islamic law.

Based on this background, this study aims to analyze the philosophical basis for providing IPR protection and explain how the essence of IPR in philosophical Islamic law.

2. Research Method

This research uses normative research methods. Normative research often focuses on literature studies and studies of existing legal materials to understand and analyze certain legal concepts or theories. The approach used in this research is a philosophical approach and an Islamic legal approach. The philosophical approach is used to analyze the philosophical basis for providing IPR protection. The Islamic legal approach is used to understand how the nature of IPR in the view of Islamic law.

The legal materials used in this research consist of primary, secondary, and tertiary legal materials. Primary legal materials include laws and regulations relating to Intellectual Property Rights (IPR) in Indonesia, such as the Trademark Law, Patent Law, and Copyright Law. Furthermore, secondary legal materials consist of literature, scientific articles, and previous research that discusses IPR and Islamic law. Finally, tertiary legal materials include legal dictionaries, encyclopedias, and other reference materials that support this research. The data collection technique used is library research, which is collecting data from various relevant sources, including laws and regulations, books, scientific journals, and other documents related to IPR and Islamic law.

3. Results and Discussion

A Brief History of the Development of the Intellectual Property Rights (IPR) Protection System in Indonesia

Historically, IPR legislation in Indonesia has existed since the 1840s. The Dutch Colonial Government introduced the first law regarding IPR protection in 1844. Subsequently, the Dutch Government promulgated the Trademark Law (1885), Patent Law (1910), and Copyright Law (1912). Indonesia, which at that time was still called the Netherlands East-Indies, had been a member of the Paris Convention for the Protection of Industrial Property since 1888 and a member of the Berne Convention for the Protection of Literary and Artistic Works since 1914. During the Japanese occupation, from 1942 to 1945, all laws and regulations in the field of IPR remained in force.

On August 17, 1945 the Indonesian nation proclaimed its independence. As stipulated in the transitional provisions of the 1945 Constitution, all laws and regulations inherited from the Dutch colonial era remained in force as long as they did not conflict with the 1945 Constitution. The Copyright Law and the Dutch Heritage Law remained in force, but not the Patent Law which was considered to be in conflict with the Indonesian government. As stipulated in the Dutch Patent Law, patent applications could be filed at the patent office in Batavia (now Jakarta), but the examination of patent applications had to be conducted at the Octrooiraad in the Netherlands.

The year 1986 can be called the beginning of the modern era of the IPR system in the country. On July 23, 1986, the President of the Republic of Indonesia formed a special team in the field of IPR through Decree No. 34/1986 (This team is better known as the Keppres 34 Team). The main task of Team Keppres 34 is to cover the preparation of national policies in the field of IPR, drafting legislation in the field of IPR and socializing the IPR system among relevant government agencies, law enforcement officials and the wider community.

On April 15, 1994 the Government of Indonesia signed the Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiations, which included the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement). Three years later, in 1997 the Indonesian Government revised the set of laws and regulations in the field of IPR, namely the 1987 Copyright Law jo. Law No. 6 of 1982, Patent Law 1989, and Trademark Law 1992. At the end of 2000, three new laws in the field of IPR were passed, namely Law No. 30 of 2000 on Trade Secrets, Law No. 31 of 2000 on Industrial Designs and Law No. 32 of 2000 on Integrated Circuit Layout Designs.

In an effort to harmonize all legislation in the field of IPR with the TRIPS Agreement, in 2001 the Government of Indonesia passed Law No. 14 of 2001 on Patents, and Law No. 15 of 2001 on Trademarks. These two laws replaced the old laws in the related fields. In mid-2002 on Copyright which replaced the old law and is effective one year

after its enactment. Finally, on October 16, 2014, a new copyright law was passed and promulgated, namely Law No. 28 of 2014 on Copyright.

Nature and Scope of IPR

Intellectual Property Rights (IPR) are exclusive rights granted by the state to individuals or groups that create intellectual works. In general, IPR consists of two main groups, namely copyright and its related rights, and industrial property rights. Industrial property rights include patent rights, trademark rights, industrial design rights, integrated circuit layout design rights, plant variety rights, and trade secret rights.

The IPR system is a private right, where a person is free to apply or register their intellectual work or not. The Indonesian state grants an exclusive right to every person who has created his work with the aim of rewarding what he has made. It also has another purpose, namely as a motivation for others to continue to innovate.

IPR as part of property law (property wealth), then the owner in principle is free to do anything according to his will and give the content he wants to his own legal relationship. Only in the further development of this freedom has changed, IPR is limited by the existence of social functions, namely by restrictions in the form of compulsory licenses, expropriation by the state, creations and creations must not conflict with decency and public order.

The original nature contained in Intellectual Property Rights (IPR) includes several things. First, IPRs are exclusive and absolute, which means that rights owners have full power to defend their rights against anyone. They can sue any party for infringement of the right. This gives the right owner a monopoly to use and prohibit others from using his creation or invention without permission. Secondly, IPRs have a limited term of protection. Once the protection period expires, the right will become public property, except for cases like the Right to Trademark which can be extended on the condition that it continues to be used in commerce. However, there are also rights such as Trade Secrets that have no protection period and do not need to be registered. Thirdly, IPR is transferable, especially in terms of its economic rights. This can be done through licenses or as a whole through various means such as inheritance, grants, wills, and agreements permitted by law. Thus, IPR is not only a right limited to the original owner, but can also be an asset that can be traded or transferred to other parties.

IPR Principles

- a. Principle of Justice
- b. Economic Principle (the economic argument).
- c. The Cultural Principle

d. Social Principle (Djumhana & Djubaedillah, 2014)

Philosophical Foundation of IPR Protection

The legal protection of private property rights has been a key factor in the growth of capitalism and free market economies. The recorded history of ancient societies shows that people recognized the right to control land and goods, and respected the government to protect their interests in wealth.

Along with technological changes, this conception has shifted. The legal system places wealth in three categories: first, most societies recognize private property rights in personal wealth, known as intangible things; second, wealth in the real sense, such as land and buildings; and third, wealth known as intellectual property. It is this concept that is attempted to be used as a rationale in the protection of intellectual property rights. As described earlier, intellectual property requires the thought and creativity of the creator, inventor or creator. Therefore, taking it by not compensating the owner is an unjustified action because it violates good moral teachings. This moral foundation is also known in philosophical theory as the theory of natural law. In moral teachings, the doctrine of not stealing or not taking what is not yours is known.

This moral foundation approach to the demand to protect intellectual property rights emphasizes honesty and justice. It is seen as dishonest and unfair to steal someone's business without first obtaining their consent. Since ownership of intellectual property rights is included in human rights as an individual who exercises thought, the value of communalism must naturally be ignored to recognize and reward the individual. Article 27 Paragraph 2 of the Universal Declaration of Human Rights states that "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he (sic) is the author."

The moral doctrine was adopted by the IPR regime to provide protection to individual IPR owners so that their rights are not violated by others. However, the natural law doctrine above is broader than just protecting individual IPR owners, because the doctrine can also be applied to protect other parties, including local or traditional communities for their traditional knowledge.

Furthermore, the philosophical basis of the IPR regime is economic. That individuals have sacrificed their energy, time, thoughts and even costs for a work or invention that is useful for life. The rationality to protect the investment capital must be accompanied by the granting of exclusive rights to the individual concerned so that he can exclusively enjoy the results of his thought process.

Aristotle's teachings have also illustrated the above arguments in an effort to create justice. One of the justice recognized in his theory is distributive justice. Distributive justice is justice that gives each person a share in accordance with their services. This means that it is not justice based on equality of amount but on equality.

The IPR regime also adopted and developed Jeremy Bentham's utilitarian theory. This theory explains that the law is formed in order to provide benefits and happiness for the majority of citizens. The formation of legislation in the field of IPR is a form of protection so that the community can obtain these benefits. This is what in the context of economic development, especially in the field of IPR, becomes reward theory.

Reward theory postulates that if creative individuals are incentivized in the form of exclusive rights, then this will stimulate other individuals to be creative. In other words, the IPR regime is a form of compensation and encouragement for people to create. This can benefit society in the long run. Through restrictions on the use of innovations, it is expected to eventually increase the level of information and innovation available in society.

In general, there are two theories about IPR, namely Utilitarian Theory and Non-utilitarian Theory. The fundamental difference between the two theories lies in their approach. Utilitarian theory sees IPR as an economic right while Non-utilitarian theory sees IPR as a moral right. In later developments, various theories emerged that both supported and criticized intellectual property rights (IPRs), including Natural Rights/Labor Theory, Personhood Theory, Unjust Enrichment Theory, Libertarian Theory, Distributive Justice Theory, Democratic Theory, Radical/Socialist Theory, and Ecological Theory (Menell, 1999).

Utilitarian Theory

Utilitarians see IPRs as an instrument to provide protection for their work in the field of technological invention (Merges, 1997). The IPR theory of the utilitarians advanced and developed in close connection with the process of modern state formation. IPRs developed during the mercantilist era which was used to increase power and wealth through the development of manufacturing industries and trade monopolies. The philosophy of this theory places IPR as something that needs to be developed to support monopoly power and accelerate innovation. Adherents of this theory include: Adam Smith (1776), Jeremy Bentham (1839), John Stuart Mill (1862), Pigou (1924), Clark (1927), and Arrow (1962).

Non-Utilitarian Theory

Non-Utilitarian Theory plays an important role in supporting the existence of IPR in the world. This theory emphasizes the need for protection of moral rights in an intellectual work. The emphasis on moral rights stems from the idea of the need for protection of artistic expression, literature and publications. Adherents of this theory include: Kaplan (1967), Treece (1986), Hughes (1988), Gordon (1989), and Netanel (1993).

Natural Rights/Labor Theory

This theory was pioneered by John Locke (1698) who offered justification for private

property rights as a natural right (natural rights) John Locke proposed the proposition that everyone has wealth (property) contained in their personal self. Then Immanuel Kant (1798) said that the natural obligation of humans is to respect the author's ownership of his creation (Merges, 1997). John Locke's theory of IPRs has a few different interpretations. One of them is that IPR is an instrument used to obtain labor. Meanwhile, the normative theory says that it is labor that should be valued (Laslett, 1963). According to John Locke, all objects owned by humans are gifts from God for human pleasure. However, these goods cannot be immediately enjoyed by humans. Humans must turn these goods into private property by employing labor. The existence of labor will increase the value of goods and will allow these goods to be enjoyed by humans (Hughes, 1988).

Personhood Theory

John Locke's theory of IPR is deeply intertwined with the nuances of the money market, wealth accumulation, service industries, and similar sectors. Justin Hughes views Locke's labor theory of IPR as strong but incomplete. According to him, the theory of IPR requires a personal dimension as proposed by Hegel. According to Hegel, IPR is a personal expression, leading to the emergence of the personhood theory. Justification for personhood comes from the legal philosophies of Immanuel Kant and Hegel. This theory has become a significant discourse in modern legal states.

The underlying premise of this theory is that a person who wants to develop into a good individual needs to control their external environment. To address the shortcomings of Locke's theory, Hegel's personhood justification was proposed. The core of Hegel's philosophy revolves around human will, personality, and freedom. According to Hegel, individual will is the essence of human existence, continuously actualized in the world. Hegel posits that in a hierarchy, individual will holds the highest position. The Hegelians (followers of Hegel) assert that the mind and heart can be unified into freedom.

Hegel's IPR theory emphasizes the direct freedom of each individual. Thus, criticism of the liberal influence on Hegel's theory must be muted. Hegel defines "liberal" as having a limited freedom to do certain things, while the negative definition of liberal is an uninhibited freedom. According to Hegel, IPR does not need to be analogous to tangible property because IPR is related to personality, mentality, and will. Intellectual property provides a solution to this problem by "embodying" personal traits. Hegel states that thought, will, talent, and similar attributes are owned by the free mind. Therefore, humans need to express and embody something external.

Unjust Enrichment Theory

The theory of the Intellectual Property Rights (IPR) system asserts that its main purpose is to provide fair compensation to creators, to the extent that it reaches a certain social point, which is similar to the legal concept of restitution. However, in addition to compensation, IPRs also serve to protect reputation and encourage

innovation. For example, through brand protection, companies like Coca-Cola can avoid losses due to the use of their name by other parties. In practice, IPRs encourage creators and investors to continue innovating by rewarding their work. However, there have been criticisms raised regarding IPR, stating that this system can result in limiting access to science and technology and ignoring the contribution of non-western traditions in intellectual creation.

Based on the description of the philosophical basis of Intellectual Property Rights (IPR) above, it can be concluded that the protection provided in IPR is more dominant in individual protection. However, to balance the interests of individuals with the interests of society, the IPR system is based on the following principles: First, the principle of Justice, which suggests that the creator of a work or other person who produces the results of his intellectual abilities deserves to be rewarded. These rewards can be material or non-material, such as a sense of security because they are protected, and recognition of their work. The law provides this protection in favor of the creator by granting exclusive rights. Second, the Economic principle, which states that IPRs are rights derived from human creative activities that are expressed to the public in various forms, and have benefits and are useful in supporting human life. Ownership of IPR is considered reasonable because of the economic nature of humans who need it to support their lives in society. Third, the Cultural principle, which emphasizes the recognition of human creations, works, deeds, and copyrights regulated in the IPR system as an inseparable effort in creating an atmosphere that encourages the birth of new works. Fourth, the Social principle, which states that the law does not only regulate human interests as an independent individual, but also as part of society.

The above principles, at least, have become the philosophical basis for the construction of the intellectual property rights regime, including in Indonesia, at least more or less these principles are implementative in the culture of Indonesian society. Given that through these principles the individualism of IPR is limited, adjusting to the circumstances of Indonesian society, Indonesian people should be increasingly able to accept IPR and respect the IPR of others, so that the level of infringement will decrease.

The Philosophical Foundation of MUI's Statement on the Haram of IPR Infringement

MUI Fatwa on Haram to Violate IPR

The Indonesian Ulema Council (MUI), in its VII National Conference on 19-22 Jumadil Akhir 1426 H. / 26-29 July 2005 A.D., after considering, that nowadays the violation of Intellectual Property Rights (IPR) has reached the level of very troubling, detrimental and harmful to many parties, especially the rights holders, the state and society, and against such violation, the Indonesian Society Against Counterfeiting (MIAP) has submitted a fatwa request to MUI because of that, MUI considers it necessary to establish a fatwa on the status of Islamic law regarding IPR, to be used as

a guideline for Muslims and parties who need it.

Basically, Islamic teachings strictly prohibit all forms of using other people's property unlawfully, as mentioned in the word of Allah SWT which reminds His people not to eat each other's property without rights, as stated in QS. al-Nisa' [4]: 29 and QS. alBaqarah [2]: 188. The prohibition is also emphasized in QS. al-Syu'ara [26]: 183 which prohibits harming humans in their rights and in QS. alBaqarah [2]: 279 which warns against doing wrong and not being wronged. The Prophetic Hadiths also reinforce this teaching by emphasizing that the property left behind is the right of the heirs, that a person's blood and property are forbidden to be harmed, and that the use of other people's property must be based on conscientiousness. The prohibition of wrongdoing is also reflected in the hadiths which emphasize that Muslims are brothers who should not oppress each other. The principles of fiqh also underscore the importance of avoiding harm and *mafsadat* and emphasize that everything that comes from the unlawful is also unlawful, and that it is not permissible to take legal action on the property of others without their permission. Thus, Islamic teachings emphasize the importance of protecting the rights of others, avoiding losses, and avoiding all forms of unfair treatment in the management of property and the rights of others.

Intellectual property rights (IPR) have important fundamentals, as stipulated in the decision of *Majma' al-Fiqh al-Islami* number 43 (5/5) Mu'tamar V in 1409 H/1988 M concerning *al-Huquq al-Ma'nawiyah*. First, special rights such as trade names, addresses, brands, inventions, and creations have widely recognized economic value, and therefore, should be respected and protected. Secondly, owners of non-material rights have authority over their rights, which can be transacted under certain conditions to avoid uncertainty and deception. Thirdly, rights such as copyright and authorship are protected by sharia, and their infringement should not occur. Scholars have also provided views in line with this, recognizing that copyright is a valuable property and that its violation can be considered a sin and theft. The explanation from the MIAP side adds to the understanding of this, while various laws and regulations of the Republic of Indonesia have been established to protect IPR, including laws governing the protection of plant variations, trade secrets, industrial designs, integrated circuit layout designs, patents, brands, geographical indications, and copyrights. The opinion of Commission C for Fatwa at the 2005 MUI National Conference VII is also an important foundation in this context.

Based on the above, the Indonesian Ulema Council (MUI) issued a Fatwa on the Protection of Intellectual Property Rights (IPR). IPR refers to the wealth that arises from the results of brain thinking that produces products or processes that are useful for humans and recognized by the state in accordance with applicable laws and regulations. Therefore, IPR gives its owners the right to economically enjoy the results of their intellectual creativity. The State grants Exclusive Rights to its registrants or owners as Legal Right Holders, which enables them to prohibit others from using such rights without authorization. The recognition of this right by the State aims to encourage every individual to produce their creativity for the benefit of society in

general. In the context of Islamic law, IPR is considered as one of the property rights (*huquq maliyyah*) that receives legal protection like property (*mal*). IPRs that receive protection under Islamic law are those that are in accordance with Islamic teachings. IPR can be an object in various types of transactions, both commercial and non-commercial, and can be made as *waqaf* (provided for the public interest) and inherited. Any violation of IPR, such as the use, disclosure, manufacture, sale, import, export, dissemination, provision, announcement, counterfeiting, or piracy of IPR belonging to others without permission, is considered an injustice and is declared haram in Islamic law.

Philosophy of Objects According to Islamic Law

Treasure in Arabic is called *al maal* or known as *al amwal*. In al Muhith dictionary, *al maal* is everything that can be owned. According to *shara'* terms, wealth is everything that is used in something legal according to *shara'* law, such as buying and selling, lending and borrowing, consumption and others. Based on this understanding, everything that humans use in the life of the world is treasure. Money, land, houses, vehicles clothes are included in the category of *al amwal*.

In general, rights are defined as "A provision by which Shara' establishes a power or a legal burden". The sources of rights themselves according to the Ulama *fiqh* are five, namely; First, *shara'*, such as various worship that is ordered. Second, contracts, such as sale and purchase contracts, grants, and waqf in the transfer of property rights. Third, personal will, such as promises and vows. Fourth, beneficial actions, such as paying off debts. Fifth, actions that cause harm to others, such as obliging someone to pay compensation for negligence in using someone else's property.

By looking at the above information, IPR is an object (*al maal*) in the form of immaterial objects in the form of *manfa'at* (*al manfa'ah*) because what is protected is not the object created but the idea contained in a work. One of the principles of a work protected by IPR is when it meets the requirement of authenticity. This means that the work is the original creation of the creator.

To assess the originality of a work, what must be considered is that the work is contained in a distinctive and personal form. This originality is closely related to the form of embodiment of a work, and therefore a work is only considered original if its form and embodiment are not the result of plagiarism from other works that have been realized. Thus, it should be understood that what is meant by originality is the 'form of manifestation', meaning that the idea that has taken shape (the expression of the idea) is original. So, what is protected is not the idea, but the embodiment of the idea.

The Theory of Property Ownership in Islam

When looking at the treasures of Islamic *fiqh*, there are several theories about wealth. Treasure (*al-Mal*) from the word *mala* (leaning or turning away from the center to one

side), is interpreted as; *“Everything that pleases humans and they maintain. Both in material form and in the form of benefits”*. Hanafi scholars define wealth as: *“Everything that people love and can present when needed”*, or everything that can be owned, stored, and utilized. The majority of scholars define property as *“everything that has value, and is subject to compensation for those who damage or eliminate it”*.

For the majority of Ulama, property is not only material, but also includes the benefits of an object. This is different from the Hanafi Madzhab Ulama who argue that the definition of property is only material, while the benefits are included in the definition of property. Therefore, Hanfi madzhab scholars argue that the rights and benefits cannot be inherited, because the right of inheritance-inheritance only applies in material matters, while the rights and *mafaat* according to them are not property. Whereas according to the Jumhur Ulama, the right of inheritance-inheritance is not only related to the material, but also related to the rights and benefits, because all of it contains the meaning of property (material), in accordance with the words of the Prophet SAW; *“Who dies leaving property and rights, then (property and rights) belong to his heirs ...”* (HR. Bukhari, Muslim, and Ahmad bin Hanbal).

The opinion of the majority of scholars that *“the one who damages it is obliged to bear”*, hints at their view of the value (*qimah*) of something. This means that anything that has value has benefit, because everything that has value must have benefit. Therefore, something that does not have value and benefit is not considered as property. Thus, it can be understood that value is the basis of something that is seen as property, and value itself is basically benefit. So, it can be concluded that benefits are the origin in giving value and looking at something.

If the benefits are categorized as property as the applicability of the nature of property to objects, then the benefits also apply to property rights as to objects, as long as their use is permitted according to Shara'.

The theory of property above gives the conclusion that the results of copyrighted works (copyright) is a work and is a treasure that can be owned by both individuals and groups. In UUHC Article 3 mentioned that; (1) copyright is considered a movable object, (2) copyright can be transferred or transferred, either wholly or partially due; Inheritance, grants, wills, written agreements, other causes justified by legislation. Thus, copyright includes property that can be owned by someone legally.

IPR Infringement Law

Issues regarding Copyright (IPR) will touch various aspects such as technological, industrial, social, cultural, and other aspects. However, the most important aspect when it comes to protecting intellectual work is the legal aspect. The law is expected to be able to overcome various problems that arise related to Copyright. The law should be able to provide protection for intellectual work, so as to develop the creative power of society which ultimately leads to the goal of successful protection of Copyright (HAKI). With the legal protection of copyrighted works, the creator or

publisher owns and controls the results of his copyrighted work.

In articles 29 and 30 UUHC explained, which includes copyright are; books, pamphlets, and all written works, drama, dance choreography, all forms of fine art, batik art, songs or music with or without text, architecture, teaching aids, maps, translations, adaptations, interpretations, computer programs, cinematography, databases, and others.

In the next article, namely article 49 paragraph 1 of the UUHC, it is explained that; Performers have the exclusive right to give permission or prohibit other parties who without their consent make, reproduce, or broadcast sound recordings and/or images of their performances. Paragraph 2 also explains that; Producers of sound recordings have the exclusive right to give permission or prohibit other parties who without their consent reproduce and/or rent out sound recordings or sound recordings. Article 72 paragraph 1 explains that; Any person who intentionally and without right commits an act as referred to in Article 2 paragraph 1 or Article 49 paragraphs 1 and 2 shall be punished with 1 month's imprisonment and/or a minimum fine of Rp 1,000,000.00 (one million rupiah), or a maximum imprisonment of 7 years and/or a maximum fine of Rp 5,000,000,000.00 (five billion rupiah). Thus, it is clear that the violation of copyright is a criminal offense that can be punished.

In Islam, it is outlined that everything that is obtained by legal means (true and halal) such as: property obtained from hard work, property taken from objects that are not in possession, property taken on the basis of mutual benefit, property obtained from inheritance, wills, grants, and others so on, is obliged to be protected both by individuals and communities. In the previous explanation has been explained that copyright or intellectual property rights are assets obtained by legal means that is the result of creative work both individuals and groups, in this case Bahesti argues that creative work is the main source of human ownership. Therefore, copyright is one of the property (wealth) that must be maintained by both the owner and the community.

Allah SWT says; O you who believe, do not eat the treasure circulating among you by false means. In another verse Allah SWT also says; Let not some of you eat the property of others by false means.

In the hadith narrated by Darulqutni from Anas the Prophet SAW said; It is not lawful for a Muslim to own property except with his willingness. Theft or hijacking in Islamic law applies only to movable objects that are material, because theft requires conditions that must be met, namely objects that are stolen in the form of movable objects, considered as treasure (valuable), respected, have a proper storage place, and guarding.

In *fiqh jinayat* it is agreed that other than material movable objects such as material objects such as rights (*huquq*), creation (*ibtikar*) in various forms are not suitable to be used as objects of theft. This property, when it has become a material form such as books, cassettes, CDs, and so on, becomes a movable and material object that is

suitable to be used as an object of theft. Therefore, the possibility of crime against copyright when it has become a moving object and materialized.

As stated in the IPR law it is said that the right to obtain protection in addition to some substantive requirements related to the creation, it is also stated that the creation that gets protection is a creation that is not contrary to the values of diversity. As stated in Article 7 letter (a) of Law No. 14 of 2001 concerning Patents which says that Patents are not granted for processes or products whose announcement and use or implementation are contrary to applicable laws and regulations, religious morality. With the existence of religious restrictions in granting protection to the results of creation, it is clear that the position of IPR as *al maal* cannot be separated anymore.

IPR Protection Based on the Concept of Public Interest (*Mashlahah 'Ammah*) Maslahat etymologically has the same meaning as *manfa'ah*, both in meaning and use of the *lafadz* (Naning & Ramdlon, 1982). Maslahat is the *masdar* word for *sholuhu* (Yusanto & Yunus, 2011). Maslahat is also equivalent in meaning to *al-shulhu* and *al-sholah* which are the opposite of *alfasad*. Maslahat in language can also be interpreted as everything that evokes goodness or actions that are strived for by humans to produce goodness for themselves and the surrounding community. While the definition of *maslahat* in terminology or *shara'* terms has been widely stated by *ushul* scholars including Imam Zarkasyi, one of the adherents of the Shafi'i madzhab defines *maslahat* with a definition that is not much different from al-Ghazali, namely maintaining (everything) which is the goal of *shara'* by rejecting or avoiding creatures (Allah) from *mafsadat*.

As mentioned above, that IPR is *al maal* even though IPR is an abstract object considering its form is a right, but as explained above, IPR is *al maal* which is abstract. With the recognition of IPR as *al maal*, then of course it becomes obligatory to keep IPR, and realize the realization of the protection of IPR.

If you look at the history of Islam that already exists, indeed the Islamic community is free to enjoy the copyrighted works of others without paying for the progress of the nation. However, the state at that time guaranteed the creator to get a decent reward from the work that had been created. For example, Hunayn ibn Ishaq, a great translator and scientist was paid by the State for all the work he did. During one period of Islamic leadership, the Caliph weighed books that were authored or translated with gold. The above is one of the efforts made by the government to provide benefits and protect the rights of the creator. However, if the State cannot do so, then the State can impose restrictions on others to utilize the creator's work. Of course, this limitation is in order to provide protection and appreciation to the creator, not in order to completely monopolize the creation.

The strictness of the rules regarding the act of "stealing" shows Islam's recognition of property rights that must be respected by everyone. However, property rights must be protected and their transfer must be regulated fairly. In Islam, stealing is not only considered detrimental to the person stolen individually, but also socially in a broad

sense or even also injuring the value of it is also included in the judgment of Allah swt because it is considered disobeying his prohibition. The law of cutting off the hands of those who steal is commonly applied in countries that are based on Islam. In Indonesia itself, because it is not based on Islam, if there is theft, it is only subject to the applicable positive legal rules derived from the Criminal Code.

The Indonesian Ulema Council as the official guardian of Islamic law in Indonesia, has also determined that intellectual property rights are seen as one of the *huqqu al-maliyyah* (property rights) that receive legal protection as mal (wealth) (Djakfar, 2016). In an effort to build or advance science and technology that is needed by mankind, there are rules of behavior that must be adhered to, namely academic norms or scientific norms. The main thing in these norms is scientific honesty which demands that every scientific activist (academic), for example, clearly states the source of taking from other people's opinions as material for their work. This is so that their work is truly original, not the result of plagiarism or piracy of other people's work (Djakfar, 2016).

Copyright in the view of Islam is a property right that must receive legal protection as legal protection of one's property (Djakfar, 2016). Contemporary scholars agree that copyright is preserved according to *sharee'ah*. The owners are free to do with them as they wish. No one has the right to violate it, but on condition that the written works do not violate the straight Islamic Shari'ah. This was the final decision of the Institute for the Study of Islamic Jurisprudence, which emerged from the Organization of Islamic Conferences in the fifth half of Kuwait in 1409 AH, coinciding with 1988 AD (Ash-Shawi, 2009).

Islam prohibits theft, which in this case can be exemplified by the practice of piracy and duplication of written works that often occurs in Indonesia. This is clearly a criminal act according to Islamic law (Santosa, 2012). If you can't afford to buy a book at a bookstore or borrow a friend can, there are many halal ways that can be obtained not necessarily in a haram way or violate the law. According to Ippho Santosa, the author of the best-selling bestseller book throughout 2010-2011, he is very sorry if you/we buy his pirated book or read illegal PDFs. He said it was the same as enjoying stolen goods. Because books are books.

In this regard, the Prophet Muhammad himself was very strict in imposing punishment on anyone who was proven to have committed theft, as he said: "By Allah, if Fatimah bint Muhammad had stolen, I would have cut off her hand." (Narrated by Bukhari). Islamic Sharia was revealed to realize the benefit and avoid damage. And an important principle that must be well understood is that in Islam the real owner of property is Allah SWT. Humans are only limited to carrying out the function of *istikhlaf* only. This concept reinforces the divine characteristics of Islamic economics. A true Muslim must have a firm belief that he is a creature of Allah. He carries out his activities on this earth created by Allah, with abilities that are fully also a gift from Allah, with the media provided by Allah and of course also following the rules that have been made by Allah. If after that a Muslim acquires property, then the property

is the property of Allah, while humans are representatives and trustees of the property, which in time will be held accountable. So actually, ownership of property for humans is a mandate *istikhlaf* and *mas'uliyah*. One form of ownership rules in Islam is the recognition of individual ownership obtained through *halal* means. This ownership on the one hand needs to remain interpreted as a mandate from Allah, the owner must continue to realize that he only carries out the function of *istikhlaf*. On the other hand, the ownership must be preserved, it must not be usurped through *haram* means. Elements of Islamic law such as this need to color the rule of law on copyright. Creators should be given appreciation that can be in the form of material, including royalties on his findings. The person concerned can use these rights for the benefit of his or her welfare. Others must respect these rights, and must realize that the act of infringement of copyright is not only threatened with sanctions that he will bear directly in this world alone, but he must also be accountable in another life (Ash-Shawi, 2009). The aspect of *istikhlaf* that strengthens the divine character of Islamic economics, must also make people realize that obeying the law means at the same time obeying Allah SWT.

M. Hutaaruk argues that buying and selling pirated products is dangerous (*dlarar*), because it harms others and does not comply with the law. The harm can be material or moral even though from one side it seems as if it is helping the public with its cheaper price. Firstly, the pirate does not realize and appreciate the creator's hard work in producing his/her work that has taken time, energy and money. Second, pirates do not recognize the creator's services for the advancement of science, literature, and art. Thirdly, pirates do not recognize the services of people or companies/publishers who riskily provide capital to broadcast, print, and reproduce the copyrighted work. Moreover, the company or printer must pay various taxes and royalties to the creator. While pirates, in addition to piracy they also do not pay royalty tax from the pirated so that in addition to harming the creator and the company, the pirate has also harmed the country. The moral aspect of copyright piracy will inhibit the growth of creativity in the work because of the reluctance of the creators to work to create a new copyrighted work. This will certainly be very detrimental to the development and progress of science and society in general.

However, not all piracy is considered an infringement of copyright. In UUHC Article 14 and 15 explained that; Not included as copyright infringement if the taking or reproduction of a work either partially or wholly used for; education, research, writing scientific papers, preparation of reports, public libraries, institutions of science or education, documentation centers, and others as well as others that are non-commercial. However, this exception does not apply to computer programs.

Islamic law seems to be an alternative solution for the protection of IPR more effectively. The divine character of Islamic law should be an added value that makes people motivated to comply with it, and is strengthened by the objective view that there are benefits that will be obtained by all parties. Elements of Islamic law with a divine character should be considered to complement the positive law on copyright. Divine values and aspects of eschatology are expected to make people more

introspective to comply with the law. This awareness is reinforced by a full understanding of the benefits contained by the rules on IPR.

4. Conclusion

The philosophical foundation for the protection of Intellectual Property Rights (IPR) stems from the belief that IPR is the result of individual or group creations, and therefore, deserves recognition to encourage the creators or owners of IPR and others to continue to produce works that provide broad benefits. There are two main theories regarding IPR, namely the Utilitarian Theory which considers IPR as an economic right, and the Non-utilitarian Theory which sees it as a moral right. In addition, there are various theories supporting and criticizing IPRs, including the Natural/Labor Property Rights Theory, the Personhood Theory, and the Unjust Enrichment Theory.

The nature of Intellectual Property Rights (IPR) in philosophical Islamic law is as one of the property rights (*huquq maliyyah*) that gets legal protection as property (*mal*). IPR in accordance with Islamic teachings can be an object in various types of transactions, both commercial and non-commercial, and can be made as *waqaf* (provided for the public interest) and inherited. Any violation of IPR, such as the use, disclosure, manufacture, sale, import, export, distribution, provision, announcement, counterfeiting, or piracy of IPR belonging to others without permission, is considered an injustice and is declared haram in Islamic law. The above-mentioned matters are the basis of consideration so that in the end MUI issued a MUI Fatwa stating that every form of violation of IPR, including using, disclosing, making, using, selling, importing, exporting, distributing, giving away, providing, announcing, reproducing, plagiarizing, counterfeiting, pirating IPR belonging to others without right is injustice and the law is haram.

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