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Copyright as a Waqf Object in the Context of Fiqh and Positive Law

*Sukiati¹, Rahmadany², Muhamad Hasan Sebyar³, Purnama Hidayah Harahap⁴

Universitas Islam Negeri Sumatera Utara^{1,2}

STAIN Mandailing Natal³

UIN Syahada Sidempuan⁴

Corresponding author: *sukiati@uinsu.ac.id

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Abstract

This research aimed to analyze the position of copyright as a waqf object from the perspective of fiqh and positive law. This study was literature research with a normative approach. The data collection technique used in this study is the documentation technique. At the same time, the analysis technique in this study used descriptive inductive techniques. The results of this study indicated that copyright is protected by Sharia law. The owner has the right and authority over his or her copyright and is protected by the rules and laws. Copyright as a waqf object is permitted by Islamic law as long as the requirements for a waqf object are met. This is reinforced by the decision of the Indonesian Ulema Council (MUI) number 1 MUNAS/VII/5/2005, which allows Intellectual Property Rights (IPR) as a waqf object. The permissibility of copyright as a waqf object is also supported by positive law, i.e. Law No. 41 of 2004 concerning Waqf and Government Regulation No. 42 of 2006. In addition, copyright as part of IPRs fulfils the criteria of a waqf object, i.e. a valuable asset permissible by Sharia law whose ownership rights are transferrable. Accordingly, IPRs are legally used as a waqf object, and such rights should not be violated.

Keywords: Copyright; Waqf; Fiqh; Positive Law

Introduction

Based on its development, waqf (as well as an endowment) cannot be separated from the life of Muslims in Indonesia.¹ Land waqf is already commonly practised by almost all Muslim communities throughout the archipelago. It is a common practice in the community to construct mosques as waqf property. Waqf land on which the mosques are built cannot be contested at any time. This is because a mosque as a waqf property is enduring and eternal in nature. The mosque, in this sense, is understood as a movable object; therefore, in fiqh (Islamic law), it is prohibited to be dismantled or replaced.² As generally known, waqf, as one of the pillars of the Islamic economy, is very closely related to society's socio-economic issues.

¹ K. Nour Aldeen, I.S. Rath, and R. Sari Pertiwi, "Cash Waqf from the Millennials' Perspective: A Case of Indonesia," *ISRA International Journal of Islamic Finance* 14, no. 1 (2022): 20–37, <https://doi.org/10.1108/IJIF-10-2020-0223>.

² Siska Lis Sulistiani, "Analisis Hukum Islam Terhadap Pengembangan Wakaf Berbasis Sukuk Untuk Pemberdayaan Tanah Yang Tidak Produktif Di Indonesia," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 18, no. 2 (December 1, 2018): 175–192, <https://doi.org/10.18326/ijtihad.v18i2.175-192>.

In Indonesia, the waqf institutions (one of which is the Indonesian waqf agency) are slow and highly conventional in their operation. That is, waqf is generally only aimed at constructing places of worship or Islamic boarding schools. The Government of the Republic of Indonesia, on a large scale, supports the development of waqf in the country through the issuance of several decrees, which include Government Decree No. 28 of 1977 concerning Waqf of Owned Land, Law No. 41 of 2004 concerning Waqf and Government Regulation No. 42 of 2006 concerning Implementation of Waqf Law No. 41 of 2004 concerning Waqf.³

According to Article 16 (1) of the Waqf Law No. 41 of 2004, waqf consists of immovable and movable properties. Immovable properties, as referred to in paragraph 1 letter a), include the rights to immovable properties, either registered or unregistered, according to the applicable laws and regulations, buildings or parts of buildings which consist of immovable properties as referred to in paragraph (1) letter (a). Investments and other property-related items are according to laws and regulations that apply to housing, while property rights to other real estate are according to Sharia laws and applicable laws and regulations. Regarding the movable property in paragraph 1 letter b, I, items that cannot be used for consumption include money, noble metals, securities, vehicles, intellectual property rights, rental rights and other movable goods according to Sharia law and applicable laws and regulations.⁴

From a legal perspective, waqf objects are classified as tangible and intangible. Tangible waqf objects include immovable objects and fixed objects. Intangible properties can be rights or obligations. Intellectual Property Rights (IPRs), in this case, are intangible assets that can be used as waqf property. Regarding the distribution of assets, according to Article 91(1) of Islamic Law (KHI), joint assets are divided into tangible and intangible assets. In addition, Article 91 (2) states that shared tangible assets include immovable assets, movable assets and securities. Furthermore, Article 91(3) states that intangible joint assets can be rights or obligations. The main point of this report is the distribution of intangible objects in the joint assets as referred to in Article 91(3), so the objects included in the category of rights from the distribution of objects have been described. One of the many substantive rights in civil law is intellectual property rights.⁵

Copyright as an intangible movable object with a protection period requires an analysis of its feasibility as waqf property as established by fiqh scholars. The old and persistent Muslim paradigm in the management of waqf, such as the assumption that waqf belongs to Allah alone and cannot be disturbed without Allah's permission, has led many community leaders to believe that waqf has broad social functions which are not limited to worship. In this regard, the authors of this study further reviewed the perspective of Islamic law on the legitimacy of the use of IPRs' economic rights as waqf assets by waqf beneficiaries. In addition, using IPRs as a waqf property requires an analysis of the owner's economic rights and moral rights to the waqf beneficiary. Economic rights are rights to obtain economic benefits from the creation or

³ Nurjanah Nurjanah, Rahmatsyah Rahmatsyah, and Ali Mutakin, "Fatwa Lajnah Bahtsul Masail NU Concerning Istibdāl Wakaf and Their Relevance with Renewal of Islamic Law," *Al-Istinbath: Jurnal Hukum Islam* 7, no. 2 November (December 1, 2022): 509–530, <https://doi.org/10.29240/jhi.v7i2.3707>.

⁴ Eva Mir'atun Niswah, "Problematika Yuridis Wakaf Hak Kekayaan Intelektual di Indonesia", *Volkgeist: Jurnal Ilmu Hukum dan Konstitusi* 1, no. 2 (December 31, 2018): 123–138, <https://doi.org/10.24090/volkgeist.v1i2.1907>.

⁵ Junaidi Junaidi, "Revitalisasi Pengelolaan Wakaf di Kota Langsa Perspektif Undang-Undang Wakaf," *Al-Istinbath: Jurnal Hukum Islam* 6, no. 2 November (November 11, 2021): 223–246, <https://doi.org/10.29240/jhi.v6i2.2924>.

product. Moral rights are inherent in the owner and cannot be removed for any reason, even though the copyright or related rights have been transferred.

Several previous studies have discussed copyright, but only a few have discussed copyright as a waqf object from the perspective of fiqh and positive law. For instance, the research conducted by Nugroho Ari Wibowo et al. discussed waqf pledges in copyright waqf from the perspective of statutory regulations.⁶ Some of them only discussed copyright from the perspective of Islamic law in general, as Suryana did. Some of them focused on copyright infringement, as in the research conducted by Indriani. Some of them discussed copyright as an object of waqf from a statutory perspective, as in the research conducted by Diani under the title juridical analysis of copyright as an object of waqf. On the other hand, this research focused on copyright as a waqf object in the context of fiqh and positive law.

In the waqf law, IPRs are waqf objects in the form of movable objects, which means they are productive. Being productive means using a waqf property that can be utilized in production activities, the results of which are distributed according to the purpose of the waqf. Productive waqf can also be used for production purposes in agriculture, industry, trade, and services whose benefits are not on waqf objects but from net profits earned from developing waqf, which is given to entitled beneficiaries according to the purpose of the waqf. In managing productive waqf objects, the *nazhir* acts as *shahibul mal*, providing the capital and handing it over to another party as *mudharib*, who will use it for business. According to the agreement, the profit earned is divided between *nazhir* as *shahibul mal* and *mudharib*. The profits given to *Nazhir* are then distributed according to waqf's objectives or used to develop the Waqf objects. However, a loss not caused by negligence or fraud of the *mudharib* is borne by the *nazhir* as *shahibul mal*; therefore, the *nazhir* must be extra careful in choosing the *mudharib*. For example, when the waqf object is in the form of a building and factory machinery, if a *nazhir* cannot manage it, the management is carried out by making an *al-Mudharabah agreement* with the selected *mudharib*.⁷

Based on the above point of view of Islamic law, it is an interesting issue to study in classical fiqh. Issues related to IPRs, their ownership status and the law surrounding them were discussed from the point of view of Islamic muamalat law. Copyright in Islamic law is considered *ibtikar* rights, i.e. inventions or creations that result from human intellectual works that previous scientists have never discovered. Copyright, when connected with the notion of property in Islamic law (based on the theory of the majority of the scholars), can be considered an asset because, according to them, the term property does not necessarily refer to physical material or things; benefits or rights can also be seen as property. The reason is that the intention of people to own an object is not solely because of the object itself, but because of the benefits it may have.

The main problems in this study were examined through normative legal research. Normative legal research was carried out utilizing researching library materials. Therefore, the main (primary) data were obtained through a literature review in this research. The data

⁶ Nugroho Ari Wibowo, Nurul Hidayah, and Hafid Zakariya, "Legal Analysis of The Arrangement of Wakaf Agricultural Agencies On Endowments Copyright In Perspective Legislation," *Jurnal Cita Hukum* 7, no. 3 (December 18, 2019): 405–416, <https://doi.org/10.15408/jch.v7i3.12289>.

⁷ Muhammad al ikhwan Bintarto et al., "Zakah and Waqf for Cryptocurrency in Islamic Law," *Al-Istinbat: Jurnal Hukum Islam* 7, no. 1 (May 30, 2022): 21, <https://doi.org/10.29240/jhi.v7i1.4229>.

collection technique used in this study is the documentation technique. At the same time, the analysis technique in this study used descriptive inductive techniques

Discussion

Copyright Definition

As previously mentioned, the difference in the definitions of IPRs originated from its translation in Anglo-Saxon legal literature as intellectual property rights. The abbreviations are, therefore, different in Indonesian, with some referring to it as HKI while others HaKI. These terms denote intellectual property rights, a set of legal rights and interests related to an activity. The concept of intellectual property itself is an intangible product resulting from human intellectual activity. Intellectual property rights are the rights to certain creations in the arts, industrial, scientific fields, or a combination.⁸

Surely, it all starts from the meaning of IPRs itself. Defining IPR must first begin with an explanation of what rights are. Etymologically, the word rights were derived from the Arabic language, namely *al-haqq*, which means possession (*al-milkiyyah* or *al-milku*), provisions and certainty, as implied in the Qur'an surah Yasin verse 7.⁹ Meanwhile, terminologically, the term indicates a decision that corresponds to reality.¹⁰ According to Wahbah az-Zuhaili, *al-milkiyyah* or *al-milku* (ownership, property rights) is a relationship of attachment between a person and assets, whose validity is established and legitimized by Sharia. This attachment relationship makes the property belong exclusively to him,¹¹ and he has the right to carry out all forms of *tasarruf* over the treasure as long as nothing is hindering him from doing so. Sri Soedewi, in her book Civil Law: Law of Objects, classified rights into property rights and ownership rights.

In general, intellectual property rights are categorized into two; copyrights and industrial property rights. Based on the WTO/Trips framework, IPRs include at least two more areas; a) protection of new varieties of plants and 2) integrated circuits. The National Copyright Act states that copyright is an exclusive right for creators and recipients of the right to publish or reproduce their creations or to give permission for it without reducing restrictions according to applicable laws and regulations. In addition to the protection system for IPRs, there is also a series of conceptual thoughts that the owner of IPRs has devoted his mind, energy and funds to obtain this property. It goes without saying, therefore, that if the property is used commercially or exploited, the intellectual property owner will receive a fee for its use. In simple terms, the right to compensation is divided into three parts. First, commercial exploitation of intellectual property can be carried out directly by the property owner, in which case he can receive direct financial compensation from the transaction. Second, the owner can sell his intellectual property rights or receive financial compensation by allowing other parties to use his intellectual property rights. Third, the property owner can prevent others from obtaining and using it.¹²

Property rights are absolute rights to an object which grant direct control over the said object and can be defended against anyone. In contrast, ownership rights are the rights to use the object as much as possible and to dispose of it at will as long as it still exists, is not used

⁸ Aulia Munadiyah, "Perlindungan Hukum Pemegang Lisensi Hak Cipta Menurut Undang-Undang Nomor 28 Tahun 2014 Tentang Hak Cipta (Analisis Putusan Nomor 14/Pdt.Sus.HKI/Cipta/2018/Pn-Niaga Sby)", *JOURNAL of LEGAL RESEARCH* 3, no. 3 (May 22, 2021), <https://doi.org/10.15408/jlr.v3i3.20735>.

⁹ Achmad Fauzan, *Legal Protection of Intellectual Property Rights* (Bandung: Yrama Widya, 2006), p. 250.

¹⁰ Ridwan, *Hak Milik Perspektif Islam, Kapitalis, dan Sosialis*, (Purwokerto: STAINPress, 2011), p. 19.

¹¹ Wahbah Az-Zuhaili, *Al-Fiqh al-Islami wa Adillatuhu* (Jakarta: Gema Insani Darulfikri, 2011), vol. 6, p. 449.

¹² T.L. Adu and T.B. van der Walt, "Effects of Awareness of User Rights on Compliance with Copyright Laws and Policies in Academic Libraries," *Journal of Academic Librarianship* 47, no. 4 (2021), <https://doi.org/10.1016/j.acalib.2021.102359>.

against the law or public order, and does not interfere with the rights of others; all without reducing the possibility of cancelling this right in the public interest, against the payment of appropriate compensation, and following the provisions of the law (Article 570 of the Civil Code). According to Salim, this definition has a broader meaning since it covers not only a fixed object but also properties (movable objects). Now that rights have been defined, IPRs will be discussed. The term “Intellectual Property Rights” is borrowed from the Anglo-Saxon legal literature. Legal experts have translated this legal term into two kinds of legal terms in Indonesian; “Intellectual Property Rights” (abbreviated as HMI) and “Intellectual Property Rights” (abbreviated as HKI). The Supreme Court of the Republic of Indonesia uses the term “Hak Kekayaan Intelektual” (Intellectual Property Rights), which is commonly abbreviated as HKI (IPRs in English). Therefore, this dissertation uses this term.¹³

The difference in translation is caused by the ambiguous meaning of the word “property”, which can be interpreted as property rights and ownership rights. Basically, the meaning is the same since property cannot be separated from wealth. Which translation to follow depends on the taste of the writer and the reader. Directorate General of Intellectual Property Rights of the Ministry of Law and Human Rights of the Republic of Indonesia, in the Guidebook on Intellectual Property Rights published in 2011, uses the term Intellectual Property Rights, abbreviated as HKI. Sudargo Gautama discussed the concept of “intellectual property” along with intellectual property rights from the legal perspective of intellectual property rights both in book titles and in disclosing the scope of types of intellectual property rights.¹⁹ Indonesian law officially mentions using the term intellectual property rights in a set of laws and regulations in the Book of Laws of the Republic of Indonesia. In the field of Intellectual Property Rights, even the organizational structure of the Directorate General of the Ministry of Law and Human Rights of the Republic of Indonesia uses the term Intellectual Property Rights in the Directorate General of Intellectual Property Rights.

The concept of IPRs itself is not found in legal terminology. The law only determines the meaning of the nature or scope of IPRs, such as copyrights, patents, trademarks, industrial designs, trade secrets and layout designs for integrated circuits. Legal experts define the term differently, but all definitions basically denote the same meaning. Several definitions of IPRs have been put forward by legal experts or writers such as Sentosa Sembiring, who quoted W.R. Cornish and Sri Redjeki Hartono. According to Cornish, IPRs protect the applicants’ ideas and information with commercial value. Sri Redjeki Hartono argued that IPRs are essentially unique and distinctive rights because the state grants them. By law, the state grants these special rights to beneficiaries following the procedures and conditions that must be met. Abdulkadir Muhammad explained that IPRs are intangible assets that can generate high financial returns or have a high value. He explained that this could happen if they were used to market certain industrial products. High and expensive value refers to product quality in the eyes of consumers. A well-known brand indicates the high quality of a product it brandishes.¹⁴

Well-known brands are IPRs that are a source of material Wealth for their owners. Bambang Kesowo defined IPRs as property rights that result from human intellectual abilities. In his book Intellectual Property Rights, Saidin defined IPRs as substantive rights, rights over objects that originate from the work of the mind, and rational relationships in the form of immaterial objects.¹⁵ The laws and regulations in Indonesia do not provide a specific definition of IPRs, but they formulated the types of IPR as follows:

- a. Copyright, i.e. the creator’s exclusive right, automatically arises according to an explanatory principle after the work is completed physically, without reducing the limitations determined by legal provisions.

¹³ J. Ozegalska-Trybalska, “Status of Derivative Works of Scientific Publications under Copyright Law and Publication Standards,” *Nowotwory* 70, no. 3 (2020): 118–120, <https://doi.org/10.5603/NJO.2020.0025>.

¹⁴ Abdulkadir Muhammad, SH, Prof, *Kajian Hukum Ekonomi Hak Kekayaan Intelektual*, (Bandung, PT Citra Aditya Eakti, 2007, 2007), p. 14.

¹⁵ O.K. Saidin, *Aspek Hukum Hak Kekayaan Intelektual*, (Jakarta: Raja Grafindo Persada, 2013), p. 9.

- b. A patent, i.e. an exclusive right granted by the state to an inventor in the field of technology, who, during a certain time, made an invention or let someone else make an invention.
- c. Brand Rights, i.e. exclusive rights granted by the Republic of Indonesia to the owners of the brands which are registered in Daftar Umum Merek (the General Register of Brands) for a certain period to use the brands or give permission to other parties to use them.
- d. Industrial Design Right, i.e. an exclusive right granted by the Republic of Indonesia for a designer or his creation for a certain period of time to use his creation or give his approval to another party to exercise that right.
- e. The right to operate integrated circuits, i.e. an exclusive right granted by the Republic of Indonesia to a designer or his creation to operate integrated circuits by himself for a certain period of time or give his consent to another party to exercise that right.
- f. Trade secret law, i.e. the right to obtain information that is not known to the public, which has economic value and is owned by the trade secret owner.
- g. Plant variety rights, i.e. special rights granted by the state to breeders and owners of plant varieties to use their cultivars or give permission to other persons or entities to use them for a certain period.

Indonesia is one of the countries that participated in the signing of an international agreement TRIPS (Trade-Related Aspects of Intellectual Property Rights), one of the final documents of the Uruguay Round multilateral trade negotiations in Marrakesh, Morocco, on April 15, 1994, along with other 124 countries and one representative of the European Economic Community. The Government of Indonesia ratified the Agreement through Law Number 7 of 1994 concerning Ratification of the Treaty Establishing the World Trade Organization, namely Ratification of the Treaty Establishing the World Trade Organization (WTO).¹⁶ As a result, Indonesia is not allowed to issue extraterritorial regulations to protect IPRs, and everything contained in the WTO framework must be fulfilled by Indonesia at least according to minimum (regulatory) standards. Therefore, Indonesia needs to adjust all regulations to protect intellectual property rights and add several regulations not covered by the current regulations.¹⁷

So far, we have found regulations for each field of IPRs in Indonesian law. Copyright issues are regulated by Law No. 28 of 2014, brands by Law No. 15 of 2001 and patents by Law No. 14 of 2001. The legal basis for intellectual property rights as copyright in Indonesia is Copyright Law No. 28/2014. These copyright laws protect, among others, the copyrights of computer programs or software, computer program or software user guides, and other similar books. Since July 29, 2003, the regulation of the Government of the Republic of Indonesia regarding copyright protection has also covered computer programs or software; user guides for computer programs or software and other similar books. Likewise, to any citizen who resides or is a resident of the United States of America or who has benefit rights obtained under copyright laws or over which the company has (direct or indirect) legal control or a majority of its stock or other ownership interests are owned by any citizen or resident of the United States who has a such beneficial interest. Computer programs or software, manuals for operating them and other similar books were published for the first time in the United States. BSA members, such as ADOBE, Auto Desk, Bentley, CNC Software, Lotus Development, Microsoft, Novell, Symantec, and Santa Cruz Operation, are the world's leading creators of computer programs or software for personal computers (PC) and are also legal entities domiciled in the United States of America. Therefore, computer programs or software, manuals for their use and other similar books created by these companies are also protected by the Indonesian Copyright Act

¹⁶ T. Roh, K. Lee, and J.Y. Yang, "How Do Intellectual Property Rights and Government Support Drive a Firm's Green Innovation? The Mediating Role of Open Innovation," *Journal of Cleaner Production* 317 (2021), <https://doi.org/10.1016/j.jclepro.2021.128422>.

¹⁷ Abdul Rochim Al Audah, "Hak Cipta Dan Perlindungan Hak Kekayaan Intelektual Dalam Perspektif Hukum Islam Dan Perundang-Undangan," *Al-Mashlahab Jurnal Hukum Islam dan Pranata Sosial* 4, no. 08 (October 31, 2017), <https://doi.org/10.30868/am.v4i08.163>.

(UUHCI).¹⁸ According to Muhammad Djumhana, in general, IPRs have the following principles:

a. Economic principles (the economic argument).

Economic principles or intellectual property rights originate from creative activity, the expression of the will of human thought in various forms that benefit their owners. Based on this principle, intellectual property rights have benefits and economic value and benefit human life. The economic value of IPRs is a form of wealth for the owner, which benefits him, such as B. Rojace's rights to play his music and songs.

b. The principle of natural justice

The principle of justice regulates that the rights of the owners of works in science, art and literature that result from intellectual abilities will be protected. Based on this principle, this law always protects creators as those with the authority to act as stipulated by the law. It is only natural for a work produced by a creator based on his intellectual ability to be recognized.

c. Principles of culture (the cultural argument)

The principle of culture regulates the development of science, literature and art to improve human life. Based on this principle, introducing human literary works is expected to generate enthusiasm and interest to encourage the birth of new works. The growth and development of science, art and literature are highly beneficial for increasing living standards, civilization and human dignity. In addition, intellectual property rights are also beneficial for the community, nation and state.

d. Social principles (the social argument).

The social principle (regulating the interests of people as citizens) means that the rights recognized by law and given to individuals constitute a unity, so their protection is based on balance, the community interests of the individual. Based on this principle, the IPRs protect creators not only to fulfil the interests of individuals, associations or companies but also based on the balance between individuals and society. This balance is reflected in the provisions.

Copyright as a Waqf Object from the Fiqh Perspective

Intellectual Property Rights, from a fiqh perspective, is one of the *al-maliyah* (property rights) that receives legal protection (*masbun*) from *mal* (Wealth) in general.¹⁹ *Al-mal* (Wealth) is *zīnātu al-bayāt* (decoration of life in the world). As stated in the Qur'an surah Al-Kahf (18) verse 46, *Wealth and children adorn the world's life. However, the deeds of lasting righteousness are the best in the sight of your Lord in reward and far better a source of hope.* Wahbah al-Zuhaili, in his book *Al-Fiqh al-Islamiyya Adillatuhu*, stated that the scholars divided the property into several groups, each of which different laws apply. He proposed four divisions as stated by law; a) Based on whether or not its use is permissible, the property is divided into *mutaqawwim* and *ghair mutawwim*. b) Based on whether it is movable, it is divided into *Aqal* and *Manqul*. c) Based on whether it is a unit or a section, it is divided into *mitzli* and *qimi*; and d) Based on whether the commodity is durable after use, it is divided into *Istiblaq* and *Istimal*.²⁰

According to Sharia laws, a person must acquire wealth in the right way, not in a flawed way, but through a transactional business following Islamic teachings. As stated in the Qur'an surah an-Nisaa verse 29, *"O believers! Do not illegally devour one another's wealth, but trade by mutual consent. Moreover, do not kill each other or yourselves. Surely Allah is ever Merciful to you."* Wealth in Islam will be held accountable before Allah SWT. As stated in surah At-Takaatsur verse 8, *"But you will surely see the Hellfire. Again, you will surely see it with the eye of certainty. Then, on that Day, you will definitely be questioned about worldly pleasures."*

¹⁸ P.H. Purwandoko, A. Sulistiyono, and M. Hawin, "The Implementation Of The Traditional Cultural Expression (Tce) Protection In Indonesia Based On Article 38 Law Number 28 Of 2014 Regarding Copyright," *Indonesian Journal of International Law* 18, no. 4 (2021): 543–570, <https://doi.org/10.17304/ijil.vol18.4.823>.

¹⁹ M.J. Nourahmadi, "Shaheed Sadr's Perspective on Property Rights in Islam," in *Handbook of Ethics of Islamic Economics and Finance*, 2020, 255–285, <https://doi.org/10.1515/9783110593419-014>.

²⁰ Musda Asmara and Lilis Sahara, "Problems with Choosing a Mate in Islam for People Who Choose a Mate through Social Media," *NUSANTARA: Journal Of Law Studies* 1, no. 1 (December 16, 2022): 40–49.

Abdullah Shah said the treasure was a test of faith. When acquiring and using possessions, whether they comply with Islamic guidelines or not should be considered. He put forward surah Al-Anfal verse 28, “*Know well that your belongings and your children are but a trial,²¹ and that with Allah there is a mighty reward.*” When violations of IPRs have reached a disturbing and detrimental level, they will endanger many parties, especially the state’s and society’s rights. The Indonesian Ulema Council (MUI) was asked to issue a fatwa regarding intellectual property status.²¹ In addition to issuing a fatwa on the general provisions of IPRs as previously described, it has also issued the following legal fatwa:

- 1) In Islamic law, IPRs are considered as *huquq maliyyah* (property) protected by the law (*mashun*) of *mal* (Wealth).
- 2) IPRs protected by Islamic law in paragraph 1 are not against Sharia laws.
- 3) IPRs can be used as the subject of contracts (*al-maquud alaih*), contracts (*al-maquud alaih*), *muawadhab* contracts (exchange, trade) and *tabarruat* contracts (non-commercial), and can be granted and inherited.

Any violation of IPRs, including but not limited to the use, disclosure, manufacture, use, sale, import and export, delivery, offer, advertising, reproduction, copying, counterfeiting, piracy, and unauthorized intellectual property rights, is illegal. Decree of Majelis al-Fiqh al-Islami No. 43 (5/5) V of 1409H/1988M regarding al-Huquq al-Manawiyah raised the position of IPRs as one of the legal aspects used by MUI in establishing its fatwa as follows;

- a) Trademarks, addresses, brands, and creations (plants) are the exclusive rights of their owners. In modern times, such rights have an economic value that people recognize as wealth. Therefore, such rights may not be violated.
- b) The owner of intangible rights such as trademarks, addresses, brands, and copyrights has control over these rights and can trade some money as long as he avoids fraud in terms of authority over substantive rights.
- c) Copyright and other IPRs are protected by law. The owner is in control, and his rights cannot be violated.²²

Wahbah Az-Zuhaili introduced the concept of copyright (*baq al-taqlif*). Since copyright is a right protected by Sharia laws based on the rules of *Istislah*, reprinting or copying a book without legal permission is considered an offence or crime against the creator; the act constitutes a sin and causes moral damage since it is an act of immorality and theft which demands compensation for the rights of an author of the manuscripts.²³

A fatwa issued by the Indonesian Ulema Council No. 1 of 2003 concerning “copyright” stipulates the following legal provisions:

- (a) In Islamic law, copyright is seen as one of the *huquq maliyyah* (property rights), which is protected by law (*mashun*) as *mal* (Wealth).
- (b) Copyrights protected by Islamic law, as referred to in number 1, are ones on works that are not against Islamic law.
- (c) As with *mal*, copyrights can be used as objects of contracts (*al-maquud alaih*), both *muawadhab* contracts (exchange, commercial) and *tabarruat* contracts (non-commercial), as waqf object and can be inherited.
- (d) Every form of violation of copyright, especially piracy, is an offence prohibited by law.

²¹ Gede Sastrawan and Gede Sastrawan, “Juridical Analysis of Copyright Violations in the Act of Photocopying Science Books,” *Ganesha Law Review* 3, no. 2 (July 1, 2021): 111–124, <https://doi.org/10.23887/glr.v3i2.446>.

²² Susna Sutisna and Mukhtar Mukhtar, “Pandangan Hukum Islam Terhadap Hak Cipta,” *Mizan: Journal of Islamic Law* 5, no. 1 (June 18, 2021): 1–16, <https://doi.org/10.32507/mizan.v5i1.927>.

²³ Saiful Aris Munandar, Arifin Abdullah, and Rispalman Rispalman, “Tindak Pidana Penggunaan Software Komputer Bajakan Dalam Uu No. 28 Tahun 2014 Tentang Hak Cipta Perspektif Hukum Pidana Islam,” *LEGITIMASI: Jurnal Hukum Pidana dan Politik Hukum* 10, no. 2 (November 19, 2021): 238, <https://doi.org/10.22373/legitimasi.v10i2.11342>.

In the early stages of its development, copyrighted items, such as books or other intellectual works of scholars, were considered social goods in the teaching and development of religious knowledge. However, in subsequent developments, according to the standard of human life, they became a right that must be protected, and therefore, copyright was considered *huquq al-maliyah* (property right), which should receive legal protection (*masbun*).²⁴

According to the sociology of law, a law can be classified as a living law in society under three circumstances. First, it can be applied legally. However, if a law is only applied legally, it becomes a dead rule (*dode regal*). Second, it can be applied sociologically. However, if a law only applies sociologically in the theory of power, it only becomes a means of coercion. Thirdly, it applies philosophically; if it only applies philosophically, the law becomes a rule to be fought for.

In Arabic, the word *Waqafa* (وقف) means “to hold”, “to stop”, “to be still”, or “to stand”. Scholars have different views on the definition of waqf and the type of waqf itself. The differences in views on the term waqf are as follows; *first*, according to the Hanafiyah school, the property of the waqf must be maintained, and the benefits of waqf property must be donated for good purposes. Based on this understanding, no consequences for losing the donated object will be incurred. The donor can revoke the waqf and also sell it. *Second*, the Maliki school of thought emphasizes that in waqf, the owner of the waqf property may earn from the property he owns, and the property may be rented out. This means that the property owner retains ownership of all forms of property and donates income from the property to charity while the property remains intact and belongs to the donor for a certain period. In other words, waqf here does not last forever. *Third*; according to the Syafi'i and Hanbali schools, a property is considered a waqf property as long as it is intact, and the owner completely relinquishes control over his and other's properties for legal and actual maintenance. The management of income (income) from the properties is used for good to get closer to Allah SWT.

In Sharia terminology, waqf is a type of grant whose realization is achieved by preserving the original (*tabbisul ashli*) and making it universal. *Tabbisul ashli* means keeping the donated items so they are not collected, sold, donated, mortgaged or rented out. Meanwhile, the items can be utilized according to the donor's will without any reward. In addition, Sheikh al-Qalyubi stated that waqf is factual, i.e. a property that could be utilized by preserving its original form for legal distribution.²⁵

The fact that waqf is part of charity means that agreements can be made unilaterally (*tabarru* since it is intended only for the good purpose) and preferably secretly (unknown to many people). However, placing waqf in the *muamalah* context requires an oral and/or written explanation endorsed by the competent authority. Therefore, the principles of legal certainty and transparency (known to the Muslim community) recorded in official documents (authentic books) are the standards of modern governance. In addition, waqf refers to financial activities (for example, cash and productive waqf), which require legal authorities to register. Laws No. 41 of 2004 and Government Regulation No. 42 of 2006 are legal policy decisions determining whether waqf is common or rare and can be implemented permanently or temporarily. According to the law of the Republic of Indonesia No. 41 of 2004 concerning waqf article 1 paragraph (1), waqf is a legal act of a waqif (donor) to separate and or surrender part of his property to be used forever or for a certain period following his interests for worship and or public welfare according to Sharia. On the other hand, the fatwa commission of the Indonesian Ulema Council in the fatwa of cash waqf defines waqf as an act of holding and utilizing property

²⁴ Maya Jannah, “Perlindungan Hukum Hak Kekayaan Intelektual (Haki) Dalam Hak Cipta Di Indonesia”, *Jurnal Umiah Advoikasi* 6, no. 2 (October 1, 2018): 55–72, <https://doi.org/10.36987/jiad.v6i2.250>.

²⁵ J. Junaidi, “Revitalisasi Pengelolaan Wakaf di Kota Langsa Perspektif Undang-Undang Wakaf”, *Al-Istinbath: Jurnal Hukum Islam* 6, no. 2 (November 11, 2021): 223, <https://doi.org/10.29240/jhi.v6i2.2924>.

without the loss of the object by not taking legal action against the object (selling, giving or bequeathing it), to distribute the proceeds earned from it to something permissible (not illegal).²⁶

Law of the Republic of Indonesia No. 41 of 2004 states that waqf aims to reserve and transfer part of a person's assets permanently or for a certain period following his interests for worship and general welfare, according to Sharia. On the other hand, the fatwa commission of the Indonesian Ulema Council in the fatwa of cash waqf defines waqf as an act of holding and utilizing property without the loss of the object by not taking legal action against the object (selling, giving or bequeathing it), to distribute the proceeds earned from it to something permissible (not illegal).²⁷ As popular as it is nowadays, cash waqf was unknown in the early days of Islam. Unsurprisingly, discussions about the legal basis of cash waqf are difficult to find, even in classic literature. In classical Islamic jurisprudence, waqf is only limited to immovable property. However, over time, cash waqf received special attention.²⁸ Among the proponents of cash waqf was Imam Az-Zuhr, who argued that dinars might be donated and can be used as business capital and distribute the profits earned in the form of waqf. In this case, the Hanafi school also allows cash waqf as an exception, based on *Istihsan Bi al-Urf*, since it is widely used in society.²⁹ The Hanafi school does not believe that a law based on Urf has equal authority to a text-based law. According to the Hanafi school, cash waqf is practised as business capital under *Mudharabah* or *Mubadhabah* schemes and donating the profits for waqf. In addition to the Hanafi scholars, some scholars from the Syafi'i school also allow waqf of dinars and dirhams, as Abu Tsyar narrated from Imam Syafi'i.³⁰

In addition, through the Fatwa Commission, the Indonesian Ulema Council (MUI) considers it necessary to hold a meeting to review and refine the definition of legal waqf so that waqf property can only be distributed and used for permissible purposes based on Islamic law. The stability of the value of cash waqf must be guaranteed. It cannot be sold, donated or inherited. MUI issued a series of fatwas on Waqf on May 11 2002, which stated that cash waqf is legal. The fatwa mentioned several views from scholars who allowed cash waqf.³¹

In the classical literature it is explained that initially waqf was practiced during the time of the caliph Umar bin Khatab, as stated in a hadith which reads, *'From Ibn Umar ra. Sayyidina Umar got a piece of land from the Khaibar war, so he said; O Messenger of Allah, I got a piece of land during the Khaibar war, and I had never owned such property before. So, the Messenger of Allah said: if you want the land, hold it and then give it to charity. So, Umar ra. donated his wealth (a piece of land). This means that he did not sell, inherit, or donate it. He purely handed it over to the poor and their relatives.'*³²

Law No. 41 of 2004 concerning the use of waqf is more comprehensive than any previous laws and regulations because it explicitly regulates the name of waqf. Government Decree No. 28 of 1977 concerning Waqf Property stipulates that it is necessary to maintain the benefits of waqf objects following the purpose of the waqf. The same provisions are also

²⁶ Bustami Bustami, Rio Laksamana, and Zuliana Rofiqoh, "Waqf Fundraising through Money in the Industrial Revolution 4.0 Era: A Case Study on Baitulmaal Munzalan Indonesia," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 20, no. 1 (June 10, 2020): 23–40, <https://doi.org/10.18326/ijtihad.v20i1.23-40>.

²⁷ Siska Lis Sulistiani, "The Legal Position of Waqf for Non-Muslims in Efforts to Increase Waqf Assets in Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 1 (June 30, 2021): 357–371, <https://doi.org/10.22373/sjhk.v5i1.9161>.

²⁸ R.A. Kasri and S.R. Chaerunnisa, "The Role of Knowledge, Trust, and Religiosity in Explaining the Online Cash Waqf amongst Muslim Millennials," *Journal of Islamic Marketing* 13, no. 6 (2022): 1334–1350, <https://doi.org/10.1108/jiMA-04-2020-0101>.

²⁹ B. Saiti, A. Demebele, and M. Bulut, "The Global Cash Waqf: A Tool against Poverty in Muslim Countries," *Qualitative Research in Financial Markets* 13, no. 3 (2021): 277–94, <https://doi.org/10.1108/QRFM-05-2020-0085>.

³⁰ Fahrudin Ali Sabri, "WAKAF UANG (Sebuah Alternatif Dalam Upaya Menyejahterakan Masyarakat)," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 8, no. 1 (2013): 40–54, <https://doi.org/10.19105/al-lhkam.v8i1.339>.

³¹ Hasnia Wahyunisa, Syahrudin Nawi, and Ahyuni Yunus, "Efektivitas Wakaf Uang Menurut Fatwa Majelis Ulama Indonesia (MUI) Dan Perundang-Undangan Dalam Mendorong Pemberdayaan Ekonomi Ummat," *Journal of Lex Generatis (JLG)* 1, no. 6 (December 7, 2020): 885–900, <https://doi.org/10.52103/jlg.v1i6.233>.

included in the Compilation of Islamic Law. Law No. 41 of 2004 stipulates that in order to achieve the objectives and functions of waqf, waqf properties can only be used as;

- a) Religious facilities and activities;
- b) Education and health facilities and activities;
- c) Assistance to the poor, neglected children, orphans, scholarships, development and improvement of the public economy.
- d) Advancement of other public welfare that is not contrary to Sharia and laws and regulations.

Government Regulation No. 42 of 2006 concerning the Implementation of Waqf Law No. 41 of 2004 also requires the management of waqf objects from foreign citizens or organizations. The Indonesian Waqf Center manages and develops waqf assets at the national and international levels and waqf assets abandoned by foreign national organizations, foreign organizations and foreign legal entities. In addition, the management and development of waqf assets must be directed according to the regulations of the Indonesian Waqf Board. The problems in IPRs waqf revolve around three major issues; legal content, structure, and culture. Regarding the legal content, no clear regulation on intellectual property rights waqf and its mechanism are available. Regarding the legal structure, no clear regulation exists on who can become Wakaif (donors) or Naziri (managers) in IPRs waqf. As for the legal culture, since most people are familiar only with land waqf, waqf of intangible movable objects such as intellectual property rights still have low acceptance and is less popular in society.³²

Intellectual property rights can be transferred using two schemes; a donor handing over his intellectual property to a Nazir unconditionally permanently or a donor permitting the use of the intellectual property for a certain period or through the transfer of licenses or franchise agreements. In the first form of waqf, if a Naziri manages it, it can only be done by individual *nazir* and a *nazir* organization. If authorized, however, all nazirs can manage royalties on intellectual property rights granted by individual nazirs, organizations and associations either as a legal entity or as founding organization. In another form of waqf, only individual Naziris and organizations are authorized to control the intellectual property if the waqf is licensed. However, if it is in a franchise system, all Naziris are authorized to control IPRs waqf. From the Islamic perspective, IPRs are considered as one of the property rights (*huquq maliyyah* atau *المالية حقوق*), which are legally protected as an object of waqf, exchange, commercial use (*muawadhab*)³³ and non-commercial use (*tabarru'at*).³⁴ IPRs as a waqf object are permissible under Islamic law as long as the conditions for waqf are met, although they have limited legal protection/rights.³⁵

Wahbah az-Zuhaili said that the fiqh law, as contained in several schools of thought, shows that the benefits of the rights that can be experienced meaningfully are like objects and, therefore, can be considered assets. Such property may be considered illegal possession, abduction, theft or destruction.³⁶ On the other hand, IPRs waqf, including the copyright waqf, according to Oni Sahron, is permissible regardless of whether the waqf covers both the right and the benefits or the benefits only, provided that the right is valid and legal, as in copyrights on songs, films, books and other contents that do not conflict with Sharia principles and laws and

³² Lutfi El Falahy, "Alih Fungsi Tanah Wakaf Ditinjau Dari Hukum Islam Dan Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf," *Al-Istinbath: Jurnal Hukum Islam* 1, no. 2 December (December 27, 2016): 121–140, <https://doi.org/10.29240/jhi.v1i2.117>.

³³ Dwi Astuti Wahyu Nurhayati and Novi Tri Oktavia, "Relevance Of Al Mawardi's Reflection In The Development Of Islamic Economic Activities," *Journal of Nusantara Economy* 1, no. 1 (December 10, 2022): 48–58.

³⁴ Wahyu Ziaulhaq, "Buying and Selling Used Clothing: An Islamic Economy Law Perspective," *Journal of Nusantara Economy* 1, no. 1 (December 10, 2022): 29–37.

³⁵ Nurhafiani Nurhafiani, Azhari Akmal Tarigan, and Muhammad Yafiz, "Development Strategy of PPM Al-Kautsar Micro Waqf Bank in Lima Puluh Kota Regency," *JURNAL ILMIAH MIZANI: Waana Hukum, Ekonomi, Dan Keagamaan* 9, no. 2 (September 12, 2022): 147–157, <https://doi.org/10.29300/mzn.v9i1.7635>.

³⁶ Nurjanah Nurjanah, Rahmatsyah Rahmatsyah, and Ali Mutakin, "Fatwa Lajnah Bahtsu! Masail NU Concerning Istibdāl Wakaf and Their Relevance with Renewal of Islamic Law" *Al-Istinbath: Journal of Islamic Law* 7, no. 2 (December 1, 2022): 523, <https://doi.org/10.29240/jhi.v7i2.3707>.

regulations.³⁷ These IPRs include brands, addresses and trademarks, copyrights, patents, industrial design rights, integrated layout rights, trade secrets, integrated circuit rights, plant breeders and other rights. Because copyright as part of intellectual property rights fulfills the criteria of waqf objects as valuable property, permitted by Sharia, and can be owned or transferred, they accordingly can be used as waqf objects.

The criteria for waqf objects are valuable and legal assets according to the Sharia laws, clearly identified or can be identified, and wholly owned by the waqif. Thus, copyright is considered a valuable asset which can be used as waqf objects. Fathi ad-Draini and Sahroni stated that most scholars from Maliki, Syafi'i and Hanbali schools argued that copyrights on original works and their uses are assets that are as valuable as objects when they can be used properly for Sharia. Apart from Salafi and Khalaf scholars, national and international fatwa authorities have also recently ruled that copyright is a valuable asset that can be owned and transferred.³⁸ Decree of the Fiqh Institute International Conference Organization No. 43 (5/5) Mu'tamar V 1988 concerning al-Huquq al-Ma'nawiyah stated that trademarks, addresses, brands, and works and creations are privileges owned by their owners, and today the rights are recognized as an asset of economic value. Therefore, these rights may not be violated. The copyright owner has control over intangible rights such as business brands, addresses and trademarks, and these rights can be traded for a certain amount of money provided that various uncertainties and fraud can be avoided. Sharia protects copyright, essays and other copyrights. The owner is in control, and his rights cannot be harmed. Decree of the Indonesian Ulema Council (MUI) No. 1 MUNAS/VII/5/2005, which allows Intellectual Property Rights to be used as waqf objects, also stipulates copyright as waqf objects.³⁹

Copyright as Waqf Object in Law

Copyright as a tax object is also supported by positive law, i.e. the Waqf Law No. 41 of 2004 and Government Regulation No. 42 of 2006. The procedure for granting Intellectual Property Rights is basically no different from that for waqf of solid objects such as land. The difference is that the IPRs waqf procedure requires an Intellectual Property Rights Certificate from the Directorate General of Intellectual Property Rights for each classification of Intellectual Property Rights, and a court opinion is required as evidence, stating that the waqf object is currently not disputed and recording the term of the waqf following the wishes of the waqif. Before implementing the Waqf Pledge, (Waqf Permit Issuance Officer/PPAIW) first consulted with the Ministry of Religion to acquire a recommendation for registering the Waqf property. Currently, the procedure for registering Waqf with Intellectual Property Rights is still regulated by Government Decree No. 28 of 1977 and Government Decree No. 42 of 2006 Law No. 41 of 2004 concerning waqf, along with other laws and regulations about waqf. Waqf remains valid as long as it does not conflict with new regulations.

IPRs are the rights to any movable property considered a grant according to Law No. No clear regulations and mechanisms are available on Waqf of IPRs. Meanwhile, according to legal culture, people are only familiar with land waqf, so waqf of intangible movable objects such as IPRs still lacks popularity. Implementing Law No. 41 of 2004 constitutes the spirit of improving and expanding waqf objects and their management for the maximum benefit. The transfer of copyright as a waqf object also has legal consequences almost the same as waqf with other objects. The rights that can be transferred in whole or part are only economic rights, i.e., only for economic use, with moral rights belonging only to the creator. If the waqf has financial

³⁷ Eficandra Eficandra, "The Reconstruction of High-Inherited Wealth in Minangkabau through Cash Waqf Movement," *JURIS (Jurnal Ilmiah Syariah)* 21, no. 1 (June 30, 2022): 121–133, <https://doi.org/10.31958/juris.v21i1.5850>.

³⁸ Asnaini Asnaini, "Islamic Sosial Finance: Konsep Keadilan Sosial Dalam Perspektif Ekonomi Islam," *JURNAL ILMIAH MIZANI: Wacana Hukum, Ekonomi, dan Keagamaan* 1, no. 1 (February 4, 2014), <https://doi.org/10.29306/mzn.v1i1.49>.

³⁹ Heniyatun Heniyatun, Puji Sulistyarningsih, and Heni Hendrawati, "Kajian Yuridis Peralihan Hak Cipta Sebagai Objek Wakaf," *Jurnal Hukum Novelty* 8, no. 1 (February 28, 2017): 91, <https://doi.org/10.26555/novelty.v8i1.a5529>.

rights, transferring these rights is limited to the period specified in the waqf pledge. According to the 2006 Waqf Law and Government Regulation No. 42, waqf can only be made for a certain period and can be fixed objects or intangible movable property such as IPRs.

Conclusion

Copyright currently has an economic value that is recognized as wealth. This property can be donated and promoted by using it in a permissible way in its original form. Sharia protects copyright, composition and other intellectual property. The owner is in control, and his rights cannot be violated. Copyright as waqf objects is permissible according to Islamic law as long as the requirements for waqf objects are met, even though IPRs waqf has a time limit for protection. This is also supported by positive law, i.e. Law No. 41 of 2004 concerning Waqf and Government Decree No. 42 of 2006 and the Decree of the Indonesian Ulema Council (MUI) No. 1 MUNAS/VII/5/2005, which allows IPRs as waqf objects. Because copyright as part of IPRs fulfils the criteria of waqf objects – valuable property, permissible by Sharia, can be owned or transferred – by itself, it is legal to use as waqf objects. Therefore, this right should not be violated. Copyright owners have control over such intangible rights as business brands, addresses and trademarks, and can be traded for some money provided that various uncertainties and frauds can be avoided. Sharia laws protect copyright, essays and other copyrights. The owner is in control and cannot be offended.

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