THE PHILOSOPHY OF INTELLECTUAL PROPERTY RIGHTS OVER IDEAS IN CYBERSPACE: A COMPARATIVE ANALYSIS BETWEEN THE WESTERN JURISPRUDENCE AND THE SHARI’AH*

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Does any painter paint a beautiful picture for the sake of the picture itself, without the hope of conferring benefit? Does any potter make a pot in haste for the sake of the pot itself and not in the hope of water? Does any calligrapher write artistically for the sake of the writing itself and not for the sake of the reading? The external form is for the sake of an unseen form, and that took shape for the sake of an unseen [form] in the proportion to your insight . . . The first is for the sake of the second, like mounting on the steps of a ladder.


Introduction

The world is moving towards an “information age” or an “information society.” However vague these ideas seem to be to some of us, they conjure the notion of a shift in emphasis in the global economy: from tangible to intangible goods, from things to ideas, from tractors to software. The power to be is the power to control these new assets—genes, software, databases and technological know-how—that make up the lifeblood of the new economy.¹

In the midst of this shift are intellectual property rights. They remain the most powerful weapon in demarcating the boundary of ownership of ideas. Developed two centuries ago to deal with the development of

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¹ Seth Shulman, Owning the Future (Boston: Houghton Mifflin, 1999).
printing technology, intellectual property rights have been further broadened with the introduction of new legal norms to catch up with the advancement of technologies. The basic premise, underlying these changes are that ‘thou shall not steal’ or ‘thou shall not reap other’s labour’. It is hardly surprising that skepticisms over the way in which intellectual property rights are moving starts to surface among intellectual property academicians, in particular with the new intellectual assets.

James Boyle in his work, “Shamans, Software, & Spleens,” calls for a rethinking of intellectual property concepts, into a system that preserves information in the public domain while maintaining the vitality of private rights. This requires the balancing of public and private rights and the rectification of public interest whenever possible. How to translate this into an intellectual property domain remains a challenge to many.

In this paper, powerful critiques of intellectual property will be examined. Their rationale, persuasive arguments, reasoning and most importantly their legitimacy, will be gauged through literature and scholarship. In the course of doing so, this paper will also examine whether Islam offers any solution. Would there be any tenets which we can fall back on if we conceptualise an Islamic notion of ideas and ownership of information? It is common ground that Islam respects private rights, and intellectual property rights is one of these. But what is interesting to consider is whether these rights are without limits? Should we instead override private rights when there are competing legitimate public interests? If we do, how, when and in what circumstances are we allowed to do so? This paper will offer some possible answers through an analysis of the limitations of “mal” and “milkiyyah” as postulated by Muslim scholars and jurists. While it is conceded that the bulk of their analyses is based on tangible property rights, it is our humble submission that some principles can be derived from all these discussions and introduced within the framework of intellectual property rights.

Several limitations of this paper should be stated. First and foremost, although critiques against intellectual property are as old as intellectual property rights, this paper will confine analysis to recent deliberations on the issue. Secondly, the paper will only address the criticism over the expansion of intellectual property as a result of new technologies. Opposition against the expansion of copyright is most visible in the context of

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