

AN ISLAMIC VISION OF INTELLECTUAL PROPERTY

For over a century, intellectual property (IP) regimes have been justified using Western philosophical theories rooted in the idea that IP must reward talent and maximize global stocks of knowledge and cultural products. Reframing IP in a context of legal pluralism, Ezieddin Elmahjub brings an Islamic and comparative narrative to the appropriate design and scope of IP rights, and in doing so criticizes the dominance of Western influence on a global regime that impacts the ability of people to access medicine, to read, to imagine, and to reshape popular culture. The Islamic vision of IP, which is based on a broad theory of social justice, maintains that IP cannot simply be seen as a reward for effort or a tool to maximize economic efficiency but as one legal right within a complicated distributive scheme affecting fundamental human rights, equal opportunities, and human capabilities.

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An Islamic Vision of Intellectual Property

THEORY AND PRACTICE

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For Manal, Isaac, and Jacob

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Preface

Since intellectual property became a global construct in the late nineteenth century, its normative design and theoretical justifications have been exclusively dominated by an Anglo-European influence. I wrote this book to introduce a novel theoretical and normative vision of intellectual property. It proposes an Islamic philosophical account to justify and regulate access to, and reuse of, knowledge and culture through intellectual property rights. The overarching framework of this account is an Islamic theory of social justice that views intellectual property as a social institution that affects the distribution of rights and obligations to access, use, and reshape knowledge and culture and make a living through that.

Modern intellectual property systems emerged and developed in the West. Western philosophical thought, particularly on natural rights and utilitarian ethics, influenced and continues to influence global intellectual property regulation and policymaking. In the nineteenth century, intellectual property standard setting was exclusively initiated and shaped by the major European colonial powers. After World War II, the United States enhanced its position as the strongest economy and the largest exporter of knowledge and cultural products. While the European influence over global intellectual property standard setting was mainly oriented towards providing protection for creators as a matter of natural rights, the US approach viewed intellectual property as a utilitarian bargain. In utilitarian terms, intellectual property is seen as a tool to incentivize individuals to invest in the production of intellectual products, such as software, movies, and drugs, thereby increasing wealth in society. The overwhelming majority of intellectual property commentaries explain the societal need to protect intellectual property, citing Western philosophical scholarship including John Locke, Immanuel Kant, Jeremy Bentham, and John Stuart Mill, among others.

A vision of intellectual property as a reward for creators and a tool to maximize social utility has – for very long – favored more property rights in knowledge and culture as the norm. Eventually, intellectual property protection exponentially expanded to cover not only genuine intellectual creations but also facts, discoveries, and information. More property rights in knowledge and culture did not leave everyone better off. A large body of research, both quantitative and qualitative, indicates that the current doctrinal structures and the operational features of the dominant global intellectual property regimes are securing substantial benefits for large producers and distributors of intellectual content in rich, developed countries. The same research also indicates that the way in which those regimes operate effectively marginalizes fundamental human development concerns, including access to medicine, educational materials, protection of traditional knowledge, and economic growth in developing countries.

An alternative vision of the global intellectual property systems is long overdue – not only for the sake of theoretical indulgence, but because of the significant gaps in the oft-cited policy rationales for global intellectual property policymaking and their impact on human development, particularly in developing countries. First, the proposition that depicts property rights in knowledge and culture as a fair reward for intellectual labor is fundamentally flawed. It does not tell us why property rights are the most appropriate reward for intellectual creativity. It also overestimates the relative creative powers of authors and inventors. It does not account for the fact that innovation and creativity are accumulative processes where one rarely, if ever, creates stand-alone creative content. William Shakespeare himself turned out to be a frequent borrower from the creative works of his contemporaries.¹ Second, justifying intellectual property as a tool to maximize social utility for the majority is both unpersuasive and narrow. It is unpersuasive because, in fact, we do not know for sure that property rights in knowledge would maximize social utility. It is also narrow because it is intrinsically blind to distributive concerns. Even if we accept that intellectual property is necessary to maximize social utility for the majority, why would we assume that the benefits generated for the majority would somehow compensate for ignoring the minority? This proposition is particularly worrying if the minority includes large groups of people lacking access to medicine and educational material.

¹ Michael Blanding, “Plagiarism Software Unveils a New Source for 11 of Shakespeare’s Plays,” www.nytimes.com/2018/02/07/books/plagiarism-software-unveils-a-new-source-for-11-of-shakespeare-plays.html

I found that Islamic sources approach intellectual property in a very different way. They propose a broad theory of social justice to inform the global debate over, and design of, intellectual property policies. The theory starts from a human flourishing perspective. Intellectual property is seen as one of the many tools to coordinate social cooperation to achieve collective social good. While the Islamic theory of social justice does not entirely reject intellectual property as a reward or tool to maximize economic efficiency, it reframes the analytical importance of these views. Reward and utility-based arguments can form one benchmark in a much larger analytical framework of fair distribution of rights and obligations to access and reuse knowledge and culture. This framework has two overarching features:

First, it starts by emphasizing the overarching priority of a bundle of deontological values before even considering justifying intellectual property rights. Every member of society is to have equal access to basic human needs to permit autonomy and enable life to flourish. This includes a broad right to life, health, education, cultural participation, and decent living standards. These basic needs must be distributed equally to everyone, regardless of their ability to work and pay, or the potential impact on economic efficiency. Interestingly, there is considerable overlap between this aspect of the Islamic theory of justice and the so-called Global South's vision of reorienting intellectual property to serve human development concerns, including access to medicine, food, educational materials, and economic growth.

Second, after securing the priority of these basic human needs, the Islamic theory of justice turns to assess the need to grant exclusive property rights in ideas and expressions. In this context, the starting point is that property rights should not enjoy regulatory priority in coordinating access to, and reuse of, intellectual content. The norm is to keep knowledge and culture in the commons, open for everyone to access, use, and reshape for their particular ends. In a sense, intellectual property rights should be considered an exceptional departure from this norm. The theory is open to considering situations where granting intellectual property rights in knowledge and culture is needed to fairly reward hardworking authors and inventors. It is also open to the possibility of using intellectual property as a tool to maximize intellectual production. However, the intrinsic powers of these property rights must be proportionate to the labor exerted to create the intellectual product. On top of that, intellectual property rights need to be framed in such a way as to take account of their potential impact on fair equality of opportunity. They must not become a tool to enable a few powerful producers and distributors of intellectual content to excessively concentrate powers to control knowledge and culture. There should be

well-defined mechanisms to redistribute the power to reshape knowledge and culture and to earn a living doing that. In this context, the Islamic vision overlaps with a loose coalition of intellectual property scholars critical of modern intellectual property regimes' perceived tendencies to concentrate powers within the hands of rich and resourceful producers and distributors of content. In particular, those scholars' proposals to expand the public domain of free content and the rights of users of protected intellectual content have considerable merit in the Islamic vision of a fair and efficient intellectual property regime.

The ideas discussed in this book come from research I have been doing in the last eight years as a PhD student and academic in different universities both inside and outside Australia.² During this time, a long list of people – some of whom I have never met – taught me so many things about intellectual property, philosophy, human development, and social justice. I can only include a partial list of those people. I apologize to those I learned a lot from, but unintentionally omitted.

Most of the writing of this book happened while working at the Law School in the Swinburne University of Technology in Melbourne, where I teach real and intellectual property units. I owe the greatest debt to my mentor and friend Dan Hunter, the Founding Dean of Swinburne Law School. Dan's leadership and brilliant research ideas opened the door for me to write this book and develop its content in its current form. First of all, he inspired me to write the book. Then he helped me refine my ideas while writing the proposal and commented on its final draft. My Swinburne colleague, Benjamin Gussen, reviewed the first draft of this book. He provided thorough and detailed feedback – though I did not always listen.

Most of the ideas concerning the Islamic notions of the social good and public interests included in Chapter 2 were formed and refined while working as a joint research fellow for the Asian Law Institute and the Centre for Asian Legal Studies at the National University of Singapore. Thanks to the directors of both the Institute and the Centre, Garry Bill and Dan Puchniak respectively, for commenting on my research while working there. Special thanks to my colleague Arif Jamal from the Law School at the National University of Singapore for chairing the research seminar organized around my research on the role of law in Islamic legal philosophy.

I have been very lucky to work in three different Australian universities in the last several years, where kind, bright, and capable academics influenced

² Portions of Chapters 4 and 7 of this book appeared in my PhD thesis completed in 2014 at the Queensland University of Technology.

the way I think about intellectual property and its theoretical and practical design. Mark Perry of the Law School at the University of New England provided extensive comments on the ideas I developed in my PhD thesis and helped me transform those ideas into a book proposal. Kylie Pappalardo of the Queensland University of Technology commented on my arguments about transforming abstract notions of social justice into debates concerning the public domain and users' rights. I am also grateful to Ismail Albayrak of the Australian Catholic University for making me think very carefully about making my arguments about Islamic jurisprudence accessible to Western audiences. This work developed in part from my PhD research at the Queensland University of Technology completed in 2014. Thanks are due to Nic Suzor, Brian Fitzgerald, and Anne Fitzgerald for supervising my research and helping me to successfully complete the degree. Thanks also to Peter Drahos for encouraging me to write this book when we met during the Australian Intellectual Property Conference held in Brisbane in February 2014.

This book will show you how a broad Islamic theory of social justice can reframe global intellectual property regimes both in theory and practice. However, not every argument made in it is exclusively derived from the Islamic worldview of social justice. My vision of the Islamic theory of justice was profoundly influenced by the work of some of the most brilliant minds of our time. I must acknowledge that John Rawls's *Theory of Justice* made me think differently about the basic structure of a fair society. I learned from his work that the fair distribution of the societal benefits and burdens of social cooperation requires us to take into consideration complicated propositions that include, but go beyond, the narrow visions of merit and aggregate utility. Elinor Ostrom's *Governance of the Commons* taught me that property systems are not the only, nor the most ideal, mechanisms to govern resources of different sorts, from jungles to codes. Openness and cooperation can also be fair and beneficial. Amartya Sen's and Martha Nussbaum's work on human development theories made me realize that a fair society is not necessarily a rich society that is mainly concerned with maximizing production. It is one that actively enables people to create and expand a set of fundamental human capabilities, including living healthy and productive lives, nourishing one's intellectual capabilities, and enjoying an extensive list of rights and freedoms. Interestingly, these works opened new horizons for me to read, understand, and analyze Islamic sources in a fundamentally different way compared to mainstream Islamic jurisprudence.

Finally, I am deeply grateful to my wife Manal and our two boys Isaac and Jacob. They provided me with the courage and motivation to undertake the

complicated task of writing about intellectual property, religion, and comparative philosophy. They patiently tolerated my increased absences during family times and on weekends – not to mention taking the laptop with me to public parks and shopping malls to finish my work. No words of gratitude could possibly do justice to their sacrifices.

Note on the Text

- 1 The romanization of Arabic letters follows the Oxford system.
- 2 Arabic terms are italicized.