

Intellectual Property Rights in the Age of Artificial Intelligence (AI): Reconciling Individual Liberty and Public Welfare in Western and Islamic Jurisprudence

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Abstract

Of all the creative work produced by humans anywhere, a tiny fraction has continuing commercial value. For that tiny fraction, copyright is a crucially important legal device. (Lessig, L). This study will focus on the Western critiques and development of Intellectual Property rights followed by a juxtaposition of the Muslim scholars' perspective and pivots the notion that Islam, generally (not always), favours communal rights over the rights of one individual. The study will then discuss the role AI plays in this context, briefly glancing at Pakistan's approach to IPRs and conclude with the position that the contemporary IP laws would be such that they would follow a quasi-utilitarian position, where the rights of the community as a whole and the individual rights would be juxtaposed and the one with the greater good/benefit would be favoured.

Keywords: Intellectual Property, Copyrights, Artificial Intelligence, Ambiguous Ownership, Freedom of Information.

1. Introduction

Two simple sentences encapsulate the concept behind the critically challenged and highly debated issue of copyrights. An artist may feel empty after completion of his masterpiece if no one is there to praise it. A poet may be at loss of words and spirit for self-admiration, for who could call him 'gifted' when he has not shared his deep thoughts. An innovator may find his invention worthless if he fails to write his method of assembling its components. Nevertheless, such displays may only become public if they are not plagiarized and granted exclusive rights.

The topic of intellectual property rights (IPRs) is a contemporary concept introduced as a result of technological advancement, globalization and the subsequent requirement of legal devices to protect intangible assets. From a panoramic point of view, the intellectual property rights include trademarks, patents, industrial designs, copyrights and a wide variety thereof. While the former three categories are straight forward, the issue of copyrights has stirred debates among the Muslim and Western jurisdictions as to its limitations to protection.

2. History and Development

The Western critiques date back to Naturalists time including John Locke's labour theory (Madieha, I. A. G. A. (2004), Garrett Hardin's "tragedy of the commons" (Hardin, G. (1968) and

Jeremy Bentham's "utilitarian" theory (Bentham, J. (1975). Of all the aforementioned critics, Locke's labour theory is most luminous. In a nutshell, the labour theory rests on input of physical endeavour by humans; that input is worth economic value for which they get remunerated. This theory is prevalent in case of intellectual creation of ideas. Translating this theory in context of copyrights, any input of mental endeavour by humans is their property and hence worth economic value if sold, published, or distributed (Madieha, I. A. G. A. 2004 (b)). The dilemma arises when law has to strike a balance between dissemination and accessibility of information and protection of such copyrights.

With regard to property rights and achieving equilibrium between public and private rights, James Boyle (Boyle, J. (1996) provides a justification for tilting towards private rights as a "*romantic concept of the creative author.*" He goes on to elaborate by stating "*we are driven to confer property rights in information to those who come closest to the image of the romantic author, those whose contributions to information production are most easily seen as original and transformative.*". In Boyle's opinion, the copyrights policy ought to promote "*efficiency, justice, democratic values and privacy.*"(ibid). On the other hand, Neil Netanel supports public accessibility to information and calls for limitation on copyrights policy. According to Netanel elevated copyright laws are troublesome as it "*imposes "tax" on audience and authors.*" (Netanel N.W)

The concern expressed by Netanel and other critics in Favor of public rights is legitimate as overprotection of copyrights would foster unnecessary monopolies of authors and diminish future production of creative works. Consequently, concerns expressed by critics such as Boyle hold equal value as it would be unfair and unjust to exploit creators/authors by making their work publicly accessible while economic incentive does not do justice to their creative work. However, since a prudent copyrights policy is to be applied, weighing public rights over private rights, the likelihood is public rights will prevail. It would be inequitable to grant unlimited exclusive rights to authors and pave way for unnecessary monopolization. The justification behind this is the reason that enabled such authors to create new ideas is because they embarked on fishing expeditions to accumulate floating old ideas of others. We now observe how the Muslim school of thought deals with this predicament.

3. IP Under Islamic Jurisprudence

Prior to determining how Muslim jurisprudence handles the aforementioned dilemma, it is essential to turn to history of intellectual ideas. Intellectual ideas or copyrights pre-date Islamic civilization as far back to 750 CE (Chowdhry, S, 2006). The original work of a poet was well-regarded and respected whereas one who plagiarized the poet's work was condemned (Beltrametti, S. 2010). The original work was protected and if published, the poet was compensated. Subsequently, a teacher/professor wishing to use author's work for teaching students had to first seek authorization from the original novelist. This type of authorization was called 'certificate of permission' or 'ijazah.'

However, since post-Islamic period, the issue of copyrights has been regarded as not more than a norm. Muslim scholars' have discussed at length regarding sharing of natural resources (*mubah*) (ibid). According to various sources some natural resources can be acquired such as reclamation of dead land, hunting, finding of grazing field and miners and treasures if a person is the first to acquire the resources. This is known as the first acquisition theory; the presumption is a person who acquires first is likely to labour for possession purposes and therefore becomes authorized to appropriate profits from it. (Vogel, F. E., & Hayes, S. L. III. .1998) This theory resembles Locke's

labour theory. The conventional scholars believe that term property is confined to physical and visible assets as opposed to intangible assets including copyrights.

On the contrary, the unconventional scholars have expressly acknowledged and accepted that ownership in Islam extends to intangible assets. They rely on primary and secondary sources of Islam. The Quran, being primary source, states in Surah Baqarah not to “*knowingly devour a portion of property of others wrongfully*” (Qur'an 2:188) and in the Last Sermon Prophet (PBUH) stated “*Verily your blood, your property are as sacred and inviolable as the sacredness of this day of yours, in this month of yours, in this town of yours.*”(Kitab Al-Hajj) Furthermore, Ibn Khaldun, one of the first scholars to correlate labour to monetary value, stated “*....the effort to obtain sustenance depends on Gods determination and inspiration. Everything comes from God, but human labour is necessary for every profit and capital accumulation.*”

Translating this to creation of intellectual ideas would mean a person who acquires or reaps creative ideas based on common pool of knowledge is entitled to reap the fruits of his labour.

Moreover, Mufti Taqi Usmani of Pakistan has stated that there are no express provisions in the basic texts which limit ownership to tangible objects. Copyrights, patents, and trademarks are legitimate claims to ownership which give their owners the right to profit from these claims. Additionally, the Council for Islamic Jurisprudence in 1988 ruled that “*nobody has the right to violate*” intellectual property claims. (Chowdhry, S ,2006c)

However, a predicament surfaces when deciding whether to limit an author’s exclusive rights over his intellectual ideas. The scholars turn to Quran and Shari’ah for guidance as dissemination of knowledge is encouraged in Islam (ibid). Keeping this in mind, the scholars respect author’s exclusive rights and provides for its safeguards; nonetheless in case of a conflict between individual’s rights and public accessibility the latter will prevail. The rationale behind this approach is that otherwise expansive prohibition to seeking knowledge would amount to “*concealment of ilm.*”(ibid) Such an act would be against the tenets of Islam.

4. Generative AI and Intellectual Property

At this point in the study, it is essential to juxtapose Generative Artificial Intelligence (AI) and the role it is supposed to play in this regard. However, it should be noted that this study does not deal with detecting AI as even that is now becoming exponentially difficult. The advent of Sora, the video generating AI, proves that point (Hsu, 2024) . The main point of contention in this study, however, is the issue which arises when contemplating the role IP is supposed to play. The AI is complicated to understand from the perspective of an individual who favours IP laws as the AI itself generates prompts, texts, pictures and videos which take inspiration from the already accumulated examples of such texts (Chaduneli, M. 2023). The individuals who originally generated the prompts, texts etc. receive no credit. That is partly due to the fact that the AI itself is too well made and an incredible amount of effort goes into creating the AI smart enough on the programming end to detect and create valid, usable content. It would be objectively unfair to give credit and IP protection to the original creators alone in this case.

AI ends up being a curve ball of sorts, when perceived via the lens of an IP protective individual. The apparent drawbacks AI has included, ambiguity of ownership, it remains unclear who to assign the ownership of the created content to, the programmer, user, AI itself? (Appel, J. N. G. 2023). The second issue is its question of creativity as it doesn’t necessarily create any new content, rather is trained very well to mimic existing works on the web. The ambiguity of ownership poses a major hurdle to IP laws in this regard. A recent U.S. Court of Appeals (for the Federal Circuit) judgment, Thaler v. Vidal (Taranto and Stark JJ, 2022), indicates that AI is not deemed an ‘inventor’ under the IP laws and hence could not receive the protection offered by the Patent Act.

The murky ownership leads it to escape the question of whether it's truly an act of stealing someone else's work. If it is deemed an act of stealing, the framework can, in theory, be such that the benefit arising from the AI generated content is equitably distributed. However, implementation of such framework would be a 'Herculean Task'. It would be a great challenge and due to the extremely vast amount of content online, with the added ambiguity, making it almost impossible to decide the ownership, stakeholders and beneficiaries. Hence, possible in theory but practical critical thinking suggests otherwise.

A more practical way would be to categorize AI separately, rather than trying to impose the same obsolete IP rules and regulations on a contemporary concept. It is practically not possible to include the content creators on the web as a stake holder in the AI-IP laws debate due to the sheer amount of them online. However, practically, an ownership system can be developed where the users, developers and the AI itself would share some degree of partnership (except where, like Chat GPT, the company voluntarily waives its partnership and contribution). Islam's emphasis on Justice and equity entails that the partnership share would, in a similar manner, be divided and shared depending on their contribution. Keegan Caldwell compares the recent surge in AI to Google and its extremely rapid popularity in a Forbes article (Caldwell, 2023). As he puts it, *"Google prompted similar concerns around plagiarism and IP infringement. But as the technology has improved, so has our ability to find and prevent instances of plagiarism or copyright infringement through a variety of tools and methods"*. Another list of potential solutions is provided by Gil Appel & others (Appel, J. N. G. 2023 (b)), which include, *"recording the platform that was used to develop the content, details on the settings that were employed, tracking of seed-data's metadata, and tags to facilitate AI reporting, including the generative seed, and the specific prompt that was used to create the content"*. Making such information public would allow for the images to be reproduced and hence be verified. But of course it would strike a quasi-detrimental blow to the AI programmers and developers, exposing their means of conducting business, profits etc. From the Islamic point of view, this makes perfect sense using the principle of fairness. Allah is the most just, ordering others to deal with matters justly as well and remnants of that ideology appear in multiple Ayahs. Good examples would include the Ayahs, [5:8] where Allah says, *"O believers! Stand firm for Allah and bear true testimony. Do not let the hatred of a people lead you to injustice. Be just! That is closer to righteousness. And be mindful of Allah. Surely Allah is All-Aware of what you do."*, [16:90] where Allah says, *"Indeed, Allah commands justice, grace, as well as generosity to close relatives. He forbids indecency, wickedness, and aggression. He instructs you so perhaps you will be mindful."* and [55:7-9] where Allah says, *"As for the sky, He raised it 'high', and set the balance 'of justice', so that you do not defraud the scales. Weigh with justice, and do not give short measure."* and numerous other Ayahs. Recognizing this ideology, it can be plausibly deduced that the same way it is not permissible to infringe another individual's intellectual property rights without just cause, the same mode of thinking can be applied on AI generated content, albeit in a different way as both concepts are similar yet non-identical. A quasi-utilitarian approach can be used, to do sufficient balance of reasons and deduce whether individual intellectual property rights are more just and equitable or whether the benefit to the public exceeds the rights of one party or stakeholder.

5. Pakistan's Approach with Reference to IP Laws

Now coming to Pakistan's approach on IP laws. Pakistan has recently joined the Madrid system, allowing the trademark holders to be able to register their marks across the 123 territories under the System's aegis (Ali, S.(2021). It is worth noting that Pakistan's approach has generally been liberal in acknowledging and welcoming issue of IPRs and copyrights to be dealt with under State

law, Copyrights Ordinance 1962 (CRO,1962) and Copyrights Rules 1967 (Rules, 1967). The Copyrights Office was established in Karachi in 1963 and since 2005 it is a part of the Intellectual Property Organization (IPO) of Pakistan. The Intellectual Property Organization is under the administrative control of the Cabinet Division. The IPO has actively been seeking valuable advice from experts of the World Intellectual Property Organization (WIPO) and other friendly countries. In this regard an international workshop, “WIPO National Workshop on Geographical Indications,” was organized by IPO-Pakistan with the assistance of the EU and WIPO in July 2006. Pakistan has a long way ahead in this field (especially with regards to regularizing AI legally) nonetheless it is gradually improving and will continue to do so.

6. Conclusion

To sum up two simple sentences by Lessig while signify the importance of providing protection to copyrights and quantifying them in monetary terms it is only to encourage individuals to continue labouring their minds and creating new ideas for future growth of common pool of knowledge and spreading *ilm*. It is evident that although Western and Muslim jurisprudence have their own ways and justifications in achieving equilibrium between private rights and public rights, the outcome of both is same. Both jurisdictions, in case of conflict, will prefer public rights over private rights, which is evident from the challenge AI has posed and the way both are dealing with the predicament. Similarly, albeit Pakistan’s Copyrights Ordinance can be traced back to the British Copyright Act 1911, Pakistan would have introduced corresponding provisions and outcomes if strictly Islamic law was applied. Nonetheless Pakistan has certainly come a long way, especially after becoming a part of the Madrid System.

7. Recommendations

1. A consistent, thorough and well-thought-out effort towards Artificial Intelligence and ways to incorporate contemporary IP laws related to AI. Consistent legal efforts towards making the algorithm and the prompt public should be the next step in this regard. The plausible way would be to formally legislate on AI and the rules surrounding Intellectual Property so the uncertain penumbra can be accentuated.
2. Another possible mode includes formal legal proceedings on AI related IP law infringements such that the courts take notice of the contemporary norms and legislate accordingly.
3. A thorough analysis must be done to determine the equitable ownership share each involved party must receive. This should be done so on the legislative end, and sufficient discretion must be provided to the courts so they can distinguish and identify exceptional circumstances where one right prevails over the other in order to provide justice accordingly.

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