

CONTENTS

Acknowledgements vii

Abbreviations ix

Preface xi

INTRODUCTION	xvii
The General Characteristics of Copyright	xvii
Copyright as a Modern Form of the Traditional Method of Conveying Knowledge	xx
A Summary of Prominent Modern Views on Copyright in Islamic Law	xxii
CHAPTER ONE: CLASSIFICATION OF RIGHT IN ISLAMIC LAW	
Defining 'Right'	i
Definition of Right with Reference to Exclusivity	4
Definition of Right with Reference to Interest	6
Definition of Right with Reference to Exclusivity and Interest	7
The Linguistic Approach	8
Classifications of Rights in Islamic Law	10
Conclusion	19
CHAPTER TWO: CLASSIFICATION OF TERMS RELATED TO RIGHT	24
Ownership	24
Wealth	31
Utility	37
Conclusion	41

CHAPTER THREE: EVIDENCE FOR COPYRIGHT IN THE PRIMARY SOURCES	47
The Divine Command to Be Honest	49
The Divine Command to Be Just	52
The Divine Command to Give People their Due	54
The Divine Command to Respect People's Property	55
The Prohibition of Falsely Claiming Authorship	56
Possession Entails Ownership	58
The Right to the Fruits of One's Labour	59
Risk Bequeaths Benefit	60
The Duty not to Cause Enmity	61
 CHAPTER FOUR: EVIDENCE FOR COPYRIGHT IN THE SECONDARY SOURCES	 66
Evidence for Copyright in Legal Analogy	66
Evidence for Copyright in Public Interest	77
Evidence for Copyright in Custom	80
Evidence for Copyright in the Legal Maxims	83
 CHAPTER FIVE: CONDITIONS FOR THE RECOGNITION OF COPYRIGHT IN ISLAMIC LAW	 96
Legality	96
The Work Must Be Original	99
Consideration of Public Interest	101
Duration	107
 CHAPTER SIX: OBJECTIONS AGAINST COPYRIGHT AND RESPONSES TO THEM	 115
 CONCLUSION	 137

Bibliography 139

Index 151

CHAPTER THREE EVIDENCE FOR COPYRIGHT IN THE PRIMARY SOURCES

While the discussion thus far has confirmed the complexities surrounding the legitimate placing of copyright within Islamic law in general, it is now possible to explore the evidences for recognising copyright from the primary sources of the Law. The identification of the Qur'an and Sunna as the principal foundations for deriving points of Islamic law, with a clear sequential prioritisation, is normatively drawn from the following *ḥadīth*:

When the Messenger of God intended to send Mu'adh b. Jabal [d. 18/639] to Yemen, he asked: 'How will you judge when the occasion for deciding a case arises?' He replied: 'I shall judge in accordance with God's Book [the Qur'an].' He asked: '[What will you do] if you do not find any guidance in God's Book?' He replied: '[I shall act] in accordance with the Sunna of the Messenger of God.' He asked: '[What will you do] if you do not find any guidance in the Sunna of the Messenger of God and in God's Book?' He replied: 'I shall do my best to form an opinion [*ijtihād*] and I shall spare no effort.' The Messenger of God then patted him on the chest and said: 'Praise be to God who has helped the messenger of the Messenger of God to find something which pleases the Messenger of God.'¹

The following discussion will highlight that a number of general Qur'anic verses and *ḥadīths* provide a comprehensive treatment of copyright, and no specific text from either source deals directly with

the matter. Consequently, the judgement of recognising copyright in the Law can only be inferred from the general texts and principles outlined by the primary sources.

The primacy of the Qur'ān in determining the legality of a matter according to the Law is further established in its own words: 'The command is for none but God'²; 'Whatever it be wherein you differ, the decision is with God'³; and 'If you differ in anything among yourselves, refer it to God and his Messenger.'⁴ Moreover, the Qur'ān confirms the perfection of the Law: 'To thee the Book explaining all things, a guide, a mercy'⁵ and 'This day have I perfected your religion for you, completed my favour upon you, and have chosen Islam as your way of religion.'⁶ Accordingly, the derivation of the Law from the primary sources occurs when a case is regulated directly by a specific (*khāṣṣ*) text or derived from a general (*ʿāmm*) text, through supporting evidences, indications and references, as an expert jurist arrives at a conscientious legal conclusion (*ijtihād*) when facing a new situation.⁷

The Sunna is defined as the Prophet's sayings, actions and his tacit approvals of the sayings and actions of others.⁸ The Sunna's authority is established by many verses, such as: 'Whatsoever the Messenger ordains, you should accept; and whatsoever he forbids, you should abstain from';⁹ 'But nay, by your Lord, they will not believe until they make you the judge of what is in dispute between them, then they shall find in themselves no dislike of that which you have decreed, and submit in full submission'¹⁰; 'He who obeys the Messenger obeys Allah'¹¹; and 'We have sent down unto you also the Message, so that you may explain clearly to men what is sent for them, and that they may give thought.'¹² Additionally, the Sunna is considered to be a commentary on the Qur'ān and supplementary to its rulings.¹³ Therefore the Sunna can provide special decisions that were not explicitly mentioned in the Qur'ān.

The Divine Command to Be Honest

Since copyright has been located within the broader Islamic framework of right, ownership and wealth, as stated before, it can be viewed within the context of honesty. The primary sources contain many unequivocal statements about the importance of honesty or keeping a trust (*amāna*).

The main Qur'ānic verse in relation to trust is: 'God commands that you render back trusts to those to whom they are due; and when you judge between man and man, judge with justice.'¹⁴ Ṭabarī (d. 310/922) stated that the verse was revealed when the Prophet took the keys of the *Ka'ba*¹⁵ from its custodian 'Uthmān b. Ṭalḥa (d. 41/661).¹⁶ The verse commanded him to return the keys, which the Prophet then duly did.¹⁷ Although the verse came in response to the specific issue of the keys of the *Ka'ba*, its actual wording is general, without any wording therein implying that its meaning is restricted. A commonly held position of Islamic jurisprudence is that a text should be interpreted and determined by its comprehensive wording and not by the occasions of its revelations (*asbāb al-nuzūl*).¹⁸ Therefore Rāzī is correct in confirming that the occasion of the revelation of this verse should not restrict its application; and that God instructs the believers to honour all of their responsibilities, whether they are religious or worldly.¹⁹ In addition, the general applicability of this verse is supported by the scholarly consensus (*ijmā'*)—one of the main sources of the Law—that stipulates that the command in the verse is to return trusts to their owners, whether they are righteous or sinful.²⁰ The reaching of scholarly consensus removes any doubt about the broad interpretation of the verse or its continuous applicability.

In fact, the principle of honesty occupies a significant position in the Law and is emphasised in many verses of the Qur'ān and numerous *ḥadīths*. For example, one verse praises the Prophet Moses by saying: 'Truly, the best of men for you to employ is the man who is strong, trustworthy.'²¹ A further verse praises believers who 'faith-

fully observe their trusts and their covenants',²² and another verse says: 'God does not love the treacherous.'²³ Indeed, the believers are exhorted: 'O you that believe, betray not the trust of God and the Messenger, nor misappropriate knowingly things entrusted to you.'²⁴

Further counsel in relation to the principle of honesty can be found in the Sunna. For example, it is reported that the Prophet said: 'Return the trust to those who entrusted you; and do not betray those who betrayed you.'²⁵ Another warning of the Prophet explains: 'The signs of a hypocrite are three [...] if you trust him, he proves to be dishonest.'²⁶ As such, one understands the Prophet saying: 'Anyone who cheats us is not one of us.'²⁷ Thus the Law castigates mistrust and dishonesty for destroying society, whereby the harmful consequences are regarded as one of the most serious crimes.²⁸ A further tradition of the Prophet forewarns: 'Your properties are sacred to each other, and for every betrayer there will be a flag to expose him on the Day of Resurrection.'²⁹

These evidences support the notion that honesty is compulsory and it has a wide application over everything.³⁰ The word *amāna*, mentioned in the Qur'an and *hadiths*, means trust, honesty, responsibility and probity, which are all duties that God has ordained upon humans, whether they relate to commands or prohibitions, their trusts or their covenants. This *amāna* is a general obligation binding a person to deal justly and in good faith in relation to every right, property, duty or such which he has a connection with. So every person, including rulers, judges, scholars and every person who is in a position of trust, is to carry out their duty in an honest manner, whether the trust is connected to worldly affairs or the Hereafter.³¹ Furthermore, there is no express provision in the Qur'an or Sunna that restricts honesty to tangible objects only, as Muḥammad 'Abduh (d. 1905) has stated.³² These texts are not abrogated or equivocal. Therefore the list of trusts can always be open and updated, and every individual is within the terms of each trust in which he is involved. Contemporary jurists have, quite logically, applied these verses to

new norms and needs with similar effect. In this light, the command to observe trusts can, and does, provide a solid foundation for recognising copyright in the Law.

‘Abduh has given the examples of money and knowledge as cases where honesty is to be observed, whether there is a verbal or special agreement or not. He elaborated that the trust of honesty borne by a scholar is the duty to return knowledge (*ilm*) to the people, in the same way that a trustee must return money to its owner, due to the existence of an actual implicit agreement to that end. Without the observance of this agreement between a scholar and student, he adds, no sound transmission of knowledge can take place. In his understanding, the fulfillment of the obligation of ‘academic trust or honesty’ depends on also disclosing the methods that lead to the discovery of knowledge.³³ Academic honesty is a particular application of honesty, whereby the Law recognises the application of trust to intangible, as well as tangible, objects. Accordingly, many contemporary jurists approve the concept of ‘academic honesty’.³⁴

The main goals of scholarship and research are discovery, teaching and dissemination of truth according to principles of honesty. The principle of honesty is connected to the concern for preserving the chain of transmission (*isnād*) of knowledge, with a view to preserving its accurate dissemination. As such, the obligation of honesty requires the reader to attribute a quotation to its true author.

One can establish the legitimacy of copyright within the concept of honesty due to the latter’s flexibility and breadth, which covers every deed. In fact, the breach of copyright is itself a violation of honesty, due to such a contravention being unethical and illegal. Furthermore, any reproduction of a work without its owner’s consent destroys public trust and confidence; and it is repugnant that this kind of dishonesty leads to undeserved profitable results, awards and fame at the expense of the real author’s rights. Accordingly, one sees Shāfi‘ī condemning breaches of confidence (*khiyāna*) because it is the unlawful acquisition of another’s property.³⁵ Likewise, Jaṣṣāṣ

(d. 370/980-1), from the Ḥanafī school, defined breach of confidence as the reduction of someone else's right in an undisclosed manner.³⁶

It is obvious that it is a breach of confidence or deception (*ghishh*) to take an existing work and to claim its copyright, such as making a false claim of authorship over another's work by pretending to be a scholar or righteous person.³⁷ Moreover, breach of confidence occurs when a publisher reproduces works without the consent of their authors or exceeds the copies of a work over the number agreed with the author.

In addition, it is a breach of confidence to edit and separate one transcript of a book into several books without a legitimate academic purpose, as it is a form of misrepresentation and deception. This type of deception is compounded when one changes the titles of books written by outstanding scholars and pretends that they are different books. Additionally, giving preference to commercial profit in editing or publishing works, at the expense of academic and ethical considerations, is another kind of breach of confidence. Ultimately, it is impossible to enumerate all the forms in which dishonesty can appear in the context of writing and publishing.

The Divine Command to Be Just

As quoted earlier, the Qur'ān says: 'When you judge between man and man, judge with justice.'³⁸ This Qur'ānic order to maintain justice appears in many verses, such as: 'O you who believe, stand out firmly for justice as witnesses to God, even if against yourselves or your parents or your kin, whether it be [against] the rich or poor: for God can best protect both. Follow not the lusts [of your hearts] lest ye swerve. If you distort [justice] or decline to do justice, verily God is well-acquainted with all that you do'³⁹; 'Whenever you speak, speak justly'⁴⁰; 'Be just: that is next to piety'⁴¹; and 'God commands justice.'⁴² Furthermore, in a *ḥadīth*, the Prophet is reported to have praised 'those who do justice in their rules, in matters relating to their families and in all that they undertake to do'.⁴³