Copyright & Patent Law

A Shi'ah Demonstrative jurisprudence Approach

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IN THE NAME OF ALLAH,
THE ALL-BENEFICENT, THE ALL-MERCIFUL

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Foreword

Praise to God, the exalted, and blessings to the guides of man, especially the last Prophet (sawas) and his pure family (as), particularly the Imam of the time (ajt).

This book is composed of the arguments that have been presented by the author about copyrights and patent law, while teaching at the Hawzah of Qum. It might seem axiomatic and an extremely clear matter that does not need to be addressed, however it appears that the reality of the Iranian market has compelled the author to discuss this matter in detail in order to clarify it for each and every reader in the market and present the standpoint of Shi'ah scholars for Western readers.

I believe this book shall fulfil a need felt by various researchers in this field and it will quench their thirst for truth and the genuine information that is presented throughout these different arguments. I hope that the reader shall enjoy perusing the ideas of this book, as much as I have enjoyed working on it. It is certainly going to increase the readers' knowledge

about some of the modern issues, their rulings and philosophy, as well as the philosophy behind the technical discourses amongst Shi'ah Muslims.

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Intellectual Property Rights and Copyright and Patent Laws[1]

Proofs of the Obligation of Observing the Copyright and Patent Laws

In this essay a variety of points will be presented to prove the obligation of observing the copyright and patent laws. The first and most important of these points may be the commitment to rationally approved judgment (*sīrat al-`uqalā'*),[2] since all rational people deem obligatory the observance of such rights. It is well known by everybody that the validity of any rationally approved judgment is contingent upon the Legislator's consent to that judgment, or the absence of His proscription against it. Accordingly, the rationally approved judgment can serve as cogent evidence of the obligation of observing such exclusive rights, given that there is no proscription against it on the part of the Legislator.

Discussion and Categories of the Rationally Approved Judgment

It seems unavoidable that more light must be shed on rationally approved judgment in its capacity as evidence provided to prove intellectual property rights are obligatorily observed rights.

Rationally approved judgment, in one of its applications, can be used in certain kinds of issues to enforce a certain rule without further need for observing the consent of the Legislator or the absence of His objection. For instance, in

case a husband pronounces the word of divorce against his wife when both of them enter into an argument about a certain problem, the Holy Legislator says, "*A divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness*". The expression "*hold together on equitable terms*," as commonly maintained by people of past times, indicates that it is obligatory for husbands to pay their divorced wives their alimonies. As rationally approved judgment in the present day maintains that a divorcee's alimony may include some other elements that were not included in the past times, such as the divorcee's right to study or to have a servant at her house, this means that rationally approved judgment has specified new items that were not included with a divorcee's alimony in the past. In such cases, the consent of the Legislator and the absence of His objection to such innovated items are not required (as a precondition to accepting the validity of the rule).

In plain words, rationally approved judgment includes all issues whose applicable patterns have elicited discrepancies (among scholars) from a rational viewpoint, seeing that a certain applicable pattern has not been included with a certain issue in the past, but it must be now considered (as is required by sound reason).as

To cite another example, the entitlement to possession was in the past proved valid when someone gathered wood from the wilderness using his own two hands or such simple tools as a scythe. However, in the present day, possession has included a

new applicable pattern; namely, gathering wood from areas many hectares in extent by the use of modern devices.

Dealing with such issues, Islamic law[3] decides the new patterns to be valid as long as they fall under the general rule that is jurisprudentially termed "all-inclusive title" (*`unwān kullī*). As for rational people, they, depending upon good reason, are capable of identifying the sub-cases under the main theme of a law. They can therefore either extend or contract these sub-cases to a specific limit. For instance, in reference to the Qur'ānic text that reads, "*Allah has permitted trade, but He has forbidden usury*," certain things that were not regarded as applicable patterns of trade in the past have become so in the present day. About twenty years ago, the so-called temporary sale (leasehold) did not exist.[4] A hundred years ago, the insurance policy did not exist.[5] However, rationally approved judgment, and nothing else, has successfully dealt with the main themes of such laws and adjusted the limits of acceptable sub-cases by including some and excluding others, without need for the consent of the Legislator. In other words, it is acceptably sufficient that people of good reason judge whether a definite sub-case can or cannot be regarded as an example of an issue.

With regard to our main topic, i.e., copyright and patent laws, it is possible to use rationally approved judgment as a means of proving that it is obligatory to observe copyright and patent laws, by stating that, since observance of the rights of others is one of the primary religious laws, it must then be obligatory to observe the copyright and patent laws, since they

serve to protect one form of property; i.e., intellectual property. This conclusion, which was reached by using rationally approved judgment in its capacity as one of the principles of jurisprudence, is based on the tradition that reads, "*It is illegal to take to oneself as personal property any part of a Muslim's assets against his will*"(6) (as long as this tradition is considered one of the general principles of Islamic legislation). We can thus generalize this rule, which classically is applied appertained to the particularity of physical property rights, to include all rights, since tradition does not provide any reason or ground for giving particularity to properties. The verdict involved can also be based on other traditions that entail the obligation of observing the rights of God and the rights of people alike.

In this way, rational people neither make a law nor invent a new right; rather, they believe that one who writes a book is as exactly the same, under the law, as one who builds a house. The latter is first of all required to go through such lawful procedures as registering the estate formally with a court, which then puts into his hand an official document proving his possession of that house. Likewise, the writer of a book goes through lawful procedures in order to register his book, receiving in like manner an official document proving his ownership of the book. In the view of rational people, a legally issued copyright or patent is no different from the legal deed issued to someone who built his house in a desert five hundred years ago, since this house is still legally owned by his heirs.

Likewise, rational people believe that there is a direct correlation between the efforts one man undergoes to build his house and the efforts another man undergoes to write his book. Rational people believe that rights are created when one has tired himself out and undergone much suffering in the process of collecting information, rearranging it, and composing a treatise on the basis of this information and then showing the treatise to people in the form of a book. The same thing is applied to one who invented a notion or a new theory, because such things are considered rights in the view of rational people.[7] As long as the building a house is considered by rational people as having the effect of creating a right, so also must writing a book and concluding a new theory be regarded as creating a right, since the invention of something must lead to the establishment of an exclusive right for its inventor.

A look into the words of the master jurisprudents who have written about this matter proves that their words have been so general, and inconsistent, that confusion found itself a place among them. One must recognize the importance of putting across an idea in as clear a manner as possible such that all people will be able to understand it.

Cases of Resting on Habitual Practice

It seems necessary to investigate the cases in which it is obligatory to rest upon custom which by long continuance has acquired the force of a law or a right. The late al-Ākhūnd al-Khurāsānī, a master jurisprudent, in his book *Kifāyat al-Uṣūl*, states that the cases in which custom must be enforced are

restricted to those in which the identification of the exact meaning of such words as *ṣalāh* (prayer) and *ṣa`īd* (bare ground) is required. Custom thus has nothing to do with the identification of the main theme of a law. In other words, custom cannot identify whether a certain liquid is blood; rather, its job is only to identify the meaning of blood, while it is the job of reason to consider whether specific examples conform to this meaning.

Conversely, Imām al-Khomeini and some of his students have held a different view.[8] They believe that custom may define the main concept of a certain issue and also identify specific examples that pertain to that concept.

Trying to collect points of evidence to prove the obligation of observing such exclusive rights as intellectual property rights as protected by the copyright and patent laws, we are not concerned with custom in its broad meaning and we thus do not state that it is imperative to rest on custom in order to make out whether a certain issue must or must not be considered exclusive right; thus we keep ourselves away from the scholastic dispute between al-Ākhūnd and al-Khomeini. In fact, the most important point in this regard is that we only provide rationally approved judgment as our evidence and confirm thereupon that rational people believe that such a thing as writing a book or inventing an apparatus is an enforceable right of its owner and that rational people deal with it accordingly. When the Lord orders us to do something and rational people consequently identify a certain duty and right to

be incumbent upon us as a part of our submission to Him, in this case, the general principle that owners of property have inherent rights in the property and that others have the obligation to respect those rights, then the same principle is applicable to the cases of the exclusive rights to write, publish, research, invent, and create by mental act, since rationally approved judgment can broaden the circle of exclusive property rights by inserting new examples within it.[9] For example, rational people have decided that insurance contracts are valid and binding contracts and that they thus come under the general jurisprudential rule of "*Fulfill the Obligations*."

As a result, if we abide by the rationally approved judgment applicable to the topic under discussion (i.e., intellectual property rights as protected by copyright and patent laws), we will not face any problem and, in this case, the rationally approved judgment will stand on its own merits and not further need the consent or the absence of any objections of the Legislator.

Concluding the Idea

If the ruling on intellectual property and copyright and patent laws is based on the determination of rational people, whose role it is to decide what particular examples are covered by a general rule, then that ruling will not require the consent or the absence of any objection of the Legislator to the ruling. In our conception, it is acceptably sufficient as evidence that the rationally approved judgment essentially supports the exclusive

intellectual property rights of the author of a book and the inventor of an apparatus.

In some of their verdicts, master scholars have used the expression "*...It is actually accepted according to the judgment of reason and rational people…*"[10] This expression, in the terminology of jurisprudence, holds a different meaning that is not referred to here. Besides, we do not intend to rest on custom and the apparent meaning and the understanding of laymen in supporting our conclusion, so that people who hold the same opinion of the author of *Kifāyat al-Uṣūl* would object to our view, since they believe that the function of custom is only to identify the meanings of the words. Rather, we believe that rationally approved opinion considers copyright and patent laws as legally protecting one species of the valid and legally binding property rights that must be observed and, as a result, observance of copyright and patent protection should be included with the general rules entailing that every right must be observed, and the right of others must be respected.

Furthermore, we can discard the term "right" and instead we say that rational people regard copyright law as protecting one form of personal property (*māl*) and state that copyright and patent laws fall under the general rule that maintains that "*it is illegal to take to oneself as personal property any part of a Muslim's assets against his will*."

Scholars of Muslim jurisprudence have given two definitions to the word *māl*. These two definitions will be

cited in a coming chapter of this thesis. Imām al-Khomeini, disagreeing with the familiar opinion of *Uṣūlists*, believes that rationally approved judgments about innovated issues are acceptably cogent evidence, in the sense that it is legal to rest the issuance of applicable verdicts on these judgments.[11]

Summary

If rationally approved judgment is presumed to be sufficient support insinuate a presentation of the main theme of a law as well as to be able to identify its applicable examples, it is then acceptable to provide it as evidence without facing any issue problem or entering into any disapproved matter, since the said judgment does not require the consent or the absence of the objection of the Legislator to it as regards the main theme of a law, only in other details. In most cases, the Legislator does not interfere to identify the main theme of a law, since this is not usually His job although, in certain isolated examples, He does interfere to identify the main themes of certain laws.

This must not be understood that we totally deny such interference of the Legislator; rather, we believe only that His job is not usually to interfere in the identification of the main theme of a law; otherwise, the rationally approved judgment with regard to any subject would have required the consent or the absence of the objection of the Legislator.

In his book *Buḥūth fī `Ilm al-Uṣūl*,[12] Muḥammad Bāqir al-Ṣadr has touched on this topic. It is therefore recommended that the reader refer to the book for more information.

If the exclusive right to intellectual property is proven to be legally binding when supported by rationally approved judgment, then we can similarly prove that the observation of other persons' exclusive intellectual property rights are also obligatory, depending upon the general and unspecific rules of the Islamic law that are applicable to the topic under discussion.

Copyright and Patent Laws as Legal Protection of Personal Property

In addition to the above-mentioned proof, intellectual property, as protected by copyright and patent laws, can be seen as personal property since a certain exclusive right automatically appears for one who writes a book or invents a machine, giving the book or machine, as a reproducible concept over and above as a physical entity, the clear quality of being property; i.e., it becomes a legally acknowledged item of personal property. Scholars define property (*māl*) as any thing that is potentially desired by rational people and as anything for which money is paid.[13] Accordingly, the obligation of observing the copyright and patent laws comes under the general rule of the illegality of appropriating any part of a Muslim's property against his will.

Argumentive Objection

It may however be argued that, according to Islamic Law, certain effects result from giving a property quality to a

thing. For instance, it is obligatory to guarantee a property that has been spoiled. This ruling is based on an alleged tradition that reads, "*He who spoils any amount of the others' properties must guarantee (i.e., make up for) it*."

In the field of the laws of inheritance, the legacy of a dead person, which[14] consists of property, legally transfers to the heirs. On the other hand, the majority of exclusive rights are in most cases non-inheritable. For instance, the right to nursing a child is not applicable to inheritance when the mother dies. Likewise, a father's right to custody of his son cannot be inherited. However, some transactional rights, such as rights of cancellation, are inheritable. One of the distinctive features of personal property is that properties are always inheritable. In view of this fact, the following question is posed:

Do such exclusive rights as intellectual property rights, as protected by copyright and patent laws hold such distinctive features as inheritability?

To answer, if we state on the one hand that intellectual property is endowed with valid, exclusive rights that are not different from any other right of cancellation, this will suggest that those rights are inheritable and legally guaranteed when they are spoiled. If, on the other hand, we consider it personal property, it is then not improbable to say that it can be legally guaranteed.

In the event that someone destroys and tears up a book manuscript that was handwritten by its author, is it sufficient to

decide that the destroyer of the manuscript is liable for making up for the price of the paper and ink only? Certainly not. Is it, then, sufficient to decide that the destroyer of the manuscript is responsible for reimbursing the author for the time spent writing – if, for example, the author had spent ten days on writing the book, then the destroyer must accordingly pay him the average wage of a ten-day job as guarantee?

Of course, this is inaccurate! In this case, the legally most important thing, that is, the most valuable thing that has been destroyed is the intellectual property rights of the person who has acquired the power of exclusiveness as a result of writing the book. Generally, how rational people view the destruction of a thing and proper compensation thereof depends upon the nature of that thing. For instance, the destruction of material properties customarily takes the form of damaging and/or removing them, while the destruction of an intellectual right must be compensated according to the actual value of it.[15] In the present day, breaking the password of a legally protected CD is considered destruction of the intellectual property of the owner of that CD.

In conclusion, we strongly confirmedly believe that all such personal property matters as its destruction and its inheritability are also applicable to intellectual property as protected by the copyright and patent laws.

On the other hand, even if we condescendingly assume that some aspects of personal property rights are not also valid aspects of intellectual property as protected by copyright and

patent laws, such as if we concede that intellectual property is property, and thus can come under the title of personal property, but yet we assert, through extraneous evidence, that it is not inheritable and not guaranteed, even then this must not mean that intellectual property is unqualified for consideration as personal property.

This fact is even clear in some physical property cases. If, for instance, a tailor puts the owner of a piece of cloth under the condition that he (the tailor) will not be responsible for making up for the cloth if it should accidentally be destroyed in the process of sewing new garments, this does not mean that the cloth will lose its legal nature as personal property even if its damage will not be made up.

In brief, even if some rights that are applicable to personal property in general are not applicable to intellectual property, this does not mean that intellectual property does not have a property quality.

In the main, the presentation of rationally approved arguments in this issue is essentially meant to prove the validity of the law in the general sense, but it has nothing to do with identifying the particular examples that may come under that law. To put this in plainer words, rationally approved judgment proves the obligation of observing such rights as intellectual property rights as protected by copyright and patent laws, but it has nothing to do with determining when in specific instances these rights exist or do not exist. In that case, it is unavoidable to attain the consent or recognize the absence of the objection of

the Legislator to the judgment involved. Generally, a rationally derived judgment in and of itself is not to be considered cogent enough to be accepted as sufficiently valid evidence.

Argumentive Objections to Observing the Copyright and Patent Laws

Apart from arguing whether exclusive intellectual property rights do or do not exist, once we prove the copyright and patent laws as legally and obligatorily enforcing an observed exclusive right recognized as such through rationally derived judgment, it will be irrelevant to study its secondary issues. As a result, we rest on rationally derived judgment in deeming obligatory the observance of these rights.

However, an objection may be raised asking whether this conclusion can stand as enforcing evidence or not.

The most important argumentative objection that should be refuted in the discussion of the issue is that the observance of copyright and patent laws is one of the innovated issues. According to this argumentative objection, such issues as copyrights on creative works, patents on inventions, and other similar exclusive intellectual property rights did not exist in the age of the direct legislation of the Islamic Law; rather, they arrived on the scene long afterward. As a result, it is argued, they are worthless.

This view has been adopted by the majority of *Uṣūlists* (scholars of *`Ilm al-Uṣūl*; those dedicated to the study of the principles of Muslim jurisprudence) who generally believe that

a rationally approved judgment that existed in the age of direct legislation (i.e. the ages of the Holy Prophet and the Twelve Imams) can be a cogent and sufficient proof provided that the Legislator has consented to them or not objected to them, but that the rationally approved judgments about issues that were innovated thereafter cannot be proven effective and enforcing.

The Answer

There are numerous points that can be offered to refute this argumentative objection and many ways to solve the problem.

In the previous discussion we proved that the validity of rationally approved judgment is conditional upon the consent of the Legislator. However, each item of a given rationally approved judgment is not conditional upon the consent of the Legislator; rather, it is acceptably sufficient to ensure a general consent by the Legislator or the absence of His objection is the case for all items encompassed by a rationally approved matter as long as this matter is actually approved by rational people. However, an argument may be raised against our point of view if we specify as a necessary condition that the consent of the Legislator is required for every individual item of the rationally approved judgment, for then it is possible to claim that the judgment about intellectual property and the copyright and patent laws was not existent during the age[16] of direct legislation and, as a result, the concepts of intellectual property and copyright and patent laws are not subject to the consent of the Legislator, since what is initially nonexistent is not subject

to His consent. On the other hand, this question will be agreeably answered if we acknowledge the general rule that maintains that the Legislator, whose consent is conditional to enacting any rationally approved judgment, consented to and certified all of the rational affairs that existed in the ages of direct legislation only because first these affairs were approved by rational people in their capacity as having good reason, but not because these affairs were primarily related to devotional or law-based issues. In other words, the Legislator has relegated judgments about rational affairs to rational people exclusively, although as an exception He deactivated such judgments in certain specific fields only.

Sayyid al-Ṣadr Discusses the Issue

In his book *Buḥūth fī `Ilm al-Uṣūl* 3:237, Martyr Muḥammad Bāqir al-Ṣadr sheds light upon the arguments on the topic of intellectual property and the copyright and patent laws, in the chapter with sub-title: *qad yuqāl.* Because his discussion is of great importance and it has been used pertinently in discussing many jurisprudential topics, I will quote his words. Although he has adduced two argumentive points, it seems best that we begin by thrashing out his rather unprecedented hypothesis with further discussion.

Sayyid al-Ṣadr (ra) says:

> It is true that the Legislator consented to the rationally approved judgments that were contemporary to the ages of direct legislation, but this does not mean that the consent was to these judgments for themselves; rather, it was on

> the basis of their qualification as rationally approved judgments.

This means that the direct legislation in the period of the two hundred years in which the Holy Prophet and Imams lived consented to the rationally approved judgments not on an individual and exclusive basis, in the sense that they consented to each particular rational judgment on an individual basis, but, rather, that they consented to these rationally approved judgments on an overall, general basis because they were qualifiedly congruent to rationality in their very nature as having been rationally approved.

Sayyid al-Ṣadr (ra) continues:

> In other words, we can understand that the Legislator has not spoken His word about the clarification of some laws and the enacting of others in various fields of life that are subjected to the rational sense, because He relegated these affairs to the rational people and transferred the matter to their experience.

That is to say: if let us say there were one hundred rationally approved judgments in the age of direct legislation, then the Legislator must have consented to all of these judgments on the basis of His general rule that declares that the affairs about which rational people have their say must be left to them for judgment.

> This consent must be then understood as a general consent and must be subjected to the (sound) view of the rational people.

In plain words, the Legislator has accepted the rationally approved judgments in a general manner, which must consequently mean that these judgments are accepted in all ages and at all times.

Arguing the Objections

However, after citing these words, Martyr al-Ṣadr (ra) has raised two argumentive objections.

> ***First Objection***: He says:
>
> It has not been proven that the Legislator, during the ages of the direct legislation of laws and sanctions, kept silence about the other issues that might be consigned to a rationally approved judgment; rather, the laws regarding these issues were also spelled out by the Legislator.

This means that the Legislator, when He issued His laws and sanctions, did not overlook other issues not covered by those laws and sanctions; therefore, if it appears that the Legislator overlooked these other issues it is rather that He wanted to refer the enactments of their related laws to rational people; it would be acceptable to depend upon the sense of the rational people in issuing laws appertained to such issues as intellectual property and the copyright and patent laws. However, it cannot be proven that the Legislator did overlook discussing these issues.

In other words, if the Legislator never had His say about the issues that are claimed to be an open area for legislation on the basis of the views of rational people and a field for putting into practice their judgments, the claim of depending upon the views and judgments of these people would have been insuperable. However, the fact is that the Legislator did say something about these issues and did reveal their laws in such sections as transactional, social, and political issues where the rational people have expressed their own views and notions.

Sayyid al-Ṣadr (ra) continues:

> In fact, laws about these issues have been clearly issued. If not, some clarifications about these issues have been at least probably reported from the sources of direct legislation.

Second Objection: Sayyid al-Ṣadr (ra), presenting a more accurate[17] argument than the previous one, says that by keeping silence on these issues the Legislator only indicates that He consented to the rationally approved judgments that existed in a practical sense during the age of legislation. In other words, the Legislator consented only to the rationally approved judgments that were agreed upon and published in that period, which means that His consent did not include all of the judgments that would come to surface in the future up to Resurrection Day (i.e., the end of the world). Of course, keeping silence on an issue is unlike speaking about it, since the Legislator could have consented verbally to all of the rationally

approved judgments of the times that were to follow up to Resurrection Day.

Argumentive Objection to the Rationally Approved Judgments

To sum up the two argumentive points of Sayyid al-Ṣadr (ra), we say that if we are asked about the consent of the Legislator to all of the rationally approved judgments up to Resurrection Day, we will answer that we cannot prove that rather than consenting to them the Legislator simply relegated all reason-based issues to rational people to decide about them.

However, this proves that the argumentive points raised by Sayyid al-Ṣadr (ra) in two premises were not necessary. To prove this fact, it is sufficient to solely highlight the point that there is no clear proof that the Legislator has relegated all reason-based issues to rational people. Supposing that the Legislator consented to one hundred rational judgments that were made in the age of direct legislation, this by no means indicates that the Legislator consented to each and every rational judgment that would be approved up to Resurrection Day, especially if one takes into consideration the fact that every day, in the present day, a new issue is presented to us in a broad range of fields, especially the fields of prestige and souls. More precisely, in the present day, rationally approved judgment no longer agrees with the sentence of direct retaliation (i.e., the Biblical injunction known by the phrase “an eye for an eye and a tooth for a tooth”) especially[18] in cases of homicide; rather, rational people, on the basis of their rationality, decree

that a murderer is to be sentenced to life imprisonment instead of direct retaliation. Accordingly, we cannot assert that the Legislator has allowed rational people, in their capacity to dependably exercise good reason, to issue judgments according to their personal views. Thus, this does not solve the problem or remove the ambiguity.

Summary and Conclusion

If we claim that rationally approved judgment proves the obligation of observing such rights as intellectual property rights and the copyright and patent laws that protect them, we will have to go through the problem that these issues are innovated, in the sense that they did not exist in the ages of direct legislation, and we will again have to discuss that problem. As has been previously cited, Sayyid al-Ṣadr (ra) raised two points of argumentive objections to the claim, but we could summarize the valid applicability of one argumentive point only; therefore, any attempt to solve this problem and to depend on the claim as 'a valid proof' will be imperfect.

We turn next to Imām al-Khomeini's (ra) opinion, one of the scholars who have believed in the validity of rationally approve judgments about innovated issues [19], who had raised another point in this regard.[20]

Objection to the Rationally Approved Judgment about Intellectual Property and the Copyright and Patent Laws

If we definitively claim that such modern rights as intellectual property rights, as protected by copyright and patents, are proven as valid and therefore to be obligatorily observed, relying upon rationally approved judgment about these issue, this will lead us to prove that these rights must not be violated; rather, that they must be accepted as valid, entitled to transference by legal right, inheritable, and warrantable (i.e., legally guaranteed) when the property so protected is exposed to destruction. However, this claim can be countered by the argumentive objection that rationally approved judgments cannot be valid unless first they are accepted by the Legislator or it can be proven that the Legislator has not proscribed them. In our case, any rational judgment about the issue of intellectual property and copyright or patent protection thereof did not exist in the age of direct legislation; therefore, it is impossible for us to determine rationally that the Legislator consented to or did not proscribe it.

Answers to the Objection

We have earlier hinted that, although such contemporary issues did not exist in the ages of direct legislation, the Legislator has agreed on general[21] principle to relegate all of the reason-related issues to legal foundations that are established by rational people. In other words, the Legislator has given a general consent to the decisions of rational people

with regard to all reason-based issues in all ages. A further discussion of this point has been previously presented.

Second, we deny the underlying assumption behind this objection and assert that there is no difference in this concern whether the rationally approved judgment existed in the ages of the direct legislation or it is contemporary. To prove our assertion we point out that Islam is a timeless religion, in the sense that it is valid for all times and under all circumstances. We thus believe that the Legislator has always known about all of the innovated issues that would come to pass as well as all of the judgments that would be decided by the rational people about these issues up to Resurrection Day. Therefore, if one of these judgments were in violation of religious law, as known by the limitless knowledge of the Legislator, He would certainly announce so at some point in time and in some clear way, be it a general or a specific statement, or otherwise indicate His proscription of that judgment. Besides, there is no way to claim that the Legislator neglected stating His judgment of support or denial of such modern issues.

Based on this, we conclude that as long as the Legislator has not proscribed rationally approved judgments about these innovated issues through either specific or general statements, then we must conclude, with no reason for controversy, that this must mean that they have been at least tacitly approved by Him. However, we must note that this conclusion has been rejected[22] by the majority of jurisprudents and scholars of [*ʿIlm al-Uṣūl*] principles of jurisprudence, who

only accept as valid the rationally approved judgments that were made in the age of the Holy Prophet (sawas) and Imams (as) who either consented to them or did not proscribe them, but these scholars do not accept as valid other rationally approved judgments that have been made (or will be made) in the ages following the age of these direct legislators.

View of Imām al-Khomeini

On the other hand, other scholars of Shī`ah[23] jurisprudence adopt the idea that the Legislator, being omniscient, must have always had a clear attitude to the innovated issues, because the religion of Islam is so everlasting and comprehensive that it must incorporate all ages. In accordance with[24] this view, Imām al-Khomeini (ra) concluded that rationally approved judgments about innovated issues are validly acceptable proofs. In his book entitled *al-Rasā'il*, he refers to the most important evidence on the validity and permissibility of acting upon *Taqlīd*; i.e., resting upon the verdicts of a well-qualified scholar in issues appertaining to the laws of the religion. The Imām thus deduces evidence from the reason-based general and natural rule of the ignorant must be referring to the knowledgeable.[25] Providing evidence, he relies on rationally approved judgment to prove his point. He then mentions an argumentive objection to this deduction. This objection states that the general rule of 'the ignorant must be referring to the knowledgeable', does not apply to the case here in order to prove a religious law. The reason is that it was not a common issue during the ages of the Holy Imams (as), such that

it can be clearly seen that they (as) might be construed as consenting to the rule.

Answering to this objection, the Imām says:

> The content of the general principle and rule of the ignorant must be referring to the knowledgeable in every item of knowledge is essentially familiar to everyone, and to depend upon this principle is completely unobjectionable. The Holy Imams knew that the scholars and knowledgeable people of the Shī`ah during the Occultation Age would be deprived of direct connection with the Holy Imams, and this would make it unavoidable for them to refer to the books of the Holy Imams' reports, the principles of the Shī`ah jurisprudence, and the encyclopedic books (on the Holy Imam's words, deeds, and confirmations); therefore, they (i.e., the Holy Imams) instructed the Shī`ah scholars to do so (in order to obtain knowledge of the religious laws). Unquestionably, the ordinary Shī`ah must refer to the scholars according to the familiar reason-based foundations and conclusions of each individual. If the Holy Imams (as) had not consented to this reference to the scholars, they would certainly have proscribed it, and as a result, there is no difference between the rationally approved judgments about matters that were experienced in the presence of the Holy Imams (as) or the other judgments about matters that would take place afterward; namely, the issues that the Holy Imams predicted and foretold that people would have to go through them. In this regard, the Holy Imams (as) did foretell the coming of the long age of occultation and thus instructed that the scholars would be required to act as the

> custodians of the orphaned descendants of the Holy Prophet (sawas) and there would come to pass a time of tumult and commotion during which the scholars would be in an urgent need for the writings of the previous scholars….

Investigation and Critique of the Imām's (ra) Words

These words of Imām al-Khomeini (ra) should most likely be taken to mean that he believed the validity of rationally approved judgments are not conditional their being agreed upon during the ages of the Holy Imams (as); rather, that rational judgments about innovated issues are also valid (i.e. can be taken as acceptable proof). Nonetheless, the Imām's (ra) words may also be taken to imply two other possibilities.

First Possibility

The Imām possibly wanted to say that Islam is such a comprehensive religion that it is workable in all ages and at all times, and the Holy Prophet and Imams were given knowledge of what would take place in the future; therefore, they must have known whether some inaccurate judgments were going to be issued about certain concerns that would become apparent in a certain age in the future. If so, then the Holy Prophet and Imams would surely have announced the inaccuracy of the reason-based judgments about these issues and have prevented these judgments from being issued; indeed, the Legislator essentially made this point in saying, "I have ordered you to follow whatever thing that draws you closer to Heaven and I have likewise warned you against whatever thing that drives

you to Hellfire." In conclusion, as long as the Holy Prophet and Imams did not proscribe, their keeping silence on such innovated concerns and the absence of their objection to them during their own age is evidence of the validity of such rationally approved judgments even if they came to pass a thousand years after their own age. Accordingly, to Imām al-Khomeini (ra), the rational judgments about such issues are absolutely valid without taking any conditions into consideration.

Second Possibility

On the other hand, Imām al-Khomeini (ra), in the paragraph quoted above, refers to "…the issues that the Holy Imams predicted and foretold that people would have to go through." This may imply that he restricted the validity of rationally approved judgments to the matters that the Holy Imams had predicted would rise up in the future, especially during their experience of a long occultation of their Imam during which people would be deprived of any direct connection with him (i.e., the Imam) and, as a result, they would be inevitably required to follow the scholars among them.

If this possible interpretation is accepted, then it means that the Imām (ra) did not accept the validity of rationally approved judgments about all issues without exception; rather, in his mind this validity was to be restricted to the rational judgments about issues that the Holy Imams (ra) predicted and informed the people that they would go through in the future.

In my conception, the earlier possibility is more likely and the words of the Imām entail the validity of all rationally approved judgments, no matter in which age they are issued. Thus, the Imām's expression *"the issues that the Holy Imams predicted and foretold that people would have to go through them"* has nothing to do with his deductions and opinions about the subject matter in general; rather, in the Imām's (ra) conception, what plays a role in this topic is the fact that Islam is a perfect religion and the Holy Prophet (sawas) and Imams (as) gave sufficient guiding details about whatever draws people closer to Heaven and whatever keeps them away from Hellfire. Hence, if the Holy Prophet and Imams (as) had known that people, in later ages, would encounter a religiously forbidden matter, they would certainly and bindingly have warned them against it, even if such a warning might come in the form of a general word or a common statement that would make rational people realize that they were forbidden and proscribed from involvement in that matter.

For instance, as for the jurisprudential principle that is derived from a holy Qur'ānic verse; namely, "*Allah has permitted trade, but He has forbidden usury*," this general statement puts across the point that God the Almighty has forbidden all kinds of usury, including the kind that takes place between two persons when one of them says to the other, "I will lend you 1,000 pounds on the condition that you repay me 1,200 pounds a month later," and the kind that takes place between a bank or a governmental financial establishment and an individual, as is very common in the present day. Nowadays,

it is common for a bank to pay out a sum of money to one of its customers, usually an individual, at interest or with required fees that the bank would receive as part of the paying- off process as profits. This is in fact one of the most evident forms of usury in the present day. However, some people restrict the forbiddance of usury to individual-individual dealings and exempt government-individual dealings from it, deciding that the profits given by a certain individual to another individual in his or her capacity as creditor are forbidden since they are usurious, while the profits taken by a governmental entityor a bank from an individual are legal, since it is assumed they do not enter under the usurious transactions! To answer them, we point out that the general rule "*He has forbidden usury*" is nowhere limited to individual-to-individual dealings; in fact, it is so unrestricted that it includes all forms of usury up to Resurrection Day.

Other people mistakenly think that the rule forbidding usury is restricted to exploitive usury. In other words, this view sees usury as forbidden only in such cases of misuse as when a person needs to borrow a hundred pounds for covering the expenses of a medical treatment, but the lender specifies as condition that his money should be paid off with interest. However, even if a person lends a sum of money in what most rational people would deem a usurious manner – for instance by demanding an excessive percentage of interest – this process is not deemed usurious by those who hold this view if as the borrower does not need the money but merely wants it for some purpose that he can do without, or if, for instance, he wants the

money to launch a lucrative project from which he will gain profit more than equal to the excessive interest specified by the lender.

Again, this is inaccurate, because any example of usury is in clear violation of the the rule "*He has forbidden usury*," which encompasses all sorts of usurious transactions without exception.

Others claim that usurious transactions between individuals and governmental establishments are excluded from the forbidden usury, which is applicable exclusively to the usurious deals between individuals.

Moreover, , we argue that if the forbiddance of usury, as entailed by the rule "*He has forbidden usury*," is restricted to usurious deals between individuals, then the legality of trade entailed by the rule "*Allah has permitted trade,*" must by the same specious logic be also limited to individuals. If that were the case, then if a governmental entity or a bank sells a commodity to an individual, the deal would be excluded from legal trade as entailed by the general rule. Yet no single jurisprudent has ever reached such a verdict; rather, all jurisprudents have clearly stated that, just as the legality of trade is so general that it includes all kinds of (legal) trade, so also the forbiddance of usury is so general that it includes all kinds of usurious transactions, meaning in effect that usury is forbidden notwithstanding whether the two parties are individuals or a

government and an individual, and that this rule will remain in effect up to Resurrection Day.

In sum, if we assume that the Legislator has full knowledge of all incidents that will take place up to Resurrection Day, then we conclude that the Legislator must have declared the proscription of any yet-to-come rationally approved judgment to which He does not give permission.

Argumentive Objection to the Imām's Contention

The first point that might be raised in objection to the Imām's contention is that it is theoretically possible that the Legislator did declare general and absolute proscriptions of certain such rationally approved judgments, but that these declarations might have not reached us, since we, in this age, may not have had passed down to us whatever was said on the subject by the Legislator in the ages of direct legislation.

However, this point is easily disproved. As a general rule, proscriptions of the Legislator cannot be effective unless we know about them. In other words, a proscription of a certain matter that was declared in and only known in the age of direct legislation cannot serve as a binding rule; rather, it must be known by us, in this age, otherwise, we are not required to commit to it only because it was declared by the Legislator.

The previously quoted words of Imām al-Khomeini can help solve a big number of brand-new issues that did not exist in the age of direct legislation. Indeed, the entire progress of Muslim jurisprudence will be most certainly revolutionized if a

jurist decrees that the rational judgment about any issue that cannot be proven to have been proscribed by Legislator through the sources of religious legislation currently within our hands (i.e., the Holy Qur'ān and the traditions of the Holy Prophet and Imams) must be decided as cogently acceptable.

However the reverse is also true. The progress of Muslim jurisprudence will take a totally different path if it is agreed that the absence of the Legislator's proscription on matters of this sort cannot serve as a sufficient proof of the cogency of rationally approved judgments in reference to innovated issues.

Therefore we aver that this matter is quite significant, as however it is ultimately decided will exert a considerable impact on the future course of Muslim jurisprudence.

Summary

In our discussion we have stated that our evidence of the validity of intellectual property rights and the copyright and patent laws protecting them is the rationally approved judgment supporting these concepts. We have applied the rational judgment about this matter to the laws enacted in support of these exclusive rights, but not to the major theme of the matter. As a result, we have concluded that the rationally approved judgment about these rights entails that all such exclusive rights as intellectual property rights, as protected by copyrights and patents, must be observed. However, an argumentive objection could be raised against this position. It could be argued that

intellectual property rights, and copyright and patent laws, are among the innovated issues, and that the rationally approved judgments about them are worthless and they cannot serve as cogent proofs, because any rationally approved judgment essentially requires the consent of the Legislator or the absence of His objection to it in order to be valid.

After that, we quoted Imām al-Khomeini's words about the cogency of rationally approved judgments whether or not they are connected to the age of the direct legislation. From the words of the Imām we have derived two possibilities of interpretation thereof, and explained the method of the consent of the Legislator to rational judgments in general, depending upon reason-based foundations. We have discussed these foundations along with the argumentive objections raised about them.

Argumentive Objection to the Imām's Word

The following question may be posed:

Is it feasible to deem cogent and valid any issue upon which people of good reason, in the capacity of their being rational people, have agreed unanimously a thousand years after the age of direct legislation?

First of all, we must take into consideration the fact that such an agreement does not meet the qualification of being grounded on a reason-based ruling and, as a result, it is not viable to apply to it the general rule of inseparability of reason

and religious law, which entails that whatever is decided by good reason must be inherently decided by religious law.

To explain, rational people have decided that intellectual property rights, as protected by the copyright and patent laws, are among the human rights that must be observed. However, this decision is not grounded on a reason-based ruling; therefore, it cannot be proven through or applied to the general rule of the inseparability of reason and religious law.

If we specify the consent of the Legislator as a condition for the validity of rationally approved judgments, we know for certain that the consent of the Legislator with regard to such innovated matters as intellectual property rights, copyrights, and patents is unavailing, although some points, which will be presently mentioned, may availingly reveal the Legislator's consent to these issues. In any case, it may be claimed that the absence of the Legislator's proscription of these innovated matters is sufficient proof of the validity of the rationally approved judgments.

However, it is possible to claim that the Legislator's proscription of a certain matter is contingent upon the materialization of that matter in reality or, furthermore, to claim that the Legislator might have proscribed an issue after He had foretold of its happening in the future. For instance, insurance contracts were not known a thousand years ago; their validity has been decided after their appearance in reality by the application of rationally approved judgments. If the Legislator had proscribed the use of insurance contracts in the age of

legislation, the people of that age would not have understood the matter, because they had no idea about insurance. Consequently, the proscriptions of the Legislator during that time must have been limited to the matters that actually existed at that time or, at the least, the the Legislator may have predicted their existence in the future, but without yet proscribing them; it would be contrary to rational thought for us to think that the Legislator might have proscribed things that did not yet exist, things that were not familiar to the people of that age. If we accept this analysis, then we have to confess that reason-based judgments about innovated matters cannot serve as cogent evidence—a conclusion that is adopted by the majority of scholars.

Doubting the cogency of the rational judgments about these matters is a sufficient proof of their invalidity, because, as proved by the fundamentals of Muslim jurisprudence, doubting the cogency of any judgment is equivalent to being certain of the nullity of its cogency. To explain, when we doubt the validity of a matter, this doubt demonstrates the invalidity of that matter.

In conclusion, a deep consideration of this issue as a whole forces one to conclude that those who disagree with the cogency of the rationally approved judgments about the innovated are right, and, as a result, the previously discussed position of the late Imām al-Khomeini cannot be accepted as true.

Misconceived Points

Some items may be conceivably regarded by some people as points of evidence establishing the cogency of rationally approved judgments with regard to innovated matters.

First Point: Some people have cited the following holy Qur'ānic verse as a valid point of evidence that proves the cogency of rationally approved judgments about innovated matters: "*Take to forgiveness, and enjoin the tradition (al-`urf), and turn aside from the ignorant.*" (7/199)

Their point of evidence is exclusively the part of the holy verse that reads, "*enjoin the tradition* (*wa'mur bi'l-`urf*)", since the Arabic word *`urf* stands for whatever is conventionally, familiarly, and consensually known by people as right and proper.

If we adopt the universal meaning of the word *`urf*, we must then explain this piece of the holy verse as follows: The Almighty God has instructed the Holy Prophet to order the people to do only that which they generally approve and accept.

If we understand the word *`urf* to carry such an all-inclusive meaning, then it clearly must include rationally approved judgments, and this forces us to conclude that the holy verse indicates the Legislator's consent to all of the rationally approved judgments and all of the traditionally approved matters at all times up to Resurrection Day, without exception.

Some people might allege that the definite article in Arabic (*al-*)[26] is added here to the word *`urf* in order to imply a certain definition of the word; such people allege on this pretext that the word should refer to a special kind of tradition, or convention. This allegation should be rejected, since clearly the definite article was added to make the word imply all of the classes that can come under *`urf* (tradition), including whatever is classified as *tradition* from the age of direct legislation up to Resurrection Day. Generally, all people are ordered to do whatever the Holy Prophet was ordered by God to do. Accordingly, the Holy Qur'ān, through this verse, must have consented to all of the rationally approved judgments that have been made and will be made up to Resurrection Day, and confirming their validity.

Argumentive Objection to the Proof

The word *`urf*, found in the holy verse being discussed, has a definite objective meaning; namely, it refers to the items that are familiarly known by all people as good and approved. Thus, the matter has nothing to do with religious laws; rather, it is related to the method of using and benefiting from rationally approved judgments in deducing religious laws.

It is definitely mistaken to say that people usually deduce religious laws by relying upon analogical reasoning (*qiyās*) and, as a result, that this process is included with the items indicated by the aforesaid holy verse. In fact, the practice of analogy in deducing religious laws is excluded from the purport of this holy verse, because numerous rational and

narrative points have proven the practice of analogy in the deduction of religious laws is forbidden. Thus, the holy Qur'ānic statement, "*And enjoin the tradition (al-`urf)*," has nothing to do with the laws; rather, it only pertains to the matters that people familiarly regard as exhibiting the theme of goodness as well as the issues that are considered right and proper in the view of sound reason, rational people, and the Legislator. Accordingly, the Qur'ānic statement can be interpreted as follows: "Point out for people the things and topics that are worthy of being described as right and proper."

In this regard, Shaykh al-Ṭabrisī, the author of *Majma` al-Bayān* (a famous book of Qur'ānic exegesis), says, "The word *`urf* is an indicative of the good conducts and the approved habits whose decency and soundness can be realized by the intellects of people."[27]

Similar words have been stated by the late scholar al-Ṭabāṭabā'ī[28] in his commentary on the holy verse involved.

In view of this meaning of the word *`urf*, the holy Qur'ānic verse appertains only to the applicable actions and titles of goodness, and it has nothing to do with the religious laws. In other words, the holy verse does not order us to approve of the religious laws that are deduced from rationally approved judgments and views.

Back to the main topic; i.e., the obligation of respecting intellectual property rights and observing the copyright and patent laws that protect them, we can only try to find out

whether the Legislator consented to the validity of the law that is deduced from the rationally approved judgment. We have, however, tried to provide as evidence the aforesaid holy Qur'ānic verse in order to prove that the Legislator consented to the rational judgments about all of the innovated issues from which religious laws are deduced, but we believe that the word *`urf* has nothing to do with religious laws; therefore, the holy verse is not related to the topic under discussion.

Similarly, the Holy Prophet is reported to have said, "The nobilities of character in the sight of God are namely to pardon those who have wronged you, to build good relations with those who have ruptured their relations with you, and to give those who have deprived you of their grants." The Holy Prophet then recited the holy Qur'ānic verse involved.[29]

This Prophetic tradition substantiates our contention that the holy verse has nothing to do with religious laws; rather, it appertains to certain ethical principles and moral behaviors.

To sum up, this holy verse does not shed any light on our main topic; i.e., the validity of rationally approved judgments concerning innovated matters.

Second Point: The following Qur'ānic verses may also be said to serve as evidence on the validity of rationally approved judgments about innovated matters:

"*Fulfill the obligations.*" (5:1)

"*... and the performers of their promise when they make a promise...*" (2:177)

To explain how these Qur'ānic texts are seen to serve as evidence on the topic under discussion, it is said that as long as rationally approved judgments are in reality a mutual promise among rational people, in that rational people promise to abide by these judgments, and these judgments represent the logical foundations that are consensually approved, adopted, and agreed upon by these rational people, and the word *`uqūd* (obligations) in the first holy verse and the word *`uhūd* in the second mean "promise", then the rationally approved judgments must be considered examples of obligatory promises, be they appertained to the theme or the law of a certain matter. Accordingly, if a rationally approved judgment entails that certain rights, like the intellectual property rights as protected by copyright or patent laws, must be observed and not be violated, even if this judgment is issued a thousand years after the age of direct legislation, then this judgment must be looked upon as a promise to be bindingly fulfilled, since the holy Qur'ānic verses confirm that it is obligatory to fulfill all promises.

As a matter of fact, this evidence appears more convincing than the previous one, which depends on the word *`urf* in that holy Qur'ānic verse, a word that has been proven to have nothing to do with religious laws. In the analysis of the present holy Qur'ānic verse a rationally approved judgment is defined as a mutual agreement, consent, and undertaking among

rational people, and the holy verse confirms that all promises and undertakings must be fulfilled, including those that will be manifested in the future up to the Resurrection Day.

Argumentive Objection to the Point

However, this evidence faces some argumentive objections, the most important of which is a widespread hesitation to accept rationally approved judgments as a kind of promise. If we ask rational people whether there is a mutual promise between them with regard to their judgments about the obligation of observing copyright or patent laws, they will definitely answer in the negative, and they will add that they consensually believe that consensus between them is available whenever there is a promise, but not the opposite; i.e., when there is consensus and agreement among them, this does not necessarily mean that there is a promise among them. To cite an example, let us pose the following question:

If rational people give their assent to the decision that a certain street may only be crossed at a definite point, does this imply that there is a mutual promise between them on this matter?

The answer is definitely “No.”

The reasoning behind this answer is thus: If one of these rational people violates this assent and crosses the street from a point other than the one generally agreed upon, the other rational people will judge that that the person has violated their judgment and norm, but they will never claim that that the

person has broken a promise. In other words, a breach of promise is not presented in such an issue. To define a promise, we say that it entails a cordial commitment between two or more parties. In fact, it happens a rational judgment on a certain matter is put into effect as a practical agreement between a thousand persons, but without there being a binding promise among them.

This is another example: If a group of people agrees to set a certain time for a lecture that must be attended by all of them, but one of them fails to present oneself at that very time, this does not entail that he has broken a promise.

In brief, in our conception, the consensual agreement of rational people does not conform to the nature and responsibilities of a promise.

The Rationally Approved Judgment as a Promise

Some professors deliberately aver that rationally approved judgments are customary promises, since normative customs treat these judgments as promises, in accord with the holy Qur'ānic verse that reads, "*... and the performers of their promise when they make a promise...*" (2:177), Consequently, it is argued, the Legislator must have consented to all of the rational judgments about innovated matters that will come into view up to Resurrection Day.

However, in our conception, these rationally approved judgments cannot be characterized as promises, and they are not seen as promises by custom, even though some people have

given them the name "promise" metaphorically and perhaps condescendingly.

Others have agreed that rationally approved judgments are customary promises and undertakings, but, at the same time, they have denied to include them among the customary promises that were allowed by the Legislator; therefore, these scholars conclude, they cannot be included with the general purport of the Qur'ānic verse: "... *and the performers of their promise when they make a promise*..." (2:177).

Generally, not all promises are applicable examples of the holy verse involved. In the same way, these rational judgments cannot be included with the general meaning of the other verse that reads, "*Fulfill the obligations*," since this holy verse includes only customary obligations after they are allowed by the Legislator.

Correspondingly, the first point that must be proven is whether the Legislator sees the copyright and patent laws as legally binding obligations, promises, and contracts.

Summary

In thrashing out the the meanings of these holy Qur'ānic verses we could not find in them any support that may prove the cogency of rationally approved judgments about innovated matters. However, because this study is of such great importance, it is imperative to keep on investigating in this domain. We thus say: If rational judgments about innovated matters are held as cogent (in the sense that these judgments can

serve as forceful proofs), then many laws will inevitably stem therefrom, but, on the other hand, if they are not proven so, then many contrasting laws will come forward.

Supplementary Discussion

Back to the topic of the argumentive objection to providing holy Qur'ānic verses as evidence to prove the cogency of rationally approved judgments about innovated matters. The following Qur'ānic verse was cited as evidence: "*Take to forgiveness, and enjoin the tradition (al-`urf), and turn aside from the ignorant."* (7:199)

Having discussed this holy verse from several aspects, we concluded that providing the verse as evidence of the point at issue was imperfect, and we then provided a good number of attestations. In addition, we say that the holy verse comprises three sections, two of which—namely, "*take to forgiveness*" and "*turn aside from the ignorant*"— entail recommendation (i.e., the holy verse recommends that we take to forgiveness and to turn from the ignorant); therefore, the directive of *enjoining the tradition* clearly must also be taken as recommended, as is dictated by the contextual course of the holy verse.

If this recommendation is taken for granted, the holy verse then is completely irrelevant to the point under discussion, which is namely the cogency of rationally approved judgments with regard to innovated matters, meaning that when rational people adjudge that the copyright and patent laws must be

observed, then everyone becomes duty-bound to observe these laws.

On the other hand, if we bindingly agree to the claim that the word *`urf*, mentioned in the holy verse involved, includes the rationally approved judgments about all innovated matters, then the meaning of the holy verse consequently requires us to act upon the rational judgments about these matters. Thus, the meaning of the verse must be as follows: It is imperative that you should order people to act upon these judgments.

Still, this meaning is imperfect, because the point to be proven is that it is obligatory to act upon rationally approved judgments.

My view, unlike the conclusion of the late Imām al-Khomeini, is that it is impossible to prove the cogency of rationally approved judgments about innovated matters. In other words, the previously cited points of evidence cannot prove the validity of each and every rational judgment; therefore, it is impractical for jurisprudents to lean on such points as their foundation and evidence.

Solving the Problem on the Basis of the Reversal Presumption of Continuity

There remains one way only to solve the problem:

Now that we are certain that rational people deem it obligatory to observe the copyright and patent laws, we still doubt whether

this judgment corresponds to the judgment of the rational people who lived in the age of direct legislation with regard to this issue.

In such cases, we should act upon the *Uṣūlic* principle of the Reversed Presumption of Continuity (*al-istiṣḥāb al-qahqarā'ī*), which is the opposite of the familiar principle of Presumption of Continuity (*al-istiṣḥāb*: acting upon something according to its previous state). In the familiar Presumption of Continuity there is a previous certainty (of something) and a subsequent doubt, but in the Reversed Presumption of Continuity, there is a previous doubt and a subsequent certainty. As an example of the Reversed Presumption of Continuity, we say that in *`Ilm al-Uṣūl*, under the topic of recognizing the meanings of the words, the word *ṣalāt* (prayer) is understood in the present day to mean the daily ritual utterance and practice of certain recitations and actions as genuflection and prostration. This is in fact, today, the tangible and precise meaning of the word *ṣalāt*. However, we doubt whether this word originally carried this current meaning (from the beginning of its use),and therefore we wonder whether the meaning of the word must not be changed, or whether the word originally carried another meaning but in time it was given the present meaning. In the course of proving that the present meaning of the word is essentially the same at the beginning of its use, scholars invoke the Reversed Presumption of Continuity.

By applying the same principle to the topic under discussion (i.e., the obligation of observing the copyright and

patent laws), we can say that we are certain that such a judgment about the obligation of observing these laws has been issued by rational people, but we doubt whether such a judgment was believed by the rational people who lived in the age of direct legislation. In this case, we invoke the principle of the Reversed Presumption of Continuity to prove that the rational people who lived in the age of direct legislation adjudged the same verdict about issues that were similar to the one of the copyright and patent laws, and, as a result, whether this judgment and others like it should no longer be regarded as judgments about innovated matters.

Argumentive Objection to Acting upon the Reversed Reversal Presumption of Continuity

Although we have accepted as valid use in this context of the Reversed Presumption of Continuity and consented to the supposition that there is no difference between the reversed and the familiar presumptions of continuity with regard to their cogency (i.e., validity as evidence), we still face the problem that previous ages did not consider the question of the copyright; rather, if we are asked whether there was a rationally approved judgment of the obligation of observing the copyright or patent laws in previous ages, we will have no other way than confessing that there was no such thing, since we are certain that the judgment about this issue arrived on the scene in the last one or two hundred years. As a result, there is no way to act upon the Reversed Presumption of Continuity in this question.

Findings of the Study

The most important evidence of the obligation of observing the copyright and patent laws is the proven validity of the relevant rationally approved judgments. As we accept this evidence with regard to the themes of the laws, we believe that rational people consider intellectual property to be one of the rightful dues and personal properties, and copyright and patent laws, therefore, as protections thereof that one must abide by. Therefore, if intellectual property is a rightful due and a personal property, it is then obligatory to observe and not to violate the copyright and patent laws that protect it, as required under the general rule of "*It is illegal to take to oneself as personal property any part of a Muslim's assets against his will*."

In this manner, the process of providing evidence of the obligation of observing the copyright and patent laws by citing such traditional (i.e., narrative) proofs, becomes perfect. As a matter of fact, it is not objectionable to rest on rationally approved judgments in revising and diagnosing a subject matter and then to provide these judgments as evidence.

However, if we intend to deduce a religious law from a certain rationally approved judgment and, with regard to the question under discussion, we aver that rational people believe in the obligation of observing intellectual property rights and the copyright and patent laws that protect them, and, as a result, we take on the obligation of observing them, we will still have to face the fact that the rational people's judgment about the

copyright and patent laws is an innovated matter that cannot serve as a point of evidence.

Second Evidence

The second evidence of the obligation of observing rationally approved judgements about innovated matters in general, and specifically the copyright and patent laws, is the general jurisprudential principle of the duty of fulfilling all obligations, which is inferred from the following holy verse: "*Fulfill the Obligations*."

To provide this holy verse as evidence, we say that one who writes a book possesses exclusive rights, namely intellectual property rights, that the writer can seek protection for by securing a copyright on the book. The writer may then contract with another person to transfer this copyright to him in return for a sum of money. We question, however, whether it is obligatory to fulfill this agreement. In order to remove the doubt, we decide the obligation of fulfilling this agreement, in its capacity as a legally binding arrangement between two parties, by depending upon the general meaning of the principle of "*Fulfill the Obligations"*.

Argumentive Objections to the Second Evidence

First Objection

There are two possible interpretations of the meaning of "*Fulfill the Obligations*."

First, it is possible that the obligations mentioned in the holy verse exclusively speak of legally binding contracts to which the Legislator has consented. In this case, we must first of all establish that such agreements about the transference of copyright are legally binding in order to prove the religious responsibility for fulfilling them. In fact, this point cannot be proven.

Second, in a position adopted by the majority of scholars, it is possible that the obligations mentioned in the holy verse are specifically rationally approved contracts, which are contingent upon the existence of properties or rightful contractual dues; otherwise, a contract would not be considered legally binding. In the question of copyright, we have doubts whether intellectual property is considered personal property and whether a copyright on such property is considered rightful due. In view of this doubt, we lack any evidence to prove the obligation of observing copyright or patent protection of intellectual property rights.

To put this argumentative objection in a few words, we say that because we cannot prove copyrights and patents to be rightful due in protection of a form of personal property, we cannot prove that they are rationally approved or legally binding contracts. As a result, copyrights and patents cannot be included within the general meaning of "*Fulfill the Obligations*." For instance, when two parties conclude a contract about the possession of trees in a forest, this contract cannot be decided as legally binding as long as we doubt the

existence of the trees of that forest. Therefore, the contract cannot be included with the general meaning "*Fulfill the Obligations*."

Second Objection

The second objection is that the evidence (i.e., the principle of "*Fulfill the Obligations*") is more specific than the point to be proven (i.e., the obligation of observing copyrights and patents), because a copyright, for example, can come into effect notwithstanding whether there is a contract concluded between the writer and any other party.. We can therefore put the question in the form of the following question:

If there is no contract concluded between the author of a book and any other party, will then any rights like the intellectual property rights as protected by copyright (or patent) be established for the writer?

More specifically, if for instance someone publishes and sells copies of the original book manuscript without the author's permission and/or without properly remunerating the author, will it then be obligatory upon the one who has done this to make restitution to the author; and will the copyright be inheritable in case of the writer's death?

In fact, when proved as a valid point of evidence, the principle of "*Fulfill the Obligations*" only validates the *obligations* that were concluded on the basis of such rights, and this is more specific than the point to be proven. As a result,

providing the holy verse as evidence is imperfect and is subjected to two argumentive objections.

Third Evidence

The third matter to be provided as evidence of the obligation of observing copyright and patent protections is the jurisprudential rule of *lā-ḍarara* (no damage) that is derived from the Prophetic tradition that reads, "*Damage is forbidden in Islam, be it initial or consequent*."

Accordingly, failing to observe the rights of the writer of a book certainly causes a sort of damage to him. In other words, when a publisher publishes a book and does not observe the rights of the author of the books who has certainly exerted efforts to create this book, perhaps working on it for ten years, this definitely means that the publisher has caused damage to the writer, and his act is unquestionably in violation of the Prophetic tradition and jurisprudential rule of "*Damage is forbidden in Islam, be it initial or consequent*."[30]

A similar example would be the case of a publisher who took an essay that was handwritten by an author person and published it under his (i.e., the publisher's) name.

Argumentive Objections to the Third Evidence

A number of objections can be raised against this evidence:

First Objection: Scholars have said different opinions about the meaning of the expression *lā-ḍarara* (no damage).

The late Imām al-Khomeini states that application of this rule is restrictedto the issue of governing, and so it has nothing to do with other issues and cannot be applied to any other case than governmental issues. In other words, this rule is inapplicable to other religious laws.

The majority of scholars have had another opinion with regard to the meaning of the rule. They state that it is a consequential law that can administer the primary religious laws. For example, in the question of the ritual ablution (*wuḍū'*), the evidence is derived from the holy Qur'ānic verse that reads, "*When you rise up to prayer, wash your faces and your hands as far as the elbows, and wipe your heads and your feet to the ankles."* (5/6) However, the holy verse at hand forbids damage; if performing the ritual ablution could cause damage to oneself, this rule takes primacy; it is therefore permissible not to perform the ritual ablution. The exception in this law is based on the rule of *lā-ḍarara*. In this way, the rule of *lā-ḍarara* administers the primary law of performing the ritual ablution.

Second Objection: The context of the rule is in the negative form, which thus implies removal of a damage that has been earlier caused, while the point to be proven through this evidence is to confirm affirmatively certain rights for the author of a book. Therefore, it is unfeasible to provide a rule of a negative sentence as evidence of proving an affirmative case. As a rule, it is mistaken to use a negative form for proving an affirmative case.

Another Point of Evidence for Observing the Copyright and Patent Laws

Up to this point, we have mentioned a number of points of evidence to prove the obligation of observing the copyright and patent laws, but some of them have been fairly acceptable while some others have been objectionable. However, there are still other points of evidence that can be offered for proving the question at issue. One of these points is based on the universal acceptance of the forbiddance of larceny and usurpation: for example, if one publishes another's book before obtaining his permission the publisher has in fact usurped the author's rights and even committed larceny. As long as usurpation and larceny are forbidden in religious law, one who does these things has committed a forbidden act and perpetrated an act of disobedience to God.

Argumentive Objections to this Evidence

First Objection: Usurpation and larceny can only occur when the usurped or stolen thing is proven as personal property or rightful due; hence, one who violates or does not observe the rights associated with these properties and dues comes to be regarded as a usurper or a larcener. It is therefore impermissible to depend on this evidence in deciding a thing to have been usurped or stolen unless that thing is proven to have the qualities of personal property or rightful due. In other words, before proving a thing to have been usurped or stolen, we have to prove it to be a personal property or a rightful due. Only then

can we prove a thing to have been usurped when others dispose of it without obtaining its owner's permission.

Moreover, scholars have set out many definitions for usurpation. One of these definitions states that usurpation is to misappropriate others' property in an aggressive way.(31)

Depending on this definition, we still have qualms whether intellectual property, as protected by the copyright and patent laws, is a personal property of the author.

Second Objection: Plagiarism, or literary theft, has become a common problem in the present day; it is alleged, for instance, in such cases as when one compiles a book by quoting chapters or paragraphs of books of other authors. Similarly, one who publishes a book without obtaining the author's license or reprints a book for making personal profits is said to have committed plagiarism. Nevertheless, the jurisprudential concept of theft is not applicable to such cases. According to its Islamic jurisprudential meaning, theft is one of the forbidden acts that bring about a certain specified religious punishment after careful analysis of the facts in the case are reviewed in reference to relevant texts in books of religious laws. Accordingly, theft in its jurisprudential concept is not applicable to the so-called literary thefts even if such acts of plagiarism are, metaphorically or condescendingly, expressed as thefts. Thus, the use of such expressions must not lead us to mistake the facts. When one ignores the copyright on a book and publishes it without obtaining the author's permission, people commonly ascribe theft to the perpetrator, claiming that

this is an example of theft, which is one of the grand sins. However, even if we concede that this is a case of neglecting the copyright law, we are still unable to prove this act is one of the grand sins. In other words, the use of the expression "theft" must not make us commit a mistake by deciding that such an act is forbidden; rather, we must first of all make sure that the jurisprudential concept of theft or usurpation is applicable to situations of so-called literary theft.

In brief, it is unfeasible to provide this point as evidence, as long as we doubt if such acts can actually defined as larceny or usurpation.

Proving the Question through Reason

Actually, the most forceful point of evidence that may be used in this regard is reason, which can be used persuasively in several ways:

First Reason-Based Approach: It goes without saying that someone who publishes a book without obtaining the author's permission has committed a wrongdoing, and the hideousness of any wrongful action is one of the primary reason-based laws even if the action has nothing to do with larceny and usurpation. In other words, to publish or sell a book before obtaining the author's permission, to quote a certain passage from another book and then ascribe it to oneself, to use the special name of a reputable company and stick it on the products of another company in order to benefit from the good reputation of the first company—all these acts and their likes

are examples of wrongfulness as testified by custom and rational people. Reason, in its turn, testifies to the hideousness of wrong, and, as a rule, whatever is decided by reason as good must be also decided as good by the religious law; therefore, the Legislator must have decided wrong as hideous and evil.

In my conception, no argumentive objection or formal contrary reasoning can be raised against this reason-based approach. We thus can conclude that to publish a book without obtaining its author's permission is wrong. In giving the quality of wrong to an action, it is not conditional that the object of the wrongdoing should be an item of personal property belonging to another person rather, it is sufficient to prove it to be another person's due so that non-observance of this due will be decided on the basis of reason as wrong. In plain words, when we come to know that the object of wrongdoing is the rightful due of someone, we can decide that any violation or non-observance of this rightful due is wrong, and wrong is hideous in the sight of reason. Similarly, we can recognize an action as wrong according to the view of custom. From this way too, we can discover the existence of a rightful due (for the wronged party).

In the majority of the previously claimed points of evidence and argumentations, we have faced the objection that a thing must be proven as a rightful due before applying this or that evidence to it. For instance, in the question of proving the violation of copyright law as usurpation, it was essential to prove a thing to have the quality of personal property before it could be proven to have been usurped. On the contrary, in the

current evidence of proving the violation of the copyright law to be a sort of wrong, one which is hideous in the sight of both reason and religious law, we need do nothing more than confirm that custom decides the non-observance of such rights as wrong, which necessarily entails that copyright protection is a rightful due of its owner. Accordingly, custom deems obligatory to observe the copyright law and the other exclusive rights. Thus, none of the previously raised objections can be applicable to this reason-based evidence.

Second Reason-Based Approach: Apart from applying wrongfulness to the question, reason decides that every man has priority over his own product; therefore, reason sees that one who produces a foodstuff, builds a building, or establishes a shop has priority that no one else has to use and dispose of what he has produced, built, or established. As reason admits the priority of the maker over what he or she makes, so also does it admit the priority of the makers over the subsequent products made from that original creation. To give an example, the writer of a book has the right to make a thousand copies of his book and sell them in order to gain profits. Reason thus decides that the owner of the book is the only person entitled to benefiting from his book, though he may contract with others, such as a literary agent and a publishing house, to help him with the marketing of his book in return for a portion of the profits. But the very fact that an author can in this way dispose of a portion of the profits proves that the author has the priority in benefiting from the book. Thus, this priority is realized by sound reason.

If we accept this premise, our claim (of the obligation of observing the copyright law) will be perfect and our evidence will be acceptable. However, some scholars argue that the first thesis is true, but its result is not; i.e., they believe as true the priority of persons over the things that they made, but they do not believe in the priority of persons over the subsequent products of the things that they made.

In my conception, this disjunction between the two premises is inaccurate, because reason does not make any distinction between the two theses (i.e., the original creation and the subsequent products). As a matter of fact, the criterion on which these premises are based is the fact that the action is its maker's, and as long as the maker has done this action, reason decides that the maker has priority over what he has made and not anyone else. The same criterion is applicable to the further results and effects of the original creative act; hence, the creative person is entitled to the effects and results of one's action and no one else is.

Third Reason-Based Approach: Many reason-based points have been used for deducing laws in miscellaneous fields of jurisprudence. For instance, reason approves the obligation of maintaining the social system of human beings, and disapproves and deems hideous whatever violates the maintenance of the human social system. In fact, the issue of "maintenance of the system" can be obviously noticed in the majority of the fields of Muslim jurisprudence, since the principium and criterion of making the individual duties[32] is the maintenance of the social

system of humanity. For instance, it is said that learning medicine, engineering, and religious knowledge are individual duties, because the social system cannot dispense with a practical existence of these fields of knowledge; therefore, reason deems learning about them obligatory to maintain the social system and deems hideous the failure to do so, as it would create disorder in it.

Let us now cite examples in which this reason-based evidence is applied to various fields of jurisprudence:

The legality of the administration of justice in every human community has been legislated in Islam on the basis of its essential importance to the maintenance of the social system. In the event that two parties enter into a dispute about any case, it becomes obligatory upon both of them to refer the case to a judge for arbitration. If judicature had been illegal, the entirety of human justice would certainly have been exposed to disorder in cases of dispute, and a quarrel between two or more people would have been resolved in some chaotic manner, there being no qualified person to put an end to their dispute and to adjudge between them. This law (of referring to a judge for arbitration) is essentially based on reason, which deems hideous any disorder in the social system.

In the jurisprudential field of *ijtihād* (deducing religious laws from the sources of jurisprudence) and *taqlīd* (acting upon the verdicts of a well-qualified expert in the religious law), if one neglects to study religious knowledge sufficiently to attain the level of *ijtihād* and, at the same time, does not act upon the

verdicts of a well-qualified jurisprudent, rational people will bind that individual to act upon *iḥtiyāṭ* (precaution: taking precautions with regard to carrying out the religious duties and avoiding the prohibitions). In fact, maintaining the social system of humanity is contingent upon such persons acting upon *iḥtiyāṭ*; i.e., one is allowed to practice *iḥtiyāṭ* only if one's practices do not create disorder in the social system of the community. However, there is another extreme; if we take precautions in all of the issues that we are not sure about and in all of the probabilities of any issue, then we will have to leave all of our affairs unaccomplished and remain at home, overwhelmed by consideration of our *iḥtiyāṭ*. For that reason, the practice of *iḥtiyāṭ* may be required only when by being invoked it does not lead to disorder in the human system.

In the jurisprudential field of executing religious punishments, we can obviously see the workability of reason-based deductions. For instance, it is obligatory to execute the punishment of larceny in the Muslim community, because, if this punishment is not executed, there will be disorder in the system of the community. Besides this reason-based evidence, there exists another devotional duty that entails the impermissibility of suspending the execution of any religious punishment. Accordingly, whoever suspends the execution of any religious punishment has in fact committed a forbidden act.

Apart from this evidence that is derived from a religious decree, reason indisputably decides that any suspension of executing a religious punishment will initiate disorder in the social system.

In the field of the forbiddance of blocking the ways of obtaining knowledge, the same reason-based evidence is provided. If we accept as necessary the blocking of the ways of obtaining knowledge and, instead, abide by the non-cogency of absolute conjecture, this will definitely create disorder in the social system.

Providing the same reason-based evidence (i.e., the obligation of maintaining the social system) for proving the necessity of establishing a government under the absolute authority of the well-qualified jurisprudent (*wilāyat al-faqīh*), the late Imām al-Khomeini, in his book entitled *Kitāb al-Bay`*, states:

> The maintenance of the human system is one of the highly confirmed duties, while disorder of the Muslims' affairs is one of the abominable things. In fact, this is not restricted to Muslims; rather, it is so general that it includes all people. Based on this fact, reason decides that the jurisprudent (*faqīh*: a well-qualified expert in the religious law) is required to lead the government, as is demanded by the reason-based duty of the maintenance of the human system. (33)

In the jurisprudential field of enjoining the right and forbidding the wrong, some scholars believe that independent (i.e., good) reason decides that whoever refrains from preventing the taking place of an evildoing in the community, helps to create disorder in the social system. For instance, any attempt to tell a lie, steal something, accuse others falsely, or

commit adultery gives rise to disorder of the human system, which is a hideous thing. Therefore, the hideousness of creating disorder in the human system is one of the proofs of the obligation of enjoining the right and forbidding the wrong.

In addition, there are many other examples, in various fields of jurisprudence, of providing the reason-based approach for maintaining the social system and the hideousness of creating disorder in this system.

Applying this approach to the issue under discussion (i.e., the obligation of observing the copyright and patent laws), we can easily see that violation of these laws is commonly considered a hideous thing that causes disorder in the human system. Of course, one who publishes and distributes a book or creates a DVD of a movie and sells copies without first obtaining the author's permission is considered to have committed a hideous deed that causes disorder in the social system, given the fact that the author of the book and the maker of the movie, for instance, must have exerted great effort and spent a long time in writing that book and making that film. Thus, when someone other than the author of the book or the maker of the film publishes the book or distributes the film without obtaining the author's or the maker's permission, this indisputably means that he has created disorder in the human system. Good reason deems hideous any action of creating disorder in the human system; therefore, the observation of such rights must be obligatory.

Apparently, this reason-based evidence is much more convincing than the previously mentioned rational judgments.

Use of the Reason-Based Evidence for Issuing Positive Laws

In the previous discussion, we discussed three reason-based approaches in support of the obligation of observing the copyright and patent laws. In short, we concluded that the strongest supportive, reason-based argument in favor of observing the copyright and patent laws is in accepting these laws as conscientious (i.e., governed by a sense of duty) laws rather than positive (i.e., actual) laws. In other words, because negligence in observing the copyright and patent laws brings about wrong or disorder in the social system, it becomes obligatory to observe these rights. However, to deduce a positive law from this reason-based evidence is impossible, in the sense that those who violate such exclusive rights cannot be subjected to the effects of the violation of rights and it cannot be decided that they should guarantee the violated rights depending on this reason-based evidence, because good reason does not decide that those who violate others' rights should guarantee the damages they cause to the owners of these rights, although good reason decides such violations are forbidden. In fact, guarantee, in such cases, is a result that issues from this very reason-based evidence. Likewise, on the basis of this reason-based evidence it cannot be decided that such exclusive rights as those protected by the copyright law are inheritable; i.e., that, when the owner of a copyright passes away, the copyright protection transfers to his or her heirs by way of inheritance.

However, if we can prove the intellectual property and the copyright or patent that protects it to be an item of personal property, only then can we consider whether it is an inheritable item of the legacy of the deceased person. On the other hand, if we cannot prove it so, the intellectual property and the protection of copyright cannot transfer to the heirs by inheritance.

Conclusion

So far, we have mentioned five points of evidence for proving the obligation of observing the copyright. Yet we have expressed reservations about some of them and agreed to others. In conclusion, we have presumed that rational people have no doubts about deciding that intellectual property rights are exclusive rights that must be observed. However, if the validity of the existence of such exclusive rights for one who writes or publishes a book is denied or doubted, then there will remain no other way to prove this right, either through applying rationally approved judgment in the subject matter or in the ruling, or through any other evidence. As a matter of fact, this conclusion has been declared by some scholars, one of whom was the late Imām al-Khomeini who, having investigated the topic of the contemporary issues, said on the last pages of his book of *Taḥrīr al-Wasīlah* 2:562:

> As for the currently discussed (by jurisprudents) issue of the so-called copyright or publishing right, we do not accept it as an obligatorily observed right in the view of the religious law. In fact, one who purchases a book becomes the legal owner of that book. The book then is

> added to one's personal property and the jurisprudential rule of '*People are invested with authority over their properties,*' is applied to that case.

He adds:

> In case that such statements like "all rights reserved," or "all rights recorded and reserved for the publisher," are written on the cover of a book, this does not leave any effect on the question (i.e. the question of the invalidity of the obligatory observance of the copyright).

By virtue of the Imām's deduction, if we doubt the existence of the qualities of property and rightful due for these exclusive rights, then there is no way to deem legal these contracts, which are currently expressed as intellectual property. On the other hand, if a well-qualified jurisprudent believes provably that rational people recognize these exclusive rights and consider them as a matter of personal properties and rightful dues, then we have to accept and commit to the obligation of observing the copyright law, because, generally, it is obligatory to observe the rights of others and it is forbidden to violate them, as is entailed by such jurisprudential rules as: "*It is illegal to take to oneself as personal property any part of a Muslim's assets against his will,*" and "*Whoever damages the others' property must guarantee the damage*."

As a matter of fact, the damage of a thing is identified according to the nature of that thing. For instance, the damage of a glass vessel is evidenced by signs of cracks or breakage, which must be legally guaranteed by reimbursing the owner for

the value of the vessel. Similarly, the damage to the creative works on a CD is evidenced by the existence of unauthorized copies of the creative works, which must be legally guaranteed by paying off all the dues (including lost revenues) to the owner

Thus, if a jurisprudent claims establishing intellectual property as a form of personal property with certain inherent obligatorily observed rights, and the copyright and patent laws as obligatorily observed laws protecting those rights, and does so on the basis of the opinion of rational people, then the rationally approved judgment about this issue will be applied to the theme, but not the specific examples, of the issue. Moreover, this rational judgment will no longer require the Legislator's specific recognition. Only then will the question be proven perfectly. The same thing is applicable to the other points of evidence, such as reason-based evidence, although the latter results in a conscientious law (i.e., the obligation of observing copyright and patent laws) and not a positive law (i.e.m consequent rulings, such as guarantee and inheritability).

Sunnis' Evidence of the Copyright

Sunni scholars certify the validity of the copyright law as a legal protection of an obligatorily observed exclusive right by depending upon the rule of the so-called *al-Maṣāliḥ al-Mursalah* (the rationally acceptable advantages), which, in their conception, stands for every judgment that corresponds with the Legislator's objective of and purpose for enacting religious laws, even though any special evidence that is deduced from the Qur'ānic and Prophetic texts is absent with regard to that

judgment. However, the Imāmiyyah scholars object to this deduction and evidence because they do not believe in the cogency of the so-called *al-Maṣāliḥ al-Mursalah*.

Remarks

In previous discussions we have demonstrated the jurisprudential frames of the question of intellectual property rights and the copyright and patent laws as legal protections of them, within which we have cited proofs that intellectual property has certain inherent obligatorily observed exclusive rights, and also investigated the question in considerable detail. However, there are still some aspects of the question worth discussing. We will now discuss to these points as remarks.

If we can prove the validity of intellectual property rights through the aforesaid points of evidence and regulations, no argumentative objection can be raised against its validity and, as a result, we can say that whoever exerts effort to write a book will be legally exclusively entitled to hold these rights as protected by copyright law. Similarly, whoever invents an apparatus will be legally exclusively entitled to the intellectual property rights protected by patent law. If we prove these points, then it would not be permissible for others to publish, copy, or utilize the book or the apparatus without first obtaining the permission of the author or the inventor. However, if the supreme religious authority does not accept our conclusion and judgment about intellectual property rights as protected by the copyright and patent laws and, instead, denies the validity of

such exclusive rights, then there will be two options to be studied carefully:

First Option: We have to investigate whether it is possible to prove the validity of the copyright through a consideration of the act of stipulating. Let us examine, for example, the agreement by the author of a book to sell a copy of his book to another party on the that the condition that the other party will not make unauthorized copies of parts of the book nor reprint it in its entirety, or the agreement by the author to authorize another party to publish the book with the condition that the other party will pay him a sum of money. If such stipulations are specified by the author, does the situation demonstrate that the author does have certain exclusive rights with regard to his book that if he chooses he can sell like any other item of property?

In answer, some master scholars who, though they deny the validity of intellectual property rights as recognized by the copyright and patent laws, have decided that, in contracts between authors and publishers, it is obligatory upon the latter to fulfill any agreed-upon condition that is specified by the author of the book, because, as a legally binding principle, "*The believers are required to fulfill the stipulations (upon which they have agreed)*."(34)

Still, this verdict is argumentively objectionable, because the aforesaid legally binding principle is restricted to the legally approved conditions exclusively. In other words, if we doubt the author of the book enjoys exclusive intellectual

property rights, then we have to doubt the validity of his stipulating. For example, if we agree with these scholars that the author has no intellectual property rights, then we may infer that such stipulations of the seller (i.e., the author of the book) are in violation of the jurisprudential principle of "*People are invested with authority over their properties*." For, if it is denied that the author has certain rights attached to every copy of his book that is sold, rights that implicitly the purchaser agrees to as a condition of sale, then the purchaser has an absolute and unrestricted right to make copies himself and put them on sale, and even to republish the book under the purchaser's name (what in common parlance is called plagiarism) – since the principle states that "*People are invested with authority over their possessions*," then the purchaser has the right to do whatever he wishes with what is his legal possession, because, in such case, the copy of the book becomes the possession of its purchaser. Thus, by this rationale, if the seller of the book specifies any further stipulation, this will be in violation of the Holy Qur'ān and Prophetic traditions.

To sum up, a jurisprudent who denies intellectual property rights as protected by the copyright and patent laws as obligatorily observed exclusive rights is not allowed to claim the unobjectionable validity of any stipulation that is agreed upon by the two parties to a sale contract of a book. It would be ludicrous to write a sale contract that stipulated the following: "This commodity is no longer mine, and I have no right to dispose of it. However, if you (the other party) want to do anything with it, you are allowed to do on the condition that you

will pay me an additional sum of money for that." Of course, such a stipulation would be invalid.

Second Option: Is it acceptable to prove the validity of intellectual property rights and the copyright and patent laws that protect them by subjecting them to the rubrics of positive laws and regulations?

To put this question in other words, we say that there is uncertainty among rational people about the validity of the copyright as protecting obligatorily observed exclusive rights. However, if these rational people were to make a binding law entailing that it is illegal for others to publish or reprint a book without obtaining the author's permission, but the author is allowed to give such permission in return for an additional sum of money, then would this law validate the author's exclusive rights?

To answer, such a law would be treated as same as the previous example of stipulations: the same argumentive objection would be raised, because just as a stipulation is valid only when the seller (i.e., the author) enjoys such an exclusive right in his commodity, so the author cannot give permission to publish unless he has some exclusive right in his commodity that empowers him to do so. On the other hand, it does not seem objectionable to enact a law entailing that publishing a book without obtaining the author's permission is in violation of the law and, as a result, whoever violates this law will have to undergo a fee. The like of this law is the law of imposing a fine on those who violate the traffic control, although this issue is

totally unlike the issue of the copyright, which we, in this study, try to prove it as a legally binding entitlement and a personal property so that it will be included with the legally approved contracts and the inheritable properties.

To look upon the question from the aspect of law, publishing a book without obtaining the owner's permission is widely considered a civil crime , although it is different from the question of the rationally approved guarantee. For example, if the law supposes that one who publishes a book that belongs to another person must be fined a thousand dollars even though the financial value of the violated intellectual rights in that book is estimated by specialists to be one hundred dollars only, this will be considered a felony and the rationally approved guarantee will become inapplicable as in effect it has already been met. Besides, the law has the authority to identify the validity of copyright registrations to a certain period, such asm under the worldwide Berne Convention, the author's lifetime plus at least fifty years. Thus, does the legal copyright on a famous book like *Mafātīḥ al-Jinān* continue and transfer to the heirs of the original owner up to Resurrection Day? The answer is negative, because the copyright by law is given a certain validity period.

On the other hand, if we consider exclusive intellectual property rights to be inheritable properties, does this apply to the observance of the copyright law?

As noted, most of the world is under the Berne Convention, which allows a copyright registration to remain in effect for the

author's lifetime plus at least fifty years. However, if we depend upon rationally approved judgment to prove that intellectual property is a form of personal property, then the ownership of intellectual property and presumably the copyright registration that protects it, cannot be limited to a certain period; all forms of property are inheritable *ad infinitum*; just as a house never enters the public domain but is inherited by the descendants of the original owner, so too intellectual property should never enter the public domain. Yet, if we prove the necessity of observing the copyright law by means of reason-based evidence, which means that any negligence in observing the copyright law will result in disorder of the social system and/or result in a wrongdoing, we will then conclude that it is obligatory to observe the copyright law on the condition that this observance does not lead to a wrongdoing. To give an example, if the author of a book or his heirs enjoy an exclusive right to publish or reprint his book for fifty years beyond his death, and after these years another person republishes the book, no offense is done to the author and no disorder is created in the social system. According to this latter scenario, it is possible to limit the validity of copyright registrations to a definite period.

Proving Intellectual Property Rights through the Absolute Authority of the Jurisprudent

We have already stated that the responsibility to guarantee a damaged item of property cannot be proven through law, because enforcing the responsibility of guarantee is contingent upon proving the damaged thing to be an item of

personal property and a rightful due. As a thing cannot be proven to have the quality of property except by the means of a stipulation agreed upon by the two parties to a contract, so also the law cannot prove it to have this quality. Nevertheless, laws can identify financial fines in cases of their breach.

As has been previously mentioned, master scholars like the late Imām al-Khomeini deny the obligatory observance of such exclusive rights like the copyright and patent, and they even do not believe in the existence of such rights; therefore, there remains one way only to prove the obligation of observing these rights; namely, the way of law, in the sense that if the law decides that such rights must be observed, it becomes obligatory to observe them. In the previous lines, we have discussed this topic with details.

However, there is still another point to be discussed in this regard. This point can come in the form of the following question:

Is it possible to prove intellectual property rights as protected by the copyright and patent laws as obligatorily observed exclusive rights by way of the Absolute Authority of the Jurisprudent (*wilāyat al-Faqīh*)?

In other words, if a well-qualified jurisprudent who enjoys absolute authority over people and to preside over the government (i.e., *al-walī al-faqīh*: the supreme religious authority) realizes that the common interest of the Muslim community lies in observing such exclusive rights as

intellectual property rights, as protected by the copyright and patent laws, is he legally allowed to make a formal decision to enjoin observation of these rights?

Before giving an answer to this question, we have to state that there are two opinions regarding the absolute authority of the jurisprudent. Some scholars believe that the authority of a jurisprudent in property issues is restricted to his guardianship over the properties of the underaged and the absent. Others, however, believe that the authority of a jurisprudent is so extensive that it includes whatever supports or enhances the best interests of the religion and the Muslim community, and, in this case, that a jurisprudent enjoys an absolute authority over all of the affairs of the community.

With reference to the question under discussion, if we believe in a restricted authority of the jurisprudent (to property rights involving minors or the absent), the jurisprudent has no right to issue such a verdict (as long as intellectual property rights are not proven to be obligatorily observed exclusive rights).

On the other hand, if we believe in the limitless authority of the jurisprudent, it is then legally possible for him to issue such a verdict.

To shed further light on the question of the authority of a jurisprudent, let us cite the following example:

In cases of wives whose husbands have been absent from them for ten years or refuse to live with them, or who deprive them of their legally deserved alimonies, or who refrain from divorcing them under such conditions, or who cause difficulty and livelihood constriction to their wives—we, depending upon the principle of "*The legal ruler is the guardian of the refraining husband*," confirm that it is under the authority of the jurisprudent to coerce such husbands to divorce their wives and, if the husbands refuse, then the jurisprudent has the right to declare such wives as formally divorced.

However, if the jurisprudential principle of *lā-ḥaraja* (i.e., "any difficulty is rejected") is applied to such cases, it becomes legal for a wife to demand a divorce from her husband without need to refer to the religious authority and, if the husband refuses, then she has the right to proceed with divorce herself according to the same jurisprudential principle. In other words, if being a wife causes difficulty to a woman, the principle of *lā-ḥaraja* should be applied to her case and then the restriction of the right of divorce to the husband is automatically abrogated. Yet, what is currently common is the practice that the supreme religious authority rules divorce in the case of that wife when he discovers that she is unwillingly being kept as the wife of that husband who causes her difficulty, and that the husband refuses to divorce her. In this case, the divorced wife should observe a revocable period of waiting (*`iddah*: the post-divorce or post-widowhood waiting period), and after this period of waiting has elapsed she has the right to marry another

man. This procedure is one of the authorities of the well-qualified jurisprudent, who can enact it as a binding law.

We believe that the laws enacted by the Consultative Council and the Consultative Council of the Jurists (CCJ) in the Islamic Republic of Iran are binding and inviolable. Thus, whatever is decided by the CCJ is bindingly observed. Since the members of the CCJ are appointed directly by the Supreme Religious Authority, it becomes obligatory for everyone to commit themselves and carry out the laws and regulations enacted by this entity, as long as whatever is issued by the Supreme Religious Authority is religiously decided as binding.

It is, however, worth mentioning that the laws of the CCJ are totally different from the laws enacted by the governmental establishments.

As a result, if for example the CCJ endorses a law that imposes the observance of the copyright law, it becomes obligatory to follow that law.

Objection to Deducing Evidence from the Absolute Authority of the Jurisprudent

It is not inaccurate to say that this evidence has nothing to do with the topic at issue, because our main concern is exclusively to prove that an author of a book enjoys exclusive intellectual property rights with regard to his book and has the right to sell these exclusive rights and allow his heirs to inherit them. However, we point out that, if the question is entered under the jurisdiction of the Supreme Religious Authority, it

then becomes obligatory to define the sum of money that must be given to the author (in return for damage to his rights) according to the law, and, likewise, it becomes obligatory to define the term during which that sum of money must be given, and to decide any matter that will be deserved by the heirs of the author after his demise.

In such a scenario, the details of all of these particulars must be decided by the law. In other words, the same argumentive objection that was raised against evidencing the validity of intellectual property rights—as an obligatorily observed exclusive right—through the concluding of a contract applies to the issue of deducing evidence from the absolute authority of the jurisprudent. More precisely, the supreme religious authority does not have the right to decide to award such an exclusive right to the author, to make any change to the actuality of the subject matter, or to decide that a thing that generally considered not to be personal property or a rightful due is one, or the opposite. A supreme religious authority is allowed only to issue verdicts that help guide the people in following properly their religious commitments or to enact laws within the frame of the system that is run according to his view. Hence, he is allowed to say, for example, that a publisher who intends to publish a book of another author must conclude a contract with the author including the condition that the publisher should pay the author an agreed-upon sum of money in order to gain his permission.

Copy Right & Patent Law

Once again, we have to prove that intellectual property rights of the kind protected by the copyright and patent laws are legally binding and that the intellectual property in question must be recognized as property. As has been previously noted, recognition by rational people of a thing as an item of personal property is not contingent upon the property having a material aspect; rather, they may recognize the intellectual rights even if the property does not have a material asset in reality. Once we prove intellectual property to have a property quality, it will be legal to sell it and to receive it by inheritance after the demise of the owners, and it will be obligatory upon those who cause it damage or usurp it to guarantee that damage and usurpation.

Among the master scholars of jurisprudence who deny that intellectual property has qualities of personal property and rightful due is the late Imām al-Khomeini, whose magnificence in the fields of Muslim jurisprudence and politics cannot be denied, and who is the founder of the concept of the absolute authority of the jurisprudent as being all-inclusive. He says, “In the question of the exclusive rights such as the copyright, we have not concluded the existence of any legally binding right.”

According to this conclusion of the late Imām, when the supreme religious authority decides that it is obligatory to conclude a contract with the author of a book before publishing his book, but the publisher violates this verdict and publishes the book without obtaining the author’s permission, the publisher is then deemed to have committed a forbidden act when he violated the supreme religious authority’s decree, even

though by the Imām's conclusion the question has nothing to do with infringing the entitlements of others. In jurisprudence, the result of such a violation is different from, even worse than, the infringement of a personal entitlement. To clarify, when one misuses or damages a person's entitlement, one becomes legally responsible for that misuse or damage toward that person alone, but when one violates the decree of the supreme religious authority, this means that one has challenged the supreme religious authority along with whatever is represented by that authority. Of course, there is a big difference between violating a personal entitlement and violating the decree of the supreme religious authority.

As can be inferred from this discussion, one who damages the protections conferred upon the author of a book by a legal copyright will not be indebted to the author (i.e., under obligation to the author to guarantee the damage to damaging the author's copyright protections), and, when the author passes away, one is automatically exempted from any liability unless positive law or the supreme religious authority have a different say about the issue.

Argumentive Objection

Some of those who deny the existence of obligatorily observed exclusive intellectual property rights claim that the author of a book must have studied under his mentor and received the ideas in his book from him and from other books whose authors, in turn, received them from their mentors and so on. Therefore, the current book is not the fruit of the personal

efforts of its author and does not belong to the author, and the author has no probative rights in it. These people raise the analogy of digging a well. One man dug but could not reach water; therefore, he left it half-dug. Then, other men dug further down, but none of them could reach water. Finally, another person made a single strike in the pit and water gushed forth. In this case, it is inaccurate to claim that the water must belong to the last person whose single strike made the water gush forth; rather, the water must be commonly owned by all of those who contributed to digging the well. Another analogy these scholars give is to a pharmacologist who, extending the results from previous samples and experiments of other people, discovers a drug. In the same manner, it is inaccurate to claim that this pharmacologist has an exclusive right in that drug; rather, all those who worked toward developing the drug must have shares in its exclusive right. These scholars conclude that the same thing is also applicable to other exclusive rights such as those protected by copyright and patent laws. Rational people believe that such people believe intellectual property has the quality of property and should receive its rightful due, but it is still problematic to prove this property quality and rightful due, since a jurisprudential principle entails that "*It is illegal to take to oneself as personal property any part of a Muslim's assets against his will*." In other words, if such authors or inventors were not independent in these works, how can it be argued that they enjoy exclusive intellectual property rights that can be covered by the copyright and patent laws?

Answers to the Objection

The first answer to this argumentive objection is that the objection is more specific than the point to be proven. To explain, many cases of exclusive intellectual property rights were not derived from previous experiments and efforts, especially in the creative arts. For instance, a new movie usually has a new theme and special purpose that was not built upon the efforts of others. Thus we can say that the aforesaid argumentive objection is dedicated to cases in which the invention was a completion of a previous effort, such as in the previously mentioned example of digging a well.

In the example of making a movie, no part of the film was founded on a previous film; rather, its maker used his personal method, directing actors, style, and script; therefore, it is inaccurate to claim that the film was the fruit of previous efforts; rather, its maker had his own independent ideas in making that film.

The second answer can come in the following form: Our main topic revolves round legally protected rights. These rights must be decided as valid either by the Legislator—such as in the cases of the rights of custody and guardianship—or by the rational people. The thrust of the argumentive objection under discussion (i.e., that current work is based on previous work) has no bearing on the legislating of rights; for, if this argument were accepted, no property, physical or intellectual, would be decided for anybody in the present day. Taking the example of a house, it may shave been possessed by other

people in the past and at least one of these people must have exerted efforts in maintaining the property before he sold it to the other, and so on. In other words, if the first owner of a property had not maintained the property, the second owner would not have been able to maintain it; according to the claim of the objection involved, they all must have rights in the property. Moreover, the boards, nails, window glass, electric wires, and plumbing were made by manufacturers, and put in place by laborers, all of whom by this argument could claim to have a right to part of the house's value. Of course, all of this is illogical and inapplicable to the actual state of ownership of the house. The previous owners were paid by each subsequent owner, just as the manufacturers and laborers were paid for their efforts, and as a result none of these has any further claim in the house.

In the course of attributing the qualities of personal property and rightful due to things, scholars decide that the associated rights are exclusively entitled to their present owners because the reason-based consideration of ownership is dedicated to the current owner even if other persons in the past played a role in creating or improving the property; as noted, all of these previous owners were paid when they sold the house to the subsequent owners, and thus have no further claim in the house. . The same answer applies in such cases as that of inventing a new drug by reliance upon previous efforts and experiments and that of completing a well partially dug by previous diggers. In the norm of the rational people, the last digger is the owner of the water by laying hands on it. The previous pharmacological

researchers were paid for their work, and the previous well-diggers chose to abandon their efforts, and so, by the understanding of rational people, neither has any claim in the final product.

In brief, the second answer to the argumentive objection is that the validity of such claims of ownership in certain works (e.g., writing a book by making use of previous ideas and efforts or inventing a drug by making use of previous experiments and efforts) are decided by the religious law, . In this case, the one who decides such a matter is either the Legislator or good reason as provided by rational people. And rational people do not pay any attention to the resources provided by earlier individuals; rather, they look directly to the actual author of the book or inventor of the drug.

To cite an analogy: If three persons participate in a homicide, one of them by waylaying the victim, another by detaining him in a certain place, and the third by killing him directly, the punishment of retaliation for murder will not be executed on all of them; rather, according to the penal law of Islam, only the one who committed homicide directly will be retaliated[35] for that crime; the two others will instead be punished for the things they actually did to help the murderer – waylaying and detaining the victim – but not for the crime of homicide itself. Thus, the crime of homicide is not applied to all of those who had roles in the situation; rather, only on the individual responsible for the direct process of killing, because custom and reason in such crimes focuses on the actual killer

only. These two answers are sufficient in refuting the argumentive objection under consideration, although there are other answers to be said in this regard.

Appendage

As we have discussed proofs of the validity of copyright, it seems necessary to present a number of remarks in order to discuss the topic from all aspects.

First Remark: Copyright as a Proprietary Right

Even if we ascertain that intellectual property rights as protected by copyright or patent laws are rationally approved exclusive rights, we still have to prove that they are proprietary rights. As a definition, a proprietary right is inherent in anything that can be compensated for, moved, transferred, and resigned. For example, guardianship and custody rights cannot be resigned, in the sense that it is impossible for a son to resign the guardianship right that is enjoyed by his father on him. On the other hand, proprietary rights can be resigned, in the sense that one is allowed to relinquish his right to the one who is liable for that right. Similarly, proprietary rights are moveable—in the sense that they can be moved from the possession of one person to another—and transferable—in the sense that they can be legally made over to another—voluntarily or compulsorily. For example, when the owner of an exclusive proprietary right passes away, this proprietary right transfers to the heirs even if this would have been against the will of the owner. Moreover, a writer has the right to copyright his book in the name of a

certain establishment or body such that it can receive all future profits from sale of the book; hence, it is not improbable that *waqf* (endowment or settlement of property or right under which the proceeds are to be devoted to a religious or charitable purpose) applies to such intellectual property rights if we decide that they are proprietary rights. In this case, a writer is legally allowed to specify that the profits of his exclusive rights should be spent in a certain field or endowed to a certain body. This assignment of rights can be legally done with intellectual property even though there is no physical property, such as real estate; rather, there is an immaterial estate only.

Based on this conclusion, if a book is published without obtaining the author's permission, the publishers will be subjected to guarantee; i.e., they will be legally bound to guarantee the damages caused to the author by publishing his book without authorization.

The decision of rational people is that borrowing copies of an intellectual work does not infringe on the author's proprietary rights. It is acceptable to borrow a book from a friend or the library, or to listen to a CD on the radio or when a friend plays it for us. These acts are not regarded as disposing of the works, of stealing from the authors. The issue appears, rather, when someone steals a copy of the author's book or CD, or destroys a copy that does not belong to him; these acts we clearly have to judge as unacceptable.

Even if we suppose that the rights protected by the copyright and patent laws are reason-based but not proprietary,

just like the rights of custody and guardianship, and that they are therefore immovable, intransferable, and nonsalable , it would still be improper to neglect observing them, which would be, in this case, decided as an act of disobedience to God. In the rights of guardianship of fathers over their sons, if a son does not submit to his father's guardianship over him, no judge can impose liability for guarantee on him. Likewise, in a divorce situation, under Islamic law a mother has the right of custody over her sons for the first two years and over her daughters for the first seven years of their lives. If the father deprives the mother of this right of custody during this period by taking his son or daughter by force from their mother, the father in this case is decided as having committing an act of disobedience to God, but he is not liable for guaranteeing to the mother.

Opinions of Sunni Scholars

Some Sunni scholars have adopted the opinion that the rights protected by the copyright and patent laws are reason-based but not proprietary. Adopting this opinion, al-Qarāfī, a scholar of the Mālikiyyah School of Law, states in his famous book *al-Furūq*, "Be it known to you that the Messenger of God is reported to have said, 'Whoever dies leaving a right, this right will be for his heirs.'"

This statement by the Holy Prophet's does not apply universally, since as previously noted some rights are inheritable while others are not. However, al-Qarāfī interprets it to say that things related to a person's personality, intellect, and

personal relationships cannot be inherited by his or her heirs. The right of inheritance is inseparably affixed to things that have a property quality. In other words, heirs usually and legally inherit items of property and property-related things, but not the positions, rights of guardianship, and ideas of the inherited person. Nor can any part of these things be transferred to the heirs by inheritance as long as they are not allowed to inherit the origins and bases of these things.

In a few words, al-Qarāfī sets up a rule entailing that property and property-related things are inheritable, have the same value of property, and are subject to inheritance and similar provisions. Conversely, what does not have the quality of property cannot be inherited, such as intellects, ideas, and mentalities, because such things, as well as their outcomes and products, fade away with the death of their owner.

Al-Qarāfi, depending upon a religious basis, concludes that the rights protected by copyright or patent laws are not proprietary; rather, they are non-proprietary and therefore cannot be inherited. He believes that decisions made on the basis of religious law are part of our obedience to God, and therefore it would be most inappropriate to accept money – as authors do when their books are published – for simply doing our religious duty by obeying God. As a result, he avers, the rights protected by copyright and patent laws are reason-based rights, but, at the same time, are not proprietary exclusive rights. They are therefore immovable, non-transferable, and non-compensable.

To come to the point, al-Qarāfī makes two major allegations with regard to these rights:

First Allegation: Only properties and property-related things can be sold or compensated for, but things that lack the quality of property and have no relation with property cannot be decided as property, and they, and whatever results from them, must be non-compensable, immovable, and intransferable.

In the conception of al-Qarāfī, such exclusive rights as those protected by the copyright and patent laws are branched off from the person's intellectual faculty, which cannot be described as proprietary and inheritable, because the intellectuality of a person cannot be inherited by his or her heirs. Hence, whatever branches off from the intellect of a person, such as his or her theories and notions, cannot be recompensed for.

Relying upon this premise, al-Qarāfī concludes that the rights protected by the copyright and patent laws are reason-based and non-proprietary rights, and, just like other non-proprietary rights, cannot be moved, transferred, or inherited.

Second Allegation: Al-Qarāfī says that jurisprudential deductions are opinions and hypotheses concluded by a well-qualified expert after putting considerable care and effort into reaching them correctly. These painstaking deductions are more significant than the copyright law, or any other secular invention or achievement, because they are made in the context of religion, which is a set of acts of obedience to God. It is

impermissible to ask for money in return for carrying out any act of obedience to God, he continues, and therefore these deductions cannot be assigned a monetary value. monetarily evaluated and, in the same manner, a jurisprudential question that has been concluded by an experienced jurist cannot be equal to any sum of money. Therefore, it would be unacceptable for any jurist to say that he is ready to sell his jurisprudential deductions on which he worked for fifty years, for such-and-such amount of money, or to give them to a person, or to barter them to someone in exchange for such-and-such.

Objections to al-Qarāfi's Allegations

Al-Qarāfī says, "Whatever is a property in its origin or is related to a property must be decided as having a proprietary value and must be applied to inheriting."

For instance, a house is a property; therefore, its benefits must have a proprietary value. As the the house is inheritable, so also must its benefits be inheritable.

As for the exclusive intellectual property rights of books, theories, and inventions, al-Qarāfī says that because these things result from the intellectual faculty of persons and, since mental abilities do not have any proprietary quality, these theories and opinions must be decided as lacking the quality of property.

However, some points of objection can be raised against these words:

First Objection: We do not believe in the inevitable inseparability of the origins and the branches of things. This means that if the origin of a thing has a certain quality, it is not necessary that its branches have the same quality. It is therefore essential to recognize the criterion on which it is decided that a thing has the quality of property. Some scholars name the criterion as the desire of rational people for that thing. Others say that the criterion is that money can be spent in order to acquire that thing. Of course, these two standards can be met by the branches of a thing even if the thing itself does not meet them, and vice versa.

If we accept as true these customary definitions of the quality of property, we will face a problem, because custom may ascribe this quality to a thing today and then retreat from it the next day. Thus, it is probable that custom denies that a man's intellect has the quality of property but, at the same time, it may decide that a man's intellect and knowledge has the quality.

Definition of Property

In the Imāmiyyah jurisprudence, there are two definitions for property:

(1) Property may be defined as a thing in return for which money is spent.

(2) Property is whatever is desired by people of sound reason.

In Sunni jurisprudence, there are other definitions for property. As to the scholars of the Shāfi`iyyah School of Law, property is defined as whatever from which a benefit is derived, be it real estate or utilities.

However, other scholars of this school state that the quality of property can only be seen as inherent in things that have a tangible value.

In his book *al-Ashbāh wa'l-Naẓā'ir*, al-Suyūṭī, a master scholar of the Shāfi`iyyah School, says, "Property is what cannot be abandoned by people."

From these several somewhat contrasting definitions we can conclude that custom has a role in what things are seen as having the quality of property.

As for the Ḥanbaliyyah School of Law, the scholars of this school define property as follows: "Property is any thing that holds a legal interest even with the absence of need and necessity."

According to this definition, property stands for everything that can be adjudicated when issues come up, such as lands and houses and their contents. Note that the Ḥanbaliyyah scholars do not state state that an entity has to be a physical thing as a condition of its having the quality of property; rather, the fundamental principle according to this definition is that the thing is something the disposition of which can be guided by law.

As for the Mālikiyyah scholars, they give a definition that is contradictory to the one given by the Ḥanbaliyyah and Shāfi`iyyah scholars and similar to the definition of possession.[36] They define property as "any thing to which possession applies and on which the owner of a possession rests." This definition means that property is inseparably related to the concept of possession and is exclusively dedicated to the owner of that possession. In other words, the Mālikiyyah scholars believe that the quality of property materializes whenever the quality of possession materializes; therefore, when possession is absent, the property quality is absent, too. In the conception of these scholars, the property quality is no more than a customary or a religious law-based consideration, and as long as possession is a nominal thing, the property quality must be so, too.

Back to al-Qarāfi's deduction that if an original thing has a property quality, then its branches must carry that quality, too, and that, accordingly, when an original thing is inheritable and compensable, its branches must be so as well—about this deduction, we have first to recognize what al-Qarāfī means by "property". If property, in al-Qarāfi's conception, is defined as any thing that is useful to people, then the intellect is not property since it is not (by itself) useful to people; rather, utility is found in the products of the intellect. For instance, a drug that is invented through the intellectual power of its inventor is useful to people who can benefit from that drug, and therefore has the quality of property, while the origin of the invention (i.e., the intellect of the inventor) has no property quality.

Likewise, if property, in al-Qarāfī's conception, is defined according to the view of custom, then custom may consider an original thing to have the quality of property, while it may consider the branches of that thing to have this quality.

Accordingly, it is not accurate to say that only if an original thing has the quality of property quality can its branches inherently have that qualification, too.

Objection to the Union of Exclusive Right Due and Property Quality in the Same Thing

In the beginning of this study, we proved that the obligation of observing intellectual property rights and the copyright and patent laws that protect them is rationally approved. In other words, people of good reason decide that intellectual property is a form of property. However, some virtuous scholars may pose the following question:

If the copyright is decided as a form of property, is it then permissible for the owner of this property to resign his or her exclusive right to others?

We answer that intellectual property is a form of personal property, and that it is not conditional that a thing, in order to be decided as property, must be tangible; rather, intangible and mental objects can be given the property quality.

Undoubtedly, custom and people of good reason have decided that intellectual property is property; so, a film, a book, and an apparatus are considered as properties in the view of the

rational people. At the same time, these things inherently carry certain exclusive rights that belong to their makers, writers, and inventors, although exclusive rights cannot be also be considered property in their own right; that is to say the exclusive rights are only property through their inherent connection with the intellectual property. Clearly, an exclusive right becomes a purchasable, sellable, and compensable property only when it is attached to a physical or intellectual item of property. An instance of these compensable rights is the currently usable special rights and privileges of certain persons by which they can, for example, take out a loan from a bank. Such persons are allowed to reassign this privilege to others for something in return. Although this privilege does not hold a property quality, the laws of property are applied to it, because it is defined as a property-related thing. In plain words, the point that proves intellectual property rights as obligatorily observed exclusive rights is that people of good reason think of it as property. But this point raises an objection; namely, that an exclusive right is not a property. By this objection, someone who has a hundred exclusive rights cannot be said to have a hundred properties.

Answer to the Objection

The rationally approved judgment does not prove the copyright as property, because an author of a book automatically enjoys an exclusive right that is expressed as copyright, and he/she will then have the right to waive that right. The difference between a right and a religious law is that the earlier can be resigned, but the latter cannot. Once more, the

very exclusive right is not a property and it is therefore non-compensable; rather, it is defined as a property-related thing, in the sense that the author of a book can duplicate the book in a thousand copies and then resign the copyright to others.

In conclusion, al-Qarāfī attempts to prove intellectual property rights such as those protected by the copyright and patent laws to be legally binding entitlements, but, at the same time, he denies the existence of proprietary rights. He builds his claim on the alleged coherence and inseparability between an original thing and subsidiary things such that if the original has the quality of property so too do its branches, with the converse also averred. In fact, we have proved such coherence as invalid, because the original thing may be a property while its branches are not. For instance, a building is a property, buts its mental depiction is not a property.

Second Objection to al-Qarāfī's Allegation

Actually, al-Qarāfī seems to have an inaccurate idea about the matter at hand. That matter can be presented in the form of the following question:

If a person who uses his intellectual abilities to formulate an intellectual product which he then records in a book; will reason-based exclusive intellectual property rights, including those protected by copyright law, be decided for him?

Of course, as long as an intellectual product remains with its creator, there will be no reason for any dispute about those rights; rather, the dispute focuses on whether people other

than the author of a book or the inventor of an apparatus are legally required to observe the creator's exclusive rights.

This issue is similar to the issue of the cancellation right in sales contracts. When the selling party in a sales contract reserves the right of cancellation (of the contract), he has two specific powers. First, the seller will have final say before the contract is concluded . Second, the right of cancellation is related to reason, which means that even if the concluding of the contract is cancelled, the effect of the contracting will still be operative. In this issue, scholars argue whether this right of cancellation is inheritable when it is specified by the seller; i.e., whether it can be transferred by inheritance to the heirs of the seller after his death.

Some scholars of jurisprudence answer that the right of cancellation is an idiosyncratic feature of the contract, and every idiosyncratic feature of a contract fades away with the death of the selling party, and therefore no such idiosyncratic feature of the contract can be inherited by the heirs.

On the other hand, if we claim that the right of cancellation is a feature of the contract held by its selling party, in the sense that the concluding of the contract and the specifying of the right of cancellation are descriptions of intangible aspects of the contract, we will then have to accept the conclusion that such contracts are tramsferable in the sense that, if the seller dies, the contract, along with the right of cancellation, will be transferred by inheritance to the heirs.

With regard to our main topic; namely, intellectual property rights, we can say that a book, as an artistic work, is an intellectual product that was created by the author by way of his mental faculties; therefore, the artistic work is inseparably dependent on its author. Likewise, when scholars discuss reliance on the verdicts of a deceased jurisprudent within the articles of the jurisprudential field of *Ijtihād* and *Taqlīd*, scholars say, "When he dies, a well-qualified jurisprudent loses his view."This is because the view of a well-qualified jurisprudent is inseparably dependent upon his existence; therefore, when he dies, his views and notions fade away. Thus, it is illegal to rest on his verdicts.

We can discuss intellectual property rights from a similar viewpoint; namely, that rational people decide certain tangible effects are to spring from the creative efforts of the author of a book but that it becomes necessary not to discuss the topic when the author has deceased not to speak about these from the aspect of the otherworldly rewards gained by those who find knowledge and spread it among people; rather, the discussion must focus on proving the intellectual property rights as obligatorily observed and legally binding rights. In other words, rational people consider such exclusive rights as those protected by the copyright and patent laws to be tangible rights; therefore, even if the security passcode on a CD has been breached, it still is not forbidden to see the material on it, because watching it is not an act of appropriating or damaging of someone else's property without permission; the main point of dispute in this issue is whether it is legal to sell, purchase,

write, or ispose of such a CD in any way that causes a financial loss to the author.

Thus, the point of our objection to al-Qarāfi's allegation is that he has overlooked the main topic of the dispute, because, by discussing intellectual property rights, we do not intend to prove whether an author of a book enjoys exclusive rights connected to his intellectual faculties. The main topic of dispute can be put in the form of the following question:

Is it obligatory to observe the reason-based tangible effects that rational people acknowledge are possessed by an author of a book or an inventor of an apparatus as soon as the work has been released to the public?

Of course, no one can deny the tangible and material effects of such books and apparatuses, because tens of charts, laws, and regulations have been ratified about intellectual property and rights. Because this is an irrefutable fact, our main dispute is concentrated on the question whether it is obligatory to observe these intellectual property rights, and whether they are inheritable.

In this way, we conclude that the position adopted by al-Qarāfī lacks accuracy.

Another Objection to the Copyright

Thus far we have claimed that intellectual property rights are obligatorily observed exclusive rights and proven the claim by applying rationally approved judgment to it. We have

further claimed that people of sound reason believe that such exclusive rights can have entitlement and property qualities and that, generally, rationally approved judgments do not require the approval and permission of the Legislator when they are applied to the general guidelines of certain matters, if not to the specific laws.

However, even if we accept these conclusions, there is still a problem to be solved. If the Legislator is proven to have proscribed and disagreed with these conclusions along with the rational judgment about it, then inevitably we must yield and follow the Legislator in rejecting the above. Three ways can by hypothetically posited in which it may be alleged that the Holy Legislator has nullified intellectual property rights. Any one of them is sufficient in itself, if proven cogent, to proscribe the acceptance of intellectual property rights.

These three ways are as follows:

FIRST WAY: Some narrative points indicate the forbiddance of concealing any item of knowledge. For instance, a tradition reads, "Whoever conceals a field of knowledge that he masters, will come on the Resurrection Day bridled with a fire rein."(37)

According to Arabic grammarians, the relative pronoun ("whoever") entails generality; that is to say, any person who is experienced in any field of knowledge must share the knowledge with people and any person who can invent a drug must invent and present it to those who need it.

However, the method of deducing the nullity of intellectual property rights from this tradition is to say that this tradition holds such a general meaning that it is not dedicated to certain fields of knowledge or certain ways of spreading knowledge. Thus the tradition avers that it is forbidden to hide away knowledge in any field. Consequently, if the concealment of knowledge is forbidden, it becomes obligatory to show and reveal it, and when it is obligatory to reveal it, it becomes impermissible to ask for any wage for that revealing, because it is illegal to ask for a wage in return for carrying out a religious duty. In the least prospect, the aforesaid tradition confirms that it is obligatory to reveal knowledge, whether in return for a sum of money or for free.

Because the second point of evidence provided by al-Qarāfī is related to this topic, we will discuss it in detail:

Al-Qarāfī says that the deductions that are found by a jurisprudent (in the Islamic code or religious law) belong to the religion, which is no more than a set of acts of obedience to the Lord, and it is impermissible to take a financial wage in return for carrying out an act of obedience to the Lord.

To answer, we see two possible interpretations. On the one hand, al-Qarāfī could be taken to mean it is forbidden to receive a wage for spreading a field of knowledge, because it is generally forbidden to take wages in return for carrying out a religious duty. On the other hand, we may claim that the tradition, which involves an unrestricted meaning, states that one must reveal the knowledge that one masters, whether a

wage is or is not requested. Thus, if an author of a book presents his book to a group on the condition that they pay him a thousand dollars as a wage in return for giving them the opportunity to benefit from his ideas that are mentioned in his book, it is arguable whether receiving such a wage is legal or not.

At any rate, the aforesaid tradition deems obligatory upon one who has discovered a drug to make it obtainable by all people, whether they pay him for that or not.

Answers

There are two answers to the first way of trying to prove the Legislator's proscription of intellectual property rights, but these answers are in part open to question.

First Answer: The tradition cited above as evidence of the invalidity of intellectual property rights as obligatorily observed rights is in reality appertained to the issue of formal testimonies in courts. In its original setting, the tradition says that when one knows an important detail about a lawsuit that will help the court make the proper decision but this person deliberately conceals that piece of information and refrains from testifying, he or she will have most surely contributed to depriving a rightful person of his or her due.

In this manner, the expression "*man katama `ilman*" means: whoever conceals a piece of information that helps the judge condemn a criminal or absolve a guiltless person from a charge.

However, this claim is proven true only after we can find other points testifying to it; otherwise, the aforesaid tradition involves such a general implication that it cannot be restricted to a certain meaning or a certain occasion. Besides, there is another tradition that holds an implication which clearly corresponds with the general meaning of the aforesaid tradition. The tradition reads, "The tax of knowledgeability is to spread it among people." [38]

Second Answer: Even if we agree to the forbiddance of concealing knowledge and the obligation of sharing it, we aver that it is one thing to share knowledge and quite another to observe intellectual property rights. Knowledge may be revealed in different ways, such as delivering a speech and writing a book. And, in these days, people of sound reason accept many effects of writing a book, such as publishing and reprinting—two processes that may yield profits. These effects are termed by rational people as indecisive rights or indecisive properties. They also believe that any financial (or proprietary) effect that stems from writing a book must be observed, but, in the event that no such financial effect stems from the publishing of a book by its author or anyone else, then the intellectual property rights are non-existent. Such being the case, rational people surely know that the Legislator has deemed it obligatory upon an author to reveal his knowledge; he has therefore revealed it in the form of a book that he has written. Yet again, it is not fair in the sight of the rational people that other people than the author of a book reprint his book in thousands of copies and make profits from his efforts; rather, the author must

enjoy peculiarity in the process of publishing his book and must not be treated as same as the others in this regard.

In brief, the most important answer to the previously mentioned objection to the copyright is that we should differentiate between the forbiddance of the concealment of knowledge and the duty of observing exclusiveintellectual property rights like those protected by the copyright and patent laws.

Furthermore, there is another answer to the same objection. We can say that the context of the tradition that confirms the forbiddance of the concealment of knowledge denotes that this forbiddance is to avoid helping unjust people and harming the just, and to do the right things that are related to the interest of the community as a whole. As a result, the second answer serves as the basis of the question and entails that intellectual property rights have not been proscribed by the Legislator.

A third answer to the objection (that the Legislator might have proscribed intellectual property rights) can be deduced from one of the principles of Muslim jurisprudence. It states, "Ordering something does not necessarily demand warning against its opposite and, in the same way, warning against something does not necessarily demand ordering of its opposite."

By applying this principle to the topic under discussion, we can positively confirm that the point under discussion entails

a decisive inseparability between the forbiddance of the concealment of knowledge and the duty of spreading it. Besides, the statements used in the traditions that indicate the forbiddance of the concealment of knowledge clearly allude to the duty of revealing and spreading knowledge. In fact, the previously quoted tradition about the tax of knowledge expresses this duty in a clear-cut way.

So, if it is forbidden to conceal knowledge and it is obligatory to spread it among people, it becomes unallowable to receive money as a wage in return for spreading it, because teaching is one of the religious duties, and we know for certain that it is illegal to receive a wage in return for carrying out a religious duty. In fact, the result is the same whether we say that it is illegal to receive a wage in return for carrying out a religious duty, or it is illegal to receive the financial benefits that come with the exercise of intellectual property rights in return for doing a duty, because both of the rulings enter under the general law of the forbiddance of receiving money in return for carrying out a religious duty.

It is also possible to say that, apart from the aforementioned general law, the tradition obviously declares the spread of knowledge as obligatory and the concealment of knowledge as forbidden in such an unrestricted way that it encompasses the forbiddance of receiving money for both.

In brief, the above argumentation has two forms; the first is by way of receiving a wage in return for carrying out a religious duty, and the second is by way of the points of

evidence that are deduced from the principles of Muslim jurisprudence and from the reported traditions. The first form should be investigated (and refuted) within the jurisprudential field of forbidden earnings in the question of receiving wages in return for carrying out a religious duty—even if discussing this question may be intended for seeking nearness to God (i.e., *qaṣd al-qurbah*)—since discussing the issue of intellectual property rights within this question (which is dedicated to discussing religious duties), in order to refute the argumentation under consideration, does not conflict with the other issues that are discussed under the same heading; namely, such devotional obligatory acts as the ritual prayer.

Unlike the old ones, the contemporary master scholars of Shī`ite jurisprudence do not prohibit receiving a wage in return for doing a religious duty.

The second form of the argumentation; namely, the general meaning of the traditions that declare the forbiddance of concealing knowledge and the claim that the open implications of these traditions entail that it is both forbidden to conceal knowledge and obligatory to spread and reveal it, be it with or without charge—this argumentation can be refuted by saying that this claim is in violation of the point under discussion. To explain: It is true that revealing and spreading knowledge is obligatory, but if a reason-based proprietary right shows up after the revealing of knowledge in such a way that enables the others to gain money as profits from that exclusive right, then there will be no question that the owner of that right is more

entitled than anyone else is to benefit from it. In plain words, if a person other than the author of a book reprints the book and sells all of the copies, bringing him financial profits, it is then unsuitable that the author of the book wasprevented from using his exclusive right, while the whole right wasgranted to the publisher exclusively. Undoubtedly, if an exclusive right is proven in this issue, it must be the author's, and no one else's. In conclusion, the forbiddance of concealing knowledge and the recognition of intellectual property rights are two different topics, having in common only their consecutive nature, in the sense that the proprietary rights of an author materialize only after he or she carries out the duty of revealing and spreading the item of knowledge that he or she has mastered. Thus, the exercising by this author of his exclusive rights is something totally different from his observing his rights. We have thus proven that the implications of the traditions that forbid concealment of knowledge are extraneous from the question at issue; namely, the observance of intellectual property rights.

However, it may be argued that the traditions that confirm the forbiddance of concealing any item of knowledge may carry an indication implying that the forbidden concealment of knowledge is only that which is preceded by a question. In other words, concealment of knowledge becomes forbidden only when it comes in the form of an unprovided answer to a question. For instance, when a duty-bound person asks the referential religious authority about a certain issue, but the religious authority refrains from revealing his opinion sufficiently, the result stemming from the concealment of

knowledge, as declared by these traditions, will be applied to that authority.

Nevertheless, it may be argued that this exclusive meaning violates the clear meaning of "whoever conceals an item of knowledge," which implies that any concealment of knowledge is forbidden, be it preceded by a question or not.

SECOND WAY: The second argumentative way by which it can be alleged that the Legislator may have nullified intellectual property rights is represented by the tradition that reads, "The tax (*zakāt*) of knowledge is to spread it." The Arabic word *zakāt* (duty, tax, or levy) can be defined as any thing that is obligatory upon everyone to branch out from his or her property or knowledge. However, other traditions have given other definitions to the word *zakāt*, often metaphoric in nature. For instance, some traditions interpret the word *zakāt* as modesty.

Concisely, the *zakāt* (tax) on knowledge is to spread it. Thus, when the spreading of knowledge is obligatory upon the owner of that knowledge, it becomes impermissible to receive money as a wage in return for such spreading.

Answer to the Argumentation

To refute the aforesaid argumentation, we can say that there is a difference between the obligation of spreading knowledge and the obligation of observing the proprietary rights of others. As is testified by rational people, a proprietary exclusive right originates for one who spreads his knowledge in

a printed book that carries his name as the author. This exclusive right can be evaluated, exchanged, and compensated for. Moreover, this right is exclusively enjoyed by the book's author, while the publisher does not enjoy any part or form of the right except to the degree the author transfers a portion to the publisher (usually a percentage of the profits) in exchange for printing and marketing the book. Thus, we have in this issue two totally different topics; namely, the obligation of spreading knowledge, and the obligation of observing the proprietary exclusive rights.

THIRD WAY: The third argumentative way by which the Legislator can be said perhaps to have nullified intellectual property rights is the claim that such exclusive rights were not observed in the age of direct legislation, which means that the Holy Imams consented to the non-observance of these rights. In the age of direct legislation it was common for an author to write a book on Qur'ānic exegesis or the Prophetic traditions, and others would freely copy that book. If observing intellectual property rights had been obligatory, those who copied the book from the author directly or from one another would have asked for the author's permission before having done so. In fact, the process of copying books was common in the period between the past century and the ages of the Holy Imams. The observance of the exclusive right of the author were not familiar things during these ages, as is supported by the fact that some modern master scholars who deny these rights as obligatorily observed exclusive rights have provided as evidence the conduct of the past scholars, which is definitely more cogent

than the conduct of religious people. Scholars used to quote statements of other scholars of earlier times without referring to the reference book or the scholar's name. Likewise, scholars of the different Muslim sects used to quote from one another without crediting the reference. This proves that the Legislator did not pay any heed to intellectual property rights, the observance of which must have thus been non-obligatory.

Answer to the Argumentation

To refute the aforesaid argumentation, we can say that intellectual property rights are contemporary reason-based exclusive rights that did not exist in the past, either in the present form or in any other form. Likewise, the issue of land ownership in its current form, and the associated laws and regulations was not familiar in ancient times, because people were too few to require authentication of ownership of lands. Hence, when a person demarcated an area by putting rocks on its boundaries and then built a house on it, the area would automatically be under his ownership and he would have a right in that area. Nowadays, such right of ownership cannot be achieved for one who put thousands of rocks and built tens of walls around an area – unless he gets a legal deed attesting to his ownership.

The point is that just as land ownership at the present time is totally different from how it was in ancient times, so also intellectual property rights in our time are totally different from how they were in earlier times. These rights were not

familiar exclusive rights for the past generations; rather, they are among the innovated reason-based rights.

In conclusion, we have so far provided irrefutable points of evidence to prove the validity of intellectual property rights as obligatorily observed exclusive right, and after we have refuted the three ways by which the Legislator can be claimed to have possibly deemed such rights invalid, there remains no other religiously acceptable argumentation to be raised about the issue.

The Copyright's Validity Period

The final point to be discussed within this thesis is the period of the validity of copyright. It is thus argued whether the copyright of an author continues to the last moment of his lifetime or continues even after the author's death up to Resurrection Day.

At first blush, there is a number of options to be offered:

First Option: The copyright is an exclusive right that has been originated and identified by rational people who, consequently, have to identify a period of validity for it. Internationally, the copyright was first of all identified as valid for five years only. This period was then extended to ten and twenty years. In the present day, the copyright's validity period is ranging between fifty and sixty years. However, it is still uncertain whether this validity period is counted from the writing of the material or the death of the writer.

Second Option: The copyright's validity period must be estimated in accordance with the efforts made by the author. For instance, if the writing of a book took the author a whole year of painstaking efforts, the validity of copyright must take a period of five years at least. If it took him two years to write the book, the validity must take a period of ten years, and so on. In other words, the period that took the author to write a book must be considered in the issue of identifying the copyright's validity period.

Third Option: The copyright's validity period must continue for whatever period to which the author consents. In fact, if the observing of the copyright is proven through overwhelming points of evidence as obligatory, any violation of it will be deemed as a wrongdoing, which is rationally hideous. Accordingly, it becomes unavoidable that the copyright continues to a period with which the author is satisfied.

Because none of the aforesaid probabilities can be supported by a point of evidence, it seems necessary and most appropriate to relegate the issue of identifying the copyright's validity period to the rational people of every age in order to avoid any disorder and chaos that may be created in the social system. Thus, the rational people in every age are required to identify the validity period of the copyright, taking into consideration the circumstances that surround the literary work, because it seems unfeasible to identify a certain period for the validity of copyright without paying any attention to the nature of the writing and the period it took the author to write

that book. However, if this way is not approved, there will remain no other way than reconciling with the author.

End Notes:

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[1]. There are two points to be highlighted: 1) Throughout this essay, there seems to me to be an inherent confusion between two concepts – intellectual property, which is the ownership of (for instance) a book as a creative work above and beyond the physical paper and ink used to reproduce the book physical form (the book as a literary work, not a physical object, as the expression in thought/word of research and composition) – and copyright and patent laws, which are a legal means for protecting the rights appertaining to intellectual property. Throughout this essay the term "copyright" (or "copyright law") is used, I think incorrectly, to refer to the concept of intellectual property. Since the thrust of this essay is to defend the observance of copyright and patent laws as obligatory, my editorial changes throughout are aimed at eliminating this fundamental confusion so the essay clearly says that intellectual property rights are legally equivalent to physical property rights, and that therefore copyrights and patents are legally equivalent to (for instance) property deeds, and therefore obligatorily to be respected in the same manner. (The confusion may be derived from the fact that the word "copyright" has as its second syllable the word "right". But a copyright isn't a right in the standard meaning of "right", which is how you

too use the word, but rather, as the term suggests, it is a legal means of protecting a certain right: i.e., the right to make copies of a creative work and offer them for sale, keeping the profit. By implication, if not by statute, the copyright law therefore protects a certain specific intellectual property right; the right to put a work before the public [putting a play on stage, exhibiting a sculpture, singing a song, etc.] without risk of relinquishing control over the work to others. I, for instance, have several published and copyrighted books; the copyrights on my books are not rights in and of themselves, but warnings to others that my rights in these books, as intellectual property, are protected by law.)

2) As regards the title, although the original in 'Farsi' had just one word, namely: "Copyright", which I think is insufficient. I've expanded it, but a less cumbersome title might be "Intellectu Property Rights and Laws". [Editor's remarks]

[2]. Throughout this essay you use the phrases "the rationally approved judgment" and "the rational people". In the first case, the definite article ("the") should only be used if this is the only rationally approved judgment in the history of the world, which is not the case. Rather, the author means clearly to use it in a generic sense, which by

English rules of grammar never takes either the definite or indefinite article, so I have eliminated the “the” in this phrase throughout this essay. As to “the rational people”, the definite article would only be used if one is referring to a specific group of rational people, who could for instance be named. But it seems that one is referring to “rational people” in a generic sense – similar to saying “any rational person would conclude…” – and so, again, the “the” would be -in this case- incorrect and I have eliminated it throughout the essay. [Editor’s remarks]

[3]. The term “Islamic law” would only take the definite article if it were referring to a single law – for instance, if one was speaking about “the Islamic law about divorce”. Here, however, one is speaking of Islamic law in general terms, so by the laws of English grammar, there must not be any article, definite or indefinite. [Editor’s remarks]

[4]. The author seems to mean by the “temporary sale”, what is used in the English legal term as “lease”. If this guess is correct, then it must be noted that leasing has been practiced in one form or another for centuries all over the globe, however he may have meant following the Iranian terms and conditions. [Editor’s remarks]

[5]. Again here there seems to be inaccuracy. As the modern insurance policy has been around for about 220 years; early examples include life insurance and fire insurance. Thus what he is referring to, seems to refer solely to the Iranian conditions and markets. [Editor's remarks]

[6]. Al-Muttaqī al-Hindī. *Kanz al-`Ummāl*, 1:92, Ḥ. 399; Al-Ḥurr al-`Āmilī, *Wasā'il al-Shī`ah* 29:10, Ḥ. 3.

[7]. It is a matter of concern that fiction is not mentioned as an example. There are many authors, who have published books of nonfiction and fiction, and one can attest that it takes an author of fiction years of research, character analysis, plotting, and drafting to compose a successful novel, that is to say: Insh'Allah, it would be a successful novel and best-seller fiction. Therefore I believe that on should include fiction, as the correct view is to get them considered as intellectual property protected by copyright law too. [Editor's remarks]

[8]. Strictly speaking, this is not an opposite view; opposite to the view that custom identifies the main theme but not the examples would be that custom identifies the examples but not the main theme. [Editor's remarks]

[9]. The antecedent noun to "it" ("within it") is "circle", which is why one had placed "it" at the end, instead of "them". [Editor's remarks]

[10]. One would only use "actually" this way if one were drawing a contrast, which is the case here. This is because one does not hold these two evidences as to be identical, rather two separated evidences.

[11] ***See:*** *Kitāb al-Ijtihād wa'l-Taqlīd'* of late Imam Al-Khomeini.

[12] Part 4, pp. 23.

[13]. This might be a tricky argument, since services are a thing for which money is paid, but services are not the personal property of anyone. That is why my editing uses the phrase "any thing" rather than "anything". [Editor's remarks]

[14]. Legally speaking, the legacy of a dead person ONLY consists of property. [Editor's remarks]

[15]. I think this argument is weak. While, yes, physical property is damaged and/or removed, and intellectual property is not, still in both cases, proper compensation is based on the value of the property, and in both cases –

physical and intellectual property – there is a value that can be explicitly set in financial terms. [Editor's remarks]

[16]. The period of direct legislation did not take place over "ages", a word that suggests thousands, even perhaps millions of years. Since this is only a period of about two hundred years, it would be acceptable to say "the age". But "the ages" would be stretching the point rather considerably. I have decided to use this word throughout to highlight this fact. [Editor's remarks]

[17]. Although the author has preferred to use this word in this context, I'm not sure that "accurate" is the right word, since he advances nothing in the previous section to suggest that he considers the "First Objection" in any way inaccurate. I suggest some other adjective such as "pertinent" or "telling", despite the fact that one should remain careful in changing any used words in the original. As such, I've left it, while writing my criticism in these lines. [Editor's remarks]

[18]. One has added "especially" because this is true not only in the case of homicide, but across the board – if for instance a man is convicted of beating another man, he is not sentenced to being himself beaten; if he rapes, he is not himself raped; etc. [Editor's remarks]

[19]. Details of his opinion can be referred to in his book *al-Ijtihād wa'l-Taqlīd*, p. 81 (New Edition)

[20]. It seems that this entire paragraph appears out of place, since the author did not begin to discuss Imam al-Khomeini's (ra) until the section headed "View of Imam al-Khomeini" below. I would editorially move this paragraph thither, however, the discussion of Imam al-Khomeini below begins by referring not to his book *al-Ijtihād wa'l-Taqlīd,* but rather his book *al-Rasā'il*. We know –out of technical Ijtihadi experience- that the Shi'ah scholars may mix their opinions in their books of Jurisprudence and principles of Jurisprudence. Therefore I must leave it to author to decide how best to dispose of this paragraph, and leave it to the reader's wise judgement in this regard. [Editor's remarks]

[21]. If one were to write it in this way, "generally", it would take the meaning of "usually", which -of course- is contrary to author's point; hence the rewording and using of 'general' instead. [Editor's remarks]

[22]. One does not think that the author wants to say "disproved", since that is tantamount to saying that he thinks they are right and he is wrong. Hence one has chosen to use the word 'rejected'. [Editor's remarks]

[23]. It is a matter of personal taste, perhaps, but I find so repugnant how the Western media use the term "Shi'ite" – committing the linguistic barbarism of putting an English suffix on an Arabic word and then using this unfortunate neologism in an implicatively supercilious, disparaging manner – that I prefer in my own writings and teachings to use instead "Shi'ah" nominally and adjectivally. [Editor's remarks]

[24]. One were to write: "according to" in this sentence, however using this phrase in this context is to suggest – nonsensically- that those who take this view interpret Imam al-Khomeini (ra) as saying, etc., etc. Hence one has written it in a different way. [Editor's remarks]

[25]. As one would not know about this general institution, I should explain this concept of "the ignorant must be referring to the knowledgeable", because one does not want the reader to be confused, or at least is not at all sure as to what is meant by it.

This institution means that it is 'a rationally approved judgement' that each and every single ignorant should be referring to the knowledgeable. [Editor's remarks]

[26] According to Arabic grammarians, the definite article (*al-*) can imply different meanings. One of these meanings

is termed as *jins* (species), which means that the definite article is added to a word in order to give the impression that this word includes all of its possible classes. Another meaning is termed as *`ahd* (definition), which means that the definite article is added to a word in order to define a certain meaning of it. There are also other meanings implied by this definite article. [Editor's remarks]

[27] Shaykh al-Ṭabrisī, *Majma` al-Bayān* 4:512.

Commenting on the holy Qur'ānic verse involved, the author further adds, "The word *`urf* implies goodness, which represents every action that is decided as right and proper by intellects or by the religious law and not regarded by people of good reason as a disapproved or hideous act." (See *Majma` al-Bayān* 4:415 and Shaykh al-Ṭūsī's *Tafsīr al-Tibyān* 5:62)

[28] *Al-Mīzān fī Tafsīr al-Qur'ān* 8:384.

[29] Al-Suyūṭī, *al-Durr al-Manthūr* 3:282.

[30] Al-Ḥurr al-`Āmilī, *Wasā'il al-Shī`ah* 26:14, H. 32382.

[31] `Alī ibn al-Ḥusayn al-Karakī, *Jāmi` al-Maqāṣid* 6:208; `Alī al-Ṭabāṭabā'ī, *Riyāḍ al-Masā'il* 14:5.

[32] An individual duty is a duty from the liability of which the other individuals of the community are exempted should it be carried out by one of them, while a collective duty, on the other hand, is any duty that every person is responsible for carrying out individually. [Editor's remarks]

[33] Imām al-Khomeini, *Kitāb al-Bay`* 2:609.

[34] Al-Ḥurr al-`Āmilī, *Wasā'il al-Shī`ah* 20:276, H. 4.

[35] However, the two others must be punished for the crime of helping the murderer.

[36] In the Imāmiyyah jurisprudence, the similarity between property and possession is generally seen from a certain aspect only. [Editor's remarks]

[37] Al-Muttaqī al-Hindī, *Kanz al-`Ummāl* 10:217, H. 29146.

[38] Al-Ṭabrisī, *Mishkāt al-Anwār*, pp. 243, H. 40.

In the same reference book, we can find the following tradition: "Everything is subjected to a tax; and the tax of knowledge is to teach it to its seekers."