Research Article

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Islam and Copyright: Discussions from the Arab World

https://doi.org/10.1515/mwjhr-2025-0009
Received May 8, 2025; accepted September 28, 2025; published online October 28, 2025

Abstract: This article presents and discusses views of some contemporary Arab scholars who have examined the validity of the notion of copyright from the point of view of Islamic law as they understand it. Whereas a few of these scholars have rejected the notion altogether, most of them have argued for its compatibility with Islamic law. To argue for or against the validity of copyright from the point of view of Islamic law, these scholars have employed an impressive host of arguments, rules, principles, and views from Islamic scriptural texts and legal history, making references to Qur'anic verses, Prophetic traditions, historical incidences and practices. These discussions, however, have focused on specific technical questions relating to Islamic law, such as whether authorship (knowledge) can be monetarized, the kind of right that copyright is, the contractual aspects of the relationship between the producers, distributors, and consumers of knowledge, and who should regulate the application of copyright and on what basis. The article concludes that these discussions – which may have influenced current policies on copyright in Arab countries – are mostly uncritical and failed to question problematic aspects of copyright and use the rich normative tradition to which Arab scholars belong to provide valuable input to present debates on the validity, usefulness, and future of copyright.

Keywords: Copyright; Islam and copyright; Arab scholars and copyright; Islamic law; Islamic legal history

Open Access funding provided by the Qatar National Library.

An earlier version of this article was presented at the Symposium on Copyright in Islamic Legal Tradition (Istanbul, June 2024). I would like to thank Ali Ekber Cinar for his logistical support throughout.

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1 Introduction

In 1979, responding to a question from an Arab press, the Syrian, Hanafi scholar Ahmad al-Hajji al-Kurdi (b. 1938)[1] published a strong critique of the notion of copyright from an Islamic perspective. Al-Kurdi (1979, 11–12) begins his religious view (*fatwa*) on the subject by pointing out that the "righteous forebears" of the Muslim community (*Umma*) did not discuss the issue of copyright or even contemplate it. The reason for this, he explains, is that knowledge in the view of those forebears was a kind of worship rather than a craft or business. All that which they sought after was to please God. Starting from the 19th century, and especially in the 20th century, however, things began to change in the Muslim world.[2] When printing became widespread, Muslim students have become lazy and less serious about seeking knowledge, and Muslims' attachment to material gains have equaled or even outweighed their attachment to religion. It was precisely in this environment, al-Kurdi argues, that the issue of copyright began to surface in Muslim societies. And now, people would only teach or share knowledge if they are paid, exposing themselves to the Prophet Muhammad's warning to those who conceal knowledge from those who need it.[3] Al-Kurdi, however, seems keen to point out that he is not against rewarding scholars for their work, but argues that it is the duty of the Muslim community to do so, without these scholars charging money for their writing and teaching. These scholars, he continues, should be content with the "moral appreciation" that they receive from their societies. Combining worldly gain and this elevated status in the community, al-Kurdi stresses, is simply untenable (*ibid.*, 12–13).

Although the majority of Arab scholars argue that the notion of copyright is compatible with Islamic law and ethics, or even reflects its spirit and fulfil some of its objectives, they are generally unable to simply ignore the view put forward by al-Kurdi and some other scholars against copyright. Al-Kurdi's and similar views came

1 Diacritics for authors' names are provided in the bibliography.

2 Another Arab scholar, the Saudi Bakr b. 'Abd Allah Abu Zayd (d. 2008), provides a rather detailed, although not documented, overview of the history of book writing, copying, and printing that has led to the situation that al-Kurdi describes. In addition to providing an overview of scholarship and publishing in Islamic history, he explains how copyright emerged and developed after the invention of the printing machine in the 15th century in Europe (Abu Zayd 1996, 101–115).

3 In addition to this tradition, other Arab scholars have referred in the same context to Qur'anic verses that warn those who conceal "that which God has revealed" (Q. 2: 158, 173, 3: 187). Some other scholars, however, have dismissed the validity of these verses as evidence in this context because they are specific in their reference to scriptures. Those who used them expanded their meaning to include all kinds of knowledge. For this discussion, see, for instance, Al-Ghiryani 2017, 98–99. As for the tradition mentioned above, it has been argued that copyright does not involve concealment because it only applies after an author has already published his ideas (Al-Shahhi 2017, 138).

to represent an "ideal" that reflected the normative practice pertaining to the pursuit and acquisition of knowledge in Islamic history. But in addition to responding to al-Kurdi's account, these scholars – most, but by all means not all, of whom are religious scholars (*'ulamā'*, ulama)[4] – needed to demonstrate the validity of the notion of copyright from the point of view of Islamic law as they understand it. The ultimate question that they sought to answer is whether the notion of copyright is consistent with or can be validated from the point of view of Islamic law, broadly understood. To answer this question, these scholars have attended to a host of other questions, such as whether authorship and scholarship can be "monetarized;" the kind of right that copyright is; the nature of the contractual relationship between the author, the publisher, and the reader; the kind of ownership, if any, that purchasing an intellectual or creative work creates; the kind of evidence that can be used to justify copyright; and who will have to regulate and enforce copyright and on what basis. To this end, Arab scholars have introduced into their discussions an impressive list of textual and non-textual pieces of evidence that they used, quite impressively, to support their respective arguments. This article presents and discusses the main themes of their discussions and provides a breakdown of the main issues that they brought into these discussions, followed by a general appraisal of the strengths, merits, and weaknesses of their respective arguments and views.

It must be noted here that whereas this article is not necessarily comprehensive in its coverage of relevant views on copyright in the modern Arab world, it arguably provides a good overview of various Arab (and specifically Arab-Islamic) perspectives on copyright in Arab countries, featuring discussions by some prominent scholars from, or residing in, various Arab countries and representing different legal and institutional affiliations and scholarly traditions. While examining the extent to which these views have actually informed present policies on copyright in Arab countries is beyond the scope of this article, we can at least assume that they have influenced them, if not contributed to their actual shaping. Discussing these views should contribute to our understanding of the underlying logic of copyright policies in the Arab world, but also of how the Islamic legal tradition is used in modern

4 Other than religious scholars, some other Arab scholars, primarily law professors, take copyright for granted and focus instead on explaining its technical (secular) legal aspects. This group of scholars tend to assume the validity of copyright and focus their energy on explaining what it means and entails with reference to existing legislations in Arab countries and to relevant regional and international treaties and agreements. Some of these scholars – e.g. Ahmad (2019) – has attempted a reconciliation, but the product is typically sketchy and uncritical. Be this as it may, the divide between these two groups – traditional religious and modern legal scholars – reflects a larger and well-known divide in modern and contemporary Arab thought, and it has naturally produced discussions that have emphasized different aspects of and interests in the subject of copyright.

traditions, and the extent to which the engagement with non-Islamic traditions is effective.

2 Overview of Arab Discussions on Copyright from an Islamic Point of View

We have seen earlier that Al-Kurdi attributes the rise of the notion of copyright in Muslim societies to the present decadence of these societies and perhaps the global culture of which they are part. In his argument, he focuses primarily on what he presents as Islamic ethos that the notion of copyright contradicts in his view, the most relevant of which are the prohibition of concealing knowledge (*katm al-ʿilm*) and monopoly (*iḥtikār*), presumptively of useful knowledge. Towards the end of his discussion, Al-Kurdi (1979, 17) stresses that his opposition to copyright extends to all sciences and is not restricted to religious knowledge. Here, al-Kurdi is obviously responding to existing or potential views that restrict the religious invalidity of copyright, with the monopoly and knowledge concealment that it involves, to works of religious sciences only.[5] This view is indeed expressed by many religious scholars, including the Saudi scholar Ibn ʿUthaymin (d. 2001), the Mauritanian ʿAbd Allah al-Faqih, and the Moroccan ʿAbd al-Bari al-Zamzami (d. 2016) (Al-Ghiryani 2017, 92, 104–105). The view that Muslims are under the obligation to share knowledge, which must have informed al-Kurdi's view, is based on a number of Prophetic traditions that exhorts the transmission of the Qur'an and Prophetic traditions.[6] This textual evidence, however, is dismissed by proponents of copyright on the basis of its specific

5 Another issue is rather technical and perhaps less significant for our purposes, and that is whether monopoly extends to include items other than food, which was traditionally the object of monopoly that Muslim scholars thought that Islamic law prohibited, based on a tradition where the Prophet is reported to have mentioned food in particular. As we may expect, some pre-modern Muslim scholars held that prohibited monopoly applied exclusively to food, whereas others, emphasizing the spirit of the law, but also another Prophetic tradition that prohibits monopoly without specific reference to food, extended it to include any item that people need. For the various views on this point, see, e.g., Al-Ghiryani 2017, 81–86. Obviously, those who believe that prohibited monopoly applies only to food reject the view that copyright is a form of monopoly. Remarkably, most of those who restrict monopoly to food (the majority of scholars, as al-Ghiryani mentions) reject the clause of no copying in the sale of copyrighted materials, which will be discussed in a later context in this article. In other words, these scholars can still reject copyright, not because it is a kind of monopoly in their view, but because it is based on an invalid contractual condition. Conversely, those who accept the validity of this contractual stipulation may reject copyright because they regard is as a kind of prohibited monopoly.

6 One such tradition reads: "*Ballighū ʿannī wa-law āya*" (Transmit from me [i.e. The Prophet Muhammad] even if one verse [of the Qur'an]).

reference to religious knowledge. Remarkably, on this and some other points, scholars who are supportive of copyright take an obvious literalist approach, whereas those rejecting it seem to emphasize the *spirit* rather than the letter of the authoritative religious texts.[7]

In addition to these religious and ethical concerns about the assumed selfishness and greed inherent in the notion of copyright as he understands it,[8] Al-Kurdi (1979, 17) believes that intellectual production and creativity would actually benefit more in the absence of copyright. When scholars and creators realize that they would not make any more profits from their works after they have sold them to publishers or readers, they would be encouraged to produce more works to sell, which would only benefit the production of knowledge and creative works. This argument is an obvious response to the rather "pragmatic" view – of which al-Kurdi must have been aware – that copyright is meant to encourage creative people to produce and publish. In other words, al-Kurdi argues that copyright is not just inconsistent with Islamic law and ethics, but can actually defeat its stated purpose. Be this as it may, as noted earlier, al-Kurdi's and similar accounts came to reflect an ideal that even some Arab scholars, who are otherwise supportive of copyright, were willing to acknowledge, even if to explain why Muslims now cannot remain faithful to it.

Notoriously absent from al-Kurdi's account, however, are technical issues with which other scholars, primarily those seeking to prove that copyright is, at the very least, not incompatible with Islamic law and ethics, had to deal. Most of these technical issues had their origin in debates in early and medieval Islamic history between Hanafi scholars, on the one hand, and scholars belonging to other schools of law, on the other hand. The most important of these technical issues are four: 1) whether intellectual and creative production can be treated as a form of "money"; 2) the kind of right that copyright is; 3) the nature of the contractual relationship between the various parties in the process of intellectual and creative production, distribution, and consumption; and 4) who should regulate and enforce the process of copyright and on what basis. We now present some views on each of these points.

2.1 Intellectual "Property": Is it Money?

A basic question with which Arab scholars examining the notion of copyright from the point of view of Islamic law had to deal is whether intellectual production can be considered as a form of money that can be sold and exchanged, a requirement to

7 The obvious irony here is that literalism, as is well known, is typically associated with dogmatism, fundamentalism, and extremism.

8 On monopoly and its association with greed and harm, see, for instance, Al-Ghiryani 2017, 77–80.

accept the validity of copyright and the rights that it gives to authors and the duties that it imposes on purchasers of their works. The issue of the nature of intellectual production and creativity and whether they can be considered as a form of money arose out of references to Qur'anic verses that prohibit the unjust "consumption" of other people's "monies." These references were meant to prove that Islamic law does support copyright because it is a kind of "money" or property that establishes financial rights (Al-Tamimi 2020, 85).[9] We will address next the issue of intellectual production being a kind of property. In the meantime, because those Qur'anic verses speak about money (*amwāl*), Arab scholars needed to attend to the question of whether and to what extent we can consider an author's right in his intellectual or creative production as a form of money.

Arab scholars writing on copyright discuss views of early and medieval Muslim scholars who disagreed on the definition of money. Generally speaking, Muslim scholars generally agreed that for something to be considered as money, it has to have a certain value for people, which would only apply to things that have certain benefits. Hanafi scholars, however, insisted that to be considered as money, an item has to be of the kind that people can exchange, transfer, deliver, move, and save. This last requirement led Hanafi scholars to distinguish between property and money. It is possible, on their view, for something that is not money to be a property. In other words, property and money are not synonymous. Based on this essential characteristic of money, Hanafi scholars, unlike other scholars, agreed that benefit (*manfa'a*), in and of itself, is not a form of money, for it cannot be exchanged and saved for later use. As is well known, the Hanafi school of law (*madhhab*), was the most widespread of all Sunni schools of law, being the official school of law of some of the most important Muslim empires in history, including the Ottoman Empire, of which most Arab countries were part. This simply means that the Hanafi view on this issue must be reckoned with in discussions on copyright, even if other schools of law did not agree with it.

Some Muslim scholars relied on the Hanafi definition of money to argue that copyright is invalid from the perspective of Islamic law. The basic argument here is that intellectual production is not a thing that can be sold and delivered to another. In fact, a scholar (Bin Muhammad 2007, 9) points out that it is not something that one can monopolize as can be done with items that qualify as money. Accordingly, one cannot sell or exchange a mere permission to print, which cannot cancel out the rule that one can use their money (here, the physical "container,"[10] such as a copy of a

9 These verses are Q. 2/188: "And do not eat up one another's monies (*amwāl*) unjustly, nor give it to rulers/judges to usurp a part of others' monies sinfully;" and Q. 4/29: "O you who believe, eat not up your monies (*amwāl*) among yourselves unjustly, unless it be a trade among you by mutual consent."
10 The distinction between intellectual production and the physical "container" in which it is sold will be discussed later.

book, that one has bought) the way they wish, let alone the rule that knowledge should be disseminated (*ibid*., 6–7). Similarly, Abu Zayd (1996, 122–3), who is otherwise fully supportive of protecting authors' "moral" rights, seems to support the view that preventing people from copying a specific work (which is otherwise permissible by default) can be justified only if it is an intervention in someone else's property (used synonymously with money here) without their permission, or if it causes harm (*ḍarar*) to them. Neither of these two points applies in the case of copying other people's works, for authorship (*taṣnīf*) is not money that one can usurp from another by copying their work.[11] Based on the same reasoning, authors cannot even prevent others from translating their works to another language (*ibid*., 162). In this context, Al-Kurdi (1979, 17) had even gone so far as to argue that according to the Islamic ethos on the production and dissemination of knowledge, if anyone owes anything to another, it is the author of a translated work who should be grateful to the translator who makes his knowledge accessible to more people. Secondly, copying someone's work may reduce their revenues or financial benefits from the sale of their works, but this, in itself, does not constitute harm. If a number of shops open in a place that used to have one shop, they may reduce the revenues of this shop, but it cannot be argued that the other shops have caused harm to the shop's owner.[12] In fact, Abu Zayd (1996, 123–124) quotes a view, seemingly approvingly, to the effect that if seeking to prevent others from copying and re-publishing one's work is motivated by the desire to make more revenues than "reasonable," the right thing to do is restrict the author's rights, not allow him or her to prevent others from a legitimate act. Personal benefit, he explains, cannot be used to cause harm to others.

Most other Arab scholars, however, have argued that intellectual production can be considered as a form of money, or can be treated as such for all practical purposes. To prove this point, they draw an analogy between exchanging money for using an author's intellectual production (which gives it a monetary value and thus turns it into money), and charging money for teaching the Qur'an and Hadith (for this

11 Abu Zayd's lengthy discussion of this issue (spanning 85 pages) is very elusive. He goes to great lengths in presenting various points of view on the subject. But here, he presents an Arabic translation that he had commissioned himself of an Urdu "treatise" on the subject by a former *mufti* of Pakistan (Muhammad Shafi', d. 1967) (p. 122). We take this to indicate that he subscribes to Shafi''s position. Later, Abu Zayd seems to appeal more to the ethos of knowledge production and transmission in Islamic civilization, i.e., authors should not seek to benefit financially from their knowledge, and if they have to, they must do that only proportionally, a view that he attributes approvingly to the Mauritanian/Saudi scholar Muhammad al-Amin al-Shinqiti (d. 1973) (p. 183). Arguably, even if Abu Zayd would concede certain financial rights to authors, he would not allow these rights to prevent others from copying, translating, or otherwise benefit from authorship, so long as they acknowledge the author's moral rights, foremost amongst which is the right of attribution.

12 Abu Zayd (1996, 123) attributes this example to the famous Hanafi scholar Shams al-A'imma al-Sarakhsī (d. 1090) in his *Kitāb al-Mabṣūṭ*.

analogy, see, e.g., Abu Zayd 1996, 169).[13] In fact, so this argument goes, the Prophet Muhammad allowed a man, who was unable to pay a dowry, to marry a woman in return for teaching her some Qur'anic verses, an incident from which is inferred that the Prophet considered the man's "knowledge" as a substitute for money, given that dowry, which is customarily money, is a basic requirement of marriage (for this argument, see, e.g., Al-Ghiryani 2017, 93).[14] Other scholars (e.g., Al-Sunbuli 1986, 244) draw analogy between authorship and craftsmanship. Here, just as a craftsman produces things that people use and benefit from and charge them money for that, an author produces knowledge that people use and benefit from, and can similarly charge them money for that. In addition to these arguments, in 1988, the Islamic Fiqh Council of the Muslim World League declared that non-material items, such as trade names and marks, authorship and intellectual production, and inventions and creative productions, are protected rights that have gained monetary value *in the custom of our age* (*Majallat* 1988, 2581).[15]

In addition to these arguments, some scholars (e.g., Al-Zuhayli 2006, 582) have presented arguments about the very definition of money. For example, an item does not qualify as money depending on its quality (physical quality, that is), but rather its utility (*manfa'a*). In fact, scholars supporting copyright mention that Maliki scholars had an expansive definition of "deliverability" (which Hanafi scholars insisted was a characteristic of money) that did not restrict it to physical entities. Here, even utility

13 In one of these traditions, the Prophet is reported to have said: *Aḥaqq mā akhadhtum 'alayhi ajran kitaba Allah* (Nothing is worthier of charging money for than [teaching] God's Book) (Abu Zayd 1996, 171). Nonetheless, the permissibility of charging money for teaching the Qur'an and Hadith (the Prophet Muhammad's sayings) was debated in early Islam, and scholars were divided on its legitimacy. Those who rejected it probably rejected the authenticity of this and similar traditions, or interpreted them in such a way as to "neutralize" them in the context of this debate.

14 Needless to say, the Prophet Muhammad's practice is considered normative by most Muslims. The practice of his Companions (contemporaries of the Prophet) and other "righteous forbears" of the Muslim Umma is also considered normative by many Muslims (notably the Salafis), but less authoritative than the Prophet's.

15 In this context, Al-Zarqa (2004, 2:763) points out that recent developments in Muslim countries have allowed religiously prohibited items, such as alcoholic beverages, to be monetarized. Other items that are legally prohibited, such as drugs, are not, however. The point that al-Zarqa makes here is that people's practice should not be the basis of deciding on the issue of monetarization, a point that Islamic law shares with modern legal systems. In other words, just as these legal systems do not accept the monetarization of certain things, so does Islamic law. What should be done, then, is to decide first on whether something is religiously permissible or not, then move on to discussing whether it can be monetarized. Al-Zarqa makes this comment in the context of discussing how the Ottoman government relaxed Hanafi contractual rules to accommodate new kinds of transactions, allowing new rights to be contractually regulated as "money," which traditional Hanafi jurisprudence would not accept as valid. Having said this, it is not really clear where al-Zarqa stands on the issue of copyright.

and benefit can be delivered, which means that they satisfy this requirement in the definition of money (Al-Ghiryani 2017, 40). It is perhaps this view that has led to the argument that authors charge money in exchange for fulfilling certain needs with the readers, the consumers of their scholarship (Al-Shahhi 2017, 129). In other words, the money is exchanged for service, which is indeed delivered to readers.

Expectedly, those rejecting the "monetarization of knowledge" question and reject the validity of the pieces of evidence used in pro-copyright arguments and provide their own counter evidence. For instance, they argue that when the Prophet allowed a man to marry in return for teaching his pride some Qur'anic verses, he only meant to show kindness and sympathy to him, seeing that he had nothing to give to his bride, or to emphasize the special status of the Qur'an, to which other writings cannot be compared. The same applies to the Prophet's permission regarding charging money for teaching the Qur'an, with scholars opposing copyright restricting it to the use of the Qur'an to heal sick people.[16] A more relevant tradition, they say, is one where the Prophet is reported to have warned a Companion of his against accepting compensation for teaching a group of people the Qur'an and writing.[17]

2.2 Copy"Right": What Kind of Right is it?

Most of the Arab scholars who have discussed the notion of copyright have tackled it from the angle of rights. As much as this approach has proved useful to them in the present context, it has had its own difficulties with which they had to deal. Traditionally, Muslim scholars dealt with what are called today property rights (*ḥaqq ʿaynī*, *ḥaqq milkiyya*) and personal rights (*ḥaqq shakhṣī*). Property rights refer to one's authority over their property and freedom to use it freely (unless the use violates Islamic law, of course). A personal right, however, gives a specific person the right to act in a specific way in relation to another (such as the right of a husband to divorce his wife). It can also establish certain duties on others towards a specific person, such as the right of preemption (*ḥaqq al-shufʿa*) for neighbors and business partners. These personal rights, and the way they should be practiced, are generally

16 Al-Ghiryani 2017, 95–97. The practice of using the Qur'an to heal sick people is called "*ruqya*," which primarily involves reciting certain Qur'anic verses and prayers.

17 Restricting the reference of reports was a common means of "neutralizing" these reports in the context of discussing certain topics. Here, for instance, we can easily imagine a counter argument, according to which the Prophet meant a particular group of people. In fact, people associated with this particular report was a group (called *ahl al-ṣuffa*) that stayed in a corner of the Prophet's mosque because they could not afford to have their own dwellings. In other words, the Prophet may have only meant that one should not charge money for teaching *the poor* reading and writing.

established by Islamic law itself.[18] Now, those using the rights approach in the context of copyright needed to think of how to fit intellectual production and creativity in the framework of these two rights, especially when others use the same approach to dismiss that copyright can be categorized as a right in Islamic law to begin with. Whereas some of them did attempt to characterize copyright as either a property or personal right, others seem to have conceded that it is a distinct category of rights that is still protected under Islamic law.

Arab scholars rejecting to acknowledge copyright as a recognizable right under Islamic law generally argue that it is neither a property nor a personal right. Property rights, they explain, were traditionally assumed to apply exclusively to material or physical items, which intellectual production is not. This, of course, applies to other "moral" rights (translated into Arabic as *ḥuqūq adabiyya* or *ḥuqūq maʿnawiyya*), the non-physical nature of which does not allow them to qualify as property rights under Islamic law. Al-Kurdi (1979, 15–16), for instance, argues that if anything, copyright is no more than a mere abstract right (*ḥaqq mujarrad*) that cannot be monetarized or entitle authors to interfere with whatever purchasers of their books want to do with their purchases. Furthermore, even if copyright refers to the right of a person (author or creator) to act in specific way or establish certain duties on particular people (readers and consumers of copyrighted materials), these rights and duties are not established by Islamic law as is the case with recognized personal rights, which derive their legitimacy from the Shariʿa itself, not from anything outside it.[19]

On the other hand, we have seen earlier that Arab scholars, following their pre-modern Muslim counterparts, disagreed on whether intellectual production can be considered as money. Those who argue that it can, are easily able to characterize copyright as a form of property right. In fact, some Arab scholars have simply argued that money and property are one and the same thing (Al-Zuhayli 2006, 593; Bin Muhammad 2007, 15). We have also seen that for some pre-modern and contemporary scholars, utility and benefit were sufficient to establish monetarization. And since knowledge and scholarship involve utility and benefit, they can be considered as money and property that can be sold and exchanged. Additionally, some of these scholars have emphasized that more often than not, a physical "container" (*wiʿāʾ*) is involved in the process of selling intellectual production that must always be fixed in a physical form to enjoy protection. The most obvious of these physical containers is the book, a bound volume that is actually the subject of exchange and obviously

18 For which reason they are referred to at times as "established rights" (*ḥuqūq muqarrara*).

19 And here, the term "copyright" does not seem very apt, for it can be taken to suggest the right of someone to copy something, rather than the right of someone to monopolize the right to copy. The term "author's rights," as general as it is, sounds more straightforward and indicative in this particular respect.

fulfills all the traditional characteristics of money and property. Once fixed in a physical form, intellectual production separates from its creator and attaches to the physical form that contains it (Al-Ghiryani 2017, 53). The physical form that production takes, so the argument goes, resembles a fruit that has separated from its tree, and which can then be traded separately from the tree – it can be sold, rented, or exchanged, just as one can do with any of his or her property. This point will appear again in later contexts.

In addition to this argument, some scholars have argued that intellectual production, independently of any physical container, can still be treated as a form of property for particular purposes. Here, they draw analogy between intellectual production and some rather personal rights the monetarization of which is accepted in Islamic law. Scholars (e.g. Al-Zuhayli, 590–591) refer here to the right to initiate divorce which a husband can surrender to his wife in return for compensation,[20] or the right of the family of a murdered person to accept monetary compensation (*diya*, also translated as blood money) in return for forgiving the murderer. Similarly, even if an author's intellectual production is an abstract right that cannot be physically exchanged, it can still be sold or exchanged, which turns it into a property for practical purposes. On this view, it does not really matter whether copyright is a kind of personal or property right – it can be either, or it can be both. In either case, it can be recognized as a right that can be traded. This argument, however, was rejected by those who argued that copyright was actually analogous to other personal rights that cannot be monetarized or traded under Islamic law (e.g. 'Abd Al-Nabi 2015, 583). For instance, Islamic law recognizes the right of preemption, but Muslim scholars have agreed that this right cannot be sold or exchanged. The reason for this is that the right of preemption and similar rights were meant to prevent certain harms. This means that if a person tries to sell them, he would be acknowledging that they are not actually causing him harm. In other words, by offering these rights for sale, a person acknowledges that their *raison d'être* is invalid. This is similar to copyright that is

20 The reference here is to the process of *khul'*, whereby a wife can initiate divorce in return for surrendering her financial rights against her husband. Whether this was a *right* that wives could exercise even against their husbands' will was, and still is, a disputed subject in Islamic law. In fact, the majority of Muslim scholars did not regard it as such, but as an *option* that women had, but can only exercise with their husbands' approval. Arguably, pre-modern Muslim scholars may disagree with the characterization of *khul'* as a monetarization of the husband's right to initiate divorce. This characterization would be valid if husbands actually sell the right to divorce to their wives, which no scholar seem to have contemplated. Husbands remain the marital partner that can initiate "divorce," whereas wives have either the option or right to end their marriage through the process of *khul'*. In other words, divorce and *khul'* are two different processes, even if they share certain repercussions. In recent decades, some Muslim countries have turned what most pre-modern scholars regarded as an option that women had, to a legal right.

meant to prevent certain harms, and this is exactly why copyright cannot be compared to the kind of personal rights that can be monetarized. In this latter group of rights, people can exercise them regardless of whether or not they would be harmed.

Remarkably, some other Arab scholars who believe that copyright is a personal right seem to have felt the need to also demonstrate that it is *not* a property right. These scholars argue that a person's intellectual production cannot be separated or detached from his or her self, even if it ends up taking one or another physical form that is sold or exchanged. On this view, the locus of a person's intellectual production is his inner self, not even the physical container that happens to give form to that production to sell to others. From this, it follows that if someone copies an author's work without their permission, it is as if he infringes on the very self of that author.[21]

Thus, the crux of disagreement between those who regard copyright as a personal right and those who regard it as a property right seems to be the locus of authorship and creativity. Those who argue for personal right locate intellectual property in the inner self of its creator, whereas those who argue for property right locate it in the physical form that creativity takes. In other words, whereas those who argue for the personal right attach authorship and creativity to a person (the author or creator), those who argue for property right attach them to a thing (the "container"). However, as the Libyan scholar Ahmad Salama Al-Ghiryani (2017, 54–55) perceptively points out, the first group does not deny that the physical form that the intellectual production assumes is separate from its author, no does the second group deny that intellectual production in its physical container is originally located in the author's inner self. The difference between the two groups, however, is a matter of emphasis, al-Ghiryani argues – whereas the first group of scholars emphasizes the internal location of intellectual production and characterize it accordingly, the second group emphasizes the external location of that production as the ground of the right characterization and determinant of the relevant rules. Al-Ghiryani himself argues that because intellectual production cannot be transferred

21 This argument is obviously influenced by Western philosophies (see, for instance, Moore and Himma), although this is not always acknowledged. Some Arab scholars do attribute to the eminent German philosopher Immanuel Kant (d. 1804) the view that copying and publishing a work without the author's permission is tantamount to forcing him to speak at a time when he does not wish to. In other words, copying constitutes a kind of coercion (*ikrāh*) that violates a person's freedom (for this argument, see, for instance, Al-Ghiryani 2017, 53). Be this as it may, this argument, arguably, has some analogy to a debate in early Islam on whether Qur'anic descriptions of God as "all-knowing," "all-hearing," and the like are attributes (*ṣifāt*) or names of God. A group of Muslim theologians called the Mu'tazila argued that they were names that are integral to God. Regarding them as attributes, which has become the Sunni position, would suggest that they can be separated from God, a view that the Mu'tazila considered blasphemous.

to another in exchange for money, nor can it be separated from its physical "container," it cannot be defended as a property right. The inseparability of the abstract and physical aspects of intellectual production means that the abstract component cannot be exchanged independently from the physical component. In fact, the abstract component, for all practical purposes, is no more than an attribute (*ṣifa*) of the physical component.[22] And because this abstract component of intellectual production cannot be delivered independently from its container, it cannot be considered a form of property and is, therefore, ineligible for exchange in a trade transaction from the perspective of Islamic law (*ibid*., 41–42). Inevitably, therefore, we must conclude that copying a book that a person has purchased is not a transgression on anybody's property. This, however, does not necessarily mean that the copier is not blameworthy on other grounds, al-Ghiryani concludes.

Additionally, Al-Ghiryani (2017, 45) points out that some pre-modern Muslims scholars had actually distinguished between rights depending on whether or not they can be bequeathed. On this view, things that are bequeathable establish property rights, whereas things that are not do not. This latter category of things includes a person's ideas and views, such as his *fatwa*s, which one cannot surrender or bequeath to another.[23] Now, these things cannot be bequeathed or surrendered (or, for that matter, sold) for the very fact that they cannot be separated from their holder. It is precisely this inseparable relationship between a person and their intellectual production that gives them rights in their intellectual production. Authors accepting this argument, however, did not necessarily agree that those rights have to be financial (*ḥuqūq māliyya*); instead, they mostly argue that it establishes moral rights similar to those that were already acknowledged and respected in Islamic history. These include the right of attribution or "paternity" (*nisba*), on which Muslim scholars insisted, as the Syrian scholar Al-Buti (1991, 82–83) points out. Other scholars have emphasized how Muslims have meticulously authenticated statements and texts through the study of chains of transmission, the insistence on mentioning one's sources when transmitting knowledge, and prohibiting lying and plagiarism (Abu Zayd 1996, 128–131, 165). Al-Kurdi (1979, 16) adds to this argument that failure to attribute a book to its author is a kind of cheating and deception (*tadlīs*) that is forbidden in Islamic law, and tampering with its content is a form of dishonesty that is both a sin and a crime. Author's rights also include the right of authors to withdraw

22 See previous footnote. Incidentally, al-Ghiryani's monograph on copyright presents a thoughtful overview of the various arguments that have been put forward for and against copyright in contemporary Arab discussions. His critique of these discussions, however, remain rather limited in scope, but still reveals part of the dialogical nature of present discussions on "modern" issues such as copyright.

23 As Al-Ghiryani (2017, 48) points out later, these Muslim scholars did not call those rights "personal" rights, but rather untransferable or unbequeathable rights.

(*saḥb*) their publications or revise them (Abu Zayd 1996, 164).[24] Other scholars have added to this the right to not disclose one's intellectual production, relying on a Prophetic tradition that warns against looking in others' books without their permission.[25]

Finally, some Muslim scholars have provided additional argument to argue for the validity of copyright away from the traditional kinds of rights known to pre-modern Muslim jurists. These scholars rely on a number of traditions that are taken to establish certain rights, including monetary rights, depending on the principle of precedence (*asbaqiyya*). In one such tradition, the Prophet is reported to have said: "He who reaches that which no other Muslim had reached before him is entitled to it." In another tradition, the Prophet is reported to have said: "He who cultivates a dead land shall own it" (Al-Tamimi 2020, 89). By the same logic, some Arab scholars have argued that if an author develops new ideas, he has the right to benefit from them and even "own" them, just as a scholar who finds a manuscript is entitled to print, edit, and distribute it (see Abu Zayd 1996, 170).[26]

2.3 Copyright: Is it a Contract?

One other angle from which some Arab scholars have approached the issue of copyright is the contractual arrangements among the parties involved in the process of intellectual and creative production, distribution, and consumption. Arab scholars supportive of copyright have argued that the copyright clause in any book (All Rights Reserved) or creative work represents a condition (*sharṭ*) in the contract of sale that a purchaser accepts by purchasing a copyrighted work. This argument, adopted by the Council of Senior Scholars in Saudi Arabia (Al-Tamimi 2020, 125) is used both independently in support of copyright, or as an additional argument to copyright being a right protected under Islamic law. Yet, as is the case with other arguments, this argument has its own problems, foremost among which is the question of whether this restrictive condition is valid in the first place.

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24 Some Arab scholars have compared the right to withdraw a work or revise it to abrogation (*naskh*), the removal or replacement of a legal ruling (*ḥukm*) in a certain issue. For this, see, for instance, Bin Muhammad (2007, 21).

25 The tradition says: "Whoever looks at his brother's book without his permission is as if he looks at Hellfire." On a longer discussion of authors' "moral rights," see, for instance, Abbas (2012).

26 For a Western discussion of the kind of right that copyright is, see, for instance, Moore and Himma. Remarkably, these authors begin their detailed discussion of copyright by stating that copyright does not protect the "abstract non-physical entity," but is about "the control of physical manifestations of expressions of ideas." This sounds like a problematic synopsis of the subject.

Those scholars who have accepted the validity of this condition rely on two Prophetic traditions. The first tradition provides that Muslims should abide by their conditions.[27] The second tradition prohibits taking someone's property or money (*māl*) without their free consent (Al-Ghiryani 2017, 60).[28] Additionally, some pre-modern Muslim scholars, such as the prominent Hanbali scholar Ibn Taymiyya (d. 1327), for instance, held that restrictive conditions are generally valid, a view that he attributed to some early Muslim authorities. In fact, Ibn Taymiyya claims that a consensus (*ijmā'*) existed on the validity of setting certain exceptions on the use of a sale item. By analogy, a seller of a creative work (an author or a publisher) can stipulate in the sale contract that the purchaser of the work abstain from copying it (*ibid*., 61–62). Here, Ibn Taymiyya proceeds from the premise that the default rule is that any consensual contractual condition is valid unless it violates textual evidence, a view that was indeed characteristic of Ibn Taymiyya's Hanbali school of law (*ibid*., 73).[29]

On the other hand, those who reject the validity of that condition have argued that any condition to the effect of restricting the right of a purchaser to use his or her purchase in whatever way they like is invalid. These scholars proceed from a different assumption, that is, conditions are valid if, and only if, they are stated in the sources of Islamic law. They rely on a tradition where the Prophet is reported to have said that any condition that does not exist in the Qur'an is invalid. Ibn Taymiyya himself attributes to Zahiri and Hanafi jurists the view that only conditions that the Shari'a explicitly stipulate and endorse are valid (Al-Ghiryani, 65).[30] But contrary to Ibn Taymiyya's claim of consensus on restrictive conditions, some Arab scholars have attributed to some significant authorities from the early Muslim generations the view that any condition that would restrict the ability of a purchaser to use his purchase the way he likes was invalid (*ibid*., 62–63).

We have seen earlier that al-Kurdi, who was among Arab scholars who have rejected the validity of copyright as a condition of sale, avoided discussing technical

27 *Al-Muslimūna 'alā shurūtihim.*

28 *Lā yaḥillu māl imri'in muslimin illā 'an ṭībi nafsihi.*

29 To this obvious advantage, the Palestinian scholar Fathi al-Durini (d. 2013) adds that, unlike Hanafis, Hanbalis look at the *utility* of things, rather than their physical nature, when deciding on whether to treat them as money (Al-Durini 1981, 26, 33).

30 On the remarkable similarities between Hanafi and Zahiri jurisprudence, see Osman 2014, chapters 3 & 4. It is worth noting here that Zahiri jurists held the view that permissibility was the default rule in Islamic law, which means that anything that the Shari'a does not prohibit can be presumed permissible (in Arabic: *Al-aṣl fī al-ashyā' al-ibāḥa*). Their view on the permissibility of contractual conditions is an exception from that default rule, and one that is based on their reading of textual evidence that states that only conditions mentioned in the Qur'an are valid. On other readings of that evidence, what is meant is not necessarily the explicit mention of the conditions, but only their consistency with the Qur'an (for this argument, see Al-Ghiryani 2017, 69).

issues that he seems to have thought were irrelevant or would weaken his primarily ethical position. Nonetheless, he was aware that he needed to reckon with the reality of his age, where there are authors, publishers, and readers and consumers of creative works. Al-Kurdi (1979, 16), therefore, seems to have decided to offer an alternative to copyright by theorizing on the contractual relationship among the various parties to the process of intellectual and creative production, distribution, and consumption. He points out that there are four possible scenarios of the contractual relationship among these parties. In the first of these scenarios, an author submits a completed book to a publisher who would print, distribute, and sell it. Here, al-Kurdi argues, the author sells his book to the publisher, and all Islamic rules of sale (*bayʿ*) applies to the sale contract between the two parties. The assumption here seems to be that by selling the book to the publisher and receiving his compensation, the author relinquishes his financial (but not moral) rights in the book, which the publisher would sell at whatever price they decide and keep all revenues. The second scenario is when an author enters into an agreement with a publisher to write a book for the publisher to print, distribute, and sell. Here, the publisher *hires* the author to write the book in return for a particular compensation, and all Islamic rules of hire/rent (*ijāra*) apply to the two parties. This includes the requirement that the compensation be fixed and agreed upon at the time of the agreement and cannot be a royalty or a percentage of the sale of the book.[31] Again, it is the publisher here who would decide the price at which to sell the book and keep all the revenues.

The third relationship is when an author writes a book and print it out of pocket, and then submits it to a publisher to distribute and sell it. Here, the author is the one who hires the publisher to distribute and sell the book in return for a particular compensation, and all rules of *ijāra* similarly apply to them, including the requirement of a pre-agreed and fixed compensation. Al-Kurdi (1979, 14–15) does not mention here who would decide the price of the book or take the revenues, but we can assume that since the duty of the publisher in the agreement is simply to market the book (for which they are already compensated), the sale revenues would go the author. So far, al-Kurdi's scenarios focus on the relationship between authors and publishers. Readers, however, resurface in the fourth scenario. Here, the author writes, prints, and distributes the book out of pocket and does not hire anyone to do anything on his behalf. Again, al-Kurdi does not mention how the author would decide on the price of the book and whether this has to be calculated in light of the costs that he incurred. However, he moves on immediately to this question: what if

31 In Islamic law, whatever is exchanged in any trade agreement must be specified to avoid any uncertainty or cheating (*gharar*). The problem with royalties and percentage is that they are not specified and are therefore invalid from the point of view of Islamic law as generally understood.

someone buys the book and begins to copy it without the author's knowledge (or consent), does this make that person a transgressor from the point of view of Islamic law? We already know al-Kurdi's answer to this question.

For his part, Al-Buti (1991, 87), who endorses copyright wholeheartedly,[32] argues that there are two possible contractual agreements. The first one is between the author and the publisher, whereby the latter purchases a manuscript from the former (who must submit this manuscript in exchange of money) and become the new owner of the book. From this time on, the author only retains his moral rights in the book and surrenders his monetary rights to the publisher, either fully or partially (i.e., for a specific time). The second arrangement is when an author sells hard copies of his or her intellectual work to individual purchasers, not to the publisher, who would be no more than an intermediary between the two sides of the agreement (*ibid*., 88). What al-Buti stresses here is that for any sale agreement to be valid, the relevant monetary value has to attach to something physical, not to the ideas and views laid down in the book or, for that matter, aesthetic side of a work of art. Remarkably, al-Buti adds that in the first arrangement, the publisher cannot print copies of the book more than what has been agreed upon with the author, nor can the individual purchasers make copies of the purchased copies. These, al-Buti argues (*ibid*., 88–89), would be considered as acts of usurpation or theft. But what exactly is usurped here is not clear, given that it cannot be the further physical copies that had never been with the author in the first place.

On a different view, Al-Ghiryani (2017, 27) argues that the contractual arrangement between the author, on the one hand, and the publisher and reader, on the other hand, involves two separate and different agreements. It involves a *sale* agreement in which a physical copy of a book is exchanged for a specific sum of money. As the owner of this physical copy, the purchaser can use its *physical material* in whatever ways they wish. The use of the *knowledge* contained in the book, however, is subject to a *lease* agreement, in which the lessee (i.e., the publisher or purchaser of the book) can only use the knowledge without any entitlement to its

32 Drawing on the distinction between intellectual production (authorship or invention) and physical containers (e.g. copies of books), Al-Buti (1991, 89) insists that authors cannot sell their intellectual production, which cannot be delivered to purchasers as is required in valid sale under Islamic law. What they can sell, however, are copies of the bound volumes. When someone purchases one of these volumes, they become its owner. Yet, neither the publisher nor any of the readers can legitimately make extra copies of a book by virtue of owing a copy of it because that was not part of the contract they had with the author when they purchased a copy. This view, made also by Al-Zuhayli (2006, 585) indicates that the main issue is not on whether authors can sell their intellectual products in physical forms, but on whether they retain ownership of the ideas expressed in these forms, which would justify accepting their right to prevent others from using their purchased copies to make additional copies, even if for a specific period of time.

ownership. In other words, when an author sells a book (to individual purchasers through a publisher), he is selling a physical copy of the book and leasing, at the same time, the ideas that he has developed in the book. This, al-Ghiryani points out, is analogous to the more common lease agreements, where a person rents an apartment from another – here, the lessor gives the lessee permission to use the property, not to own it.[33]

Finally, Al-Durini (1981, 21) points out that to bypass the early tight Hanafi definition of money, later Hanafis insisted that a utility can be considered as money only exceptionally by a contractual agreement. In other words, it is the contract that validates what is otherwise invalid or inconsistent with analogy.

What we have presented so far are the most important and detailed arguments that Arab scholars have introduced for and against copyright from the point of view of Islamic law as they understand it. Some other arguments are shorter and tend to avoid involvement in technical legal details that, as must have been clear by now, tend to be controversial, and focus instead on what they regard as principles of Islamic law, such as interest (*maṣlaḥa*) and necessity (*ḍarūra*), and judicial preference (*istiḥsān*),[34] even if these happen to contradict analogy (*qiyās*) and other established legal rules and norms of Islamic law (Al-Ghiryani 2017, 7). In fact, one argument seems to rely on the controversies that we have seen to conclude that copyright does not contradict any clear or incontrovertible textual evidence, established consensus (*ijmāʿ*), valid analogy (*qiyās*), legal rule, or even an opinion from the Prophet's Companions (Al-Tamimi 2020, 106). Similarly, Al-Zuhayli (2006, 584) is willing to disregard all the technical issues and concerns that the notion of copyright raises and rely simply on the notion of utility and interest to wholeheartedly endorse it: copyright, he states, is "a firm right (*ḥaqq thābit*) established by jurisprudential reasoning (*ijtihādāt*), general customs, and the principles of justice and interest". These views simply shift the burden of proof to those seeking to dismiss copyright, capitalizing on the view that permissibility in Islamic law is the default rule,[35] whereas prohibition is the exception that can only be established by strong evidence based on the sources of Islamic law.

33 This analogy can be easily invalidated, of course, given that in this latter lease agreement, the lessee does not actually buy anything, whereas in the case of books, the lessee buys a physical copy, which becomes his property in real terms as is conceded by everyone.

34 There are various definitions of *istiḥsān*, but a common definition is prioritizing a certain view over analogy (or a weaker analogy over a stronger one) to serve a certain interest that would be lost otherwise.

35 See footnote 30 above.

2.4 Copyright: Necessity, Fairness, Interest, and Authority

The two arguments of necessity (*ḍarūra*) and interest (*maṣlaḥa*) are used as additional arguments, or as a last resort when a scholar feels that all other arguments have failed. Here, even if the validity of copyright cannot be established by reference to more "regular" Islamic rules, it can be justified as an exceptional arrangement that accommodates certain necessities and fulfil certain interests.[36] For example, it is argued (e.g. Abu Zayd 1996, 173) that since it is a fact that in our age people are less scrupulous than they were in the past, authors must protect their intellectual production.[37] In another argument (e.g. Sulayman 2008, 4), if authors would not write unless they guarantee that they would benefit from their writing, then they should be given assurances of benefit under the rule that if a desirable act is contingent on another act, then this latter act becomes desirable itself.[38] Al-Durini (1981, 65–67) approaches the issue of *maṣlaḥa* from the angle of the principle of *sadd al-dharā'i'* (blocking the means [to a prohibited end]). According to this, author's financial rights should be protected; otherwise, these rights would be violated, which would discourage them from conducting research, which in turn would harm the entire *Umma*. Later (*ibid*., 68), he also employs the principle of necessity (*ḍarūra*) to argue that authors can charge money for their intellectual production; "late scholars," he argued, "held that one can take a compensation in return for commissioned acts of obedience (*ṭā'āt*)."[39] Finally, he draws analogy between God's justice to people in the Day of Judgement, and the fairness that we must implement in our world. Under this principle, people should be properly compensated for their work (*ibid*., 105).[40]

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36 It must be noted here that interest (*maṣlaḥa*) is not considered as an exceptional rule in some Muslim legal schools, particularly the Hanafi and Maliki, but rather regular principles that can provide a solid basis for legal rulings (*aḥkām*). But even here, it is not meant to trump other rules if it can be demonstrated that these other rules lead to a categorical prohibition of a certain act. This, however, may remain a controversial characterization of *maṣlaḥa*.

37 Given that authors in the past did not have financial rights, this view seems to suggest that if authors do not protect their intellectual production, they may lose their moral rights in their works.

38 In Arabic: *Mā lā yatimm al-masnūnu illā bihi fa-huwa masnūnun*. See, for instance, Abu Zayd (1996, 174–175).

39 Al-Durini (1981, 71) draws analogy between authors and those who engage in *jihād* (i.e. fighting "in the way of Allah"). This later group of people are not prevented from seeking or expecting financial rewards for their fighting, which is supposed to be for religious reasons only. Equally, even if knowledge is supposed to be intended to please God, this does not mean that it should not have another, worldly benefit.

40 Al-Durini seems to be seeking here to weaken or even invalidate the argument made by al-Kurdi and others about copyright being contradictory to Islamic ethos. He does not seem satisfied with merely justifying copyright on technical legal grounds.

Now, if copyright is matter of an exceptional arrangement that cannot be justified with reference to the regular rules of Islamic law, it needs a certain authority to develop its rules, oversee its implementation, and enforce it. Here comes the role of the head of the Muslim state,[41] who, Arab scholars argue, has the prerogative to make exceptions for the benefit of the entire society. On the particular issue of copyright, the exception would relate to the general rule of owners' freedom to use their properties (by copying it, that is), but also to the authors' freedom to allow readers to only use the physical copies that they own in a particular way. In other words, if the head of the state finds it necessary (*ḍarūrī*) to put restrictions on both authors and readers to serve a valid interest or prevent a particular harm (*mafsada*), then he has the capacity, nay the duty, to do that under Islamic law (Al-Ghiryani 2017, 110–113). Thus, a ruler may decide that restricting the freedom of owners of copies of intellectual and creative works to make copies of them would boost scholarship and creativity. Conversely, he may decide that there is public interest in publishing or republishing a particular work, even without the author's consent. In this latter case, the rule can legitimately order the publication of the work and pay a fair compensation to the author (Ahmad 2019, 33). Here, the notions of necessity and interest are key, but also the notion of obedience to the ruler who has the prerogative to weigh various individual and social interests and harms and make a decision that he deems sound and fair to everyone in each particular case.

3 Reflections on Arab/Islamic Discussions of Copyright

The Arab scholars who discussed the notion of copyright from the point of view of Islamic law have employed an impressive host of arguments, rules, principles, and views from Islamic legal history, making references to Qur'anic verses, Prophetic traditions, historical incidences and practices, to argue either for or against the religious validity of copyright. As detailed as these discussions are, they seem marred by a number of issues, most of which are likely caused by the rather simplistic understanding of copyright and the many issues that it has raised, even in societies where it has first emerged.

The most obvious of these issues with Arab discussions of copyright is the exclusive focus on one particular type of intellectual and creative works and treating all other such works as if they were similar to it. That is, most, or perhaps even all, of

41 Traditional Muslim sources refer to the ruler (*walī al-amr*), which today would be the government and the parliament.

these discussions focus on books, to the negligence of other kinds of works that are typically copyrightable today, such as art works, computer programs, etc. This focus on books is quite understandable given that these Arab scholars are primarily authors and readers of books, and that books remain the most widespread copyrightable material produced in the Arab world. Yet, even here, Arab authors seem unaware that focusing on different kinds of books may take their *ijtihād* on the issue of copyright in different directions. For instance, a scholar discussing the validity of copyright from the perspective of interest and harm may have a take on textbooks' copyright that differs from his view on other book genres, as high-priced textbooks very likely cause harm to students who are unable to afford them. A scholar weighing the harm caused by copyright to the author and publisher here, on the one hand, and the harm caused to the public by the high pricing, on the other hand, may decide the latter harm outweighs the former, especially if selling these kinds of books with a narrow profit margin will still be enough to compensate the author and the publisher for their work. The harm that the author and publisher will have to endure may not be more than reduced profit, but not loss, whereas the harm that copyrighting these books will cause would be depriving at least some people from the chance to benefit from them, which, arguably, contradicts the principle of equal opportunity that most countries espouse.

Furthermore, Arab discussions of copyright tend to conflate works of religious and non-religious knowledge. This seems to have had the effect of leading at least some of them to feel a particular apprehension about the idea of copyright that they thought would turn religious scholars into a kind of businessmen who care about profit more than caring about benefiting people, at a time when these scholars themselves relied on the works of their predecessors that were available to them free of charge. We may add to this that the engagement in the production of religious knowledge is not typically costly – all is needed are mostly written sources, which are usually readily available in academic and public libraries.[42] Be this as it may, taking into consideration various kinds of copyrightable materials would arguably have enriched Arab discussions of copyright from the perspective of Islamic law, and may have even altered them significantly.

A second major issue with Arab discussions of copyright is their rather excessive focus on particular technical aspects of the subject of copyright (primarily aspects that they could related to Islamic law and legal history), at the expense of other relevant and more philosophical aspects. Perhaps the most basic of these aspects that are generally neglected in Arab discussions is the kinds of works that should be protected under copyright laws. In fact, the issue of creativity, which supposedly

42 And now even online for free, a fact that Arab authors, editors (of classical works and manuscripts), and publishers seem to accept or are unable to change.

provides the basis of protecting copyrighted materials, rarely appears in Arab discussions.[43] Whereas it seems reasonable for scholars rejecting the notion of copyright to not tackle this point, it is surprising that scholars supportive of it do not feel the need to discuss the criteria of the works that they think should be copyrighted. Attending to this question, again, may have enriched their discussions and allowed them to contribute more meaningfully to present discussions on copyright. Similarly, the idea of "fair use" does not feature much in Arab discussions of copyright from a religious point of view, although it could also be useful in trying to reconcile the normative tradition of Arab authors (where knowledge was meant to be free) and their present reality (where laws restrict access to knowledge). Even the idea of "first sale" is remarkably absent in Arab discussions, even though Arab scholars do not seem to disagree that authors can sell their books, but rather on what should happen after the first sale. In fact, this unclarity about authors' rights before and after selling a copyrighted work appear in the evidence used in some discussions. For instance, to prove that Muslims disapproved of copying books against their authors' consent, an Arab scholar mentions an incident where the Egyptians wanted to copy the works of the famous Maliki scholar Asad ibn Furāt (d. 828), which he refused. They complained to a judge, who told them that they had no right to force him to give them permission, or copy his works without his permission (Bin Muhammad 2007, 24).[44] Obviously, people here wanted to copy a book that they had not bought. It is very possible that the same judge would not have objected to them copying the book if one of them had bought a copy (which becomes his property), even if the author objected to that copying.

Furthermore, with one or two exceptions, most Arab scholars do not attempt to discuss the "fair" duration of copyright, which Arab laws tend to simply "copy" from Western legislations.[45] This uncritical adoption of Western laws seems to have led to many inconsistencies. For instance, if copyright can be considered as a property right that can be bequeathed as some Arab scholars have argued, on what basis can the duration of ownership of copyright by an author's heirs be limited? What if the value of a particular copyrighted work, an Arab author asks, only appears after the expiry of the copyright and the heirs of the author happen to be destitute, how can we

43 Al-Buti (1991, 82) states that his analysis of authors' rights deals with works that are creative. However, he does not seem to realize that this statement needs some detailed discussion in order to decide which works deserve protection under copyright laws. For a Western discussion of this theme, see, for instance, Reese (2017).

44 But it is reported that Ibn Furāt agreed to let them copy his books when the judge himself asked him to allow them.

45 Trying to find a basis in Islamic law for the issue of duration, some scholars, e.g. Al-Zuhayli (2006, 586), have argued that the duration of copyright after an author's death should be limited to 60 years, by analogy to the maximum duration of rent of endowed land, known in Arabic as *ḥikr*.

justifiably deprive them of the revenues generated by the sale of the copyrighted materials which they had once "owned" and never sold or surrendered? (Bin Muhammad 2007, 34–35). Here, this Arab scholar, Muhammad bin Mahmud bin Muhammad, is obviously appealing to the notion of fairness, a notion that other Arab scholars acknowledge, but have shrunk from taking into its logical conclusion from Bin Muhammad' point of view.

Finally, generally speaking, most Arab scholars have focused in their discussions of copyright primarily on two parties, the author and the reader, with only a few of them paying serious attention to the third relevant party, that is, the publisher. Abu Zayd (1996, 186–187), for instance, emphasizes what he seems to regard as a damaging role of publishers in the entire issue of knowledge production and distribution, arguing that although they have been a great means of disseminating knowledge and helping authors print and sell their works, they also exploit authors who have to surrender much of their financial rights in their scholarship. Similarly, Al-Durini (1981, 5) begins his discussion of copyright by pointing out that the violation of this right comes from publishers that bypass the original publisher and author of a work and copy it. Notably, we do not find similar comments about how publishers may also be exploiting consumers of copyrighted materials, or turning the process of knowledge production and dissemination into a business, where financial loss and profit become the only criteria to consider when making decisions about pricing.[46] Remarkably, an incident relevant to this point features in one of the Arab discussions. According to this, when the famous scholar Yaḥyā ibn Ziyād al-Farrā' (d. 828) completed one of his works and gave it to the scribes (*warrāqūn*) to keep and copy for people, they refused to give people access to it unless they buy a copy at a rather high price. People complained to the author, who tried to negotiate with the scribes to reduce the price. When he failed, he decided to read the book again to everyone (so that they can write after him), at which point the scribes, trying to avoid further loss, agreed to copy the work at a lower price (Bin Muhammad 2007, 25). This is a powerful incident from the Islamic tradition that could have obviously contributed more to shaping modern attitudes towards copyright in the Arab/Islamic world.

4 Conclusion

Arab scholars who have discussed the issue of copyright from the point of view of Islamic law belong to a rich and varied normative tradition of legal and ethical rules and principles, where the production of knowledge was typically not monetarized,

46 For a Western discussion of this point, see, for instance, Goldstein (1992).

even if some aspects of it, such as the actual copying of books, were.[47] In this tradition, scholars were rewarded for their engagement in the production of knowledge by other means, such as elevated social status, enhanced reputation and peer recognition, respect from the rulers and possibly appointment in prestigious state positions (particularly as judges, *qāḍī*s), in addition to the "other-worldly" reward which, theoretically, was their ultimate aim. Today, we can add to these rewards good appraisal and promotion for university professors, and winning national and international grants, awards, and prizes, etc. Against the backdrop of this tradition, even if it is conceded that one should abstain from copying another person's works if this copying can cause them harm, criminalizing the act would understandably be troubling for many Arab scholars who think of the subject in terms of religious and normative validity.[48]

If the above argument is accepted, then what needs explanation is not why some Arab scholars have rejected the notion of copyright, but rather why most of them are supportive of it. Here, we have to take two factors into consideration. The first factor is that these Arab authors write in a context where copyright laws are a fact of life, where all Arab countries have their own copyright legislations and commitments under relevant international agreements. Vocal opposition to copyright would be an obvious act of political rebellion, and would likely undermine a scholar's moral authority or chances of holding state positions. Most Arab scholars, therefore, seem to have prioritized this reality over the ethos of the tradition to which they belong and which many of them readily acknowledged as an "ideal" that authors may individually choose to adhere to when it comes to their own publications, but must respect the law otherwise. The second factor is that these scholars are usually authors – i.e. copyright holders – themselves, with an obvious interest in acknowledging and protecting authors' rights. We can see the bias towards authors' rights clearly in the discussion of copyright by the well-known Syrian scholar Wahba Al-Zuhayli (d. 2015), who condemns those who advocate the view that authors are not

47 Trying to explain why the notion of copyright did not develop in Islamic history, Al-Buti (1991, 85–86) argues that the value of the scribe's effort in writing and copying a manuscript was greater than the value of its intellectual content. It was this effort, and the materials used in the writing, that determined the cost and therefore the price of a book. This intellectual value, however, was augmented when the cost of book production was significantly reduced with the invention of the printing machine.

48 This, of course, relate to a wider debate about when to turn a religious duty that seems to be left to the conscience of believers into law, with the obvious implication that the duty would only be abided by on pain of a certain kind of punishment, and ceases therefore to be an act of religious piety that rests on a sincere conviction and commitment of believers. On a relevant discussion about the transformation of "moral rights" and privileges into "legal rights" in the context of copyright, see Matthews (1980).

expected to be keen to benefit financially from their works that were produced through long years of learning and toiling. The Egyptian/Qatari scholar Yusuf al-Qaradawi, who readily acknowledges that ideal, points out that some authors do not have a source of income other than the revenues that they get from their publications, for which reason their rights should be protected (*Majallat* 1988, 2542).[49]

This is not to suggest that Arab scholars supportive of copyright are only driven by mere selfishness. Many of them do seem sincere in thinking that Islamic law – taken today to be protecting all rights – must protect authors' rights. In fact, the Arab/Islamic discourse on copyright – whether approving or disapproving of it – is mostly rights centered. Speaking for copyright, for example, the well-known Iraqi/Qatari scholar Ali Al-Qaradaghi (2001, 401–402) argues that the problem with the kind of right that copyright is not Islamic jurisprudence, but rather modern laws that assumed that moral and intellectual rights need to be justified as rights.[50] In other words, Islam protects all kinds of rights, no matter how they are categorized. Speaking against copyright, on the other hand, Abu Zayd (1996, 185) speaks of "God's rights" in Islamic publications, that is, the price of these publications should not prevent or impede the dissemination of knowledge. What may be surprising in this discourse is the relative absence of a serious employment of the notion of harm, a notion that seems more authentic in the Islamic legal discourse and may have led Arab scholars, not only to come to other conclusions on the validity of copyright, but also to engage in and contribute to current debates on copyright more critically and authentically, and perhaps provide an alternative theory that reduces the harm that all relevant parties in the production and dissemination of knowledge and creative works may experience.[51]

Be this as it may, what is arguably striking in Arab discussions supportive of copyright is that even when they regard it as a case of conflicting rights that requires conciliation between authors' right to benefit financially from their intellectual production and society's right to use and learn from these publications (Al-Zaghlul and Ḥamad Fakhri 2011, 6; Ahmad 2019, 17), most of them seem to assume that what needs protection is only the right of authors and creators, a protection that requires

49 This is actually a strong point. Today, by way of illustration, the basic monthly salary of full professors in Egyptian public universities is less than $250 (with the current exchange rate of $1 = 50EGP). Many faculty members write books (which their students have to buy) to supplement their income.

50 Based on this reasoning, al-Qaradaghi seems comfortable with the various aspects of the notion of copyright, including financial rights.

51 On the use of the notion of harm in the context of some issues that are rights centered today, see, for instance, Osman (2022) and *id.* (2023).

restricting society's access and use of their work.[52] Completely absent in these discussion is the view that in addition to protecting authors' rights, copyright also and equally seeks to protect the right of the society to access and use knowledge by *limiting* authors' and creators' monopoly over their works.[53] On this view, it is assumed that knowledge should be in the public domain so that the public can exercise their "right to receive and impart information" (Geiger 2017, 84, 102). Granting copyrights to authors and creators is thus meant to be a necessary but also a temporary arrangement that is hoped to encourage authors and creators to publish their intellectual and creative works.[54] In other words, copyrights are rights that the

52 Remarkably, in an earlier discussion of the subject of copyright, the famous Egyptian legal scholar Abd al-Razzaq al-Sanhuri (d. 1971), the author of the civil codes of Egypt and some other Arab countries, emphasized society's right, arguing authors rely necessarily on the ideas and scholarship available to them, which is the creation of other members of society. Furthermore, it is society that bestows value on any intellectual work by reading, disseminating, and debating its content, which gives credibility to authors and allows them to succeed (Al-Ghiryani 2017, 31; see also Ahmad 2019, 17–18, who mentions the same point to explain the logic of modern laws and international agreements). This focus on society's right did not necessarily mean that it should be prioritized over authors' rights, but provides some balance to discussions on the conflicting rights associated with the issue of copyright.

53 For a discussion of this view, see Geiger (2017, 75), who speaks about copyright having two aspects, the first of which is the "access aspects," which secures and organize access to creative works, and the second is the "protection aspect," which allows creators to benefit commercially from their works. See also Goldstein (1992, 80), where he speaks about copyright being about authorship, which involves an audience as much as an author. And for the contemporary "Free Culture" and "Access to Knowledge" movements, see Vaidhyanathan (2017). Al-Khafaji (2008) seems aware of this dual nature of copyright, and the Palestinian scholar Kamil Jamil al-Asali is reported to have discussed copyright as including the right to access to knowledge (Mu'azz 1986, 11). Other than these examples, the focus in Arab discussions is typically on authors' rights.

54 Al-Ghiryani (2017, 107–108) cites the Egyptian law professor Muhammad Jalal Muhammadayn, who seems to have understood that copyright is a right that the society itself exceptionally grant to authors, under certain conditions and for a certain duration, as a kind of reward in return for disclosing his knowledge or invention. This understanding does not seem to be widespread among the Arab scholars who have written on the subject. In fact, al-Ghiryani himself, who has written what may be considered the best discussion of the subject of copyright in Arabic, seems to conflate Muhammadayn's description of copyright with the view predominant among Arab scholars. On the one hand, he states that copyright is an exceptional right only dictated by public interest and made possible by the prerogative that rulers have of restricting what is permissible for a particular interest (which is encouraging creative members of the society to write and invent) (*ibid*., 110). In fact, he adds that the society, which grants authors and creators copyrights, can rescind these rights if authors abuse them, such as not putting their work to good use, in which case the government can force them to do so in return for fair compensation (*ibid*., 131). On the other hand, al-Ghiryani mentions the views of some other scholars who agree with Muhammadayn's description mentioned above, when they only say that copyright is meant to protect the rights of authors and inventions, not restrict the right of society for a particular time.

society surrender to authors, not rights that authors have against the society as most Arab scholars seem to assume. If these Arab scholars have engaged with this conceptualization of copyright, or were more familiar with controversies on the necessity and usefulness of copyright in Western societies themselves,[55] they may have been more inclined to either reject copyright altogether (which al-Kurdi does), or oppose expanding the scope and extending the duration of copyright (which al-Ghiryani does), positions that would be more reflective of the "ideal" of their tradition, and that would enrich current debates on copyright. However, by focusing their energy on protecting authors, these Arab scholars seem to have sacrificed their normative tradition, where scholars welcomed the dissemination of their intellectual production, for an uncritical acceptance of an idea that is foreign to that tradition. In fact, to be true to their understanding that copyright is a right held by authors against the society, these Arab scholars should have argued for further extension and expansion of copyright. As Bin Muhammad has noted, it makes no sense to argue that copyright is a right that Islamic law protects, and then decide that authors and their heirs can only enjoy it for a limited period of time. What is obviously needed in Arab countries today is true national dialogues that engage critically with the tradition, western and global discussions of various aspects of copyright, and even modern legislations and international agreements, so that Arab scholars can contribute to this crucial topic as partners, not copiers.

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55 Hasan Jumay'i (2004), an Egyptian law professor, speaks about debates in Western countries, particularly France, about the kind of right that copyright is. He does not refer to Islamic views (see footnote 3 above). For a good example of a Western discussion of the merits of copyright in theory and practice, see Breyer (1970).

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