Protection of Intellectual Property Rights Under Islamic Law

From Tort to Special Privileges

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Abstract

Knowledge and innovation, which are the basis of intellectual property rights, are public goods leading to some kind of market failure in terms of positive externalities. Such a market failure undermines the motivation for production of knowledge and innovation, which in turn would be a social loss and distributive injustice. Therefore, there has to be a response beyond the mere respect for basic property rights under Islamic law according to the Rule of Prohibition of Harm to others. The general application of such a rule and within the private law paradigm confers merely normal protection to intellectual property rights, like any other property rights, which is too little too late. However, affording the extra protection and special privileges to the owner of such rights as a mechanism to compensate the market and private law failure requires a different interpretation of this rule. This article suggests that ownership rights in knowledge and innovation could benefit from this rule at two levels: a general level of basic rights and a special level of privileges based on a social trade-off and distributive justice to avert a social loss. As such, Islamic law is capable of offering such special privileges to the owner of intellectual property rights who is willing to make a deal with society for improved but limited property rights.

Keywords: intellectual property rights, basic property rights, intellectual property privileges, monopoly rights, prohibition of harm.

A. Introduction

The Rule of Prohibition of Harm to others in Islamic law (hereafter RPH) is one of the most all-purpose rules in deducing Islamic and legal statements. This constitution functions as one of the essential justifications for proving the legitimacy of intellectual property rights, and a group of contemporary Sharia scholars have referred to it in their decrees. However, opaqueness in understanding intellectual

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property and level of protection has caused ambiguity and inconsistency in Sharia decrees and legal comments. Observing these ambiguities demonstrates that knowing the characteristics of intellectual property properly is prior to discussion about its legitimacy.

Some of the contemporary Shia scholars who have issued decrees about legitimacy of intellectual property from the Islamic perspective have declared that intellectual creations are only instances of the general concept of property in response to the question whether ratifying such rights leads to the issuance of a new rule or whether these rights can be justified by adjustments to current rules and are protected by the general tort law rule.[1] Following this assumption, all Sharia rules related to property and ownership, including tort rules such as the above general tort rule, are applicable to intellectual creations. These Sharia scholars have deduced generalities like respectability of properties, RPH, etc. to explain the protection afforded to intellectual creations. The fundamental problem with this rationale is that while the question is whether intellectual creations are properties or not, the subject of respectability of properties and RPH is *properties*. Therefore, if we apply such rules to the creations it means that we have accepted that they are properties and there will be no question about their being property or not. Before the enactment of protective utilitarian-based legislation, intellectual creations were considered to be properties at the lowest level, which is not ideal in an intellectual property regime, and it is the law that defines the expected proprietorship. The proof of this assertion is that those intellectual creations that have not sought legal protection have not gained proprietorship value either. Accordingly, the main question is about the legitimacy of the legislation. In contrast to this conception, some Sharia scholars have distinguished between the value of someone's work as just property rights and the value of his monopoly that has been afforded to him over his creation. They have identified the creator's right to assign the first transcription of the artistic or scientific work (work value) but premised his monopoly to publicise the work on a contract clause or a legal specification.[2]

As it was described, the origin of these discrepancies is different understandings of the subject matter of intellectual property. To understand the subject matter of intellectual property properly, one must take into account that three different subject matters are conceivable for intellectual property, each of which would lead us to a different conclusion.

One way is to consider the fixation of the artistic or scientific work as the subject matter of intellectual property. Another way is to regard the abstract

1 M. Fazel Lankarani, 'Polls and Looks About New Jurisprudence and Legal Problems', *Rahnemoon Quarterly*, Vols. 2 and 3, Autumn and Winter 1371 [Persian calendar], p. 210; S.K. Hosseini Haeri, *Jurisprudence of Ahl al-Bayt* [in Arabic], Vol. 23, Autumn 1379 [Persian calendar], pp. 95-103; N. Makarem Shirazi, 'Polls and Looks About New Jurisprudence and Legal Problems', *Rahnemoon Quarterly*, Vols. 2 and 3, Autumn and Winter 1371 [Persian calendar], p. 211.

2 S.A. Sistani, *Polls, Copy and Printing Rights, Book Site of Ayatollah al-Ozma al-Sistani*, n.d., <www.sistani.org/index.php?p=297396&id=44>; L.A. Safi Golpaygani, 'Polls and Looks About New Legal and Islamic Jurisprudence Problems', *Rahnemoon Quarterly*, Vols. 2 and 3, Autumn and Winter 1371 [Persian calendar], p. 209.

characteristic of the work, which would be the idea and meaning embodied in it, as the subject of intellectual property. Rethinking about what is assigned in intellectual property contracts such as publication contracts or licence agreements would give us a more suitable criterion for determining the answer. It is clear that after the publication of the work neither of the two above-mentioned subject matters is assigned because both the physical and abstract dimensions of the work have been published in the society with no control from the creator over them. What is truly assigned in intellectual property contracts is the monopoly of the creator over the work. Upon signing a contract, the creator quits his monopoly rights in the work and deeds it to someone else.

Now it is clear that the creator's monopoly over the work does not exist before the establishment of an intellectual property regime by the passage of pertinent laws, and therefore the creations are not considered properties then. Legislation, by prohibiting publication, institutes a monopoly that has a common value and is assignable. Although before the establishment of an intellectual property system the creator *has* the natural right to publicise the work and to assign this right upon receiving consideration, a state in which the creator has a general level of basic rights, the level of a favourable monopoly that could cause high property value is absent. With the passage of special regulation for creating a distinct area such as copyrights or trademarks, another level of proprietorship is constituted, which is desirable for an intellectual property regime, gives extra protection and is called the ultimate level of proprietorship. This kind of protection is more than just recognition of property rights as natural rights. It is affording the owner of such natural rights whose property suffers from being public goods extra protection based on utilitarian calculation and trade-off between the owner and the State.

To find the answer to the question about the legitimacy of intellectual property at the general level of basic rights and without special intellectual property privileges and regulation at hand, resorting to general rules such as *respectability of properties* and RPH, which are the basis of the law of tort, is not sufficient because they can only justify the basic and natural level of proprietorship. As harm is defined only in relation to a property in the general level of protection, absence of property means absence of harm; consequently, there would be no place to apply RPH or other similar rules that are based on considering the harm done to the property. Other legal systems have established the required proprietorship by constituting monopoly privileges for the creator with the help of distributive justice criteria in the context of economic utility. Identification of this monopoly and its extent and limits needs strong and effective justification because it is followed by severe civil and criminal sanctions.

In this article, an attempt is made to clarify the different criteria for the establishment of an intellectual property regime, its extent and legitimacy with the help of RPH and various understandings of it in Islam. Different understand-

ings of RPH are the result of various Sharia bases; truthfulness and compatibility of all of them are not dealt with in this article.[3]

B. Foundation of Intellectual Property

Intellectual property is an institution that is designed in the context of economic law with the aim of reaching distributive justice. Economic law is a branch of public law that practises the sovereign power of the State with legislation and surveillance aimed at correcting market defects and failures. In short, in economic law, the government uses legal instruments for the realisation of distributive justice and managing economic behaviours. In the field of intellectual property, as in some other fields, market failure hinders the efficient cycle of supply and demand and the realisation of commutative justice, all of which are the basis for the intervention of economic law.

Generally, in all legal systems, the basic legal framework for protecting all properties and proprietorship is ensuring the realisation of commutative justice without much attention to the nuances of social benefits and efficiency of economics. Identification of proprietorship helps it come true with appreciation of work, production and economic efficiency. But sometimes transactional expenses are so high that commutative justice is not reachable, and the government intervenes in people's relations with the aim of realising distributive justice with the help of appropriate and corrective regulations and other instruments.

Distributive justice policy in the market is followed when the natural cycle of supply and demand is unable to promote production and quality and keep the transactional expenses at a reasonable level. In such cases, private proprietorship and the system of free trade are neither useful nor just, and the government should intervene for the sake of distributive justice. This policy is noticeable in labour law, consumer protection law, environmental law, antitrust law, bank and securities law and intellectual property law. But why is justice not realised in intellectual property? The subject of intellectual property, knowledge and information, is a public commodity, the conditions of which are influential on all the people of society. Public commodities such as health and well-being, healthy environment and food, knowledge and information for a decent life are needed by

3 These different interpretations are thoroughly analysed in two essays: "RPH as a theory in the structure of legal and sharia structure" (M. Hekmatnia, 'Rule of Prohibition of Harm as a Theory in the Structure of Islamic Jurisprudence and Law System', *Quarterly of Strategic Studies of Women, 13th Year*, Vol. 51, Spring 1390 [Persian Calendar], pp. 7-42.) and "Extent of functionality of RPH" (A.-H. Rezae Rad, 'Rule of Prohibition of Harm's Extent of Functionality', *Islamic Law Quarterly*, Vol. 25, Summer 1389 [Persian calendar], pp. 63-89.), and the reader is referred to read them for detailed analysis. In this essay, after making clear the foundation of intellectual property in the legal system, we are going to prove the legitimacy of it by practising different understandings of RPH in the Islamic Sharia system.

every human being, but sometimes they cannot be produced and supplied in a normal way because of market failures.[4]

Knowledge and information are among the fundamental commodities that are considered to be means to reach other commodities, the provision and supply of which cause the whole society's standard of living to grow. But in the field of intellectual commodities, more market failure is seen because in most cases creators of intellectual products do not provide and supply them for free, and if obliged to do so, they tend to switch to other markets and products, which in turn would cause a gap and deflation in the market of intellectual goods and services. Leaving the provision and supply of knowledge to the market means that the creators are bound to free activities, and the resolution of the market failure needs government intervention by way of expending public properties and limiting individuals' freedom and rights, according to public goods. By prohibiting commercial use of the intellectual products and levying civil and commercial sanctions against it, the legislative body could impel society to get the permission of the creator for any kind of use of these products. This monopoly on the one hand has commercial value, and on the other hand is retainable and assignable to others. These conditions would lead to some kind of proprietorship right for the creator. Proprietorship is an institution that guarantees order and development of society in different dimensions by leading the material benefits of one's endeavour to him. The government could also use this competent institution to make intellectual properties to promote knowledge and science to the same extent. It is obvious that these conditions require prohibition of proprietary possessions and legitimate freedoms that are not identified in the Islamic legal system without employing considerable rules to justify them.

As the legislation of intellectual property rules requires confining proprietary rights and commercial relations, their legitimacy is controversial. The next part deals with defining RPH to the legitimacy of these rules at two levels of distributive and commutative justice.

I. Basic and Maximum Levels of Protection of Intellectual Property Rights under Islamic Law

The government uses private law to identify property and proprietorship through the mechanisms of tortious liability with the aim of realising commutative justice. Sometimes, applying these mechanisms is not enough and the benefits of the people and society as a whole would be imperilled. According to the RPH, this harm should be eliminated, and therefore the government's intervention to protect society and restore distributive justice is needed. Employment regulations or consumer protection laws are samples of this intervention for the purpose of distributive justice. For intellectual properties in which the mechanisms of tortious liability of private law are not enough as a general level of protection, public law

4 J.A. Kenneth, 'Economic Welfare and the Allocation of Resources for Invention', *in National Bureau of Economic Research, The Rate and Direction of Inventive Activity: Economic and Social Factors*, Princeton University Press, Princeton, NJ, 1959, p. 2.

should take the responsibility and protect the people against the harms shunned by the principles of distributive justice.

According to what has been discussed so far, the legal system regulating intellectual properties is identifiable at two levels. The first level is related to the realisation of commutative justice. At this level, there are some basic protections for the value of the intellectual property based on tortious liability rules without intervention from the government. The reason for this basic protection is that the fixation of intellectual creation is the result of the creator's endeavour, which is valuable and respectful, and the common value of it could be assigned for a consideration under contract law. Under the contract law, this assignment is valid only between the creator and the assignee, however, and all others can use the intellectual property in any way after its publication. On the one hand these uses are not forbidden by law because they are not in conflict with each other, and the purpose of law, especially in the field of tortious liability, is only to keep order and eliminate conflicts. On the other hand these uses cause the creator to have no control over the creation except the consideration of the contract. At this level, the natural monopoly of the creator is only over the initial fixation of the creation, the value of which is the consideration that is paid in return for the first revelation of the work. This stage could be named the basic level of protection in which there is typically insufficient possibility for compensating the expenses undertaken for the creation. Obviously, in these conditions, society's resources will be directed towards the production of knowledge and art only to the extent that the benefits gained are enough to cover the expenses and above that extent is led towards other beneficial fields. In many cases in which an innovation needs more expense, the ability to attract enough resources stops or diminishes drastically. Moreover, if an invention is made in these conditions, there will be a strong tendency to keep it as a trade secret for a long time, which is not favourable to society. For these reasons, the legal system intervenes in the market relations to increase the creator's benefits from the intellectual creation and avoid potential harm. The legal system limiting people's intervention creates a monopoly for the creator that is assignable and has the maximum value that is desirable for the intellectual property regime. As the mentioned monopoly is in one person's possession only, a legal system similar to those of the physical properties is created in which rules similar to the tortious liability rule for settling conflicts between different possessors exist. As in labour law, which has a special system with privileges to protect the weaker side of the employment contract (which would be the worker), and to compensate contract law deficiencies in the modern labour environment, an *ad hoc* regime of intellectual property law ignores tort law liability and introduces the two parties of the contract into a new playground in which the creator is given protection in return for the extra expenses that have been done for the creation and registration of the work and finally its release into the public domain after the protection period. Although the legal system is the originator of proprietorship in both physical and intellectual properties, there is no need for a new *ad hoc* regime to protect one side in physical properties, and the right of the owner to have the property is enough for the proprietorship to be conceived. But in intellectual properties, mere identification of the creator's right would not

result in favourable protection. This kind of protection could be named the utilitarian-based and maximum level of protection, which falls under RPH to prevent harm to the creator.

This could also be analysed from the perspective of harm to society. Identification and specification of limits of proprietorship are among public order issues and are considered to be the government's responsibility. Making a distinction between possession and proprietorship clarifies this argument properly. While possession is a physical and tangible phenomenon that exists regardless of the legal system, proprietorship is a social concept that is conceived by the legislative body of the government for individuals and social institutions. Actually, if the legal system does not recognise one's proprietorship of an object, he would not be considered to be the proprietor although he may possess the object. It is more accurate to say that the government recognises an object as 'property' by the legal system and following that conceives the proprietorship. Some Sharia scholars have also declared that the specification of proprietorship in Islam should be done by the governor with the aim of realisation of justice and maintenance of public benefits.[5] On the basis of this argument, some other Sharia scholars believe that the basis of proprietorship and property is God's will to enable all society members to use the resources justly.[6] The result of this basis is that the fortunes and wealth are first society's properties and then the individuals'.[7] For instance, in a Hadith it has been stated that "fertile land is for God and he has endowed it to his worshippers. If someone abandons a land for more than three years without a reason, the land should be taken from him and given to others."[8] Therefore, whenever the proprietorship disregards its main purpose of defending the public interests and whenever observing its traditional rules could lead to an increase in expenses and waste, intervention by the government is permissible. Generally, in Sharia descriptive resources of Islam, waste, harm and public interests are considered to be reasons for restricting proprietary rights.[9]

The purpose of using resources efficiently sometimes depends on the establishment of new institutions such as intellectual property. In these institutions, the government confers economic and assignable value to the creators' works and corrects market failure in scientific and artistic fields with restriction of people's possession right in intellectual properties and banning their publication. In this way, consuming time and energy for creating a scientific or artistic work would be reasonable, and channeling resources towards production of knowledge forms knowledge-based economics. Without such an intervention by the government, investment in such costly domains would be shut down and in other less expen-

5 Motahari, 'A Review of the Islamic Economic System', Morteza Motahari, 1st edn, Sadra Publications, Spring 1368 Solar calendar, p. 52.

6 S.M.B. Sadr, *Our Economics*, Espahbodi (Trans.), Islamic Publication, Tehran, 1349 [Persian calendar], pp. 28-29.

7 Motahari, A Review of Islamic Economic System, p 233.

8 Sadr, 1349, at 29.

9 F. Hedayatnia, 'Principles of Limiting Proprietary Dominance Under Islamic Jurisprudence', *Islamic Law*, Vol. 26, Autumn 1389 [Persian calendar], Paeez 1389 [Persian calendar], pp. 137-164.

sive ones diminished. Consequently, in such a society, very little resources are spent to produce knowledge, and development of technologies in industry and agriculture would be very slow and based on the traditional methods. This would gradually make the society dependent on other societies in the production and utilisation of technologies as it would stagnate in the context of economic production and growth. On the contrary, a country in which scientific activities are considered a virtue and that devotes a substantial amount of resources to them would see more efficiency and economic welfare with everyday inventions in various domains of industry and agriculture. In such circumstances, RPH with its various interpretations would disapprove of the situation of the first society.

C. Utilitarian and Maximum Level of Protection Based on RPH in Islamic Law

It has been discussed so far that with a view to facilitating the efficient allocation of resources to the production of knowledge and information, the legislative body makes restrictions to individuals' proprietary rights with enactment of civil and criminal sanctions. With this government intervention, the subject matter of intellectual creation acquires property's attributes from which proprietorship could be conceived. It is clear that the legitimacy of such an intervention in people's possessions should definitely be justified. In this regard, referring to RPH that negates harmful possessions of people or non-protective conditions would make us independent of other evidence. Adducing RPH in Sharia sources is based on three interpretations of this rule. Each one of these interpretations may be used to prove the legitimacy of intellectual property, but each one would lead to completely different practical results. RPH is sometimes represented as a rule to prohibit harm to others, but sometimes it serves to negate harmful legislation. In this sense RPH tries to invalidate harmful rules or their subject matters. Some scholars have also used RPH to invalidate the non-existence of a rule in cases in which such non-existence would lead to harm. RPH could be interpreted in these three different senses and conceived as true in both meanings of invalidating harm to others and negating harmful rules.

The harm of free public possession of the intellectual works as a result of non-consideration by the legislative body has to be analysed from two different perspectives, namely the creator's harm and society's harm. In each of them, after ascertaining the harm done, with the help of RPH, the harm would be negated or the damage of non-existence of a rule invalidated, and legislation of such a rule might be legitimised.

After orienting RPH to intellectual property, it should be taken into consideration that the result that is the necessity of an *ad hoc* protective regime is only the major part of this logical deduction and the minor part would be cases that need to be investigated by experts, and are dealt with in this article only if needed. In fact, once the existence of valid evidence negating harmful activities against intellectual creations or harmful rules against them is proved, it is time to consider

Object of harm	Interpretation of RPH		
	RPH as an original rule	**RPH invalidating harmful rules**	**RPH invalidating rules that prohibit harm**
Harm to the creator	Prohibits every action that would harm the creator	Invalidates rules regarding proprietary dominance of individuals that would harm the creator	Invalidates non-existence of protective rules that would harm the creator
Harm to society	Prohibits every action that would harm society	Invalidate rules regarding proprietary dominance of individuals that would harm the creator	Invalidates non-existence of protective rules that would harm the creator

the instances and the extent of the harm on a case-by-case basis, which needs analytical information and economic statistics.

I. Adducing RPH as an Original Rule

Some Sharia scholars have considered RPH as an originally prohibitive rule.[10] In this sense, RPH religiously prohibits harming others with the help of proprietary rights. If exercising proprietary rights without the creator's consent is considered harmful to him, RPH would declare such rights as illegitimate. One reason for this is that the creator has spent a lot to make the intellectual creation and possessions such as duplication of the physical copy of the creation could waste his effort and energy. This kind of harm to the creator is especially conceivable in those majors and industries in which great expenditure is undertaken for a single innovation. For instance, ten to fifteen years[11] and an expenditure of billions of dollars[12] are needed to complete the cycle of research, development and commercialisation of a biotechnological pharmaceutical. Seventy-five per cent of such expenditure is the result of failure of different experiments regarding the complicated criteria of the pharmaceutical industry.[13]

This great expenditure is among the main impediments to innovation in the field of pharmaceutics. A group of complicated obstacles such as supervisory institutions are also in the way of new products to be launched in the market, so

10 F.I.M.J. Shariat Isfahani, *Rule of Prohibition of Harm to Others*, Researched by Institute of Al al-Bayt (peace be upon them), Beirut, The House of Lights, 1407 [Arabic calendar], pp. 24-25.

11 M. Dickson & J.P. Gagnon, 'Key Factors in the Rising Cost of New Drug Discovery and Development', *Nature Reviews Drug Discovery*, Vol. 3, 2004, pp. 417-429; J.A. DiMasi, 'New Drug Development in U.S. 1963-1999', *Clinical Pharmacology & Therapeutics*, Vol. 69, No. 5, 2001, pp. 286-296; J.A.R. DiMasi *et al.*, 'The Price of Innovation: New Estimates of Drug Development Costs', *Journal of Health Economics*, Vol. 22, No. 2, 2003, pp. 151-185.

12 H.G. Grabowski & J.A. DiMasi, 'The Cost of Biopharmaceutical R&D – Is Biotech Different?', *Managerial and Decision Economics*, Vol. 28, Nos. 4-5, 2007, pp. 469-479.

13 P. Tollman *et al.*, *A Revolution in R&D: How Genomics and Genetics Are Transforming the Biopharmaceutical Industry*, BCG Report, Boston Consulting Group, Boston, MA, 2001.

much so that only 1 out of 5,000 pharmaceutics would be successful in reaching the commercial market.[14] Without intellectual property rules, the profit of these products would not be able to cover the expenses for 4,999 failed products and the long process of commercialisation.[15] It is clear that if this waste of effort and expenditure is imposed on the creator, it could be publicly regarded as harm.

Some scholars do not credit the existence of such harm. They explain that harm is nothing but dispossession of properties and rights.[16] Therefore, existence of harm is dependent on conceiving the proprietorship over the property and considering the creator as the proprietor, and the problem is that we have not yet proved that the creation is a property.[17] On the other hand, if the property of intellectual creation is proved on the basis of other religious rules before adducing RPH, there would be no need for RPH.[18] In response to this argument, other scholars have contended that harm is identified by convention and the public considers such a creator as harmed.[19]

After the legislation of intellectual property laws, conventional harm could be defined because the new legal regime has instituted the scarcity element, which is needed for identifying the conventional value of the property. The creator with the support of such legislation would spend a great deal on creation, which could be considered to be harm if he is not capable of covering those expenses. Legislation of intellectual property laws in one field is a sign that the public has accepted the harmfulness of the creator's activities without consideration and agreed to promote an *ad hoc* legal regime. It is clear that if the creator spends time and money for creation on the basis of this legislation, he is not considered to be doing any harm against himself. In fact, the legislative body, with enactment of laws that create monopolies in various fields of intellectual property, has accepted the necessity of investment in those fields and agreed that the creator should be considered harmed if not compensated for his time and effort. Accordingly, the public would identify the property value of this monopoly and acknowledge the harm of ignoring such a monopoly for the creator and society.

II. Conflict Between RPH and Rule of Proprietary Dominance

As discussed above, one of the RPH functions is prohibition of harmful activities. In this sense, if others' possessions in the intellectual creation are considered

14 G.J. Mossinghoff, GATT: Intellectual Property Provisions, Statement Before the Joint Subcomm. On Intellectual Property and Judicial Admin. and the Subcomm. On Patents, Copyrights, and Trademarks, Comm. on the Judiciary, 103d Cong. 295, 1994.

15 Pharmaceutical Research and Manufacturers of America, *Pharmaceutical Industry Profile 2009*, PHRMA, Washington, DC, April 2009; J.A. DiMasi & C. Paquette, 'The Economics of Follow-on Drug Research and Development: Trends in Entry Rates and the Timing of Development', *Journal of PharmacoEconomics*, Vol. 22, Suppl. 2, 2004, pp. 1-14.

16 M. Ibn Asir, ' *The End in Strange Talk*' [in Arabic], Vol. 3, Ottoman Printing Press, Egypt, 1311 [Arabic calendar], p. 81.

17 S.K. Hosseini Haeri, *Jurisprudence of Contracts* [in Arabic], 2nd edn, Academy of Islamic Intellect [in Arabic], Qom, 1421 [Arabic calendar], p. 164.

18 *Id.*, p. 47.

19 M. Hekmatnia, *Theoretical Principles of Intellectual Property*, 1st edn, Publication of Research Institute for Islamic Culture and Thought, Tehran, 1386 [Persian calendar], p. 467.

harmful to others (the creators), the conflict between prohibition of these possessions and freedom of trade and rule of proprietary dominance should be resolved. In tangible properties the property right of the owner would entitle him to have every kind of physical possession in them and therefore there would be only one proprietor for every property at a time. But in intellectual creations, identification of proprietorship demands prohibiting other people from some forms of possessions in property that belongs to them. Therefore, intellectual property deprives individuals from some proprietary rights for the benefit of the creator, and this at first sight seems to be in conflict with the freedom and proprietary rights of people. It has been said by some scholars that RPH could not be used in cases where it would result in harming others while prohibiting harm to some.[20] Regarding this, would it be possible to outlaw proprietary rights and possessions with the help of RPH?

Some Sharia scholars have prohibited those possessions that would result in causing harm to neighbours and could be prevented without any harm to the owner. Meanwhile, they have endorsed those possessions that would harm the owner drastically if prevented. This distinction arises because they believe that the rule of proprietary dominance is based on common sense and has only been endorsed by Sharia, and should therefore be interpreted by common sense.[21] In different fields of intellectual property, prohibiting the publication of the creations sometimes would not lead to considerable harm to the owners of the physical fixations of the work, while the creators could be harmed if they are copied. Therefore, on the basis of RPH only, these possessions (which would harm the creator exceedingly) are excepted from the rule of proprietary dominance.

In some Sharia accounts about RPH, instances have been given of prohibition of exercising rights that would result in harm to others. For instance, Bedouins have been prohibited from using the water of their own wells excessively with the aim of depriving nearby pastures.[22] In fact, proprietary dominance right over the well should not result in depriving others from public pastures. Also, the owner of a wall between two houses who wants to destruct it with the aim of harming his neighbour is restrained with the help of RPH, and in case of destruction, it should be rebuilt by the owner. Verse 231 of Baghara sura could be another example of prohibition of exercising rights that would lead to harm to others: "do not mire your wives with the intention of harming them and those doing so are cruel." The uncivilised Arabs before Islam used divorce as a mechanism for revenging and bothering their wives, and this verse prohibits Muslims from this behaviour and does not allow man to exercise his right of divorce as a means to harm women.

Indeed, before the intellectual property regime was instituted by law, intellectual creations were not treated as property, and therefore such conflicts could not

20 Z.al-D. Iraqi, *Essays of Principles* [in Arabic], 2nd edn, Vol. 2, Academy of Islamic Intellect, Qom, 1420 [Arabic calendar], p. 323.

21 S.M.B. Sadr, *Discussions on the Science of Principles*, Recorded by Mahmood al-Hashemi, Vol. 5, 2nd edn, *Encyclopedia of Islamic Jurisprudence*, Qom, 1417 [Arabic calendar], p. 512.

22 M.I.H. Hor Ameli, *Shiites Means*, Institute of Al al-Bayt for Reviving the Heritage, Qom, Vol. 17, 1414 [Arabic calendar], p. 333; S.A. Sistani, *Rule of Prohibition of Harm*, Office of Ayatollah al-Sayed al-Sistani, Qom, 1414 [Arabic calendar], p. 56.

exist. Before the enactment of sanctions for breaching intellectual property rights, no intellectual creation was considered to be property, but only proprietary dominance over properties. But after the legal recognition of intellectual properties, the question would be whether the common sense of society would consider individual exercise of proprietary rights over the physical fixations of the intellectual creation an instance of harm or not. Some Sharia scholars believe that RPH includes those reasonable harms that are not mentioned in Sharia.[23] After the enactment of intellectual property law, creators spend on their scientific activities more than before for reaching a beneficial monopoly, and it is clear that neglecting such a legal right should be considered harmful according to RPH.

III. Adducing RPH as a Secondary Rule

As discussed in the previous part, the practicability of RPH as an original rule is dependent on resolving the conflict between freedom of trade and possessory rights (those that render intellectual creations valueless). Moreover, there should be a rule demanding compensation for the creators' expenses or preservation of public interests. If RPH plays the role of a secondary rule, such conflict is not propounded and it would restrict the original rule of freedom of trade and possessions. Most Sharia scholars believe that RPH actually has an invalidating function and thus invalidates the original harmful rules.[24]

People in an Islamic society would act on the basis of rules that are enacted by the religious legislative body. If people harm others while implementing those rules, these rules are negated by RPH because the root of this harm is the religious rules.[25] Therefore, in intellectual property if freedom of trade and proprietary rights result in harming individuals or society, the original harmful rule of freedom of trade would be invalidated. Such restriction will result in the creator's monopoly, and thereby a rule appropriate to the elimination of the harm is constituted. It should be kept in mind that such an assumption could be true if we consider RPH at the legislative level, invalidating harmful acts.

The problem with this argument is that if we consider the harm of the creator as the basis for practicing RPH, we shall confront some restrictions because this rule is applicable only to the extent that the supposed harm is eliminated. This amount of protection is much less than that offered by intellectual property regimes to motivate individuals to produce useful science and knowledge. On the contrary, if we consider the social harm and preservation of public interest, we would not face such restrictions. This way it should be possible to justify that if the creator does not benefit from the creation, it would result in harm to society and consequently endanger the public interest. For instance, in the field of public health some studies have proved that if there were not powerful and influential support of intellectual property, 65% of pharmaceutical products would not have

23 Sadr, 1417, at 473.

24 H.I.Y. Helli, *Reminder for Fakihs*, Vol. 1, 1st edn, Institute of Al al-Bayt for Reviving the Heritage, Qom, 1423 [Arabic calendar], p. 522.

25 N. Makarem Shirazi, *The Rules of Jurisprudence*, Vol. 1, 3rd edn, The School of Imam Commander of the Faithful, Qom, 1411 [Arabic calendar], pp. 70-71.

been developed,[26] and the state of public health and treatment would be much different. Also, without new science and innovation, reduction of many difficulties in Islamic society is not possible, and elimination of intellectual property regime could abolish many of the developments. Weakness of protective legislation deprives investors of opportunities for risky investment in the fields directly dependent on legal protection,[27] while the growth of developing countries demands much of such investment. Without a strong legal regime, companies owning technologies do not tend to reveal the special technology or invest on research and development. Therefore, the most fundamental condition to provide opportunities for investment and transfer of technology is the establishment of a safe environment against scientific piracy. When RPH is propounded as a secondary rule, its aim is to realise distributive justice. If all the pros and cons of the institution of intellectual property are analysed, the above social aspects could be seen. These aspects, all of which are related to distributive justice, are considered in the second interpretation of RPH, which represents it as a secondary rule invalidating the original harmful rules. On the contrary, the first interpretation of this rule helps to realise commutative justice, and social benefit or loss is not considered while practising it.

RPH as a secondary rule has another side that can be used to explain the legitimacy of the creator's rights and that negates the state in which there is no rule to recognise the creator's right. Like other religious rules, if we consider the non-existence of a rule as the will of the religious legislator, it can be said that this non-existence is a rule dominated by RPH, negating the harm resulting from it. If it is accepted that regulation and deregulation are both the authority of the religious legislator and that religious documents have all the necessary rules for the life of human beings, then it would be possible to suggest that non-existence of rules is itself a rule because it is based on the religious legislator's will not to enact a rule in those circumstances.[28]

Therefore if the non-existence of rules results in harm to individuals and society, this is actually from the religious legislator, and RPH would invalidate such harm and non-existence of rules.[29] In these circumstances, if it is proved that the non-existence of protective rules of intellectual properties has caused public loss such as economic and scientific depression, decline of the public welfare, waste of resources and political and economic dependence, RPH would determine appropriate protective rules, negating this non-existence of rules.

All in all, non-recognition of an intellectual property regime would result in considerable harm to Islamic society at both the internal and international levels.

26 G.J. Mossinghoff & R. Oman, 'The World Intellectual Property Organization: A United Nations Success Story', *World Affairs*, Vol. 160, 1997, pp. 104-105.

27 P.K. Yu, 'Intellectual Property, Economic Development, and the China Puzzle', *in* D.J. Gervais (Ed.), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era*, Oxford University Press, Oxford, 2007, pp. 169-216.

28 S.A. Hashemi Shahroodi, *Studies of Knowledge of Principles* [in Arabic], 1st edn, *Encyclopedia of Islamic Jurisprudence* [in Arabic], Vol. 3, 1420 [Arabic calendar], p. 528; Sistani, 1414, at 292-293.

29 Makarem Shirazi, 1411, at 80; S.K. Heydari, *Rule of Prohibition of Harm to Others* (from researches of Mohammad Bagher Sadr), The House of the Sincere, Qom, 1379 [Persian calendar], p. 298.

In the case of proving the negative effects of such non-existence, it would be possible to justify that such harm is negated by the religious legislator and the necessity of protection is obvious too. In the Islamic Republic of Iran, for instance, some legislation has been enacted on the basis of this argument. Intervention in proprietary rights of individuals can be seen in the provisions for expansion of streets that restrict the individuals' rights to prohibit public loss, because if the illegitimacy of intellectual property results in such public losses, such a rule should not be endorsed by the religious legislator.

D. Conclusion

Intellectual property law is a regulatory and economic law that resolves the problem of market deficiency in the field of intellectual creations with the help of the power of the State because tort law is incapable of realising commutative and distributive justice and efficient balance between supply and demand in the science and information market. The resolution of market deficiency in rejecting public loss in the field of science and knowledge production is done by the government by restricting individuals' proprietary rights and prohibiting public reproduction of the creations. Although individuals' proprietary rights are based on the rule of proprietary dominance and the rule of freedom of trade, which are considered to be original rules in Sharia, restriction of such rights is possible if some criteria are respected. RPH, with its different interpretations, explains that the practice of proprietary rights should be restricted if it causes harm to others. It should be noticed that any of these interpretations could identify a different scope of validity for protective legislation of intellectual property and that choosing one among them as the evidence for proving the legitimacy of protective legislation would be effectual in recognising intellectual protection and determining the duration of it.

The result of practising RPH as an original rule, prohibiting harm to others, is that intellectual protection is accepted in risky and costly areas of research and development such as biotechnological pharmaceutics, with extended duration to compensate the creator's expenses appropriately. But in other fields like literary and artistic works, in which less investment is demanded, the legitimacy of protection may not be recognised decisively, and if recognised, a shorter period of protection is determined. The minor part of the RPH argument is objective and should be analysed and determined independently by an expert, and it may vary depending on the field of innovation and creation. For example, the minor of RPH argument may be that the protection of elegant paintings for a period of five years is harmful to painters. Therefore, the major of the argument would negate such harm according to Sharia and RPH.

One deficiency of the first interpretation of this rule and considering it to be an original rule is that in circumstances in which there is no intellectual property law in a specific field or no intellectual property regime at all, the public would be incapable of determining the financial value for the creation and consequently the harm and the extent of it could not be identified according to the public. Whereas after the enactment of intellectual property laws in every field, the pub-

lic could be able to identify the financial value of this monopoly and determine the harm caused by neglecting such monopoly. Another problem is that the legitimacy of such monopoly could not be discussed in this phase because, logically, legitimacy should be decided before legislation. Therefore, only with assuming the post-enactment state for intellectual creations, RPH may be practised to prohibit the presumptive harm.

Another deficiency of this interpretation of RPH is that the protection could not be extended to let the creators benefit from their artistic and literary creation because preventing harm is the only objective that could be realised by the recognition of some extent of protection to compensate the creators' expenses and the extent of such protection is far less than the extent that is granted by the intellectual property regime. Nevertheless, practising this interpretation of RPH is not useless as in this way a minimum level of protection might be acquired for creators, which is useful in case other interpretations will not be accepted and is complemented by them if they are acknowledged.

According to economic and political law, if the creator does not benefit, it would result in harm to society and public benefit weakening. The retardation of Islamic countries is considered a great loss in contemporary circumstances. Therefore, RPH would invalidate any freedom of trade and proprietary right resulting in such a loss.

The state of a society before and after the enactment of intellectual property legislation is completely different. After the institution of the intellectual property regime and resolving the problem of market deficiency, the creator's work would be identified as valuable, financial and intellectual investment to create artistic or scientific work would become beneficial and this would lead resources into the production of science and knowledge. On the contrary, in a State without intellectual property laws, investment in costly scientific and artistic activities will typically diminish drastically, and technological development in agriculture and industry would be sluggish and conventional.

If the above-mentioned argument is accepted, the problem of conflict between intellectual property laws and freedom of trade and proprietary rights of individuals should be dealt with. Proprietary possession of people over the physical edition of a work is legitimate and is recognised by legal systems on the basis of Sharia resources. Therefore, neglecting and restricting these rights would be considered to be in opposition to some religious rules and unacceptable. Intellectual property in fact results in the dispossession of some individuals' proprietary rights in favour of the creators, and this at first sight is in contrast with people's freedom and proprietary dominance over their properties. Permission of such intervention in people's legitimate rights must be demonstrated with the help of Sharia resources. If we consider the second interpretation of RPH and see it as a secondary rule, such conflict is not propounded. Although the results of the first and the second interpretations of RPH are in conflict with each other, the latter dominates the former because it has got the characteristics of secondary rules.

It should be noticed that all interpretations of RPH must be proportional to the negated harm. Therefore, in every field of intellectual property, an appropriate criterion should be applied separately to calculate cost and benefit. Hence, the

extent and duration of protection in different fields of copyrights, patent and trademarks should be calculated on the basis of the required expenditure for innovation in that field. This criterion could be the risk of investment, technical infrastructure and human resources, business competition and market potentials.

All these need enough economic information, and the first step is to recognise the problem for which intellectual property regulation is enacted and economic law is in search of a solution. Otherwise, the reform may be inconsistent with the problems and add to them, and the result would be the enactment of different regulations and amendments. Appropriate recognition of the problem could ease the process of decision-making about the extent of government's intervention, regulation and their sanctions, and would finally result in more efficiency and compatibility with the realities.