

## Copyright Waqf: An Analysis of Islamic and Positive Laws

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### Abstract

After the Law No. 41 Year of 2004 on Waqf was enacted, the paradigm about waqf in Indonesia begins to shift. In Article 16 Verse (3) of the Law No. 41 Year of 2004 it is stated that the property waqf consists of movable and immovable ones. One of the property waqf categorized as movable and intangible property is Intellectual Property Rights. Copyright is one of waqf objects which is included in the category of Intellectual Property Rights. In the classical Islamic period, copyright was not known as an object of waqf, therefore, this study is necessary to understand two main things. *First*, how waqf as intangible property rights can be the object of waqf in Islamic law. *Second*, how the positive law interprets the property waqf, including copyrights as the object of waqf itself. It was a normative legal research with legal and conceptual approaches. The legal source analysis technique employed was legal reasoning using the deduction method. From the research results, it can be concluded that the copyright validity as the object of waqf lies on the economic benefits side in the form of honorarium/royalty, so that this can put the copyright under the property category. If it is endowed to the public, its legal consequence is that the benefits of copyright become public property forever, no one may inherit, sell, own or donate on behalf of a personal person.

**Key words:** Waqf, Copyrights, Islamic Law, Positive Law

### Introduction

By the enactment of Law Number 41 year of 2004 on Waqf, it serves as a legal protection on the productive waqf management and to encourage waqf innovation. Intellectual Property Rights as the material rights in legal concept are greatly possible to be transferred according to legal provisions through the waqf mechanism. However, up to now there are still many people who are skeptic to the copyright waqf. The problem is that, *first*, how copyrights as a material right which is intangible can be considered as an object of waqf in Islamic Law. *Second*, how the positive law interprets the waqf property, including copyrights, as the object of waqf itself.

In Indonesia, up to the present time the potential of waqf as a means of doing well for the benefits of the community has not been managed and utilized optimally in the national scope. In terms of practice, many people think that waqf is only limited to: first, Waqf is generally in the form of immovable objects, especially land. Second, in fact, on the land a mosque or a madrasa is built. Third, its use is based on the will of the waqf giver (*wakif*). In addition, there is an interpretation that in order to maintain its eternity, waqf land cannot be traded. (Djazuli & Al-Asyhar, 2007).

Normatively, in Indonesia the issue of waqf is stated in the Law no. 41 Year of 2004 *junto* Government Regulation No. 42 Year of 2006. Article 1 verse (1) states that waqf is a legal act *wakif* to separate and/or give a part of one's property to be used forever or for a certain period of time in accordance with one's interests for the purposes of worship and/or general welfare according to sharia. The object of waqf according to this provision is known as waqf property. In Article 1 paragraph (5) it is stated that Waqf Property are assets that have long-lasting durability and/or long-term benefits and possess economic values according to sharia which are endowed by *wakif*.

There are many ways to transfer this copyright in the copyright legal system, including the transfer of copyright through the waqf mechanism. So, in this study the author intended to find out how the validity of copyright as an intangible material right can be an object of waqf. In addition, the author also wanted to know the concept of Islamic and positive laws in interpreting waqf property, including copyright as the object of waqf itself (Rashid, 2018). Copyright is an IPR regime that has the most potential to be used as a waqf asset considering that copyright is a variety of works and the broadest development both in Indonesia and in other countries (Prajna, 2019).

## **Theoretical Review**

### **Copyright Overview**

Copyright is an award for a creator's creativity, so that he can arrange the use of the results from pouring his ideas or information, and he has the right to publish or reproduce his creation, or give permission for it. Therefore, every work registered and receive protection shall be respected and appreciated (VisiYustisia, 2015). In the e-book issued by the WIPO (World Intellectual Property Organization) Publication, it describes the meaning of copyright as follows:

Copyright law provides writers, artists and other creators with protection in the field of literature and creative arts, generally referred to as creations. Another closely related field is related rights or copyright-related rights which include rights that are the same with or identical to copyrights, although sometimes it has more limited and shorter duration. Beneficiaries of related rights are: performers (such as actors and musicians) in their performances; producers of sound recordings (for example, compact discs/CDs) recording their voices; and broadcasting organizations on their programmes, radio and television. The Works protected by copyright are novels, poems, plays, reference works, newspapers, advertisements, computer programs, databases, films, musical compositions, choreography, paintings, drawings, photographs, sculptures, architecture, maps and technical drawings. (Volger, 2010).

Meanwhile, the definition of copyright is based on Article 1 verse (1) of Law No. 28 Year of 2014 on Copyright:

What is meant by Copyright is a creator's exclusive right that arises automatically based on declarative principles after a work is manifested in a tangible form without reducing restrictions in accordance with the provisions of regulations.

Copyright is an expression of an idea, so what is protected is not the idea itself, but the idea which is already in its real form. Works protected by copyright include those in the fields of science, art and literature. The objects protected by copyright as stipulated in Article 40 verse (1) of Law No. 28 of 2014 On Copyright include: (a) Books, pamphlets, published works of art, and all other written works; (b) Lectures, lectures, speeches, and other similar creations; (c) teaching aids made for educational and scientific purposes; (d) Songs and/or music with or without subtitles; (e) Works of art in all forms such as painting, drawing, carving, calligraphy, sculpture, sculpture, or collage; (f) Drama, musical drama, dance, choreography, wayang puppets), and mime; (g) Works of applied art; (h) Architectural works; (i) Maps; (j) Batik art or other motif art; (k) Photographic works; (l) Portraits; (m) Cinematographic works; (n) Translation, adaptation, arrangement, transformation, or modification of traditional cultural expressions; (o) Translation, interpretation, adaptation, anthology, database, adaptation, arrangement, modification and other works resulting from the transformation; (p) Compilation of works or data, whether it is in a format that can be read by Computer Programs or other media; (q) A compilation of traditional cultural expressions as long as the compilation is an original work; (r) video games; and (s) computer programs.

### ***Overview of Waqf***

Waqflinguistically comes from the word waqafa-*yaqifu* which means stop. This word is often equated with *al-tahbis* or *al-tasbil* which means *al-habs'an tasarruf*, i.e. preventing from managing (Zuki, 2012). According to Usman, the meaning of waqf is to stop or withhold property that can be taken advantage of without being destroyed immediately and for permissible use, and is intended to gain the pleasure of Allah SWT. (Usman, 2009). Meanwhile, the definition of waqf according to what is formulated in Article 1 verse (1) of the Government Regulation no. 28 Year of 1977 concerning Waqf of Owned Land is: The legal act of a person or a legal entity that separates part of one's assets in the form of owned land and institutionalizes it forever for the benefit of worship or other public purposes in accordance with Islamic teachings (Iman et al., 2021).

The definition of waqf has also developed over time. The Law No. 41 Year of 2004 on Waqf in Article 1 which states that Waqf is a legal act of *wakif* to separate and/or give part of one's property to be used forever or for a certain period of time in accordance with one's interests for the purposes of worship and/or public welfare according to sharia.

### ***Pillars of waqf***

Waqf itself is declared to be valid if its pillars and conditions have been fulfilled, namely: Wakif is a person who is intelligent, mature, smart, of one's own volition (not coercion) and full ownership (Abd Jalil et al., 2016). The Law on Waqf states that the status of wakif consists of:

### ***Individuals***

*Wakif* individuals as referred to in the verse can only perform waqf if they meet the following requirements: mature, sound mind, not hindered from carrying out legal actions and the legal owner of the waqf property.

### ***Organization***

Wakif organization can only perform waqf if it fulfills the organization's provisions for waqf property belonging to the organization in accordance with the statute of the concerned organization.

### ***Legal Entity***

Wakif legal entity can only perform waqf if it fulfills the provisions of a legal entity to endow waqf property belonging to a legal entity in accordance with the statute of the concerned legal entity.

*Mauquf Bih* (goods or property endowed). The waqf property is a great thing in endowment. But, the property endowed is only valid as waqf property, if the object meets the requirements. According to Wahbah al-Zuhaili in the book *Huswatun Hasanah Cash Waqf* it is stated the conditions for property that can be endowed, namely:

- 1) The object of Waqf should have economic value, the substance still exists and it may be used of according to Islamic teachings.
- 2) The object of Waqf should be clear in form and certain in boundaries. This condition aims to avoid disputes and problems in the future after this property is endowed.
- 3) The waqf property should really belong to the wakif perfectly, meaning that it is free from any burden.
- 4) The object of Waqf should be permanent. However, Imam Malik stated that waqf may be limited in time.

*Mauquf 'Alaih* (purpose of waqf). What is meant by *mauquf alaih* is the purpose of waqf which should not conflict with the values of worship. this is in accordance with the nature of waqf practice as a part of worship. The confirmation of the purpose of waqf greatly assist in determining the use of waqaf property. Surely, the purposes of waqf is for goodness, to reach Allah's pleasure and to draw closer to Him. The use can be for worship facilities such as mosques, Islamic boarding schools and can also be in the form of social facilities such as orphanages, schools and so on. (Saidi & Pagar, 2018).

### ***Overview of Property Ownership***

In Islamic law, property rights are categorized into property owned by an individual. Imam Shafi'i said that property is devoted to something valuable and can be traded and has consequences for those who destroy it (Djuwaini, 2008). Joseph Scacht categorizes Mal into: immovable (*'aqar*) and movable (*mall manqul, mall naqli*) assets and exchangeable (*misli*) and unchangeable (*qimi*) assets. Exchangeable Assets can re grouped into measurable (*makil or kayli*) or weighed (*mawzun or wazni*) or countable (*ma'dud muta qarib*) objects. (Schacht, 2003).

Linguistically, ownership means human ownership of an asset and the authority to transact it freely. According to the terms proposed by the ulemas, ownership is the privilege of an object that prevents other parties from acting on it and allows the owner to transact directly on it as long as there are no syara' obstacles (Djuwaini, 2008). The definition of property according to Abdul Majid is the specificity of existing in the owner of an item in accordance with sharia to act freely with the aim of taking its benefits as long as there are no syar'i obstacles

According to ulemas, there are four ways to own property according to Islamic law, namely:

- 1) Through the control of assets that are not owned by a person or other legal institutions, in Islam they are called *mubah* (permissible) assets, for example: rocks in a river when they are brought home by people then they become theirs.
- 2) Through transactions such as buying and selling, grants and *waqf*.
- 3) Through one's legacy, inheritance.
- 4) The result or fruit of the property that has been owned by someone, whether the result comes naturally or through the effort of ownership.

According to article 17 of the Compilation of Sharia Economic Laws, property ownership (*Amwal*) is based on the following principles:

- 1) *Amanah*, that *amwal* ownership is basically a deposit from God and used for the benefit of life.
- 2) *Infiradiyah*, that the idea of objects is basically individual in nature and the unification of objects can be carried out in the form of a business entity or cooperative.
- 3) *Ijtima'iyah*, that the ownership of objects does not only have the function of fulfilling the needs of the owner's life, but at the same time there are community rights.
- 4) Benefits, that property ownership is basically directed at increasing the benefits and narrowing it down *mudharat*.

The Definition of objects in the Civil Code can be found in Article 499 which states that according to the understanding of the law what is called material is, *every item and every right, which can be controlled by property rights*. From this formulation, it can be seen that in the view of the Civil Code what is meant by material is everything that can be controlled with ownership rights, regardless of its type or form. One thing that needs to be noted here is that ownership in the form of property rights is mastery with economic value. An object that can be owned but has no economic value is not the object of discussion.

The characteristics of material rights are as follows:

- 1). Material rights are absolute rights, which can be defended against anyone
- 2). The property rights have *zaaksgevolg* or *droit de suit* (rights that follow). This means that the right follows the object wherever it is located. The right continues to follow the person who has it.
- 3). Whichever happens first, it is three times higher than what will happen later.
- 4). Property rights have *droit de preference* (rights first).
- 5). The possibilities for filing a lawsuit are also different. In material rights, the lawsuit is called a material lawsuit.
- 6). The possibility to move is also different. The possibility to transfer the property rights can be done completely.

### **Research Method**

It was a normative legal research type by finding the truth based on legal rules or principles (Mahmud Marzuki, 2005). The approaches adopted included Legal (Statute) Approach to the Law Number 28 Year of 2014 concerning Copyright and the Law Number 41 Year of 2004 on *Waqf*. The second approach was the conceptual approach by examining the views and doctrines in the science of law and finding ideas that give birth to legal understandings, concepts and principles.

## Results and Discussion

### *The Concept of Copyright in Islamic Law*

Islam has a definite view of property. The absolute owner of property or everything on this earth is Allah swt. Ownership by humans is relative, limited to carrying out the mandate to manage and utilize in accordance with its provisions.

Some schools of thoughts explain the views of property in Islam. According to Hanafiyah, *al-Mal* is anything that is possible to own, store, and generate benefits. This opinion shows two elements that should be in it:

1. It is possible to own and store it, so *al-mal* must be tangible. Something that is intangible such as knowledge, health, competence, prestige and so on cannot be categorized as *al-mal*.
2. It is reasonably possible to take advantage of it.
3. In addition, the benefits that exist in something should be a benefit that is generally accepted in society.

Material or property in the view of Islam is a way, not the only goal and not a cause that can explain all events (Zaman et al., 2020).

According to the Fuqahas, property is composed of two elements, namely:

1. The element of being (*aniyah*) which means that the property exists in reality, therefore the benefits of a house maintained by someone are not referred to as property, but include property or rights.
2. Elements of habit in society (*Urf*) which means that property is everything that is seen as property by all humans or some humans. In this context, when someone maintains something, he wants its benefits, both visible benefits (*madiyah*) or unseen benefits (*Ma'nawiyah*). (al-Nawawi, 1998).

In seeking and obtaining wealth, Islam does not limit a person's will in looking for and getting property as long as it is carried out in the general principles prevailed, namely halal and good, while the form of business in obtaining property that is the gift of Allah in general can be done as follows:

1. Obtain the property directly before the property is owned by anyone. The obvious form of obtaining new treasures before they become the property belonging anyone is to revive dead land that is not yet owned (Ihya Al Mawat).
2. Acquiring property that is already owned by someone through a transaction, namely the transfer of property takes place automatically, or the transfer of property does not occur automatically (Ghazaly, 2016).

Copyright contains two important components, namely moral rights and economic rights. Moral rights are rights inherent in the creator, namely the right to always include the name of the creator in each of his creations and the rights to the integrity of his creation, cannot be removed or deleted, even though the copyright or related rights have been transferred (Hidayah, 2013). While economic rights are rights owned by an author to benefit from his

creation. These economic rights in each law regarding copyright are always different, both in terms of terminology, types of rights covered and the scope of each type of economic rights.

Referring to Islamic law, economic rights on copyright can be categorized as property owned by someone. Imam Shafi'i said that property is devoted to something of value and can be traded and has consequences for those who destroy it (Djuwaini, 2008). Joseph Schacht categorizes Mal to be: immovable property ('*aqar*) and moving (*mall manqul*, *mall naqli*) and exchangeable assets (*misli*) and cannot be exchanged (*qimi*). Assets that can be exchanged are grouped into objects that can be measured (*makil or kayli*) or objects that can be weighed (*mawzun or wazni*) or countable (*ma'dud mutaqarib*). (Schacht, 2003).

In terms of the benefits in copyright in the form of an economic aspect, where the creator is entitled to receive compensation in the form of honorarium/royalty in the form of publishing or duplicating his creation in a certain amount for business purposes, it is this economic aspect that places copyright in the category of meaningful property in this case. The Maliki school believes that property is not only in the form of objects (material) but can also be in the form of benefits (immaterial). This opinion is also reinforced by the majority of Fiqh ulemas who do not limit assets to something tangible, but can also be in the form of something intangible such as rights and benefits *mall* (assets) is based on the value of the benefits that exist in the object, therefore assets can be in the form of tangible and intangible objects (intangible assets) includes copyright. Second, the Maliki school allows *waqf* for a certain period of time, so that copyright *waqf* by itself includes *waqf muaqqat* (limited period of time), because the copyright period is limited by law.

### ***The concept of the validity of copyright as an object of waqf***

The scope of *waqf* which is generally understood so far tends to be limited to *waqf* of immovable objects such as land and buildings, *waqf* can also some of their wealth in the form of movable *waqf* property, either tangible or intangible, namely money, precious metals, securities, vehicles, rights intellectual property, lease rights, and other movable property. Allotment of *waqf* property is not solely for the benefit of religious and social facilities but is also directed at advancing public welfare by realizing the potential and economic benefits of *waqf* property.

*Waqf* among fuqahas is more on the basis of adherence to the principle that the object as *waqf* is essentially a perpetuation of the benefits of the object. The concept of *waqf* objects can be seen from the principle of their usefulness, therefore Copyright which can provide economic benefits in the form of royalty payments is seen as one of the *huquq maliyah* (property rights) that are protected by law (*mashu*) as *mall* (wealth), and can be used as the object of the contract (*al-ma'qud'alaih*), good contract *mu'awadhah* (exchange, commercial), or *tabarru'at* (non-commercial) contract, and it can be *waqf*.

In fact, copyright *waqf* has actually been carried out, at least it has been done by a lecturer at the Syaria'ah Faculty, State Islamic Institute Sunan Gunung Djati named Hanafi (late) who has donated one of his books to the HMI karkom IAIN SGD (now HMI Bandung Regency Branch). The method of endowing the right of scientific work in the form of writing is to allow the person who receives the *waqf* to publish and distribute it on the condition that the perpetrator does not take profit except in exchange for printing, or if you want to take profit, then the profit is distributed to represent the *wakif's* desire. *Wakif's* statement can also be interpreted that he endows his rights as a writer. Because of that, the *shadaqah* as the name implies is *shadaqah* from the results of the author's rights. The value of the publishing rights donated by the author can be calculated based on the calculation of one print or more for all

prints. This condition depends on the tradition that is usually adopted in a country in which the author lives. In this case, the publisher can take profit from the publication of books of which publishing rights have been donated by the author on the condition that they must issue the author's share in the form of *shadaqah* to the way of goodness, if there is a profit as determined by the author (Qahaf & Rido, 2005).

The existence of Copyright as waqf property, in addition to providing economic benefits and creating social justice, the waqif's copyright will also get a reward. Waqf that is prescribed in Islam has two dimensions at once, namely religious and socio-economic dimensions. The religious dimension is because waqf is a religious recommendation that needs to be practiced in the life of the Muslim community, so that the waqif gets a reward for obeying its orders. While the socio-economic dimension is because waqf shari'ah contains economic and social elements, where waqf activities have helped to be tolerant between one another.

Copyright waqf is the same as other object of waqf which is done with authentic evidence, namely the Waqf Pledge made by the Official Making the Waqf Pledge Deed and its certificate (copyright certificate) made by the authorized party. Copyright waqf should be registered with the Directorate General of Intellectual Property Rights to be included in the General Register of Copyrights. It can be done absolutely (without specifying the party entitled to benefit from the waqf) and also *muqayyad* (the party determining the party entitled to benefit from the waqf).

The economic aspect of copyright waqf is that the creator is entitled to receive compensation in the form of honorarium/royalty for publishing or copying a certain amount of work for business purposes. Copyright waqf means donating copyright benefits to other parties. While the object of copyright in waqf is retained (*habs*) be reproduced and distributed to the general public by authorized parties to be marketed/sold.

## Conclusion

Determination of the validity of copyright as an object of waqf refers to the opinion possessed by the Maliki school of thought which is based on two things. In terms of the benefits in copyright in the form of an economic aspect, where the creator is entitled to receive compensation in the form of honorarium/royalty in the form of publishing or duplicating his creation in a certain amount for business purposes, it is this economic aspect that places copyright in the category of meaningful property in this case. The Maliki school believes that wealth is not only in the form of objects (material) but can also be in the form of benefits (immaterial). This opinion is also reinforced by the majority of Fiqh ulemas who do not limit assets to something tangible, but can also be in the form of something intangible such as rights and benefits mall (assets) which is based on the value of the benefits existing in the object, therefore assets can be in the form of tangible and intangible objects (assets) including copyright. Second, the Maliki school allows waqf for a certain period of time, so that copyright waqf by itself includes *waqf muaqqat* (limited period of time), because the copyright period is limited by law.

In positive law, the position of copyright waqf is the same as waqf in general, because copyright is included in the category of objects (wealth). The procedure for copyright waqf is regulated in Law Number 41 of 2004 concerning Waqf and the Copyright Act, namely through copyright registration which is carried out at the Directorate General of Intellectual Property Rights. The legal consequence is that if the property is endowed to the public, then the benefits of copyright become public property forever, no one may inherit, sell, own or donate on behalf of a private person.

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