

# Original Article: The Place of Mortgage and Security in Intellectual Property Rights in Iran

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## ABSTRACT

The increasing advancements in of industrial and commercial domains have led to the emergence of intellectual property rights in law literature. Thus, a profound range of laws and regulations have been made on which lawyers have relied. Applying commercial documents are alluded to "commercial documents' mortgage" on which in jurisprudence, there is a serious disagreement among jurists related to the particular conditions of mortgage contract, some of whom consider mortgage objectivity and acceptability which civil law has followed. Some others believe mortgage receipt is unconditional and mortgaged objectivity is similar, being strong in compliance with verses and hadiths cited in mortgage contract and also the requirement of mortgage contract as "secured". In this scrutiny, this issue and "religious mortgage" are considered. Hence, on a jurisprudential viewpoint, no obstacle is vivid for security, since Iranian commercial law is neutral to permit certifying commercial documents; we refer to civil law as a general law. Relying on Articles (772 and 774) of Civil Code, mortgage objectivity and mortgage receipt emerge as some conditions of mortgage contract and void debt is the advent. Since natural requirement of mortgage contract is "security" and objectivity and acceptability conditions are regarded to meet this requirement, "security of commercial documents" deals with determining rights arising from evidence in the document itself. The security of these documents is accepted while not accepting documents mortgage as religious documents and not mentioned in a specific sentence.

## Introduction

Law means a set of rules governing public relations in a society as the ancient social phenomenon; there is no doubt that some of human relations falling within law framework are essential for social life being reflected in all societies, as collateral contracts, a mortgage contract in which money is allocated to secure a certain debt so that lender trust borrower to fulfill its obligation to repay the loan on its maturity as a permanent establishment of ancient communities. It is cited in verse 283 of Surah Al-

Baqarah in the Holy Qur'an with the theme "And if you are traveling and do not find a writer, you should be pledged as a guarantor of religion." It is a strong proof of our claim itself.

The legislator should always strives to make the essential changes in a disciplined and predictable manner regarding the novel requirements so that individuals do not have to resort to the fictitious formal contracts for escaping the ancient and inflexible laws and regulations, or to eliminate some conditions not correspondant to the speed and security requirements, more particularly commercial law;

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for instance, due to the receipt condition in the validity of the mortgage contract mentioned in Article 772<sup>1</sup> of Civil Code, the contract's parties in the documents, inevitably acknowledge mortgage receipt and contract in a formal way. Despite having the same basis and wisdom, some contracts are in various formats, conditions and provisions like sale and peace in the sale position. The basis for creating security and strengthening transactions can also appear in the form of diverse contracts; as is often the case in agreements with relatively light and friendly exchanges, sometimes by way of a guarantee and sometimes by a remittance not leading to a local liability; a foreign liability is attached to the principal debtor's liability, individual trust and security are obtained. However, usually in the case of transactions with a relatively large volume or where it is impossible or difficult for the creditor to know and trust the credit, financial ability and goodwill of the other party and his guarantors, the creditor agrees with the debtor on collateral objective. A certain property gets an objective right. The latter type of documents, which is provided for in the Iranian civil law in the form of a mortgage contract, is more pleased and valid than the other documents. According to Article 772<sup>2</sup> BC, "the mortgaged property should be given to the mortgagor or to the individual possession that is determined between the parties". Regarding the mortgage objectivity, it is also mentioned that a certain property is present for determining a certain religion, and Article 774 BC has also stated this necessity. Moreover, the definite object has been opposed to religion and benefit. This view divergence is also visible among lawyers (Abadi, 2016). The right is to solve problems, not to make trouble and add to theoretical and practical difficulties; on the one hand, the conditionality of the mortgage bill, specifically in its traditional sense of material billing, has created difficulties for the banking system; thus credit assets for instance, are the demands and individual benefits and rights. In the new laws and regulations, there is a new collateral form, which is clearly different from the mortgage

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<sup>1</sup> The mortgaged property must be given to the mortgagor or to the possession of a person to be determined between the parties, but the continuation of the bill is not a condition for the validity of the transaction.

<sup>2</sup> The mortgaged property must be certain and the mortgage of religion and interest is void.

contract as the only objective collateral form in civil law without considering the law stability as a general law. Comfort is subject to raising compromised changes. In Iranian law, when it comes to collateral, the mortgage issue is mainly discussed. Terms of conclusion, rulings, effects and general mortgage rules are stated in Articles 771<sup>3</sup> to 794<sup>4</sup> of Civil Code (Soleimani, 1354: 98). And in this research, it is attempted to examine the status of pledging and certification of intellectual property in Iranian law.

### Literature review

Regarding the issues of mortgage, security and the relevant various viewpoints, many studies have been carried out. Addressing mortgage of intellectual property in Iranian law, Farhadi (2012) reported that according to Article 772 of Civil Code, the mortgaged property should be received by the mortgagor, and based on Articles 773<sup>5</sup> and 774<sup>6</sup> of the aforementioned law, the mortgaged property should be property and special. Obvesiously, in the above conditions for the mortgage case, it seems that the payment of intellectual property is not possible and be restricted, because on the one side due to the lack of external and non-intellectual property, collecting is impossible. On the other hand, the intellectual property has the legislature's temporary protection and does not qualify as property forever; besides, due to the significance and usefulness of prescribing intellectual property mortgage in promoting the country's trade and socio-economic development, it is possible to grant intellectual property mortgage with an extent interpretation of these materials, or at least for this purpose modify the given materials or particular regulations in this regard.

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<sup>3</sup> A mortgage is a contract under which the debtor owes the creditor. The mortgagor is called the mortgagor and the other party is called the mortgagee.

<sup>4</sup> The mortgagor can make changes in the mortgage or make other seizures that are beneficial to the mortgage and do not contradict the rights of the mortgagee without the mortgagee being able to forbid him, if the ban is with the ruler.

<sup>5</sup> Any property that is not legally transferable cannot be mortgaged.

<sup>6</sup> The mortgagor can make changes in the mortgage or make other seizures that are beneficial to the mortgage and do not contradict the rights of the mortgagee without the mortgagee being able to forbid him, if the ban is with the ruler.

Approaching the security of intangible property in Iranian law, Ansari (2012) specified the difference between mortgage and collateral of intangible property, the concept of mortgage collateral and its components as mortgage or security of unusual property, the secured use of intangible property in Iranian law.

Nick-Farjam (2011) delved into mortgage collateral in Iranian and British law and proposed some common features of bill documents, taxation of bill documents, the proponents' and opponents' views about taxation Barati documents, accepted theory, transferability, receipt and seizure of bill documents, bill documents in terms of type of property, position and nature of bill documents.

### Definition of intellectual property rights

Intellectual property or rights are rights which give their owners the right to benefit from human intellectual and innovative affairs and have economic value as well as the capability to trade; however, the subject is not a specific material issue. Rights of authors of literary or artistic works or literary and artistic property as copyright, patent, customer rights such as goodwill, the right of merchants and artisans to call, trademarks and trade secrets are known as commercial and industrial property of various types. It is an intellectual property (Nyquist, 1981). Some authors prefer the title of "intellectual property" for these rights since the source of these rights is human thought; however, the others find the term "spiritual property" more appropriate because some of these rights, as goodwill are not produced due to thought and thoughts, but only since they do not have a material existence. They are included in the realm of these rights.

Intellectual property rights in Iran are often translated as "intellectual property rights", which seems to be the lexicon "intellectual" due to its widespread meanings as it should and perhaps does not give the right data about the meaning and purpose. In more vivid terms, so-called logicians, this lexicon is comprehensive but not a hindrance since it is often defined in terms of material, formal and apparent. Katouzian (2003) has defined spiritual rights as the rights giving the exclusive benefit of human activity, thought and initiative to the owner. The protected subject in these rights is intellectual works and innovative human creations.

### The property of intellectual phenomena

The property is something used and has an economic exchange value. Hence, the criterion for determining the object tax is that it can be dated and have economic value. It is not essential; the property should be tangible and material since intangible and intangible property may also have economic value from the custom viewpoint and trading subject. Benefit, usufruct, easement and deduction are the case. Therefore, the tax on intellectual property rights should not be doubted, as these properties are traded because of the value that custom presupposes for them. It is worth to note that the object immateriality does not affect its taxation. Some believe that spiritual things such as thought, art, and craft are not property, and that only one who initiates an idea has a kind of inalienable right to the initiative and the result of his initiative, which others do not have the right to use and express. There are other types of rights that do not belong to you. If above-mentioned meaning is that the subject and property of intellectual property rights is not material property, it is a correct statement and it can be accepted, but if it means that the subject of these rights, that is the intellectual works are not taxable, it cannot be adopted since as stated before, the society makes them the subject of a transaction for the value it places on this property, and this amount indicates the tax on this property (Saffary, 2020).

### Security

Security is one of the pillars of the main structure in private law. In the traditional system, however, it is more often referred to as a result in the form of other legal entities. Security, by its nature, seeks to provide reassurance to those who transfer their property to others and are entitled to repay it (such as a loan) or to individuals who are simply obligated to fulfill your commitment that is not satisfied. In addition to this requirement, there have been numerous branches of guarantee in the legal world to organize such a purpose. A mortgage contract is a solution branched out from the guaranteed institution. Indeed, security is a context in which guarantee contracts such as mortgages and the like emerge.

The mortgage contract with its reliable nature has faced issues in the historical context and in dealing with the types of property as its subject. By human progress and establishment of other types of property added to the traditional division, the mortgage contract also encountered new problems. Property was subdivided into two general categories after these human advances, in particular the need to respect the intellectual work of individuals and the legal property recognition having no place in traditional categories as being tangible and intangible properties. Tangible property, which is the familiar faces of the transactions subjects, means those who were tangible and foreign; intangible one, however, refers to those having tax property, but could not be touched or mentioned in the outside world, although their origin or result had this characteristics. Tangible property is the same natural creation which human beings possess and entrust throughout their lives; however, immaterial property or intellectual creations are social phenomena of thought, idea and validity (Khomeini, 1987). Intangible property is the one which has no material existence in the outside world. The term mortgage is a contract under which the financial collateral of the debt is placed. As Article 771<sup>7</sup> of the Civil Code defines, mortgage is a contract under which the debtor gives money to the creditor as a collateral agreement. The mortgagor is called the mortgagor and the other party as the mortgagee. Mortgage literally means stability and permanence as well as imprisonment; however, the jurists' lexicons in its definition are different. Some have proposed the mortgage meaning and, its definition, as pledging the property to be collateral (and guarantee) with the creditor so that if he cannot assert his right from the debtor in due time, it is pledged from the property or the price to resign (Zakizadeh Renani, 2020). There is giving bail on religion or a contract legislated to bail on religion (Khomeini, 1987). The collateral title is pledged to the debt so that if it is not possible to repay the debt from the debtor, the debt will be used to repay the debt (Helli, 1414: 219) or the collateral defined to claim the mortgagor has not found a special meaning, but is applied in the same literal sense; thus, mortgage

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<sup>7</sup> A mortgage is a contract under which the debtor owes the creditor. The mortgagor is called the mortgagor and the other party is called the mortgagee

does not have a specific term and meaning in the holy Shari'a.

Therefore, by definition mortgage is not assigned to religion as collateral; it also includes collateral as well as substantive borrowing. Of course, there is a difference in the validity of the mortgage as well as the content.

### **Mortgage and security intellectual property in Iranian law**

According to Article 774 of Civil Code: "The mortgaged property should be the same and the mortgage of religion and interest is void." Likewise, according to Article 772: "The mortgaged property should be given to the bill." These two articles leading to some issues in intellectual property mortgage have both followed the common jurisprudential theory. However, applying the legal establishment of "intellectual property mortgage" (Ebrahimi, 2020) in promoting business and encouraging inventors, artists and authors in the businesses and presentation of ideas and valuable intellectual as well as the artistic works can have a place. When these rights are not applicable as a tool for economic and commercial gain, they will not find their true value and place in the modern world. Indeed, the protection of intellectual property should not be observed as a goal, but these rights are a means to promote knowledge at the community level and contribute to the economic growth and development of countries, and thus if the protection of these rights does not lead to its desired goal, by itself, it will not be worth much. In the case of inventions, for instance, what is more prominent to the invention owner is "not merely the acquisition of a special and exclusive right under a patent," but the business and widespread products supplies derived from inventions which promote legal status and economics become innovations and inventions in society. It is obvious that an inventor or patent owner, so as to to exploit the material aspects of his intellectual endeavors, as well as to provide them to the public, he will require "a great deal of capital to be able to commercialize his ideas and to produce the goods produced by these ideas in a massive level to your community" (Ahmadyanfar, 2014).

Lack of legal text in mortgage of intellectual property has no choice, but to rely on the general

mortgage rules to clarify the mortgage sentence of this particular property. In the civil law and in the chapter related to the mortgage contract, that is the 18th chapter of the 3rd chapter of this law, two general conditions have been set, both of which in the first view are considered as a serious obstacle in the field of intellectual property mortgage. The first condition stated in Article 774 of this law is the same as the certainty of the mortgaged property, and the second condition, which is mentioned in Article 772, is the supervisor of the ability to receive the same mortgage.

Property objectivity results from intellectual creation (based on the Civil Code). From the way Article 774 is written, it can be inferred that the legislator has considered the mortgage subject of one of the pillars of the mortgage contract and the condition for its validity. According to the provision of this article, the possibility of mortgaging intellectual property is questioned. Therefore, it is worthwhile at the outset to analyse the condition of the mortgagee being the same in the legal status of this contract (first clause) to make it easier to judge the mortgage of intellectual property.

According to the context of Article 774 of the Civil Code: "The mortgaged property must be certain and the mortgage of religion and benefit is void." This legal article followed by the well-known jurisprudence declares mortgage of a large property group to be incorrect, and based on the phrase "specific", as some civil law writers have pointed out, it seems that the mortgage of intangible property as copyright and goodwill is impossible (Katouzian, 1985). In Imami jurisprudence, the main reason for the mortgage objectivity is the claim of consensus and the emergence of texts. However, it should be noted that some narrations are "general" and include any kind of money. Such is the narration mentioned from Imam Sadegh (A.S.): In fact, the narrative is based on the word "property" and not "object". However, the observer's argument about the necessity of textual appearance on the necessity of mortgaged property being identical is flawed, because despite the above-mentioned narration which explicitly accepts any mortgage, the argument on textual appearance will not have any case. The reference is void due to consensus.

Our contemporary civil jurists in recent years have also made valuable efforts in mortgaging dubious property, and each of them has conducted his part to somehow remove the existing legal obstacles and issues. Regarding the necessity of "mortality" of the mortgaged object, according to some jurists, the mortgaged object does not have to be an instance and individuals of the original property, and organic property can also be pledged. Original property is property which is inherently valuable as food, clothing, carpets, houses, land and gold (Langroudi, 1979). According to these authors, it cannot be stated at all that this type of property cannot be mortgaged. The definition of "the exact object" in Article 774 BC applies to these objects, specifically postage stamps, bought and sold as a commodity. Also, Article 10 of the Law on Publication of Treasury Documents, approved in January 1964, states: "Treasury documents can be bought and sold" (Bojnorei, 1998: 278). However, it seems that the meaning of the object in Article 774 is the principle of the property existence as being opposed to religion and benefit, not to have a material and external existence; in other words, sometimes the object is used to mean material existence, which in this sense intangibles such as patents in general are used interchangeably; however, sometimes we use the same in contrast to the benefit of property which means the property principle itself. This mistake is actually due to the literal commonality of the word objectivity. The objectivity here means property in the sense of "principle" versus its benefit, not in the sense that the property is external and has its definition. By the pass of time in terms of this verbal commonality, the first meaning of the lexicon has given way to the second one.

## Conclusion

Considering that documents and intellectual property are due to their economic nature and their actualization, reserves and support of countries are in the field of trade and economy. By setting the right laws, they can be protected. Therefore, the enactment of laws protecting intellectual property rights, with what can be expressed as the result and the strongest reason for the legal proof of the mentioned rights, is the reliance on the jurist ruling and in Islamic society since the Islamic government can make regulations to meet the

requirements and provide its interests within the social ones, and obedience to them until they are not resolved, is legally obligatory. Obviously, the status of intellectual property and their material and spiritual value is not covered for any one, since these properties have the capability to be seized against the demands of intellectual property or to be mortgaged and eventually forcibly transferred to creditors. In general, the necessity and permission of the mortgage contract in Article 3 of the Civil Code is clear, and following the appearance of this article, a mortgage contract is permissible for the mortgagor and essential for the mortgagor so that the mortgagor can break it at any time. Therefore, this article found it difficult to certify commercial documents since due to the incompatibility of commercial documents with the description of the license, which means the right to terminate the permissible contracts, they cannot be justified and analyzed with a permissible mortgage contract. It does not seem that jurists and jurists consider the necessity of a mortgage contract for the mortgagor and the role of the permission and the necessity of the mortgage contract in certifying commercial documents as such a necessity and allowance for the mortgagee. Therefore, two types of legal and religious licenses or permissible can have meaning in mortgage and only one of these two meanings of license can be adopted in mortgage contract. Also, the problem of Article 3 of the Civil Code in the necessity and permission of the mortgage contract should be explained and resolved. Since the legislator has adopted this article in accordance with Islamic law, and also according to Islamic jurisprudence, the meaning of the mortgage contract is determined by the mortgagor, which means being legal and permissible, so the meaning of the mentioned article also means religious permission. And it is permissible, so this solution aligns the opinion of the jurists and Article 6 of the Civil Code with the security of commercial documents, and eliminates the issue of their apparent incompatibility with the security of commercial documents, and makes the way of security for the commercial documents with mortgage institution.

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