

Cybersquatting of Domain Names in Civil Law with Special Reference to Morale Right in the Islamic Perspective

¹Zinatul A. Zainol and ²Abdul Basir Mohamad
¹Faculty of Law, ²Faculty of Islamic Studies,
Universiti Kebangsaan Malaysia, 43600 Bangi, Selangor, Malaysia

Abstract: Each person or a corporation, all of them have their specific rights in some cases which is called domain name that must be preserved as possible by all parties and at the same time, it can not be invaded by any party. If referring to a person, it means that his or her dignity can not be violated because it can result in him experiencing shame. Whereas, in the case of a corporation or business entity that is already well-known all over the world in the field of business or services, their domain names are likely violated by certain parties in the context of getting some benefit or making a lot of profit because of their domain names have been trusted by the public. It is so easy to do so now through the electronic system, the internet. With the internet, anyone can use the domain names of certain companies or corporations to get his or her own personal interests. Thereby, this study examines the cybersquatting of domain names in current laws and then analyzes the same aspects in Islamic law which is related to morale right.

Key words: Cybersquatting, domain name, trademark, Islamic law, morale right, depreciation of usurped property, immaterial damage

INTRODUCTION

Cyber squatting of domain names is the undesirable byproduct of electronic commerce. On the one hand, companies and trade mark owners are constantly concerned and agitated to find that their desired domain names have been registered by enterprising cybersquatters yet on the other hand, laws relating to trademarks are not the only one that proscribes this kind of activity. Mindful of the fact that cybersquatting has been described as a parasitic and predatory practice, there is nothing humanitarian and respectful about it. In *Intermatic vs. Toeppan* (1947) F. Supp. 1227, the US Court correctly described cybersquatters as individuals who attempt to profit from the internet by reserving and later reselling or licensing the internet domain names back to companies that spent million of dollars developing goodwill of the trademark. Accordingly, the registration of domain names with the sole or primary purpose of improperly dealing in the domain names is sufficient to constitute an invasion of a right, regardless of whether it involves actual use of the domain name. The issue of balancing the legitimate interests of the parties does not arise because cybersquatters are capitalizing on the name and reputation of the trademark holder.

Prohibition of cybersquatting under laws relating to trademarks: Trademark owners are faced with new challenges when their marks are used on the internet (Hornick and Gelchinsky, 1998). Given that there is no specific legislation on cybersquatting with the exception to the United States where the Anticybersquatting Consumer Protection Act regulates and controls cybersquatting cases in the United States, the traditional trademark laws and the common law action of passing off are normally relied on.

Cybersquatting and trademark infringement: Trademark infringement typically requires the trademark owner to prove the unauthorized use of an identical or similar mark in the course of trade (Cornish, 1996; Zhang, 2001; Bently and Sherman, 2001). By the way, the meaning of use of a mark is defined by Section 3 (2) of the Malaysian Trade Marks Act in the following terms:

- References to the use of a mark shall be construed as references to the use of a printed or other visual representation of the mark
- References to the use of a mark in relation to goods shall be construed as references to the use thereof upon or in physical or other relation to goods

- References to the use of a mark in relation to services shall be construed as references to the use thereof as a statement or as part of a statement about the availability or performance of services

The underlying issue whether the registration and use of a domain name infringe a registered trademark is something difficult to be reconciled with the way the notion of unauthorized use in the course of trade is normally understood (Froomkin, 1999). Many domain names are used for websites that sells some products or services while some websites provides information. There are also many domain names that are not used in any realistic way, they are merely shelved or stocked by the domain names registrants. Some domain names lead to error pages. Some are also used for websites displaying under construction notice. In United Kingdom, the prohibition of cybersquatting on grounds of trademark infringement is based on a liberal interpretation of the concept of use in the course of trade. In the landmark case of *Marks & Spencer Plc vs. One in A Million Ltd. and others* (1998) FSR 265 Chancery Division (1999) FSR 1 Court of Appeal, the Court of Appeal was not persuaded that the registration of domain names comprising the trademarks of well-known companies which form part of the defendant's personal collection does not amount to use in the course of trade. Instead, the court held that:

The use of the trademark in the course of the business of a professional dealer for the purpose of making domain names more valuable and extracting money from the trade mark owner is a use in the course of trade

In this case, five actions were brought by well-known United Kingdom companies; *Marks & Spencer Plc.*, *J. Sainsbury Plc.*, *Virgin Enterprises Ltd.*, *British Telecommunications Plc.*, *Telecom Securicor Cellular Radio Ltd.* and *Ladbroke's Plc* for summary judgment against the defendants, *One In A Million*, *Richard Conway*, *Julian Nicholson* and *Global Media Communications*. The Plaintiffs claimed that the defendants' act of registering internet domain names comprising of the trade marks of well-known companies and enterprises is an infringement of their trade marks under Section 10 (3) of the United Kingdom Trade Marks Act 1994. In another case, *Tesco Stores Ltd. vs. Elogicom Ltd. and another* (2006) EWHC 403, the court had to decide whether the use of domain names incorporating the claimant's trade mark *Tesco* which were directly redirected to the claimant's official website

amounted to use in the course of trade. Even though, it was argued that those domain names enhanced the goodwill and reputation of *Tesco*, the defendants were actually benefiting from the direct rerouting of traffics. The defendants were affiliates of *Tesco* under the Trade doubler program and it sought to reap commission for itself from *Tesco*. On this point, the court held:

The use of internet domain names is itself a service offered to the public by registering and making its *tesco* related domain names available as pathways on the internet to *Tesco* websites with a view of generating income for itself in the form of commission, it did use in the course of trade a series of signs (those domain names) which were each similar to the trade mark registered by *Tesco*

Arguably, the rationale in the foregoing two cases stretches the notion of use in the course of trade to its limit but no doubt for reason of public policy (*Taylor and Foggo*, 1998). In *Marks & Spencer Plc vs. One In A Million Ltd. and others* (1998) FSR 265 Chancery Division (1999) FSR 1 Court of Appeal, there was no actual use while in *Tesco Stores Ltd. vs. Elogicom Ltd. and another* (2006) EWHC 403, the domain names were used but in a way that would enhance the claimant's sales and goodwill. In both cases, use in the course of trade was established in the court's decisions.

At face value, the decision in *Marks & Spencer Plc vs. One In A Million Ltd. and others* (1998) FSR 265 Chancery Division (1999) FSR 1 Court of Appeal, limits itself to business of professional dealer thus a person who is not a dealer would not be using in the course of trade. It is also unclear whether the dealer must actively soliciting offers to sell the internet domain names. But on the facts except in one case, none of the domain names are used on active sites.

Accordingly, there is some support for saying that passive use would equally be use in the course of trade so long as the domain names are registered by a professional dealer.

On the contrary, the Australian Courts do not follow the same line of thought. In *CSR Ltd. vs. Resource Capital Australia Pty. Ltd.* (2003) FCA 279, the court noted that there could be considerable difficulties in the claim of trademark infringement on the ground that Section 120 of the Australian Trade Mark Act 1995, explicitly states that a person infringes a registered trade mark if the person uses as a trade mark at the Federal Court of Australia, *Hill J.* held:

I think there is a real difficulty in relief being given under the Trade Marks Act 1995 (Cth) by virtue of RCA having infringed the CSR trade marks. It is a problem that is noted by the Court of Appeal in the British Telecommunications Plc. vs. One in a Million (1998) 42 IPR 289 case but not ultimately decided by it. It was one thing to say that a cybersquatter who registered a name intending to sell that name to the owner of the trade mark or threaten to sell to a competitor if the owner does not pay money may have registered the name as an instrument of fraud and therefore be guilty of passing off as was held by the Court of Appeal in England. But it is another thing to say that for purposes of Section, 120 of the Trade Marks Act 1995 (Cth) RCA used the domain name as a trade mark in relation to goods or services in respect of which CSR had registration or for that matter closely related to either goods or services referred to in the CSR registrations. No doubt, it can be said that the interest of CSR were likely to be adversely effected by the acts of RCA but that was not sufficient to constitute trademark infringement

Section 120 of the Australian Trade Marks Act 1995 provides that a person infringes a registered trade mark if the person uses as a trade mark a sign that is substantially identical with or deceptively similar to the trade mark in relation to goods or services in respect of which the trade mark is registered. A person infringes a registered trade mark if the person uses as a trade mark a sign that is substantially identical with or deceptively similar to the trade mark in relation to goods of the same description as that of goods in respect of which the trade mark is registered or services that are closely related to registered goods or services of the same description as that of services in respect of which the trade mark is registered or goods that are closely related to registered services. However, the person is not taken to have infringed the trademark if the person establishes that using the sign as the person did is not likely to deceive or cause confusion. A person infringes a registered trade mark if the trade mark is well known in Australia and the person uses as a trade mark a sign that is substantially identical with or deceptively similar to the trade mark in relation to goods that are not the same description as that of the goods in respect of which the trade mark is registered or are not closely related to services in respect of which the trade mark is registered or services that are not of the same description as that of the registered services or are not closely related to registered goods. Because the trade mark is well known, the sign would be likely to be taken as

indicating a connection between the unrelated goods or services and the registered owner of the trade mark. For that reason, the interests of the registered are likely to be adversely affected. In deciding for the purpose of this study whether a trade mark is well known in Australia, one must take account of the extent of which the trade mark is known within the relevance sector of the public whether as a result of the promotion of the trade mark or for any other reason. Thus in relation to domain names, it must be shown that the defendant was using or intended to use the domain names as trademarks in relation to either goods or services. But on the specific facts of the case, it was not shown that the domain names were used as trademarks. In Malaysia, the courts have not had the opportunity to decide on a similar issue. But generally, the requirement of unauthorised use in the course of trade under Section 38 of the Trade Marks Act 1976 has been construed to mean use in a trade mark sense thus, it is suggested that the Malaysian courts would follow the approach adopted by the Australian courts instead of the United Kingdom Courts. On this note, it appears that the mere registration of a domain name which incorporates a word trade mark may not be an infringement of trade marks under Section 38 of the Trade Marks Act 1976, so long as the domain name is not used as a trade mark in relation to goods or services.

Cybersquatting and passing off: The observations made by Lord Aldous in Marks & Spencer Plc vs. One In A Million Ltd. and others, reinforces the proposition that passing off is indeed flexible in its application (Carty, 2003), capable of preventing the misappropriation and invasions of goodwill in areas not anticipated by the two famous authority on passing off; Lord Diplock in Erven Warnick BV vs. J. Townsend and Sons (Hull) Ltd. in 1979, AC 731 or Lord Oliver in Reckitt and Colman (Products) Ltd. vs. Borden Inc. in 1990, RPC 341. Lord Aldous said:

Lord Diplock five characteristics were those, he identified in 1980 from previous cases but I do not believe that he was thereby confining for ever the cause of to every detail of such characteristics as to do so would prevent the common law evolving to meet changes in methods of trade and communications as it had in the past

Researcher Lordship's main assertion is that the common law, i.e., passing off should continue to evolve in order to meet the changes in methods of trade and communications.

Indeed, the flexibility of passing off is not altogether new. The old principle that nobody has any right to represent his goods as the goods of somebody else as a decision made in the cases of AG Spalding Bros. vs. AW

Gamage Ltd. (1914-1915) All ER Rep. 147; Perry vs. Truefitt (1842) 6 Beav 66; Reddaway vs. Banham (1896) AC 199; Phones 4u Ltd. and Another vs. Phone 4u.co.uk Internet Ltd. and others (2006) EWCA Civ 244 has been tailored continuously to guard against the invasion of reputation and goodwill. For instance, in relation to international goodwill, the Court in Peter Waterman vs. CBS (1993) EMLR 27, acknowledged that the advancement of technology has led to the development of international reputation of certain names and marks while on the specific facts of Marks & Spencer Plc. vs.

One In A Million Ltd. and others, the said changes must necessarily be the use of the internet as a means of conducting business and domain names as a form of business identifier. In this case, Browne-Wilkinson said:

The changes in the second half of the 20th century are far more fundamental than those in the 19th century England. They have produced worldwide marks, worldwide goodwill and brought separate markets into competition with the other. Radio and advertising with their attendant advertising cross national frontiers. Electronic communication via satellite produces virtually instant communication between all markets. In terms of travel time, New York by air is as close as Aberdeen by rail. This has led to the development of international reputation in certain names, particularly in the service fields, for example Sheraton Hotels, Budget Rent A Car; in my view, the law will fail if does not try to meet the challenge thrown up by trading patterns which cross national and jurisdictional boundaries due to a change in technical achievement

An important finding of Marks & Spencer Plc vs. One In A Million Ltd. and others is the analysis on instrument of fraud where Lord Aldous said:

The placing on the register of a distinctive name such as Marks & Spencer makes a representation to persons who consult the register that the registrant is connected or associated with the name registered and thus the owner of the goodwill in the name further, registration of the name including the words Marks & Spencer is an erosion of the exclusive goodwill in the name which damages or is likely to damage Marks & Spencer I also believe that the domain names comprising the name Marks & Spencer are instrument fraud. Any realistic use of them as domain names would result in passing off

Lord Aldous analysis was adopted with approval by the Malaysian Court in Petroliam Nasional Bhd. and Ors. vs. Khoo Nee Kiong (2003) 4 MLJ 216 (see also Intel Corp. vs. Intelcard systems Sdn. Bhd. and Ors, (2004) 1 MLJ 595). In this case, Justice Su Geok Yiam said:

In the instant case, the defendants by registering the said domain names which contain the word Petronas which has not only become a household name in Malaysia but is also well-known internationally there is a serious issue to be tried in that the defendant is making a false representation to persons who consult the register that the registrant Araneum consulting services is connected or associated with the name registered and thus the owner of the goodwill in the name Petronas. Such persons would not know of the defendants and would believe that the defendant was connected or associated with the Plaintiffs who are the owners of the goodwill in the said domain names. By registering the said domain names the defendant has eroded the exclusive goodwill in the name Petronas which damages the Plaintiffs

The above analysis on instrument of fraud effectively diminishes the scope of registering and trading of distinctive names as domain names. The main reason why His Lordship in Marks & Spencer Plc. vs. One In A Million Ltd. and others regarded that the mere registrations of distinctive names as domain name are instrument of fraud was not because the defendant was making false representations to the public. Instead, the court was convinced that any realistic use of the domain name by a dealer in domain names such as the defendant would inherently lead to passing off. In particular, the first three uses of domain names to a dealer may well lead to passing off. There remains a question as to whether the domain names are also realistically used when they are merely registered but not connected to any active websites.

It is however, implicit from the reasoning made in Marks & Spencer Plc. vs. One In A Million Ltd. and others that the court did not consider it necessary to make a distinction between active and passive use. Arguably, it is somewhat unreasonable to suggest that the goodwill of a trademark or name is likely to be damaged purely on the premise that a who is search reveals that the registrant of the domain name is not the trade mark owner. The court by making an analogy to trading names (Societe Anonyme des Anciens Etablissements Panhard et Levassor vs. Panhard Levassor Motor Co., Ltd. (1901) 2 Ch. 513; Fletcher Challenge Ltd. vs. Fletcher Challenge Pty. Ltd. (1982) FSR1; Glaxo Plc. vs. Glaxowellcome Ltd. (1996) FSR 388;

Direct Line Group Ltd. vs. Direct Line Estate Agency Ltd. (1997) FSR 374; Norwich Pharmacal Co. vs. Customs and Excise Comrs. (1972) 3 All ER 813, nonetheless held that it had the jurisdiction to grant injunctive relief where the defendant is equipped with or is intending to equip another with an instrument of fraud. A name which by reason of its similarity to the name of another, inherently lead to passing off is such an instrument (One in A Million; Britannia Building Society vs. Prangley and others, Chancery Division, hearing dates 12 June 2000). Accordingly, it is pertinent that in clear cases of cybersquatting such as Marks & Spencer Plc. vs. One In A Million Ltd. And others and other cases (Britannia Building Society vs. Prangley and Others (unreported) hearing dates 12 June, 2000), the courts will not hesitate to regard the mere registration of distinctive names as domain names while did not in itself amount to a misrepresentation sufficient to establish passing off, constitutes threaten misrepresentation. The only qualification appears to be that the defendant must offer the domain names to others. In other words, any attempt by a cybersquatter to sell the domain names to a third party will be restrained by the courts as amounting to threaten misrepresentation and instrument of fraud.

Morale right on names and reputation in the Islamic law:

Immaterial damage which results from the attack on a person's inalienable right is regarded as a moral damage which is right simply illustrated in a case of trespassing on to a person's land. In the case that a person wrongly enters onto the land owned by a man and the man is the rightful owner who has the right to oppose the person from entering his land and he is entitled to claim restitution for any kind of damage against the acts of the person. The damage resulting from trespassing onto the land is in fact a kind of a legal maxim *injuria sine damnum* which means injury to law but no physical damage and it may be recognized as a moral damage in the Islamic law.

Encroachment of personal right: An act of trespass on merely to the right of a person's property is regarded as a tort of moral damage. It can cause immaterial damage (*naqs ma'nawi*) to the property where its owner's right is pushed out illegally and the discussion of all about this normally in the Islamic law might be related to the case of usurpation (*ghasb*). In this case, it could happen a damage in kind of immaterial depreciation for a usurped property where the Hanafi school of law puts it in its definition of liability for *ghasb* as *nuqsan* which means decrease, diminution or depreciation of value of the usurped property and it has been recognized as a type of immaterial damages which is acknowledged by the Islamic law for compensation. It might be happened by the way of

usurpation where a thing of another is taken by force and violence and in consequence its value becoming decrease the usurper of course will be held liable for the decrease of value. This is the consensus opinions amongst Muslim jurists. Likewise, if a person usurps another's chattel and then it is lent to a man, its value after that decreases, the usurper is liable for the diminution of value. It was enacted in the *Majallat al-Ahkam al-Adliyyah* (1968), article 917:

If any person causes any diminution in value of the property of another, he must make good the amount of such loss

The examples shown by the Hanafi jurists imply that the depreciation of value emanating from taking wrongfully another's property mostly describes the issue of liability for immaterial depreciation. This is on the ground that the depreciation which is associated to a chattel or thing, it is truly considered that the immaterial depreciation for such a chattel or thing is much more than what happens to the physical or material aspect. Based on this, the Muslims jurists attempted to clarify the depreciation of value relating to the usurped property on four aspects. It will be discussed on the topic.

Depreciation of usurped property: According to the Hanafi school, any diminution or depreciation of value, materially or immaterially of usurped property while in the possession of the usurper could be divided into four categories. The depreciation of value due to the decrease of price in the market. In this case, the usurper is not responsible, provided he returns the usurped property in the place of usurpation because a diminution of price arises from the diminution of desire on the part of the purchaser and not from the ruin or destruction of any of the parts of the usurped property. This is also the opinion of the Shafii school, the Maliki school and the Hanbali school. However on the other hand, Abu Thawr opines that the usurper is definitely liable in the case of diminution of value by reason that he is liable for any damage.

The depreciation of usurped property due to a defect in itself (*wasf*). The usurper is in this case responsible for such depreciation, on the condition that the usurped property is not *mal riba* (property which is grouped to *ribawi* property) but that with respect to *mal riba* either compensation for the depreciation or damage must not be taken along with the actual restitution as that would necessarily induce usury (*riba*) or demanding the value of it and that property is left to the usurper such as in the case of wheat which becomes foul. In this case, the owner has an option either to take back his property without

demanding the value of its depreciation or to leave it in the possession of the usurper and to claim its replacement (because it is fungible property). In another case, the usurper is responsible for the usurped property (when it is not *mal riba*), in all its parts for depreciation. For example if an animal which has been usurped by someone is in a weak state when returned to its owner, the person is responsible also for the diminution of its value. The Shafii school and the Hanbali school opine (they did not mention whether it is *mal riba* or not) that the usurper shall be liable for the depreciation of the usurped property whether in its substance (*dhat/ayn*) or in its characteristic (*ṣifah*) whether caused by an act of God or by an act of the usurper. However, in the case of depreciation of food which becomes moist or musty, these two schools have their opinions, respectively. The Shafii school maintains that if a slave who has been usurped by a usurper and a part of his body is damaged due to disease (by act of God), not caused by the usurper's usage while he is in the possession of the usurper, he is responsible for the payment for damages (*arsh*) as a result of depreciation caused by the disease plus an indemnity for rent. This principle is also applied to the damage caused by the usurper's usage, e.g., where a usurped coat has been used and has been destroyed. Further, in the case of usurped food (or wheat) which becomes foul by itself, the owner has the right to take the food back as well as the compensation (*arsh*) for the damage.

But on the other hand, the Maliki school opines that the usurper shall not be liable for the depreciation of usurped property caused by an act of God. The owner merely has a right either to take back his property without demanding the depreciation of value or he can claim the value of it on the day of *ghab* and leave the property to the usurper. Besides, there is an opinion that the owner has a right to take back his property along with its value of depreciation. The depreciation of usurped property due to defect in its immaterial quality which is required in its substance. For example if a usurped slave has lost knowledge of his profession as a baker or any profession while in the possession of the usurper, the latter is liable for that depreciation. It is also the opinion of the Shafii school. According to the Hanbali school, the owner has an option either to keep him and take compensation for the deficiency or claim replacement. Likewise if a person usurps a female slave who afterwards has learnt a profession (*sanah*) while in the possession of the usurper and the value of the female slave is increased in consequence and then the value of her being decreased due to losing knowledge of such a profession which he has learnt, the owner has a claim of compensation against the usurper after the return of the female slave. This is the

opinions of Al-Shafii and Amad b. Hanbal. On the other hand, Abu Hanifah and Malik opine that he has no right to claim compensation. Furthermore, in the case of a slave who has learnt a new profession with the usurper, the usurper is not liable for knowledge lost after returning. This is because the new profession which is taught by the usurper to the slave is for different purposes. The law concerns that the act of *ghasb* is different to the act of teaching. This also may be because that new profession is not from the owner of the slave.

The usurper of a slave will be responsible for the latter's depreciation in the case of him becoming weak or old after *ghasb*. But according to Ibn Qayyim, the owner has an option either to keep him and take compensation for the deficiency or claim replacement as aforementioned. If a person usurps a slave who afterwards becomes fat and the value is decreased in consequence, the usurper is responsible for that depreciation.

Al-Nawawi of the Shafii school adds that where a person usurps a female slave, who afterwards becomes fat during usurpation, he is not responsible for compensation for the previous leanness when he returns her to the owner. But if a person usurps a fat female slave who afterwards becomes lean and her value has been decreased thereby and then she grows fat again and her value has been increased as well, he is held to compensate for a previous leanness when he returns her to the owner. This may be because the previous leanness and the decrease of value of the female slave had happened in the possession of the usurper. On the other hand, he is not liable according to the Hanbali school. In another case if a person usurps a female slave (or a cow, etc.) who afterwards becomes fat and then becomes lean so that her value decreases, the owner has a claim of compensation against the usurper after the return of the slave. This is the opinions of Al-Shafii and Amad b. Hanbal. On the other hand, Abu Hanifah and Malik disagreed and opined that the owner has no right to claim the compensation.

Obviously, the opinion of Al-Nawawi above is different from the opinion of Al-Marghinani, who says that where a person usurps a fat female slave who afterwards becomes lean and then grows fat again or who loses two of her teeth and then acquires two new ones or where a person cuts off the hand of a usurped slave while in the possession of the usurper and the usurper receives compensation from him and returns it with the slave to the owner, no compensation for the depreciation is incumbent upon the usurper. The depreciation of usurped property causing some parts of it to sustain defect could be divided into three classifications: The depreciation of usurped property by an act of the usurper which causes

a part or some parts to sustain defect such as a usurper tearing a piece of cloth of another; he is in this case responsible to return that cloth to its owner and also responsible for the depreciation of its value because the damage existed as a result of the usurper's act. This is also the opinions of the Maliki, Shafii and Hanbali schools.

The depreciation of usurped property by the acts of a person other than the usurper. In this case that person is considered to be in the same position as the first person (usurper) who has usurped that property. Consequently if property which has already been usurped is again usurped from the first person by another and is destroyed by him or while in his possession, the owner has an option of claiming the compensation either for the first or second person. He also has the option of claiming a portion of the value of the property from the first person and a portion from the second person. If the first person has been liable for compensation, he can claim it back from the second person. But if the second person has been liable for compensation, he cannot claim it back from the first person. According to the Maliki school, the owner has the option of either rendering the liability upon the usurper to pay the value of the property which will be valued on the day of ghab (and the usurper can claim the payment from the third party) or of taking it back with its defect and demanding the compensation from the third party.

The depreciation of usurped property due to a defect of its quality by act of God (bi afah samawiyah). If a person usurps an animal and afterwards, it has been effected by a sickness while in his possession and is sick when it is returned to its owner and dies due to that sickness, the usurper is responsible for the value of its depreciation which is caused by that sickness, not the whole value of that animal. Likewise if a person usurps a donkey, it suffers a wound and becomes too weak to walk, the usurper is responsible for the value of that depreciation. But if the donkey absolutely cannot walk, the usurper is responsible for the whole value of it. So far as an act of God is concerned, it has already been explained in the preceding pages including the views of the Shafii, the Hanbali and the Maliki school. The degree of depreciation of usurped property by the acts of usurper will be discussed into two categories:

- Yasir (small amount)
- Fahish (great amount)

If the depreciation is of a small amount, the usurper is responsible for that depreciation and the usurped property remains with the owner. But if the depreciation

is of a great amount so as to destroy many of its uses (if a rent of cloth were large), the owner would in that case have it in his option either to take the whole of the value on the day of ghasb from the usurper and give him the cloth (since he has destroyed it in every respect even as much as if he had burnt it) or to keep the usurped property and take compensation for the depreciation. The significations of fahish and yasir are as follows: Fahish (a large rent) is such as occasions a destruction of some parts of the property and also of some of its use; some of the parts and some of the uses still remaining. It is also observed by Al-Qaduri that fahish is such as occasions a destruction of many of the advantages. Yasir (a small rent) is such as does not induce a destruction of any of the uses but merely occasions damage. In the Majallah however, these terms are described as follows:

Fahish means the depreciation which is equal to or in excess of one fourth of the value of the usurped property. Yasir means the depreciation which does not amount to one fourth of the value of the usurped property. Some Muslim jurists signify these terms as follows: Fahish means the depreciation of usurped property equal or in excess of half of its value. Yasir means the depreciation of usurped property which does not exceed a half of its value.

This kind of liability is regarded as liability for immaterial deficiency (al-naqs al-manawi) even though in fact the case with regard to the material property but the damage involved is immaterial damage (darar adabi) rather than physical damage (darar mali). As far as the discussion is concerned, it could be said that every damage which results to the immaterial right like the case of depreciation of value of usurped property, it could be analogized to the right of a person upon his name which is encroached by another person. Thereby, it is regarded as the same as the encroachment of copyright of an author of a book. When an author of a book and a publisher company together agree to publish a book, it is incumbent upon the publisher not to change or alter the content of the book as to respect the morale right of the author for his idea and arts. In case of the publisher does a modification upon a book of another, he is responsible for the modification made and the publisher has to pay compensation to the author upon his wrongful act and this case can be regarded as morale damage (darar adabi) or it could be said nowadays as civil wrong of copyright. The liability will definitely be borne on the publisher even though his act to change the content of the book not dealing with the corporeal or physical damage (darar maddi) even the change made has induced or generated the sale of the book to be a good marketability to the public. It is well-known that a researcher has the morale

right to his idea in writings which are called as copyright upon the art of idea. As such the Islamic law acknowledges this kind of right to the researcher even though, it is in type of intangible, it is considered as similar to tangible property for fair and justice. This right is in fact acknowledged on the ground that the views of Muslim jurists of all schools of law are recognized firmly that the art of idea in writing is owned lawfully by the researcher. This might be seen and analogized to the case of views or opinions produced by the leaders of Islamic schools like Al-Shafii, Abu Hanifah, Malik b. Anas and Ahmad b. Hanbal in certain issues. Their views based on their ijtihads and those are theirs which could definitely not be altered or changed by anybody. Their views are absolutely their own rights even though in some cases, the views undergone evolution based on a specific situation like in the case which had occurred to Al-Shafii himself where his legal opinions divided into old opinion and new opinion. Both opinions are certainly recognized as his right and nobody may interfere to his rightful ownership. This right is regarded the same as the copyright for the researcher which does not contradict to the need and sense of shariah in order to protect the individual and public interest.

Likewise, the Islamic law places a great importance on the protection of name and honour and it was confirmed by a celebrated hadith where the Prophet said:

Your blood, your property and your honour are sacred to you like the sacredness of this day of yours, in this city of yours and in this month of yours

From this hadith, it may be said that the Islamic law gives a direct authority for protecting name, honour and reputation of anybody and forbidding any attack to the name, honour and reputation of other human beings in any way. Therefore, the Islamic law prohibits any transgression to the name and reputation of others and all kinds of misappropriation involving another person's name and reputation including the registration and use of domain names incorporating another person's name is an undesirable conduct and thus should be considered illegal and against the lawful conduct. So, the registration and use of domain names incorporating the trademarks of others is a wrongful appropriation and it could be deemed as a usurpation of immaterial property. This is so since, domain names typically carry the name and reputation of the trademark owners. In other words, the wrongful appropriation of domain names should be believed as analogous to that of the usurpation of trademarks. To sum up from the discussions, the Islamic law of tort obviously gives protection and security to people to have, possess

and own property, materially or immaterially and they at the same time have a right of ownership and possession of such property and have a legal right to claim remedy if such kinds of rights are intruded upon.

CONCLUSION

Relating to the discussion made by the muslim jurists as to the liability for nuqsan or immaterial diminution of value which results in usurped property, it may be listed into two inferences.

In the situation that the depreciation or diminution of value of the usurped property due to the decrease of its price in the market, the usurper will not be liable for the decrease of price, so long as he returns such usurped property in the place of usurpation. This is because the recession of price is considered not similar to the material or physical deficiency. It is in fact caused by the current economy situation, not caused by the acts of the usurper. In the case that the depreciation of value of the usurped property caused by its defect in itself as an animal becomes weak or loses its sight or hear or it suffers incapacitated or a usurper lost knowledge of his profession or lost his expertise in a specific work or he becomes old, etc., all of these kinds of immaterial depreciation or defect, the usurper will be held liable for those depreciations.

In the case of liability for depreciation, the usurped property should be returned to its owner with its restitution of deficiency as in the case of a usurped slave has become decrease of its value while in the possession of the usurper. The return should be the slave plus the cost of deficiency of its value. In this situation, according to the Hanafi jurists, the usurped property is not involved in ribawi property. With that respect, the owner of the property merely having a choice either of taking it back as it is or demanding the value of it and that property is left to the usurper such as in the case of wheat becomes foul. If its owner takes the wheat back with its deficiency of value, the Hanafi school opines that the value would induce usury. So, the owner could take his wheat as it is or to leave it to the usurper and to claim its replacement. But the Shafii and the Hanbali schools did not make connection, this discussion to the question of ribawi property or not unless these both schools differ their opinions with regard to the depreciation of value on the usurped property resulting from an act of God. The Shafii school maintains that the owner has the right to take the food back with its compensation for deficit of value but the Maliki school opines that the usurper shall not be liable for the depreciation of value by the act of God. So, the owner either of taking his property back without its

compensation or claiming the value of it and leave the property to the usurper. The discussion mostly touches the case relating to the liability arising out of immaterial damage rather than physical damage. So, it could be said that the discussion which deals with something-immaterial damage is not alien in the Islamic law. With respect to this, it could be said that any damage which regards the right to immaterial as aforementioned could be analogized to the right of a person to his name or his fame.

In this case, it could be said that his right on his reputation, honour or esteem is tantamount to the right in respect of immaterial or morale. It may be related to outcome of literary or artistic work produced by a writer or an artist. Therefore if a writer or an artist publishes or produces something of his own, the outcome which arises out of his ideas should become his own right under morale right.

Any duplication or copying without his permission, it should be a morally wrongful appropriation and he can as such claim compensation upon that wrongful copy under copyright rule. In brief, it is generally recognized now-a-days that the researcher is entitled morally upon his writings in the scope of artistic value and thereupon he has fully right upon any profit generated from his artistic work.

In the case of a publisher who has breached a contractual agreement about the amount of selling a book, its writer is entitled to sue the publisher for compensation for such a breach of contract as a morale damage. Likewise if the publisher made a change or an alteration or a modification to the book, he should firstly have consent

from its writer if not the publisher is liable for such kind of his acts and even by such an alteration the marketability of the book getting higher.

ACKNOWLEDGEMENTS

Part of this study is an outcome of research which was conducted by using the research funding of the F2010000-UKM and Dewan Bahasa dan Pustaka project.

REFERENCES

- Bently, L. and B. Sherman, 2001. *Intellectual Property Law*. Oxford University Press, USA., ISBN: 9780198763437, Pages: 1051.
- Carty, H., 2003. *Passing off and Instruments of Deception: The Need for Clarity*. EIPR, New York, pp: 188-189.
- Cornish, W.R., 1996. *Intellectual Property*. Sweet and Maxwell, New York.
- Froomkin, A.M., 1999. *A commentary on WIPO's the management of internet names and addresses: Intellectual property issues*. http://osaka.law.miami.edu/~amf/commentary.htm#_1_1.
- Hornick, J. and J. Gelchinsky, 1998. *Evolving internet intellectual property issues*. *Trademark World*, pp: 26-28.
- Taylor, S. and G. Foggo, 1998. *United Kingdom-ban on domain name speculators strengthened*. *World Trademark No.* 24.
- Zhang, W., 2001. *Trade Mark Law and Practice in Malaysia*. Butterworths, USA., ISBN-13: 9789679623376, Pages: 395.