

Database: Its Position Under Islamic Law of Property

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Abstract: The issue of database as property as well as its protection is very much debated of late. The idea of database as property under syariah law is relatively new. This study attempts to examine the position of database as property under syariah law and whether or not it should be well protected under syariah law. This writing observes that some recent ulama have began to recognized database as a valid and valuable property. However, such opinion is far from conclusive. This is because there are others who considered database, as ambiguous property which does not receive conclusive protection under syariah law. This study argues that database property should received a universal recognition among the ulama' around the globe. Only then will it be well protected under the sacred syariah law.

Key words: Syariah, database, property, protection, Malaysia

INTRODUCTION

The issue of database protection under the Syariah is currently examined and debated by the ulama'. Such development is heart warming as it indicates jurisprudential exercise by muslim jurists and academicians in coming up with new Syariah principles which will govern database protection. One of the questions debated by them is whether database could be recognized as property. The other is should database be protected under the Syariah? This writing thus attempts to prove that the Syariah indeed recognizes database as a proper and valid property and that it should hence be protected from any kinds of misuse and abuse.

RESEARCH MATERIALS AND METHODOLOGIES

The legal study conducted was indeed qualitative in nature. Being so, research methodologies of library research and critical analysis were used in analyzing relevant materials, data and information. This legal study has collected relevant materials, data and information on database property in general. These were critically assessed and analyzed. A critical analysis was also performed on all materials pertaining to syariah principles in determining availability of protection.

Property: its traditional definition and scope under the Syariah: In determining that database protection does exist and recognized by the Syariah, it is critically important to prove that database is indeed a valid

property. First and foremost, this study examines the traditional concept of property under Islamic Law of Property.

Traditional description of property had been explained by the old Islamic scholars. The scholars have given different views on the definition of property. The Hanafiyyah scholars defines property as:

A thing or goods which is capable of being controlled and usually benefits are derived from it

There are 2 elements in this definition, first, capable of being controlled (hiyazah) and benefits are derived from it. The former element indicates that the uncontrollable materials is not regarded as property. This includes the intangible matters such as knowledge, health, dignity and intelligence. The latter emphasizes the fact that benefit can be derived from a property. Therefore, things that are useless for instance poisoned food or things that are initially benefited but are not functioned as such for example a drip of water or one seed of rice are not considered as property. This is because custom determines that to be regarded as property the benefit of a thing must be continuously exist in its ordinary state (Wahbah, 1995).

Alternatively, the scholars other than Hanafiyyah were of a view that a property is:

Everything that is valuable and if it is damaged, the person who responsible for the damage must pay for the damages

This description has been accepted as a legal definition of property which emphasizes on the value of the materials at issue.

Concisely, the scholars of Hanafiyyah limits the meaning of property to things which are intangible in nature. On that reason, they do not recognize benefit (manfaah) and rights (haq) as property but both are only considered as ownership (milkiyyah).

Manfaah is described as the advantage which comes out from certain things, for instance living in a house, having a ride in a vehicle and wearing clothes. While, right (haq) is something (ikhtisas) acknowledged by shara' for a person to enable him to perform certain authorities and to impose certain duties.

However, the other scholars do not agree with this view, they observe that both benefit and right are regarded as property as the purpose or meaning of a thing is placed on the manfaah not on its physical. In fact, without benefit, consumers would not look for them. This contention is substantiated by the definition given by Dr. Abdul Karim Zidan which states: Anything that can be controlled and benefited by its ordinary states (Awang *et al.*, 1991). It is submitted that from that definition there are two important elements to determine property in Islam. First, a thing that can be kept and collected or in other words something that can be owned and secondly, a thing that a person can obtain benefit from it. Anything that is outside the ambit of this meaning is not considered as property in Islam. Thus, thing that has no benefit is not property for example liquor, pig, corpse and food that is dangerous to human health.

From the earlier discussion, the meaning of property in Islam is limited as compared to the concept of property in civil law as the latter define property as includes everything that is owned which assessed by its monetary value either in the form of realty or personality or in the form of corporeal or incorporeal. A database, for that matter, may be protected under this concept as it is an own-able property as well as it is beneficial in nature.

Generally, property has been divided by the Islamic scholars into the following 4 categories:

- Valuable and invaluable (halal and haram)
- Moveable and immovable
- Comparable (mithliy) and incomparable (qimiy)
- Istihlaki and Isti'mali

First category consists of valuable and invaluable property. Valuable property (al-mal al-mutaqawwam) comprises of an owned property and Islam allows the use

of it. This includes immovable properties as well as movable properties such as food. While, invaluable property (al-mal ghair al-mutaqawwam) is something which is not owned or something which is not allowed by shara' unless it is really in need. The examples are fishes in the sea, birds on the sky and minerals under the ground. It is decided by the scholars that it is valid to make contract relating to valuable property such as sales of goods, rental, loan, company and other types of contract. If it is damaged, the person responsible for it has to pay for the damages on the contrary, invaluable property is not allowed to be the subject matter of a contract, thus any damage caused would not have to be remedied (Wahbah, 1995).

The second category, movable and immovable property have 2 distinct meanings which were given by the Hanafiyyah and the Malikiyyah. The former describes movable property (al-Manqul) as a property which is transferable and capable of being moved from one place to another whether it is remained in the same form and structure or has been changed because of that transfer. It includes money, trading goods, animals and things that can be measured and weighed. Immovable property (aqar), on the other hand is described as a property which is fixed to its place and not transferable to other places such as house and land. The latter, however has narrowed down the meaning of movable property and widen the definition of immovable property. The movable property is defined as something which is movable and transferable from one place to another but the form of the subject matter is remained the same. For example, clothes, books and vehicles. While, immovable property is described as something which is non transferable and unchangeable for instance land. It also includes something which is changeable in form during the transfer, for example a demolished building and a timbered tree that has changed its form to firewood (Wahbah, 1995).

The third category consists of comparable (mithliy) and incomparable (qimiy) property. Comparable property is a homogeneous property available in the market without an obvious different in its physical and the amount (unit) involved. It is divided into 4 parts that are, al-Makilat (measured goods) such as wheat and rice, mawzunat (weighed goods) for instance cotton and metal, Adadiyyat (counted goods), i.e., the same form of counted goods, such as coconuts and eggs and finally, al-Dharriyyat (measured), a goods that is sold by yard and meter. Those are things which are similar in every part without any dissimilarity for example wool and cotton fabric and the same size of glassed bottles. In contrast, incomparable property exists in a situation where the goods are measured differently, such as a hand made

fabric which is different from one another. In other words, it is a property without comparison or similarity in the market. Even if there is similarity, it is differed in term of price and the units available in the market. The examples of these goods are animals, land, trees, houses, praying mat, carpet, precious stones, diamonds, manuscripts or second hand books. This also includes things that are counted but have difference in value due to the various sizes and types such as watermelon. It is decided by the scholars that if the comparable goods is damaged, it has to be replaced by the same goods. It is not sufficient to replace it with goods of the same value. In contrast, for incomparable goods, the replacement is allowed to be in the form of value of the goods (Awang *et al.*, 1991).

The final category is *istihlaki* (disposable item) and *ishtimali* (repeatable item). *Istihlaki* property is considered as useless property unless its physical is deteriorated. The examples of this property is foods, drinks, woods, gas, paper and money. All of these examples except money are unusable unless its physical is deteriorated. However, money is considered as *istihlaki* once it has parted from the hands of the owner, although its physical is remained intact. While *Isti'mali* is a property which is usable and its physical is unchanged such as immovable properties like carpet, clothes and books (Wahbah, 1995).

From the above mentioned discussion, a database may be categorized as property that is valuable. This is due to its nature that contains information which is benefited by the public at large. The next part will analyze on the new type of property which can be invoked to protect the interest of database owner.

DATABASE AS MODERN CONCEPT OF PROPERTY: ITS RECOGNITION UNDER THE SYARIAH

Database is indeed an intellectual property in the eyes of the man-made law and is, thus protected against any kinds of abuse or misuse. As for its position under the Syariah, this study maintains that database should be recognized as valid property that need to be legally protected.

This argument is based on the fact that recent Muslim jurists have begun to recognized intellectual property as valid and valuable. Even though, the concept of intellectual property in Islam had rarely been discussed by the old Islamic jurists (*al-mutaqaddimun*) (Rosman, 2002), a new legal principle of intellectual property has been introduced by the recent jurists in Islamic law. This indicates that the Syariah now recognizes intellectual property as a valid and valuable property.

Despite of lack of views from previous Islamic jurists on the intellectual property matters, several new scholars have performed detailed research on this matter and have come out with new legal principles. According to Dr. Mustafa Ahmad al-Zarqa', intellectual property is defined as:

Including copyright for instance the right of a writer to gain benefit from his publication, a journalist from his news papers privilege and an artist from his beautiful effect of artistic work. It is also consisted of industrial rights for example an invention of equipment, a creation of different patented trade to gain market trust and a creation of trademark to obtain goodwill (Al-Zarqa, 1968)

While this concept has also been discussed by Al-Shaykh Ali al-Khafif where he describes intellectual property as:

Something which is relied upon unobvious/ intangible items (*ma nawiyah*) which can not be detected by human senses but can be sensed using human minds for instance ideas and creations (Al-Khafis, 1990)

The elements of intangible items and creations of human minds seem to be the important criteria in interpreting intellectual property. As explained by Dr. Ajil al-Nashami, intellectual property means:

A right which is relied upon intangible goods, either in the form of product of human minds for example the right of a writer towards his writing; for academic or literary purposes or in industrial innovations. This is to include the product from the employees' efforts such as the right of sellers in a patented product and a trademark. Its implication would result in the owner obtaining monopoly in using the said products of efforts (Al-Nashami, 1988)

A similar definition suggested by Muhammad Uthman Shibir where he characterized intellectual property as a right against intangible property which focuses on the product of human mind such as academic and literary writings as well as industrial innovations (Shibir, 1996). The earlier mentioned definitions have led into one conclusion that is intellectual property can be described as a bundle of rights to control intangible properties in the form of human minds products. Despite of the similarity in definitions between those Islamic scholars and the civil intellectual property definitions, it is submitted in order to be fully accepted in syariah law, those definitions must be linked to 2 elements that are a right must be acknowledged by shara and the right must fulfill proprietary requirements

under the shara (Rosman, 2002). To formulate a comprehensive and accurate definition of Islamic intellectual property, there are 2 important elements first, the current legal practise and second, the concept of haq under Islamic principle. Taking into consideration the both elements, the Islamic intellectual property is described as:

A bundle of rights (haq) which has been recognized by Islamic law (shara') for an individual, by which he has power to control the expression of idea which has been reduced into material form and to ensure the interest in it by applying and governing it within the determined rules of shara (Rosman, 2002)

The definition as mentioned earlier has outlined the elements of intellectual property that has to be satisfied before a product is protected under the intellectual property law.

The first element refers to the rights obtained under Islamic intellectual property. The phrase; a bundle of rights which has been recognized by shara', connotes that the process of expressing idea must be permitted in Islam. Thus, any creation or invention which against the rules in Islam would not be protected as intellectual property. The intellectual product must not involve any prohibited elements as described by shara'. The straightforward example of this is the production of a pornographic film which contains prohibited elements would not be protected as intellectual property work in Islam (Rosman, 2002). It seems that the work of database has no difficulty to be protected under the Islamic intellectual property as long as the information or knowledge comprised are not against the Islamic rules.

The rights conferred by the Islamic intellectual property does not control the knowledge or information underlying the intellectual property product but it is meant to grant rights on the effort of reducing the knowledge into material form. This indicates that the information embedded in a database is not protected but the compilation of information which includes the act of obtaining, verifying and presenting the information is afforded protection.

The second element emphasizes on the requirement of authorship. The words for an individual does not limit the meaning to human being individual but also include a company. The researcher is not necessarily the owner as the protection is extended to a person other than the researcher if the intellectual property product has been assigned to a company (Rosman, 2002).

The third element refers to a power to control. Once the researcher or the owner of intellectual property work

suffices requirements of protections under the Islamic intellectual property, he would entitle to control the manipulation of the product. In other words, he maprevent other person from intruding into his work.

The fourth element is derived from the phrase: The expression of idea which has been reduced into material form. This indicates that the protection is conferred to the effort of materializing the intellectual property product not on the product per se. The element of originality is required here as the author is not allowed to copy other person's creation or invention, i.e., the work must originate from the researcher. However, this condition does not require the work to be entirely new, it necessitates the investment of skill in creating the product which includes the use of the existing work with a new style. This argument is supported by the old Islamic scholar, Imam Al-Qarafi in his book, *al-Furuq* (Rosman, 2002). It was stated in his book that *ijtihad* (reason) is not able to be inherited as it is not property. This is due to the fact that it is not reduced to material form. This opinion corresponds to the current intellectual property law which requires materialization of the work into certain form before it can be protected. Database in fact has been reduced to material form in the form of digital storage, thus fulfills this requirement.

The fifth element highlights on the importance of the element of interest as being described in the phrase of; to ensure the interest in it by applying and governing it. The rights given to the owner of intellectual property is aimed to protect his interest. To that effect, he is conferred certain authorities to enable him to use and to govern his rights. However, it is to be noted that the owner's interest must be balanced up with the interest of public at large (Rosman, 2002). In other words, the consumers, i.e., the public must be allowed to enjoy the benefit of intellectual property product, i.e., database, within certain limitations as prescribed in the intellectual property rules.

The final elements gives limitations on the authorities possess by the owner as it states that within the determined rules of shara'. This phrase suggests that in performing the intellectual property rights, the owner must ensure that the act is within the limitations allowed by shara'. It is forbidden for the owner to suppress the consumers for example by charging a high price for the intellectual property product.

From the mentioned earlier elements, it is concluded that the Islamic intellectual property recognizes the rights (haq) which belongs to the owner of database. Nevertheless, the authority to these rights is confined to certain conditions determined by shara'. If the owner creates a database work that is against the Islamic principle, there is no rights given, thus, the owner's interest is not protected.

LEGAL AUTHORITY FOR INTELLECTUAL PROPERTY PROTECTION

The legal principle of intellectual property has been derived from the Islamic legal sources as discussed:

Al-Quran and Al-Hadith: As a matter of fact, the issue of intellectual property has not been explained in detail through texts; the Quran and the Sunnah. However, the texts have been emphasizing on the prohibition of manipulating other people's property without obtaining permission in other words, through a valid means.

This contention is supported by Surah Al-Nisa' (4:29-30) which states that:

Believers, do not consume your wealth among yourselves illegally, but rather trade with it by mutual consent. You shall not kill one another. Allah is merciful, but he that does that through wickedness and injustice shall be burnt in fire. That is an easy thing for Allah

There is a hadith narrated by Imam Muslim which leads to the same effect, it states that:

A Muslim is prohibited from encroaching other Muslim's life, property and dignity

Both texts make illegal the act of intruding other person's property which may include the intellectual property of that person.

In the absence of *Ijma'* which elaborates on this matter and the fact that it is not possible to invoke the method of *Al-Qiyas* for lack of original case to compare with the legal authority has been relied on other relevant methods such as *Al-Masalih al-Mursalah*, *Al-Urf*, *Sadd Al-Dhara'i* and *Al-Qawaid Al-Fiqhiyyah*.

Al-Masalih al-Mursalah: The basis of this principle is to protect public interest with the aim to secure benefit and to prevent harm. As mentioned earlier, this method is used particularly when it is needed to protect the values, one of which is the property. In order to use this method to support the existence of that legal principle, it is significant to show that the intellectual product is a property which is needed protection. In other words, the *maslahah* must be essential and necessary (*darruriyyah*). In determining whether a database as intellectual property product, can be protected under the Islamic legal principle, the pre requisite conditions must be complied with that are:

Intellectual property must be something that is recognized as property according to Islam. It must not be

conflicted with any text in the Quran and Hadith. Database as a product of intellectual property, as discussed before has been accepted as property in Islam. There is no texts (*nass*) prohibiting on the establishment of this new *hukm*.

The *maslahah* (consideration of interest) embedded in the intellectual property must be obvious, i.e., reasonable and acceptable by human being. Therefore, the main objective of the legislation of the law which is to obtain benefits and to prevent harm can be achieved. The public interest in a database work is obvious as the public will benefit the compilation of information contained in it. Thus, the aim of gaining benefit is achieved.

The *maslahah* contains in the intellectual property must be general (*kulliyah*).

The purpose of the *hukm* is to secure benefit or prevent harm to the people as a whole and not to a particular person or group of persons (Rosman, 2002). The advantage of database can be enjoyed not only by the owner of that product but also by the public at large. As database seems to suffice the above conditions, it is protected under the Islamic intellectual property on the basis of *Al-Masalih al-Mursalah*.

A part from this source, database under the Islamic property regime is afforded protection on the basis of custom (*Urf*).

Al-Urf: For the purpose of recognizing intellectual property as a valid legal principle in Islam, the custom:

- Must not be conflicting with the texts, that is it must be a valid custom. As mentioned above the intellectual property right does not contradict with any available texts
- Must be practiced by the public at large or by the substantial number of people. In point of fact, the intellectual property right has been applied by the muslims worldwide
- Must be in existence prior to the enactment of *hukm*. It is indeed established before the process of establishing *hukm* on it is made
- Must not possess anything either, verbally or in conduct which demonstrates that it is not recognized by Islamic principle. The intellectual property does not hold any word or action that would not be accepted by the *shari'ah* principle

Based on that reasons, the intellectual property is enacted as one legal principle in Islam under the source of *Al-Urf*.

Sad al-dhara'i: *Sad Al-dhara'i* or blocking a means is the way of preventing an act that can cause evil and

destruction. Due to that fact, not recognizing intellectual property is a means leading to harm and destruction.

The destruction caused is inferred from the fact that, if intellectual product is not protected by Islamic legislation, the creation and invention of a valuable work such as database will be ceased. This will affect the public at large as the advantage of the product cannot be enjoyed by them. Another substantial problem would also occur, if one discovers that the intellectual property product has no legal protection, he will simply infringe the work for instance by copying or reproducing the work without obtaining authorization from the owner of the work. In this circumstance, the interest of the creator is at stake. Therefore, it is vital to block the means to destruction by enacting hukm relating to intellectual property.

Al-Qawaid al-fiqhiyyah: There are a number of Islamic legal maxims that can be a basis to the enactment of hukm for intellectual property, among them are:

Harm is avoided (Al-Nadawi, 1994). This maxim suggests that the infringement of intellectual property right must be evaded as it is harmful to the owner of the right as well as to the general public. This source has been discussed by Dr. Muhammad Sodiq Fahmi which states that:

We are of a view that, the soul that has been protected in the Islamic legal will be affected unless it recognizes the rights of the author. This is due to the fact that Islamic legal prohibits an individual from causing harm to others for instance by encroaching the work of the author, as that conduct is considered as criminal act in Islamic legal principle. This argument is based on the Hadith which states that; Doing harm or causing destruction and responding to harm and destruction caused by other person are not permissible

The mentioned earlier contention supports the protection of intellectual property right on the basis of avoiding harm.

The origin of the particular matter is permissible (al-Ibahah) (Al-Zarkashi and Al-Manthur, 1403H). The legal principle derives from this maxim connotes that if there is no clear texts in the Qur'an and Hadith explaining on the matter, it is considered as permissible provided that there is no text prohibits its existence. In the case of intellectual property, there is neither verses nor hadith elucidating on its legal position and no texts prohibit its establishment. Hence, it is legislated according to this legal maxim.

Governing subjects is depending on the public interest (Rosman, 2002). This maxim justifies the fact that there is limitation on the administrative power that is in deciding all matters, the ruler must take into account the interest of the subjects. The legislation of intellectual property right is considered as satisfying the interest of the author as well as the general public.

PROTECTION OF DATABASE UNDER THE ISLAMIC INTELLECTUAL PROPERTY: AN ANALYSIS

The discussion mentioned earlier demonstrates that a database as intellectual property product may be protected under the Islamic law provided that first, the database work is within the ambit of the definition given and it is legally authorized by any of methodology of hukm in Islamic legal system. It seems from the explanation stated earlier, database has satisfied the both requirements. The following discussion will look at the application of the shari'ah legal principle to justify the protection of database product as intellectual property. The legal reasoning for the existence of intellectual property principle in Islamic regime is based on these 4 aspects; first, intellectual property as right (haq), second, intellectual property as ownership (milk), third, intellectual property as beneficence (manfaah) and fourth, intellectual property as property (mal).

Database as Haq: The definition mentioned earlier states that intellectual property refers to a bundle of rights, i.e., the rights to control the expression of idea in a material form. According to the Islamic scholars, right or haq is divided into 4 categories:

- Right (haq) as interest (maslahah)
- Right determined by shara'
- Right as Authority (ikhtisas)
- Right as a combination of causation, interest and authority

Right (haq) as interest (maslahah): Dr. Muhammad Yusuf Musa has defined haq as:

An interest (maslahah) which is determined for an individual or a society or both by Allah

Looking at the other side of the coin, it is submitted that not all interests are recognized by shara'. There are things that against Islamic principle for example, an act of monopoly a trade goods which is said to protect the sellers interest, however Islamic law does not recognize that interest. It was also argued that haq is not an interest

as an interest is a way of obtaining benefit and to prevent harm. Therefore, it is submitted that haq is not an interest but a way of gaining interest.

Right determined by shara': Haq is described as:

A matter which is determined by shara for a human being or for Allah upon other people (Al-Shaykh 1990)

This definition is said to be lacking as, the word human being does not include a company. Thus, the word human being must be changed to individual as this word refers to a human being individual as well as the organization. In addition to that, the right stated in the above meaning is intended to be general (al mubahat al-ammah), where as the right possessed by the owner of intellectual property involves authority. Therefore, the meaning of haq as being used generally, for example the right to use the road, is different from haq that has been described by the Islamic intellectual property law.

Right as authority (ikhtisas): The right is described as:

An authority or jurisdiction which has been admitted by shara' as power (sultah) or responsibility (taklif) (Al-Zarqa and Ahmed, 1968)

This definition has converged the word authority with power which suggests a same meaning. However, the word authority (ikhtisas) means something which is derived as a result of certain acts. It is specifically meant for the owner, due to that authority, he may seek remedies from the court. Where as power (sultah) is a relationship between individuals and between individual and certain matters. This definition is inaccurate as it refers the word interest as authority while in actual fact both are not the same. Authority is the causation from the interest, in other words, a person may not have the authority unless and until he is given rights to certain matters.

Right as a combination of causation, interest and authority: This category explains right as:

Something which has been caused by an authority recognized by shara' whether in the form of power to control or responsibility to satisfy certain interests

This definition seems to be the appropriate meaning for haq as it covers the whole element of haq which includes authority, power, responsibility as well as excluding matters which are not related to haq. It also explains the purpose of haq which is to fulfill interest.

This absolute definition covers all the rights, the specific rights of Allah and of the individual or both. It does not confine its meaning to property only but it includes other thing as the word used is something. The nature of haq according to this meaning is to control and to responsible. The phrase power to control is applicable to individual as well as a thing. The responsibility in haq is exemplified in the relationship between the individuals, where in case of payment of debt, a person who lends money will have the right (haq) to be paid and the person who borrows the money is responsible to pay back.

All the mentioned earlier meanings lead to a conclusion that intellectual property has been categorized by the current Islamic scholars as haq mutaqqarrar which relates to haq mali and haq ayni. The intellectual property right is categorized as haq mutaqqarrar in relation to haq mali as it is related to property which has monetary value. It is also been classified as property right with the element of a'yni as the shara' has given to the owner the authority to manage and administer the intellectual property rights.

Intellectual property, in principle is the right of Allah and the right of individuals. The right of Allah which also known as public right is reflected when the public gains benefit from the intellectual product as in database, the public may obtain various information easily and promptly. While the right of individual is acquired when an individual creates a work which involve skill, intellectual judgment and cost. This right arises as a result of his sacrifices in inventing the product such as database. In creating database, the creator has to invest substantial effort to obtain the necessary information, this work undeniably involves a great amount of financial obligation and technical support in order to ensure that the database is comprehensive and user friendly.

In conclusion, haq according to Islamic principle is the intangible elements embedded in a physical goods which is unseen to the human senses. As a matter of fact, there are two important elements in physical goods first, tangible element, i.e., the goods and second, intangible element that is the right and the beneficence in it. In contrast, there are opinion which says that the tangible element exists in the property while the intangible part is dealt in ownership (milkiyyah) This concept was established by the Islamic scholars of hanafiyyah.

Database as Milkiyyah: The old Islamic scholar of Hanafiyyah was of a view that haq (right) and manfaah (beneficence) are the main elements of ownership (milkiyyah). This concept has been defined differently by the Islamic scholars. There is definition which refers ownership as power, as uttered by Imam al-Kamal ibn al-Humam, ownership is a power which is caused by

al-Shari' from the beginning to manage. Nevertheless, this meaning is far than accurate as the use of term power is general in application as compared to ownership which is more specific (Rosman, 2002).

Imam al-Qarafi on the other hand defines ownership as:

Legal hukm for a physical goods ('ayn) or beneficence (manfaah) which is relied on human being for the purpose of benefiting it or trading with it provided that no hurdles in doing so

However, it is submitted that ownership is not legal hukm but the issue of ownership is determined by legal hukm.

Ownership is also referred to as authority or ikhtisas. This is the most appropriate meaning for ownership as far as the intellectual property is concerned. It can be seen in the definition conveyed by Imam Ibn Abidin which states ownership as thing that can be used through certain authorities. To the same effect, Dr. Wahbah al-Zuhayli has defined ownership as:

An authority upon certain things which will prevent other person from intruding it. The owner may manage or govern that goods ever since he owns it except for legal hurdle are occurred

This meaning is regarded as accurate as it is close to the nature of ownership. Ownership establishes a specific relationship between the owner and the owned subject matter. If a person legally owns a property he is the only one who has authority or over that property. With that authority he may benefit and administer the property except for if legal hurdles occur for instance if the owner becomes insane or dumb or he is just a minor. The authority will prevent other person from taking advantage over the property or to administer it.

This concept of milkiyyah may be applied in the issue of database protection. This is because this authority, i.e., enable the database owner to legally manipulate the database product and may prevent other.

Database as Manfaah: Database, generally benefits the society at large. Using database, retrieval of information can be performed within seconds. This may assist a person, for example a journalist to make a prompt report or a author to achieve the expected result. All of these outcomes will be benefited by the society. In Islam, based on this fact, a database as the intellectual property product can be protected as manfaah (beneficence).

This concept is applied by analogized the benefit in the intellectual property goods and the tangible property. The whole idea and creativity embedded in databases

which originate from human mind is analogous to the benefit of fruits such as apple, from the apple tree. The benefit of database as mentioned above is to obtain information in a quick and easy manner while the benefit of the apple is obtained when it is eaten.

Database as Mal: To determine whether or not, database as intellectual property product is considered as property, the opinions of the Islamic scholars should be observed. The Islamic scholars as a matter of fact have different views on this matter. The main reason for these dissimilar opinions relies on the causation of nature (illah) for property. The issue of property has been discussed by the scholars based on first, whether to confine property only to physical goods (ayn) or whether to include in its definition the property that is intangible in nature (manfa'ah and haq).

There are views which only limits the definition of property to a tangible goods. However, as far as the intellectual property is concerned, the views which recognized the intangible property as property is more appropriate. These views do not confine the meaning of property to tangible goods but it includes haq and manfaah that derive from a creation (which is also know as maknawi).

The determination of whether or not intellectual property is regarded as property is based on Urf. As said by Imam al-Suyuti:

Anything which has been stated absolutely by shara' without any guidance to it, no explanation on the language, will revert to urf

As Al Qur'an and Sunnah do not lay down the elements of property, urf plays an important role to decide on the nature of property in Islam.

Referring to urf, a property must be something which possess value (mutaqawwam), regardless of its form, tangible or intangible. The value, on the other hand, is measured from its benefits. Therefore, intellectual property is regarded as property as it holds such a high value and benefit. This type of property is categorized as incorporeal or intangible property (ma'nawi) or also classified as manfa'ah.

The acceptance of intellectual property as property has been argued by certain Islamic scholars for example Hanafiyah. They, initially, do not agree with the contention that manfaah and haq are property, they were of a view that manfaah and haq are only ownership. However in certain circumstances, particularly when manfaah is a subject matter of a contract for example rental agreement, it is considered as a valuable property. From this argument, it is submitted that intellectual property may be considered as property and this view has its basis

on urf. The Islamic scholars of Hanafiyyah, using urf, accept haq (intellectual property) as valuable property on the following conditions:

- The haq (right) must be caused by shara, not by future possibility
- The haq must belong to the owner from the beginning, not for the purpose of preventing harm
- The haq can be transferred to other person
- The haq must free from fraudulent and obscurity
- Based on the trade urf (Urf Tijari), the haq is managed in the same manner as other tangible property

In short, Islamic scholars of hanafiyyah has set the mentioned earlier thresholds to categorize intellectual property as haq mutaqqarrar relating to property. Accordingly, intellectual property is regarded as property and it is under the ambit of Islamic legal property of Islam.

EXCLUSIVE RIGHTS OF DATABASE OWNER

Database as intellectual property product entitles to economic rights. Although, the issue of economic rights has not been discussed by the old Islamic scholars, this issue attracts the attention of the modern Islamic jurists. To that effect, the new scholars have come up with definitions relating to that issue.

As described by Abd al-Salam al-Abbadi, economic right is:

A right within its jurisdiction where the owner of the right gains the monetary benefits; by using and publishing the work within the ambit of shara' and the law

A more comprehensive and clear definition was explained by Zuhayr al-Attasi which states:

What is meant by economic right in a work of writing is the expression of mind which originates from his expertise in the field which hold a legal monetary value, by referring to the benefit which is regarded as property and it is valuable according to shara'. The nature of monetary value in an idea is only materialized when it is parted from the author and it is embedded in a book or other form of physical goods which expresses the idea

The mention earlier definitions can be concluded as:

A bundle of right conferred by shara' to the owner of intellectual property which relates to a physical item, by which it fulfills the interest of the owner and it is enforced within the ambit of shara' (Rosman, 2002)

The purpose of recognizing the economic rights of the owner of intellectual property in Islam is to encourage the inventor to invent a new invention for the benefit of the public at large. With the legal protections the inventor will put more effort to create a better product as he understands that he has the exclusive control over the work and can prevent other person from infringing his rights.

Generally, all types of intellectual property product have been accepted as economic rights in Islam except for the copyright. As database needs copyright protection, this issue needs further clarification. The main reason why copyright does not confer economic right is because the scholars are concerned on the dissemination of knowledge particularly when the writing is relating to shara knowledge. However, this contention has been denied as the economic rights of copyright work is analogous to the hukm on taking commission in teaching Al Quraan and other Islamic knowledge.

The current Islamic scholars have agreed that the economic rights are recognized by in Islamic legal principle. The legal enactment of this issue is based on Al-Qiyas, Al-Masolih al-Mursalalah, Al-Urf, Sad al-dhara'i and al-Qawaid al-Fiqhiyyah. The recognition of economic rights of intellectual property in Islam is based on al-Qiyas where it is analogous to the commission given to a person who teaches Al-Quran and other act of obedient. Thus, as teaching Al-Quran can be monetarily valued, the effort of intellectual property creator in creating the product can also be valued economically because both are considered as the act of obedient (Rosman, 2002). Protecting database is necessary as it is property that is entitled to be protected in Islam. Thus, according to the principle of Al-Masolih al-Mursalalah, database can be owned and be monetarily traded in shara', in other words recognize the economic rights of the creator. The concept of Al-Urf has accepted the economic rights of the owner under the shara' as it does not contradict the texts in the Qur'an and Sunnah. This is supported by a maxim under Al-Qawaid al-Fiqhiyyah which states that:

What has been determined by custom or urf is what has been determined by the texts

The remuneration of the creator's effort is important not only to encourage the creator to invent for the benefit of the society but to lessen his economic burden in creating the invention. Therefore to prevent the effort of creator from come to an end, according to the concept of Sad al-dhari, he should be conferred the economic rights. The purpose of this right is to block the means to the harm, i.e., lack of invention which will affect the public at large.

In addition to the economic rights, moral rights are also available in Islam. Based on the discussions by the current Islamic scholars (Al-Najjar *et al.*, 1995), moral rights are defined as:

A bundle of right conferred by shara' to the owner of intellectual property which is not physical in nature, by which it fulfills the interest of the owner and it is enforced within the ambit of shara'

The legal enactment of moral rights is based on certain matters in Islam, for example it relates to the responsibility in safeguarding the knowledge, the ethic of narrations (*turuq al-ada wa al-tahammul*) and the prohibition of fraudulent misconduct and piracy activities. In conclusion, Islam has outlined certain elements of moral rights. First, moral right is an intangible interest belongs to the creator against his intellectual creations, which differs from his economic rights that relies heavily on the monetary benefit in it. Secondly, it relates to the personality of the creator, thus the moral rights are remained with the creator, although the economic rights have been assigned to other person. Thirdly, there is no authority to administer the moral rights as compared to the economic rights which can be transacted through contractual means (Rosman, 2002).

The above explanations support the fact that Islam protects the owner of intellectual property such as database. This protection is reflected from the recognition of the economic and the moral rights of the creator.

INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS IN DATABASE

The conferment of economic and moral rights to the creator has led to another right, namely the right to prevent infringement. The infringement of database is occurred when an unauthorized person uses the right of the owner without his permission. In Islam it is known as, *al-Ta'addi* which is defined by Imam Muhammad ibn Urfah as:

The use of certain things without the owner's permission, even without the intention to own it

This hukm is derived from the texts of the Quran and the Sunnah. In Surah al-A'raf (7:33), it forbids the intrusion of other person's right as it states:

Say: 'My Lord has forbidden all indecent acts, whether overt or disguised, sin and wrongful oppression; He has forbidden you to associate with Him that which is not sanctioned by Him or to tell of Allah what you do not know'

The same command is highlighted in Surah al-Nisa' (4:29-30) which asserts that:

Believers, do not consume your wealth among yourselves illegally, but rather trade with it by mutual consent. You shall not kill one another. Allah is merciful but he that does that through wickedness and injustice shall be burnt in fire. That is an easy thing for Allah

This hukm is further supported by hadith which affirms that:

It is forbidden for muslims to intrude to other muslims life, property and dignity

All the above texts substantiate the fact that the act of taking other person's property without permission which includes infringing intellectual property, is forbidden in Islam. Consequently, transacting with infringing intellectual property articles, i.e., an illegal copy of database is analogous to taking other person's property without authorization. The act of copying database without permission is prohibited in Islam. This forbidden act is not confined to the very act of copying by the infringer but it includes the act of transacting with that copied materials such as purchasing the infringing database. In other words, the buyer or other person who knows that he is dealing with infringing article, he is committed offence in Islam. This situation is explained in the verses below. In Surah al-Maidah (5:2), it forbids the muslims from abetting in sinful matters where it states:

Help one another in what is good and pious, not in what is wicked and sinful

The act of causing harm is forbidden in Islam, thus transacting with infringing articles is encouraging a sinful act and causing harm not only to the owner of the work but also to the public at large. This point is reflected in Surah al-Qasas, (28:77) which asserts that:

And do not strive for evil in the land, for Allah does not love the evil-doers

In conclusion, the act of reproducing a database by other person is forbidden in Islam, unless a permission is obtained from the owner of the work. This prohibition extends to any transaction which relates to infringing articles, which includes the act of buying the pirated copies. It seems that the protection of Islamic intellectual property is wider than the protection offered in the ordinary intellectual property law. This is indicated from the fact that Islam prevents the act of infringing, as well as buying that article where in the intellectual property law the act of buying by the consumer is not considered as an offence.

CONCLUSION

This writing concludes by saying that some recent ulama have began to recognized database as a valid and valuable property. It is hoped that such opinion will become conclusive and all ulama must agree on the value and validity of database property. Only then will it be well protected under the sacred syariah law.

REFERENCES

- Awang, A.A., 1991. Undang-Undang Harta dalam Islam. Vol: 3, Dewan bahasa Pustaka, Kementerian Pendidikan Malaysia, Kuala Lumpur.
- Al-Zarqa, A.S.M.A.Z., 1968. Al-Madkhal al-fiqhi al-am, Dar al-Fikr, Dimashq, Vol: 3.
- Al-Zarqa, A.S.M.A.Z., and M. Ahmed, 1968. al-Madkal al-fiqhi al-am, 10th Edn., Vol. 3 (1378H), Dimashq; Dar al-Fikr.
- Al-Khafis, 1990. Al-Milkiyyah fi al-shariah al-Islamiyyah ma'a muqaranatiha bi al qawanin al-Arabiyyah, Beirut, Dar al-Nahdah al-Arabiyyah.
- Al-Nadawi, 1994. Al-Qawaid al-fiqhiyyah mafhumuha, nash'atuha, taowwuruha, dirasah mu'allafatiha, adillatuha, muhimmatuha, tatbiquha , Dar al-Qalam, Dimashq.
- Al-Nashami, 1988. Al-Huquq al-ma nawiyah bay al-ism al-tijari, Majallah Majma al-Fiqh al-Islam 3(5).
- Al-Zarkashi and Al-Manthur, 1403H. Vol. 1, at 176. al-Tabsirah fi usul al-fiqh, Dar al-Fikr, Dimashq.
- Al-Shaykh, M.F.A.S., 1990 in al Khafif 'Ali, al-Milkiyyah fi al-shari'ah al-Islamiyyah ma 'a muqaranatiha bi al-qawanin al-Arabiyyah, Beirut; Dar al-Nahdah al-'Arabiyyah.
- Al-Najjar, A.A., A.A.Mal-Himayah al-muqarrarah li huquq al-mu'allifin al-adabiyyah fi al-fiqh al-Islami muqarinan bi al-qanun, 1995. Aal-Qaherah: Dar al Nahdah al-Arabiyyah.
- Rosman, A.S., 2002 Harta Intelektual Menurut Fiqh Islam: Pendekatan Perbandingan dengan Undang-Undang Malaysia, Universiti Teknologi Malaysia, Skudai.
- Shibir, 1996. Al-Muamalat al-maliyyah al-mu asarah fi al-fiqh al-Islam, Dar al-Nafais, Amman.
- Wahbah, A.Z., 1995. Fiqh dan Perundangan Islam, Jilid IV, Dewan Bahasa dan Pustaka, Kuala Lumpur.