

Database Property: Its Protection under Islamic Law of Contract

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Abstract: Database is indeed an intellectual property which is well protected under the man-made contract law. However is database property amply protected by syariah contractual principles? This study attempts to look into this issue. This legal study is qualitative in nature. Hence, relevant materials, data and information on database are collected, assessed and critically analyzed. Critical analysis is simultaneously performed on all materials pertaining to Syariah contractual principles. This study finds that database content may be regarded as valid property in the eyes of Syariah and as such should receive protection. The existence of basic Syariah contractual principles which could be used to protect database properties is also acknowledged. It is however noted that these basic Syariah principles are unrefined, being too general in nature. These principles have also not been codified in a single legislation. This has resulted in an ineffective and inconclusive protection for database properties. Ultimately, this study suggests that validity of database property should be universally acknowledged and codified under Syariah law so as to receive conclusive and effective protection under Islamic law of contract. In achieving this, Syariah contractual principles should therefore be refined and codified in one single written legislation.

Key words: Database property, database protection, man-made contract law, Syariah contractual principles, Islamic law of contract

INTRODUCTION

Under the modern man-made law, a database is protectable through licensing agreement. This means that a database receives contractual protection. This study, however goes beyond this, exploring and examining whether a database receives equal protection under Islamic Law of Contract. It will first look into the issue of whether database could be regarded as valid property in the eyes of the Syariah. This study will then proceed determining whether database may be protected under the Islamic contractual concept. This is because, a database will only be protected under the Syariah if all protectable elements are satisfied.

RESEARCH AND METHODS

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 contractual principles in determining availability of protection.

The issue of database protection under the Syariah is currently examined and debated by the ulama'. Such development is heartwarming as it indicates jurisprudential exercise by muslim jurists and academicians in coming up with new Syariah principles which will govern database protection. The 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.

Protection of database property under Islamic law of contract; discussions and debate: Is database property amply protected under Syariah contractual principles? This issue has been keenly debated by the Muslim scholars. In determining this issue, a thorough assessment on each element of Islamic contract must be scrutinized.

Initially, the requirement of contract in Islam has its basis on the definition of contract. Contract or also known

as *aqd* in Arabic language, jurisprudentially means an engagement and agreement between 2 persons in a legally accepted, impactful and binding manner (Ala'eddin Kharoffa, 2000). Alternatively, a comprehensive meaning has been suggested by Muhammad Qadri Basha as contract is described:

An expression of the matching between a positive proposal made by one of the parties and the acceptance of the other party in a way which has an impact on the subject matter of the contract

There are 2 important elements that is derived from the meaning mentioned earlier that are positive proposal (*ijab*) and acceptance (*qabul*). However to make a contract legally acceptable and impactful, there are other additional conditions needed which are the parties to the contract and a subject matter to the contract. Every each of the element is further observed.

IJAB AND QABUL (OFFER AND ACCEPTANCE)

Ijab (offer) is also known as confirmation. The offer is called *ijab* as it confirms the freedom of acceptance to the other party. The acceptance made by the other party is called *qabul*. The existence of both elements establishes a contract.

In order for *ijab* and *qabul* to be regarded as contract, they must be made using certain format. This format (*sigha*) is the utterances expressing the wills of the 2 parties, showing the purpose of contract and bringing it into existence after it had been a hidden and unknown thing or intention. The example of this format is shown through verbal contract, such as the offeror says: I am selling this goods to you for this sum of money and the offeree accepts by saying "I accept". However, a contract is not confined to verbal contract only, written contract is acceptable in Islam, provided that the writing is clear, readable and understandable (Ala'eddin Kharoffa, 2000). This fact indicates that a documented contract is enforceable, such as a database licensing agreement on condition that the parties to the contract agree to the terms and conditions set out in the contract. It is admitted that signals and gestures are acceptable format, only if the parties to the contract are incapable of speaking. A question arises for a database contract to be concluded via online transmission, a potential user of database is required to click on the button agree or accept. Can this manner be regarded as acceptance? Since, oral communication is the standard form of expression, other means should not be permitted unless it is significant (Kharofa, 2000). It is a known fact that the potential online

database user never had the opportunity to transact with the owner of database verbally. It seems that the act of clicking button is considered as a signal or gesture to show acceptance. Thus, it is submitted that this form of *ijab* and *qabul* can be accepted as a valid contract in Islam.

In addition to the earlier, the justification of this online contract can be relied on the basis of contract by conduct. This contract is known as *mu'atah* or *ta'ati* or *murawadah* which is a contract involve the act of exchanging which indicates the agreement by both parties without the verbal format of *ijab* and *qabul*. In the case of online database agreement, the offeror has set out certain means of acceptance that is by clicking the button. There is no verbal negotiation or agreement involved, only minimum act of clicking is required. It is regarded as valid contract in Islam provided that parties to the contract realize that the conduct that he or she made signifies the agreement to the contract. This is based on the custom (*Urf*) of the society at large (Al-Zuhaili, 1995).

Prior to the establishment of a contract, the element of *ijab* and *qabul* must first satisfy certain conditions. First, the cause of *ijab* and *qabul* must be unambiguous. In other words, the format used shows the type of contract acquired by both parties to the contract. Specifying and defining the subject can be effected by seeing, examining or by specifying the subject matter and amount of the contract. Secondly, the elements of *ijab* and *qabul* must be equivalent. Meaning that *qabul* must be corresponding to *ijab* in terms of the subject matter or the consideration, for example the seller says (*ijab*) sold this thing to you for RM10 and the buyer replies (*qabul*) I bought it for RM10. And thirdly, *Qabul* must be related to *ijab*. This denotes that *ijab* and *qabul* must be made in one place where both parties present or the absence party knows about the *ijab*. In the case of online database agreement, even though both parties are not in the same place, as long as there is a means of communication between the offeror and the offeree, it is sufficed to satisfy the element of *ijab* and *qabul*. This situation is analogous to a contract made between parties via telephone or through mails. The meaning of in the same place is not necessarily that both parties to the contract must be in the very same place but it is enough if the contract is made in a time where the parties to the contract is in a process of establishing a contract (Al-Zuhaili, 1995).

From the earlier observation, it appears that *ijab* and *qabul* as required in Islam is applicable to database contract, either in the form of written contract or even online database. The next element will look at who are the qualified parties to the contract.

PARTIES TO THE CONTRACT

To ensure that a contract is valid, the parties to it must be qualified. This qualification is also known as capacity. To that effect, capacity means a quality which makes a person qualified for acquiring rights and undertaking duties and responsibilities (Kharofa, 2000). Capacity in this sense is separated into 2, first *wojub* (rights) and second, *ada'* (performance). The former deals with a question whether a person is entitled to all his legal duties. While, the latter means a person is qualified to take action which is legally valid. This kind of capacity only exists if a person acquires proper mental awareness and becomes discerning.

In conclusion, there are three types of person, first, people with full capacity. This type of people has all the rights to enter into a contract and all actions taken are valid whether the conduct is for their own sake or on behalf of others. Secondly, people without capacity. This kind of person may include a non-discerning child below the age of 7. Such a person is regarded without aptitude as he or she does not comprehend the meaning of contract. Other example of this type of person is a lunatic (lacking in mental abilities). The third category is people with deficient capacity which includes the discerning child and the idiot and it also extends to idiot and forgetful person.

In conclusion, provided that the parties to the contract are a people with full capacity, the contract is enforceable under the Syariah principles regardless of whether it involves tangible property or intangible property such as database.

SUBJECT MATTER

Subject matter of a contract (*al-Ma'qud Alaihi*) is also known as the place of reference. This subject matter is the place of application of the rules of contract and it is the main focus of a contractual transaction. A subject matter of contract plays a substantial role as it is the main purpose of the parties to enter into a contract. The law will have a great impact on the subject matter, as well as the *hukm* will normally be implemented on it. There are a list of things that is considered as subject matter in Islam. It can be in the form of corporeal property as in sale and mortgage or in the form of benefit or privilege, as in rent or a human being as in a contract of marriage. As far as a database is concerned, the subject matter of a database licensing agreement exists in the form of benefit or privilege as the data or information in it may be benefited by the user (Al-Zuhaili, 1995).

To ensure the validity of contract, there are certain conditions for the contractual parties to adhere to. Firstly,

the subject matter of a contract must be in existence at the time when the contract is made. In the absence of the subject matter there will be no legal effect on the contract. The purpose of this condition is to avoid deceit or ignorance which will cause dispute or conflict among the parties. Secondly, the subject matter of contract must be specific. In other words, it must be defined clearly to avoid any obscurity. In order to specify or to define the subject matter, the parties to the contract can see or examine the goods. The purpose of this condition is to avoid misrepresentation as to the state of the subject matter. Thirdly, the subject matter must not be something illegal. Illegal subject matter can nullify the contract as a whole. To that effect, a muslim is prohibited from dealing with liquor or pork. The type of contract, as a matter of fact is depending on the nature of the subject matter. For example fruits and vegetable is only valid to be put in sale but not mortgage (Al-Zuhaili, 1995).

From the earlier, a conclusion may be drawn to the effect that a subject matter of database has satisfied the earlier mentioned conditions. When a database owner decides to deal with his database product, usually the data or information in it have been arranged and compiled in such a way that it can be accessed by the user. Furthermore, the content of database is normally pre determined. Thus, it suffices the element of a specific subject matter. In fact in certain circumstances, the user is allowed to test the database during the trial period. And, if the information contained is legal that is not dealing with things that are prohibited in Islam, then it is permissible. Therefore, a database contains information about pornography materials is not included as pornographic activities are forbidden in Islam.

Unlike the typical thresholds of contract, consideration is not being put as one separate condition but is discussed under the topic of subject matter. Consideration is also known as objective or purpose (Al-Zuhaili, 1995). The purpose of a contract, although not included as a separate requirement of contract is important as it indicates the intention of parties to the contract. It is also named as *Iwadh* or *Sabab*. Consideration must exist in every valid contract and it is different in nature according to the type of contract. For example, the purpose of sales of goods contract is to transfer the goods to a buyer for a sum of money while in a rental contract, the purpose is to give benefit from the rented subject matter for the money paid. Thus, in order to ensure that the consideration is valid there are 2 requirements that must be satisfied; firstly, the consideration must be in existence; secondly, the consideration must be permissible and valid. In the case of database contract, it appears that these requirements

are fulfilled provided that the content of database is available for the user in return to the money paid for the required information. And for a permissible database, i.e., a database with a legal content, it has satisfied the second condition of consideration.

DATABASE PROTECTION UNDER SYARIAH CONTRACTUAL PRINCIPLES: FURTHER JUSTIFICATIONS FROM INTELLECTUAL PROPERTY POINT OF VIEW

Exclusive protection of database property by Syariah contractual principles could further be justified by looking at several recognition given by the muslim jurists on intellectual property in general.

Indeed 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, 1968b)

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 nawiyyah) 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 Dr. 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 two 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 author if the intellectual property product has been assigned to a company (Rosman, 2002).

The third element refers to a power to control. Once the researchers 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 may prevent 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 researcher 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 works 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 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.

The Syariah principles which recognize validity of intellectual property have been derived from the following Syariah sources:

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 earlier 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 (kulliyyah). 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: Even Islamic custom or Urf recognizes intellectual property on the condition that the below requirements are satisfied:

- Must not be conflicting with the texts that is it must be a valid custom. As mentioned earlier 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 may lead 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 numerous Syariah legal maxims that could be used as basis of recognizing intellectual property: 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 research. 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 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, 1403H). The legal principle derives from this maxim connotes that if there is no clear texts in the Quran 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 researchers, as well as the general public.

CONTRACTUAL PROTECTION OF DATABASE UNDER THE CONCEPT OF ISLAMIC INTELLECTUAL PROPERTY: FURTHER ANALYSIS

The earlier mentioned discussions clearly demonstrates that database as intellectual property must be protected under Syariah contractual principles. This is so as database property fulfills the four basic elements of right (haq), ownership (milk), beneficence (manfaah) as well 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 (Ali, 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, 1968a). 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 earlier meanings lead to a conclusion that intellectual property has been categorized by the current Islamic scholars as haq mutaqarrar which relates to haq mali and haq ayni. The intellectual property right is categorized as haq mutaqarrar 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 2 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 iktisaf. 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 researcher 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 Quran 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 Hanafiyyah. 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 above thresholds to categorize intellectual property as haq mutaqarrar relating to property. Accordingly, intellectual property is regarded as property and it is under the ambit of Islamic legal property of Islam.

EXCLUSIVE ECONOMIC RIGHTS OF DATABASE OWNER: A FURTHER JUSTIFICATION TO CONTRACTUAL PROTECTION UNDER SYARIAH CONTRACTUAL PRINCIPLES

In view of exclusive economic rights of the database owner, the necessity of protecting database property contractually from under Syariah principles is further enhanced.

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 Dr.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 researcher and it is embedded in a book or other form of physical goods which expresses the idea

The 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 Qura'an 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-Mursalah, 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-Mursalah, 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 Quran 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-dhara'i, 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 (Mabruk, 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 earlier 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. Thus, in view of recognition of such economic and moral rights, it is further argued that such database property should be contractually protected as well under Syariah contractual principles.

CONCLUSION

The earlier arguments have substantiated the fact that database is protectable under the Islamic contractual principle. In order to get protected the database contract must satisfy the thresholds ascertained by Islamic principle. As database agreement is normally presented in the form of a written document, either in a physical or online form, it is very important to ensure that every each of the terms are unambiguous or in other words, readable and understandable by both parties. This is because the unclear agreement may render the contract invalid. The

responsibilities of the user of database, as well as the limitation of rights are spelled out in the terms of contract and this in some way protects the interest of database owner.

The existence of basic Syariah contractual principles which could be used to protect database properties is thus acknowledged. It is however noted that these basic Syariah principles are unrefined, being too general in nature. These principles have also not been codified in a single legislation. This has resulted in an ineffective and inconclusive protection for database properties. Ultimately, this study suggests that validity of database property should be universally acknowledged and codified under Syariah law so as to receive conclusive and effective protection under Islamic law of contract. In achieving this, Syariah contractual principles should therefore be refined and codified in one single written legislation.

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