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Issues on Intellectual Property as a Jointly Acquired Property: A Critical Analysis from Shariah and Law Perspectives

Marina Abu Bakar

Universiti Islam Antarabangsa Sultan Abdul Halim Mu'adzam Shah (UniSHAMS), 09300, Kuala Ketil, Kedah, Malaysia

Noor Asyimah Ramli

Shar'ie Lawyer, Noor Asyimah & Associates, 13700, Prai, Pulau Pinang, Malaysia

Saad Gomaa Gomaa Zaghoul

Universiti Islam Antarabangsa Sultan Abdul Halim Mu'adzam Shah (UniSHAMS), 09300, Kuala Ketil, Kedah, Malaysia

Ahmed Ramadan Mohamed Ahmed

Universiti Islam Antarabangsa Sultan Abdul Halim Mu'adzam Shah, 09300, Kuala Ketil, Kedah, Malaysia

Meryem Abous

Universiti Islam Antarabangsa Sultan Abdul Halim Mu'adzam Shah (UniSHAMS), 09300, Kuala Ketil, Kedah, Malaysia

Mohamad Fauzi Md Thahir

Universiti Islam Antarabangsa Sultan Abdul Halim Mu'adzam Shah (UniSHAMS), 09300, Kuala Ketil, Kedah, Malaysia

Nadia Murshida Abd Azzis

Universiti Islam Antarabangsa Sultan Abdul Halim Mu'adzam Shah (UniSHAMS), 09300, Kuala Ketil, Kedah, Malaysia

Abstract---Jointly acquired property is property obtained during the marriage of a husband and wife generated from their collective resources or efforts. However, in this era of digitilization, the cases on jointly acquired property has changed from a physical property to an intellectual property. Therefore, the cases on jointly acquired property should also include matters related to intellectual property of the married couple gained during the marriage period. Although jointly

acquired property is an exclusive right of the husband and wife, this property can be contested by a third party. In fact, a fatwa (Islamic legal ruling) in Kelantan has legalize such application. As a consequence of this issue, this research aims to study the concept of intellectual property in term of jointly acquired property and analyze the issue of intellectual property according to Islamic and legal perspective. This study is a qualitative research with data collection done through library research particularly referring to classical books and contemporary Islamic jurisprudence literatures related to jointly acquired property in Islam, jointly acquired property fatwa in Kelantan and jointly acquired property cases in Syariah Court. Content analysis approach has been applied in data analysis process.

Keywords---acquired property, intellectual property, Islamic legal, law perspectives, legal perspective.

Introduction

Jointly acquired property refers to property earned mutually by husband and wife during a valid marriage period in which both parties contribute directly or indirectly to the acquisition or ownership of the property. It is among the rights of the husbands and wives in the event of divorce, polygamy, and death (Sitiris & Halim, 2010). Meanwhile, intellectual property is any representation of ideas and inventions that is produced from thought, comprising any kind of intellectual outcome in various fields whether in the form of literary works, art, scientific works, broadcast production, industries such as patents and businesses such as trademarks and others (Rosman, 2002). All products and outputs are named as intellectual property due to the similar basis of these inventions that is the ability of thinking (McKinnon et al., 2018; Mohr et al., 2015).

Initially, jointly acquired property is an exclusive right for husband and wife per se. It is regarded as such because in determining the division of jointly acquired property, the Court will take into account the joint efforts of the husband and wife, the contributions given directly and indirectly by the husband and wife, the presence of minor children with their needs and any debts incurred by either party or parties (husband or wife) for their mutual benefit. Nevertheless, in the era of modernization, the nature of jointly acquired property does not only exist in physical form, but also in intellectual form. Although jointly acquired property is considered as an exclusive right for husband and wife, but when the case involving jointly acquired property, it can be filed by a third party. In fact, *fatwas* in Kelantan have allowed such practice. Thus, this study explored the issue of intellectual property claims to be regarded as jointly acquired property and analyzed the issue of intellectual property claims as jointly acquired property according to Islamic and legal perspectives (Pisano, 2006; Glass & Saggi, 2002).

Jointly acquired property in Islam

Jointly acquired property refers to property attained collectively by husband and wife during a valid marriage time in which both parties contribute directly or

indirectly to the acquisition or ownership of the property. Jointly acquired property can be defined as income or assets derived from collaborative effort between husband and wife, and profit derived from capital invested by husband and wife (Abd. Latif, 2004). The essential elements in defining jointly acquired property is the contribution of each spouse, either husband or wife, in the course of obtaining the property. Furthermore, jointly acquired property comprises all categories of immovable property and movable property gained within marriage period, either directly or indirectly based on Islamic law (Yaacob, 1989).

There is no specific definition of jointly acquired property given by the previous scholars. Among the factors that contribute to this situation is the common practice in the past whereby earning for living was performed by the husband while the wife stayed at home doing the house chores. Thus, no issue pertaining to jointly acquired property arose at that time. A different scenario can be seen in Nusantara area whereby majority of the population in Indonesia, Brunei, Pattani and Malaysia are farmers. Husbands and wives live together working on their agricultural land and in the event of divorce, the property or the farmland will be divided between them. Thus, the concept of the division of jointly acquired property in Malaysia is not uncommon as it has been practiced by the Malays since time immemorial and has been part of the tradition of Malay community. In fact, jointly acquired property does not contradict the teachings of Islam (Ibrahim, 1999). Although this concept is not specifically discussed by the previous scholars, but the description of such property was known as *Mata' al-Bayt* which means household appliances and *Mal al-Zawjain* as property of husband and wife in discussing the concept of jointly acquired property (Grassa & Gazdar, 2014; Bawany & Padela, 2017).

In general, jointly acquired property referring to property proceeds earned during the period of marriage. However, not all properties can be classified as jointly acquired property. There are also property proceeds classified as non-jointly acquired property such as property possessed by wife or husband before marriage that has been purchased with his/her own money, effort or gifts or grants or inheritance without expansion or development to the property after marriage by any party. Such property is categorized as either inherited property, inheritance, gift or *hibah*. In addition, the property acquired by the wife during the marriage through her own efforts without any direct contribution from the husband, is not considered as jointly acquired property (Azmi & Ghani, 1995). Marriage alone does not entitle the husband to claim the property as jointly acquired property. Similarly, any contribution by the husband in fulfilling his duty to take care the family and household as prescribed by Islamic law, is not counted as a joint effort for the purpose of interpreting the definition of "jointly acquired property". Jointly acquired property are classified as follows:

- Property acquired by a husband during the marriage with his own money, or hard work without any direct contribution from the wife (as the wife is regarded as an indirect contribution).
- Wife's or husband's property owned before marriage subsequently developed collectively during the marriage, including all proceeds and additional value from the development and advancement done by the other party's efforts, or the joint efforts of the parties with respect to such properties.

- Any contribution done by the wife in taking care of the family and household or any other matter relating to the acquisition of property shall be treated as joint effort in describing “jointly acquired property”.
- Any contribution done by the husband (other than contribution in fulfilling his duty to take care of the family and household as prescribed by Islamic law) leading to the acquisition of property shall be counted as a joint effort in describing “jointly acquired property”.

The law on jointly acquired property in Islam has been stated in Al-Quran, Surah An-Nisa', verse 32:

“To men is allotted what they earn, and to women what they earn”

This verse indicated that every man and woman have their portion accordingly. Thus, jointly acquired property is considered as part of the property gained by the husband or wife that could be divided according to the quantum of efforts contributed by both parties. The concept of jointly acquired property comprehends the concept of *maslahah*. *Maslahah* is an Arabic term derived from the word *salaha* which means benefit, interest and prevent harm (Ibn al-Manzur, 1993). *Maslahah* is a noun of the word *salaha* and singular to *salaha*, which means benefit or prevent harm and interest. Therefore, something that can secure benefit and enjoin virtue is considered as carrying a specific *maslahah*. Meanwhile, the concept of jointly acquired property in line with the concept of *maslahah mursalah*. *Maslahah mursalah* is named as *maslahah* because of its nature that provides benefits and interest and protect against harm and destruction. *Mursalah*, on the other hand, refers to the fact that there is no textual authority can be found on its validity or otherwise (Jalal al-Din, 1983). The concept of jointly acquired property is based on *maslahah mursalah*, which is to secure the benefit or interest of both parties in preserving the property. Apart from that, the concept of jointly acquired property also corresponds with the method of *fiqh al-'Adah Muhakkamah*, which regarded as law and *'uruf* (custom) recognized by Islamic Law. This concept is considered as custom and tradition that has been practiced consistently in the community of Malays and known by the public. Thus, such *'uruf* (custom) that has been accepted as good and appropriate practices could stand as a rule to be observed (Maikala, 2010; Mete et al., 2010).

Jointly acquired property according to legal perspective

Legislation on jointly acquired property passed in Malaysia before the independence, namely through the Civil Court, Customary Court Hoe (1973), and Syariah Court (Tapah, 2003). Prior to the enactment of specific laws related to Muslim's jointly acquired property; kadis and Syariah Court judges encountered challenges in determining the basis for jointly acquired property cases under Islamic law (Ibrahim, 1999). In 1980s, the jurisdiction to hear and decide on jointly acquired property cases was under Civil Court (Beanan et al., 1983). However, the situation has changed when this jurisdiction has been fully transferred to Syariah Court. This jurisdiction has become the exclusive right of Syariah Court after the amendment to Article 121 1 (A) of the Federal Constitution. For non-Muslim married couples, the matrimonial property is heard

in Civil Court. Nevertheless, there are similarities between the concepts of jointly acquired property and matrimonial property which both adopt the concept of contribution in acquiring the property (Hussin & Jamaluddin, 2016).

From legal perspective, cases regarding jointly acquired property arose from divorce suit, polygamy, or inheritance (death) enable the husband and the wife with proper locus standi (Bakar, 2021). Locus standi is important in determining whether a person has the right to be heard or not. In order to ensure that an individual has the right to be heard in Court, he must prove his position in filing such suit in Court. In inheritance (death) cases, the respective heirs of the husband or wife do not have locus standi to claim for jointly acquired property on behalf of the deceased. This situation differs to other kind of inheritance property as the respective heirs have locus standi upon death (Giancaspro, 2017; Lea & Hall, 2004).

However, there are exceptions in certain circumstances that allow the respective heirs to claim jointly acquired property after the demise of the deceased to ensure justice and safeguard the property. In fact, the disputes on jointly acquired property should be resolved prior before the division of the deceased's estate. The Islamic Family Law Enactment in all states in Malaysia include legal provision on jointly acquired property in the event of polygamy application except Terengganu and Sarawak. Section 23 (9) of the Islamic Family Law Enactment clearly stated that jointly acquired property can be filed in the event of polygamy application (Zakaria, 2018).

The practice in Syariah Court of Malaysia shows that jointly acquired property that can be claimed are those property acquired during valid marriage period. Husband or wife must contribute directly or indirectly within the marriage time. There are three aspects that will be considered in deciding matters on jointly acquired property, namely evidence, testimony, and details regarding the property. These aspects will be taken into account in proving the existence of the parties' contribution in acquiring a property during marriage period. The judgment made is based on Islamic law and Islamic Family Law Enactment (Zohdi, 2017; Othman, 2019).

In Kelantan, the jurisdiction of the Syariah High Court over jointly acquired property are specified in the Administration of the Syariah High Court Enactment 1982 (Kelantan). By virtue of this laws, the Syariah High Court has the power to hear and conduct proceedings in relation to the division or application on jointly acquired property. Apart from that, legal provision on jointly acquired property is also explained in Section 122 of the Kelantan Islamic Family Law Enactment No.6. 2002. Prior to the existence of this Enactment, Kelantan adopted a law in 1919 that Notice Number 33 of 1919 (Distribution Property Laki Bini) Kelantan, the laws of 1953 and 1966 of the Law Council of Islamic Religious and Malay Custom, Kelantan and the Qadhi Court of Kelantan in 1953.

Intellectual property according to Islamic perspective

Historically, the concept of intellectual property has existed and practiced among the earlier Muslim communities from the time of revelation to the end of the 17th century AD. In this phase, the recognition on the concept of intellectual property

can be seen in the process of writing of revelation Al-Quran by *musyafahah* (face to face), the application of *sanad* and acknowledgment of qualification (*pengijazahan*) in the transmission of knowledge, Islamic culture and respect to the value of knowledge. The Quran was revealed through Jibril by *musyafahah* (face to face) to Rasulullah s.a.w gradually in 23 years. The revelation was then memorized by Rasulullah s.a.w and conveyed to the *wahy* writer (scribes) appointed among the companions for transcribing purpose. The *wahy* writer transcribed the Quranic verses in the presence of Rasulullah s.a.w under his supervision as to ensure its authenticity and avoid deviations. Among the *wahy* writers involved were Saidina Abu Bakr, Umar al-Khattab, 'Uthman al-'Affan, 'Ali bin Abi Talib, Zaid bin Thabit, Mu'awiyah Ibn Abi Sufyan, Amir Ibn Fuhairah, Thabit bin Qais, Khalid Ibn Al- Walid, al-Zubair Ibn al-'Awwam and 'Abdullah Ibn Salul. The process of compiling the verses and surahs of Al-Quran is done by way of *tawfiqi*, that is, according to the instructions of Allah SWT through the intercession of Jibril. In order to ensure the effective process of revelation delivery, Jibril recited the Quran accurately and then followed by Rasulullah s.a.w (Sarmani et al., 1992). The method of delivery and writing of this revelation verifies that the Quran is the book of Allah which is authoritative and protected from being falsified and deception. The principle in delivery mode by way of *musyafahah* is similar to the recognition of the writers' rights that is prevention on any changes and falsifications to the original work (Amori, 2021; Maseleno et al., 2021).

Sanad, on the other hand, is a chain of narrators who involved in the narration of *hadith* from one narrator to another narrator (Nur al-Din, 1988). Islam acknowledged the importance of *sanad* in imparting knowledge as such method affirms the authenticity of information. Allah says in the Quran:

“Say: “Do you see what it is you invoke besides Allah? Show me what it is they have created on earth, or have they a share in the heavens bring me a Book (revealed) before this, or any remnant of knowledge (you may have), if you are telling the truth!” (Surah al-Ahqaf: 4)

In a *hadith* narrated from Salmah, Rasulullah s.a.w said:

“Whoever says what I do not say, then there is a place in hell” al-Bukhari (1987), (Hadith No. 109).

In an *athar*, 'Abdullah Ibn Mubarak mentioned:

“Practice of *sanad* is part of religion. Without it, people will talk about religious matters as they please” (al-Hajjaj, 1994).

The significance in the discipline of *sanad* could eradicate fabrications and falsifications as well as ensuring the quality of a narrator so as competent to be a transmitter of knowledge. In fact, the concept of *sanad* also coincides with the right of paternity (Azmi, 2009). Islam emphasizes the background aspect of the narrator and prioritize the authenticity of *hadith* in its narration. In the early stages of Islam, this the discipline of *sanad* only applied in the narration of *hadith*. However, as the time passed, this discipline expanded in the field of *fiqh* and poetry. For example, in the field of *fiqh*, it is applied in the issuance of *fatwas*. Although many scholars in various sects produced students who are well-

known as Islamic figures, but not all of them have the right to publish *fatwas* imparted from their teachers. Such right conferred to the student if he has the trust of his teachers and competent in doing so. Thus, Islam examined the acceptance of any *fatwa* on the basis that someone apprehend it from a scholar. In the enquiry of a valid *fatwa*, the opinion and the background of the person issuing the *fatwa* will be scrutinized and reviewed accordingly (Yusoff et al., 2021; Rinarta & Suryasa, 2017).

The concept of acknowledgment of qualification (*pengijazahan*) in the transmission of knowledge is practiced between teachers and students by way of *musyafahah* (face to face). A teacher will impart the knowledge word by word in front of his students and documented by his students. Then, the teacher will verify the contents of the knowledge taken by his students before signing the notes. This method is to approve the knowledge imparted is correct and to avoid misunderstanding among students. The concept of acknowledgment of qualification (*pengijazahan*) is similar to the principle of copyright. It functions as a license to maximize the use of an intellectual property. The concept of acknowledgment of qualification clearly demonstrates that such concept recognized copyrights, trademarks, patents and so on from being exploited by irresponsible parties. Islam strongly encourages the believers to seek knowledge as knowledgeable people are respected and considered noble. The culture and value of knowledge in Islam illustrated in the verses of Quran, *hadith*, history of Rasulullah s.a.w, history of the companions, history of Islamic scholars and being a well-known practised *'urf* (custom). Among the verses of Quran that encourage people to seek knowledge are as below:

“Say: :Travel through the earth and see how God did originate creation, so will God produce a later creation: for God has power over all things” (Surah al- ‘Ankabut: 20)

“And so amongst men and crawling creatures and cattle, are they of various colors. Those truly fear God, among His Servants, who have knowledge: for God is exalted in Might, Oft-forgiving” (Surah al-Faatir: 28)

In addition, there are numbers of *hadith* indicating the advantages of seeking knowledge and criticize those who are ignorant in religious matters. For example, a *hadith* narrated by Muhammad Ibn ‘Abd al-‘Ala al-San’ani, Rasulullah s.a.w said:

“The advantage of a knowledgeable person over a worshiper is like my privilege over the lowest among you” (Muhammad bin Ismail al-Bukhari, 1981, Hadith No. 2609).

Another *hadith* narrated by Hisham Ibn ‘Ammar from Muhammad Ibn Sirin from Anas Ibn Malik, Rasulullah S.A.W said:

“Seeking knowledge is obligatory on every Muslim and the person who takes knowledge not from his members (experts) is like tying a pig's neck with diamonds, gems and gold” (Ibn Majah, Muhammad Yazid., T.t, Hadith No.224).

Knowledge culture among Rasulullah s.a.w and his companions can be seen through the advances and technologies used in warfare to face the enemies of Islam. For example, the construction of trenches in *Khandaq* war and other war strategies in fighting the enemies. During the reign of Caliph al-Ma’mun (813 AH), Baghdad had become the centre of knowledge disseminations and developed as

hub for various Islamic scholars and scientists in Europe. Historically, Muslims' glory in various fields of knowledge can be seen in new findings and theories of Islamic scholars such as al-Razi who created the theory of Algebra, Ibn Khaldun who developed Islamic social theory, Jabir Ibn Hayyan who contributed in chemistry and Ibn Sina in medicine. Nowadays, in terms of *'urf*, knowledge is highly needed. The level of achievement of a society commensurate the level of knowledge possessed by the people. Those who are illiterate and fail to receive proper education will be left behind in this evolving world. A society that wants to achieve success in this world and the hereafter should balance up the needs with knowledge. The survival of Islamic civilization can be restored with knowledge empowerment among the society

It has been the practice in Islam in giving rights over intellectual property. Most books in the era of Islamic civilization were printed only with clear permission from the authors (Makdisi, G., 1981). Such condition is equivalent to the application of paternity right, whereby the recognition was given to the author so as to enable him to benefit from his creation and at the same time to acknowledge the author as the creator of the work. Ibn Khaldun criticized the practice of plagiarism by condemning the imitation of the ideas and works of others (Ibn Khaldun, t.t). Imam al-Ghazali said that Ibn Ahmad when he was asked if several pages were missing in the book in which the *hadith* were recorded, whether was it permissible for those who found them to re-copy the notes. He replied: "No, it is a must to ask permission in order to copy the notes" (al-Ghazali, 2010). According to Azmi (2009), it is clear that the methodology used by previous scholars preserved the author's writing by way of protection the authors' name and intellectual property rights by attributing every piece of work to its author (Azmi et al., 2009). Moreover, enforcement of trademarks on business goods was widely practiced during the 'Abbasid Empire. Today, merchandise with price tag indicating the origins and manufacturer is a must. It is also a recognition that proves that the product has met the quality requirements set by the authorities (Ibn al-Ukhuwwah, 1976). Such practice of price tagging has similarity with the function of trademarks and patents in use today.

The concept of property in Islam has been discussed by the scholars in school of law according to their respective definitions. The debate on the definition of property can be divided into two, namely – the view of the majority (Syafies, Malikis and Hanbalis School) and the view of the minority (scholars of the Hanafis School). Majority of scholars are of the view that property is something that has an element of benefit, value and can be owned (according to the Maliki School). This view contradicts to the scholars of Hanafis School who reject the concept of benefits regarded as property. Thus, copyright is not considered as property according to Hanafis School. Even so, there is no specific discussion on copyright from a property theory aspect (Mazlan & Muda, 2020). The concept of intellectual property was seriously discussed and explored by contemporary scholars in the early 20th century. Contemporary scholars such as Fath al-Zarqa', Mustafa Ahmad (1968); Syibir, Muhammad 'Uthman (1999); Bahnasi (1983); Jum'ah (1977); al-Khafif, 'Ali (1990); Wahdan, Reda' Abd al-Rahman (1996), have different views in defining intellectual property. The definition on intellectual property as follows:

Table 1
Definition of intellectual property according to contemporary scholars' views

No.	Scholars	Definition of Intellectual Property
1.	Fath al-Durayni	Intellectual property is an illustration of thought generated by a person through his thinking ability that resulted in discoveries and inventions that have never been preceded by others before him.
2.	Al-Zarqa'	Intellectual property includes copyrights whereby the author has the right to take advantage of his books, journalists in his newspaper privileges and artists from his artworks. It also covers the rights of attaching to instrument's creators, trademark patent composers and trademark originator.
3.	Muhammad 'Uthman Syibir	Intellectual property is named as <i>al-Huquq al-Ma'nawiyyah</i> . It refers to a person's capacity in handling intangible (<i>ma'nawi</i>) goods whether it is the product of intellect such as the author's rights in scientific writings and literary works or even patents in industrial inventions and trademarks.
4.	'Abdullah Mabruk al-Najjar	Intellectual property is man's possession from his thinking capability and its' outcome. This view focuses on copyright of intellectual property only.
5.	Nu'man Jum'ah	Intellectual property is named as <i>al-Huquq al-Zihniyyah</i> . Refers to an individual's rights upon his or her ideas and inventions which have been materialized separately from that individual and are present in the physical means.
6.	Nazih Muhammad	Intellectual property is the right of thought which is in the form of intangible property that is the result and fruit of his thoughts and imagination such as copyright, patent and trademark rights.
7.	'Ali al-Khafif & Reda 'Abdul Rahman Wahdan	Intellectual property is based on intangible (<i>ma'nawi</i>) objects that cannot be recognized by senses but can be perceived by the mind such as ideas and inventions.

Based on the definitions given by contemporary scholars, it can be concluded that intellectual property consists of two main elements, either as a benefit or as a right. Some scholars are of the view that patents, copyrights, and others are intellectual property rights and not intellectual property itself (Rosman, 2002). Thus, intellectual property can be defined as any representation of ideas and inventions resulting from thoughts expressed in a physical means and a group of rights and powers over those inventions conferred by Islamic Law for the owners to control, utilize, use and administer property. Although the concept of intellectual property did not exist as a specific concept in the early Islamic era,

practices such as ensuring the correct flow of information, its protection and assurance of free from any elements of misrepresentation, preserving the rights of creators of their creations, works and ideas – was practiced by the earlier Muslim community. This old aged methodology of persevering intellectual property was praised by the Western scholars (Streibich, 1975).

Thus, it is not surprising when most of the books written by the previous scholars are still preserved up to this day (Ibn Khaldun, t.t). Today, Islam has recognized intellectual property as one form of property based on four main factors that it is – (i) no contradiction with the *nas*, (ii) practiced by the entire Muslim nation in particular and the world in general (iii) its existence and practiced before any legislation of written law (iv) nothing in Syariah disqualify the concept of intellectual property. Furthermore, intellectual property rulings have been agreed upon by contemporary scholars in the 5th *Mu'tamar Majma 'al-Fiqh al-Islami* conference in Kuwait on December 10, 1988 (Abd Majid, 1992).

Intellectual property exists in two main forms. Firstly, intellectual property in the form of reflection of ideas and inventions resulting from thoughts materialized in a physical means that gives rights and powers by the Syariah over those inventions. Secondly, intellectual property in the form of specific right owned by the owner that allows him to control, utilize, use, and administer the property. The first form of intellectual property can exist in written works, artworks, patents, trademarks or trademarks and industrial designs. The second form of intellectual property can be referred to copyright and industrial property rights (patent rights, trademark rights, industrial invention rights). Both forms allow all sorts of right to the owner or creator to have moral and economic rights. The moral right referring to the prevention of changes or modification made to his work, the right to avoid falsification of his work by attributing his name to works he did not do and the right to obstruct others from using his work or name to detriment his skill, reputation and position (Kitner, 1975). For examples of moral rights include paternity rights and integrity rights. The right of paternity or *haq al-Ubuwwah* refers to the right to claim as the owner so that he is identified as the author or creator of the work (Bahnasi, 1983). This right guarantees them to be recognized as an artist or inventor (Hassan, 1990). The right to integrity allows the creator to object to any changes made by others to his creation as to detriment of his honour and reputation. Economic rights are material in nature and enable the owner receives a monetary return (Hassan, 1990). The owner may treat intellectual property as other physical goods binti Hassan (1993), including to protect such property.

The majority of scholars recognize intellectual property as property because they are of the view that benefits are counted as property (Syalabi, Muhammad Mustafa., 1966; Madkur, 1955; al-Khaffif, 'Ali., 1996). Thus, they concluded that, Islamic rulings that is subjected to physical property applied to intellectual property. Nevertheless, there are some differences between intellectual property and physical property. A summary of the differences is illustrated as follows:

Table 2
Summary of differences between physical property and intellectual property

No.	Differences Aspects	Physical Property	Intellectual Property
1.	Underlying property (<i>mahal</i>)	The property is in physical form.	The property is in the form of ideas born from mere thought. The underlying property is meaningful.
2.	Perpetuity of ownership	Ownership of physical property and rights over it are perpetual and permanent	Ownership of intellectual property and rights has certain length of time.
3.	Power	The owner may have powers to use (<i>isti'mal</i>), exploit (<i>isitighlal</i>) and manage (<i>tasarruf</i>) the property.	In the ownership of intellectual property rights, the power to benefit (<i>isti'mal</i>) has been denied. This is because the sale of copies of the intellectual property render the owner no chance to take advantage of it.
4.	Ownership Restrictions	Physical property (excluding land and trees) exists only as a single object.	Intellectual property exists in the form of ideas and inventions can exist in various forms. For example, a scholarly work can exist in the form of a book, document, recorded in MP3 and CD. And at the same time can be copied and printed in a large number.
5.	Nature of properties	Physical property stands as tangible property because it is made from a specified material that can be reached by the senses.	Intellectual property is represented by physical means such as copies of works, books, models of technological inventions and others.

The difference between physical property and intellectual property has caused the scholars' different opinion regarding the ownership of intellectual property. Since intellectual property involves benefits over a specific period, then such property is tied to a specific period. The right on intellectual property may be passed over to the heirs of the owner not more than a specified period after the death of the owner. This is very different from physical property where the ownership and right of the property is perpetual and can be inherited over time.

Intellectual property according to legal perspective

Although the basic ideas and concepts of intellectual property has existed in Islam, however, only a small number of studies conducted has been done in Islamic perspectives. After the 17th century AD, the culture of knowledge is seen to be more vigorous and growing in all over the world. This progress led to innovation of printing presses that could print thousands of copies of books and enabled the authors to enjoy great financial benefits as a result of their essays and ideas. Scholarly activity has turned into a form of career and a source of income (al-Sanhuri, 'Abd al-Razzaq, 1967). Nevertheless, the activity of printing books without permission has caused many authors suffer losses. This circumstance gives rise to the concept of intellectual property to flourish with the aim to preserve and protect the rights of authors in the form of scholarly works and published books. The concept of intellectual property has brought a new trajectory in the scholarly field that brought to the establishment of various enforcement bodies and legislation to support the protection of intellectual property.

Throughout the world, France has enacted specific law to protect intellectual property rights on 13 January 1791 (al-Sanhuri, 'Abd al-Razzaq, 1967). The law was passed after the French Revolution in order to guarantee the rights of authors and permit the inheritance of those rights for five years after the death of the original author. However, there was *lacuna* in French law regarding intellectual property. As the result, the law was amended from time to time until March 11, 1957. Awareness on preservation of intellectual property increased in the 19th century whereby United Nations (UN) established the Council on Literature and the Arts at its conference in Paris in December 1878. The Berne Convention that was held on 19 September 1876 is to recognize the rights of authors over their works (al-Sanhuri, 'Abd al-Razzaq, 1967). As the consequence of this conventions, amendments and expansions of scope has been done. In the meantime, conferences and conventions organized by United Nations has established UNESCO on 6 September 1952 in Geneva that comprises various countries. In 1979, the World Intellectual Property Organization (WIPO) was established in Geneva. WIPO membership has increased every year, and until 20 February 1997, 161 countries have agreed to join WIPO including Malaysia. As a result of a series of UNESCO and WIPO conferences, Malaysia began enforcing the intellectual property laws known as the Copyright Act 1987 (Copyright Act 1987 (Act 332)). Provisions on intellectual property are set out in Section 25 (2) as follows: "Subject to this section, where copyright subsists in a work, no person may, without the consent of the author, or, after the author's Copyright 39 death, of his personal representative, do or authorize the doing of any of the following acts:

- The presentation of the work, by any means whatsoever, without identifying the author or under a name other than that of the author.
- The distortion, mutilation or other modification of the work if the distortion, mutilation or modification".

It has been the practice throughout the world and Malaysia, the validity of recognition on intellectual property ownership commenced when once it is

registered [Lipton \(2000\)](#); [Bouchoux \(2001\)](#) with the authority for example, the Ministry of Trade and Consumer Affairs Malaysia. The registration aims to guarantee the exclusive rights of registered intellectual property owners in commercial transactions and to ensure that the intellectual property being protected by the enforcement division through legal provisions. Upon registration, the owner will have a valid document that is a certificate of registration as an evidence to confirm the ownership of any intellectual property. Failure to register intellectual property renders the property unprotected. In the event of infringement of rights occurs, two forms of control can be performed that is through legal protection and technical control ([Zuall Cobley, 1999](#); [Turner, 2000](#)). In Malaysia, the law relating to intellectual property is based on Common Law. Laws relating to intellectual property was Copyright Act 1969. This Act was later repealed and replaced by Copyright Act 1987. Among the laws that have been enacted to protect intellectual property are Copyright Act 1987, Trademark Act 1976 (amended in 1994 and 2000), Patent Act 1983 (amended in 1993, 1995 and 2000), Industrial Design Act 1996 and Optical Disc Act 2000 (Copyright Act 1987 (Act 332); Trademark Act 1976 (Act 175); Patents Act 1983 (Act 291); Industrial Designs Act 1996 (Act 552) & Optical Disc Act 2000 (Act 606)). The Intellectual Property Corporation (IPC) was established on 2 January 2003 and responsible for enforcing laws related to intellectual property as stipulated in Malaysian Intellectual Property Corporation Act 2001 (Act 617). All these legislations have empowered enforcement agencies such as the Enforcement Division, Ministry of Domestic Trade and Consumer Affairs and the Royal Malaysian Police to act in the event of any infringement of registered intellectual property rights.

Malaysia always be at the forefront in protecting local intellectual works, especially at the international level. This effort can be seen through international conventions between Malaysia and several countries such as the Berne Convention, Paris Agreement and Trade Related Intellectual Rights Agreement (TRIPS) which are placed under the World Trade Organization (WTO). Technically, various forms of technology-based controls have been developed to further strengthen the internal security system of intellectual properties. Intellectual property that exists in the form of physical means such as books, compact discs (CDs), cassettes and technological design models requires physical control of such tangible materials. The protection of intellectual property in physical means such as books, documents, and others can be done through hiring guards for security, warning bells i.e. security alarms and others. As for non-physical means of intellectual property such as computer software – the control is exercised by registering with the internal security system of software disks, articles, and scholarly works ([Schneider, 2002](#)). Regarding high-tech media, several technological methods are utilized, including e-commerce transactions, software disks (CD Software) and the Internet. E-commerce transactions involve the trading of intellectual property products such as books, music, photos, software done thru online transaction and it is prone to several misconducts such as unauthorized access, theft and interruption. Protection on e-commerce transactions can be implemented with several methods such as Secure Socket Layer (SSL), Secure Electronic Transaction (SET), Public Key Infrastructure (PKI), Digital Watermark technique, Digital Locks and others. To protect the software disk (CD Software), several techniques can be used such as encoding, Digital Watermark technique, digital signature (Digital Signature) and encryption

technique (Encryption). Meanwhile, for matters relating to the trade of intellectual property through the internet – any infringement might be controlled using software or equipment such as Firewalls (Pfleeger, 1997).

Analysis on the recognition of intellectual property as separate property according to Syariah and law perspectives

Intellectual property is the outcome of one's ideas because of one's creativity. Generally, intellectual property is an exclusive property possessed by a particular person. The contribution of one's ideas and creativity to another party will render a royalty payment to be paid as a consideration. Married couples may receive royalty payments because of their creativity in novel writing, song writing, trademark designer, drama producer and others – that can be used as a source of income to support the family during marriage period. Thus, the married couple has the right to claim their portion in the royalty payment if it can be proven that there is direct or indirect contribution has taken place. Direct contribution can be seen in incurring expenses to support the creativity of the spouse, managing the work of the spouse in generating idea or creativity that can then be proven with valid documents. Whereas, indirect contribution can be done thru effort to give unconditional support to the husband or wife to produce work such as managing children and household that could enable the other party to obtain the intellectual property.

However, there is a *fatwa* that has not been gazetted in Kelantan regarding the application on jointly acquired property by the heirs of the deceased wife. A meeting of the Islamic Religious Council and Malay Custom, Kelantan conducted on August 18, 2002 discussed the ruling on jointly acquired property by the heirs of the deceased wife. The meeting decided as follows:

- An application on jointly acquired property by a surviving party such as a wife who claims for jointly acquired property from her husband is permissible whether it is due to divorce or death.
- An application on jointly acquired property by the heirs of the deceased such as children or heirs of the deceased wife who claim for jointly acquired property from the husband of the deceased is permissible whether it is due to divorce or death.
- The portion of distribution of jointly acquired property application that can be claimed by the living party or the heirs of the deceased depends on the decision of the Syariah Court.

The *fatwa* issued by the Islamic Religious Council and Malay Custom, Kelantan on 18 August 2002 is clearly justify any application on jointly acquired property by the wife and the heirs of the deceased such as children or the heirs of the wife in case of divorce or death. Nonetheless, the amount and portion of the property is subjected to the decision held by Syariah Court. In actual, no cases related to jointly acquired property involving intellectual property that has been filed in Syariah Court in Malaysia. However, there are several cases heard in the Syariah Court that involve several claims against jointly acquired property through heirs such as the case of *Tuan Awang Tuan Mamat & others v. Tuan Alam bin Tuan Ahmad & others* (2006) 22 JH 207, *Awang bin Abdul Rahman v. Shamsudin bin*

Awang (1997) 11 JH 193 and *Rohani bt Awing & 3 others v. Maimon binti Awing & 2 others* (JH) 36 BHG2 1434H.

In the case of *Tuan Awang Tuan Mamat & others v. Tuan Alam bin Tuan Ahmad & others*, the Court allowed the heirs of the deceased husband or wife to claim jointly acquired property against the married couple. However, the Court in this case had dismissed the claim as it was filed after 50 years than the period of death of their parents. The Court held that the heirs had agreed and satisfied with the division of property that took place immediately after the death of both their parents. In addition, in the case of *Awang bin Abdul Rahman v. Shamsudin bin Awang* (1997) 11 JH 193, the Court has rejected the claim made by the child to the deceased first wife. The court considered that the deceased of the first wife, the mother of the child, had consented the deceased's share on the property which had been registered in her husband's name. The Court further said that the deceased mother of the Plaintiff is entitled to claim the property as jointly acquired property, not the Plaintiff. In this case, the Court rejected the application made because it is of the view that the wife qualified to file a claim for jointly acquired property with the husband compared to the heirs, i.e. her children. The decision in this case contradicting with the decision in the case of *Tuan Awang Tuan Mamat & Others v. Tuan Alam bin Tuan Ahmad & Others*. The Court held that the heirs of the deceased husband or wife entitled to claim jointly acquired property against the married couple. Besides, the Court's decision in this case is in line with the issued *fatwa* in Kelantan.

Meanwhile, in the case of *Rohani bt Awing & 3 others v. Maimon bt. Awing & 2 others* (JH) 36 BHG2 1434H, a jointly acquired property case was filed in the Syariah High Court by the deceased wife. Even so, she died before the case could be heard in Court. The children of the deceased have pursued the jointly acquired property claim by naming themselves as Defendants. The Syariah High Court has rejected the application of the children. Subsequently, they appealed to the Syariah Court of Appeal. The appeal was finally rejected by the Syariah Court of Appeal. The Syariah Court of Appeal stated that the children of the deceased (Defendant) has failed to prove that a piece of land was developed during the marriage of the deceased and her late husband. However, the Syariah Court of Appeal did not comment on the position (*locus standi*) of the children of the deceased who filed such application on behalf of their deceased mother. In fact, the issue was not raised by any party in this case. This shows that the Court has agreed that the children of the deceased can bring action on behalf of the deceased in contesting matters on jointly acquired property.

Conclusion

The application of jointly acquired property by heirs can be filed in Syariah Court even though the property is the exclusive right of the married couple. However, lately, it has become a trend for heirs to contest on jointly acquired property in Syariah Court. Syariah Court considers the facts and evidence submitted by the Plaintiff in deciding the case and the portion in distributing the jointly acquired property. In order to file cases on jointly acquired property, the children of the deceased must submit proof of contributions made by the parents during life to acquire the property, including expanding or improving the property during the

marriage of the deceased parent. Therefore, the application should be filed immediately to avoid any loss of documented evidence. In addition, any delay in filing the suit in the Court will render the Court to presume that the married couple satisfied on the share of the property against the spouse during his or her lifetime. There is no specific legal provision regarding the nature and type of property that can be claimed as jointly acquired property. Thus, there are no legal barriers in filing a suit on any type of property including intellectual property. Thus, intellectual property is categorized as property that can be claimed as jointly acquired property.

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