

Re-Identifying Property in The Malaysian Penal Law

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Abstract

The lack of legal recognition, acknowledgment on the significance, importance and the value of online resources such as information, data, keyword and meta-tags has caused them to be held in a vulnerable position and subjected to various forms of misuses and abuses. Currently the existing cyber-specified provisions are specifically focussed its main task of regulating illegal acts and activities occurring daily in cyberspace rather than protecting online resources. The lack of adequate legal protection for these online valuable resources is seriously affecting the level of confidence of internet users in conducting their business in cyberspace.

One of the effective ways in protecting these online resources is to classify them as 'property'. Any violation of such should be governed by the relevant penal provisions relating to property. In Malaysia, the penal provisions for offences against property has confined its applicability to corporeal and moveable property only, such penal provisions could not be used to protect online resources in that they are incorporeal and intangible in nature. The penal provision as such lacks its identity in classifying what property is and its definition.

In proposing to extend the application of the Malaysian penal law to cyber cases relate to online resources, 'property' should further be redefined under the 'bundle of rights' theory. By defining property which consists of the bundle of rights and interests, this bundle theory would overcome the conceptual hurdle and that these online assets are to be regarded as property even though it lacks physical status and be accorded the same level of protection as any other type of property recognised by the law.

Introduction

The lack of legal recognition, acknowledgment on the significance, importance and the value of online resources such as information, data and keywords have exposed them to a vulnerable position and subjected to various forms of misuses and abuses. The single most effective way in protecting these online assets is to accord them the property status and hence any violation of their rights should be subjected to the relevant penal provisions. However, the current Malaysian penal law is confine to corporeal property and hence lacks clear principles in identifying property. The aim of this paper is to analyse the current

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position of the Malaysian penal law in identifying ‘property’. This paper further proposes the adoption of new definition – the bundle of rights model in identifying property in the 21st century and to examine the possible issues and concerns in implementing this new definition in penal provisions in order to make it applicable to cases of misuse and abuse of online resources both in cyberspace and in the physical world.

Meaning of ‘property’ in the Malaysian Penal Law

In Malaysia, offences against property govern under the Malaysian Penal Code¹ which is modelled after the Indian Penal Code.² The various offences against property include theft, criminal misappropriation of property, criminal breach of trust, receiving stolen property, cheating and other offences.³ The main purpose of enacting these offences against property under the Malaysian Penal Code is to conserve and preserve private rights in property against adverse attack against it. It is to protect persons against violations of their rights in property. The common ingredient within these offences is ‘property’. The word ‘property’ has been used throughout these provisions has not been defined comprehensively under the Malaysian Penal Code.

Lack of clear definition has resulted into many different interpretations of the word ‘property’ by various provisions in the Penal Code. Section 380 deals with theft in dwelling house. However, the words ‘custody of property’ is used in this provision. The phrase ‘custody of property’ is again not clearly explained. However, withdrawing money or items by one party unilaterally from a joint bank account does not amount to theft under this provision as money and items are in the possession of the bank.⁴ Section 380 connotes ‘property’ to mean something that must be held in a building, tent or vessels for human dwelling. In the case of *Che Man bin Che Mud v PP*⁵ held that money held in a bank account and shown in a bank book held by a person was corporeal property as it is intangible.

Other provisions, such as section 383 provides for the offence of extortion. Extortion is committed when whoever intentionally puts any person in fear of any injury and dishonestly induces the person in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security. The terms ‘any property’ include both moveable and immoveable property. From the wording of this provision, it connotes that letters written by a hostage or kidnapped person requesting ransom to be paid has been held to be ‘property’.⁶ A document which enables a person or which gives a person a reasonable hope or expectation of collecting a substantial amount of money is ‘property’.⁷

¹ Act 574

² Act No. XLV of 1860

³ Such as extortion, fraudulent deeds and dispositions of property, mischief and trespass
Ratanlal and Dhirajilala’s Law of Crimes Vol 2 (24th Edition, 1998), p1869

⁴ Unreported, 22nd October, 1994; Criminal Appeal No: 42-21-1991

⁶ *Halsbury’s Laws of Malaysia, Vol 11, Criminal Law, Malaysian Law Journal* (2001), 190.404, p437

⁷ *ibid*, 190.404, p438

Another provision, section 390 deals with the offence of robbery. Section 390 (2) states in order to commit robbery, the first element of theft must be fulfilled. Theft is committed when a person carries away or attempt to carry away property. This section uses the word 'property' and under this provision, 'property' is confine to moveable property in that the words 'carrying away' are being used. It corresponds to section 378 of the Penal Code.

Section 403 creates the offence of dishonest misappropriation of property. 'Property' here means both moveable and immoveable under this section. As explained by its illustration, if a person finds a government promissory note belonging to another, pledges it with a banker for security for a loan then he has committed an offence under this provision. The government promissory note or the loan is to be treated as 'property' for the purpose of this provision. Critics have commented that there can be no criminal misappropriation of property that has been abandoned.⁸ The property must belong to an owner in order to make the person misappropriate it guilty.

For the offence of criminal breach of trust under section 405, whoever being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person, dishonestly misappropriates, or converts to his own use. The word 'property' in this section refers to both moveable and immoveable property. The word is also wide enough to include a chose in action as stated in the case of *Laxminarayan Joshi*.⁹ The court therein stated that the appellant could only succeed if he could show that in lieu of chose in action which was property he had substituted securities of equal amount. In another reported decision of the Supreme Court,¹⁰ their Lordships observed that a right to a sum of money is 'property'. However, merely because the claim stood pending before the arbitrator liable to be reduced in the award to be passed by him, or that the court would not allow enhancement of the awarded amount for which it is pending in this Court it would not affect the position of chose in action as 'property'.

In the case of *Dalmia RK v Delhi Administration*,¹¹ it was held that whether the offence defined in a particular section of the Penal Code (Indian Penal Code) can be committed in respect of any particular kind of property will depend not on the interpretation of the word 'property' but on the fact whether that particular kind of property can be subjected to the acts covered by that section.

Under section 415 of the Malaysian Penal Code, cheating is defined as fraudulently or dishonestly inducing the person so deceived to deliver any property to any person¹² or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit that causes or likely to cause damage or harm to any person in body, mind, reputation or property. In this section, the word 'any property' is given it widest meanings. The property in this provision need not be in existence at the time of

⁸ *Ratanlal and Dhirajlal's Laws of Crimes* Vol 2 (24th Edition, 1998), p1949 - 1950

⁹ AIR 1980, SC 439

¹⁰ *Ranojirao Shinde* (In C.A. No. 1730 of 1966) and *Krishnarao Shinde* (In C.A. No. 1731 of 1966)

¹¹ AIR 1962, SC 1821

¹² Section 415 (a)

cheating provided such property is, when made, delivered under the influence of the cheating.¹³ Furthermore, the thing need not have any monetary or market value provided it has special value for the person concerned.¹⁴ There is also no requirement that a person cheated must own the property.¹⁵

Section 378 of the Malaysian Penal Code creates the general offence of theft. The words ‘moveable property’ has been used in this provision. ‘Moveable property’ is defined under section 22 of the Code which means corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth.

In reference to the explanation under the Indian Penal Code, ‘moveable property’ means a thing, so long as it is attached to the earth, it is not being moveable property and therefore is not subject to theft. But it becomes capable of being the subject of theft as soon as it is severed from the earth. Therefore, it is important that a thing must be capable of being moved before it could be subject to the offence of theft. The fact that the act of moving implies the thing must be a physical object of some sort. It must be able to perceive by the sense as opposed to ‘incorporeal property’ which is not perceivable in real sense and it is merely consider as an obligation.¹⁶

Based on the above analysis, my conclusion is that there is lack of identity in clearly defining what ‘property’ means under the Malaysian Penal Code. There are many provisions under the Penal Code and each of them dictates its own interpretation on the scope of ‘property’ under different property offences. There is clearly no consistency in its interpretation. As a result of this, there is uncertainty in the law. As the word ‘property’ is not clearly defined under the Penal Code, it is difficult to apprehend clearly what would be classified as ‘property’ within the penal law of Malaysia.

Inadequate protection on online resources

Lack of clear identity and well-defined concept of ‘property’ not only created interpretation problems within the Penal Code but it also has other serious implications. As one could not ascertain what ‘property’ is or what type of property is applicable in a given provision, other than what have been ruled in relevant cases. In the absence of clear guideline in identifying what ‘property’ is and its classification, it prevents new or future resource to be qualified and classified as ‘property’ and to attain the property status.

The rapid development of Internet and World Wide Web in the 21st century has created many valuable and useful online resources. The issue of the protection of online resources such as information, data, keyword and meta-tag and other future online resources as ‘property’ have always been the subject of great controversy. The lack of clear legal principles in cyber-specified laws and the inconsistency in existing penal laws

¹³ Refer to illustration (c) of Section 415

¹⁴ *Ratanlal and Dhirajlal's Laws of Crimes* Vol 2 (24th Edition, 1998)

¹⁵ *Rahj bin Abdullah v PP* [1998] 1 SLR 447, also contrast with Section 403 in which the property must be owned by somebody

¹⁶ *Mallal's Penal Law*, Malayan Law Journal Sdn Bhd (2002), p29

in relation to the identity and classification of 'property' has created a vacuum in law. The lack of legal recognition, acknowledgement on the significance, importance and the value of these online resources makes them vulnerable to misuse and misappropriation. This present discussion would emphasis on the misuse and misappropriation of information, data, keyword and meta-tag.

Information and data

One of the most common misuse and misappropriation of personal information and data is phishing attack. The creation of the internet and the increase use of the databases for storing consumer information have facilitated perpetrators in gaining speedier access and to greater amounts of individual information at any one time. Once the perpetrator has obtained person's information, he may use such personal information to pursue further illegal activities such as applying for new credit card account or obtain home loan or car loan in the victim's name through online portals.¹⁷ Internet has made it easier for perpetrator to manipulate personal information at anytime and potentially hundreds or thousands of personal information available over the internet are at risk. The victims of phishing attacks and identity theft not only suffer financial losses but also result in the victims' loss of valuable time and money spent trying to rebuild and restore his/her credibility and good name.

In Malaysia, the recently enacted Personal Data Protection Act of 2010 is to regulate the processing of personal data in commercial transactions by data users and to safeguard the interests of data subjects. However, the 2010 Act is only applicable to the processing of personal data in respect of commercial transactions. There are many data capable of being collected not via commercial transactions but in furtherance of employment; educational; professional or welfare purposes. In those instances, the application of the 2010 Act will be excluded. The 2010 Act in defining sensitive personal data has omitted data concerning racial or ethnic origin and sexual life of data subject. The 2010 Act also did not deal with issue of misappropriation of personal information and data.

The lack of clear principles in providing adequately protection for online resources in cyber-specified laws is also evidenced in the Computer Crime Act of 1997. The 1997 Act deals with offences relating to misuse of computers. Section 3 provides the offence for unauthorised access to computer material. This section provides that a person shall be guilty of an offence if he causes a computer to perform any function with intent to secure access to any program or data held in any computer.¹⁸ For all intents and purposes, this section is to criminalise the 'act of unauthorised 'access' to computer material rather than specifically protect the computer material in question. It is also possible that the perpetrator may have authorised access to the computer material, such as employee's authorised access to company information. If an employee access company information in the course of his employment and he then proceed to keep a copy of the information

¹⁷ Jennifer Lynch, *Identity Theft in Cyberspace: Crime Control Methods and Their Effectiveness in Combating Phishing Attacks*, 20 Berkeley Tech. L. J. 259, 2005, p2

¹⁸ Section 3 (1)(a)

for his future use, it is doubtful as to whether the employee would be made liable under this provision as his access to computer material was not unauthorised.

Keyword and meta-tag

Other types of online resources such as keyword and meta-tag are often subject to misuse and misappropriation. Keyword and meta-tag are used in search engines. The search engine provides the link to internet user who enters a search using a specific keyword or meta-tag. For instance, once an internet user key in the word 'cake', all the websites associated with 'cake' or its contents containing the word 'cake' would be listed in the search engine results accordingly. The purpose of misusing someone else's keyword or meta-tag is primarily to divert internet traffic and to secure potential clients away from its competitors. This can be achieved as internet has become one of the most powerful and yet inexpensive worldwide marketing platform for many businesses. In this competitive online marketing platform, eighty percent of the internet traffic is generated by search engines. There are many misuses and illegal search engine optimisation techniques are being used in order to ensure that a company is able to get the top listing from the search engine such as using trademarked words in meta-tags.

The legal issue often arise is whether meta-tag used by one website owner infringes the registered trademark of another company or its website. Trademark is a sign which serves to distinguish the goods or services of an industrial or a commercial enterprise to that of another. If a company has legally acquired a particular trademark for its business then such trademark will be used to represent the company, its goods or services, whether offline or online.

Today, modern advertising requires the setting up of a company's website and online advertising to secure customers are becoming common practices and it is highly possible that an online business or company may have or has used a keyword or meta-tag that is similar to a registered trademark belonging to another company offline. As trademark can be registered under the trademark system, anyone who uses the same or similar trademark duly registered by the others will amount to a trademark infringement. In the case of *National American Medical v Axiom*,¹⁹ the court held that the competitor's use of the trademark in meta-tag which caused those trademarked term to appear in search result descriptions of defendant's website has infringed plaintiff's marks. The Court therein stated that:

'The facts of the instant case are absolutely clear that Axiom (defendant) used NAM's (Plaintiff's) two trademarks as meta tags as part of its effort to promote and advertise its products on the Internet. Under the plain meaning of the language of [the Lanham Act] such use constitutes a use in commerce in connection with the advertising of any goods.'

Trademarked term used in meta-tag is protected under the trademark system but on the other hand, there is no specific law to protect the use of meta-tag in search engines. The

¹⁹ No. 07-11574 (11th Cir., April 7, 2008)

problem with this is that there are several cyber related services offering keywords or meta-tag ownership with a fee and each one of them may be selling the same keyword or meta-tag to different companies, or even to rival companies at the same time. Furthermore, some keyword or meta-tag will only work with the particular issuing companies' proprietary address bar plug-in.²⁰ Complication arises as there are many services offering search tools over the internet, there is no single system governing naming standard or to ensure that the purchaser secures the legal right to any of the terms they purchased and to synchronise all keyword or meta-tag registration and ownership across the board.

The results of misuse and misappropriation of these new online resources are very serious and if left unchecked would affect the level of confidence if internet users in conducting their business in cyberspace will be reluctant to conduct business transactions which necessitate the revealing of their personal information over the internet. The misuse of keyword or meta-tag leads to serious trademark infringement, branding dilution and fraud cases.

The fundamental question is whether these online resources should be protected at all. Information, data, keyword or meta-tag lacks the necessary degree of intellectual quality and the level of abstraction compare to other form of legally recognised resources such as literal work or compilation which may subject to copyright law protection. In protecting online resources in cyberspace, the fundamental issue is to accord them with some form 'property' status and hence acquire property status accordingly.

It is now necessary to address the inadequacies of the laws in protecting these online resources as these online resources has fast become one of the most crucial and valuable resources in the modern commercial world. Some online resources are valued more than physical property that people traditional perceived in the commercial world. The values of these online resources may not necessarily be quantified in fix monetary sum or figure. It could also be expressed in the form of pecuniary advantage in that other interests or business opportunity may be obtain or derive from these online resources. For instance, the exclusive use of keyword in the search engine generates internet traffic and business opportunity for the online business owner. One should not underestimate the value of internet traffic and business opportunity as they play an important role in the modern trade and commercial practice.

Therefore, in order to protect these online resources adequately, the single and most effective way is to identify and classify these online resources as 'property' and accord it with the same level of protection as any other form of property that has been recognised by the laws. The significance of granting these online resources property status is that it allows these online resources, the rights that could be derived from them capable of being owned. Once a resource has become a property, it allows the owners to exploit the resources further to the other interested parties beneficially. The use and the exercise of those rights would be subjected to the control of its owners. When a resource attains property status, laws in relation to the protection of property would be applicable

²⁰ Example of address bar plug-in is InstantFox Quick Search to speed up web search and search via address bar. It allows users to get search results instantly and customize own search shortcuts

and hence, any misuse, abuse and misappropriation of such would be sanctioned by the relevant law accordingly.

Serious misuse and misappropriation of online resources that result in significant consequence, the negative impact inflicted involves serious physical, social and financial harm resulting in potential loss of life, physical injury or loss of livelihood and should be governed by penal provisions. Penal law has been applied throughout recorded history to protect private property and its owners. The function of penal law is social control. It is the most effective branch of law in regulating illegal behaviours relating to property belonging to another. Penal sanction serves as punishment for wrongdoer and deterrence for potential violator. The threat of punishment such as long term imprisonment and execution associated with violations of criminal law are designed to prevent crimes before they occur. The fear of being punished deters criminal behaviours. The power of deterrence under the criminal law includes the authority by the State to sanction or punish offenders. It is the ability to control and restrain illegal behaviours by imposing punishment on offenders that makes penal law the most appropriate protection to safeguard one's property which is essential for the survival in the modern society and online environment as well.

Hence, the same should be applied to justify the application of penal law to serious misuse or misappropriation of online resources as the misuse and misappropriation of these online resources in the modern internet era has proven to have caused harm or risks of harm to interests detrimental to the others and society as a whole and threaten societal well-being at large or seriously infringe the rights of an individual. As the concept of property is complex and encompasses a lot of fundamental issues concerning ownership and control of rights, it is crucial to clearly identify what property is within the penal provision.

‘What ‘property’ is?’

As stated earlier the fundamental concern is that as the Malaysian Penal Code do not defined what ‘property’ is, it is difficult to classify that online resources such as information, data, keyword or meta-tag to be regarded as ‘property’ within the scope of the Penal Code. In order to apprehend the true nature of ‘property’, reference may be made to the traditional classification and concept of property in general.

Classification and concept of property

The old fundamental theory of property refers property as ‘things’.²¹ The common understanding is that property as a ‘thing’ wherein the owner of such property has the exclusive right of free use, enjoyment and disposal of it.²² This definition of property is based on the ‘physicalist’ sense of things.²³ In the physicalist theory, property can either

²¹ Tangible; corporeal material object, personal possessions or belongings

²² Leif Wenar, *Essay: The Concept of Property and the Taking Clause*, 97 Colum. L. Rev. 1923, p3

²³ Denise R. Johnson, *Reflections on the bundle of rights*, 32 Vermont Law Review 247, p249-250

be classified as 'real property' such as land and things that are attached to the land or 'personal property' such as furniture, horses, money or things that are moveable and different rules are applicable to different type of property in question.

One of the most prominent writers who adopted the physicalist view was William Blackstone of the eighteenth century. According to William Blackstone, the function of a private property was that it secured freedom and autonomy for individuals who acquire its ownership and the only obligation attached to this was that no harm shall befall onto others in the exercise of one's rights in the property.²⁴ The notion of absolute dominion, the exclusive right of possession, enjoying and disposing well suited the situations in the eighteenth century for property that existed at that period of time was relatively simple and property then was being classified either as real or personal only.

However, the word 'property' has many different meanings. In a border sense, the word 'property' represents the ways to allocate resources among that society. In any social group, there have to be some shared understanding as to the manner of access to things and how scarce valued resources are to be arranged.²⁵ There is a need for common understanding about access to resources. Hence the function of the concept of property in essence deals with different problems which exist in relation to 'property' and how such problem should be resolved among the members of the society. In this sense, the word 'property' not only refers to an object or thing but as an 'institution' coordinating relationship among individuals who has right or interest in a subject matter. Hohfeld's analysis revealed that ownership in property was not only a non-social relationship between a person and a thing but was a complex set of legal relationship in which individuals are interdependent.²⁶ His theory contended that no one can enjoy complete freedom to use, possess and disposal of his/her property without conflicting and interfering the freedom of others. This would basically involve the balancing between an individual and collective rights for these rights are correlated with one another.

Can 'rights' be considered as property?

Despite many legal theorists expressing the various functions and concepts of property, 'property' is often perceived by layman as physical object only, such as a house or a piece of furniture. The thing-ownership concept of property is well accepted, generally. On the other hand, resources such as information, data, keyword and meta-tag and its rights are often perceived as something intangible and incorporeal, a long way from being recognised and accepted as a form of 'property' in the traditional and common sense.

The thing-ownership concept of property provides a very straight forward, simple and inflexible concept of property as it only recognises thing as property based on their physical existence and character. However, the concept of property is not only confine to traditional thing-ownership concept but a more liberal and flexible conception. These

²⁴ *Ibid* at p250

²⁵ W T Murphy and S Roberts, *Understanding Property Law*, (3rd Edition 1998), Sweet and Maxwell, London, p1-5

²⁶ Denise R. Johnson, *Reflections on the bundle of rights*, 32 Vermont Law Review 247, p251

liberal and flexible conceptions could be seen in early ancient laws. For instance, the Book II of the Napoleon Code, article 544 states: "Property is the right to enjoy and dispose of things in the most absolute manner, provided we do not overstep the limits prescribed by the laws and regulations." Similarly, the Roman law also defined 'property' as the right to use and abuse one's own within the limits of the law.

Both the Napoleon Code as well as the Roman law defines property as rights in property. Rights in property includes right to enjoy, dispose of things and right to use and even abuse one's own within the limit of the law. Hence, one may contend that 'property' is not only refers to the things own but rather as a system of law governing private property which primarily concerned with an individual's right to make decision about the use of a thing as property. The individual's right in property consists of two basic elements: first, it implies the absence of any obligation to use or refrain from using the property in any way whatsoever and secondly, private property implies that other people do not possess the same liberty as the owner.²⁷ It means others can only use the private property with permission or consent and it is up to the owner to decide whether or not to exclude them from the enjoyment of it.

Once we accept that property means rights in property, it is not impossible to argue that rights that could be derived from online resources such as information, data, keyword and meta-tag to be classified as 'property' and to attain the property status. However, there are various categories of rights in property and clear classification of such rights is of utmost importance.

There are basically two major categories of rights that exist in property. Proprietary right is the most important rights in property as it indicate that the person who possessed those rights acquires the status of ownership. Examples of proprietary right are the right to control the others from using the property or the right to determine the use of property. The other being that of personal right which have no implication of the status of ownership, personal rights are rights enforceable against a particular individual. When personal right has been violated, personal remedy is available allowing the claimant to claim the benefit of a specific obligation from the intruding party and most of time will be in the form of monetary compensation. Examples of personal rights are contractual rights arising from property such as easement or tenancy. However, some of the proprietary rights are also derivable from contract.²⁸

A right in property which is proprietary in nature is to be considered as 'property' and hence such right acquire a property status. On the other hand, a right in property which is personal in nature could not be qualified to attain proprietary status as this right does not associate with ownership or proprietorship. Therefore, it is important to distinguish proprietary right from personal right accordingly.

An issue of identifying intangible rights as 'proprietary right' or 'property' has been seen in the case of *Victoria Park Racing and Recreation Grounds Co. Ltd v Taylor*.²⁹

²⁷ Jeremy Waldron, *Property Law*, edited by Joel Feinberg and Jules Coleman, Philosophy of Law, (Seventh Edition, 2004) Thomson Wadsworth, p563

²⁸ For instance, Sale and Purchase Agreement – the rights of the Purchaser

²⁹ (1937) 58 CLR 479

In that case, the plaintiff company was the owner of the racecourse and it was enclosed by fence and the plaintiff charged members of the public for admission to enter into the racecourse. One of the defendants, Taylor owned a cottage opposite the racecourse. Taylor erected a wooden platform on his land which allowed him to secure the entire view of the racecourse and also hear information announced over the public address system to spectators at the racecourse. The defendant allowed another defendant, Commonwealth Broadcasting Corporation to station a commentator on Taylor's platform and to broadcast live radio reports of the ongoing races. The plaintiff as a result suffered a catastrophic loss of business and sued for an injunction on the grounds of nuisance and breach of copyright. The issue in this case was whether the 'right of view or observation' could be considered as 'property' belonging to the Plaintiff. The High Court of Australia by the narrow majority held that the defendants have done no wrong known to the law.

The significance of this case (which was left unsettled) was whether the defendants had taken anything that might be regarded as the plaintiff's property. The fundamental principle which also emerged in the majority decision of this case was that a resource can only be 'propertised' if it is 'excludable'. 'Excludable' means it is feasible for a legal person to exercise regulatory control over the access of strangers to the various benefits inherent to the resources.³⁰ By adopting the above principle in 'propertise' a resource, one must look for the element of 'exclusivity'. The study on the role of 'right to exclude' in defining property is crucial because it is considered as one of the most critical component of 'property'.

The notion of 'exclusion' or decision on the use of resources is bestowed on the rightful owner who acts as the manager or gatekeeper of the resource.³¹ According to Merrill and Smith that "thing-ownership" can be reduced to an owner's right to exclude the others from his thing. Although such contention may be an over-simplification on the true nature of property, nevertheless, it is settled in property law that "dominion or indefinite right of user and disposition is when one may lawfully exercise over his rights over particular things or objects, and generally to the exclusion of all others".³² The word "dominion" connotes a practical discretion which endows upon the owner of the property with the freedom from within which is to deploy the property to any of a wide range of uses.³³ Other writers such as Adam Mossoff³⁴ called the right to exclude as the 'right to use' in his article in explaining the exclusive use in patent law.³⁵

³⁰ Sarah Worthington, *Personal Property Law, Text, Cases and Materials*, (2000) Hart Publishing, Oxford – Portland Oregon, p675

³¹ Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, Seattle University Law Review, forthcoming, George Mason University Law and Economics Research Paper Series, 09-09 http://ssrn.com/abstract_id=1338372, p9

³² *The American and English Encyclopedia of Law 284*, (John Houston Merrill Edition 1887)

³³ Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, Seattle University Law Review, forthcoming, George Mason University Law and Economics Research Paper Series, 09-09 http://ssrn.com/abstract_id=1338372, p14

³⁴ Adam Mossoff is an Associate Professor of Law at George Mason University School of Law. He specialises in intellectual property and property law

³⁵ Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 (2) Harvard Journal of Law & Technology 2009 22, Number 2 Spring 2009

In the Supreme Court case of *Kaiser Aetna v United States*³⁶ the Court considered the “right to exclude others” as one of the most essential stick in the bundle of rights that can commonly characterise the subject-matter as property. In the process of differentiating between a ‘property’ and an ‘un-owned thing’, the right to exclude others is a necessary essential condition of identifying the existence of “property”. The right to exclude plays an important role in the defining of the thing that is owned by someone.

Therefore, for a right in property to be considered as ‘proprietary’, it must consist the basic element of ‘exclusivity’. As oppose to the personal right in which the holder of personal right has no power to exclude the others from using or enjoying the resource in question.

Exclusive right of use determination

Furthermore, according to Eric R. Claeys, in order to obtain a better understanding on the nature of this right and also in the context of online resources, the ‘right to exclude’ should be construed as the ‘*exclusive right of use determination*’ for it has more focus and determinacy in describing property as an interest.³⁷ ‘Exclusive right of use determination’ is conceptually different from ‘right to exclude’. ‘Right to exclude’ states an outcome. On the other hand, ‘exclusive right of use determination’ encourages the owners to deploy his/her property to productive uses yet maintain the dominance over the property by exercising his/her exclusive right to determine.

Heller states that ‘property’ means ‘right to exclude’.³⁸ He further explains that when legal and social factors internalise property as an interest in exclusive use determination, their conceptual priors automatically screens out veto or blockade rights.³⁹ Hence, the most essential right in property - *exclusive right of use determination* conceptually facilitates the process of transfer or assignment of rights to the others appropriately. It justifies property as a stable platform for both coordination and commercialisation and it allows the rights owners to use productively the things they own exclusively.⁴⁰ This is particularly important when dealing with property that is intangible and intellectual in nature in that the inaccessibility over intangible property will only result in such negative effect that will prevent it from further development and exploration.

It is important to differentiate ‘right to exclude’ and ‘exclusive right of use determination’. Such differentiation was also explained by Michael Heller’s ‘Anti-commons’ theory. This theory states anti-commons property can best be understood as

³⁶ 444 U. S. 164, 176 (1979)

³⁷ Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, Seattle University Law Review, forthcoming, George Mason University Law and Economics Research Paper Series, 09-09 http://ssrn.com/abstract_id=1338372, p15

³⁸ Michael A. Heller, Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, Science 1 May 1998: Vol. 280. no. 5364, <http://www.sciencemag.org/cgi/content/full/280/5364/698>, pp698 – 701

³⁹ Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, Seattle University Law Review, forthcoming, George Mason University Law and Economics Research Paper Series, 09-09 http://ssrn.com/abstract_id=1338372, p17

⁴⁰ *ibid* at p31

the mirror image of commons property. A resource is prone to overuse in a tragedy of the commons when too many owners each have a privilege to use a given resource and no one has a right to exclude another.⁴¹ Implicitly, Heller states that ‘property’ means ‘right to exclude’. Heller further explains that when legal and social factors internalise property as an interest in exclusive use determination, their conceptual priors automatically screens out veto or blockade rights.⁴² In the other words, exclusive right of use determination substantially differs from the right to exclude because exclusive right of use determination represents a positive attitude of allowing determination of right of use as oppose to the absolute exclusive attitude from the ‘right to exclude’.

Re-identify property - the bundle of right theory

Once it is accepted that certain rights in online resources bear the characteristic and the quality to be classified as property, the next step is to search for a suitable definition of property. In view of the creation and development of cyberspace and online resources, ‘property’ should now be re-identified and re-defined by the metaphor – bundle of rights in which this metaphor describes property as a collection of proprietary rights and other rights in property. It is an abstract notion to describe property as a collection of rights.

The fundamental principle of the bundle of rights theory demonstrates the many ways in which a property can be divided and enjoyed by different parties. Each stick in the bundle is considered as property by itself.⁴³ When each stick in the bundle of rights is a property, then removing a stick from the bundle does not affect the remaining sticks in the bundle and therefore the removing of a property right is an independent act for alienation. For instance, a person is still considered as the owner of the land despite the fact that he has given away some of the interest binding upon land to somebody else such as easement or right of way. Easement and the right of way are rights incidental to ownership but are not proprietary in nature. The transfer or delegation of such does not affect owners’ proprietorship. This example further illustrates that the notion of rights in property can be divided into many smaller segments of rights and this is peculiar to the bundle of rights theory.⁴⁴

When property is being described as bundle, bundle means it is intentionally binding together of its item that were previously separated and interdependent.⁴⁵ Bundle also suggests that a finite set of definite items.⁴⁶ An example of the definite item can be seen in A. M. Honoré eleven standard incidents of ownership:

⁴¹ Michael A. Heller, Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, Science 1 May 1998:Vol. 280. no. 5364, <http://www.sciencemag.org/cgi/content/full/280/5364/698>, pp698 – 701

⁴² Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, Seattle University Law Review, forthcoming, George Mason University Law and Economics Research Paper Series, 09-09 http://ssrn.com/abstract_id=1338372, p17

⁴³ Note the bundle of right theory does not consider the distinction between proprietary right and personal right

⁴⁴ Denise R. Johnson, *Reflections on the bundle of rights* 32, Vermont Law Review 247, p252

⁴⁵ Daniel B. Klein and John Robinson, *Property: A Bundle of Rights? Prologue to the Property Symposium*, 8(3) ECON JOURNAL WATCH, 2011: 193-204, p1

⁴⁶ *ibid*

- Right to possess;
- Right to use;
- Right to manage;
- Right to income;
- Right to alienate;
- Right to security;
- The incident of transmissibility;
- The incident of absence of term;
- The duty to prevent harm;
- Liability to execution and
- The incident of residuary

It is submitted that in defining property in cyberspace, the bundle of rights theory should be adopted in order to give rightful recognition to the rights that can be found in various online resources. In applying the bundle of rights theory, one should refer to Tony Honoré's eleven standard incidents of ownership. However, the eleven standard incidents of ownership need to be revised and extended further to accommodate the peculiar characters and interests that can be found in various resources available online.

Furthermore, it is important to classify the various rights in the bundle accordingly. Distinction has to be drawn between 'property rights' or 'proprietary rights' and 'personal rights' as explained above. In deciding the scope of 'property rights', reference can also be made to the definition of 'property right' by Cooter and Ulen as a comprehensive list of:

“what a person may or may not do with the resources he owns: the extent to which he may possess, use, transform, bequeath, transfer, or exclude other from his property... The legal concept of property is, then, that a bundle of rights over resources that the owner is free to exercise and whose exercise is protected from interference by others... Property creates a zone of privacy in which owner can exercise their will over things without being answerable to others.”⁴⁷

Based on the above passage, property right includes a wide range of activities which include the right to decide and the right to exclude from access to the resources and so on.⁴⁸ A well-defined bundle of rights would include and specify all the relevant attributes of each use and the contingencies of such use of a particular resource. The relevant attributes of each use and the contingencies of such use depend on the nature of the resources in question and the circumstances in which it has been utilised. For instance, the relevant attributes of use and contingencies of use of personal information may include right of data subject such as right to be informed; right to correct; right to withdraw consent on the use of personal data and also right to prevent processing personal data that likely to cause damage or distress.

⁴⁷ Nicita, Matteo Rizzolli and Maria Alessandra Rossi, *Towards a Theory of Incomplete Property Rights*, ISNIE Conference, Universidad Pompeu Fabra, Barcelona, 22-25 September 2005, p5

⁴⁸ *ibid*

Implementation

The bundle of rights model should be adopted and incorporated in the Malaysian Penal Code in defining ‘property’ under the relevant provisions. It is submitted that ‘property’ should mean bundle of rights – a list of proprietary, personal and residuary rights. This list of proprietary, personal and residuary rights should be annexed in the Penal Code. The traditional classification of property within the Penal Code such as moveable and immoveable property should no longer be used in view of the development and common usage of the internet and information technology in the modern world.

A unified definition of property – the bundle of rights model should be applied and incorporated in all the relevant provisions concerning property offences. For instance, Section 383 of the Malaysian Penal Code provides for the offence of extortion. Once the word ‘property’ in this provision is amended to incorporate and to include ‘property rights’, the delivery of subject matter within this provision is no longer restricted to any property in the traditional sense (moveable or immoveable) or any valuable security such as money, promissory note, a bond or sign or affix seal to a blank paper⁴⁹, it may well extend to include personal and financial information such as credit card number, credit card secure code, bank authorisation code or security box code.

Despite adopting the bundle of rights model in defining property and ‘property’ now means ‘property rights’, however, not every provision under the Penal Code is suitable to be amended and which is applicable to cases of misuse and abuse of online resources as proposed. Section 378 is a good example. After inserting the word ‘property’ to replace the words ‘moveable property’, Section 378 should read as follows:

‘Whoever, intending to take dishonestly any (*property*) out of the possession of any person without such person’s consent, moves that property in order to such taking, is said to commit theft.’

Despite the word ‘moveable property’ has been substituted by the word ‘property’ as proposed, property is now defined as a list of proprietary, personal and residuary rights (combination of such depends on the nature of subject matter in question). Here in Section 378 with the proposed amendment it will not produce the desired result and as it is inappropriate to apply to instances relating to misuse and abuse of online resources in that the other words contained in the provision will create inconsistency. The inconsistency lies within the provision as the words ‘take’, ‘out of possession’ and ‘moves’ has been used and these words stipulate that ‘property’ that are subjected to this provision bears the physical, tangible and corporeal nature. For this reason alone section 378 is only applicable to properties that are of physical and moveable nature only.

As a consequence in order for Section 378 to be applicable to instances of misuse and abuse of online resources, section 378 should be further amended as follows:

Whoever, *violate* any property or intend to *violate* dishonestly any property *belonging* to another without the rightful property owner’s consent, is said to be to have committed theft.

⁴⁹ As explained in the illustrations (a) – (d)

With the now amended Section 378, it has widened its scope of application by virtue of the words 'violate' which will cover all forms of misuse and abuse as well as adverse attack of the property in question. Furthermore, from the wordings of this provision, it is not a pre-requisite that property subject to this provision needs to be physical, tangible or corporeal in nature. However, property subject to this provision must be a property belonging to someone. Hence, proof of ownership may become one of the important ingredients under this new offence.

However, it may be argued as to whether the new proposed section 378 with the new definition of property and disassociation with the notion of possession has contravened the fundamental offence of theft. The notion of 'possession' is fundamental to the offence of theft. Hume argued that people make association in their minds between themselves and the 'things' they possess, physically.⁵⁰ The convention of respecting possession is based from the people's mutual expectation of their rights to control their property.⁵¹ To violate such mutual expectation, the offence essentially consists of 'taking' and 'carrying away' the property of the victim with the intent of permanently depriving the victim of it.⁵² The phrase 'permanently deprives the victim of it' means that the victim (owner) of the property is no longer able to possess and enjoy the property. The rules against 'taking or carrying away' property were designed to prohibit and to punish those disturbing public order by interfering with the right to 'own' something or the right to possess and use it.⁵³ The right to possess here refers to the physical possession. The words 'take', 'out of possession' and 'moves' have often been associated with the offence of theft in the recorded history and it is clear that the offence of 'theft' must involve some form of physical taking and possession.

However, in cases of misuse and abuse of online resources, there is no issue of taking, moving out of possession of online resources from its owner as online resources are incapable of being taken away by the others. Online resources are non-physical and intangible in nature and no one can actually take or move online resources out of the possession from its owner. Thus, the notion of possession, physical possession and deprivation cannot be applied to cases of misuse and abuse of online resources. For online resources, it is the exclusive access and its control associated with dilution in its values that is of concern to the rightful owner or holder of the online resources and its rights. The exclusive use and access of these online resources, the notion of exclusivity is the basic underlying notion in dealing with non-physical; intangible nature of online resources. The notion of exclusivity differs substantially from the traditional concept of possession.

Therefore, with the new 'property' definition incorporated and section 378 amended accordingly, the fundamental question is whether misuse and abuse of online resources should be considered as 'theft' at all and hence the application of section 378. On one

⁵⁰ Thomas W. Merrill, Henry E. Smith, *Law and Morality: Property Law: The Morality of Property*, April 2007, 48 Wm and Mary L. Rev. 1849

⁵¹ *ibid*

⁵² Michael E. Tigar, *Symposium: A Critique of Rights: The Right of Property and the Law of Theft*, May 1984, 62 Tex. Rev. 1443

⁵³ *ibid*

hand, it can be argued that Section 378 should not be applied at all because by looking at the meaning of ‘theft’ from the penal perspective, ‘theft’ traditionally should only be confined to physical taking and possession. It is impossible to cover cases of misuse and abuse of online resources. On the other hand, it is argued that the growing importance of online resources and growing instances of serious misuses of such urgently demand that the Penal law ought to be amended accordingly to reflect the current situation and to protect new creations and development of cyberspace technologies and its enhancements in its commercial values.

In the event section 378 is not be used in cases of misuse and abuse of online resources then-section 403 as an alternative is to be amended in dealing with misuse and abuse of online resources. Section 403 creates an offence of dishonest misappropriation of property when a person dishonestly misappropriate; or converts to his own use, or causes any other person to dispose of any property. Misappropriation unfortunately is not defined under the Malaysian Penal Code. However, reference can be made to the explanations under the Indian Penal Code, wherein the word ‘misappropriate’ means nothing more than improperly setting apart for one’s own use to the exclusion of the owner.⁵⁴

Under the Indian Penal Law, an appropriation can also be considered as a mental act in which it implies an allocation of a thing as one’s own. Appropriation is completed as long as a person decides to set a thing apart to one’s exclusive use. The emphasis on ‘the exclusive use’ makes the notion of appropriation closely associate with physical, tangible property. The notion of appropriation and the exclusive use of such would deprive the owner of his property is very similar with the notion of possession. The notion of misappropriation under section 403 is still very much associated with some form of tangible, physical and corporeal property only.

Furthermore, Section 403 is essentially the same with section 378. The only distinguishing factor is that theft requires that the initial taking is wrongful but in criminal misappropriation, the initial taking may be innocent, but with the subsequent change of intention and knowledge of the new facts it makes the person liable under section 403.

Section 403 is in no better position when compared with section 378 for cases of misuse and abuse of online resources. It is submitted that the Malaysian Penal Code should adopt a wider and more flexible notion of misappropriation within its provision. Reference should be made to the English notion of appropriation under the Theft Act of 1968 as it incorporates a much wider meaning compared to the Malaysian and Indian Penal Law.

Under the English law, Section 3 of the Theft Act 1968 defined appropriation as an interference with any of the rights of an owner and this includes, where he has come by the property (innocently or not) without stealing it,⁵⁵ any later assumption of a right to it by keeping or dealing with it as owner.⁵⁶ This principle – in that appropriation is

⁵⁴ Dr. Sir Hari Singh Gour, *The Penal Law of India*, (11th Edition, Vol. 1 1998), Law Publishers (India) Pvt. Ltd., p3918

⁵⁵ Contrast it with the Malaysian position. In the Malaysian Penal Code, Theft is distinguished from criminal misappropriation. Theft requires the initial taking is wrongful and in criminal misappropriation, the initial taking may be innocent, it is the subsequent change of intention and knowledge of the new facts make the person liable under criminal misappropriation

⁵⁶ Section 3(1) of the English Theft Act, 1968

an interference with any rights of an owner; and any later assumption of a right to it by keeping or dealing with it as owner is of particular importance in the context of misuse and abuse of online resources. It is because the various forms of misuse and abuse could be summarised and being described as ‘interference with any rights of an owner by the wrongdoer’s assumption of a right to it by keeping or dealing with it as the owner’. For instance, the right to use is one of the rights that exist in information. Any wrongdoer who misuses that right of use of the information meant that it amounts to dealing with it as owner and hence amounting to an interference with such right of the rightful owner.

There are few English authorities concerning the meaning of appropriation under the English law. Interference with any of the rights of an owner was clearly explained in the case of *R v Morris*.⁵⁷ In that case, the defendant who switched the labels on two articles in the supermarket, with the intention of buying the more expensive item with the lower price tag. He had assumed the right of the owner on the basis that only the rightful owner of the goods has the right to label the goods. The offence of theft therefore committed as soon as the label was being switched. From the outset, it may not seem to fit neatly into the offence of theft because the defendant did not intend to deprive the owner of the less expensive item. But in law, the goods became stolen goods when the defendant assumed the right of the owner by amending the price of the goods.

Lord Roskill further in this case stated that it is not necessary for the accused to have assumed all the rights of the owner: ‘it is enough for the prosecution if they have proved ... the assumption by the defendants of any of the rights of the owner of the goods.’ For an appropriation to take place, there is no need for the defendant to actually deprive the owner of his property (whether permanently or temporarily).

The *Morris* case has given the most liberal and flexible meaning of appropriation - assumption of any of the right of the owner of the property amounts to appropriation and appropriation may takes place regardless of whether there is ‘actual deprivation’ of the property from its owner. Such principle is of particular importance because the element of deprivation is no longer part of the requirement for appropriation to take place. The English notion of appropriation is most appropriate to be applied to cases concerning online resources. The non-physical and non-exhaustive nature of online resources demand and require a flexible and liberal notion of appropriation rather than an orthodox notion of appropriation which is based on the idea of taking, carrying away or depriving the owner the possession of property permanently. Any misuse and abuse of online resources hence be interpreted and regarded as assumption of any of the rights of the owner of the property by way of the offender’s assumption of a right to it by keeping or dealing with it as owner.⁵⁸ Therefore, the Malaysian Penal Code should adopt a more flexible and wider notion of misappropriation and to amend section 403 accordingly.⁵⁹

⁵⁷ 1984, AC 320

⁵⁸ The rights of the owner of the property includes right to use, right to access, right to control and right to income...etc

⁵⁹ However, one must take into account in that ‘misappropriation’ under the English law is one of the components for the offence of theft whereas ‘misappropriation’ is distinguished from the general offence of theft under the Malaysian Penal Code section 378

Conclusion

To conclude, the Malaysian Penal law requires a clear principle in identifying ‘property’. The penal provision should not only confine its application to physical, corporeal property only. A flexible and adoptive definition in identifying property is needed within the penal provision in view of the rapid development of the internet and the use of information technology in our daily lives. With the new definition, some of the online resources would now be regarded as property and be protected by the Malaysian Penal Code accordingly. However, the legislative language used in provisions for offences against property under the Malaysian Penal Code is very much based on the notion of physical possession and appropriation and would need further legislative attention. Some of the terms being used throughout the provisions are fundamentally incompatible with the underlying nature of non-physical and non-exhaustive character of online resources and its rights. This paper raises some of the concerns in adopting and implementing the new definition of property under the Malaysian penal provisions. But those concerns need to be addressed adequately in order to ensure that various online resources are being protected adequately from the penal law perspective.

