Protection Of Database Under Actionable Torts

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ABSTRACT

The need for legal protection for database is derived mainly from the universal problem of piracy. Database piracy has for years become a threat to database producers, primarily because of its nature of "easily susceptible for copying". Advances in digital technology have facilitated the creation of databases. The technology makes possible for a large amount of data to be created and converted to a digital form. The same technology used in increasing the value of database, may also permit quick and easy reproduction of those databases or substantial portion of the data contained in it. This encourages the act of "free riding". In the event that copyright, contract and self-help technical devices fail to repress wholesale copying, the law of actionable torts would suffice to prohibit the free riding activities of database, including parasitical or market-destroying business practices. In Malaysia, the courts should be willing to apply tortious principles in appropriate database cases. This would be a viable alternative to heavy-handed intellectual property legislation.

ABSTRAK

Keperluan perundangan untuk melindungi pangkalan data sebahagian besarnya disebabkan oleh masalah cetak rompak. Cetak rompak pangkalan data telah menjadi ancaman kepada pengeluar pangkalan data sejak sekian lamanya kerana sifatnya yang "sangat mudah ditiru". Perkembangan teknologi digital sangat membantu dalam penciptaan sesuatu pangkalan data. Ia membolehkan sejumlah data yang banyak dicipta dan ditukarkan kepada bentuk digital. Teknologi yang diguna pakai bagi menambah nilai kepada sesuatu pangkalan data juga digunakan bagi membuat penyalinan yang pantas dan mudah terhadap pangkalan data tersebut atau sebahagian besar daripada data di dalamnya. Ini menggalakkan perbuatan "penunggangan percuma". Dalam keadaan mana hak cipta, kontrak dan peralatan bantuan teknikal gagal untuk membendung peniruan secara berleluasa ini, undang-undang tindakan torts membantu dalam melarang perbuatan salah laku ini, termasuklah amalan perniagaan secara parasit dan memusnahkan pasaran ini. Di Malaysia, mahkamah perlu bersedia mengguna pakai prinsip-prinsip torts dalam kes-kes yang melibatkan pangkalan data. Ini merupakan satu alternatif yang berupaya membantu meringankan bebanan penggunaan undang-undang harta intelek.

INTRODUCTION

The doctrine of unfair competition has been formulated in international treaties[1] and applicable in certain countries.[2] However, some jurisdictions either refuse to accept this doctrine or remain silent on the matter. In common law countries, for instance, there is no such legal principle as tort of unfair competition. However, in that system, the liability for an act of unfair competition is derived from the application of general tort principles to regulate various types of market behaviour. This tortious protection is determined by judges through their decisions in courts. In that respect, this article analyzes the protection of database under the common law actionable torts. The discussion is divided into two relevant areas of torts, and they are, trespass to chattel or goods and unjust enrichment. The law of trespass to chattel is examined to ensure the application of its traditional elements in protecting sophisticated databases. The doctrine of unjust enrichment, alternatively, is evaluated to study the application of the law in protecting unjustified interference with database.

DATABASE: THE DEFINITIONS

Database is described as "quantity of data available for use, which is stored in a computer in a way that enables people to get information out of it very quickly".[3] It is also described as collection of data produced and retrieved by computer. The data is usually stored on magnetic disk or tape. A database program enables the computer to generate files or data and later search for and retrieve specific items or groups of items. For example, a library database system can list on screen, all the books on a particular subject and can then display further details of any selected book.[4]

Normally and strictly, a database is a body of information held within a computer system using the facilities of a database management system. All accessing and updating of the information will be via the facilities provided by the software as will be recording of information on the log file, database discovery and multi-access control.[5]

The above definitions seem to confine the meaning of database to electronic or computer database. However, it is an acceptable fact that a database can include a physical database which is non electronic in nature. A technical definition of database is significant in determining the legal protection of database. This is because the

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[1] Internationally, the protection against unfair competition is found in three main international bodies that are the Paris Convention, the Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement) and the WIPO Model Provisions on Protection against Unfair Competition.

[2] There are countries which have a specific legislation or statute for that purpose (which is also known as *Lex Specialis* approach). This form of unfair competition law can generally be divided into two; first, countries with specific legislation, such as Austria, Belgium, Denmark, Finland, Germany, Japan, Luxembourg, Peru, Korea, Spain, Sweden and Switzerland. Secondly, the principles develop from specific provisions within broad statutes. The examples are Bolivia, Brazil, Bulgaria, Canada, Columbia, Hungary, Mexico, Peru, Rumania and Venezuela. World Intellectual Property Organization (1994), *Document on Protection against Unfair Competition*, Geneva, WIPO Publication No. 725(E).

[3] *Collins Cobuild: English Language Dictionary*, Collins Publisher, 1987, pg. 357.

[4] *Philip's Encyclopedia Comprehensive Edition*, George Philip Ltd., 2002, pg. 266.

[5] *Oxford Dictionary of Computing*, Oxford University Press, 4th Edn., 1996, pg. 119.

process of selection and arrangement of data in the database may raise a question of copyright protection.

Useful guidance can be sought from definitions offered in legal instruments. One statutory definition can be found in the European Database Directive. Article 1(2) of the Directive provides:

..."database" shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.

Following the Database Directive, the United Kingdom's Copyright Design and Patent Act 1988[6] defines "database" in section 3A(1) as follows:

..."database" means a collection of independent works, data or other materials which – (a) are arranged in a systematic or methodical way, and (b) are individually accessible by electronic or other means.

The term "database" is thus a term with no precise definition. At its most generic, a database might be described as an "organized collection of data", which is probably, but not necessarily, electronic in nature. Because these electronic collections have become so familiar, however, the term has expanded beyond its purely technical meaning.

TRESPASS TO CHATTEL/ GOODS

The doctrine of trespass to chattel or goods has traditionally existed where there is unauthorized interference with, or use of personal property. Despite its traditional applicability, database owners have begun to assert trespass to chattels or goods claims as a basis for protecting databases and proprietary computer systems.[7]

The Definitions

"Trespass" has been defined as a tangible interference with property, requiring physical contact with the property as a threshold matter.[8] The concept of "trespass to chattel" or "trespass to goods", despite literally carrying the same or similar meaning, is in fact, interpreted and classified quite differently in different jurisdictions. Trespass to chattel is a legal doctrine that has been applied in the United States particularly, if the relevant case is under the state's jurisdiction. Meanwhile, trespass

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[6] The Copyright Design and Patent Act 1988 was amended through Copyright and Rights in Database Regulations 1997 to comply with the European Council Directive On The Legal Protection Of Database (Directive 96/9) on March 11, 1996 (O.J. L77/20).

[7] This new sub-set of claims, which has also been referred to as "cyber-trespass" focuses on whether someone is authorized to access the database, the means used to circumvent that authorization and the level of approved access .See Corey W. Roush, 'Database legislation: changing technologies require revised law' 28 *U. Dayton L. Rev.* 269, 288. See also Edward W. Chang, 'Bidding on trespass: *eBay Inc. v. Bidder's Edge, Inc.* and the abuse of trespass theory in cyber-space law' (2001) 29 *AIPLA Q. J.* 445 at 449.

[8] Laura Quilter, 'The continuing expansion of cyberspace trespass to chattels' 17 *Berkeley Tech. L.J.* 421 at 17.

to goods is a common law doctrine, which is applicable in the United Kingdom as well as in other commonwealth countries, including Malaysia.

The term "chattel" is defined in a law dictionary as "... an item of personal property which is movable, as distinguished from real property (land and improvements)...",[9] while the word "goods" is interpreted as "... an item held for sale in the regular course of business, as in a retail store ..."[10] These two have something in common, in that they refer to a valuable item or property, or also known as personal property, which is defined as a physical, and a tangible property differing from both real property and intellectual property law.[11]

In the United States, according to S 217 Restatement (Second) of Torts[12] "... a trespass to chattel may be committed intentionally by (a) dispossession another of the chattel, or (b) using or intermeddling with a chattel in the possession of another". On the other hand, trespass to goods is defined as "... a wrongful, direct (and not consequential) or negligent interference with goods in claimant's possession at the time of interference. Absence of intent is generally an excuse ..."[13] In other words 'trespass to goods' refers to a wrongful and direct interference with goods that are in the possession of another.[14] It is also defined as committing, without lawful justification, any act of direct interference with a goods in the possession of another person which amounts to possible injury.[15]

In conclusion, 'trespass to chattel'[16] or 'trespass to goods' is a torts' cause of action that is based on intentional interference to a property that in the possession of another person.

A database which consists of information is considered as 'property' as the definition of 'property' in today's information age has expanded to include services and intangibles.[17] Property is normally referred to as a bundle of rights recognized in law in reference to a particular subject matter.[18] It also consists of the bundle of privileges, powers and rights that law recognizes with respect to particular subject matter.[19] Since a database generally consists of information, the relevant property rights include copyright,[20] the use right,[21] the disclosure right,[22] the integrity right,[23]

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9 http://dictionary.law.com/default2.asp?selected=181&bold=|||| (11 Nov. 2004).

10 http://dictionary.law.com/default2.asp?selected=820&bold=|||| (11Nov. 2004).

11 Laura Quilter, *The continuing expansion of cyberspace trespass to chattels*, pg. 424-425.

12 Restatement (Second) of Torts S 217 (1965). Although many state trespass laws mirror the Restatement, the Restatement is not a mandatory authority followed by courts. However, the courts do find its analysis persuasive. Clifton Merrell, *Trespass to chattels in the age of the internet*, 80 *Wash.U.L.Q.* 675 at note 24.

13 *Wilkinson v. Downtown* [1897] 2 QB 57 at 426.

14 Norchaya Talib, *Law of torts in Malaysia*, Sweet & Maxwell Asia, 2nd Edn., 2003, pg. 47.

15 R.F.V. Heuston, *Salmond on the law of torts*, Sweet & Maxwell, 16th Edn., pg. 93.

16 Trespass to chattels claim is also referred to as the tort of conversion's little brother. In *Thrifty-Tel, Inc v. Bezenek*, 54 Cal. Rptr. 2d 468, 473 (Cal. Ct. App.1996).

17 Raymond T. Nimmer, 'Intellectual property is still property' (1990) 13 *Harv.J.L. & Pub. Pol'y* 108.

18 Raymond T. Nimmer, 'New Property Rights and E-Commerce', 697 *PLI/Pat* 9 at 12-13.

19 Raymond T. Nimmer, 'New Property Rights and E-Commerce', pg. 12.

20 Ibid., The right to reproduce the information in copies. pg. 13.

21 Ibid., The right to use the information for internal purposes . Ibid.

22 Ibid., The right to disclose the infomation or not to do so.

23 Ibid., The right to ensure the information will not be altered or destroyed without consent.

the transmission right[24] and the access right.[25] These rights arise in many different bodies of law and one of the relevant laws is the law of tort of trespass to chattel.

The Application of Trespass to Chattel / Goods Legal Doctrines to Database

A principle of trespass to chattels or goods is obviously applicable to an act of intruding into a physical database as this doctrine was initially developed to protect physical property.[26] However, it is acceptable that this doctrine is used to prevent the unauthorized use of electronic database[27] and Internet databases, in the form of websites and online databases. It is submitted that websites are likely to constitute database as they exist as a result of the systematic and methodical characteristics in the underlying data.[28] Online database, on the other hand, is specifically invented to enable the user of the Internet to access to information or data contained on the database while they stay online.

The act of trespassing the Internet database is committed through first, the unauthorized use of Internet software robots and secondly, via method of deep linking. A software robot is a program used by one website to search, copy and retrieve information from another website.[29] This automated web spider communicates across the Internet to index or collect information about another site in a lightning speed, retrieve large amounts of data in seconds, and can potentially clogg-up network connection to servers and even the server itself.[30] This technology causes spam[31] activities, whereby the promoters and advertising companies send

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[24] Ibid., The right to regulate electronic distribution of the information.

[25] Ibid., The.right to control access to information known to the owner.

[26] Laura Quilter, 'The continuing expansion of cyberspace trespass to chattels' pg. 421.

[27] Electronic or digital database exists in the form of CD ROM.

[28] Ida Madieha Abdul Ghani Azmi, 'Creepy crawlies and trespass to chattels: non copyright means to protect proprietary data in cyberspace' [2004] 2 *MLJ* X. See also Lorna Brazell, 'Protection of websites by database law' [2002] Nov *Copyright Law* 15.

[29] In *eBay v. Bidder's Edge*, 100 F. Supp. 2d pg. 1060, a robot is a software program that executes commands at 1,000 lines a minute when retrieving textual information on the Internet. This software robot can be used in varieties of ways by a malicious website owner which includes program to scour a website for email addresses, then send junk mails to those email addresses within a couple of hours, see David Kramer and Jay Monahan, 'Panel discussion: to bot or not to bot: the implications of spidering' (2000) 22 *Hastings Comm. & Ent. L.J.* 241 at 242. However this software robot can also be used in a beneficial way, for example search engines often use web spiders, crawlers or robots to seek out websites, catalog relevant information, repackage and supply the information to Internet users. Some examples of this search engine using software robots are Yahoo!, Ata Vista, Lycos and Googles.

[30] John D. Saba, Jr, 'Internet property rights: e-trespass' 33 *St Mary's L.J.* 367 at 370. See also Troy Wolverton, 'EBay, bidders edge face off in court', CNET News.com at http://www.Canada.cnet.com/news/0-1007-200-1697820. html

[31] Spam is the term used to described unsolicited email. In *Compuserve v. Cyber Promotions*, 962 F.Supp. at 1018 n.1, it is stated that "[T]his term is derived from a skit performed on the British television show Monty Python's Flying Circus, in which the word "spam" is repeated to the point of absurdity in a restaurant menu..." Spam creates a two fold problem. First, users complain because their email inboxes are full of messages in which they are not interested. Ibid.,at 1023. Sometimes these messages are explicit in nature, which includes advertising pornographic sites, further compounding the anger of Internet Service Provider (ISP) users. Second, the large number of messages forces the ISPs' server to devote greater time to routing these messages and storing them on the server. This processes decreases bandwith. The decrease in bandwith causes the users of ISP like Compuserve to experience slower transfer rates of data, making the Internet appear sluggish. Consequently, users not only complain about unwanted messages which sometimes are offensive in nature, but also slower transfer rates. Ibid., at 1022.

enormous amounts of unsolicited bulk emails to Internet Service Providers[32] and their users. Spam result in customer (Internet users) complaints, monopolize valuable server time and can slow down connection speeds which will delay the users' access to the site.[33] In *eBay, Inc . v Bidder's Edge, Inc,.*[34] the Judge in that case extended the spamming case law to protect a database owner from diminished server capacity caused by repeated, unauthorized intrusions by bots (robotic software) used to locate, retrieve, copy and aggregate data .

The second method, deep-linking occurs when one website publishes a hypertext link deep in the interior of another website's homepage.[35] Deep linking bypasses a website's homepage, which generally contains important advertisements, advertising banners and other important information, and provides path deep into the interior of the website. Due to these problems of unauthorized use of software robot and unsolicited deep linking, it is vital for the website owners to establish clear property rights[36] in order to ensure that Internet sites are only accessed in a proper manner. A well-defined right would give website owners the power to control access to their sites. This would protect them against harmful and unfair Internet practices. While the idea of trespass does not establish rights to prevent further copying as a matter of property law, it does provide a basis, in addition to contract, to control access to the content of database.[37] Thus, it is submitted that the doctrine of trespass to chattel or goods is the appropriate legal mechanism to protect website or database owners' right.[38]

THE THRESHOLD OF PROTECTION[39]

Trespass to Chattel in the United States

The threshold of trespass to chattel doctrine can be derived from S 217 and S 218 of the Restatement (Second) of Torts. S 217 requires that the act must involve a physical contact with chattel[40]. Even though the word "physical contact" does not appear in the

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[32] A company that provides its customers with access to the Internet, typically through dial up networking. Usually, the customer pays a monthly fee, and the Internet Service Provider supply software that enables the customer to connect to the Internet by modem. See Douglas Downing, *Dictionary of computer and internet terms*, 6th Edn., 1998, pg. 240. Major Internet Service Providers in the United States include Microsoft, Netcom and Mindspring, America Online, Compuserve and Prodigy. In Malaysia Jaring and TMNet are the pioneers of Internet Service Provider's activities.

[33] R.Clifton Merrell, 'Trespass to chattels in the age of the Internet' 80 *Wash. U.L.Q.* 675 at 676.

[34] 100 F.Supp. 2d 1058 (N.D.Cal.2000).

[35] Deep linking involves providing a link not to the home page of the targeted site, but to a specific interior page on the site that provides a service. This method can be very beneficial because it allows an Internet user to drill down to the exact information sought within a website without having to scour the whole site. Kurt A.Wimmer, *E-litigation*, [2000] May 29 *Nat'L L.J.* pg. A17.

[36] In the case of *eBay v. Bidder's Edge*,100 F. Supp. 2d at 1058, it is indicated that treating a web server as property grants owners an exclusionary right, thereby increasing value.

[37] Raymond T. Nimmer, 'New property rights and e-commerce' 697 PLI/Pat 9, April-May 2002, pg. 14.

[38] John D. Saba, Jr, 'Internet property rights: e-trespass' pg. 371.

[39] This part will deal with the requirements of a trespass to chattel in the United States jurisdiction and trespass to goods as exemplified in the common law countries such as the United Kingdom and Malaysia.

[40] According to the Restatement (Second) of Torts S 217, a trespass to chattel is defined as "... intentionally dispossessing another of the chattel or using or intermeddling with a chattel in the possession of another."

section, the term "*intermeddling*" indicates the act of intentionally bringing about a physical contact with the chattel.[41] This element plus the requirements in S 218 develop the threshold in a trespass to chattel claim.[42]

Based on the S 217 and S 218, it is submitted that a trespass to chattel action is established in a situation where a person intentionally and without authorization interferes with or dispossesses other person's chattel which cause harm to the owner of the chattel.

Thus, the requirements of a trespass to chattel claim are as follows:

i. the act involves physical contact;
ii. dispossession of another of the chattel where the possessor is deprived of the use of the chattel for a substantial time; and
iii. harm where the chattel is impaired as to its condition, quality or value.

i. Physical Contact or Interference

Trespass to chattel usually entails physical contact or interference with the owner's use and enjoyment of his or her property. "Physical contact" connotes that a tangible interference must be involved. A strict interpretation of "physical contact" would not cover the act of extracting data or information from a digital database without authorization as it does not concern tangible subject matter. Thus, the doctrine of trespass to chattels has been extended to a digital or Internet database based on the assumption that electronic signals or transmissions are sufficiently tangible to support a trespass to chattels claims.[43] In other words, the application of trespass to chattel doctrine has considerably been expanded by case law, from a tort involving physical contact to a tort involving the momentary touching of electrons. [44] This approach was first introduced in *Thrifty-Tel, Inc v. Bezenek*, [45] where computer technology was used to crack the plaintiff's access and authorization codes and long distance calls were made without paying for them.[46] The Court believed that the 1,300 phone calls in a seven hour period generated electronic signals sufficiently tangible to support a

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[41] Restatement (Second) of Torts S 217 cmt. (e) (1965).

[42] S218 provides that:

"...One who commits a trespass to a chattel may be committed intentionally by:
(a) dispossession another of the chattel, or;
(b) the chattel is impaired as to its condition, quality or value, or;
(c) the possessor is deprived of the use of the chattel for a substantial time, or;
(d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest..."

A claimant is required to satisfy any of the elements provided in that section.

[43] Please see *Thrifty-Tel, Inc v. Bezenek* 54 Cal. Rptr. 2d 468 (Cal. Ct. App.1996) and *CompuServe, Inc v. Cyber Promotions* 962 F.Supp.1015 (S.D.Ohio 1997).

[44] The Court noted that the courts have substantially loosened the physical touching requirement for trespass to chattels over the years to include indirect touching of dust particles from a cement plant that migrate onto real and personal property.

[45] 54 Cal. Rptr. 2d 468 (Cal. Ct. App.1996).

[46] The defendant's children made ninety calls, consuming twenty-four minutes of telephone time on the first two random telephone days, in an attempt to enter random telephone access numbers. By using a computer program, they were able to generate 1300 phone calls entering random strings of numbers in a six to seven hours period. As Thrifty-Tel was a small carrier, the defendant's children action had overburdened the system and denied some subscribers access to phone lines. Ibid., pg. 472.

verdict on trespass to chattels.[47] The Court also found that the physical contact of the electrons with the phone equipment satisfied the physical contact element of the tort. His Honour further explained that "[A]t early common law, trespass required a physical touching of another's chattel or entry onto another's land..." [48] The court's conclusion that the electronic signals sent over the computer and phone lines was a sufficient physical contact element of trespass was based on the finding that microscopic particles[49] or smoke[50] that touched real property was considered as having physical contact.

The court in the Southern District of Ohio in *CompuServe, Inc. v. Cyber Promotions,*[51] citing *Thrifty-Tel*, affirmed that electronic computer signals sent as spam to CompuServe were sufficiently tangible to satisfy the elements of a trespass to chattels claim.[52] The court stated that " [T]he value of that equipment to CompuServe was diminished even though it was not physically damaged by defendant's conduct..."[53] It indicates that the element of physical damage is not compulsory to satisfy as long as the chattel i.e., the equipment, is impaired as to its condition, value and quality.

The expansion of the element of "physical contact" to include electronic signals sent from one computer server to another was expressly supported by Judge Hupp in *Ticketmaster v. Ticketmaster.com*[54] where he explained that:

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[47] The California Court of Appeals refused to rule on the conversion issue. The court expressly stated that it did not need to resolve whether intangible computer access codes can be the basis of a conversion suit. Traditionally, the loss of an intangible property interest could only be a basis for a claim of conversion if that interest is tied to something tangible that could be physically taken, see *Moore v. Regents of the University of California*, 793 P. 2d 479 (Cal. 1990). For example, a tangible stock certificate represents an intangible property interest in a company. See also *Payne v. Elliot*, 54 Cal. 339, 3429 Cal.1880), holding that, the shares of stock are the property involved and not the actual certificates. The Courts generally do not recognize this as conversion as the unauthorized taking of intangible property is not merged with something tangible. The court decided not to rule on whether the storage of intangible access numbers in something tangible, like a computer disk or a piece of paper, would be sufficient merger of the intangible with the tangible to give rise to a conversion claim. Ibid.

[48] *Thrifty-Tel*, 54 Cal. Rptr. 2d at 473 n.6.

[49] See *Bradley v. American Smelting and Refining*, 709 P.2d 782, 790 (Wash. 1985) .This case held that microscopic particles from copper smelter could give rise to trespass to land claim.

[50] See *Ream v. Keen*, 838 P.2d 1073, 1075 (Or. 1992). This case held that smoke from a neighbouring field could give rise to trespass to land claim.

[51] 962 F. Supp. 1015 (S.D. Ohio 1997). This case extended the doctrine of trespass to chattels into the area of unsolicited bulk email. Cyber promotions sent spam emails to CompuServe users. CompuServe initially tried to stop the problem both by notifying Cyber Promotions that its emails were unauthorized and by filtering the messages using the headers and return address information. However, Cyber Promotions ignored the notification and easily bypassed the filters by falsifying the point of origin information contained in the header of the message which concealed their origin. 962 F.Supp.1015 (S.D. Ohio 1997) at 1017-1019.

[52] Ibid., pg. 1017.

[53] Ibid., pg. 1022.

[54] 200 WL 525390, 2001 US App Lexis 1454. Ticketmaster filed suit in Federal District Court in California against Tickets.Com for using unsolicited hyperlinks to the interior of Ticketmaster's home page.Tickets.Com provided tickets to specific events via website. In the event that Tickets.Com was not able to provide tickets for a specific event, Tickets.Com posted a link to the interior of Ticketmaster's event page, thereby bypassing the home page to prevent Tickets.Com from allowing customers to deep link through its backdoor. Ticketmaster sued Tickets.Com under ten different causes of action, including the claim of trespass. The court, however, dismissed the bulk of those claims, including the trespass action. The court was obviously not ready to ban deep linking on a trespass claim.

If the electronic impulses can do damage to the computer or to its function in a comparable way to taking a hammer to a piece of machinery, then it is no stretch to recognize that damage as trespass to chattels and provide a legal remedy for it.[55]

In the case of *eBay v. Bidder's Edge,*[56] the court used the trespass to chattel theory to create a stopgap remedy to protect on line databases. Prior to *eBay*, it was submitted that the trespass to chattel theory was primarily used to prevent parties from swamping online service users with unsolicited commercial email messages.[57]

The most recent case involving cyber-trespass to database is *Register.com Inc. v. Verio, Inc.,*[58] where the Southern District Court of New York granted a preliminary injunction based on plaintiff's trespass to chattels claim even though the plaintiff could not show that it had suffered any tangible harm to its chattel, i.e., the WHOIS database.[59] The element of physical contact was not further elaborated.[60]

From the above cases, it seems the traditional notion of trespass to chattel,[61] which conditions "something in a tangible form" has been stretched to cover chattel, which is intangible in nature, such as digital data and electronic signals. Even though in the real space context, trespass to chattel usually entails physical interference or interruption with the owner's use and enjoyment of his property, in cyberspace there is no physical dispossession, it only involves intermingling with electronic transmission. Therefore, the trespass to chattel claims has been applied in the case of unauthorized use of online or digital database based on the assumption that electronic signals are sufficiently tangible to support a trespass to chattel cause of action.[62]

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[55] Ibid.

[56] 100 F Supp 2d 1058 (N D California, May 24, 2000), eBay entered into an agreement with Bidder's Edge to allow Bidder's Edge's software robot to crawl through eBay website for ninety days. Bidder's Edge's software robot was designed to automatically poll that eBay website and index most of eBay's auction products and pricing. After the ninety day contract ended, however, eBay and Bidder's Edge failed to reach a licensing agreement. E Bay gave sufficient notice to Bidder's Edge that further use of any software robot constituted trespass and would not be tolerated. At first Bidder's Edge abided by eBay's instructions, but when Bidder's Edge learned that other companies were continuing to loot eBay's website web site information with their own software robots, Bidder's Edge resumed the crawling. In an effort to refute Bidder's Edge's practice, eBay attempted to physically block the defendant from their web site, but failed. After eBay had exhausted all its options, eBay brought action against Bidder's Edge under a claim of trespass to chattels. At 1061-1063.

[57] Edward W. Chang, *Bidding On Trespass :eBay, Inc. v. Bidder's Edge, Inc. And The Abuse Of Trespass Theory In Cyberspace Law* 29 *AIPLA Q.J.* 445 at 446. See the example in *CompuServe Inc v. Cyber Promotions*, 962 F.Supp 1015.

[58] 126 F.Supp. 2d.238 (S.D.N.Y. 2000).

[59] This WHOIS database contains the names and contact information such as postal address, telephone number and email address for customers who register domain names through the Registrar.

[60] The defendant used a search robot to access the WHOIS database maintained by the accredited registrars, including Register.com, and collected information from customers who had recently registered a domain name and then used that information to contact and solicit Register.com's customers by email, regular mail and telephone. As a result of defendant's actions, Register.com received numerous complaints about the email and telephone solicitations by Verio from its customers and co-brand partners. This WHOIS database contains the names and contact information such as postal address, telephone number and email address for customers who register domain names through the registrar.

[61] To support the trespass to chattels claim, the court reasoned that although trespass to chattels once required strict proof of physical interference, proving such elements is not as strict in the modern trespass doctrine. See *Thrifty –Tel*, 54 Cal. Rptr.2d at 472. See also John D.Saba, Jr, 'Internet Property Rights: E-Trespass' pg. 374.

[62] *eBay*, 100 F.Supp.2d at 1069.

ii. Dispossession Of Another Chattel / Substantial Interference [63]

This element was brought up by the defendant in *CompuServe, Inc v. Cyber Promotions,*[64] to assert that the plaintiff's trespass to chattels claim was not supported because the defendant's email actions did not dispossess CompuServe of its property. It was contended by the defendant that substantial interference with the chattel is required in a trespass to chattels claim.[65] The defendant supported his contention by referring to case law[66], which indicated that the requirement of substantial interference is required in a trespass to chattel claim. However, even though the Court seemed to agree with the defendant's argument, it stated that other tortious actions exist under the restatement to sustain a trespass claim.[67]

In *eBay, Inc. v. Bidder's Edge, Inc.*,[68] the presiding Judge ruled that to establish trespass to chattels, "intermeddling with or use of another's personal property" rather than "a substantial interference with possession" was all that was required. This indicates again that only one element is needed to establish trespass to chattel. However, the Judge further stated that there was some uncertainty as to the precise degree of possessory interference required to constitute intermeddling. In other words, the Court was of a view that, the interference must be substantial, the degree of deprivation from the chattel was not made clear by the Court.[69]

It was submitted that the element of substantial interference or deprivation of the use of the chattel for a substantial period of time would appear to restrict the application of this tort to cases of physical vandalism.[70] The extent of application of "physical property" to electronic signals would not assist in establishing that there is substantial interference with electrons. As a matter of fact, some courts have confirmed the trespass to chattel claims on the basis of relatively minor amounts of interference;[71] this is to include electrons flowing through a system originating from spam emails which caused inconvenience to plaintiff's customers.[72] This indicates

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[63] S218 (a) of the Restatement (Second) of Torts states that a person may commit trespass to chattel intentionally if he dispossess another of the chattel. The requirement will be discussed together with § 218 (c) that is "the possessor is deprived of the use of the chattel for a substantial time" or also known as substantial interference of the use of the chattel. This is because a chattel can only be dispossessed if a substantial interference involved in the use of the chattels by the owner.

[64] 962 F.Supp.1015 (S.D.Ohio 1997).

[65] Ibid., pg. 1022.

[66] Ibid. The defendant cited *Glidden v. Szybiak,* 63 A.2d 233, 235 (N.H. 1949) which stated that because plaintiff did not contend any harm done by defendant pulling on her pet's ears, no tortuous action could be brought. Another case referred to by the defendant is *Koepnick v. Sears Roebuck & Co.*, 762 P.2d 609, 619 (Ariz. Ct. App. 1988) where it was held that a vehicular search amounting to two minutes is not sufficient dispossession.

[67] The list of possible intentional conducts which may amount to trespass to chattel is listed in S218 of the Restatement (Second) of Torts such as the act of dispossession of another's chattel and the act of harming or impairing the chattel. These conducts are not required to co-exist, it is sufficient if one of the conducts committed as the conjunction "or" instead of "and" were used in the Restatements .

[68] 100 F.Supp. 2d 1058 (N.D.Cal.2000).

[69] The copying undertaken by Bidder's Edge caused injury to eBay. Bidder's Edge bots had visited eBay's site approximately 100,000 per day, accounting for as much as 1.53% of the total requests received by eBay and as much as 1.10% of the total data transferred by it over the web.

[70] Jacqueline Lipton, 'Mixed metaphors in cyberspace: property in information and information Systems 35 *Loy. U. Chi. L.J* 235, 242.

[71] *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F.Supp.1015,1022 (S.D. Ohio 1997).

[72] Jacqueline Lipton, 'Mixed metaphors in cyberspace: property in information and information' systems' pg. 242.

that the level of substantiality required has not been determined by the court in ascertaining the level of interference involved in a trespass to chattel claims. This is due to the fact that in most of these cases, the plaintiffs are more concerned with the defendants making unauthorized invasion into plaintiffs system to gain some kind of commercial advantage.[73]

In *Ticketmaster v. Ticketmaster.com,*[74] the comparative use of ticketmaster's website by Tickets.com was very minimal which has not shown that Tickets.com's use interferes with the regular business of Ticketmaster.[75] The finding seems to suggest that in order to determine whether or not there is a trespass to chattel, the amount of interference must be substantial.

In contrast, in *Register.com Inc., v. Verio, Inc.*,[76] only evidence of "mere possessory interference" is needed to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels.[77] This indicates that in contrast to Ticketmaster, the amount of interference is not necessarily substantial, as the word "mere" connotes that the intermeddling involved must not be something that is substantial or comprehensive.[78]

In contrast to *Ticketmasters* and *eBay* which require a showing of actual or potential interference with the owner's use of the system, the Court in *Oyster Software, Inc. v. Forms Processing, Inc,*[79] rejected the argument that trespass could not be found if the interference is negligible. Here, all that was required is "use". The Court in that case held that there was a potential trespass based on the use of robots to copy metatags from plaintiff's site for use in defendant's site. It was submitted that the Defendant's conduct was sufficient to establish a cause of action for trespass not because the interference was "substantial" but simply because the defendant's conduct amounted to 'use' of plaintiff's computer.

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[73] Ibid., at note 43. Examples include a situation where the defendant makes unauthorized use of information stored within a plaintiff's system, such as customer details for targeted marketing purposes, or information on the plaintiff's available products and services for market research and/or Web aggregation purposes. See also Hongwei Zhu, The Interplay of Web Aggregation and Regulations S 2.1 (MIT Sloan School of Management, Working Paper No. 4397-02, 2002, available at http://ssrn.com/abstract_id=365061 (Last visited October. 23, 2003).

[74] 200 WL 525390, 2001 US App Lexis 1454.

[75] John J. Cotter, Sean C. Ploen, *Using and misusing third party resources*, 661 PLI/Pat 213, 230. Westlaw.

[76] 126 F.Supp.2d 238, 249-250 (S.D.N.Y 2000), the court cited *eBay v. Bidder's Edge*, 100 F.Supp. 2d at 1071 for that principle.

[77] John J. Cotter, Sean C. Ploen, *Using and misusing third party resources*, 236.

[78] In determining that "possessory interference" existed, the court gave weight to the following factors:

i. Testimony from Register.com's technology officer that if the "strain on Register.com's resources...becomes strong enough, it could cause Register.com's computer systems to malfunction or crash";

ii. The technology officer's believe that if Verio's searching were allowed, "then every purveyor of Internet-based services would engage in similar conduct";

iii. Verio's testimony that it saw "no need to place a limit on the number of other companies that should be allowed to harvest data from Register.com's computers";

iv. Verio's awareness that its robot "could slow the response times of the registrar's databases and even overload them";

v. Verio's investigation into "cloaking the origin of its queries by using a process called IP aliasing". Ibid., 236-237.

[79] 2001 WL 1736382 (N.D. Cal.2001).

Taking the above discussions into account, it seems that the application by the courts relating to this element has always been uncertain. The Court in *CompuServe* did not consider this element as there was other element, i.e., harm, that had been successfully proven by the plaintiff. In a situation where the court considers this element to support trespass to chattel claim, a question on the degree of substantiality has not clearly been determined by the court in order to assess the necessary level of interference required in a trespass to chattel claim.[80] Due to the ambiguity of the element of dispossession and substantial interference, the Courts seem to rely on other element such as harm in establishing trespass to chattel doctrine.

iii. Harm

The element of harm has been commonly applied by the court in establishing the trespass to chattel doctrine.[81] Harm as decided by the court in cyber trespass cases includes lowering advertisement page hit, reduction in consumer purchases, slowing down the computer system, diminishing the system resources, withdrawing server capacity and potential system shut down which diminishes the value of computer system[82]

In *CompuServe, Inc v. Cyber Promotions,*[83] the Court held that Cyber Promotions was liable to CompuServe for trespass to chattels under both S 218(b)[84] for committing harm resulting in the diminution of quality to possessor's personal property and S 218(d)[85] for committing harm to one of possessor's "legally protected interests".[86] The Defendant violated S 218(b) by first, diminishing the value of CompuServe's computer system to the extent that Cyber promotions' mass electronic mailings demanded disk space and processing power from Plaintiff's computer equipment and second, depriving those resources from serving CompuServe customers. The "legally protected interest" of CompuServe was impaired as Cyber Promotions' interference into CompuServe's Computer system harmed Plaintiff's business reputation and goodwill.[87]

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[80] *eBay, Inc. v.Bidder's Edge, Inc,* 100 F. Supp. 2d 1058 (N.D. Cal.2000) (stating that to establish trespass to chattels, "intermeddling with or use of another's personal property "rather that "a substantial i*nterference with possession"* was all that was required), *Ticketmaster v. Ticketmaster.com,* 200 WL 525390, 2001 US App Lexis 1454. (stating that the comparative use of ticketmaster's website by Tickets.com was very small which had not shown that Tickets.com's use interferes to any extent the regular business of Ticketmaster) *Register.com Inc., v. Verio Inc.,* 126 F.Supp.2d 238, 249-250 (S.D.N.Y 2000), (stating that only evidence of "mere possessory interference" is needed to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels).

[81] The element of "Harm" is provided in S218(d) of the Restatement of Tort (Second) where it states that one who commits a trespass to a chattel may be committed intentionally if "... bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest..." This element is discussed together with S218(b) which states that a trespass to chattel may occur if "...the chattel is impaired as to its condition, quality or value..." This part is discussed simultaneously as "impairment" brings the same meaning as "harm'.

[82] *CompuServe, Inc v. Cyber Promotions,* 962 F.Supp.1015 (S.D. Ohio 1997), *Intel Corporation v. Hamidi,* 1999 WL 450944,(Cal.Super.Ct.Apr.28, 1999).

[83] 962 F.Supp.1015 (S.D.Ohio 1997).

[84] Restatement (Second) of Torts.

[85] Ibid.

[86] 962 F.Supp.1015 (S.D.Ohio 1997) at 1022-1023.

[87] Ibid.,at 1027-1028.

The Court in *Intel Corporation v. Hamidi,*[88] relying upon *Thrifty-Tel* and *CompuServe* ruled that "any impairment in the value to Intel of its email system is sufficient to show injury".[89] The element of harm was also derived from the fact that the Defendant's trespass resulted in diminishing employees' productivity and the devotion of company resources to message blocking efforts.[90]

It is noted that, the element of "harm" could also include future harm. In *eBay, Inc. v. Bidder's Edge, Inc.*,[91] the Court held that the risk of future harm[92] caused by the Defendant and other entities that may potentially interfere with the plaintiff's chattel is enough to support a trespass to chattel claim.[93] This issue was evaluated on the "balance of harm" test.[94] This evaluation weighs the relative hardships to the parties based on several factors of harm. Following this balancing test, the Court took the initiative to categorize *eBays's* alleged factors of harm into two different types; "system harm" and "reputation harm". System harm is the type of harm eBay might endure from a defendant's unauthorized use of the software robot[95] while reputational harm is the alleged result of a Defendant's actions from misrepresentation of information.[96] It was submitted by the Court that if Bidder's Edge was allowed to continue its hostile practices of web crawling, other companies might join in the foray and eventually cause harm to eBay. This would result in eBay suffering irreparable harm from lost of profits and customer goodwill.

Following *eBay*'s decision, the Court in *Register.com Inc., v. Verio, Inc.*[97] concluded that any future use of "a search robot to access the database" would exceed the scope of Register.com's consent and amount to trespass to chattel. The Court in that case was not reluctant to satisfy the trespass to chattels elements based on very minimum levels of harm,[98] as well as any other potential harm occurring from additional software robots.[99] The Court cited *CompuServe* and *eBay* and states that:

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[88] 1999 WL 450944. at *1-*2 (Cal.Super.Ct.Apr.28,1999). In this case, Intel sued a private individual for sending email messages criticizing Intel's employment practices to over 30,000 Intel employees at their business email addresses.

[89] Ibid., pg.t *2.

[90] Ibid. However in a sharply divided opinion, the narrow majority held that these claims did not state a proper claim of trespass to chattel. Some actual or threatened harm to the asset or property must be shown to establish trespass.

[91] 100 F. Supp. 2d 1058 (N.D.Cal.2000).

[92] The court held that the web crawling performed by Bidder's Edge has satisfied the element of damage or harm in trespass to chattel. Even though the spider programs use one percent of the total usage of eBay's servers, this did not cause any disruption of service. It did deny eBay the use of that portion of its processing bandwith. In addition to that, allowing such copying would prompt other potential competitors to crawl eBay's website. This threat of irreparable harm justified granting eBay an injunction. Ibid., pg. 1071-1072.

[93] The court stated that "...Bidder's Edge's ongoing violation of eBay's fundamental property right to exclude others from its computer system potentially causes sufficient irreparable harm to support a preliminary injuction..." Ibid.,at 1067.

[94] In its analysis, the court first discussed the parameters of granting preliminary injuuctive relief by administering a two-part test i.e., "balance of harm" and "likelihood of success" test.

[95] System harm was evaluated based on the potential harm that might occur as a result of defendant's action. Ibid., pg. 1064-1065.

[96] However, the court declined to include the balance of harm analysis due to eBay's failure to consider it as underlying claim. Ibid., pg. 1064.

[97] 126 F.Supp.2d 238, 249-250 (S.D.N.Y 2000).

[98] In traditional trespass to chattels, the level of harm must rise beyond the trivial and be substantial enough to be equivalent to physical seizure or deprivation of use of enjoyment, Marry Anne Bendotoff,

Although Register.com's evidence of any burden or harm to its computer system caused by the successive queries performed by search robots is imprecise, evidence of mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels.

As opposed to the decision in *Oyster* and other cases that have decided on that matter, the Court in *Ticketmaster* denied the action of trespass brought by the Plaintiff on the ground of lacking sufficient harm. It was submitted that there was no proof that the use of robotic software to collect data from a site did result in proven damage to the system or proven denial of use for a significant period by the true owner. The Court further affirmed that a requirement of actual, substantial loss or damage was consistent with the common law concept of trespass to chattel, although some cases recognized that a number did not require substantial impairment.[100] Traditional formulation requires substantial impairment or harm. In contrast, the court in cyber trespass cases submitted that any loss of value would satisfy the requirement of damage.[101] In other words, the level of harm required is very minimal. In certain cases, a trespass to chattel claim can even succeed without quite proof of actual damage to computer system.[102] Thus, it appears that in a trespass to chattels claims, the court disregarded the causation element, allowing the injunction based on harm to the system's value, whether in the form of loss of the network's value, loss of company resources or loss of good will.[103] In such cases, the element of harm can arguably satisfied at the most trivial level.[104]

TRESPASS TO GOODS IN THE UNITED KINGDOM AND MALAYSIA

It is observed that in common law cases relating to trespass to goods there are three elements emphasized by the courts that are, first, there must be intentional interference involved, secondly, the goods are in the possession of the claimant and finally, the existence of interference.

i. Intentional interference

The act constituting the trespass must be either intentional[105] or negligent. The act of defendant, which was neither intentional nor negligent, is not liable in trespass to

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Elizabeth R. Gosse, 'Stay off my cyber property!": trespass to chattel on the Internet' 6 *Intell.Prop.L.Bull.* 12 at 13.

99 Ibit., at 241. Although Register.com estimated the amount of harm to a 2.3% diminishment of network resources, the court noted that this amount although minimal, amounted to "some' harm, thus meeting the elements of trespass to chattel. Similar to the eBay court, the Register.com court weighed the potential harm resulting from other software robots, if Verio's software robot was not stopped.

100 Raymond T.Nimmer, *The nature of property rights in information, information law*, West Publication, USA, 2-48.

101 See Dan L.Burk, 'The Trouble With Trespass' 4, *J. Small & Emerging Bus. L.* 27, at 35. It was suggested that "...Trivial interferences never constitute a dispossession but the harm necessary to trigger liability may arise from an injury to someone or something other than the chattel itself, so long as the harm bears a proximate relationship to the dispossession..."Ibid., pg. 28.

102 In *Intel Corporation v Hamidi*, 1999 WL 450944. at *1-*2 (Cal.Super.Ct.Apr.28,1999), one of the harms alleged was loss of employee productivity.

103 Marry Anne Bendotoff, Elizabeth R. Gosse, 'Stay off my cyber property!: trespass to chattel on the Internet', pg. 16.

104 Ibid.

105 For unintended trepassory contacts there is a liability in the absence of negligence. John G.Fleming, *The Law of Torts*, 9th Edition, LBC, at 59.

goods.[106] The requisite intention is indicated from the act of interference with the chattels which is deliberate or willful. The intention need not be to interfere permanently with another's goods.[107] This means that if the unauthorized access to the data in a database involves only insubstantial period of time, it does not exclude the intruder from liability under trespass to goods.

Yet another requirement to trespass is concerned with the channel of interference. There cannot be a trespass if the interference is indirect.[108] The interference must be through the direct act which causes immediate contact with the claimant's goods. It was submitted that direct interference must be physical in nature.[109] This will bring to a consideration whether or not trespass to data in cyberspace is regarded as physical, and thus, direct. It is submitted that trespass to chattel may be committed by any act which brings the defendant into contact with the chattel. This includes the act of destroying, damaging[110] or merely using goods[111] or removing an article[112] from one place to another.[113]

Nevertheless, in some cases actual contact is not required. This means that although the interference was not actually completed, for example in a situation where someone is about to interfere with the goods,[114] it is, in spite of everything, considered as an act of trespassing. It seems that even though trespass to goods requires contact to physical property, it is not necessary that the contact is physical. As an analogy, to computer or online database, the act of sending spam email or an attempt to unauthorized access the database content in a computer server or hard disk can be regarded as trespass even though no real touching to the computer server or disk was occurred. Thus, the requirement of physical property is represented in the physical part of computer disk as hardware, since no actual interference is necessary in establishing trespass to chattel, the intention to trespass as exemplified in the act of sending spam email or the act of unauthorized access to data has been complied with the element of intentional interference.

ii. Possession / Dispossession of Property

Trespass to goods, like trespass to land, is essentially a harm to possession and not to ownership. Therefore, the claimant in trespass to goods claim must have been in

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[106] In *National Coal Board v. J E Evans and Co (Cardiff) Ltd* [1951] 2 KB at 861, the Court of Appeal held that a contractor whose employee, while excavating, damaged the cable of the plaintiff and whose act was neither intentional nor negligent was not liable in trespass to goods. He operated the machine which was excavating the earth, but he neither desired nor ought to have foreseen that damage to the cable which constituted the tortuous invasion of the plaintiff's interest, his act, therefore, was neither intentional nor negligent. R.P Balkin, J.L.R. Davis, *Law of Torts*, Butterworths, 2nd Edn., 1996, pg. 101.

[107] Ibid., pg. 100. Thus the unauthorized borrowing of a car in order to take it on joyride with the ultimate intention of returning it to is owner is still a trespass, *Schemmell v. Pomeroy* (1989) 50 SASR 450.

[108] *Hartley v. Moxham* (1842) 3 QB 701.

[109] Norchaya Talib, *Law of torts in Malaysia*, Sweet & Maxwell, 2nd Edn., 2003, pg. 47- 48.

[110] *Fouldes v. Willoughby* (1841) 8 M & W 540 at 549, 151 ER 1153 at 1156.

[111] *Penfolds Wines v. Elliot* (1946) 74 CLR 204 at 214-215. For example driving a car, riding a horse or filling a bottle.

[112] *Kirk v. Gregory* (1876) 1 Ex D 55.

[113] John G Fleming, *The Law of Torts*, Ninth Edition,LBC, at 58.

[114] Ibid., For example chasing a chattel(*Farmer v. Hunt* (1610) 1 Brownl 220; 123 ER 766), throwing poison baits to dogs and the laying of baits (*Hutchins v. Moughan* [1947] VLR 131).

actual possession at the time of the interference complained of.[115] As noted by Dixon J. in *Penfolds Wines Pty Ltd v. Elliott*[116] "... trespass is a wrong to possession ...".[117]Possession connotes both the power of exercising physical control over the goods[118] and the intention to exercise such control on one's own behalf.[119] Any possession is sufficient provided that it is complete and unequivocal.[120]

It is an established principle that moving of goods, also known as "asportation", is considered as dispossession. As decided in *Kirk v. Gregory,*[121] a woman who moved rings belonging to a man who had just died from one room in his house to another, was held liable for trespass to goods. Therefore, the act of moving data through copying from one website to another without authorization may amount to dispossession. However, this is not necessarily so, as in certain circumstances particularly when no harm occurs, asportation is not regarded as dispossession.[122]

The principles from decided cases seem to show however, that, an act involving neither asportation nor dispossession could amount to a trespass to goods. This position was described in *Everitt v. Martin*[123] which dealt with an issue whether a person could commit an act of trespass by allowing his coat to come into contact with another person's car. It was decided by Adams J. that there was a right of action of trespass in the act of mere touching of another's good without damage or asportation, provided that the act involves intentional contact.[124]

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[115] *Ward v, Macauley,* (1791) 4 T.R. 489, *Keenan Bros. Ltd v. C.I.E* (1962) 97 I.L.T.R . 54 where it was decided that even an owner of goods may be liable in trespass if he seizes those goods from one who has lawful possession o them, e.g., as a bailee.

[116] (1946) 74 CLR 204 at 224. The plaintiff s made and sold wine in their own bottles. Their name was printed on the bottles and it was also printed that the bottles belonged to them. The defendant who was a hotel proprietor sold wine in bulk to his hotel guests. The guests brought their own bottles and among the bottles brought, were those of the plaintiffs'. The plaintiff sought for an injunction claiming that the defendant was trespassing on their goods. The Court denied an injunction and said that no trespass had occurred as the plaintiffs did not have possession in fact of the bottles.

[117] In the early case of *Johnson v. Diprose,* (1893) 1 QB, 512, Lord Esher described the notion of possession in the following terms:

> "...the plaintiff in an action of trespass must at the time of trespass have the present possession of the goods, either actual or constructive, or a legal right to the immediate possession..."

In other words, an owner who is not in possession at the date of the alleged trespass cannot sue for trespass as the question of whether the claimant is the owner is immaterial. Therefore, a cyclist who parks his or her bicycle outside the shop remains in possession of it, however, if a thief rides away on it the thief then has the possession despite obtaining it wrongfully. R. P Balkin, J. L. R. Davis, *Law of torts*, pg. 101.

[118] *Sajan Singh v. Sardara Ali* [1960] 26 MLJ 52 at 57. Thomson C.J. "...It was essential for the plaintiff to show that he had the right to immediate possession of the lorry at the time of commencing the action..."

[119] R. P Balkin, J. L. R. Davis, *Law of torts*, pg. 100. A bailee can sue in trespass to goods.

[120] R. Ratanlal, K. T. Dhirajlal, *The law of torts*, Wadhwa, 24th Edn., pg. 419.

[121] (1876) 1 Ex D 55.

[122] An example of this situation is where a person in gently reversing his car touches the bumper of another car, the brake of which has not been applied and without damaging it cause it to move a few feet. In that case, he does not dispossess the owner's car, even though he has asported it. R.P Balkin, J. L. R. Davis, *Law of torts*, pg. 99.

[123] [1953] NZLR 298.

[124] However, he had no hesitation to declare that there would be no right of action in the case of merely accidental contact where no damage is done. For further support that mere touching is not trespass, see *Wilson v. Marshall* [1982] Tas SR 287 at 299-300 per Cox J (FC).

If the act is intentional, the elements of dispossession and harm do not necessarily exist in order to establish trespass to goods. If the interference was negligently committed, the element of harm or dispossession must exist to constitute trespass.

iii. Harm

It is most likely that a trespass to goods will involve a harmful contact with some other object of varying degrees of injury. As in common law principle, a trespass to chattels is actionable per se without any proof of actual damage.[125] Hence, indirect harm is acceptable. Any unauthorized touching or moving of a chattel is actionable at the suit of the possessor of it, even though no harm ensues. This act of trespass would include erasing a tape recording or showing[126] a private letter to an unauthorized person.[127] Thus, it is inferred that an act of sending spam email to one server, which result in monopolizing valuable server time while simultaneously slowing down connection speeds, and the unauthorized access of and copying of data or information from one web site or online database will definitely come under the protection of trespass to goods. Despite an absence of the element of actual harm, such acts of sending spam email and unauthorized access and copying data have caused substantial reputation and economic damage to the owner.

In addition to that, the element of damage in trespass to goods need not be material or lasting.[128] Therefore, the damage done to the server need not necessarily be substantial. It is sufficient if the spam emails cause insubstantial moment of interruption to the computer system as well as a minimal loss of profit to the database owner.

It seems from the above, the requirements needed to establish trespass to goods/chattel in the common law jurisdictions such as the United Kingdom and Malaysia, are somehow similar to what is available in the United States. The United States jurisprudence has developed and expanded the doctrine of trespass to chattel further to cover the intangible nature of goods, such as database content. In common law jurisdictions, similar conclusion could be made, through judicial activism.

THE SHORTCOMING IN CYBER TRESPASS NOTION

The existing element of a trespass to chattels appears to be in line with the cyber trespass issues. Nevertheless, it is observed that there have been misapplications of those old rules to fit the new cases. Let us look at them in turn.

On the issue of "physical interference", the court in cyber-trespass cases found that the digital signals from phone calls were sufficient to establish physical contact by analogizing to cases where dust particles and sound waves established a

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[125] *Leitch & Co. v. Leydon* [1931] A.C. 90, 106; *Penfolds Wines Pty. Ltd. v. Elliot* (1946) 74 C.L.R 204, 214-215.

[126] R.F.V. Heuston, *Salmond on the law of torts*, pg. 92.

[127] As distinct from merely looking at the letter as it was a view of Lord Camden C.J. that "...The eye cannot by the laws of England be guilty of a trespass... "as decided in *Entick v. Carrington* (1765) 19 St.Tr.1030, 1066.

[128] R.P Balkin, J.L.R. Davis, *Law of torts*, pg. 99. To beat a dog may also be an act of trespass, *Wright v. Ramscot* (1665) 1 Wms Saund 183.

trespass claim.[129] Recognition of electronic signals as a trespass has eliminated the requirement for a physical trespass and recognizes intangibles electrons as adequate to support a trespass to chattels claim[130] However, in arriving to that point the court relied upon trespass to land cases and not trespass to chattels cases.[131] The new cyber trespass to chattels has married the doctrines of trespass to land and trespass to chattels, blurring the traditional boundaries between them.[132] It is observed that the reasoning of the court is not necessarily well grounded in the bases of trespass law, thus the court's conclusion that signal sent over telephone wires are sufficiently tangible to effect a trespass may not be trustworthy precedent.[133]

A question that arises here is if the principle is to be accepted; to what extent is it applicable to other types of unsolicited communication of electronic signals such as via telephone call or fax message? [134] Is it also applicable to the act of trespassing by unwanted television and radio broadcasts and through household appliances attached to an outlet?[135] It is noted that to conclude that electronic signals can constitute trespass to chattel may be absurd as it seems very unconvincing to satisfy the physical contact element of trespass to chattel.[136] By misconstruing what is fundamentally a communication technology via websites as real property or even chattel property, the courts have granted the owners of publicly-accessible Internet servers an absolute right to exclude that does not apply to any other communication medium, such as television and telephone. An owner merely has to withdraw permission for use to be deemed harmful and trespassory and therefore subject to remedies.[137]

If electronic signals can be regarded as physical interference, this brings into issue the Internet Service Provider's (ISP) liability. If a user sends a robotic spider to ISP A, this will involve numerous servers that carry signals along the way before reaching ISP A's server. In this case trespass to chattels may expose many ISPs and intermediaries to liability.[138]

It seems that mere possessory interference is needed and only a minimum level of harm is necessary to establish a claim for trespass to chattels. However, S 218 Restatement of Torts requires a greater degree of impairment for such action.

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[129] *Thrifty-Tel, Inc v. Bezenek,* 54 Cal. Rptr. 2d 468, 472-473 (Cal. Ct. App.1996).

[130] Laura Quilter, 'The continuing expansion of cyberspace trespass to chattels' 17 *Berkeley Tech. L.J.* 421 at 439.

[131] Although the land-chattels distinction may seem minor, it reverses several hundred years of legal evolutions collapsing the separate doctrines of trespass to land and trespass to chattel back into their single common law progenitor the action of trespass. Dan L. Burk, 'The trouble with trespass' 4. *J. Small & Emerging Bus. L.* 27, at 33.

[132] Trespass to land and trespass to chattels protect two different interests. Trespass to land requires a far lesser degree of contact than trespass to chattels to give rise to liability. This distinction perhaps indicates that the courts intention to grant a greater degree of protection to land. Therefore by applying the similar concept to trespass to chattel as trespass to land, the courts tend to ignore the policy justifications underlying each. Ibid.

[133] Marry Anne Bendotoff, Elizabeth R.Gosse, 'Stay off my cyber property!: trespass to chattel on the Internet', 6 *Intell.Prop.L.Bull.* 12 at 15.

[134] Ibid.

[135] R.Clifton Merrell, 'Trespass to chattels in the age of the Internet' 80 *Wash.U.L.Q.* 675 at 688.

[136] Ibid.

[137] Ibid.

[138] Ibid.,pg. 690. For these reasons, the case law developed in trespass to chattels before *Thrifty Tel*'s case did not allow for particulate trespass.

Therefore the court should only allow a claim that demonstrates damage to the servers as well as increased customers' complaints.[139] This fact should be supported with evidence that the activity of a trespasser caused these server problems and expert evidence to prove such claims. Even though the harm caused need not be substantial, the courts should require a noticeable impairment on the performance of their equipment to satisfy the trespass to chattel claims.[140]

The element of harms as stipulated in the Restatement could either be in the form of economic or physical harm. On the other hand, a trespass to land does not require that element and allow for nominal damages. It is submitted that this justified the fact that other intangible harm, such as smoke and particulate matters, may satisfy the requirement in trespass to chattels claim.[141] The actual harm that spam or spiders caused to the servers has rarely been calculated[142] and the use of available computer resources has rarely been found sufficient to constitute harm. In short, cyber trespass to chattels seems to avoid the harm requirement which is a strict formulation of a property right[143] as in the realm of communication and network technologies this strict formulation creates absurd results.

It is obvious from the relevant decided cases that the trespassers did not dispossess the owners of the equipment or their property in anyway. In those cases, the equipment was contacted by electrons and was not damaged, removed or render inoperable.[144] Moreover, even if electrons are regarded as tangible, physical property, it is hard to imagine substantial interference with electrons that causes such a result in practice.[145] As a matter of fact, some courts have found trespass to chattel in relation to computer systems on the basis of relatively minor amount of interference, including electrons flowing through a system and inconvenience to plaintiff's customers from unwanted spam. Most of these cases dealt with the defendants making unauthorized interruption into plaintiff's systems to gain some kind of commercial advantage such as taking customers details for targeted marketing purposes or information on the plaintiff's available products or services for market research or web aggregation purposes. The judges tend to bend and stretch existing trespass to chattel theory to protect the information or database under the guise of protecting the website as if it were a real place.[146]

Moreover, as the cyberspace trespass to chattels doctrine has been expanded, the requirement for harm has been practically receded which to allow application of unclear, attenuated and indirect harms.[147] In extending the doctrine of trespass to

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[139] Instead of allowing simply one or two percent processing time to qualify for impairment

[140] Ibid., pg. 691-692.

[141] Ibid, pg. 689.

[142] Ibid., This may be because the harm to servers is difficult to measure or if measured, would seem insignificant or slight .

[143] Laura Quilter, 'The continuing expansion of cyberspace trespass to chattels' pg. 440.

[144] Dan L. Burk, 'The trouble with trespass' 4 *J.Small & Emerging Bus. L.* 27 at 34. It is nearly impossible to recognize trespass to chattels in *Thrifty Tel* or *CompuServe*, since the owners of the equipment were not in anyway dispossessed of its use by the passage of electrons through the equipment in exactly the way the equipment was designed to carry them.

[145] Jacqueline Lipton, 'Mixed metaphors in cyberspace: property in information and information systems' pg. 242.

[146] Ibid., pg. 243.

[147] Laura Quilter, 'The continuing expansion of cyberspace trespass to chattels' pg. 439.

chattel, the courts have allowed various novel and indirect harms which include loss of corporate good will, alleged psychological distress suffered from reading email and the time wasted by employees.[148] Beside that, the element of harms "occurred' is not necessarily confined to harm actually suffered by the server, but it has been extended to potential harms. Thus, the courts turn to a new approach of recognizing indirect and speculative harms. However, this approach has removed a vital limit of the doctrine, i.e., a connection between the alleged harm and the remedy imposed.[149]

As the threshold of 'trespass to chattels' has deviated from its traditional requirements, the doctrine turns to be impressionable, where the principle is easily influenced by the circumstances of the case and able to fit any and all situations. In other words, cyber- trespass to chattel is on its way to becoming the "cure-all" remedy for unwanted Internet contacts. With this new definition of trespass to chattel plus the novel interpretation of harm, which indirectly strip-off the harm requirement, it would be difficult not to conceive of anything that might not constitute trespass to chattels. In other words, trespass to chattels at present, is defined purely at the owner's will and can include almost any kind of act.[150] By altering and to a certain extent removing some of the requirements, i.e., harm, the courts have created an absolute property right which is similar to trespass to land,[151] but without fully analyzing the potential consequences of their rulings.[152]

It is suggested that to solve these problems the courts should continue using cyber trespass theory but require claimants to demonstrate either, actual and tangible harm was done to the chattel, or the chattels' value to the plaintiff was substantially diminished. It is difficult to satisfy the element of tangible harm, in the case of database as there is no actual taking involved and the equipment is not damaged. However, the value of database may be diminished as a free riding of the content of database may cause economic loss as well as reputational harm to the database owner.

THE DOCTRINE OF UNJUST ENRICHMENT

The common law principle of unjust enrichment is one of the possible actions in combating the act of free riding of database. This cause of action focuses on the question of how the common law obligations should seek to regulate the commercial exploitation of informational products. This is important when the database stands outside the existing intellectual property regime such as copyright.

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[148] Ibid., See *Intel v. Hamidi*, 114 Cal.Rptr.2d 244 (Ct .Appeal .2001).

[149] Ibid., pg. 440.

[150] Ibid., pg. 441. As in the dissenting judgment of Kolkey J. in *Intel v. Hamidi*, 114 Cal. Rptr. 2d 244, at 262 (Ct. App. 2001) even lovers' quarrels could turn into trespass suits by reason of the receipt of unsolicited letters or calls from the jilted lover. Imagine what happens after the angry lover tells her fiancé not to call again and violently hangs up the phone. Fifteen minutes later the phone rings. Her fiancé wishing to make up. No, trespass to chattel.

[151] As contrast to cyber-trespass theory, trespass to land is ruled through the limiting doctrines and balances of real property law. Ibid.

[152] Edward Chang, 'Bidding on trespass: *Ebay Inc. v. Bidder's Edge, Inc.* and the abuse of trespass theory in cyberspace law' 29 *AIPLA Q.J.* 445, at 464.

The Definitions

In English Law, the recognition of the concept of unjust enrichment has been controversial.[153] Unjust enrichment has been dealt with by the English Court by referring to quasi-contract, implied contract and constructive trust. Hence, relief that was granted was based on equity or tort, not unjust enrichment. English law does not also mention the principle of unjust enrichment directly, but discusses it under the head of remedy of restitution.[154] In other common law countries like Australia, the logical vehicle for protection of database cases employed is unjust enrichment. However, even in Australia, there still is much confusion over what actually amounts to unjust enrichment.[155]

Unjust enrichment is defined as "... the unjust obtaining of money benefits at the expense of the claimant ..."[156] In principle, it is a generic conception which describes the causative event of loss of value by the plaintiff and acquisition of that value by the defendant in circumstances that are unjust.[157] It is a general principle of justice which has unconsciously guided the legislature in their enactment of laws and the courts in their past pronouncements for it is inconceivable that any system of law would allow one person to retain a measurable gain that is the product of another's loss.[158]

As described above, unjust enrichment has also been recognized in some jurisdictions, as the law of restitutions. Restitution can be defined as the area of law concerned with relieving a defendant of wealth, which in the eyes of the law, he should not be entitled to retain.[159] While, the term, "the law of restitution"[160] describes that area of the private law of obligations that is concerned with restoring the plaintiff's wealth, of whatever sort, where the transfer of the asset representing that wealth, while effective for the purposes of the law of contract and the law of property, ought nevertheless to be undone or reversed.[161] Restitutionary claims are to be found in equity as well as law.[162] This law is relating to all claims, quasi

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[153] This is due to the lack of a systematic approach towards unjust enrichment, furthermore the absence of the influence of Roman law and the structure of English law have contributed to hesitation in adopting the principle of unjust enrichment. Besides that, the application of principles of contract to quasi-contractual obligation, where in English law, tort, agreement or presumed agreement remains the basis for obligation, adding to the difficulty of accepting a general principle of unjust enrichment . Anselm Kamperman Sanders, *Unfair competition law: the protection of intellectual and industrial creativity,* Colerendon Press, 1997, pg. 131.

[154] Ibid., pg. 131-132.

[155] Brian F.Fitzgerald, 'Protecting informational products including databases through unjust enrichment: an australian perspective' [1998] 1 No. 7 *E.I.P.R* 247.

[156] L.B Curzon, *Dictionary of Law*, ILBS, Kuala Lumpur, 6th Edn., 2003, pg. 436.

[157] Brian F.Fitzgerald, 'Protecting informational products including databases through unjust enrichment: an australian perspective' pg. 248.

[158] Varsha L.Doshi, *Restitutionary remedies in illegal agreements*, Malayan Law Journal, Kuala Lumpur, 1998, pg. 1.

[159] Professor Andrew Tettenborn, *Law of restitution in England and Ireland,* Cavendish Publishing Ltd, London, 2nd Edn., 1996, pg. 1.

[160] The law of restitution is the body of law concerned with claims for the reversal of unjust enrichment, the prevention of one who has committed a wrong from profiting from it, the restoration of a claimant's property right adversely affected by defendant's action and the restitutionary remedies.

[161] Ross B Grantham, Charles E.F Rickett, *Enrichment and restitution in New Zealand*, Hart Publishing, 2000, pg. 5.

[162] Goff and Jones, *The Law of Restitution,* Sweet & Maxwell, London, 3rd Edn., 1986, pg. 3.

contractual or otherwise which are founded upon the principle of unjust enrichment.[163]

The application of different terminology, i.e., unjust enrichment or restitution for the same cause of action does not affect the purpose of that legal principle which is to prevent the act of free riding and to restore the plaintiff of the benefit received by the defendant in unjust circumstances. It was submitted that restitution was a response to the event of unjust enrichment; in fact the only response to that event, but it was also a response to other event.[164]

THE THRESHOLD OF PROTECTION

In applying the concept of unjust enrichment, the elements which must be established are:

a. Unjustness;
b. Enrichment of the defendant; and
c. At the expense of the plaintiff by subtraction from the plaintiff or by doing wrong to the plaintiff.

i. Element of "Unjust"

In order to succeed in a claim, the plaintiff must prove a principle ground for recovery of unjust factor. To determine "unjustness", one must inquire into these two rationales, vitiated intent or qualified intent. The former occurs in a situation where the plaintiff never intended to transfer the benefit to the defendant in the first place. On the other hand, the latter depends on the purpose of transferring the value, if the purpose of transfer of value failed, the plaintiff's intent to transfer the value also failed as exemplified in mistake (including ignorance), duress, legal compulsion, necessitous intervention and total failure of consideration.[165]

A challenging issue here is to apply this unjust factor, to a situation where there has been an unauthorized taking of a valuable tangible, for example, the content of database. It is submitted that, in order to prove that the act of unauthorized taking or copying the content of database is unjust, the valuable intangibles taken, i.e., the

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[163] Lord Wright in his speech had admitted that a properly worked-out law of unjust enrichment is needed in every civilized system. His Lordship further described the principle as:
"...The general title restitution is well chosen but may need explanation. It indicates the essential feature of this branch of law, which distinguishes it from the other main branches. Restitution is not covered with damages, or compensation for breach of contract or for torts, but with remedies for, what, if not remedied, would constitute an unjust benefit or advantage to the defendant at the expense of the plaintiff. Hence, (to state the matter very broadly) an action for restitution is not primarily based on loss to the plaintiff but on benefit which is enjoyed by the defendant at the cost of the plaintiff, and which it is unjust for the defendant to retain..." Lord Wright of Durley, 'Legal: essays and addresses' (Cambridge CUP, 1939), 34-65 reprinted from (1937) 51 *Harvard LR* 369-383). Also see *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] A.C 32.

[164] William Swadling, What is the law of restitution about? Four Categorical Errors, in W.R Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo (eds.) *Restitution past, present and future: essays in honour of Gareth Jones*, Hart, Oxford, 1998, pg. 331.

[165] There are other examples of recognized categories of unjust factors which are not included under vitiated or qualified intent, that are free acceptance, illegality, unauthorized payments out of consolidated revenue and ultra vires demand by a public authority. These categories are based largely on policy considerations rather than plaintiff's intent or defendant's conduct.

database content or information, should not move to the defendant through voluntary and fair transaction, in other words, which is vitiated or qualified.[166] In cases such as unauthorized taking or copying of database content, the unjust factor should be conceptualized as the unauthorized taking of a valuable intangible in a competitive market based on the principle of vitiated intent to transfer value.[167] This is based on the grounds that if the database content is taken without authorization, then it is likely that the plaintiff never possessed the requisite intent to transfer the information to the defendant.[168]

ii. Element of "Enrichment of the Defendant"

In order to succeed in a restitutionary claim, the plaintiff has to establish that he has conferred a "benefit" on the defendant. This requirement has two aspects, first, that the defendant has received a benefit and, second, that the benefit has enriched the defendant. As discussed above, it is not necessary to prove that defendant has received possession of property. It is sufficient for the plaintiff to prove that the defendant has been enriched by some kind of benefit or gain.What amounts to gain or benefit? As mentioned by Andrew Tettenborn:[169]

...But in this part of the law "gain" is a very wide term. It includes, it is suggested, anything amounting to benefit which has or might have money value to the person that accesses it...

It is also submitted that the meaning of term benefit would invariably be depending on the circumstances of each individual case. As set out by Palmer,[170] benefit has two important meanings, first, where there has been an addition to the defendant's wealth, and second, where a performance requested for by the defendant has been rendered.

Once it is proven that the defendant received an identifiable benefit quantifiable in monetary terms, it is the right of the plaintiff to recover his restitutionary claim.[171] The burden to prove that the defendant has benefited lies on the plaintiff. It is the defendant's task to prove otherwise, that he was not in fact enriched by using restitutionary defence.

In an unjust enrichment claim, it is important to establish, first, what is value and second, how a plaintiff proves a link to the value.[172] If the valuable intangibles

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[166] Peter Birks, *An introduction to the law of restitution*, Oxford University Press, 1989, pg. 141 and 219.

[167] Brian F.Fitzgerald, 'Protecting informational products including databases through unjust enrichment: an Australian perspective' pg. 250.

[168] Professor Birks has grouped the act of unauthorized taking of value under unjust factor called "ignorance". However, it is submitted that the position should be labeled as "unauthorized taking" rather than "ignorance" as there may be the existence of knowledge but no authorization. Ibid.,9.

[169] Andrew Tettenborn, *Law of restitution*, Cavendish Publishing, 1993, pg. 2.

[170] Palmer, GE, *The law of restitution*, Little Brown & Co, Boston, 1978, pg. 44-45.

[171] Brian F.Fitzgerald, 'Protecting informational products including databases through unjust enrichment: an Australian perspective' pg. 253.

[172] This is because an action in unjust enrichment do not necessarily require that plaintiff possesses a proprietary right. Ibid., pg. 10.

such as information in database can be bought and sold in the market, the objective market mechanism will determine value.[173]

iii. "At the expense of the plaintiff by subtraction from the plaintiff"

The next question is whether this enrichment was at the plaintiff's expense. Thus, where a defendant has been unjustly enriched, it will be of no consequence to the plaintiff unless it occurred at the plaintiff's expense. Enrichment at the plaintiff's expense occurs in three situations. First, the plaintiff being in possession of a benefit confers it to defendant, second, when the defendant takes a benefit from the plaintiff's possession and third, when a third party confers it on the defendant.[174] In other words, enrichment is said to be at the plaintiff's expense when the circumstances are such that the plaintiff would have certainly been the recipient of the benefit if not for the defendant's interception of the benefit by the defendant.

To comply with the element of "at the expense", it is necessary for the plaintiff to establish benefit, gain or value as well as to show that there is a causal link between the value-adding performed by plaintiff and the benefit or gain extracted by the defendant. Once a benefit has been identified in the hands of the defendant, the plaintiff needs to show a relationship with the value and the causal link between that value and the benefit or gain received by the defendant.

In a database case, usually the benefit comes in the form of monetary value. The defendant might use the plaintiff's data to create a competing database where he will gain benefit from it. In proving the element of "at the expense", the plaintiff is required to demonstrate that the defendant's unauthorized taking of the plaintiff's database content will give benefit to the defendant.

In an action of unjust enrichment in database cases, the element of competitive market is necessary. This is because it justifies the value of the value-added information in the database. As decided in *Board of Trade v Dow Jones,*[175] the unfair competition act is resulted from the proximity of the plaintiff to the commercial or market value of information. The privity of commercial value is indicated by the act of plaintiff in creating the value in the database content through fast delivery, hard work[176] and creativity. Due to that reason the plaintiff owns the right to the added value which he has brought to the information or database content. Therefore, the plaintiff is entitled to seek for remedy of restitution for the act of unauthorized taking or misappropriation of the value added in the database.

In this sense, the examination of unfair competition criterion is considered in the requirement of unjust enrichment principle. In other words, if there is unjust enrichment, there must inevitably be unfairness in competition in the market. The act of misappropriation or unauthorized taking from another in order to receive an advantage in unjust circumstances will lead to the reduction of incentive in the value-

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[173] Mason and Carters observed that:
"...Australian cases establish a general principle that if services have a market value as services, the performance of those services can count as benefit which... may found a claim in restitution for unjust enrichment...". Mason.K and Carter J.W, *Restitution in Australia*, Butterworth, 1995, pg. 304.

[174] Varsha, *Restitutionary remedies in illegal agreements,* pg. 113.

[175] 456 N.E 2d 84 (1983).

[176] Brian F. Fitzgerald, 'Protecting informational products including databases through unjust enrichment: an Australian perspective' pg. 252.

added product of the database owner.[177] Therefore, the commercial exploitation by unauthorized taking the content of database can be considered as amalgamation of the act of unjust enrichment and unfair competition which give the right of restitutionary remedy to the database owner .

CONCLUSION

The trespass to chattel doctrine was used in database cases to prevent access to the information contained in it. The right at issue here is the right of access to the information but not to reproduce, distribute or other rights as stipulated in copyright law. In other words, the theory of trespass to chattel is designed to protect against unauthorized interruptions that result in some harms to the physical item that are being trespassed upon or to the function of that item. Therefore, the intention of trespass to chattel doctrine does not actually protect the theft of copying of data. To make the trespass to chattels theory applicable to protect databases, the key element here is the act of copying must be harmful to the computer system physically or cause some damage to its function. Thus, if the harm is not directly related to an actual impairment of the systems or websites, the trespass to chattels theory would arguably be applicable.

Unlike the above, the doctrines of unjust enrichment is indirectly related to the principle of unfair competition. This is due to the fact that the law is used to prevent dishonest trade practices; i.e., free riding activities. Although these actionable tort action is not essentially bound to the principle of unfair competition as such, it appears from the claims in the tort action that the element of unfair competition is needed.[178]

In conclusion, there are two possible approaches in protecting database under the common law torts in Malaysia. The first approach is through the common law doctrine of trespass to chattel/goods. Although, this doctrine is initially used to prevent access to database content, but not to protect from theft of data, an action can be taken under this tort if the act is harmful to the function of the computer system. The second approach is through the doctrine of unjust enrichment. This is particularly important, in a case, whereby, the wrongful action comes from the free riding activities by the competitors.

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[177] Ibid.

[178] Unjust enrichment requires the element of "unjust" to be established which indicates unfair competition element.