
TRANSFORMATION OF PROPERTY FROM TANGIBLE TO INTANGIBLE ASSETS: A LEGAL ANALYSIS

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ABSTRACT

Property has always played a major role in the economic progress of any country. The property itself has undergone various changes from its physical form to its intellectual existence too. In this era of globalization, any nation that can recognize its economic assets and keep them legally guarded will surely ensure its economic development. Strong legal protection of all valuable resources especially intellectual property is very much essential for surviving in today's competitive world. We are all well conversant with the general idea of the term property. Generically, property can be defined as something which has a tangible value, and which can be owned. Now intellectual property is a bit different in this context and yet similar in terms of ownership rights. From a liberal understanding, intellectual properties can be considered to be products born out of intellectual capability and its protection means the sense of ownership over it such that it can be used in the tangible market without any fear of that intellectual product getting exploited and the one who gave birth to that intellectual product getting his due credit.

This paper will discuss the journey of property from its physical form to intellectual property, and the kind of legal protection and recognition given to it. This paper will also discuss its impact on the economy of a nation and making a mark globally.

Keywords: Intellectual Property Rights, International Trade, Theory of Property, TRIPS, WTO.

“Intellectual property was the oil of the 21st century”, Mark Getty

Introduction:

Man from the day of civilization to globalization starts building up property in one way or another. Reasoning for holding property may vary from time to time, earlier it was personal security and social status and now it is for economic strengthening and progression. Property always remains at the center of growth. The subject matter of trade never remains static it changes with the needs of time and society. With the intensification of the commercial market, property has also evolved in its way. Earlier we know it in its physical form only, which means either in the form of land or some building or structure but now it exists in intangible form also. For a better understanding of the concept of property, it can be divided majorly under two heads, tangible (corporeal) and intangible (incorporeal) property. Tangible property can be explained as, a property that exists in physical form and can be perceived by touching or seeing. Intangible property can generally be defined as intellectual work or things produced by using mental capabilities.

The property itself does not affect the economy as such it's the rights attached to it that bring the whole difference in the economic growth. Poorly defined property rights laws can land the economy of any country in to situation of chaos. This paper will focus on full ownership rights in intangible property, which is termed intellectual property rights, and its contribution to the evolution of the economy. We will discuss the different forms of IPR and the protection provided to them in India so far for meeting the international standards set in the global market.

Theories related to the concept of property

The concept of property prevails in society from time immemorial. From time to time various thinkers like Grotius, Bentham, Locke, Hobbes and many more proposed their theory on the concept of property and rights related to it. We try to analyze them step by step in light of the present scenario.

As per the law of nature, there is no concept of ownership or possession, everything belongs to the divine. Humans were just using land and its resources to fulfill their survival needs. According to naturalist theory, law is divine prescription. Prominent Naturalist Thomas Hobbes

was a great supporter of absolute rule, the state of nature is one of war, “of every man, against every man”.

According to his beliefs, humans are by nature either fragile or wicked to manage them, and it was essential for a sovereign to be in command. In a natural state, nobody owns anything. The land is used and cultivated to meet up with his own needs. There is no concept of entitlement or ownership. One can hold onto any land till the time it is captured by some more powerful human. In such a situation of uncertainty, any kind of development is impossible. Such a situation of confusion becomes the inspiration for building up an organized society headed by a sovereign. This head/ monarch will be responsible for the protection of the interests of all. For the protection of everyone’s interest head can make rules and regulations by which everyone must abide.¹ Grotius also holds similar views, according to him all things originally were without an owner and whosoever captured them or occupied them, became their owners.

Initially, this theory may sound good but it has one major issue it gives more power to a stronger ruler than relying on justice and equity. It promotes the concept of ‘might is right’

John Locke is credited with taking naturalist theory to another level by including personal property rights. As per Lockean theory of property, "Every man has a property in his person, he has the right to preserve his property, that is, his life, liberty, and estate."

Majorly during the 19th and 20th centuries this theory by Locke was considered as a foundation stone of classical liberalism. His plan to plant property rights in the natural law was considered a crucial tool for declaring the rights of people against the state. It restricts the moral authority control of the state on the outcome of individual human hard work. Locke’s argument was implicitly based on the assumption of private property rights. Locke’s individualist, private property standpoint wasn’t treasured ad infinitum, but it has its flaws. The reason was that critics considered him a liberal thinker, demanding to establish the private rights to the property against the state. Ironically, European powers used the Lockean reasoning to assume the land and property of other countries.² On the pretext of development and efficient usage of property European powers kept on capturing territories and properties of other races. History has shown

¹ Concept of property rights, ACADEMIKE (2019), available at <https://www.lawctopus.com/academike/concept-property-rights/> (last visited Jan 27, 2022).

² John Locke, *Second Treatise on Government* (Dover, 1965).

us from time to time the need for well-defined laws to restrict the unwarranted desires of the human race.

When the question of justifying IPR as a property arises, natural law thinkers believe that each person has a natural property right to his ideas. As per this theory natural and intellectual property are the same thing. They both come up with similar rights like exclusivity and monetary benefits from property. As intellectual property is the result of the mental efforts and creativity of the inventor it may sometimes be of much higher value than physical property. Accordingly, infringement of IPR is considered not just as a theft but as a serious infringement.

Nevertheless, this theory lacks uniformity, it claims that intellectual properties are not natural things but believes that every right emanates from nature only. Undeniably, we can exploit them by the involvement of the government only. Moreover, this theory remains incomplete because “he didn’t mention the amount of endeavor needed to justify something as own property and duration of such ownership.

Indeed, every new invention is based on some kind of previously dysfunctional ideas and takes help from other material resources and not just the outcome of mental hard work.³ All in all, it considers intellectual property as property in itself but fails to provide a proper framework for it.

The Utilitarian Theory

The concept of Utilitarian Philosophy was developed by Jeremy Bentham according to him “it is the greatest happiness of the greatest number that is the measure of right and wrong.”

Bentham was of the view that before taking any action one must consider its consequences. If the consequential effect brings good to the larger number of masses that is a determining factor for rightness in society otherwise it is wrong.

As per this philosophy Industrial progress is good for society as it brings benefits to larger masses. Indeed industrial growth is not just based on raw materials and men's power. It needs intellect to run and to come up with larger benefits for all. Therefore to promote research and development inventors must be guaranteed with superior cost. Another theory that favors the

³ W. Dibble, *Justifying Intellectual Property*, 1 UCL Juris. Rev. 74, 74-76 (1994).

role of IPR in industries is ‘incentive theory’ which is a kind of extension of utilitarianism. Incentive theory majorly came to prevalence in the 1940s and 1950s based on the work of earlier psychologists like B.F. Skinner and Clark Hull. As per this theory if two humans are given the same task in the same circumstances their result will largely depend upon the incentive they getting in return for their work. Reward in return for hard work is the driving force for the continuance of labor and yearning to achieve the final goal. IPR granted by the states are application of this theory in the corporate world.

However, this hypothesis also has some drawbacks it fails to acknowledge the right arising out of the contract and it is unable to accurately measure gains and losses to society.

Nevertheless, the theories we have studied so far have valued IPR as a valuable asset to the economy. All schools in one way or another have acknowledged the importance of the labor of the inventor or creator. The right of inventors to their creations must be appreciated in monetary terms by protecting them through IPR.

Definition of property in the contemporary world

In the present scenario definition of any kind of property whether tangible or intangible is given in law in one or another way. This was done to bring uniformity and understanding to the concept of property. Various Acts defined property in different ways depending upon the purpose they are serving. For example, TPA⁴ while defining “immovable property” tells only about the things that cannot be termed as immovable property like ‘growing crops, grass and standing timber’.

Similarly, Acts made for benami properties⁵ include all kinds of rights and interests attached to property while defining property. Irrespective of whether movable or immovable property is tangible or not, the definition of property includes everything attached to the property.

SOGA⁶, a separate law is made to regulate sales and purchase of movable property. It defines property in the broader spectrum as a property in the form of merchandise.

⁴ Transfer of Property Act, §3, No.4 of 1882 (India).

⁵ Benami Transaction (Prohibition) Act, § 2(c), No.45 of 1988 (India).

⁶ The Sales of Goods Act, § 2(11), No.3 of 1930 (India).

Similarly, intellectual property is also defined by different authorities on international platforms. Though it is a debatable concept but still widely agreed to the same meaning. WIPO⁷ is an international organization dedicated to intellectual property rights and protection all over the world. While describing IP it includes all types of the creative outcome of intelligence, either in the form of some art or some industrial innovation. These intellects are protected and promoted through various IPRs (trademarks, copyrights, patents, etc).

One of the biggest organizations for regulating trade activities in the world is WTO⁸ (WTO) also recognizes and defines IPR as rights given to the inventor or creator for his intellectual creations. These rights are a kind of exclusivity rights for a certain period.

Even though different states have different Acts and definitions to describe intellectual property but main content and intention remain the same.

Property and economics:

The relationship between property and economics is straightforward as well as significant. When property is used efficiently it will generate more revenues ultimately contributing to the economy of that society. It has other ancillary benefits too like better living standards and human progress. These factors also contribute to the growth of an economy. This whole formulation of property and economy and their relation depends upon unbiased and accessible property rights. In our previous discussion, we have seen how property has evolved from man's land to private property. This evolution has added a lot more value to the property.

For example, we see the property rights of the people of the USA back in the 19th century. At that time people have rights only over the land surface, minerals under the subsurface belongs to the government irrespective of ownership. By the change of the next century ownership laws also extended to include land as well as under surface resources. Later on, more rights are given to private ownership holders. But to meet the greater good of society certain restrictions were also placed on owners, like they have to maintain natural flora and fauna on their property, and they cannot use their property for any illegal act or hazardous activities. These restrictions are equally applicable to all owners without any biases. The result of such practice can be seen today in the contemporary United States of America. People are happier and property there is

⁷ World Intellectual Property Organization.

⁸ World Trade Organization.

well-utilized, the reason being that negative restrictions imposed by the government on them are the same for all of them. So that brings satisfaction level to humans. Initial negative restrictions put by the government, ultimately resulting in to positive growth of society.

IPR and economic development:

Like property, IPR also plays a crucial role in the growth of any economy but the gravity will be different from country to country. Coca-Cola, KFC, Burger King, Nike, and Adidas are a few names that explain IPR's role in economic growth. IPR can play both positive and negative roles in the economy. For example, stringent laws can promote business with the country for security reasons on the other hand it can also hamper trade by crediting lesser profits to investors. Popular economist, Joseph Stiglitz, suggested that lack of resources is not the only reason for the difference of one economy from another major contributor is disparity in knowledge and comprehension. This factor divides the world into two zones of developed and developing nations.

IPR can help in achieving two major economic goals. The first one is that it can encourage research and development by using incentive theory and exclusivity. The reason is that in the absence of such protection, competitors can use the result of other's hard work without any fees and it will be discouraging to inventors. Secondly, IPR in harmonization with international standards helps in the spreading of knowledge. Even though it tends to raise the price very high at the same time makes things available to the world market to develop and explore further.

No doubt about one thing IPR can generate a positive economy when it aims to promote health competition in the market. There is no doubt about the fact that intellectual property is worth billions of dollars all over the world. Coca-Cola, Pepsi, Apple, Samsung, Mickey Mouse, Nike, and Harry Potter are some of the examples of the most successful business houses with the most valuable intellectual property.

Ill-defined property rights:

Any law aimed to bring order and uniformity in society. It gives the sense to people to understand wrong and right not only for them but also for the whole community. So laws should be made diligently with effectiveness.

Talking about awareness and responsibility in our daily routine, let's take the example of illegal encroachment by street vendors on roadside pavement. This property either belongs to the government or some citizen. We see such things sometimes get angry too but do nothing in this regard. Even the government knows it well; they engage themselves in cheap and unorganized ways to resolve such issues with no result. Such an indifferent attitude towards public property, even though it is well defined by law just imagines the situation of anything which is not defined by any law. Though it sounds very trivial matter if we see the bigger picture such incidents result in huge property damage. This is just one example, if such practice continues, in the long run, it results in a crippled economy. One major issue in that economy is of mismanagement of property. In the absence of a uniform and clear definition of IPRs chaotic situations of unaddressed legal dispute may arise. Indeed, in most such cases, intellectual property owes more value than tangible assets.

The TRIPS⁹ agreement can be termed as a lamp in the darkness. It provides to international community with a uniform standard definition and regulations for intellectual property. Before TRIPS international market is packed with many different standards for IPRs. This led to a situation of confusion. The TRIPS agreement is the first platform to bring harmonization and uniformity in intellectual property laws. TRIPS also acknowledged the needs of under-developed countries and created room for their existence in the international market. The aim was to provide evenhanded growth to all and dissemination of knowledge. Such expansion of the market and sense of security inspires more innovation and development¹⁰.

CONCLUSION

The above-mentioned definitions, philosophies, and justifications in favor or against intellectual property as a right or not, cannot deny the role and magnitude of intellectual property protection in any economy. It acts as a crucial factor in deciding the direction of any economy. A weak definition in law can harm economic progress. So any form of property either tangible or intangible is essentially well-defined. Being one of the signatories of the TRIPS agreement India has taken major steps in the direction of building stronger and healthier IPR

⁹ Agreement of Trade - Related Aspects of Intellectual Property Rights, 1995.

¹⁰ Prabhuda Ganguli, *Intellectual Property Rights Unleashing the Knowledge Economy*, 58 (Tata McGraw-Hill Publishing Company Limited, New Delhi, 2001).

laws and provides definitions, recognition, and protection to various kinds of IPRs in its municipal laws.

Starting with copyright protection, the legislation¹¹ was primarily made for the protection of musical work, literature, drama forms of art, recording of sound, music, and all forms of artistic work in India. Under this act registration certificate is provided to an author for his unique work and protection is provided during the lifetime of the artist and thereafter for the next 60 years. The original work of the author remains to be the author's work even without registration. This certificate just works as prime proof in case of any legal dispute.

Patent¹² laws in India primarily provide products and processes for invention and exclusive rights to the inventor to use them. Patent protection in India underwent various changes for so many times to meet the needs of the market both nationally and internationally. The Patent Act was amended in 1999, 2002, and 2005 to meet India's obligations under TRIPS. Later on in 2012, 2013, 2014, 2016, and 2018 patent rules in India were constantly under change for various reasons, like changes in fee structure, patent agent exam qualification, notification of patents on international platforms, and mode of communication between applicant and agent.

A patent is given to a new non-obvious inventive and commercially exploitable product or process. It is granted by a national government for a limited period of 20 years from the date of filing of a patent application (according to TRIPS standards).

In India, law relating to the protection and registration of trademarks for goods and services and from any fraudulent use of marks is made to meet international standards. This Act¹³ provides a shield to any word, sign, symbol graphic, etc, which provides distinctiveness to the product. Trademarks help customers to distinguish one product from other similar goods. It represents the company's reputation in the market, so very essential intellectual property is to be protected at the earliest. Examples of some successfully protected trademarks are Coca-Cola, Yellow Pages, and Louis Vuitton.

One more attempt to protect IPR in India came into force in May 2001 to protect industrial designs¹⁴. This Act provides a safeguard to the visual design of objects. Design can be defined

¹¹ The Copyright Act, No. 14 of 1957 (India).

¹² The Patents Act, No. 39 of 1970 (India).

¹³ The Trade Marks Act, No. 47 of 1999 (India).

¹⁴ The Design Act, No.16 of 2000 (India).

as any shape or special arrangements, pattern, color or line composition, or ornamentation applied to any article by any industrial process and due to such application, the final product becomes appealable or solely judged by eyes. Under this Act, registration can be granted for one class only but the applicant is free to apply under a different class. This Act is built on keeping in mind the international system.

To protect the authenticity and origin of products, which add specialty and distinct quality to the goods are termed as Geographical Indication¹⁵. The range of goods under this field varies from agricultural, and manufactured goods to naturally originating goods. Registration is given to such goods that are distinct, holding good quality and reputation from other similar goods mainly due to place of origin. This Act also plays an important role in the protection and promotion of goods of Indian origin in the international market.

Indian government also came up with new legislation in 2001¹⁶, to protect plant breeders, farmers, and plant varieties. The major motive behind this Act was to inspire farmers and plant breeders to do more research and development.

Other legislation made by the Indian parliament to protect the latest forms of intellectual property, i.e. Semiconductor Integrated Circuits¹⁷. The main object of this Act is to protect the field of semiconductor integrated circuits layouts and matters allied.

India en route to a strong and stable economy in the international market has come up with various forms of protection for different IPR. Most of the fields mentioned in the TRIPS agreement we have covered so far except a few like trade secrets, and traditional knowledge protection. Steps so far have proved very significant in the expansion of the Indian market and economic growth. Today India holds the position of one of the most promising economies to invest in the global market. With precise and uniform municipal law, we can surely become a developed nation. Nevertheless, being one of the fastest developing nations sooner or later we will be building laws and policies at par with other developed nations that already have much stronger and deeper laws protecting their IPR and property rights, like the USA and the European Union.

¹⁵The Geographical Indication of Goods (Registration and Protection) Act, No.48 of 1999 (India).

¹⁶ The Protection of Plant variety and farmers right Act, No.53 of 2001 (India).

¹⁷ The Semiconductor Integrated Circuits Layout-Design Act, No.37 of 2000 (India).