Law of Intellectual Property

INTELLECTUAL PROPERTY RIGHTS IN GENERAL

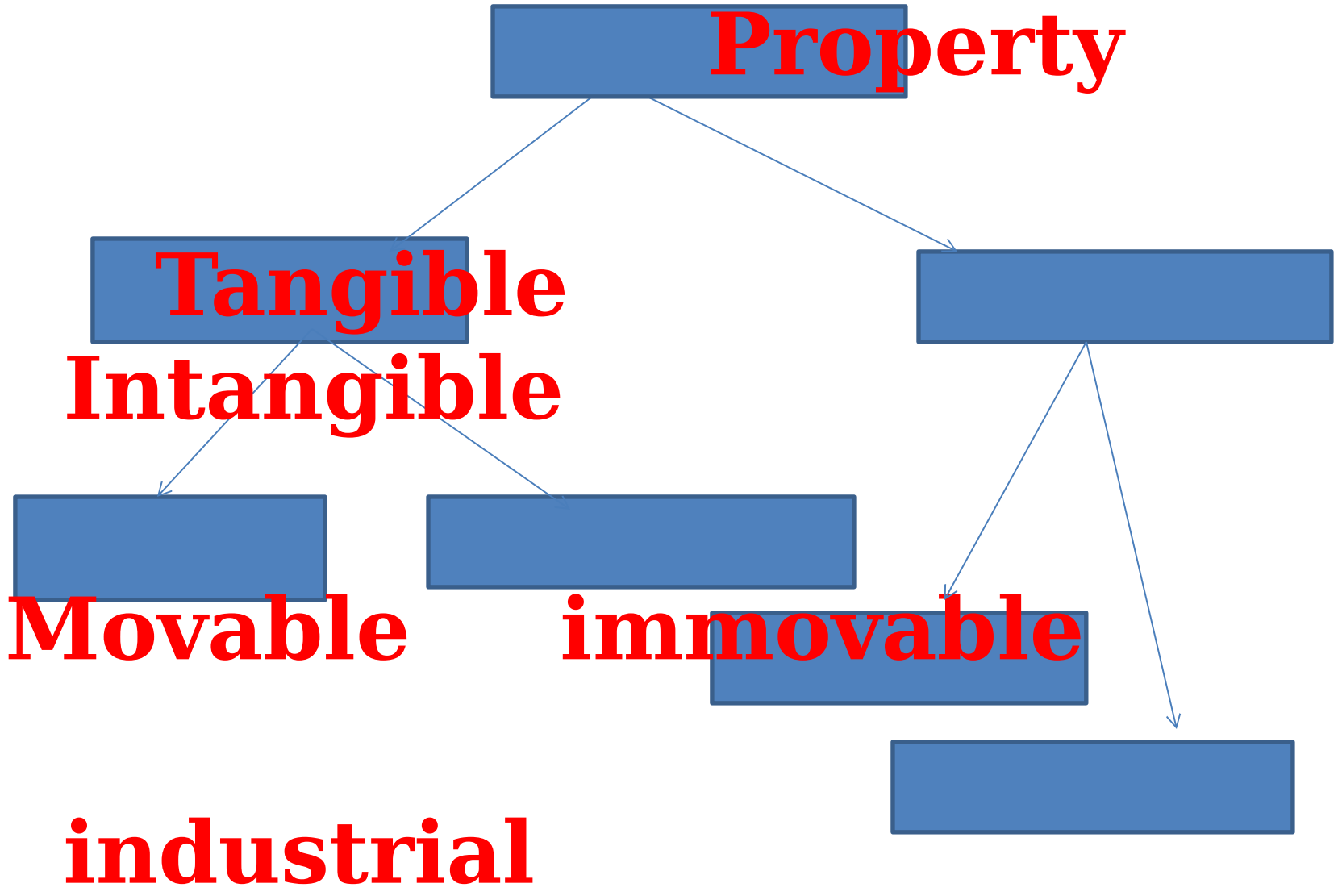
Introduction to Intellectual Property Rights

Definition and classification

- **Intellectual property** is an elusive concept to define.
- No authoritative definition exist
- Because

1. the conceptualization of IPRs has been influenced and shaped by different theories and legal traditions

2. Its concept has been continuously evolving and the purpose it serves has been changing progressively
3. With rapid technology and scientific development, its subject matter expanded to include computer program, data basis, plants , animals, cells and genes


Property
Tangible
Intangible
Movable
immovable
industrial

- It is known that intellectual property rights are property rights. On top of this, they are the domain of properties.
- *intellectual implies, this domain is composed of the fruits of human intellect. In view of the extent of the required magnitude of —intellectual labor instead of —physical labor in the production of*

- In its conception Intellectual property, very broadly, means the legal property which results from intellectual activity in the industrial, scientific and artistic fields.
- Intellectual property law is a branch of the law which protect some of the finer manifestations of human achievements.
- intellectual property law regulates the creation, use and exploitation of mental and creative labor.

- Intellectual property right is
  - i) can be treated as property
  - ii) to control particular use
  - iii) of for specific type of intangible assets
- IP is also a law which defines the property rights of owner of intangible assets

- Countries have laws to protect intellectual property for two main reasons.

1. to give statutory expression to the moral and economic rights of creators in their creations and such rights of the public in access to those creations.
2. to promote, as a deliberate act of government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development

Intellectual property as property protection

Similarities and differences b/n IP and TP

1. Similar Doctrine –they tries to reconcile private Vs public interest tension.
2. There are bundles of judicially protected interest
3. There is owner ship

Difference

IP

- Intangible
- Statutory origin
- Specific duration
- Considered as public goods
- The Goal is not conservation/ It is there for promotion

TP

- Tangible
- Common law origin
- Perpetual duration
- Considered as private goods
- Conservation –since resource is limited

IP

- Moral right – incorporation of other right than monitory interest
- The use or reproduction by one does not deprived other .

TP

- No moral right
- Use by one does deprived other

Classification of intellectual property

- There is a conventional mode of classification of intellectual property as industrial property and copyrights.
- In other word Conventionally IPRs are divided in to industrial property right and literary and artistic works

- Industrial properties include inventions (patent), property interest on minor invention (Utility model certificate) and commercial interests (trade marks, trade names, geographical indications, and industrial design), plant breeder rights, biodiversity, etc.
- literary and artistic works includes literary works (fiction and non fiction), artistic works, maps, drawings, photography and audio visual works.

Nature of Intellectual Property

- Intellectual properties have their own peculiar features.

1. Territorial

- Any intellectual property issued should be resolved by national laws. Why is it an issue? Because intellectual property rights have one characteristic which other national rights do not have. In ownership of intellectual property of immovable properties, issues of cross borders are not probable. But in intellectual properties, it is common. A film made in Hollywood can be seen in other countries. The market is not only the local one but also international. If a design in China is imitated by another person in France which law would be applicable?

2. Giving an exclusive right to the owner

- It means others, who are not owners, are prohibited from using the right. Most intellectual property rights cannot be implemented in practice as soon as the owner got exclusive rights. Most of them need to be tested by some public laws. The creator or author of an intellectual property enjoys rights inherent in his work to the exclusion of anybody else

3. Assignable

- Since they are rights, they can obviously be assigned (licensed). It is possible to put a dichotomy between intellectual property rights and the material object in which the work is embodied. Intellectual property can be bought, sold, or licensed or hired or attached.

4. Independence

- Different intellectual property rights subsist in the same kind of object. Most intellectual property rights are likely to be embodied in objects.

5. Subject to Public Policy

- They are vulnerable to the deep embodiment of public policy. Intellectual property attempts to preserve and find adequate reconciliation between two competing interests. On the one hand, the intellectual property rights holders require adequate remuneration and on the other hand, consumers try to consume works without much inconvenience. Is limitation unique for intellectual property?

6. Divisible (Fragmentation)

- Several persons may have legally protected interests evolved from a single original work without affecting the interest of other right holders on that same item. Because of the nature of indivisibility, intellectual property is an inexhaustible resource. This nature of intellectual property derives from intellectual property‘s territorial nature. For example, an inventor who registered his invention in Ethiopia can use the patent himself in Ethiopia and License it in Germany and assign it in France. Also, copyright is made up of different rights. Those rights may be divided into different persons: publishers, adaptors, translators, etc.

- **Theories of Intellectual Property (Justifications for Intellectual Property Protection)**

1 Natural Right theory: Labor Theory (Locke's Theory)

- Property right is a natural right. A person has a right to own the creation of his mind in the same manner he owns creation of his labor. When a person is deprived of what he has created he becomes.

- At the beginning, everything was common but by using labor /intellect/ it has become private. We need to protect somebody‘s labor because it is a natural right. So, it may take to conclude that intellectual property rights are natural rights.
- The problem is that natural right theory doesn‘t cope with the temporal limitation of intellectual property rights. It is true that temporal limitation is applicable to intellectual property. Intellectual property is most of the time limited in time as to the protection accorded by law. This theory may be justifiable for corporeal ownership in which its existence may be for indefinite period of time. In intellectual property, however, after lapse of a certain time the work will be part of the public domain

- Nothing can be called with greater prosperity man‘s property than the fruits of his labor. The property in any article or reason of his own mechanical labor is never denied him; the labor of his mind is no less worth of the protection of the law
- A person has a natural right to the fruits of his/her labor and that this should be recognized as her property, whether in tangible or intangible term.

2. Personality Theory

- Intellectual property rights are important to create personal self assertion. As propounded by Hegel, a person would be more self assertive when she/he owns property. He will feel more equal (equality). He will be freer. It is believed that the work is the personal expression of the author‘s or the inventor‘s thoughts.

- So he should be given the right to decide when and how his work may be produced or performed in public, and the right to prevent mutilations and changes. Intellectual property laws are to be there to protect the author‘s or the inventor‘s manifestation of his personality. This is also backed by the need for the safeguarding of the individual‘s freedom of expression

3. Utilitarian Theory

- What do Intellectual Property Rights do? They make the public good a private, a non rivalorous – rivalorous and the non-exclusive – exclusive, and the non-scarce scarce which are not scarce by nature.
- The laws create artificial scarcity of knowledge. This is because creators do not have the necessary incentive unless they have accorded some means to control their knowledge. Unless this is done, they lack the necessary economic incentive. This is called utilitarian theory of intellectual property.

- Utilitarian is institution socially beneficial. It states that we have intellectual property systems because it has the effect on the betterment /economic/ of the society. Its correctness is to be assessed in the economic success of the countries. So, it is more of an economic issue. We have witnessed tremendous technological advancements both in the science and the arts

- According to this theory, you do something because you will get something. Why should we care about creations of society? Society should care about its creators because the ultimate beneficiary is the society itself because they give solution to technical problems.
- Such theory has never been successful as we would expect them to be. There is an objection from economists. When intellectual property is given exclusive rights, according to them, it is a creation of a monopoly right. Monopoly is contradistinguished with a perfectly competitive market. If monopoly is unrestricted it will result in market crush. How does intellectual property right create monopoly? How do antitrust organizations fight monopoly?

- There are arguments counterfeiting this. Whenever the law gives an exclusive right to the innovator, the right holder is not enabled to control the problem. There are so many ways of resolving a problem. That means there is no intellectual property law which prohibits other innovators from innovating a solution to the same problem. This is not sound in copyrights since they protect expression of ideas .

- Patent for a drug for a certain illness does not prohibit innovating another drug for the same illness. However, each monopolizes their right until another comes. So, the monopolistic nature is undeniable. That is why governments try to control such monopolization.
- There is a counter argument to this, i.e., if we end up in giving different solutions to the same problem, it will result in economic waste since there are different problems which we have to give solutions to.

- The other version of utilitarian theory is incentive (bargain) theory. The protection given to intellectual property is an incentive to individuals not only to create works of the mind but also to publicize and disseminate them into the public. It is to encourage creativity and publicity. Works of the mind are very important to a given society for its social, cultural and economic

- Through literature development, the cultural orientation of a given country will be promoted. Invention promotes industrialization. Development of the west has to do much with intellectual creativity.
- Those works require investment in terms of time, money and effort. So without protection people will not invest on them. They are no less investment demanding than corporeal thing and the protection of the law is needed.

- In addition, creativity by itself is not adequate. If the work of a mind is not made available to the public, that is not useful. With protection publicity will be encouraged thereby enabling their publicity and serve their intended purpose.
- Upon the expiry of their period of protection the public will start to use the properties. When right is protected then the creator will make his work to be known. Without protection people may not make their works known. The state is bargaining with individuals.

- The other question is: does the theory really work? Numerous assertions are made. There are factors other than intellectual property rights which stimulate innovation.
- Before the existence of intellectual property rights there were innovations. Some say, even great works of the mind are created without the existence of protection. As an example, we can take Shakespeare‘s writings. What incentives encouraged these people? What they are saying is there are born creators, who continue creating even without protection. People create for different reasons: to satisfy their natural urge, necessity, fame… Some writers say copyright is unnecessary restriction on the public favor of the author. For them, when there is shortage, a better system is needed and creativity follows even without legal protection.

- However, the critics must be seen seriously in light of the world‘s development. In older days, people may write books because violation itself is very difficult, there were no printing machines, no mechanism of dissemination, no recording machines for reproduction and distribution.
- In history, works of the literature were even limited to certain groups, elites of the church. These days, however, the situation the changed. The critics on incentive theory will not work firmly today.

Objections to incentive and reward theory may be summarized as:

- The need to pay the rights owner a royalty or fee may increase the price of the product or service to which intellectual property right relates. It can be seen as a kind of tax on knowledge and information.
- Even if consumers are prepared to pay the prices charged by the right owners, the latter may not meet the demands of the public in sufficient quantities. This will lead to compulsory license.

- The grant of rights has little positive effect in promoting investment that is required for the production of new inventions, technical innovation, literary and artistic productions and the like.
- Whilst no monopolies in the strict sense are applied by economists, intellectual property rights have the potential to be used to anti-competitive effect, particularly where they are pooled together or used as a lever to obtain other ends.

- Intellectual property rights can be used to suppress free speech and access to information.