> Property means the highest right a man can have to anything, being that right which one has to land or tenements, goods or chattels which does not depend on another's courtesy:
>
> It includes ownership, estates and interests in corporeal things, and also rights such as trademarks, copyrights, patents and even rights in personam capable of transfer or transmission, such as debts; and signifies a beneficial right to or a thing considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured.[2]

2. Meaning and Range of Intellectual Property

IP is an intangible property right exercisable and asserted in respect of a material or tangible work. For example, S. 14 of the Copyright Act, 1957 defines copyright as an exclusive right to make a copy, and an adaptation and exercise of other rights, with reference to tangible works, for example, literary, dramatic, musical, artistic works, cinematographic films and sound recording.

A World Intellectual Property Organization (WIPO) publication explained:[3]

> The history of the human race is a history of the application of imagination, or innovation and creativity, to an existing base of knowledge in order to solve problems. Imagination feeds progress in the arts as well as science. Intellectual property (IP) is the term that describes the ideas, inventions, technologies, artworks, music and literature, that are intangible when first created, but become valuable in tangible form as products. Suffice it to say that IP is the commercial application of imaginative thought to solving technical or artistic challenge. It is not the product itself, but the special idea behind it, the way the idea is expressed, and the distinctive way it is named and described. The word "property" is used to describe this value, because the term applies only to inventions, works and names for which a person or group of persons claim ownership. Ownership is important because experience has shown that potential economic gain provides a powerful incentive to innovate.

The legal label of an intangible property changes when it is not considered independently on its own. For example, when computer software, admittedly an intangible property, is incorporated in a media, the Supreme Court has held that, for the purpose of the tax on sale of goods,

2. *R.C. Cooper* v. *UOI*, (1970) SC 564, 591, para 40.
3. Intellectual Property: A Power Tool for Economic Growth (WIPO Publication No. 888) pp. 10–11. This is reproduced from 'The Enforcement of Intellectual Property Rights' pp. 14–15 (A casebook 3rd Edition 2012, prepared by Justice Louis Harms, Supreme Court of Appeal, South Africa).

the software and the media cannot be split up. Therefore, they are considered as one entity and labeled as 'goods' for the purpose of sales tax on goods.[4]

The term IP was used as a specific legal term in mid-nineteenth century. Random House Webster's Unabridged Dictionary contains this defined entry under 'Intellectual Property':

> Law. Property that results from original creative thought as patents, copyrights material and trademarks.[5]

Concerning artistic, literary and musical works, the Supreme Court has observed that they are the brainchild of the authors, the fruits of their labour and therefore considered to be their property.[6]

The IP law relates to and effectively recognizes rights flowing from intellectual activity in industrial, scientific, commercial, literary and artistic fields. It is an internationally known legal concept. This law (a) grants protective rights to intellectual activity in the industrial commercial, scientific, literary and artistic fields, (b) regulates those rights and (c) provides remedies and reliefs for enforcement of those rights. It gives legal imprimatur to the inherent rights of the intellectual creators.

IP is a handy shorthand phrase, a catch-all term that seeks to bring within its umbrella of legal protection several disparate legal systems having little in common. They address different problems and issues but have common economic significance and are concerned with some creative element however minimal though not trivial and have need for legal protection of their intangible rights.

John Salmond, in his eminent work on jurisprudence, first edition (1902), said:

> In modern law every man owns that which he creates. The immaterial product of a man's brains may be as valuable as his land or his goods. The law therefore, gives him a proprietary right in it, and the unauthorized use of it by the other persons is a violation of his ownership. Salmond then enumerates some traditional intellectual properties, patents, copyrights, trademarks and trade names.

WIPO, a United Nations agency, was set up in 1967. The Convention which founded WIPO has defined IP as including rights relating to literary, artistic and scientific works; performances of performing artists, phonograms, and broadcasts; invention in all fields of human endeavour, scientific discoveries, industrial designs, trademarks, service marks and commercial names and designations; protection against unfair competition

4. *Tata Consultancy Services* v. *State of A.P.*, 2005 (1) SCC 308, 329.
5. Second Edition, p. 990.
6. *Gramophone Co.* v. *Birendra Bhadur Pandey*, AIR (1984) SC 667, 676.

and all other rights resulting from intellectual activity in industrial, scientific, literary or artistic fields.[7]

Earlier, the protection of the law was granted to such fields as they were used in industrial/business activities. Those activities being industrial property, the term 'law of industrial property' was used. Later to emphasize the mental labour required to be applied, particularly in regard to patents, designs and copyright, the term 'the law of intellectual property' was coined.

There are different forms of law as per varying kinds of IP. The Indian statutory laws on this subject are The Trade Marks Act, 1999; The Copyright Act, 1955; The Patents Act, 1957; The Designs Act, 2002 and the Geographical Indications of Goods Act, 1999. The common law and the rules of equity govern the topics of passing off and confidential information. The statutory scope is still expanding, for example, the Biological Diversity Act, 2002.

As society, technology and business practices progress and develop so do the boundaries of the law of IP. These laws however varying are united by some common threads in basic aspects. All of them recognize and emphasize intangible rights. Examples are the originality and novelty in the patents, the distinctiveness and the distinguishing nature of signs in trademarks, a person's reputation and goodwill in passing off and originality of expression and presentation in copyright works. Another common aspect is that in respect of every IP, the rights defined and regulated by various laws are conferred exclusively on the owner of the rights and every owner of IP may take an action against the infringer in civil and criminal courts. These rights are assignable and heritable. The owners may grant licenses.

IP Rights are intangible rights, though they are in respect of tangible objects. These rights accruing from tangible products are not the same rights as intangible objects. There is a distinction between property rights in respect of the ownership of the tangible article and the rights of intangible nature therein. of a book has a right to own and hold on to the possession of the purchased copy. The buyer can take action against a person who takes it away from him without his permission. An author of a book has several intangible rights, such as to make as many copies as he pleases, adapt it, translate it and other rights. These rights obviously do not belong to the buyer of a copy of his book.

IP rights are legally recognized in a wide range of objects because technology and science become targets of extensive and intensive intellectual exploitation as time marches on. From the conservative objects, namely patent, copyright, trademarks and design understood in a general sense, the law now protects, to name only some,

7. Art 2 (VIII).

computer programmes, genetically modified animals and plants, websites and domain names.

There are two broad categories of IP assets. One is commercial based and the other is product based. Commercial-based IP covers trademarks, trade names, brands, geographical indications. They have no independent existence apart from the product or service in connection with which they are used. They are not products themselves. The second category covers patents, copyrights and designs. They are commercially treated as they are, as they constitute products themselves. Of course, that does not mean that they are tangible properties. Rights in them belonging to the owner described as intangible rights constitute IP.

In *Asahi Kanei* v. *Kogyo*,[8] a patent case, Lord Oliver expressed the underlying purpose of the law as encouraging improvements and innovations by conferring the benefit of a monopoly for a defined period on the inventor so that his invention is known to the public as his invention entirely. Another equally stimulating purpose is that the companies would be willing to take the risk and expand much money and efforts in the development of scientific and technical research.

One of the reasons for the tremendous and rapid advance in industrial power in the United States from the nineteenth century was the liberal patent laws, which gave the maximum incentive to human ingenuity. The number of registered patents had passed the million mark by 1911.[9] As estimated in 2004, the United States of America and the European Union hold 97 per cent of all patents worldwide and multinational corporations account for 90 per cent of all products and technology patents.[10]

Adam Smith in his work 'The Wealth of Nations' expressed the idea of non-working people living on the sweat of others in 1776: "The landlords, like all other men, love to reap where they never sowed."

The main thrust of the entire field of IP law is that a third party is not permitted to make a harvest for what he has not sowed.

IP law protects the result of human creative endeavours. The creative owners are granted legal protection from those who would otherwise make illegitimate use of their creations. It also seeks to preserve the indigenous national and international culture and technological knowledge. For example, an invention which is traditional knowledge is deemed not to be an invention.[11] The claims of indigenous people in

8. (1991) RPC 485, 523 (HL).
9. A History of the American People by Paul Johnson, p. 531.
10. The Hindu Business Line (A Tamil Nadu economic and business newspaper issue of December 10, 2004, p. 9; see the article titled 'issue patently questionable', contribute by K.P Prabhakaran, a former National Science Foundation Professor, Royal Society, Belgium.
11. S. 3 (P) Patent Act, 1970.

India or elsewhere over their knowledge are also specifically protected under the patent law.[12]

There are also provisions for compulsory licenses in the IP legislation in various countries for mitigating hardship, which an IP owner may create by unjustly, or unfairly refusing to give reasonable access to it to those who may desire to use it. For ordering grant of compulsory licenses, a copyright owner, for example, would be given a price determined by the independent authority set up under the Copyright Act. It is also authorized to impose such terms and conditions as it deems proper in individual cases.[13]

Similarly, there are provisions in the patent law for grant of compulsory licenses by the Controller of Patents on terms and conditions to be settled by him in certain situations.[14] Moreover, there are statutory restrictive conditions imposed on the patentee with regard to contracts and licenses which he may transact with a third party.[15]

Public interest is also served by several permitted actions described as 'act not to be considered as infringement of copyright'.[16]

A recent decision of the Supreme Court gave a good example of an intangible right. A Stock broker's card enabling him to act as a broker is a commercial or business right in the nature of an intangible nature.[17]

IP has evolved from being useful for industrial and commercial use of industrialists to reaching out to the common men through computer programmes, websites and domain names.

3. Intellectual Property, an Intangible Right, is a Complete Asset by Itself

Illustration

The owner of a trademark granted an exclusive license to another to use his trademark. Thereafter, in his income tax returns, he claimed depreciation in respect of the said trademark. This was disallowed by the Commissioner of Income Tax.

A's challenge to the said disallowance failed in the New Zealand Court and also in the Privy Council. It was held that when the owner of a trademark grants an exclusive license to use the trademark to another, he no longer has any right in the trademark during the currency of license.

P.C. said "To say that a trademark proprietor who has granted a licensee the exclusive right to use the trademark, is nevertheless during

12. S. 24(I) (K) Patent Act, 1970.
13. S. 30 to 32B Copyright Act, 1957.
14. For Indian enactment, see sections 89 to 94 of the Patent Act, 1970.
15. S. 140, Patent Act, 1970.
16. S. 52, such a provision with some variation in language and content is common in similar statues of other countries.
17. *Techno Shares* v. *ITO*, (2010) 327 ITR 323 (SC).

the currency of the licence the owner of the right to use the trademark seems to their Lordships to offend common sense."

The reason was that the right which the owner of the trademark had was only an intangible right to use the trademark, and which was given away to the exclusive licensee. There was no other right to property concerning trademark, which remained with the owner of the trademark.[18]

4. Evolution of the Law of Intellectual Property

International Conventions and Treaties, national statutes and judicial expositions have evolved the law of IP in all areas. In some areas like confidentiality, they evolved through common law in the first instance and continue to do so.

In olden days, the statute law was barren or scanty and the common law aided the development of the law in some areas. Although the principles of common law were applied to various problems and situations, it did not fulfill satisfactorily the requirements of the creative society.

As common law and scanty statute law needed an impetus for fulfilling the needs of the creators of IP, various nations met to resolve their problems at several conventions. To give effect to conventions and treaties, the participating countries passed the required pieces of legislation. The concept of IP as a resource for knowledge-based industry was recognized all over the world. Particularly World Trade Organization (WTO) has enabled an important Trade agreement to come into being namely, Trade Related Aspects of Intellectual Property Rights Treaty (TRIPS).

In *Griggs Group* v. *Evans*,[19] while considering whether the comity of nations would be adversely affected if the English Courts made an order regarding a foreign IP, the court opined: "The question resolves itself into discovering what is internationally acceptable. What have not been acceptable in 1908, they may be so in 2008. And a helpful source to go to, absent an actual decision of the courts, which can be recognized as still applicable today is the usage of nations as evidenced by widely respected Conventions or treaties."[20]

The conventions have proceeded very largely on twin principles. One called 'national treatment' basis means that the persons entitled to the benefits of the convention are treated in each country in a manner another country treats its own nationals. No discrimination is permissible between foreigners and nationals. Foreigners will have all privileges, benefits, rights and protection available to nationals, subject to complying with limitations, conditions and formalities applicable to the nationals. This

18. *Trustees in C.B Sirnken Trust* v. *CIR*, NC, (2011) FSR 409, 415 (PC).
19. (2004) FSR 939.
20. Ibid., p. 964.