



INTERFACE BETWEEN PROPERTY LAW AND INTELLECTUAL PROPERTY LAW

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ABSTRACT

The laws governing both property and intellectual property work together to protect the property interests of people in the society. The approach of the two might vary but the ultimate objectives are similar. The aim of this research is to identify the ballast i.e. connecting link between the two parallel rails on a railway track. Property law and IPR law are the two rails, governing two different sets of property and transactions, but headed in the same direction to achieve the same goal.

Introduction:

The universe of property law is vast. There exist plenty of legislations to govern different sets of properties as it is impossible as well as impractical to draft one comprehensive legislation to govern all of them. The laws governing movable and immovable properties have now been in existence for quite a long period. They include Transfer of Property Act, 1882, Sales of Goods Act 1936 and others. Whereas, the development of laws on intellectual property is relatively recent with the growth in the knowledge economy. The importance knowledge has today can be adjudged from the fact that almost every nation has drafted

laws and brought structural changes to protect knowledge, creativity and innovations. There are several laws in India for the protection of intellectual property such as patents, copyrights, trademarks and many more.

Even though the legislations on intellectual property and traditional property are different, a plain reading of the laws would certainly show that the essence and the intent of both kinds of legislations are the same. After all, they all deal with 'properties' only. Below-mentioned are the few aspects where the ideologies of both the property and the intellectual property laws coincide.

Striving to achieve a balance between public interest and private interest:

Since the beginning of time, a lot of human sentiments have been attached to the issue of property. It is natural human tendency to be protective about one's own property and wishing it to stay within the family for generations as it is seen as a matter of pride and status. However, if such wishes are granted and the property becomes inalienable, it would act as a detriment to property and the market. Furthermore, it would be against the interest of the community. Therefore, certain situations warrant that the property should be let free and enter the public domain.

The Transfer of Property Act, 1882 and the IP laws in India seek to achieve a balance between the wider public interest and private interest by limiting the ownership of the property for a certain period of time. This policy of the law exists to prevent property from being tied up forever.¹ After a certain

¹ S. N. SHUKLA, THE TRANSFER OF PROPERTY ACT, P. 59 (25th Ed. 2005).



period of time, long or short, the property falls into the market and the public arena. The public may have access to it, or be able to purchase it, and even recreate it. The nature of the property will determine what would happen to the property next.

As regards property law in India, there exists Rule Against Perpetuity stipulated under section 14 of the TPA. It is based on the general principle that the liberty or right of the owner of the property to alienate or transfer his property at his pleasure, should not be so exercised that it is detrimental to the property itself.² The objective of this section is to encourage free circulation of property in the market. Perpetuity has been said to be odious in law, destructive to the common wealth, and an impediment to commerce, by preventing the wholesome circulation of property.³ The section restrains the creation of future conditional interests in the property. It restricts the owner from creating unknown life interests and operates on account of public policy. Therefore, this rule balances human psychology and law; it balances between individual and community interest. It prevents the property from being blocked with one family till the end of time.

As regards copyright, the general rule is that a copyright will last for 60 years. In the case of original literary, dramatic, musical and artistic works, the 60-year period is counted from the year following the death of the author. For instance, all films in India made until 1959 have lost the protection provided by copyright and are now in the public domain. There is a high likelihood of a lot of

big shot Bollywood movies getting remade. Part II may become a permanent suffix to a lot of upcoming movies. The law has been challenged by many artists to increase the duration of copyright protection. But whether the law will be amended or not is a question that is yet to be answered by the courts.

This termination of copyright can be construed as a rule against perpetuity in the field of Intellectual Property laws. The rationale behind the termination is to be able to revisit, adapt, and rewrite those works. It allows one to explore and examine those works in ways that criticism alone cannot. The original author gets his due recognition and revenue and her/his heirs are also benefited for a certain time period after his death. Life immortality of a human is a curse, likewise, immortality of the benefits of a creation is against public policy. Thus, this rule is enunciated for the protection of interests of the public and particularly those who want to explore the work in depth.

Eminent Domain: Property Acquisition by State

Plenty of provisions in both the property and IPR laws are incorporated to forbid fetters on the freedom of ownership. Ownership is not just defined as a single right but as a big basket containing numerous other rights and interests. The term 'ownership' is only an umbrella term. The other rights within it include right to enjoy the property as per ones likes and dislikes, right to alienate the property and many more. If one does not enjoy these securities, the essence of ownership will be undermined. However, there are certain exceptional situations where

² POONAM PRADHAN SAXENA, PROPERTY LAW, P. 134 (3rd Ed. 2017).

³ D. J. VAKIL, COMMENTARIES ON THE TRANSFER OF PROPERTY ACT, P. 240 (2nd Ed. 2004).



an owner of a property may be deprived of these rights. It happens in those situations where the interest of the public weighs more on the scale than the interest of the individual. Here the government plays the role of the 'Taker'. Acquisition by State can take place in case of both tangible and intangible properties.

The rationale behind this is that the State, i.e. the chosen government in power is the primary proprietor of land. The concept of eminent domain plays an important role in the Indian property law arena. The propriety right in the previous era was seen to exist with the kings and now, in a democracy, is viewed to be with the government. Even though the property is taken up by private individuals, the government's primary power prevails in certain exceptional situations and for the benefit of the community at large.

This policy is founded on two maxims namely:

- "*salus populi supreme lex esto*" i.e. the well-being of the people is the supreme law.
- "*necessita public major estquan*" i.e. public need is greater than the private need.

These maxims pave their way in both the property and intellectual property:

Patents Act, 1970 provides for the acquisition of inventions and patents by the Central Government. If the Central Government is satisfied that an invention should be acquired from the patentee for a public purpose, it will publish a notification in the Official Gazette, and thereupon the invention or patent and all

rights would stand transferred to the Central Government.⁴ The patentee in such a case, shall be paid compensation. The compensation must be agreed upon between the parties. If no such agreement is arrived at, the compensation will be determined by the High Court on a reference made to it.⁵ This usually takes place when patented invention is not available to public at a reasonably affordable price or the reasonable requirements of the public have not been satisfied.

The other option available to the government is Compulsory Licensing provided u/s 84 of the Act. Under compulsory license, the government permits some other party to produce the patented product or process without the consent of the patent owner. It is a contract between an unwilling seller and a willing buyer that is enforced by the government.

In the case *Natco Pharma Ltd., India vs Bayer Corporation, USA*,⁶ the then Controller of Patents issued the order of grant of first compulsory license for patents in India. It was issued to Natco Pharma Ltd. The patent had been granted and belonged to M/S Bayer Corporation. This patent related to the drug Sorafenib Tosylate which was sold under the brand name *Nexavar* by Bayer Corporation. *Nexavar* is used for the treatment of kidney cancer and liver cancer. After getting this compulsory license Natco Pharma Ltd. is now free to manufacture and sell a generic version of *Nexavar* in treatment of cancer. Certain amount of Royalty is to be paid to Bayer Corporation for the net sales.

⁴ Section 102, Patents Act, 1970.

⁵ M.K. BHANDARI, LAW RELATING TO IPR, p.111 (2nd Ed. 2010).

⁶ *Natco Pharma Ltd., India v. Bayer Corporation, USA*. C.L.A No. 1 of 2011. March 9, 2012.



This decision by the Controller was found on consideration of the reasonable requirements of the public with respect to the patented invention. Prior to this landmark judgement, only 2% of total kidney and liver cancer patients were able to access the Bayer's drug. Moreover, it was not available to the public at a reasonably affordable price because Bayer was charging about Rs 2.8 lakhs for a therapy of one month of the drug. Non-availability of the drug in India was costing a fortune because of the high price of the imported drug. Therefore, in the light of these circumstances, the need for granting of a compulsory licence was indispensable.

On the other hand, land and property acquisition in India is governed by the Land Acquisition Act, 2013.⁷ Land acquisition in India has been defined as the process by which the union or a state government obtains private land for the industrialisation drive, development of infrastructural amenities or urbanisation of the secluded land. The power of eminent domain allows the government to take private land for public purposes only if the government provides fair compensation to the property owner. An interesting provision in the Act is Section 30 which provides for award of solatium i.e. compensation for emotional harm caused and the manner of determination of solatium is also provided under the First Schedule of the Act. The underlying principle within it is that land is considered more valuable than money as it lasts forever.

In case the acquisition is for a government project, the consent of the affected parties is not required. Although the position regarding

consent is different for private projects. Since, right to property is not a Fundamental Right under the Constitution, the concerned individuals have to concede to the government but only after the government fulfils certain criterias.

Article 300-A of the Constitution provides that "No person shall be deprived of his property save by authority of law". Hence, the rights to property can be shortened, abridged or altered by the State only by properly exercising its legislative power and decision-making where public requirement overrides the interest of individual right.⁸ In addition to that, to say valid it must please the

following three tests:

- (i) The authority which has passed the law must have the legislative capability to do so;
- (ii) It must not invade upon any other fundamental right under part III of the Constitution; and
- (iii) It must not violate any other provision of the Constitution.⁹

Transferability: Property and Intellectual Property

It is a general principle that almost all kinds of property are transferable. If one is an owner of a property, he/she/other always has an indispensable right to transfer the ownership of that property. Transferability is a necessary attribute of property and ownership. It is an implied right to be able to transfer. Not only ownership but other rights regarding the property can also be transferred without necessarily passing of the ownership. The medium of transfer includes sale, gift,

⁷ Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

⁸ State of Mysore v. K.C. Adiga, AIR 1976 SC 853.

⁹ Jalan Trading Co. Ltd. v. Mill Mazdoor Sabha, AIR 1967 SC 691.



exchange and others. The pre-requisite is that the property must be in existence at the date of the transfer¹⁰ and that the transferor should either be the owner or someone authorized to transfer the property.

Transfer of Property Act, Sale of goods Act, 1936 and other laws pertaining to corporeal property authorize the same. The position on transferability of incorporeal property is somewhat similar. Just like any other property, the intellectual property is also capable of being assigned, gifted, sold and licensed. For instance, a patent or a copyright in the law is a property right hence it is capable of being transferred. It can be done via grant of licence or through assignment.

As regards voluntary licensing, a similarity can drawn with the concept of lease. By way of a license, the patent holder can permit others to make, use, or exercise, the invention which otherwise would not be permitted. This is done by way of a written agreement and neither Indian patent office nor the government has any role in the grant of such license. The bundle of rights transferred in such a case may be limited as to time, geographical area, or field of use. Similarly, in case of a lease¹¹, the bundle of rights is transferred by the lessor to the lessee for a stipulated period of time. A lease has been defined as a transaction with respect to immovable property and creates a right to enjoy such a property for certain time and for consideration of the conditions mentioned in it. It is only a partial transfer where the right to use and enjoy the possession of a property is transferred in favour of the lessee. Both patent licence and lease are not for an

indefinite period. The possession of both is capable of being retained by the owner.

On the other hand, a similarity can be drawn between Assignment under the Patents Act, 1970 and the provisions of Gift provided under the TPA, 1882. In the former, all or part of the patentee's rights, title and interest in a patent can be passed via assignment. In the latter, all or part of the donor's rights, title and interest in a property can be passed by way of a gift. The transfer can be made for any movable or immovable property that is capable of being transferred. In both the situations, i.e. assignment or gift, the transfer may either be an absolute one or a partial one. The owner may or may not divest himself of all his rights. He may retain some as per his own discretion.

Crimes against property

The rights regarding property would be reduced to plain sentences if adequate protection is not provided to safeguard the property. Infringement of Intellectual property can take place in many forms. For instance, infringement of a registered geographical indication takes place when an unauthorized person exploits the rights bestowed on the registered proprietor of the geographical indications.¹² Similarly, other intellectual properties can also be infringed by way of unauthorized use, sale etc. Both criminal action and civil remedy can be availed in case of infringement of Intellectual Property. Similarly, regarding tangible property, both civil and criminal offences such as theft, breach of trust, trespass and others can be committed.

¹⁰ I. T. Commissioner Kanpur v. R. S. Gupta, AIR 1987 SC 785.

¹¹ Section 105, Transfer of Property Act, 1882.

¹² T.K. BANDYOPADHYAY, SAURABH BINDAL, INTELLECTUAL PROPERTY LAW, P. 137 (1st Ed. 2015).



Once a crime against property is committed, the Criminal Procedure Code plays the role of a queen on the chess board. The offences under the Trade Marks Act, 1999 and the Copyright Act, 1957, by virtue of the First Schedule table II of the Code of Criminal Procedure, 1973, are classified as cognizable offences. Thus, the offence under these acts can be investigated and inquired by the police¹³ by mere registration of a FIR without the adjudication by the Magistrate upon the issue. Many times, the identity of the manufacturers or the distributors of the infringing material is unknown to the complainant. Such a scenario might be construed to be a hindrance in the initiation of a criminal action. This problem is addressed u/s 93 and 94 of the Code by virtue of which one can request for initiation of a search and seizure proceedings against unknown persons. On the other hand, offences against property are made punishable under the IPC, 1860 and therefore pave their way within the CrPC, 1973.

Conclusion

While separated by many decades in terms of inception, laws governing property and intellectual property are amazingly similar in essence and goals. The origin of both is from the same grundnorm and therefore they are of the same nature. Moreover, both the laws synchronize with human psychology. They aim to strike a balance between the public and the private interest. This is achieved by providing the individual a platform to protect his property as well as his knowledge property. This protection of property provides incentives to people to create new properties as well as

accumulate them. It also leads to a desire to retain those properties. Sometimes, this retention is harmful to the needs and interests of the public. This is where the State comes into the picture. Where the public interest is being compromised, the State has power to acquire the property using its power of eminent domain for the larger interest of the society. So, the constant balancing of interests continues with judgements, one way or the other, being delivered from time to time leading to important shifts, and balancing and rebalancing exercises. It's a delicate interface, but a very important one as well.

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- (iii) Indian Penal Code, 1860.
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- (v) Patents Act, 1970.
- (vi) Sale of Goods Act, 1936.
- (vii) Trade Marks Act, 1999.
- (viii) Transfer of Property Act, 1882.

