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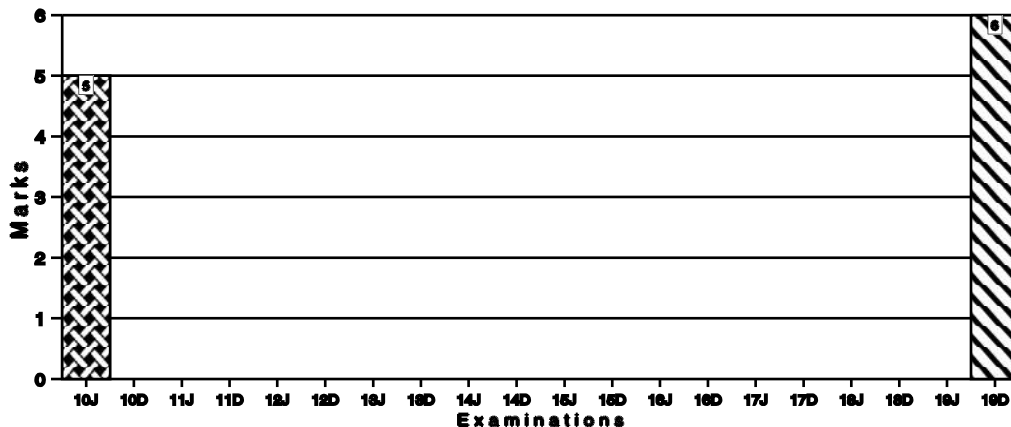
INTRODUCTION

THIS CHAPTER INCLUDES

- Concept of Property *vis-à-vis* Intellectual Property
- Concept of Property and Theories of Property – An Overview
- Theories of Intellectual Property Rights
- Meaning, Relevance, Business Impact, Protection of Intellectual Property
- Intellectual Property as an Instrument of Development
- Need for Protecting Intellectual Property – Policy Consideration – National and International Perspectives
- Competing Rationales for Protection of Intellectual Property Rights
- Intellectual Property Rights as Human Right
- Determining Financial Value of Intellectual Property Rights
- Negotiating Payments Terms in Intellectual Property Transaction
- Intellectual Property Rights in the Cyber World

Marks of Objective, Short Notes, Distinguish Between, Descriptive & Practical Questions

Legend



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DISTINGUISH BETWEEN

2010 - June [3] (a) Distinguish between the following:

(i) 'Intellectual property' and 'industrial property'.

(5 marks)

Answer :

There are three types of property :

- Movable property
- Immovable property
- See carefully
 - ⇒ The term 'intellectual property' is coined to indicate that kind of property which covers in it, creations of human mind and human intellect.
 - ⇒ It consists of valuable information which can be converted into tangible objects
 - ⇒ The two types/branches of intellectual property are –
- Copyright
- Industrial property
 - ⇒ Owners of intellectual property to enjoy certain rights like right to use and licence and certain limitations are also placed upon them.
 - ⇒ Intellectual property includes right relating to :-
- Trademarks and Service marks
- Patents
- Industrial designs etc.

While

- Industrial property
 - It is a kind of intellectual property.
 - It is a collective name given for rights related to industrial or commercial activities of a person and this reflect industrial or commercial rights.
 - Industrial property includes –
 - Patents
 - Trademark, service mark
 - Utility models
 - Industrial design

- Geographic origin
- Protection against unfair competition
- It covers –
 - Inventions
 - Creations
 - New products
 - New Processes
 - New design / model
 - Distinct marks

DESCRIPTIVE QUESTIONS

2019 - Dec [4] (b) Discuss how labour theory is different from the functional theory in justifying the intellectual property. **(6 marks)**

TOPIC NOT YET ASKED BUT EQUALLY IMPORTANT FOR EXAMINATIONS

DESCRIPTIVE QUESTIONS

Q.1 Explain the concept of property. What are the different theories of property?

Answer:

The term 'Property' has a very wide connotation, it not only includes money and other tangible objects of some value, but it also includes the intangible rights which are considered to be a source or an element of income or wealth. It includes the rights and interests which a human possesses over land (and chattel) and which is to the exclusion of all others. It is the right to enjoy and to dispose of certain things in the way that he pleases to, provided that such use is not prohibited by law. However, there are certain things over which property rights by any single individual (or an entity) cannot be exercised. This includes the sea, the air and the like as they cannot be appropriated. Everyone has a right to enjoy them, but no one has an exclusive right over them.

Different theories laid down on the subject of concept of "Property" are as follows:

- (a) Historical Theory of Property
- (b) Labour Theory (Spencer)
- (c) Psychological Theory (Bentham)
- (d) Functional Theory (Jenks, Laski)
- (e) Philosophical Theories (Property as a means to Ethnical Ends and Property as an End in itself).

According to the Historical theory of Property, the concept of Private Property grew out of joint property. In the words of Henry Maine, "Private Property was chiefly formed by the gradual disentanglement of the separate rights of individual from the blended rights of the community". In the earlier days, the ownership rights over property were vested in large societies which were chiefly Patriarchal societies. However, with the disintegration of societies and families, there was a gradual evolution of the concept of individual rights. Roscoe Pound in his theory has also pointed out the fact that the earliest form of property was in the nature of group property and it was later on when families partitioned that the existence of individual property came to be recognised.

Labour Theory (Spencer)

This theory of property is also known as 'Positive Theory'. The underlying principle basis of this theory is that labour of the individuals is the foundation of property. The theory states that, a thing is the property of a person who produces it or brings it into existence. The chief supporter of this theory is Spencer, who developed the theory on the principle of 'equal freedom'. He stated that property is the result of individual labour, and therefore, no person has a moral right to property which he has not acquired by his personal effort.

Psychological Theory (Bentham)

According to this theory, Property came into existence on account of the acquisitive instinct of the human beings. Every individual has a desire to own and have into his possession things which is the factor responsible for bringing Property into existence. According to Bentham, Property is

altogether a conception of mind and thus, it is nothing more than an expectation to derive certain advantages from the object according to one's capacity.

Roscoe Pound also supports Bentham on this school of thought and has observed that the sole basis of conception of Property is the acquisitive instinct of individual which motivates him to assert his claim over objects in his possession and control.

Functional Theory (Jenks and Laski)

This theory is also known as the 'sociological theory of property'. It assumes that the concept of Property should not only be confined to private rights, but it should be considered as a social institution securing maximum interests of society. Property is situated in the society and has to be used in the society itself.

According to Jenks, no one can be allowed to have an unrestricted use of his property, to the detriment to others. He thus states that the use of property should conform to the rules of reason and welfare of the community.

According to Laski, who also supports this school of thought, Property is a social fact like any other, and it is the character of social facts to alter. Property has further assumed varied aspects and is capable of changing further with the changing norms of society.

Property is the creation of the State

The origin of 'Property' is to be traced back to the origin of 'Law' and the 'State'. Jenks observed that Property and Law were born together and would die together. It means that Property came into existence when the State framed Laws. As per this theory, Property was non-existent before Law. According to Rousseau, 'it was to convert possession into property and usurpation into a right that Law and State were founded.' The first who enclosed a piece of land and said – this is mine – he was the founder of real society. He insisted on the fact that property is nothing but a systematic expression of degrees and forms of control, use and enjoyment of things by persons that are recognised and protected by law. Thus, the conclusion is that property was a creation of the State.

Philosophical Theories (Property as a means to Ethical Ends)

In the views of Aristotle, Hegal and Green, Property has never been treated as an end, but always as a means to some other end. According to Aristotle, it may be a means to the end of Good Life of citizens. In the views of Hegal and Green, it may be a means to the fulfillment of the Will without which individuals are not full human. According to Rousseau, Jefferson, Friendman, it may be a means as a pre-requisite of individual freedom seen as a human essence.

Similarly, the outstanding critics of property like Winstanley, Marx have denounced it as something which is destructive of human essence, a negative means in relation to ontological end.

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Q.2 Explain different connecting points of Intellectual Property Law regime and Cyber Law regime in India as well as from the international perspective.

Answer:

Intellectual Property Rights in the Cyber World: Though both Intellectual Property and the Cyber Law are independent subjects and have their own area of operation, however, the influence of one on the other cannot be denied and the same is becoming all the more evident these days. We live in a world which is dominated by computers and the internet and therefore the world today is appropriately called as the Cyber World. Intellectual Property (IP) equally is an expanding phenomenon with more and more innovations coming to surface, which also acts as a catalyst to the expanding businesses. However, in terms of vintage and history, Intellectual Property is relatively a longstanding field of legal practice than the Cyber Law. In the Indian context particularly, Cyber Law emerged only with the passage of the Information Technology Act, 2000, while as an IP law, the Copyright Act was passed in the year 1957.

However, the common theme which runs through both these areas of law is that both have been significantly impacted by the development staking place in the field of technology as also the growth of Internet medium. For instance, a lot of issues cropped up in the area of Copyright law the internet enabled its users to readily reproduce materials available online. In an effort to meet

such challenges, the Governments have been, time and again, bringing stringent provisions in the criminal law so as to catch-up with the criminals and thus create deterrence in the society towards such malpractices.

Copyright and Cyberspace - Copyright protection gives the author of work a certain “bundle of rights”, including the exclusive right to reproduce the work in copies, to prepare derivative works based on the copyright work and to perform or display the work publicly.

Public Performance and Display Rights - The right that does get affected is that of display. Display of the work is also done by making copies, which are then retailed or lent out. This also falls under the right to display, which the holder of the copyright has.

Distribution Rights - Copyright Law grants the holder of the copyright the exclusive right to distribute copies of the work to the public by sale or by the transfer of the ownership.

Caching (Mirroring) - It is a violation on the internet. Caching may be local caching and proxy caching. In addition, proxy caching may give rise to infringement of the right of public distribution, public policy, public performance and digital performance.

Protection of Database in India - The Indian Copyright Act, 1957 protects “Databases” as “Literary Works” under **Section 13(1) (a)** of the Act which says that copyright shall subsist throughout India in original literary, dramatic, musical and artistic works. The term computer Database has been defined in the Information Technology Act, 2000 for the first time. **Section 43 of the IT Act, 2000** provides for compensation to the aggrieved party up to one Crore rupees from a person who violates the copyright and cyberspace norms. Also Section 66 of IT Act, 2000 provides for penal liabilities in such a case.

Internet Protection in India - The internet challenge for the protection of internet is the protection of intellectual property. It is still unclear as to how copyright law governs or will govern these materials (literary works, pictures and other creative works) as they appear on the internet. Section 79 of the IT Act 2000 provides for the liability of ISP’s “Network Service Providers not to be liable in certain case.” Section 79 of the IT Act exempts ISP’s from liability for third party information.

Indian Cyber Jurisdiction - Though it is in the nascent stage as of now, jurisprudential development would become essential in the near future; as the internet and e-commerce shall shrink borders and merge geographical and territorial restrictions on jurisdiction. There are two dimensions to deal with.

1. Manner in which foreign courts assume jurisdiction over the internet and relative issues.
2. The consequences of decree passed by a foreign court.

Thus, there is an immense need for the Indian society to be made aware about the necessity of copyright protection in all fronts to prevent any unauthorized use and pilferage of the system. The analysis of copyright in cyberspace reveals a mixed result of new opportunities and threats. Such threats often outweigh the opportunities offered by the cyberspace and necessity arises for increasing regulations of cyberspace to protect copyrights. Further lack of internationally agreed principles relating to copyrights in cyberspace gives ample room for divergent domestic standards.

Cyberspace - Cyberspace can be described as the virtual world interconnecting human beings through computers and telecommunication without regard to the limitations of physical geography. With the onset of the modern technology, more importantly the internet, copyright protection has taken a hit and thus the issues relating to it assumed greater significance. Now-a-days, the protections of Copyright law have been extended to protect internet items too. It protects original work or work that is fixed in a tangible medium i.e. it is written, typed or recorded. Although the current copyright law provides protection to the copyright owners, it has its own shortcomings when it comes to its implementation and enforcement on the Cyber World. Cyberspace is a virtual world, which technically exists only in computer memory, but it is interactive and pulsing with life.

IPR and Cyber Space – While Internet is undoubtedly acclaimed as a major achievement of humankind it cannot be denied that it has come with its own set of challenges. One of the major challenges that it poses is on account of the fact that it has captured the physical market place and has created a new substitute which is the virtual market place. It is thus the responsibility of all IPR owners to protect their IPRs from any *mala fide* actions of the miscreants operating on the internet medium by invalidating and reducing such *mala fide*

acts/attempts of such criminals by taking proactive measures. It is important to know about the copyright issues associated with the computer programs/software, computer database and various other works in the cyberspace. Under the TRIPS (Trade Related aspects of Intellectual Property Rights) agreement, Computer Programs also now qualify for Copyright protection just as any other literary work is afforded to.

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Q.3 Trace the common features of Intellectual Property Rights and Human Rights.

Answer:

Intellectual Property Rights as Human Right: Human Rights and Intellectual Property, though two very different set of laws with no apparent connection, have gradually becoming intimate bedfellows. Since inception, the two subjects developed virtually in isolation from each other. But in the last few years, international standard setting activities have begun to map previously uncharted intersections between intellectual property law on the one hand and human rights law on the other. Exactly how this new-found relationship will evolve is being actively studied – and sometimes even fought over – by states and non-governmental organizations (NGOs) in international venues such as the World Intellectual Property Organization (WIPO), the U.N. Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights, the World Trade Organization (WTO), the World Health Organization (WHO), and the Conference of the Parties to the Convention on Biological Diversity (CBD). A look at the lawmaking which is underway in these for a *prima facie* reveals two distinct conceptual approaches to the interface between human rights and the intellectual property.

The first approach finds that there is a conflict between human rights and the intellectual property rights. This view believes that a regime of strong intellectual property protection undermines and therefore is incompatible with the human rights obligations, especially in the area of economic, social, and cultural rights. In order to resolve this conflict it is suggested the normative primacy of human rights law over intellectual property law should be recognised in areas where specific treaty obligations conflict.

In the second approach, the Human Rights and the Intellectual Property Rights are seen as concerned with the same fundamental question, i.e., defining the appropriate scope of private monopoly power that gives authors and inventors a sufficient incentive to create and innovate, while ensuring that the consuming public has adequate access to the fruits of their efforts. This school of thought sees Human Rights law and the Intellectual Property Rights law as essentially compatible, although often disagreeing over where to strike the balance between incentives on the one hand and access on the other.

But the principal reason for the execution of these agreements lies not in deontological claims about inalienable liberties, rather in the economic and instrumental benefits that flow from protecting Intellectual Property products across the national borders. It is also true that both areas of law were preoccupied with more important issues, and neither saw the other as either aiding or threatening its sphere of influence or opportunities for expansion. This evolutionary process resulted in a de facto separation of human rights into categories, ranging from a core set of peremptory norms for the most egregious forms of state misconduct, to civil and political rights, to economic, social and cultural rights. Among these categories, economic, social, and cultural rights are the least well developed and the least prescriptive, having received significant jurisprudential attention only in the last decade. Human Rights law added little to these two enterprises. It provided neither a necessity nor a sufficient justification for demanding a strong, state-granted intellectual property monopolies (whether bundled with trade rules or not). Nor, conversely, did it function as a potential check on the expansion of Intellectual Property Law.

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Q.4 List a few advantages of including the process of evaluation of Intellectual Property in an Organisation. What are the different methods adopted for such evaluation.

Answer:

Advantages of Intellectual Property Valuation: The Intellectual Property Rights, such as Patents and Trademarks, which require necessary

registration with the concerned authority, provide legal evidence of one's ownership over such intangible assets while also ensuring one's peaceful and exclusive right to the use of such property. It gives one the right to exclude others from use of such rights. This means that one is armed with the legal remedy against any infringement by the competitor(s). Moreover, it is also an asset which can be profitably licensed or sold to others to provide them with the rights they would otherwise not have, and consequent to these benefits an increase in the total value of one's business.

At times, the process of valuation of an enterprise's Intellectual Property itself requires registration of such property as a precondition which enables the

process of monetizing one's intangible assets. Conducting valuation of one's Intellectual Property has its own significance and advantages. For instance, assessing the value of one's Patent, Trademark or Copyright may simplify the licensing or assignment process, and help one to determine the royalty rates that should be paid as a result of using one's intellectual property assets. Further, ascribing a reasonable valuation to one's intellectual property, if not currently accounted for, increases the overall value of one's business and provides one with collateral for loans and mortgages.

The difference between quantitative and qualitative valuations: An intellectual property can be valued on various parameters, but the overarching principle guiding the valuation process is, how much of a competitive advantage does one's intellectual property provides over others in the industry. While evaluating the worth of intellectual property, the following two methods of valuation have traditionally been used:

- **Quantitative valuation:** As the name itself suggests, this method relies on measurable data or numerical information to produce an estimate of the value of one's intangible assets. It attempts to answer the question by providing a monetary value or contribution that the intellectual property provides, whether directly to the business or indirectly by increasing the value of other parts of the operation or the appeal to investors.
- **Qualitative methods:** The parameters of valuation under this method are very different from the quantitative valuation method. This method provides a non-monetary estimate of the value of an Intellectual Property by rating it on the basis of its strategic impact, loyalty held by consumers,

its impact on the company's future growth, and other intangible metrics that do not rely solely on numbers.

These two kinds of valuation methods should however not be presumed to be contradictory or mutually exclusive; depending on the needs of one's business, one may employ a variation of method that fall into both the categories. It will not be wrong to suggest that the two valuation methods are perhaps the two sides of the same coin. Quantitative and qualitative attempts to tackle the question of firm value from different viewpoints, which may both come in useful depending on the audience in question and the reason for valuation.

In conclusion it can be said that determining value of one's Intellectual property can be a very challenging task and an exhausting process. But obtaining a valuation can result in significant benefits to one's business and thus the need for valuation can neither be underestimated nor be undermined. Following the valuation models described above to break down the process into simple steps and establishing a clear purpose and audience for the valuation, can make valuation manageable.

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Q.5 What are the different competing rationales put forward for protection of Intellectual Property?

Answer:

Competing Rationales for Protection of Intellectual Property Rights:

Intellectual property indeed is now one of the valuable assets in commercial transactions, be it intellectual property licensing, joint ventures, foreign collaborations, manufacturing, purchase or distribution agreements, or mergers and acquisitions. Licences to use patents, copyrights and trademarks, are often combined with transfers of know-how and are increasingly an important term in technology transactions. These licences provide royalty revenues to the owner of the Intellectual Property and distribute products and technologies to licensees who might not otherwise have had access to them. In such transactions, the licensees may also gain rights to create improvements or derivative works and to develop their own Intellectual Property assets, which can then be cross-licensed or licensed to others. This creates a very productive cycle of innovation and invention and

adds to the revenues of the companies.

Intellectual property laws confer the right to own intellectual assets by its creator and also enables him to make profits from his artistic, scientific and technological creations for a defined period of time. Such rights are applicable to the intellectual creations and not the physical object in which it is embodied. Countries have enacted laws to protect intellectual property for two main reasons. One is to give statutory expression to the moral and economic rights of creators in their creations and the rights of the public to access such creations. The second is to promote creativity and its dissemination which results in economic and social development.

The World Intellectual Property Report 2011: The Changing Face of Innovation – a new WIPO publication describes how ownership of intellectual property (IP) rights has become central to the strategies of innovating firms worldwide. With global demand for patents rising from 800,000 applications in the early 1980s to 1.8 million in 2009, the Report concludes that growing investments in innovation and the globalization of economic activities are key drivers of this trend. As a result, IP policy has moved to the forefront of innovation policy.

WIPO Director General, Francis Gurry, notes that “innovation growth is no longer the prerogative of high income countries alone; the technological gap between richer and poorer countries is narrowing. Incremental and more local forms of innovation contribute to economic and social development, on a par with world-class technological innovations.”

Intellectual property assets are used not only in business transactions, but are also traded in their own right such as online exchanges for the evaluation, buying, selling, and licensing of patents and other forms of Intellectual Property. The buyers and sellers of intellectual property manage their intellectual property as financial assets just as investors in stocks, options and other financial instruments.

Strong intellectual property rights help consumers make an educated choice about the safety, reliability, and effectiveness of their purchases. Enforced intellectual property rights ensure products are authentic, and of the high-quality that consumers recognize and expect. IP rights foster the confidence and ease of mind that consumers demand and markets rely on.

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Q.6 What is “intellectual property rights”. List out the subject matter protected by IPR under the World Intellectual Property Organization.

Answer:

Intellect means perception. It is the barometer of one’s understanding of persons or things of events and concepts, individually or collectively. Intellectual Property (IP) refers to the creations of the human mind like inventions, literary and artistic works and symbols, names, images and designs used in commerce.

Intellectual property is divided into two parts:

- (a) Industrial property and
- (b) Copyright.

Industrial property includes inventions (patents), trademarks, industrial designs and geographic indications of source and

Copyright includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, sculptures and architectural designs.

Intellectual property encompasses four separate and distinct types of intangible property namely:

- (a) patents,
- (b) trademarks,
- (c) copyrights,
- (d) trade secrets .

All the above types of intangible property collectively are referred to as “intellectual property”.

Products that are used to be traded as low-technology goods or commodities now contain a higher proportion of invention and design in their value. For example, brand- named clothing.

Therefore, creators are given the right to prevent others from using their inventions, designs or other creations. These rights are known as “intellectual property rights”.

The convention establishing the World Intellectual Property Organization (1967) listed the subject matter protected by intellectual property rights are as follows:

- (1) literary, artistic and scientific works;
- (2) performances of performing artists, phonograms and broadcasts;
- (3) inventions in all fields of human endeavor;
- (4) scientific discoveries;
- (5) industrial designs;
- (6) trademarks, service marks, commercial names and designations;
- (7) “all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields” and
- (8) protection against unfair competition.

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