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Original Article

Saleability of intellectual properties in law

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ABSTRACT

Intellectual property rights are not ordinary property rights concerned with the objects rather these rights are more valuable and respected than the rights of ordinary properties. Intellectual property rights are part of the private rights whose objective is on the one hand respecting the author and on the other hand, protection of his work which is required by human society. In other words, their goal is respecting the intellectual, moral and material or financial rights of the author. In Iranian law intellectual properties are not considered to be an exchangeable item (object, good) and there are doubts regarding its transfer via selling. British law excludes the immaterial properties from the domain of exchange. However, judicial procedure and the public conduct are both against the law. In the present aryicle, the authors have sought to assay and analyze the issue via reference to the existing laws in this area as well as the ideas of the legal experts and their critical evaluation.

Keywords: Sale in Iranian Law, Sale in British Law, intellectual property.

Introduction

One may say that intellectual properties do not have a determinate scope and this is due to their dynamicity because everyday new properties are registered in this relation and its scope becomes wider and wider day after the day. Intellectual properties do not have a material existence like the Internet rather the owners of these rights own these properties in a conventional way. Since these properties are known for many years now the legislators of different countries have adopted specific judicial procedure and decision norms.

Intellectual property in British law includes a set of intangible rights that support the valuable commercial products which are the results of human mental activity. This set includes commercial brands, copyright, author right and also rights of commercial secrets, right of invention, moral rights and rights of illegitimate and unjust competition of an intellectual human product which is of economic value. These rights might be tangible and objective or like intellectual properties to be realized in mental form, e.g. those cases which are protected by the copyright law or protectable, achievements of the inventors or a commercial secret [1]. Since there are very close relations between the tangible and intangible properties, intellectual property by the role which it plays in this context helps the discussions to be separated. In other words, it distinguishes the intellectual properties from the material and tangible property rights.

In Iran some lay the emphasis on the role of government in supporting these rights and state: "Intellectual property consists of the exclusive, special and temporary rights which are endowed to the creator, innovator and inventor by the government for their intellectual creations" [2].

Intellectual property rights have been defined in the works of the professors of law. Most of these experts have enumerated the examples of intellectual properties and seek to define these rights based on the common features of these properties. The current article intends to assay the nature and conditions of the conveyance of the intellectual properties and the veracity of this kind of conveyances in view of the conflict between them and the traditional and jurisprudential foundations of sale.

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Research Theoretical Foundations:

1. Features of Sale in Iranian Law:

Sale refers to the act of exchange of something for money. Of course this term simultaneously denotes both selling and buying and is paradoxical in nature [3, 4]. It often implies the conveyance of the sold item in return of the money and is used both in selling and buying. However, one should not neglect the fact that this term is usually used to refer to the selling. In other

words, it represents the act undertaken by the seller and this is important in view of the fact that terms denote in most cases what is intended by them in everyday life. Thus, in sale the act of transferring the ownership is of central and the possession is of secondary importance [5].

Civil law in the article 338 has defined the sale as "giving the possession of an exchangeable item in return of a determinate amount of money". It seems that this definition with few differences in expressions has been deriven from the definition of Shia Imams. One of the legal experts has defined sale as follows: "conveying an item for a determinate consideration" [6]. This definition is indeed very close to the article 338 of Civil Code. One of the commentators of Civil Code after quoting the article 338 of Civil Code argues that the definition provided in the article 338 is drawn upon the past notion of the sale while in contemporary world it has different meaning.

Anyway one can say that sale is the most complete alternative of the exchange [7]. Some other legal experts contend that although sale as a term is understood by the early and later scholars in a diametrically different ways but the short definition that can be offered of the sale is what has been already proposed in the article 338 [8]. In Iranian civil law sale represents a contract according to which one of the parties, i.e. seller, lets the other party, i.e. buyer, to possess the exchanged item in return of a determinate amount of money. He believes that the Civil Code in the article 338 has followed the ideas of Shia Imams and definition of sale as proposed in this article is deriven from the notion of Shia Imams of sale [9].

One of the legal experts without porposing any definition of sale contract states that the article 338 of Civil Code in definition of sale has not paid attention to the judgment of the public and just repharses the notion of some jurists as follows: "sale is letting one to possess an item in return of determinate consideration" [10].

As the definition of sale and the words of the jurists offer, the sold item must be a tangible object. Tangible object is of material and sensible existence and is exchanged in an independent way. The term "objective item" in the definition is intended to exclude the interests, rights and practice from the domain of sold item; this object includes the personal and shared.

Computer softwares in comparative context are never part of the classification of the rights or interests. On the other hand, in public the exchange of these softwares is known as sale. A group of experts believe that this type of properties must be considered as objects and the legal judgments of these properties are the same as regards them. some other experts have casted serious doubts regarding the restriction of the sold item to the objects under current conditions and propose the definition to be reviewed and they believe that sale is better to be defined based on the concept of property in order to include the goal or means of acquisition of property like company shares which are sold in stock exchange as well as the secondary property that includes the goodwill [11].

Exchange must have a subject which is undertaken or conveyed. The subject of exchange might be a property that the obligor is obliged to deliver it like obligation of delivering a determinate book or house. In the contracts of conveyance of intellectual works the determinate subject is intellectual property through which the exploitation of the work is conveyed to someone but the owner of the work [12].

2. Features of Sale in British Law

Given the fact that after several years and the domination of French law over most legal systems England is still judging the cases based on common law. Accordingly, British law is based on judicial procedure. Then for studying sale in this country one needs to assay the judicial procedure of this country. By studying the cases discussed in this relation one can reach a unique position as regards the sale in British Law [13].

Among the features of sale in British Law we can refer to the following points:

1) In definition of good, the sale of movable an immovable properties has been distinguished. Immovable properties include not merely the immovable properties themselves rather everything that belongs to the immovable which cannot be separated from the properties, i.e. immovable interests and profits. Then, whatever belonging to the immovable or constituting part of it is merely considered as a good which is not separable and is distinguished from the intended property [14];
2) From the definition proposed in the article 61 it is understood that good includes all personal (movable) properties, i.e. movable objective properties.
3) "Interests resulted from the farming land" and "products of lands under industrial farming" (industrial interests) consist of products like potato or wheat which are not grown in natural form and are the results of human efforts. Such products even based on the judicial procedure are considered as goods and are not mere attachments to the property insofar as the contract of wheat sale even when is sealed before the harvesting will be regarded as the good sale contract.

Among other features of sale in British law one can refer to the exchange basedness of the sale contract; because in the clause 1 of article 2 of British Sale of Goods Act it is noted: "*A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price*". From this phrase the exchanging nature of the sale contract is inferred.

3. Concepts of Intellectual Properties

Intellectual property has been translated in Persian to immaterial property, immaterial ownership, spiritual property, mental property and thought property because "intellectual" simultaneously refers to reflective, metnal and rational and at the same time connotes intangibility and immateriality while property represents the exchanging property and object [15]. Some of the legal experts have considered the term "intellectual property" better than "spiritual property" because here the rights have their origin in mental efforts and their results [16].

A number of other legal experts have considered the term "spiritual property rights" to be more appropriate and contend

that not all the subjects of intellectual property are necessarily the work of thought rather some of them are classified under this category due to their lack of material existence like goodwill [17].

Other legal experts have offered different views regarding the nature of the intellectual property: "Intellectual property rights represent those rights which are of economic value and their subject is not material object. The subject of these rights is indeed the intellectual work of man. These rights include the copyright, artist rights, right of the inventor, the right of commercial and industrial brand and right of goodwill" [18]. Intellectual property rights in its wider sense consists of the rights resulted from the intellectual creations and creativities in scientific, industrial, literary and artistic fields [19]. Nevertheless, today the scholars and activists in the domain of production of knowledge and information struggle to consider identical the foundations of property rights and exclusive rights of the knowledge producers and choose the the known traditional form of property right for protection of the producers of the knowledge and they have been successful in this path.

England must be considered to be the first country that has codified regulations in support of the literary and artistic works. Copyright in the sense that is known in England has its root in sixteenth cenrty. At the beginning the courts considered special formalities to be necessary for support of books. In 1556 the system of registery of books was established by Stichner company so that in this way the authors to be supported. In 1709 the so called "engraving copyright act" was adopted according to which the support of the copyrights was assigned to the publication institutes [20]. The last influence on copyright laws in England has been on the one hand a result of the WTO memorandum 1994 regarding the commercial aspects of intellectual property known as TRIPIS and on the other hand in EU Instruction of "some aspects of copyright and secondary rights in information society" of 2001.

One of British writers begins his discussion of the definition of intellectual property in the following words: "when the word intellectual property is mentioned it indeed refers to beliefs, inventions, discoveries, symbols, and pictures, aesthetic works (performance, theatre and music). In other words, intellectual property contains every product of human thought which is of potential value. If we want to define the wider sense of intellectual property we must say it in one word: information". Basically in all legal systems including Iran legal system the literary and artistic rights are protected. This is to say that law does not protect the ideas in pure form rather they should be first realized in the material form and then they can expect to be protected by law [21]. The second precondition for giving this right is authenticity of the work or in other words, its innovativeness. It needs to be taken into consideration that the authenticity of a work is different from its newness. According to French legal experts, authenticity is a personal notion and not generic one [22]. To put it otherwise, a work can be protected by law if it represents the mentality of the author [23]. It is due to this reason that contrary to the invention right if two persons independently create works which are quietly similar but each one represents the mind and thought of the author both works will be protected by law. The third exception of the wide circle of literary and artistic right is the restrictions imposed on the copyright. These exceptions can be divided into two subcategories. In each one of these cases there is no need for getting permission from the owner of right and other individuals can use the protected work within the framework of the regulations and conditions mentioned in the law.

Copying for the sake of personal and nonprofit use is allowed based on the article 11 of the law of protection of the rights of authors, creators and artists.

According to the article 7 of the law of protection of the rights of the authors, creators and artists: "quoting from the works that have been published for the sake of literary, scientific, technical and educational intentions and in the form of critical analysis and note with mentioning the source and in normal form is permitted". Moreover, according to the article 8 of the same law: "Public libraries and institutes of collection of journals and scientific and educational institutes that are managed in nonprofit way can copy the works protected by law as much as they need";

4. Sale of Intellectual Properties and Traditional Sale

In the discussion of the possibility of sale of intellectual property the issue of objectivity of the sold item (intellectual property) is among the key issues. The history of protection of objective rights is not clear though we can trace the basis of this protection back to the Roman law. In Roman law the objective rights of the people were protected but in 1474 a law was adopted, so for the first time the intellectual property to be protected. The first spark for the protection of the invention rights of the individuals was triggered in Venice but in those times the industry and technology was not developed enough. The governments gradually accepted that they must protect the rights of inventors, artists and authors. Such a protection causes the artists, authors and inventors to have more incentive for invention and innovation. Of course in past centuries, Italy was not an integrated country but Great Britain had special situation and due to the occurrence of first world industrial revolution in this country, it was a pioneering country in the field of inventions.

In the second half of nineteenth century and following the expansion of science and technology and markets the issue of protection of industrial property was raised and the first international convention under the title of Partis Convention 1883 was prepared in support of intellectual property rights and several years after it the Bern Convention 1886 was prepared and endorsed by some countries.

In Iranian civil law it seems that the sold item can be only an object and other properties like intellectual interests and properties lie outside the scope of definition. This is not irrelavent as regards the interests because many of the authors use the word object in order to exclude the lease due to which the lessee owns the interests of the leased place (article 466

Civil Code); while such an intention was not expected as regards the intellectual properties.

The first definition of sale in Shia jurisprudential works is indeed the definition offered by Sheikh Mofid (d. 1044). He writes "sale contract is signed between two parties based on the consent for exchanging the good and the money" [24]. As we see, in this definition the word object has not been used. After Sheikh Mofid and in *Mabsut* by Sheikh Tusi (d. 989) we come across for the first time with the word object (good). Also in his book *Nihayah* Sheikh Tusi insists on the thingness of the sold item even if he does not speak of objectivity.

Mohaqiq Aval (d. 1255) in Kitab Al Sharayeh speaks of conveyance of property (and not object).[25] Shahid Aval in his renowned work *Lumah* defines sale as a contract that realizes the conveyance of property in return of the price [26]. Although in other works like *Lectures* speaks of slae as a contract that prepares the ground for transfer of the object. In *Sharh Lumah* Shahid Thani endorses the definition proposed by Shahid Aval [26]. Moqadas Ardabili in *Majma al Faeda va Al Burhan fi Sharh Ershad Al Azhan* offers an alternative definition that is more focused on the exchange [27].

As we mentioned earlier the definitions of the jurists in some cases insist on the property and in some other cases insist on the objectivity and as Shahid Thani has noted in one of his works, this is because of exclusion of the lease from the definition of sale. Thus, given the lack of a definition of the sale in Quran and the prophetic traditions the only resort is consensus and there is no such a consensus.

As previously mentioned, the definition of Sheikh Ansari of sale is the basis of the definition that is provided in the article 338. Sheikh Ansari after presenting his definition outlines five objections and answers them [28]. First, if we say that sale consists of "owning the sold object in return of the price" then we can refer to the act of selling with the phrase "I made him the owner" instead of "I sold" and if we do not allow the sale to happen with the phrase "I made him the owner" the definiens (owning) will not be equivalent with definiendum (sale) while the definiens must be equivalent with the definiendum. Sheikh answers this objection as follows: "Based on what we said of sale we know that the reality of owning the exchanged object in return of the price is nothing but sale. Therefore, if someone says to another person that I have let you own that property in return of the determinate price it will be an example of sale". Then, with this argument Sheikh Ansari suggests that we can refer to the act of selling with the phrase "I have made you the owner". Second, this definition can be objected that it includes the selling of the debt to the debtor because this man cannot own any property; this objection indeed suggest that this definition does not cover all individuals and examples and thus by the phrase "I have made you the owner" one cannot transfer one's property to him because this is to say that man becomes the owner of the property that already belongs to him and this is not possible. However, jurists collectively consider the sale of the debt to the debtor possible then we should interpret the phrase "I sold" to "I rendered it null". Sheikh answers this objection as follows: "There is no problem in owning what is supposed to be owned by someone because the measure of ownership is that it must have an effect. Sometimes someone buys a book and owns it and thus he can for example sell it, donate it, lease it and some other time someone owns what is supposed to belong to him and the effect of this type of ownership is the cancelation of debt from the debtor and the same thing occurs; for example, someone lends something to someone and now he must be paid the same amount. As a result, the debtor does no longer owe anything as regards the previous debt". Third, this definition also includes Mua'atat (a contract in which there is no word in it and it takes place through exchanging the goods and price); while Mua'atat is not a sale according to the consensus of the Shia jurists; Sheikh answers: "in upcoming discussions it will be shown that Mua'atat is a type of sale and those who deny Mua'atat as a sale they indeed deny its veracity not its being a type of sale". Four, someone might object to the aforementioned definition that it includes also the profitable transaction or purchase (the opposite of sale. In response, we can say that owning in purchase is implicit and the reality of profitable transaction is owning in return of the price and this is why we call the buyer the owner. Five, this definition does not exclude the irrelevant cases and includes settlement, debt and quid quo pro donation.

Object in British law has been discussed under the title of good. For this reason, if we want to use more precise title for the British slae act we have to say "sale of goods act". In this act good is defined as follows: " *goods* " *includeall personal chattels other than things in action and money, and in Scotland, all corporeal moveables except money ; and in particular "goods" includes emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale.*"

Intellectual property rights represent advantages that are related to the character of a creator. These rights are immaterial and support the person forever. The intellectual rights of the author are not limited to any time and space and are unconveyable.[1]

There might be a work which has been published without mentioning the name of author. Such works are known as anonymous works. In no one of legal codes of Iran the name of anonymous works is mentioned. According to the article 11 of French Copyright Law, the author of the anonymous work can enjoy the protection of law by revealing his name. If the author does not do this he can determine the publisher as his representative to guard his rights.[2]

Although the majority proponents of individual freedom are agree with the property rights in tangible or material sources and goods and consider its creation morally and socially necessary and vital [29], there is no such consensus regarding the intellectual property rights and the scholars are divided in this regard.

A. Rand who is considered to be one of the radical liberalists believes that the patent right, literary right and artistic rights are the foundation of all different forms of property and if these

[1] http://www.ideafarin.com/static.php
[2] http://www.ideafarin.com/static

rights are vanished the whole structure of ownership collapses [30]. Of course, it is needless to say that Rand's claim in view of the historical background is exaggerating and we cannot consider the intellectual property rights as the basis of other rights.

On the other hand, there are other liberals and economists who are fighting the intellectual property system including William Laggett, Fredrich von Hayek and Tom Palmer. This group of liberals suggest that the creator of a work cannot resort to objective right in order to prevent others from taking advantage of his own work; rather the creators of these works must come up with a solution for protection of their works. These solutions may range from hiding the invention to contract sealing.

The reason of the adoption of this different position by economists and experts lies in the different nature of intellectual phenomena as compared to material properties and resources. In other words, intellectual phenomena as unending sources do not exhaust by using. Even the earth is the symbol of the eternity and despite this it loses its capability of cultivation. The mine streaks end one day. The capital goods are expended. The overgrazed pastures turn to barren lands; while intellectual phenomena and works upon their emergence will last forever and never come to end. This is the case with a song or an invention where the beauty of song is never lost and innovation that exists in the invention continues to exist.

Thus, the greatest difference between the intellectual phenomena and material goods lies in the fact that even if the property right is not defined in material goods their scarcity is possible but this is not the case with the intellectual properties [31].

Conclusion

Intellectual properties are property and are owned by individuals and since particularly in our law the sold item must be an object the question is rasied that whether the intellectual properties are objective properties or the article 338 is just delineating one of the extensions of the sold item. Moreover, given the definition of article 1 of the British Sale of Goods Act it seems that in this country the saleability of the intellectual properties is faced with the same problems. In Iranian legal system no particular legal doctrine has been offered as regards the sale of intellectual properties and the issue of judicial procedure is weak.

By the study of saleability of intellectual property in Iranian law it seems that the existing laws in this regard do not enjoy the necessary comprehensiveness and two proposals can be offered; first, in interpretation of the word "object" it would be said that this word in the article 338 is versus profit and includes both material and immaterial.

In our law there are some cases that can endorse this proposal including the article 78 and 79 of Commercial Code and article 34 and 37 of the amended version of commercial code adopted in 1968 where the legislator has clearly accepted that the sold item can be a share. In other cases the judicial procedure must be led to a direction where the immaterial rights are considered to be as an example of sale and the word "object" is just used for exclusion of lease.

The second path is that since the main sale is based on common sense and for its definition in any time we must refer to the common law due to the incompatibility of the content of article 338 with the common sense it is said that this article is not comprehensive and must be revised and instead of "object" the word "property" must be replaced.

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