

FROM INTANGIBLE ASSETS TO INTELLECTUAL PROPERTY: DELINEATING THE INTELLECTUAL PROPERTY COMMERCIALIZATION FROM THE LEGAL PERSPECTIVE

Osman Bugra BEYDOGAN*

Abstract

The economic attribute of intangibles in the contemporary world is of inarguable significance. Correspondingly, intellectual property rights present the most value-intense, and the most refined, element of the intangible capital. This attribute is largely owed to the legal recognition to which they are subject, as distinct from the other sorts of information assets that are also of economic value. The said legal recognition intrinsically entails a strong protection and enforcement of the rights as well as a transactional value to the rights. Intellectual property rights thus became the most significant corporate assets and their quiddity has notably evolved into a commercial nature. Meanwhile, on the legal basis, the principal theories regarding the rights over intangibles have been historically pertained to individualist approaches as opposed to the -evolved- commercial nature by which these rights are today identified. In addition, the classification among intellectual capital elements themselves are more subtle than ever in connection to the immense growth of knowledge-based economies. On that note, throughout this study we strived to discuss the significance of intangibles in creating value, and relatedly, the position of intellectual property rights with reference to the legal identity they are backed up with. Secondly, we focused on the nature of said legal identity, more specifically through the concept of property rights in the classical sense; whether intellectual properties are qualified as properties within the conventional legal meaning. Finally, we sought to answer, respectively: why these rights are more mercantile -or commercial in nature- than the tangible assets; and what is the area depicted by the term 'commercialization' when it comes to the legal perception of intellectual property commercialization.

Keywords: *intellectual property, commercialization of IP rights, intangible assets, commercial nature of IP, legal perception on IP commercialization.*

1. Introduction

When commercialization of intellectual property rights came under legal scrutiny, the economic aspects and business dynamics pertaining to this often fall out of the scope due to the very nature of the said kind of study. However, in order to interpret and create IP legislations, the knowledge of multidisciplinary angles that form the overall characteristics of intellectual property is a prerequisite. In dealing with

this prerequisite, we build upon the stance that the intangibles, unlike tangible capitals, are the essential and perpetual source of value in view of the fact that they are inexhaustible. Clearly however, not every intangible encapsulates the same intensity of value, in this way, the term “intangibles” in itself is too ambiguous to create an intellectual property legislation around. Therefore, it is necessary to establish the position of intellectual property rights among intangibles. In this connection, we

* PhD Candidate, University of Debrecen, „Marton Geza” Doctoral School of Legal Studies, Hungary (e-mail: bugrabeydogan@gmail.com).

are going to emphasize that, besides other features, one major determinant to differentiate the intellectual property rights from the other sorts of knowledge assets is the legal identity that the former is provided with by the IP laws. Correspondingly, we argue that this identity is not quite reflective of a classical sense of proprietary rights despite being called so. It rather exhibits *sui generis* characteristics. In view of the value embedded in them and that of the property-right-like legal identity they are backed up with, IP rights not only enable the controlling of the dissemination of value, thus creating a competitive advantage, but they also form a sort of currency to the extent that they have transactional power. All considered, we purport IP rights are the subject of business and commerce but have very little to do with individuals, regardless of the fact that they are, in essence, created by individuals. This reveals, first, that in most instances intellectual properties are manufactured for commercial purposes, therefore they are purposively and intrinsically subjected to commerce. Secondly, even if not initially created for commercial purposes, the monopolistic and exclusionary effect of intellectual property rights confers certain commercial value, at least to the extent that it prevents the others from exploiting the incorporating intellectual property (i.e. inventions, trademarks, designs, literary and artistic works) for commercial purposes.

Having taken this wide array of economic and commercial connotations into the equation, we suggest IP rights encapsulate both static (potential) and kinetic (dynamic) commercial importance. Frankly however, not every step of the commercialization continuum is identified as, or results from a legal matter; even if it is a legal matter, it does not necessarily always fall in the domain of intellectual property law. The wide continuum of

commercialization also entails pure business industrial aspects which do not clearly interest the focus area of IP laws. Consequently, the legal aspects of intellectual property commercialization tend to blend in with (or melt into) the broad definition of commercialization. Having argued that commercialization of IP rights has to refer to more than just squeezing out some money from one's ideas, we attempt to define the scope of intellectual property commercialization for the purposes of legal scrutiny and from a legal perspective, to which we tend to ascribe a two-layer meaning.

2. Intangibles as the Fundament of Creating Value

At the North end of the world where nature is not particularly generous in giving out to its inhabitants the building materials, igloos (also known as snow house, snow hut) came to rescue of humankind and became the ultimate way of survival against blizzards and brutal winter conditions. As the snow blocks act like good insulators, the interior temperature could be kept at survivable level with body warmth only. Hence, igloos proved efficient in counteracting cold. Nevertheless, as the raw material of these shelters, namely snow, is fairly delicate and at the end of the day this makes the shelter quite fugacious especially when the temperature alterations towards positive occur. Further, the humidity created inside the shelter by the human respiration will form a thin layer of ice on the inner face of walls, as a result of which the whole insulation function will be impaired. In a nutshell, the life of the shelter, in the best scenario, is unlikely to exceed several weeks. In the wake of such a prospect, it is probable that a question is aptly posed: whether an already-built igloo or the constructional knowledge as to the making

of it is more valuable? In most instances, the answer would conceivably be the latter.

Regarding the value, the appearance of which in the above example is a snow house, there is the one-time value on one hand and a perpetual source of value on the other. This simple and rather primitive analogy is however viable in most cases where the value of intangibles and physical substance compete, especially at business level as we sought to discuss later.

With that being said, in an attempt to perceive the power of intangibles within the frame of value creation, pinning down true characteristics of the intangible in question likely be vital. To this end, an often-overlooked nuance between information and knowledge has primarily to be taken into consideration. *Information* pertains to facts provided or learned by something or someone mostly in the form of raw data, whereas *knowledge* features a subset of information and pertains to information and skills acquired with the help of education, experience, etc.¹ In a scrutiny of the power of intangibles and their evolution into intellectual properties, we believe, taking “knowledge assets” in a broader sense and “intellectual assets” in a relatively narrow sense as reference points, rather than “information assets”, is plausible. This is mainly because intangibles, at least those which are eligible for intellectual property quality, are seldom in the form of raw information -the value of which is arguable-, but they are rather compounds of information, skills and experience. Moreover, the latter postulate is also consistent with the creation of literary and

artistic works which has a lot to do with skills and experience.

However, given the advancements in information technologies, science and with the world immensely digitalized in various realms, the conception of intangibles *inter se* embodies more ambiguity than ever. With this being the case, the hierarchical connection between intellectual capital, intellectual asset and intellectual property should necessarily be demonstrated. Intellectual capital, among others, forms the broadest term including the knowledge, information as well as intangible factors of other sorts. As Poltorak & Lerner put it, intellectual capital is what an enterprise is left with after all of its tangible assets has been stripped off.² Accordingly, the total sum of knowledge in an enterprise including those possessed by the employees and existing information, regardless of their value, will collectively constitute the intellectual capital of the entity in question. Intellectual assets, on the other hand, present a subset of intellectual capital factors that are identified, captured, and documented so that they are enabled for access.³ In addition, it is necessary to note that the knowledge assets, of which we previously made mention, may more conveniently be deemed a part of intellectual assets insofar as they are cleared of trivial information and as they are subject to inter-organization sharing and transfer. In the same vein, knowledge assets could be adequately described as a set of knowledge that has a present or future value possessed by an individual enterprise.⁴ Finally the narrowest and most valuable subset of this intangible chain consists of intellectual

¹ Ian Lurie, *Information is free. Knowledge is not*, this document is available online at <https://www.portent.com/blog/random/information-is-free-knowledge-is-not.htm>, (last access: 14.05.2020).

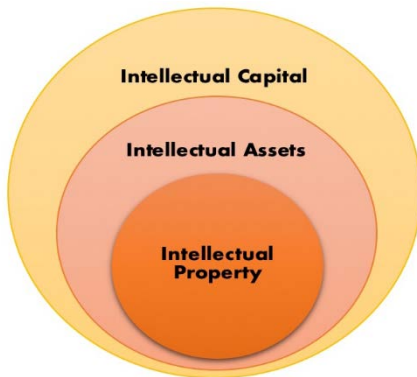
² Alexander Poltorak, Paul Lerner, *Essentials of Intellectual Property: Law, Economics and Strategy*, Second Edition, John Wiley & Sons Publishing, New Jersey, 2011, p. xxvi.

³ *Ibidem*.

⁴ This description has been based on and put forward in the light of “information asset” definition of Arena & Carreras suggested in Cristopher Arena, Eduardo Carreras, *The Business of Intellectual Property*, Oxford Publishing, New York, 2008, p. 42.

properties which also delineate our main domain of scrutiny. This category of intangibles differentiated from the broader sense of intellectual assets by the legal protection attributed to them under applicable laws.

Although intangibles of any hierarchical level are pertinent to value creation thus greatly important to business, it is suggested that the aim concerning intangibles is often to convert them into a more valuable subsequent subset of intangibles, consequently to generate intellectual property out of intellectual capital.⁵ Accordingly, the value created by intangibles gradually increases in every subset as moved from the edge of the circle to the center. Through this flow, value creation normally occurs in each and every level. The magnitude and intensity of the value created will inherently vary depending on the level it is created at. Nevertheless,



value in most cases will be determined by

domestic and global market forces over the time. As such, sometimes relational databases, for instance, may be of more significant value than a computer software with a limited area of use.⁶

With the significant shift of the economic tendency from a product-driven one to a knowledge-based one, not only are intangibles *per se* of tremendous value but they are also the very foundation of value. Monetary and tangible assets (i.e. hard assets), in a way, serve as auxiliary factors to reify the intangibles into profit-generating goods and services. Accordingly, they are used to make, use and sell products and services based on intellectual property.⁷ In this sense, intangible assets function as a bridge between hard assets and intellectual properties.⁸ It is necessary, however, to note that despite financial capitals being less important than social and human capital for achieving, and especially for sustaining, a competitive advantage -as a sort of emergence of value-, they are often crucial for acquiring or establishing the resources that are needed to exploit opportunities⁹, especially when rather traditional businesses are at issue.

Putting their significance in conjunction with corporate elements aside, the very nature of intangibles is apt to portray a perpetual foundation of value. In the most simplified fashion, this may be said to stem from following qualities:

- I. Knowledge, unlike material assets, resides in the human brain. Thus, the value attributed to it is not owed to a

⁵ Alexander Poltorak, Paul Lerner, *Essentials of Intellectual Property: Law, Economics and Strategy*, Second Edition, John Wiley & Sons Publishing, New Jersey, 2011, pp. xxviii.

⁶ Christopher Arena, Eduardo Carreras, *The Business of Intellectual Property*, Oxford Publishing, New York, 2008, p. 42.

⁷ Russell Parr, *Intellectual Property; Valuation, Exploitation, and Infringement Damages*, 5th Edition, John Wiley & Sons, New Jersey, 2018, p. 40.

⁸ *Ibidem*.

⁹ Michael Hitt, Duane Ireland, David Sirmon, Cheryl Trahms, *Creating Value for Individuals, Organizations, and Society*, published in "Academy of Management Perspectives", Vol. 25, no. 2, pp. 57-75.

- physical substance. As long as the mental capacity of humankind exists, so does the knowledge that is of value.
- II. Owing to the lack of physical substance, intangibles are excluded from exhaustion. Hence, knowledge cannot run out due to overwhelming use.
 - III. They are easily transformed, modified, built upon and compounded with other knowledge without requiring substantial investments. Also, new knowledge may make a near obsolete technology current.¹⁰ This makes intangible assets cumulatively valuable.
 - IV. It is also knowledge that can yield tangible property so long as the materials are available.
 - V. The worth of all goods and services produced based on certain knowledge holistically are embedded in the value of the original knowledge. Therefore, it is pointedly more value-intense than the products -including the services-generated.

As a result of these traits, knowledge and intangible asset-based businesses can create much more wealth than traditional financial assets-based businesses, because outgoings which are costs in traditional businesses turn into investments in knowledge businesses and create future revenue-generating assets.¹¹

On the other hand, the value created does not necessarily accrue only to businesses but it may also cater to customers

and, in a wider perspective, to the society. Accordingly, it is possible to behold the value created by the medium of intangibles both on the micro and macro level. As regards to performance on the micro level, such elements of intangible capitals as brand value, management skills, reputation, intellectual properties along with know-how, R&D activities, inter-organizational relations, process quality etc. collectively figure an indicator for the creative and innovative strength as well as potential of a given business, therefore, determine its market value¹² possibly greater than its book value. Meanwhile, products and services as well as customer relations quality of which have been enhanced with the help of said intangible capitals, eventually resulting in satisfaction, will form the benefit of customers from the value created.

Where the value creation at the macro level is concerned, knowledge-based industries and businesses have their significant impact on fostering innovation and competition which, in turn, leads to employment, improvement in gross national product -inasmuch as they are more wealth-intense than conventional businesses and industries- and results in a greater per-capita income.¹³ Also, intellectual properties often figure a concrete policy tool for the governments, through which they seek to shape economic and at some instances social dynamics in the global market which is more knowledge-based now than ever. The recent joint analysis report¹⁴ disclosed by the European Patent Office (EPO) and the

¹⁰ Christopher Arena, Eduardo Carreras, *The Business of Intellectual Property*, Oxford Publishing, New York, 2008, p. 56.

¹¹ Daum Juergen, *Intangible Assets and Value Creation*, Wiley, West Sussex, 2003, pp. 6.

¹² Annette Kur, Thomas Dreier, *European Intellectual Property Law: Text, Cases and Materials*, Cheltenham – Massachusetts 2013, p. 9.

¹³ *Ibidem*.

¹⁴ *Intellectual property rights intensive industries and economic performance in the European Union, Industry-Level Analysis Report*, October 2016, this document is available online at <https://euiipo.europa.eu/tunnel->

European Union Intellectual Property Office (EUIPO) pertaining to economic performance of IP rights intensive industries in the EU mirrors a stream of macro impacts and economic contribution of knowledge-based industries.¹⁵ Accordingly; IPR-intensive industries are shown to have generated 27.8% of all jobs in the EU during the period 2011-2013. When indirect jobs are taken into account, the total share of IPR dependent jobs rises to comprise 38.1% of all jobs. The worth of economic activities conducted by IPR-intensive industries amounted to 42,3% of EU GDP.

In the same vein, U.S. Patent and Trademark Office (USPTO) reported that, in 2014, IP-intense businesses figured 38.2% of total U.S. GDP, meanwhile supporting 45.5 million jobs that amounted to 30% of all employment.¹⁶

As far as intangibles present the foundation of creating value in variety of realms and on distinct levels, intellectual property rights constitute the most advanced and legally institutionalized reflection of intangibles.

3. Intellectual Properties Through the Lens of the Concept of Property

Historically, intellectual property rights have often been explained and justified through the theories of material (or classical) property. In this way, they are extensively modeled after property rights in tangible goods.¹⁷ Indeed, the rights of both

types veritably present similarities. Accordingly, the former one establishes the rights over the physical goods pertaining to the determination of its use, whereas the latter vests the same authority in its owner, in the context of intangibles. Therefore, just like it is the case in classical property, intellectual properties can be bought, sold, assigned and put up as collateral and inherited. This is where IP rights approximate material property rights the most. In this fashion, physical attribution, or dependency on a material substance, seems to be the distinction between the two types of rights. This is unlikely to be falsified. As is well known, intellectual properties are shaped by the intellectual capacity and creativity, and outcome of these facilities in intangible and legally protectable form. They lack physical substance, thus do not have weight or height; they are odorless and tasteless¹⁸, all in all, they are immaterial. However intellectual creations, in order to be the subject of IP rights, have to be expressed or externalized in a convenient medium. Depending on the type of the creation, this expression or externalization may be a composition of colors, a poem, a song, a packaging or a machinery prototype. Differently from classical property, however, intellectual properties exist independently from the medium they have been reified into; thus, they are subjected to a distinct legal regime than the material good they are embedded in.

web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/performance_in_the_European_Union/performance_in_the_European_Union_full.pdf, (last access: 12.05.2020).

¹⁵ In the said report, IPR-intensive industries have been defined as the ones that have an above-average use of IPR per employee, in comparison to other IPR-using industries.

¹⁶ USPTO, *Intellectual Property and the U.S. Economy: 2016 Update*, available online at <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>, (last access: 14.05.2020).

¹⁷ Annette Kur, Thomas Dreier, *European Intellectual Property Law; Text, Cases and Materials*, Cheltenham – Massachusetts 2013, pp. 2.

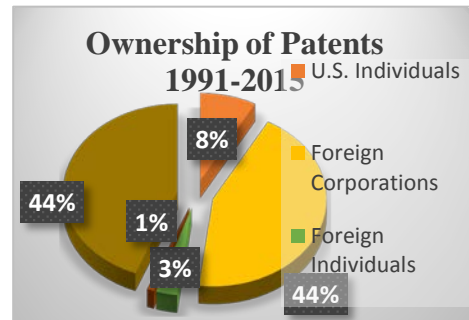
¹⁸ It is necessary, however, to note that the mediums through which the intellectual properties are externalized may have with, height, color, etc.

Another crucial divergence becomes apparent in the context of continuity of the rights. Property rights on material goods - save for the exceptions stemming from specific laws e.g. expropriation- are sustained as long as the owner retains the ownership intention. Thus, such property rights are not time-limited. Conversely, protection by intellectual property rights pertains to a definite time. Copyrights, for example, are protected for the lifetime of the author and another 50 years after the author's death as pursuant to the Berne Convention.¹⁹ Patents are granted for 20 years; designs are often protectable for 5 years and renewable 4 times, thus 25 years in total; meanwhile, utility models and trademarks enjoy protection of 10 years, which can be renewed indefinitely.²⁰

In addition, the absolute exclusionary effect of classical property rights does not necessarily encompass the concept of intellectual property. In other words, IP rights, unlike material property rights, are concerned with striking an optimal balance property interest (exclusionary) and non-property (access) interest.²¹ Said quality thus, underlies the rationale of definite time protection, and is also quite apposite to functions of IP rights on a macro level, as later discussed in connection with justification theories of IP rights. By limiting the exclusivities by time, this enables the opportunity to build upon previous knowledge thus preserves the intellectual

productivity as well as the progress in sciences and arts.

At the end of the day, having regard to disharmonious features of the two concepts we strive to exhibit, the property metaphor may not always be feasible to explain the



notion of IP rights, and it is suggested that it may be even misleading.²² With this being the case, it is necessary to bear in mind that IP rights have their unique characteristics, and without regarding them, the conventional understanding of proprietary rights is unlikely to suffice to elucidate this realm.²³

4. Why More Commercial Than Tangible Assets?

A possible answer to this question has its bearings in the cognition that we earlier strived to exhibit in the context of value creation, flowing from the fact that intangibles are the primary foundation of innovation not only on the micro level but

¹⁹ Fifty years of protection after the lifetime of the author is set as a lower limit, meaning the signatory countries have flexibility to impose longer protection periods. In most cases, especially in the EU, protection is granted for the lifetime of the authors and an additional 70 years.

²⁰ Trademarks are maintainable indefinitely provided that the renewals take place in every 10th year, nevertheless, this requires an action, hence they are circumstantially indefinite rather than indefinite in nature.

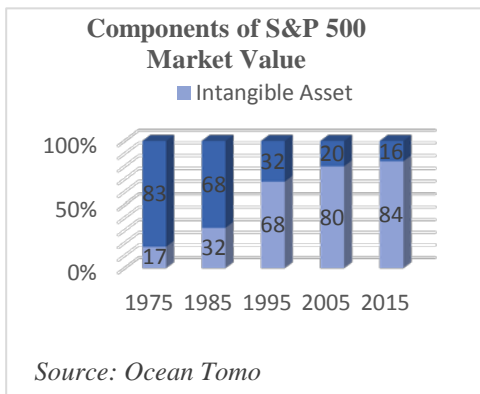
²¹ Annette Kur, Thomas Dreier, *European Intellectual Property Law: Text, Cases and Materials*, Cheltenham – Massachusetts 2013, p. 2.

²² *Ibidem*.

²³ Sami Karahan, Cavit Suluk, Tahir Sarac, Temel Nal, *Fikri Mulkiyet Hukukunun Esaslari*, Seckin, Ankara, 2013, p. 4.

also in the wider perspective. Correspondingly, intellectual properties, with the protection they enjoy and with the legal regime they are subjected to, present a much more significant impact in this in comparison to intangible assets in a broader sense. As Arena and Carreras articulate: if knowledge is the basis of value creation in today's economy, then intellectual property is one of its primary currencies and the means of extracting that value.²⁴

Nevertheless, it cannot be overstated that the archaic theories striving to justify and pin down the rationale of intellectual property rights, as we will touch upon through this study, have been largely based on individual artistic and inventive activities



and often on their flourishing impact on artistic and scientific progress. A more down to earth perception -or actuality- of intellectual properties, however, indicates the fact that they are rather business tools in the micro, and policy tools on the macro level than a sophisticated fashion of rights given to individuals so as to award their intellectual and creative endeavors. Not to

mention that the majority of creative works are today extensively business oriented, hence, carried out within organizational and institutionalized settings.

The above statistical data from the United States pertaining to patent ownership profile based on the patents granted between 1991-2015, demonstrated on the right,²⁵ turned out corroborative to this premise. Accordingly, 88% of patents granted within this period are owned by foreign and United States corporations, meaning, individuals remain as a minor stakeholder in terms of patents. This is the case for trademarks as well. Though trademarks, in principle, can be owned by individuals, due to their core function, they hardly associate with individual ownership.

As we pointed earlier, knowledge is an inexhaustible source of value creation, not exclusively but extensively at a business level. This is the case not only for IP-intensive businesses but also for rather traditional material-property oriented businesses. Take the example of Coca-Cola™, though the said company engages in rather conventional, non-IP-intense production, by the end of 2018, the price-to-book ratio has been realized as 11,04.²⁶ That means the current market value of the company is more than eleven times greater than its book value. This positive gap has been mostly created by the trademarks of the company. Regardless of whether it is traditional or IP-intense, businesses of various types today, somewhat, have to lean towards intellectual properties in so far as the wealth and the capitalization is extensively centered around intangibles.

²⁴ Christopher Arena, Eduardo Carreras, *The Business of Intellectual Property*, Oxford Publishing, New York, 2008.

²⁵ See. Russell Parr, *Intellectual Property: Valuation, Exploitation, and Infringement Damages*, 5th Edition, John Wiley & Sons, New Jersey, 2018, p. 26.

²⁶ Coca-Cola Co Price to Book Value on 31 December 2018 based on YCHARTS data; available at https://ycharts.com/companies/KO/price_to_book_value, (last access: 13.05.2020).

Approvingly, the study suggested that this tendency is increasingly continuous.²⁷ In this direction, intangible assets in 2015 comprised 84 percent of market value, leaving the hard assets far behind at the rate of 16 percent (*See the chart above*).

Hence, those without access to intellectual property will stagnate for a while in low-profit commodity businesses and eventually fade out of existence.²⁸ This is also inevitable taking into account the fact that the value emerges not only from the possession of the knowledge but arises more significantly from the exclusion of the others. The power of intellectual properties, correspondingly, resides in the fact that they are the major instruments through which the rights holders are able to control the dissemination of the knowledge and the value. In terms of intellectual assets -in which IP rights are embedded-, the question “who owns the knowledge” is of explicit importance. What is more important however is the question of “who is deprived of the knowledge”. Competitive strength and value arise rather from whom the information is concealed from than who possesses it, namely monopoly.

Most evident, and perhaps the ultimate, way of successfully remaining competitive in business resides in opening up to new markets and keeping up with demands in it, in the meantime offering as broad a product range as possible. Nevertheless, as we are to detail throughout this study, the execution of these strategies will often amount to substantial investments, thus to costs, meanwhile still accommodating serious risks. This very point is also where intellectual properties

serve as the most efficient business tools. Companies are seeking to expand product lines, increase market share, minimize new product development costs, expand market opportunities internationally, and reduce business risks. Companies are also seeking to create corporate value for investors. All of this is accomplished by exploiting patents, trademarks, trade secrets, and copyrights.²⁹ In the simplest example, companies desiring to enter new markets often resort to licensing their trademarks so as to get their products produced in the target market by another manufacturer or get their services provided by another provider that already exists in the target market, thus avoiding the investment in manufacturing and possibly distribution infrastructure in the targeted market. Various businesses also quite commonly form an IP-based enterprise and pool their relevant IP rights, mostly their patents, so as to easier generate more advanced or unprecedented products and which they would not be able to come up with on their own.

Finally, the proprietary characteristics of intellectual property rights is a big help for them to substitute the currency in the business sphere, or be the currency itself. Appropriately, by means of sales, leasing and collateral, they are interconvertible with monetary currency (transactional characteristic). Further, with the recent tendency, intellectual properties are gathered in the portfolios of intellectual property merchant banks, which establish an IP exchange market of sorts through which IP rights are even bought and sold by means of auctions.

²⁷ Ocean Tomo, *Intangible Assets Market Value Study 2017*, available online at <http://www.oceantomo.com/intangible-asset-market-value-study>, (last access: 13.05.2020).

²⁸ Russell Parr, *Intellectual Property: Valuation, Exploitation, and Infringement Damages*, 5th Edition, John Wiley & Sons, New Jersey, 2018, p. 5.

²⁹ *Ibidem*.

5. Delineating Commercialization

Commercializing is a means of extracting the value encapsulated in intellectual property rights, by linking them to products or processes.³⁰ As far as IP rights are concerned, commercialization is often perceived as squeezing money out of them or converting them into money. This postulate is partially relevant; converting them into money firstly, by manufacturing/offering and marketing the IP protected goods and services and secondly by selling the rights themselves are certain forms of commercializing. It is crucial, however, to note that the said aspects pertain respectively to trade of IP protected substance and the transactional feature of IP rights. Commercialization activities certainly involve making money from intellectual outcomes, though the activities with such orientation are more accurately be defined as monetization.

Conversely, commercialization consists of a greater area of activities, in a way forming a superset that covers a cluster of activities including monetization. Nearly any type of activity aimed at making a commercial use of the intellectual property in question may be roughly identified as commercialization. Thus, its scope may be defined as the process of bringing intellectual property to the market in order to be exploited.³¹ WIPO, in its Guide on Intellectual Property Commercialization³², defined its scope as “*a continuum of activities and actions that provide for the protection,*

management, evaluation, development and value-creation of ideas, inventions, and innovations to implement them in practice. Prototypes and implemented processes lead to the development of products and services by entrepreneurs, startups, existing companies as well as governments resulting in economic and societal benefits”. Clearly adopting a broader concept of commercialization, emphasis has been put both on micro (or business) level and macro (social) level functions of IP rights. In this direction, attributing the concept of commercialization solely to monetizing is very likely to remain shallow, and it would not properly lead to merited scrutiny as to legal aspects of it.³³ Admittedly on the other hand, a great deal of the activities involved in the continuum of commercializing intellectual property rights may not have a direct contact with the realm of intellectual property law. Although intellectual property rights are existentially linked to the intellectual property laws under which they were granted, once they came into existence their management and exploitation is driven by the business strategies of the right-holder, whereby a wide array of choices and sub-elements such are those regarding manufacturing, marketing, competition etc. become determinant. Consequently, the term of intellectual property commercialization is often perceived to have fallen in the scope of business and economics than that of intellectual property law and that is even more so when the corporate aspects are at the stake.

³⁰ Christopher Arena, Eduardo Carreras, *The Business of Intellectual Property*, Oxford Publishing House, New York, 2008, p. 59.

³¹ European IPR Helpdesk, *Fact Sheet Commercialising Intellectual Property: Licence Agreements*, available online at <https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Commercialising-IP-Licence-Agreements.pdf>, (last access: 15.05.2020).

³² United Nations Committee on Development and Intellectual Property (CDIP), *Guide on Intellectual Property (Ip) Commercialization*, available online at https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_16/cdip_16_inf_4.pdf, (last access: 15.05.2020).

³³ Quite contrary to this broad understanding of commercialization propounded in this document, respective paragraph of executive summary containing this definition starts with following postulate that clearly indicates the monetization: “Commercialization of intellectual property (IP Commercialization) is making money out of one’s ideas.”

Therefore, the highly commercial nature of intellectual property and rights attributed thereto tend to inhibit the possibility of setting a sharp divide between the legal and commercial aspects of intellectual property rights. As a matter of fact, it is *per se* arguable whether such a divide can possibly be drawn between those aspects. Furthermore, when the task is to identify the implications of intellectual property commercialization for the purposes of law and jurisprudence, this elusive divide represents a particular challenge. Last but not the least, it is also phonetically eccentric when the commercialization of the rights - which are in fact readily commercial in nature- is spoken off.

Having acknowledged the magnitude of the scope of the term of 'commerce' hence that of 'commercialization', intellectual property commercialization may nevertheless be somewhat identified in respect to those aspects that coincide the domain of intellectual property law.

6. Identifying the Concept of Intellectual Property Commercialization from the Legal Perspective

From the outset, the legal relations and status emerging from the commercialization continuum defines the borderlines of the legal perception of intellectual property commercialization. Clearly however this definition also indicates an ambiguously vast domain. Alternatively, the definition could be relatively narrowed down to 'the interface with intellectual property laws of the process of making intellectual property and IP rights a subject of commerce'.

In either case, no distinct and crystal-clear concept *prima facie* outstands. Nevertheless, these definitions maintain two

potential connotations. Firstly, for a relation or a status involved in the intellectual property commercialization continuum it has to be of a prevalent legal nature. That is to say, pure commercial matters such as product development, manufacturing, business strategies, marketing choices etc. usually do not present any specific or direct province for intellectual property law. Secondly, with regards to the dissociation of intellectual property rights from the goods or services on which they are embodied, commercialization of intellectual property also entails two different facets. We shall roughly address these two aspects as (i) commercialization of intellectual property; (ii) commercialization of intellectual property rights and briefly describe these below.

Prior to that however, it is crucial for our purposes to elucidate the differential between the intellectual property (IP) and the intellectual property rights (IPRs). The former term (IP) refers to the outcome or product of the human intellect that is susceptible of intellectual property protection and is somehow externalized, meaning that it is not merely an abstract thought, idea or concept. From that view point, an invention, a work of art or a design appears to be the creative outcome of the human intellect, hence it should fall within the scope of the aforesaid term. The latter term (IPRs) on the other hand entails the exclusive rights that are granted by law to the proprietor of the rights in respect to their intellectual property. On that note, an invention, a work of art or a design will respectively be the subject of patent rights, copyright or design rights given that they conform with the substantive requirements and that -when necessary- the formal procedures are fulfilled.³⁴

³⁴ The general principle in pursuant to Article 5(2) of Berne Convention is a formality-free protection for copyright. Further, under different jurisdictions, unregistered trademarks and designs may occasionally avail of intellectual property protection.

Although this divide does not necessarily always retain a vital importance; in fact, the use of intellectual property (IP) for intellectual property rights (IPRs) and vice-versa is often only a matter of preference and is intended to address the same phenomena, it nevertheless comes useful in exhibiting different facets of commercialization.

6.1. Commercialization of Intellectual Property (IP)

As was highlighted above, in the rudimentary sense intellectual property commercialization is perceived as the venture of making money from intellectual creations. Plausibly, the latter most commonly transpires by way of incorporating these creations -which are incidentally protected or protectable under intellectual property rights- onto goods and marketing them thus making profit. Likewise, a similar pattern may apply to services as far as the underlying intellectual outcome is susceptible to being provided as a service.

Therefore, with reference to the distinction we laid above, what is visibly commercialized through this a pattern is not the intellectual property rights as such but rather the intellectual property, more particularly the goods and services that correspond to (or embody or incorporate) the underlying intellectual property. Accordingly, the definition of intellectual property commercialization from a legal perspective that follows from this pattern may be: The exercise of intellectual property rights in the context of commerce, specifically by way of trading goods and providing services that incorporate the IP in question. Thereby the focus is said to be around the goods and services that incorporates the intellectual property. Evidently this shall lead to an immense area

of activity, even more so once it is conceived that almost every fashion of goods or services that are commercially available embody at least one intellectual property and that the more technology gets involved in the products, the bigger the number of embedded intellectual properties gets. In the same vein, the legal aspects of commercialization shall cover the vast area of relations arising from the exercise and the breach of the commercial nature of exclusivities that are part of IP rights. These relations primarily pertain to manufacturing (the breach of which results in counterfeit products), imports and exports (parallel import cases being probably the largest battlefield over which international trade and IP rights clash) and distribution of the goods or services that embody the relevant IP rights. Insofar as each specific type of intellectual property right confers different exclusivities on its holder, the relations and disputes arising from their exercise and breach and correspondingly the actual scope of the legal aspects of intellectual property will inherently vary. Nevertheless, the definition and the breadth of legal aspects of intellectual property commercialization of this fashion may be confined to 'the legal relations and the disputes that are originating from the exercise and breach of intellectual property rights in the context of trade of goods and provision of services that incorporate intellectual property rights.'

6.2. Commercialization of Intellectual Property Rights (IPRs)

The second modality of intellectual property commercialization is largely constructed upon the transactional value of intellectual property rights. This follows that the value embedded in the intellectual property prerogatives also serves, as it were, as a corporate currency.

Accordingly, this manner of commercialization activities, which could also plausibly be addressed as IP right transactions, take the intellectual property rights as their subjects, instead of the goods or services on which IP rights embodied. In other words, this modality pertains to making profit from the intellectual property rights themselves rather than incorporating the IP protected substance into goods and services and commercially benefiting therefrom.

On an analogy, commercialization of IP rights amounts to a peculiar type of commerce, the subject commodity of which consists of intellectual property rights i.e. patent rights, design rights, trademarks, copyrights etc. Such transactions tend to take various forms, although these are not of limited number, the foremost types are briefly pinned down below:

- I. IP rights assignment: IP assignment refers to the transactions that transfer the ownership (title) of IP rights such as patents, design rights, trademarks, copyright and related rights from their present owner (assignor) to another party (assignee); hence the latter becomes the new owner of the intellectual property right at stake. In a way, intellectual property assignment creates a legal impact that is equivalent to sales of IP rights insofar as it transfers the title from one party to another and is typically made in return for an agreed pecuniary consideration.
- II. IP licensing: Connotes the agreements on the basis of which the IP right holder (licensor) authorizes a third party (licensee) to exploit the intellectual property for a limited time and on the agreed terms; and he/she in return receives the agreed consideration. The parties to the agreement enjoy a great deal of liberty

in determining the scope of the license and it is not necessarily holistic. That is to say the authorization granted by the right holder may be limited to certain prerogatives among the bundle of rights covered by that particular IP right (such as right to reproduce the copyrighted material, or right to distribute); or the whole bundle of rights recognized for that specific type of intellectual property may be licensed.³⁵ Also, the limits to the scope of license may be set by other factors such as geographical limitations, field of use, right to sub-license etc. Furthermore, the consideration that is accorded to the licensor is not necessarily monetary; it might also be in the form of another commercial benefit, or quite often it is a cross license.

- III. Franchising: Although franchising infers a business model, it has its roots in intellectual property licensing. The contractual settings of franchising are centered around the core business which is in possession of a cluster of intellectual property rights and seeks to expand (franchisor) and a third party (however typically a multiple number of third parties) who seeks to benefit from the said business model, good reputation and intellectual properties of the core business (franchisee). Accordingly, the franchisor authorizes the franchisee to use its intellectual properties, that emblematically being trademark, know-how and copyright; furthermore, it undertakes the duty of providing assistance and training as to the said business model, meanwhile retaining supervision and control over the performance of the franchisee. The franchisee on the other hand, gets under the duty of paying the franchisor

³⁵ With the exception of moral rights to literary and artistic works due to their non-economic quiddity.

the agreed consideration and providing the preset quality standards, while replicating the business model of the franchisor, in a way acting as an extension of the core business, building upon its well founded reputation, customer portfolio and intellectual property value.

- IV. Joint ventures and Spin-offs: Joint ventures refer to the initiatives that are aimed at collaboratively bringing into the market, hence commercializing, the knowledge assets that are owned by different parties. Collaboration in this context may be organized contractually or by establishing a separate entity that is to undertake the collective project in question.³⁶ The main benefit to each participant is likely to be the allocation of the risk entailed and collective and accumulated benefit from the knowledge assets, that include intellectual property rights, that the collaborators bring into the joint venture. Accordingly, each party will be able to derive significant economic benefits from the commercialization existing intellectual properties of one another as well as from the intellectual properties that are resultant from the joint venture as such. The parties, having been able to avail themselves of the experience, expertise, technology and more importantly the intellectual properties of one another, will undoubtedly have a less costly and more rapid access to the end result/product.

Moreover, universities and research organizations are the fundamental sources of

innovation technology and knowledge in general. Such intellectual outcomes and knowledge assets not only possess significant corresponding economic value but they also retain immense potential for the scientific, industrial and intellectual - likewise cultural- progress of the society. For that reason, the necessity of paving a way for transfer of knowledge from universities to industry and to the public becomes apparent. Spin-off is the mechanism that facilitates intellectual property commercialization in the said direction. It refers to a brand-new corporation that is created by the parent organization -which may be universities, research organizations or another corporation- so as to bring its innovation into the market. Thus, spin-offs serve as a mediator and an effective means of technology transfer between the research environment and industrial sector.³⁷

- V. Collateral function: Over the discussions above we have extensively referred to the economic and commercial value embedded in intangible assets in general and in intellectual property rights in particular. Value of the latter is captured, institutionalized, protected and enforced by intellectual property laws, to which they owe their very existence. Therefore, although the actual worth varies depending on the type of intellectual property right and on the intellectual property in question as such, the presence of certain value is objective. This follows that, once there is objective economic value attributed, they are susceptible to use as collateral

³⁶ Robert Goldscheider., Alan Gordon eds., *Licensing best practices: Strategic, territorial, and technology issues*, John Wiley & Sons, New Jersey, 2006., p 212.

³⁷ European IPR Helpdesk Fact Sheet, *Commercialising Intellectual Property: Spin-offs*, available online at www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Commercialising-IP-Spin-offs.pdf, (last access: 15.05.2020).

to secure financing, typically under a lending agreement. Accordingly, on the occasion that intellectual property rights are used as collateral, the borrower promises the rights of his intellectual property -such as a patent, trademark, copyright, or design rights- if he/she fails to repay his loan.³⁸ This connotes a capitalization of the potential and predictable value of intellectual property rights for commercial purposes, hence commercialization thereof. It is also observed that, although its full potential has yet to be realized, securitization of intellectual property rights tends to gain incremental importance as the global economies persistently grow closer to knowledge-based models.³⁹

VI. Capital function: Founding capital of commercial entities such as limited liability companies and joint stock companies is not necessarily comprised only of cash capital but also *inter alia* in-kind capitals could be brought by the shareholder as capital contribution. Prerequisite for in-kind contribution to qualify as founding corporate asset is subsumed under the headers of economic value, negotiability (transmissibility) and monetizability. Capitalization of the objective value embedded in intellectual property rights, by the same token as in abovementioned collateral function,

may also, depending on the jurisdiction, qualify in-kind capital in the context of commercial entities.⁴⁰ This evidently forms a method of commercialization of intellectual property rights through capitalization thereof.

7. Conclusion

In the light of the ground we strived to lay, it may be articulated that: knowledge is the main foundation of value; IP rights are the fixation or instrumentalization of value; whereas commercialization equates to the extraction of value. In a way knowledge encapsulates the existing and potential value and the wealth likewise, whereas tangibles no longer present the capital and wealth, quite contrarily they remain rather primitive in this equation.

Intellectual properties present the most advanced and possibly the most qualified form of intangible assets as they are backed up and institutionalized by the IP laws. In this sense, IP laws figure the set of principles through which a certain balance is intended to be struck. As much as IP rights are the source of monopolistic powers of the right-holder, they have a number of more sophisticated goals which often contrast the monopolistic interest of right-holders. Said -more sophisticated- objectives of IP laws are most apparent in macro level. In this context, monopoly IP rights built upon has to be limited in favor of artistic and inventive

³⁸ Brian Jacobs, *Using intellectual property to secure financing after the worst financial crisis since the Great Depression*, published in "Marquette Intellectual Property Law Review" vol. 15, 2011, p.451.

³⁹ Dov Solomon, Miriam Bitton, *Intellectual property securitization*, published in "Cardozo Arts & Entertainment Law Journal" vol.33, 2015, p. 127; *Ibidem*. p. 463.

⁴⁰ For instance, Turkish Commercial Code enounces intellectual property rights to qualify as an in-kind capital contribution. It reads as follows:

Article (127):

Unless otherwise is stated by law, the following may be contributed to commercial companies as capital:

- (i) Cash, receivables, negotiable instruments and shares of capital companies,
- (ii) *Intellectual property rights*, (emphasis added)
- (iii) Movables and immovables of any kind,
- (iv) Right of usufruct over movable and immovable property.

progress and of a fair accession to the knowledge and of competition. Limitations - of finiteness- of these rights, along with lacking physical substance, is the most marked point where they steer away from the proprietary concept, therefore IP right do not fully exhibit the characteristics of property rights in classical meaning.

Admittedly, in most instances, creative activities are hardly engaged in with the sole impetus of inventive or artistic pleasure but they are rather carried out on professional level, typically within a contractual relation. Naturally, the end products of these creative activities end up being a part of the aim of profit making, thus, more of a corporate subject anything else. In this connection, intellectual property rights are primarily business tools that subsist the main instrument to control the dissemination of the precious knowledge and the values created arduously, thus they are guarantors of competitive strengths of the businesses under the possession of which they remain. And they are of course key elements to implement various business strategies as specific regards to market accessions and mitigation of R&D costs. Further, intellectual property rights subsist the currency itself that is used in business and commerce owing to the capacity of being bought, sold and put as collateral. That may be called the transactional function of IP rights.

Finally, as far as commercializing these rights is concerned, the terminology of commercialization should be well defined. Although commercializing is often defined as making money out of them, this is only one component of a wider continuum. Hence, this continuum pertains to bringing intellectual properties into the market to be exploited⁴¹ which certainly encapsulates

their statutory and contractual legal aspects as well. Consequently, having put the legal aspects of intellectual property commercialization in main focus, the scope of the term should be perceived in two layers. Firstly, the commerce in goods and services that incorporate intellectual properties, hence come to interface with IP rights. Secondly, it connotes the legal vehicles of commercializing; (i) the sales or assignment of IP rights; (ii) other business contracts that do not alter the ownership of the intellectual property rights but are aimed at commercial exploitation thereof; principally but not exclusively, intellectual property licensing, franchising as well as commercial initiatives which entail legal transaction such as establishing joint ventures and spin-off companies; (iii) legal transactions in the center of which stands the transactional value (can also be referred to as negotiability, commodity value or currency aspect) of intellectual property rights, for instance, securitizing the external financial support by using the IP rights as collateral or bringing intellectual property rights into the companies as capital.

On the final note it may be maintained that although intellectual property and the rights attributed to them are majorly commercial in nature and their economic/commercial reverberations are occasionally more profound than legal ones, their existence is nevertheless inextricably dependent to IP laws that create the identity of intellectual property. Correspondingly commercial and legal aspects of intellectual property very frequently come into the scene simultaneously. Having accepted 'commercialization' as a large continuum that covers almost every step taken with a view to bring into commercial use or open up to public whatever being

⁴¹ European IPR Helpdesk, Fact Sheet, *Commercialising Intellectual Property: Licence Agreements*, available online at <https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Commercialising-IP-Licence-Agreements.pdf>, (last access: 13.05.2020).

commercialized, corresponding legal aspects are, admittedly, ambiguously ample. Nevertheless, in the light of above discussion we tend to suggest intellectual property commercialization should not be perceived as narrow as mere act of making money from intellectual property, meanwhile as far as it is seen from the

intellectual property law stand point it should also not entail the entire continuum that knowledge-based industries commence, especially those that pertain to pure business strategies and concerns and pure industrial matters even though various other legal status and relations might naturally emerge therefrom.

References

- Alexander Poltorak, Paul Lerner, *Essentials of Intellectual Property: Law, Economics and Strategy*, Second Edition, John Wiley & Sons Publishing, New Jersey, 2011
- Annette Kur, Thomas Dreier, *European Intellectual Property Law; Text, Cases and Materials*, Cheltenham – Massachusetts 2013
- Brian Jacobs, *Using intellectual property to secure financing after the worst financial crisis since the Great Depression*, published in “Marquette Intellectual Property Law Review” vol. 15, 2011
- Cristopher Arena, Eduardo Carreras, *The Business of Intellectual Property*, Oxford Publishing, New York, 2008
- Daum Juergen, *Intangible Assets and Value Creation*, Wiley, West Sussex, 2003
- Dov Solomon, Miriam Bitton, *Intellectual property securitization*, published in “Cardozo Arts & Entertainment Law Journal” vol.33, 2015
- Michael Hitt, Duane Ireland, David Sirmon, Cheryl Trahms, *Creating Value for Individuals, Organizations, and Society*, published in “Academy of Management Perspectives”, Vol. 25, No. 2, pp. 57-75
- Robert Goldscheider., Alan Gordon eds., *Licensing best practices: Strategic, territorial, and technology issues*, John Wiley & Sons, New Jersey, 2006
- Russell Parr, *Intellectual Property; Valuation, Exploitation, and Infringement Damages*, 5th Edition, John Wiley & Sons, New Jersey, 2018
- Sami Karahan, Cavit Suluk, Tahir Sarac, Temel Nal, *Fikri Mulkiyet Hukukunun Esaslari*, Seckin, Ankara, 2013
- *Coca-Cola Co Price to Book Value on 31 December 2018*, available at https://ycharts.com/companies/KO/price_to_book_value, (last access: 13.05.2020)
- European IPR Helpdesk Fact Sheet, *Commercialising Intellectual Property: Spin-offs*, available online at www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Commercialising-IP-Spin-offs.pdf, (last access: 15.05.2020)
- European IPR Helpdesk, *Fact Sheet Commercialising Intellectual Property: Licence Agreements*, available online at <https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Commercialising-IP-Licence-Agreements.pdf>, (last access: 15.05.2020)
- Ian Lurie, *Information is free. Knowledge is not*, this document is available online at <https://www.portent.com/blog/random/information-is-free-knowledge-is-not.htm>, (last access: 14.05.2020)
- *Intellectual Property and the U.S. Economy: 2016 Update*, available online at <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>, (last access: 14.05.2020)

- *Intellectual property rights intensive industries and economic performance in the European Union, Industry-Level Analysis Report*, October 2016, this document is available online at https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/performance_in_the_European_Union/performance_in_the_European_Union_full.pdf, (last access: 12.05.2020)
- Ocean Tomo, *Intangible Assets Market Value Study 2017*, available online at <http://www.oceantomo.com/intangible-asset-market-value-study>, (last access: 13.05.2020)
- United Nations Committee on Development and Intellectual Property, *Guide on Intellectual Property (Ip) Commercialization*, https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_16/cdip_16_inf_4.pdf, (last access: 15.05.2020)