

## **Intellectual Property as a Type of Property: The Russian Federation Law and Legal Doctrine**

*Vladimir Valeryevich Vasilyev*

Tver State University, Tver, Russia

---

**Abstract:** The present article examines one of the most important issues of definition of the legal nature of intellectual property. The author covers the timeline of intellectual property concept development in the Russian Federation and the already existing points of view on the legal nature of intellectual property. In his article the author also analyzes the correlation of intellectual property definition with adjacent definitions like property, intellectual rights, intellectual monopoly and the results of intellectual activity. In the present article the intellectual property is determined as a part of public relations between the subjects of the Civil Law the objects of which are the intangible and theoretic substances. In his work the author analyzes the international legislation in the studied area and the Civil Law of the Russian Federation and, as consequence, arrives at a conclusion that the protection of intellectual property rights should be based on the balance of private and public interests. Such a balance will provide the progressive technological and industrial development of society. The intellectual property is a type of property. However, such conclusion does not speak for the possibility of identification of entity property and intellectual property which both are the types of fungible category of “property”.

**Key words:** Civil law • Property • Intellectual property • Intellectual rights • Intellectual monopoly • Exclusive rights • Creative activity • Means of individualization • Entity property • Balance of convenience

---

### **INTRODUCTION**

For the legal system of the Russian Federation the definition of “intellectual property” is a rather new phenomenon. In Fundamentals of Civil Legislation of the Union of SSR and republics No. 2211-1 dated May 31, 1991 ratified by the Supreme Soviet of the USSR the expressions of “results of intellectual property” and “creative activity products” were used. In nomenclature of the lately adopted Patent law of the Russian Federation No. 3517-1 dated September 23, 1992 the definition of intellectual property was also absent and for designation of inventions, useful models and industrial pattern the expression of “industrial property” was used. For the first time the term “intellectual property” was recognized in the Law of the USSR “About the property in the USSR” and further - in the Law of the RSFSR “About the property in the RSFSR” dated December 24, 1990.

The definition of “intellectual property” is used in paragraph 1 of Article 44 and in paragraph “o” of Article 71 of Constitution of the Russian Federation in

accordance with which the intellectual property is protected by the State and its legal regulation is a subject of exclusive jurisdiction of the Russian Federation.

The expression of “intellectual property” is widely used in different Acts of the President of the Russian Federation, in judicial practice and intergovernmental agreements of the Russian Federation.

The sub-paragraph 1 of paragraph 1 of Article 2 of the Civil Code of the Russian Federation in its first original version relegated the intellectual property to the subject-matter of the Civil law identifying this definition with the results of intellectual activity and means of individualization. However, according to the Federal law of the Russian Federation No. 231-ФЗ “About bringing into force of Article 4 of the Civil Code of the Russian Federation” dated December 18, 2006 the term of “intellectual property” was substituted and further in Article 2 of the Civil Code of the Russian Federation the expression of “intellectual rights” started to be used. Nevertheless, in Article 128 of the Civil Code of the Russian Federation the results of intellectual activity and

means of individualization were again identified with the term of “intellectual property”. The terminology of constitutional legislation is not unity as well. In Article 44 of Constitution of the Russian Federation the expression of “intellectual property” can also be found. At the same time, the Article 43.2 of Federal constitutional law of the Russian Federation No. 4-ФКЗ “About the introduction of modifications into the Federal constitutional law “About the judicial system of the Russian Federation” and into the Federal constitutional law “About the Russian Federation Arbitration Courts” in connection with creation of Intellectual Property Court in the system of Arbitration Courts of the State” dated December 12, 2011 entrenches the Intellectual Property Court to be the specialized Court that reviews the cases connected with protection of intellectual rights.

From one side the reason for such situation lays in the position of scientific opponents which express their doubts regarding the usability of definition of “intellectual property”, while from another side the reason of this situation lays in the absents of unity in understanding of the essence of “intellectual property” concept.

In this regard, one of the key targets is the research of definition of “intellectual property” which is possible to be conducted only due to proper examination of category of “property” that has frequently became the subject of scientific researches. The feasibility of this definition usage in the sphere of legal regulation of results of intellectual activity, means of individualization and rights is represented to be justified. The point of departure in the process of this issue solution is the philosophical ideas of the nature of the property. Property is the historically determined public appropriation mode of subject of industrial and unproductive consumption which regardless of its connection with the subjects is not a subject itself, but the interpersonal relations, however, are the subjects within their meaning. In primitive society the property was reduced to claims to lordship over territory and establishment of property rights on to personal weapon, instruments of labor and other things of personal use. In the 18<sup>th</sup> century the theory of natural right has got its further development in scientific works of French representatives of the Enlightenment (Voltaire, Diderot, Holbach, Helvetius, Rousseau, etc). According to this theory the right of founder of creative results in any scope of human’s activity is his imprescriptible and natural right which arises from the nature of creative activity and exists independently from the recognition of this right by the state authorities. The suggested views onto the essence of results of

creative activity have formed the so-called proprietary theory (from Latin word “*proprietas*” which means “*property*”). The examination of essence of results of intellectual activity as the property has found its way in the European legislation of the 18<sup>th</sup> century. For example, the norms of French Patent Law dated January 07, 1791 have considered the industrial invention to be the property of the author of invention and its creator. The proprietary theory has a fundamental influence onto the development of the modern European legislation and the law system of the USA. The operating Code of Intellectual property of France contemplates that the “author of creative product holds the exclusive and absolute rights of intangible property as for his invention in a view of its creation” [1]. In the USA the Law of copyright is considered to be a part of personal ownership [2].

The problem of usage of the category of “property” together with the results of intellectual activity and means of individualization is considered to be a question of present interest. The counterparts of such usage are coming to a conclusion that only material and substantial things can be the object of conversion. They criticize the attempts to use the definition of “intellectual property” in the Civil Code of the Russian Federation as well. However, such position is left to be disputed. The definition of “intellectual property” as well as the generic category of “property” has a dualistic nature characterizing it to be an economic-legal phenomenon. In economy the intellectual property means a position regarding the assumption of results of intellectual activity (knowledge, scientific information, objects of art, objects of culture, inventions) expressed in impersonal form. The conclusions about the legal essence are not differing in their unity. Some scientists are judging from the necessity of examining of intellectual property as an executive right or collection of executive rights of person or legal entity onto results of intellectual activity and equated to them means of individualization of a legal entity, products, performed works or other services [3]. Other scientists consider that the intellectual property is the collection of legal relations regarding the ownership, disposal and usage of products of intellectual activity and the executive rights onto the results of creative activity and means of individualization [4]. The third group of scientists is coming to a conclusion that the intellectual property is a legal status of two main categories of results of intellectual activity: the subjects of copyright law and allied rights and the subjects of industrial property [5]. For the forth group of scientists the term “intellectual property” means the collection of rights that arise

regarding a number of non-material objects like results of intellectual activity and means of individualization [6]. The fifth group of scientists confirms that the intellectual property is the executive right onto the use of results of intellectual activity in a form of material reproduction of created image or in a form of copies of imaginative writing performed in any mode [7]. The sixth group defends the notion that the term of “intellectual property” should be changed due to fact that for expression of “results of intellectual activity” it is better to use another term of “intellectual monopoly” [8]. Such differentiation of approaches to definition of the term “intellectual property” speaks for the relevance of the researches in this sphere. First of all, the limitation of intellectual property by only executive rights seems to be unfounded. According to Article 1226 of the Civil Code of the Russian Federation the executive right is the property right and the disregarding of non-property rights could unfoundedly limit the subject of legal regulation of the civil rights. Taking this into account, we can easily suppose that the non-property rights and the caused by their realization non-property relations could leave without a corresponding scientific attention as well.

It is believed that the intellectual property as one of types of property is a collection of public relations between subjects of the civil law. The objects of these relations are characterized as nonmaterial, incorporeal and ideal substances [9]. Such trinity gives them the particular importance that appears in a close and inextricable connection with their creator (author). They can be expressed beyond the physical form, which means that they can be represented in a physical media. It serves as an objective way for creative activity expression. The physical media include books, automobiles, computers, machine-tools and other objectively existing things. In Article 1227 of the Civil Code of the Russian Federation the law-maker has reasonably drew a clear distinction between the physical media and intellectual property rights which fixed that the last one does not depend on the property rights on physical media (thing) in which the corresponding results of intellectual activity and/or means of individualization are expressed, while the transfer of property rights on thing/item does not entail the transfer or granting of intellectual property rights on the results of intellectual activity and/or means of individualization represented in this thing/item except the cases described in paragraph 2 of Article 1291 of the Civil Code of the Russian Federation. The existence of physical media of results of intellectual activity in the civil turnover is an objective need of society. Their legal structure is

completely identical to the legal regime of material property as far as the physical media of results of intellectual activity themselves are nothing more or less than the things/items which are the subjects of material property with inherent characteristics of object of civil-legal regulation, power of owner and methods of protection.

The exemplarity of results of intellectual activity is expressed in the fact that their base lays in the ideas and the creativity of a human being. The results of intellectual activity having received the recognition from the society and the public distribution are not protected from illegal use from the side of the third parties, including the aim of misappropriation of material benefits. Such situation is connected with economic essence of intellectual property as far as only the process of misappropriation but not the method of protection from illegal use is important for economy and the protection of these results is the key problem of the right and law which are not directly related to the economy. The proscription can be established only due to recognition of author’s and inventor’s rights onto the results of their intellectual property. That’s why the economic essence of intellectual property through jurisprudence is transforming into a unique substance different from the economic understanding. This substance is called the right of intellectual property. From this it follows that the definitions are closely interrelated and interdependent but are not identical.

The Convention dated July 14, 1967 which floated the World Intellectual Property Organization (WIPO) is establishing that the intellectual property includes the rights relating to: literary, art and scientific works; performing activity of artists, sound record companies, radio and TV programs; inventions of all scopes of human activity; scientific discoveries; industrial patterns, trademarks, service brands, brand names and trade designations; the protection from unethical competition, including other rights regarding the intellectual property in production, scientific, literary and art spheres. Paragraph 2 of Article 1 of Convention of Industrial Property Protection (Paris, March 20, 1883) reviewed on July 14, 1967 with subsequent amendments and additions dated October 02, 1972 establishes that the subjects of industrial property protection include the patterns for inventions, useful models, industrial patterns, trademarks, service brands, brand names, trade designations and indications of source or appellations of origin of goods. Thus, the Convention defines the industrial property as the corresponding collection of rights but not as the exact subject of these rights. Paragraph 2 of Article 1 of

Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) contemplates that the definition of “intellectual property” covers the terms of “law of copyright and allied rights”, “trade marks”, “geographical indications”, “industrial patterns”, “patterns”, “topographies of integral circuits” and “confidential information”. On the basis of Article 3 of the mentioned above Agreement it follows that the topography of integral circuits is also a part of intellectual property.

The draftspersons of part 4 of the Civil Code of the Russian Federation have chosen another way in consequence of which the civil law of Russia started to contradict the international legislation. In Article 1225 of the Civil Code of the Russian Federation the law-maker uses the definition of “intellectual property” identifying it with the results of intellectual activity and equal to them means of individualization of legal entities, products, works, services and enterprises which are the subject of legal protection. From the context of Article 1226 of the Civil Code of the Russian Federation it is following that the results of intellectual activity and means of individualization are recognized as the rights of intellectual property. Whereby, the question about the correlation of definitions of “intellectual property” and “rights of intellectual property” arising. The answer to this question was tried to be found by the Supreme and the High Arbitration Courts of the Russian Federation. The decision of Plenums of the Supreme Court and the High Arbitration Court of the Russian Federation No. 29 “About questions arise due to introduction into effect of part 4 of the Civil Code of the Russian Federation” dated March 26, 2009 gives us the explanation of definition of “intellectual property” which covers only the results of intellectual activity and equal to them means of individualization of legal entities, products, works, services and enterprises but not the rights onto them (p 9). It seems that the detachment of definitions of “intellectual property” and “rights of intellectual property” is not correct. The examination of results of intellectual activity and means of individualization separately from the rights onto them has a specific conditionality as these two terms are the interrelated phenomena and their separate existence due to such detachment is artificial. It is believed that the right of intellectual property is the collection of legal norms that regulate the public relationships associated with the involvement of results of intellectual activity, means of individualization and rights onto them into the civil turnover.

The postindustrial development of civilization and the appearance of more and more of material goods have engendered the necessity of expansion of use and the consumption of information. The information becomes the key source of knowledge and goods involved into the turnover. In this regard, the critics of the use of definition of “intellectual property” have an opinion that the recognition of legal regime identical to the property right in favour of results of intellectual activity can lead to the creation of barrier to the undisturbed motion of cultural values, as well as to development of pharmaceutical drugs that help people to get well and etc. In other words, such situation will lead to the protection of the interests of individuals-the owners of results of intellectual activity, to the detriment of the public interests- the interests of society [10-12]. More of that, some scientists come to conclusion that excessive use of patent protection can retard the technological development [13].

Besides, according to some scientists’ opinion the recognition of property rights on ideas and information entrenches on a right of property ownership [14]. However, such grounds despite their apparent consistency are beside the point. Of course, in all consciences, the intellectual property should be examined as a special social product that serves a mankind. And herein it is very important to develop the mechanism which can ensure the balance between the owner of results of intellectual activity and the society with the purpose of inadmissibility of limitation of human rights on food, health and cultural heritage usage [15, 16]. The property as economic and legal category can not be left without the adequate consideration in the sphere of intellectual activity. This category serves the enrichment of essential understanding of results of intellectual activity and means of individualization. The results received in a process of intellectual activity of people and means of individualization are more close in their content to the internal content of property than the material objects (things) [17]. The creator (author, inventor, innovator, etc) during the process of intellectual activity performance put the part of his heart and mind into every received result which acquires a personal value for him. It exerts in the relation of the author to the results of his work which become his “own creation”. The rights to results of intellectual property and their protection are based on the same criteria as the property right onto material goods and there are No. fundamental differences between them [18].

Consequently, the presented above views testify that the intellectual property is a type of property. The connection of creative potential of person and the received result of intellectual activity, as well as the essential significance of these results to society and law objectively show us the possibility of the use of definitions of “intellectual property” and “right of intellectual property” in the civil law.

#### REFERENCES

1. Code of the French Intellectual Property, 2005. literary and artistic property/translation from French- Novosibirsk: SO RAN publishing office, pp: 34.
2. Rights of Intellectual Property in the United States of America. Documents, 2002. comments of specialists and reference materials/drawn up by E. Jonson. M: Liberia publishing office, pp: 12.
3. Russian Legal Encyclopedia/ Head editor Sukharev A. M.: INFRA-M publishing office, 1999, pp: 379.
4. Barikhin, A.B., 2006. Big Legal encyclopedic dictionary. M.: World of Books, pp: 215.
5. Sudarikov. Intellectual property. M. Business and educational literature publishing office, 2007, pp: 7.
6. Right of property: guide-book/edited by Bliznets I.A. M.: Prospect, 2010, pp: 3.
7. Orkina, E.A. Intellectual property: economic contest and legal form: student guide.-Rostov-on-Don, Fenix, 2006, pp: 89.
8. Boldrin, Michele and David K. Levine. free access Against intellectual monopoly. Cambridge: Cambridge University Press, pp: 2008.
9. Zenin, I.A., 2009. Civil and Trade law of foreign countries: student guide.- M.: High Education, Yurayt-Izdat, pp: 139.
10. Martin, G., C. Sorenson and T.A. Faunce, 2007. Editorial: Balancing the need to protect the intellectual property rights (IPRs). *Globalization and Health*, 3: 4.
11. On patents - Daniel B. Ravicher (August 6, 2008). "Protecting Freedom In The Patent System: The Public Patent Foundation's Mission and Activities".
12. Joseph Stiglitz, (October 13, 2006). "Authors@Google: Joseph Stiglitz - Making Globalization Work."
13. Pearce, J., 2012. "Make nanotechnology research open-source". *Nature*, 491: 519.
14. Stephan Kinsella, Against Intellectual property 2008, pp: 44.
15. Staff, UN Committee on Economic Social and Cultural Rights. Geneva, November 12–30, 2001. Human rights and intellectual property
16. Chapman Audrey, R., December 2002. "The Human Rights Implications of Intellectual Property Protection". *Journal of International Economic Law* 5(4): 861-882. doi: 10.1093/jiel/5.4.861. Retrieved February, 9: 2013.
17. Alekseev, S.S., 2008. Right of property. Problems of theory M., Norma, pp: 67-68.
18. Lysander Spooner The Law of Intellectual Property, Part 1 Chapter 1 Section 9. Boston, pp: 1855.