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Redefining Ownership Under Thai Law: Is It a Right or Title?*

*Norravich Limpanukorn***

Abstract

In current Thai law, ownership is traditionally regarded as a real right applicable only to corporeal objects. An analysis of Supreme Court precedents suggests that certain intangible properties, like shares, are subject to usucapion (adverse possession), while some rights, such as copyrights and trademarks, are not. This leads to the question of which intangible objects may qualify as objects of ownership and could be acquired through usucapion. Furthermore, the paper conducts a comparative survey of ownership concepts in German and French legal systems alongside insights from Roman law articulated by the Gaius Institute. From all the connections, the author argues that ownership should be regarded not as a right but as a title and that its object can be extended to incorporeal objects that satisfy certain conditions, and this will have important implications for explaining why some types of incorporeal property, such as shares, may be acquired through usucapion but that others, such as intellectual property rights, cannot.

Keywords: Gaian — Ownership — Things — Property — Merger interpretation — Titularity interpretation

I. INTRODUCTION

The Thai concept of property law appears mainly in Book I and Book IV of the Thai Civil and Commercial Code. Although the concept solidly exists, there are certain interpretation issues that vary from the interpretation of the definition of the terms

'things' (*Sáp*) and 'property' (*Sáp-Sin*) to the concept of ownership. In this paper, the author will present a viewpoint on the interpretation of ownership.

In order to argue that ownership in Thai law should be considered a title rather than a right, this paper will be constructed as follows. Firstly, the next section will explain the Thai concept of things and property to lay the foundation for the reader who is not familiar with Thai property law. Then, the concept of ownership and current interpretation in the Thai legal system will be explained, and the interpretation issue will be highlighted. In the fourth section of the paper, a comparative study of German and French law will be presented. Next, the author will lead back to the possible interpretations of ownership in the Roman era. Finally, the last section will present the redefinition of ownership, its application, and its compatibility with the current practice under Thai law.

II. THINGS AND PROPERTY UNDER THAI LAW

In this section, the author will lay the foundation for the reader who is not familiar with the Thai concept of classification of things and property, as it would be helpful in understanding what theoretically could or could not be the object of ownership in the current interpretation and address the contradiction, which will be discussed later; thus, readers are encouraged to consult the following contents.

Under the Thai Civil and Commercial Code (TCCC), there are certain issues concerning things and property. The definitions are in section 137, which states that things (*Sáp*) are corporeal objects, and section 138, which states that property (*Sáp-Sin*) includes things as well as incorporeal objects, susceptible of having a value and of being appropriated. The outstanding elements and relevant issues are as follows.

A. Corporeal Objects

Saying that things are corporeal objects is simple. But what is a corporeal object? The most general understanding, in which everyone agrees, is that any objects visible to bare eyes or touchable are considered corporeal objects.[1] For example, a desk, chair, land, dog, moon, etc.

How about those objects that are not visible to bare eyes, such as bacteria cells or gas? Are those objects corporeal objects? There is a further idea proposed by legal scholars that corporeal objects also refer to those objects whose existence is in nature,

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** Student, International Program in Business Law (LLB), Faculty of Law, Thammasat University; norravich.limpanukorn@gmail.com.

[1] บัญญัติ สุชีวะ, คำอธิบายกฎหมายลักษณะทรัพย์ (พิมพ์ครั้งที่ 20, วิญญูชน 2565) [Banyat Sucheewa, *Explanation of the Law of Things* (20th edn, Winyuchon 2022)] (Thai) 21; ศนันท์กรณ์ โสตถิพันธุ์, คำอธิบายกฎหมายลักษณะทรัพย์สิน (พิมพ์ครั้งที่ 1, วิญญูชน 2566) [Sanunkorn Sotthibandhu, *Explanation of the law of property* (1st edn, Winyuchon 2023)] (Thai) 39.

consisting of height, length, and width, i.e., they either have volume, or is a point particle (scientifically treated as it has no volume).[2] Therefore, objects with volume, such as cells, pathogens, atoms, and molecules, can be considered corporeal objects. There are certain situations that can elaborate this definition.

1. Electricity

The situations related to the status of whether electricity is considered a corporeal object are the legal cases of theft, which means an act of dishonestly by taking away the "thing" of another person. The court considered that wiring and taking electricity from the public wire would be an offense of theft,[3] and since the telephone signal is an electric current, wiring and using the telecommunication signal from a public phone cable without the title are also theft.[4]

There are various criticisms on the status of electricity. Prof. Banyat Sucheewa felt that electricity was understood to be an incorporeal object and should be property, not a thing.[5] Correspondingly, Prof. Jitti Tingsaphat mentioned that electricity is not a thing but property, but the term "thing" in the criminal code shall be interpreted to include those capable of having ownership or susceptible of being appropriated as owners.[6] Prof. Dr. Sanunkorn Sotthibandhu thinks that electricity is not directly a corporeal object but is a kind of energy that can be derived from things, such as water, oil, or sunlight, and thus may be explainable as a thing.[7]

I highly disagree with the interpretation that corporeal objects are visible and touchable since it is too narrow and may cause confusion in determining what is considered a thing or property. From the two mentioned supreme court decisions, it is obvious that the Thai court adopted the second approach that corporeal objects refer to those objects whose existence is in nature, consisting of height, length, and width. In fact, electricity is the movement of electrons, i.e., the flow of charges.[8] An electron is a type of particle, which means taking electricity would be taking away a particle, which is a corporeal object. Therefore, it satisfies the element of theft.

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[2] อานนท์ มาเม้า, กฎหมายทรัพย์สิน: ความรู้พื้นฐานทางความคิด หลักทั่วไป และบทเบ็ดเสร็จทั่วไป (พิมพ์ครั้งที่ 4, วิญญูชน 2564) [Arnon Mamout, *Property Law: Knowledge Basic of General Idea* (4th edn, Winyuchon 2021)] (Thai) 127–28.

[3] Thai Supreme Court Decision 277/2501 (Plenum Decision).

[4] Thai Supreme Court Decision 1880/2542 (Plenum Decision).

[5] Banyat, *Law of Things* (n 1) 22.

[6] Notes of Professor Jitti Tingsaphat on Supreme Court Decision 277/2501.

[7] Sanunkorn, *Law of Property* (n 1) 52.

[8] "Electricity Explained: The Science of Electricity," (US Energy Information Administration, 19 December 2022) <https://www.eia.gov/energyexplained/electricity/the-science-of-electricity.php#:~:text=Electricity%20is%20the%20movement%20of%20electrons%20between%20atoms&text=The%20shell%20closest%20to%20the,shells%20can%20hold%20even%20more>.

2. Signal

Although electricity is considered a corporeal object, a signal is different. There is a case in which the defendant breached the phone signal of others, but it was not considered theft. The court ruled that relying on the phone signal of another person without permission, or use of the phone signal without rights, is not a dishonest taking of other people's things. Thus, bringing a mobile phone to tune in and copy the signal of another person's phone number and use it to send and receive radio signals without permission is not an offense of theft.[9]

This case may be confusingly similar to the previous decisions. The question might be why wiring and using a telecommunication signal is a crime of theft, but using the radio signal of others is not. In fact, the cases are not the same. A signal is an electric current that moves along a wire conductor, i.e., there is a movement of electrons. Wiring it, therefore, is considered theft since electrons are corporeal objects and are things.

On the other hand, a radio signal is not a corporeal object but a type of electromagnetic wave. An electromagnetic wave is a form of radiation that occurs from changing of fields, which are electrical fields and magnetic fields.[10] Thus, the wave is about energy, not particles, i.e., it is not considered a corporeal object. Since the wave is not a corporeal object, the radio signal cannot be a thing. Therefore, the elements of theft are not satisfied.

The clear cutline can be drawn here that the corporeal objects also refer to those objects whose existence is in nature, consisting of height, length, and width, disregarding whether they are visible or touchable by human sense or not. There are further queries that gas, such as oxygen itself, is a corporeal object and can be considered a thing, but when it comes to a tank of oxygen, are the tank and the oxygen in the tank separate things or is the tank and the oxygen considered a thing as a whole? It is quite clear that one cannot grab into the air and keep oxygen with himself. Without containing it in the tank, the oxygen cannot be appropriated. But once in a tank the oxygen is capable of being appropriated and is a separate thing. The tank and the gas are not merged; there are two things.

B. INCORPORERAL OBJECTS

On the other hand, there is a classical interpretation that the term incorporeal objects refer to objects that are not objects visible to bare eyes and not touchable.[11] With due respect, as aforementioned, human sensory need not be used as a criterion to

[9] Thai Supreme Court Decision 5354/2539.

[10] "Electromagnetic Waves" (National Oceanic and Atmospheric Administration, 10 April 2023) <https://www.noaa.gov/jetstream/satellites/electromagnetic-waves#:~:text=Electromagnetic%20waves%20are%20a%20form,when%20an%20electric%20field%20(Fig>.

[11] Banyat, *Law of Things* (n 1) 23.

distinguish between corporeal and incorporeal objects. Thus, the term 'incorporeal objects' refers to objects that are not corporeal objects, such as energy, signal, and data, along with those deemed by law to be objects, i.e., rights.[12]

A. Susceptible of Having a Value and of Being Appropriated

Under section 138, to be "property" it is a must for such an object to be susceptible of having a value and of being appropriated. But what do "value" and "being appropriated" mean?

1. Value

It was generally understood that the term value not only refers to a price or economic value, but also refers to the subjective value in itself, such as mental value.[13] There is a further explanation from scholars that property that is susceptible of having value means that there is still a demand of human beings attached to it, and once there is no demand, the value is then eliminated.[14]

2. Being appropriated

Being appropriated refers to "which may be regarded as rights." As a clarification, susceptible of being appropriated refers to that which may be intercepted, can take benefits, and may be entitled or acquired, so it is not necessary to have real physical possession over it at the time of consideration.[15]

The further question will be whether all things are property, i.e., "things" under section 137 interpreted as corporeal objects susceptible of having a value and of being appropriated, or things are not necessarily property.

There are two opinions, and the first way is that "things" are a set containing both corporeal objects that can be considered property and corporeal objects that are not property, including things outside of commerce.[16] This means the first approach

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[12] Thai Supreme Court Decision 1476/2518; Thai Supreme Court Decision 2855/2519; Thai Supreme Court Decision 5161/2547:

> Data does not count as corporeal objects. The letters, pictures, diagrams, and instruments are just symbols that convey the meaning of the information from the memory card using a computer. The information on the memory card is, therefore, not considered a thing under section 137 of the TCCC. The defendant copying information from the plaintiff's memory card is not an offense of theft.

[13] Banyat, *Law of Things* (n 1) 24.

[14] ศรีราชา วงศารยางกูร, คำอธิบายกฎหมายว่าด้วยทรัพย์สิน (พิมพ์ครั้งที่ 8, วิญญูชน 2564) [Sriracha Wongsarayangkul, *Explanation of the Property Law* (8th edn, Winyuchon 2021)] (Thai) 27–28.

[15] Banyat, *Law of Things* (n 1) 24; Arnon, *Property Law* (n 2) 146; Thai Supreme Court Decision 1272/2473; Thai Supreme Court Decision 2763/2541.

[16] Arnon, *Property Law* (n 2) 128–29.

concerns that things are not necessarily property, whereas corporeal objects that only have value but cannot be appropriated or are not capable of having value are things but not property, such as a planet, air, and sea. However, if those corporeal objects are susceptible to having value and being appropriated, such as the air put into an oxygen tank for a ventilator, then that oxygen tank is considered a thing, which is also property.

The second opinion is that things are always property, except things outside commerce that have their own category. This means that section 137 and section 138 should be read together where things refer to corporeal objects susceptible of having a value and of being appropriated.[17] Therefore, unlike in the first approach, corporeal objects that are not susceptible to having value and being appropriated are not considered things at all. For example, planet, air, and the sea can be things but are not property in the first approach, but cannot be considered things in the second approach.

It is a controversial issue to determine which approach is the correct one, but the second approach is the mainstream one. There is an explanation from a scholar that the concept of property was built out of the idea involving economic value, and the same applies to things. In other words, the concept of things is under the concept of property. Therefore, whatever is considered a thing, it must always be property, i.e., susceptible of having a value, and being appropriated.[18]

Now, as we finish our discussion on the issue of things and property, and the prospective objects of ownership, I will discuss the current concept of ownership under Thai law.

III. OWNERSHIP UNDER THAI LAW

The previous section discussed the classification of things and property under Thai law. This section will discuss the current interpretation of ownership in Thai law, including the definition of ownership and the object of ownership. The focal point of this article is the concept of adverse possession, where the jurisprudence leads to the author's argument that ownership should be considered a title rather than a right.

The general provisions regarding the term ownership are in Book 4, title 2 of the TCCC.[19] However, there is no appearance of the meaning of what ownership really is. The closest provision to the definition of ownership is in section 1336: "Within the limits of law, the owner of property has the right to use and dispose of it and acquires its fruits; he has the right to follow and recover it from any person not entitled to detain it, and has the right to prevent unlawful interference with it." The question is whether section 1336 really is the meaning of ownership, or if it is not the definition, what is ownership? In this section, the definition of ownership, the object of ownership, and the acquisition of ownership by adverse possession will be discussed.

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[17] Banyat, *Law of Things* (n 1) 21.

[18] Arnon, *Property Law* (n 2) 131.

[19] Thai Civil and Commercial Code, ss 1308–1366.

A. Definition of Ownership

On the one hand, some scholars believe that ownership refers to all the rights the owner has over the property, i.e., the owner can use and dispose of it, acquire its fruits, follow and recover it from any person not entitled to detain it, and prevent unlawful interference with it.[20] This means that ownership refers to rights as limited in section 1336, i.e., a person with all the aforementioned rights is a person who has ownership. Therefore, under this approach, ownership and the five rights mentioned in section 1336 are the same.

On the other hand, some scholars believe that ownership and the rights mentioned in section 1336 are different. Section 1336, in the second view, is the exercise of ownership, which means the owner of the property can exercise the rights to use and dispose of it, acquire its fruits, follow and recover it from any person not entitled to detain it, and prevent unlawful interference with it.[21] In other words, the aforementioned rights are the *consequence* of having ownership. Therefore, section 1336 is not the definition of ownership. The author personally agrees with the second approach due to the reason that section 1336 is in Book 4, title 2, chapter 2, which is about the extent and exercise of ownership. For the author, ownership is a big picture consisting of various jigsaws, where the rights mentioned in section 1336 are some of the derived pieces. Thus, there are better approaches than taking just a few pieces to define the whole picture.

There are proposed ideas of the definition of ownership in similar ways that ownership is a type of real right that displays the title of the owner.[22] The disputed point for this definition is what is the object of ownership? Only things, or property? For instance, there is an opinion that ownership is a real right that shows the title of the owner of that property, and a person may have ownership over every property.[23]

B. Object of Ownership

There are two types of rights, which will be discussed here: real rights and personal rights. A personal right refers to the right that the object is an action to do or not to do, i.e., the right to demand against a person. In other words, it is right (*ius*) over a person (*in personam*) to force a person to do or not to do something. This means that the rights can be exercised against only a specific person and thus they are considered relative rights.

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[20] Sriracha, *Property Law* (n 14) 119–20; Thai Royal Institute Dictionary 2011.

[21] เสนีย์ ปราโมช, อธิบายประมวลกฎหมายแพ่งและพาณิชย์: กฎหมายลักษณะทรัพย์ (พิมพ์ครั้งที่ 1, กรุงเทพฯ: เนติบัณฑิตยสภา 2551) [Seni Pramoj, *Explanation of the Civil and Commercial Code: The Law of Things* (1st edn, Bangkok: Thai Bar Association 2008)] (Thai) 187.

[22] อานนท์ มาเม้า, กรรมสิทธิ์ (พิมพ์ครั้งที่ 1, โครงการตำราและเอกสารประกอบการสอนคณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2560) [Arnon Mamout, *Ownership* (1st edn, Bangkok: Faculty of Law Thammasat University 2017)] (Thai) 66.

[23] Banyat, *Law of Things* (n 1) 160.

Alternatively, the term 'real rights' is our main focus. Under Thai law, real rights can be created only by virtue of the law.[24] However, there is no clear definition of real rights. Also, unlike the case of personal rights, the proposed definitions of the term 'real right' in the view of scholars are not final.

1. Characteristic of real rights

The main characteristic of a real right is that it is an absolute right. This means that the holder of the right can exercise the right against all (*erga omnes*), and everyone has a general duty to respect and not disturb or interfere with such right.

2. Theoretical definition

Real right refers to the rights over a thing whereby the holder of the right can exercise his power in full as owner or to the extent of real rights in the manner that hampers the rights of the owner, in case the thing is of the others, such as exercising a servitude on the other's land or has power over the thing in the manner in which such thing is placed as security, such as retaining pledged property.[25] This means that real rights can be classified into three types. The first type is an absolute real right, which is ownership. The second type is the real right to use things, including superficies, usufruct, habitation, charge on immovable property, and servitude. The last type is securities, which are pledges for movable property and mortgages for immovable property and certain movable property under section 1302. Thus, when ownership is classified as a type of real rights, the object of ownership shall also be the same, which is a thing.

Moreover, in linguistic definition, the term 'real right' also refers to things where it means right (*ius*) over a thing (*in rem*).[26] This means that the object of real rights must always be a thing which is a corporeal object, but not including property that includes an incorporeal object.

3. Extended definition

This definition extends the object of the real right to be property, which means that the object of real rights is not only a 'thing' but also property that is an incorporeal object.[27] This means, under this definition, real right refers to the rights over the property.

Some justify this by saying that it is not required that the object of fundamental rights be limited to things such as copyright and trademark, but those real rights are

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[24] Thai Civil and Commercial Code, s 1298.

[25] ศนันท์กรณ์ โสตถิพันธุ์, คำอธิบายหลักพื้นฐานของกฎหมายเอกชน (พิมพ์ครั้งที่ 1, วิญญูชน 2562) [Sanunkorn Sotthibandhu, *Basic Principle of Private Law* (1st edn, Winyuchon 2019)] (Thai) 260.

[26] Sanunkorn, *Law of property* (n 1) 101; Arnon, *Ownership* (n 22) 89.

[27] Seni, *The Law of Things* (n 21) 120; Banyat, *Law of Things* (n 1) 59.

not the real rights according to the TCCC, thus creating a distinction between real rights in the TCCC and real rights from other legislation.[28] For me, it is too harsh of a distinction as this leads to the doubt that if there are some real rights established by further legislation and both the corporeal and incorporeal can be objects of that right, that right is not considered the same real right under the TCCC at all or only the part where its object is incorporeal and not considered real rights under the TCCC. One way or another, it creates a big ambiguity. For instance, in Business Security Act B.E. 2558 (BSA), the preferential right under this Act is on par with mortgage and pledge as it is a preferential right, but both things,[29] such as machinery, land, etc., and incorporeal objects, such as claim[30] and intellectual property,[31] can be its object. The question is: if the BSA right is not the real right under the TCCC, then how about the part where the BSA is a right over land? Why is a mortgage over land considered the TCCC's real right, but the BSA is not, when they are closely similar? And if the BSA right is a real right under the TCCC, how about the BSA right over claim and intellectual property, which are intangible? Furthermore, there are several cases that will be discussed later on where the Supreme Court of Thailand mentioned ownership over shares, which are incorporeal objects, and if it is not a real right in the TCCC, then in which law is it? The distinction is not so convincing.

IV. CHARACTERISTIC OF OWNERSHIP

Although not expressly mentioned by law, some scholars define three characteristics of ownership: absolute, exclusive, and perpetual.[32]

'Absolute' means that the power under section 1336 can be exercised arbitrarily without asking for any permission. This clearly distinguishes between ownership and obligation in which it cannot be arbitrarily enforced but needs authority to help enforce it, such as by a court. For example, the owner of the car can use or dispose of his car arbitrarily, or if someone steals his car, he can recover it from the thief even through violent means. The owner of the house can exclude the intruder from his house even through the use of force. And that he could do these things without the court's permission.

'Exclusive' means that the owner can exclude others from unlawful intervention. In other words, ownership creates a legal duty to every person to respect and refrain from interfering with the things of the owner. Actually, this characteristic is already mentioned by section 1336 as a power to prevent unlawful interference.

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[28] Seni, *The Law of Things* (n 21) 126.

[29] BSA, s 8(3)–(4).

[30] BSA, s 8(2).

[31] BSA, s 8(5).

[32] Seni, *The Law of Things* (n 21) 1287–89; ประมูล สุวรรณศร, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์: ทรัพย์ (พิมพ์ครั้งที่ 1, นิติบรรณการ 2550) [Pramool Suwannasorn, *Explanation of the Civil and Commercial Code: Things* (1st edn, Nitibannagarn 2007)] (Thai) 128–29.

'Perpetual' means that there is no provision eliminating the existence of ownership in time, i.e., the exercise of ownership is not precluded by prescription, and the ownership does not cease no matter how many years have passed. This distinguishes ownership from other real rights that limit ownership (*ius in re aliena*), such as a servitude that is extinguished by non-usage for ten years (section 1399) or the right of habitation that may not exceed thirty years or the life of the grantee (section 1403). It also distinguishes ownership from other rights, such as personal rights, which are barred by prescription after ten years (section 193/13).

A. Acquisition of Ownership by Adverse Possession

Ownership can be acquired through adverse possession. The section that is topic of discussion in this paper is section 1382 of the Thai Civil and Commercial Code: "Where a person has, for an uninterrupted period of ten years in case of an immovable, or five years in case of a movable, peacefully and openly possessed a property belonging to another, with the intention to be its owner, he acquires the ownership of it." From the provision, it can be seen that the conditions are as follows:

a) A person possessed property belonging to another;
b) Peacefully;
c) Openly;
d) Intention to be its owner;
e) Uninterrupted period of ten years in case of an immovable, or five years in case of a movable.

The focal point in this article is the object of adverse possession, i.e., what can be the object of adverse possession? The first condition is that the property must be owned by another since property cannot be possessed in an adverse manner if the possessor is the owner himself or if there is no owner.[33] The question arising will be whether the term 'property,' in the situation where a person possesses property belonging to another, means that all property can be adversely possessed, or only 'things' that can be adversely possessed.

From a historical perspective, acquisition of ownership by adverse possession is a type of acquisition of things where it is a type of original acquisition (*a titolo originario*).[34] The adverse possession (*usucapio*) was noted in Roman private law to be the acquisition of things by law (*ex lege*) where a thing that is an object of adverse possession must be a thing that the possessor, which is a Roman civilian, is capable of having ownership under *ius civile* (*Dominium ex iure Quiritium*). Thus, the outcome of the adverse possession is that the adverse possessor acquires ownership.[35]

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[33] Thai Supreme Court Decision 2397/2563; Thai Supreme Court Decision 3095/2552.

[34] ศนันท์กรณ์ โสตถิพันธุ์, คำอธิบายความรู้เบื้องต้นเกี่ยวกับกฎหมายเอกชนโรมัน (พิมพ์ครั้งที่ 1, วิญญูชน 2559) [Sanunkorn Sotthibandhu, *An Introduction to Roman Private Law* (1st edn, Winyuchon 2016)] (Thai) 116.

[35] Sanunkorn, *Law of Property* (n 1) 479.

Back to the provision, section 1382 also mentioned that the outcome is the adverse possessor acquires ownership. Based on the fundamentals that considered ownership as a type of real right, the object of adverse possession shall be limited to only the things that are corporeal objects, not property that are incorporeal objects. Thus, property that is an incorporeal object, such as intellectual property rights and rights to claim, shall not be an object of adverse possession since ownership is only for things.[36] However, Thai Supreme Court decisions are not consistent and cause doubts to this author on the issue of ownership. Some case studies follow:

1. Intellectual property rights

Initially, it is understandable that intellectual property rights are a type of incorporeal object and, therefore, not capable of having ownership.[37] Thus, it cannot be adversely possessed under section 1382. Moreover, some scholars further view that possession is factual and can only apply to corporeal objects, which are things.[38]

However, the Thai Supreme Court has provided alternate reasons. The first reason is that intellectual property is neither a movable property nor an immovable property in which the ownership can be acquired through adverse possession under section 1382.[39] Another reason is similar to section 1382 in Book 4, which focuses on ownership and possession, but intellectual property is special and different from movable and immovable property and cannot be classified as property.[40]

Nonetheless, under section 139, immovable property denotes land and things fixed permanently to land or forming a body therewith, including real rights connected with the land or things fixed to or forming a body with the land. Under section 140, movable property denotes property other than immovable property, including rights connected therewith. Since section 140 negatively defined movable property as property *other than immovable property*, it shall include both things that are movable from one place to another without losing their shape or character and property that are incorporeal objects such as energy, rights connected with things that are movable, and other rights including intellectual property rights.

The author also further disagrees with the second reasoning that intellectual property cannot be classified as property since the requirement of being property under section 138 is that it is susceptible of having value and being appropriated no matter whether it is a corporeal or incorporeal object. Since the right over intellectual property is an incorporeal object susceptible of having value and can be regarded as rights, i.e., being appropriated, the intellectual property rights are also property under the Thai Civil and Commercial Code.

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[36] Thai Supreme Court Decision 9544/2542.
[37] ibid.
[38] Sanunkorn, *Law of Property* (n 1) 491.
[39] Thai Supreme Court Decision 677/2532.
[40] Thai Supreme Court Decision 846/2534.

In the eyes of the author, the two foregoing reasons are not adequate to distinguish which incorporeal objects that are property can be an object of adverse possession under section 1382. However, the sole reason that intellectual property rights are a type of incorporeal object will contradict other court decisions on shares.

2. Shares

Shares, from the view of the company, are capital that the shareholders bring to the company to use in the operation of the business. For creditors of the company, shares are securities for debt payment of the company. For shareholders, shares represent shareholders' interest in the company, including rights and duties to the company.[41] This means shares are used to display the rights of shareholders to the company under the law, the memorandum of association (MOA), and the article of association (AOA), where the term share certificate is not the share itself, since the share is intangible, and the certificate was issued to a person to display that they are the owner of such a share.[42] Therefore, shares are property, which may be disposed of or become part of an estate that devolves to the heirs.[43]

Since shares are incorporeal objects, separately from share certificates, they shall not be objects of adverse possession, providing that incorporeal objects are not capable of having ownership, and possession is factual and can only apply to corporeal objects. However, the Thai Supreme Court decided differently: that it is possible to possess shares.[44] The court also impliedly decided that shares can be the object of ownership as the sale of shares is considered a sale under section 453 of the Thai Civil and Commercial Code.[45]

Under Thai jurisprudence, shares in the company are a type of right. Although the transfer of shares is void, the transferee acquires ownership over the shares if he possesses the shares for five years under section 1382.[46] The court further ruled that even though the transfer of shares is not in accordance with the law, if the transferee

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[41] สหธน รัตนไพจิตร, คำอธิบายกฎหมายลักษณะห้างหุ้นส่วนบริษัท (พิมพ์ครั้งที่ 7, วิญญูชน 2564) [Sahaton Rattanapijit, *Explanation of the Law of Partnership and Company* (7th edn, Winyuchon 2021)] (Thai) 303.

[42] นิลุบล เลิศนุวัฒน์, กฎหมายบริษัทมหาชนจำกัด (พิมพ์ครั้งที่ 1, โครงการตำราและเอกสารประกอบการสอนคณะนิติศาสตร์มหาวิทยาลัยธรรมศาสตร์ 2566) [Nilubol Lertnuwat, *Public Limited Company Law* (1st edn, Bangkok: Faculty of Law Thammasat University 2023)] (Thai) 82; นิลุบล เลิศนุวัฒน์, กฎหมายจำนองและจำนำ (พิมพ์ครั้งที่ 1, โครงการตำราและเอกสารประกอบการสอนคณะนิติศาสตร์มหาวิทยาลัยธรรมศาสตร์ 2565) [Nilubol Lertnuwat, *The Law of Mortgage and Pledge* (1st edn, Bangkok: Faculty of Law Thammasat University 2022)] (Thai) 353–54.

[43] โสภณ รัตนากร, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหุ้นส่วนและบริษัท (พิมพ์ครั้งที่ 13, นิติบรรณการ 2556) [Sophin Rattanakorn, *Explanation of the Civil and Commercial Code on Partnership and Company* (13th edn, Nitibannagarn 2013)] (Thai) 280.

[44] Thai Supreme Court Decision 2/2536.

[45] Thai Supreme Court Decision 11883/2554; Thai Civil and Commercial Code, s 453: Sale is a contract whereby a person, called the seller, transfers to another person, called the buyer, the *ownership* of property, and the buyer agrees to pay to the seller a price for it.

[46] Thai Supreme Court Decision 1174/2487; Thai Supreme Court Decision 38/2492.

did not object, it inferred that the transferee had the intention to possess it for himself as owner and obtained possessory right.[47] Thus, he acquires ownership through adverse possession when he possesses the share for five years.

Some scholars may debate that the issue of adverse possession of shares in the previous paragraph is, in fact, relevant to the doctrine of good faith or estoppel, as the dividend has already been issued without any objection beforehand. In this respect, the court may be applying wrong legal reasoning and it is not really an issue of adverse possession. However, there are also cases in which the court assumes the possibility of acquiring shares procedurally[48] and independently[49] through adverse possession. Therefore, the said argument is not so convincing.

The problematic point is that the previous understanding that ownership is limited to only the corporeal objects, i.e., things.

Now, it leads to the questions of whether we can have ownership over incorporeal objects, can they really be adversely possessed, and to what extent will it cover. Then, what are the lines of distinction? Why are we able to have ownership over shares but not for intellectual property rights? Can we have ownership over and adversely possess bills, claims, or digital assets? Before discussing this further, the author would like to touch upon the German and French law to see if the ownership is construed similarly or differently, as these two jurisdictions highly influence the Thai concept of property law.

IV. COMPARATIVE STUDY: GERMAN AND FRENCH

As to the problem of interpretation of ownership and its object under Thai law, German and French law will be observed on whether or not the object is extended to the incorporeal or limited to only the corporeal.

A. German Law

The term *Sachenrecht*, or the law of property or of real rights, is embodied in the two parts of the German Civil Code (BGB), where the main body is in § 854–1296 with the basic foundation in § 90–103. Similar to Thai law, things (*Sachen*) are corporeal objects.[50] Thus, fundamental rights are only limited to things. In the bigger framework, objects (*Gegenstände*) are undefined, but the term corporeal objects (*Körperliche Gegenstände*) is mentioned. The *Gegenstände*, therefore, is divided into *Körperliche Gegenstände/Sachen* and *Unkörperliche Gegenstände/Rechte*, where

[47] Thai Supreme Court Decision 3395/2529.
[48] Thai Supreme Court Decision 1086/2512.
[49] Thai Supreme Court Decision 695/2534; Thai Supreme Court Decision 2475–2476/2566.
[50] BGB, § 90.

only the former can be the object of ownership.[51] Incorporeal objects cannot be the object of private-law ownership.[52]

However, there was probably a glitch of ownership over incorporeal objects that occurred. The term intellectual ownership (*Geustiges Eigentüm*) was introduced, and the German Federal Constitutional Court decided that both categories fall into constitutional-law ownership.[53] Here, the Federal Constitutional Court decided that ownership in constitutional law is the allocation of resources; thus, when both intellectual property and corporeal property trigger a similar process of such an allocation, both fall into the same category of constitutional-law ownership. However, that perhaps could not replace the idea that private-law ownership, which is our focal point, is limited to only *Sachen*, not *Gegenstände* or *Rechte*. Also, the terms ownership of personal rights (*Forderungseigentüm*) and ownership of rights (*Rechtseigentüm*) have been mentioned.[54] But the mainstream opinion remains. Ultimately, private-law ownership, for German law, has no place for incorporeal objects, and that ownership clearly is a real right.

B. French Law

The French system also has a similar structure to the German system; it clearly distinguishes corporeal (*corporelless*) from incorporeal (*incorporelles*), but the technical term here is property (*biens*), not objects or things. Thus, in French law, there are corporeal property (*biens corporels*) and incorporeal property (*biens incorporels*).[55] The code also provides the term incorporeal right (*droit incorporel*) in Articles 1607 and 1693 of the code.

The code not only classified *biens corporels* and *biens incorporels*, but also distinguished between *biens incorporels* that are *droit* and those that are not *droit* but are intangible in nature. As it can be seen, the term incorporeal movable (*meubles incorporels*)[56] has expressly been mentioned, and the code is distinct between movable properties, which are corporeal and incorporeal. Then, it separates the mode of delivery of the movable property, which is corporeal movable, and incorporeal movable except rights,[57] and separately provides the method to deliver rights.[58] Then, in *Livre III Titre VI Chaptire VIII* of the code, it provides a provision relevant to the transfer of rights as it provides that those who sell a *droit incorporeal* must guarantee

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[51] BGB, § 903.

[52] (1966) 44 Entscheidungen des Bundesgerichtshofs in Zivilsachen, 288.

[53] Francesco Giglio, "Pandectism and the Gaian Classification of Things" (2012) 62 The University of Toronto Law Journal 13, footnote 45 <https://doi.org/10.1353/tlj.2012.0003>.

[54] George Gretton, "Ownership and its Objects" (2007) 4 Rabels Zeitschrift für ausländisches und internationales Privatrecht 821, footnotes 104–5 <https://doi.org/10.1628/003372507782419462>.

[55] The French Civil Code, arts 1075–72: "*biens corporels et incorporels*."

[56] The French Civil Code, art 2075.

[57] The French Civil Code, art 1606.

[58] The French Civil Code, art 1607.

its existence.[59] It should be noted that although *droit incorporel* refers to the right, perhaps it is also in a different context from the right relevant to succession (*droit successif)* and the right relevant to litigation (*droit litigieux*).[60]

The ownership (*propriété*), reading just from the code, is not so clear whether it is limited to only *biens corporels*. It mentions one may have ownership over property (*biens*),[61] then that ownership is the right to enjoy and dispose of things (*choses*),[62] the term that is not so well conceptualized as there is no direct reference *choses corporels* or *choses incorporels*. Nonetheless, the jurisprudence leaves the meaning of *choses* and refers to the objects of ownership as *biens*.[63] Still, the *biens* contain ambiguity about which type of *biens* they are. One way or another, the dominant view is that only *biens corporels* can be its object and that ownership is a right as the code refers to *droit de propriété*.

However, there is also a minority view presented by Samuel Ginossar.[64] For him one can own both things (*les choses/les biens corporels*) and rights (*les droits/les biens incorporels*). The ownership of the first category is corporeal ownership, and the latter is incorporeal ownership. Moreover, the Ginossarian view does not consider ownership to be a real right (*droit réel*) at all but a relationship between a person and his patrimony.[65] In other words, ownership is neither a right nor an element of one's patrimony, but is a link between a person and his patrimony, which consists of *biens corporels* and *biens incorporels*. For Ginossar, ownership is a title that allows a person to assert his relationship to his property as owner.

French scholars also define features of ownership as exclusive, unlimited, and perpetual.[66] Exclusive is that the owner of things can prevent third-party interference on his own, with the help of authority or a person without authority. This character gives the owner a monopoly interest. Unlimited means whatever the owner does with his things is deemed legitimate. He could do whatever he desired, subject only to legal restrictions. Lastly, perpetual means that the owner can enforce and recover possession of his things unlimitedly. His judicial right is perpetual, unlike other actions that are limited by the statute of limitations.

At this point, it can be seen that there are some scholars' opinions that it is possible to own incorporeal objects in the sense of ownership and that ownership is interpreted differently. Germany's system justifies ownership over incorporeal objects similarly to some Thai scholars as the former separates between private-law

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[59] The French Civil Code, art 1693.

[60] Du transport de certains droits incorporels, des droits successifs et des droits litigieux.

[61] The French Civil Code, art 543.

[62] The French Civil Code, art 544.

[63] Cass civ 3^{lème}, (2001). Bulletin des arrêts de la Cour de cassation. Chambres civiles No 106: "*le propriétaire actuel du biens.*"

[64] Samuel Ginossar, *Droit réel, propriété et créance* (Paris: Pichón et Durand-Auzias 1960).

[65] Patrimony refers to the rights and duties of a person, and patrimonial rights includes real and personal rights with value. Thus, property is a part of patrimony.

[66] Laurent Aynès, "Property Law" in George A. Bermann and Etienne Picard (eds), Introduction to French Law (Kluwer Law International 2012) 154–55.

ownership and constitution-law ownership, while the latter justifies it by distinguishing between the TCCC's ownership and ownership in other legislation, disregarding whether it is private law or not. However, as mentioned, applying this to Thai law will create further theoretical doubts. The French minority is more sound. Above all, both the ideas that ownership is corporeally limited and the Ginossarian view can be traced back to Roman law, the Gaian *schema*.

V. THINGS, PROPERTY, POSSESSION, AND OWNERSHIP IN ROMAN LAW

From the thought of Roman law, *res* or things only refers to corporeal objects. Under Roman jurisprudence, there is no *res* that is an incorporeal object.[67] In other words, the concept of *res* was initially built to refer only to corporeal objects that can be objects of a right. However, the Gaian *schema* is different.

A. The Gaian *Schema*

The institutes of Justinian maintained that corporeals are tangible things, such as human beings, gold, silver, etc.[68] Incorporeals are intangible things whose existence is juridical, such as an estate of inheritance, a usufruct, a right of use, and obligations.[69]

Under the Gaian *schema*, *res* is not only limited to the corporeal objects (*res corporales*) but is a category that includes incorporeal objects (*res incorporales*). Compared to Thai law nowadays, *res* in the Gaian *schema* is similar to the term 'property.' There might be a thought that *res corporales* also include human beings, but the human being is not susceptible to being appropriated under Thai law. Then how come *res* is similar to the term property but not object? It is because, in the Roman law context, human slaves are considered things, a category of *res mancipi*.[70] Therefore, the human being is susceptible to being appropriated at a time. Although Gaius expresses the distinction between *res corperales* and *res incorporales*, it is still clear under the Gaian *schema* that the *res incorporales* cannot be possessed since they cannot be physically held. Thus, the *res incorporales* cannot be acquired by *usucapio*.[71]

From the institutes, ownership is missing from both categories. Then, there is a question of what ownership is in this *schema*. When one acquires land, it is of *res corporales*, but if he acquires a right of use over the land, it is of *res incorporales*. But when one says he acquires ownership over the land, does it mean that he acquires the land itself, or does he also acquire ownership as a right separately from the land? If

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[67] Sanunkorn, *Roman Private Law* (n 29) 104.
[68] Gaius Institute II, 12–14; George, *Ownership* (n 54) 804–5.
[69] ibid.
[70] Barry Nicholas, *An Introduction to Roman Law* (1st edn, Clarendon Press 1975) 105–6.
[71] ibid 106.

ownership is considered a right, then it shall be the first to mention in *res incorporales* by the institutes, but why does it disappear?

There is one comparable statement from Nicholas:[72] "The strictly comparable statement to 'I have bought a right of way over a plot of land' is not 'I have bought a plot of land', but 'I have bought the ownership of a plot of land'. In each case I have acquired the right."

Ownership was not recognized by Gaius since there was no necessity. On the one hand, only a corporeal object can be its object in considering ownership as a right. This means the acquisition of the *res corporales* is equivalent to the acquisition of ownership. However, Roman law does not describe ownership as *ius* but refers to the term owner and ownership as *dominus* and *dominium*, where ownership was the relationship between a citizen and a patrimonial thing.[73] At the same time, the real right was conceptualized, whereas *ius in re aliena*, which means right in the things of the others, was mentioned as *ius*.[74] On the other hand, it is able to say that the Roman jurists did not view ownership as a type of right at all. This delves us into two possible interpretations: the merger interpretation and the titularity interpretation.

1. The merger interpretation – the dominant view

The first interpretation proposed that the physical thing (*res corporales*) and the ownership of that thing are identical. This interpretation is a result of the pandectist as they think what Gaius described in his institution is the elements of person's patrimony. However, only *res corporales* are a fact, and the law implements legal interest to it. But the *res incorporales* are legal things that do not exist in the real world but are created by the law. Thus, both sides with legal interests are part of patrimony. They then explained that when Gaius mentioned about *res corporales*, he already referred to ownership, while the *res incorporales* referred to other patrimonial rights. When one says he acquires the physical thing, it means that he acquires the thing and acquires ownership as a right over the thing. The link between ownership and the physical thing is so strong that it becomes one with its object.

The idea preserves ownership as a right but merges with the physical thing. Under the merger interpretation, ownership is a type of real right that merges with the thing, i.e., ownership becomes the thing itself. The process results in the right being closely connected to things, making the express reference to the right redundant. Thus, it is useless to mention the term ownership again, as when corporeal things are mentioned, it also refers to ownership. The other real rights are not merged. The term real rights, under this interpretation, refer only to the right of the type *ius in re aliena*. This means Gaius listed, on one side, the corporeal objects that can be objects of ownership, and on the other side, the incorporeal objects that could not be objects of

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[72] ibid 107.

[73] Peter Birks, "The Roman Concept of Dominium and the Idea of Absolute Ownership" (1985) 1 Acta Juridica 2, 26–27.

[74] Gretton, *Ownership* (n 54) 806.

ownership but themselves as legal interests. There is no doubt that this approach of interpretation dominates the area of property law, as can be seen in mainstream opinions on German, French, and Thai property law. At the surface, their patterns in the classification of things are Gaian, and they preserve ownership as real rights limited to corporeal objects, theoretically.

2. The titularity interpretation

This interpretation has already been mentioned in the Ginossarian view. The idea of ownership as titularity is that ownership is a link between a person and his patrimony. Surprisingly, it was not only Ginossar who produced this idea. Birks, too, thinks that ownership is a link between a person and objects. He thinks both sides of Gaius's list deal with ownership, both corporeal and incorporeal ones.[75] This means that not only does a person own gold and silver, but he also owns servitudes, usufruct, and obligations. And by owning the latter, he does not mean that a person holds rights but has ownership over rights. Both scholars' ideas independently resemble each other; while Ginossar reflects Roman ownership as a title and he applies his concept to reflect French law, Birks directly applied his theory to Roman law. However, the concept of titularity coincidentally becomes the result.

Under this interpretation, the ownership is not preserved as a right. The ownership is instead a relation between a person and an object of his patrimony. Under this approach one can own the physical thing such as the land. One can also own real rights over the land. Ownership as a relationship then merges, not with the land, but with titularity. Under this interpretation, ownership does not become the thing, and also is not a right; ownership is considered title. Extensively, once the ownership is a title between a person and *res*, a person can also have ownership over incorporeal things. For Ginossar and Birks, corporeal things and rights, both real and personal, are part of the patrimony and connected to the patrimonial owner by ownership title.

However, this theory is a big challenge to the *actio in rem*, as Gaius described as an action by which one claims that he owns a corporeal thing or is entitled to a particular right in the thing.[76] For real rights such as usufruct, it is justifiable that this still falls into the *actio in rem* as land is its object, but an obvious problem is on an obligation that is a personal right. Perhaps the Birksian view is too extensive.

Gaius's classification is neither Ginossar's or Birks's scheme nor the merger of corporeal and incorporeal objects into one's patrimony. The titularity interpretation is convincing, but overstated. Although Gaius lists the patrimony that can be owned, title, as observed by Gaius, is arguably not an ownership title; it is the title of an owner. The left side of the list is the objects in one's patrimony with certain characteristics, so the title that links the owner and the objects is beyond the general title of the owner and is thus subject to ownership title. Meanwhile, the other side describes elements of patrimony that can be owned but not with ownership title. This does not preclude an

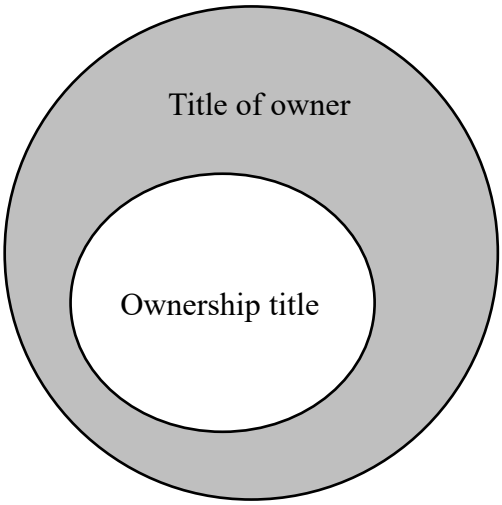
[75] Birks, *Roman Concept of Dominium* (n 73) 26–27.

[76] Gaius Institute IV, 3.

object that is not physical in nature from being subject to ownership title. The answer to why Gaius separated *res corporales* and *res incorporales* at a time would be that in the Roman era, there were not yet any incorporeal objects that were qualified.

Then, *actio in rem* is mainly concerned with corporeal things. The part that "one claims that he owns a corporeal thing" is not that a person exercises the right of ownership, but exercises the real rights arising from the assertion of ownership title, such as the right of enjoyment and other *ius in re propria*. And, the part where one claims that "he is entitled to a particular right in the thing" is when he asserts his title of owner over the *ius in re aliena*, such as usufruct and habitation. If looked thoroughly, both types of rights mentioned are all *in rem* as their objects are corporeal. But it was not mentioned that the corporeal things themselves are objects of ownership title and that the incorporeal things are objects of the title of owner. Thus, something that can be owned by just the title of owner but involves real objects, e.g., real rights, can involve an *actio in rem*. However, something that can be owned in the same way but without real objects, e.g., obligation, cannot be involved in that process. Here, Ginossar's and Birks's obstacles are eliminated.

I would conclude by saying that I took a titularity approach, that ownership is a title, but not that extreme compared to Ginossar or Birks. Instead, it is a subset of the title of owner. All ownership, of course, is the title of the owner, but not every title of the owner is considered an ownership title, as shown in the figure below.



In the current day, in most legal systems, the pattern of the law of property is clearly Gaian. However, it remains unclear whether the merger interpretation or the titularity interpretation is to be applied to each of them.[77] Or would it be more suitable if none of them were applied?

[77] For a further comparative survey, I refer the reader to Gretton, *Ownership* (n 54) 807–31.

B. Ownership in Roman Law

Despite disagreement in ownership status, various experts in Roman law have pointed out the definition and characteristics of ownership as follows:

Schulz views ownership as giving full power over things subject to legal limitations.[78] One can own land, even though there is usufruct or servitude over it. In such a case, he still has ownership over the land, but real rights limited it. Ownership may also be limited by public law. Schulz further mentioned that it was a mistake of Romanistic lawyers to believe that Roman ownership was unlimited since there is no evidence that Roman ownership gave unlimited power to the owner. Kaser, too, agreed with Schulz that, before the golden age, there was no definition of ownership. Thus, it is absolute power under private law. For Kaser, ownership is an absolute power that can be exercised against all through *actio in rem*, and this power was later known as *dominium* and *proprietas*.[79]

Arangio-Ruiz, similar to Rein, defined ownership as power over the property (*signoria dell'uomo supra la cosa*), where its absoluteness depends on the exclusion of others from interference (*esclusione di ogningerenza altrui*).[80]

Nicholas said that ownership is either so simple or so elusive in definition. At its simplest mode is the distinction between mine and thine. At the most sophisticated stage, it is the ultimate right over all other rights. For Nicholas, ownership is an absolute right in enjoyment (*ius in re propria*), i.e., it is the ultimate residual right in a thing that will remain when all others expire. Another aspect is that ownership is an absolute title, i.e., to show that he is the owner is to show that he has better rights than the others.[81]

These characteristics have been inherited until now, as we can see in the French features of ownership and Thai characteristics of ownership. If one further asks when the title of owner will become ownership title, I would say if it passes these characteristics: absolute, exclusive, and perpetual. I will explain and reshape this later in the next section, but Now I will delve into the concept of possession to finish the final setting that will eliminate the issue of possession over incorporeal objects.

C. Possession of *Res Incorporales*

The Romans usually refer to possession as a fact, which from the initial thought, may contrast with the view of modern legal scholars that possession is a right. However, the statement does not mean that possession is not a right. It was noted that what the Romans did mean by possession as a fact was by contrasting it with ownership.[82]

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[78] Fritz Schulz, *Classical Roman Law* (Darmstadt: Scientia Verlag 1992) 338–39.

[79] Max Kaser, *Das römische Privatrecht* (Munich: C. H. Beck 1971) 400–402.

[80] ประชุม โฉมฉาย, วิวัฒนาการของกฎหมายโรมัน (พิมพ์ครั้งที่ 3, โครงการตำราและเอกสารประกอบการสอนคณะนิติศาสตร์มหาวิทยาลัยธรรมศาสตร์ 2559) [Prachoom Chomchai, *Evolution of Roman Law* (3rd edn,Faculty of Law Thammasat University 2016)] (Thai) 253–54.

[81] Nicholas, *Roman Law* (n 70) 153–54.

[82] ibid 115.

Ownership can exist without any manifestation, but possession needs to be illustrated. If one's gold coin was snatched from his pocket, he lost his possession but did not cease to be its owner. The snatcher also acquires possession, not ownership. One observable point is that a wrongful act can terminate possession but not ownership unless the wrongful act destroys such a thing.[83] Thus, by declaring that possession is a fact, the Romans did not reject that possession is a right but meant that possession needs factual manifestation to show that one is the possessor. It may be concludable that possession is not entirely a fact and not entirely a right but is both, simultaneously.[84]

Since possession or *possessio* needs factual manifestation, the problem arises of whether a person can possess rights or not.

1. *Possessio*

The components of *possessio* consist of two parts: *corpus* and *animus*. *Corpus* is a material composition directly involved with the thing in a factual sense, i.e., it is physical power over the thing. *Animus* is a mental element that refers to the intention of the possessor to exercise power over the thing in the same way as if he has ownership or holds other real rights.

From the aspect that *possessio* is also a fact, the *corpus* element then needs to show physical power over a factual object. Thus, it is not possible for one to possess *res incorporales*, such as rights, since one cannot display physical power over the non-physical object.

2. Quasi-possession

Apart from the classical possession, the concept of quasi-possession was first introduced by Javolenus around the late 1st century, that the use of right must be considered equivalent to the delivery of possession.[85] Around the same time, Ulpian ensured that the possession of right is possible, where he mentioned the recovery of a usufruct which has been delivered, and also where servitudes of urban estates have been created by delivery.[86]

Although the proposal occurred before the Gaian schema and was rejected by both Gaius and Paulus[87] that only corporeal property can be possessed, the concept of quasi-possession has widely been adopted afterward. In Justinian's era, the quasi-

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[83] ibid.

[84] For further literature on possession, I refer the reader to สมเกียรติ วรปัญญาอนันต์, "ข้อความคิดว่าด้วยการครอบครองตามกฎหมายลักษณะทรัพย์สิน" (2564) 50(1) วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ [Somkiat Worapunyaanun, "The Concept of Possession in Property Law" (2021) 50(1) Thammasat Law Journal] (Thai) 26–31.

[85] Digest Book 8, title 1. Concerning servitudes, 20. Javolenus, On the Last Works of Labeo, Book V.

[86] Digest Book 6, title 2. Concerning the publician action in rem, 11. Ulpianus, On the Edict, Book XVI.

[87] Digest Book 41, title 2. Concerning acquiring or losing possession, 3. Paulus, On the Edict, Book LXX.

possession is considered a power over Gaian's *res incorporales*. The legal effects of possession were applied to the case of quasi-possession *mutatis mutandis*, including the acquisition of *res incorporales* by delivery and *usucapio*.[88]

In the current era, quasi-possession and *possessio* were merged into one concept in some legal systems, such as in the French civil code, where possession is the detention or use of things or rights,[89] and in the Thai Civil and Commercial Code that a person acquires possessory right by holding property with the intention of holding it for himself.[90]

Despite various scholars' objections that incorporeal objects cannot be possessed under Thai law, this author views it differently since the object of possessory right under section 1367 is property, which also includes incorporeal objects. This discussion will continue with the assumption that the idea of quasi-possession was adopted in Thai law, and the only issue to discuss on adverse possession over incorporeal property is whether or not there is ownership.

VI. REDEFINING OWNERSHIP UNDER THAI LAW

Now, from all the aggregated information mentioned beforehand, the main argument is that ownership in Thai law should be considered a title rather than a right. Firstly, the author will discuss whether current Thai property law adopts the merger interpretation or the titularity interpretation, or whether none of them are fully adopted. Then, the author will propose the redefinition of ownership. Lastly, the redefined concept will be applied to show compatibility with Thai jurisprudence on the adverse possession of incorporeal objects.

For the author, Thailand does not fully adopt the merger interpretation or the titularity interpretation. But in other scholars' opinion, the closest comparison in each aspect can be classified as follows:

A. Thai Mainstream View

The mainstream opinion is that ownership is a type of real right, and the object of right is a thing. It is similar to the merger interpretation in terms of preserving ownership as a right. However, the difference is that Gaian's merger interpretation considered that ownership merged with the physical object, but the Thai legal aspect concerned ownership as a right separate from things.[91] In other words, it is abstract and incorporeal, and it is the thing that is the resident of ownership. Consequently, ownership can be considered as a separate object from a thing. The explanation in terms of the chart is as the following.

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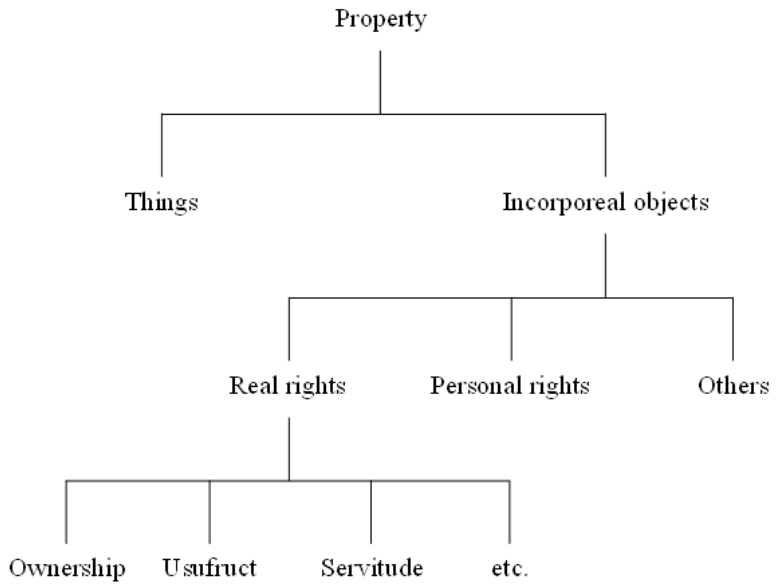
[88] Somkiat, *Possession* (n 56) 19.

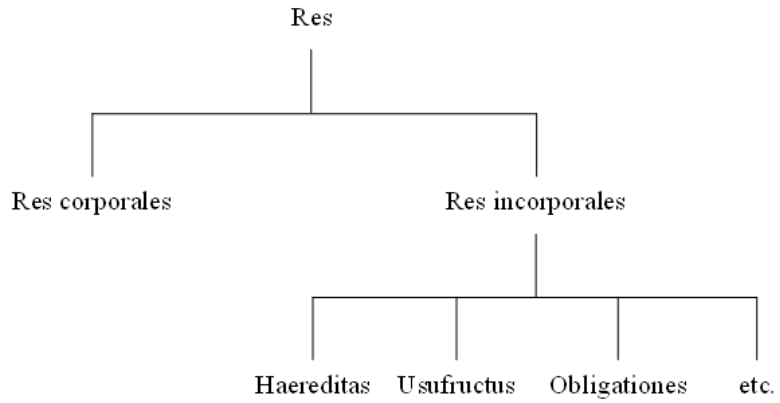
[89] The French Civil Code, Art. 2255.

[90] Thai Civil and Commercial Code, Section 1367.

[91] Arnon, *Ownership* (n 22) 86.



The word on the top is property (*Sáp-Sin*), which certainly is the Gaian's *res*. Things (*Sáp*) are corporeal objects, which is the Gaian's *res corporales*, and on the right, the term *res incorporales* is now presented by incorporeal objects. To a certain degree, both Gaian's merger interpretation and Thai property law agreed that ownership could not exist without a corporeal object as its object. Still, the Gaian *schema* rather views ownership as the thing itself. The genuine merger interpretation chart is as the following.[92]



On the right side, there is no ownership existing in the *res incorporales*, leading to the question of what the ownership is, and the answer from the merger interpretation is that it was preserved as a right but was merged with the *res corporales* on the left side.

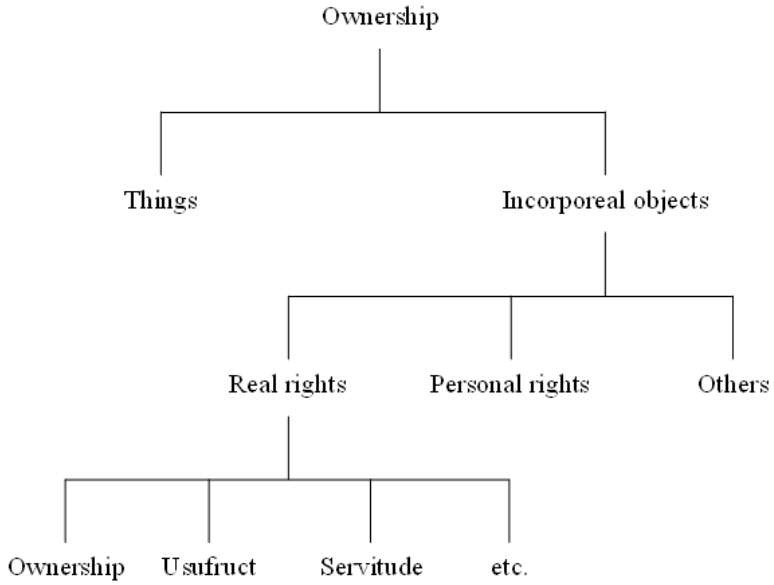
It is then concludable here that the mainstream view and the merger interpretation are similar in that ownership was preserved as a right over corporeal objects. Nevertheless, ownership in Thai mainstream view appears clearly as a right, separate from the corporeal objects, whereas the merger interpretation concerned

[92] Gretton, *Ownership* (n 54) 805.

ownership as a right that was merged with the thing, i.e., it is a right that becomes one with the *res corporales*.

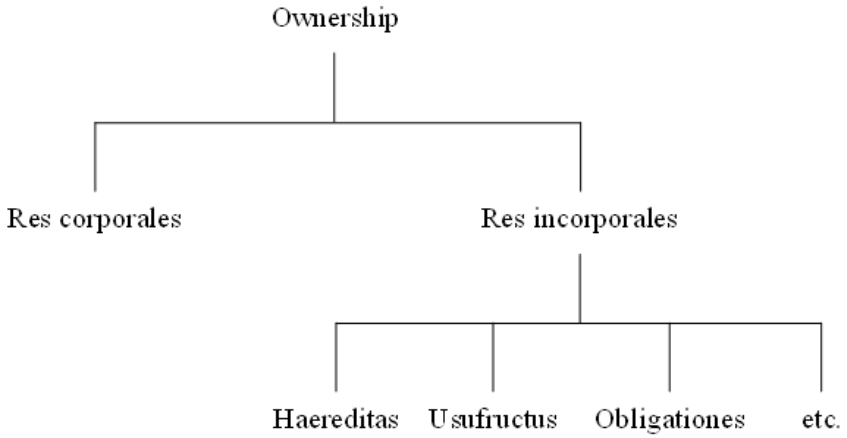
B. Thai Extended Opinion

Unlike the Ginossorian view, the Thai extended view considered ownership as a real right still, where ownership is a right to show that one is owner of the property.



This approach is very problematic even when considering the justification that is distinct between the TCCC's ownership and the others. If the chart is thoroughly considered, one paradox can be noticed. Ownership is placed simultaneously in two positions. One is on the top to show that it is the right over property, and another is under the umbrella of real rights, which is a part of the property, the incorporeal objects. Under this approach, one also owns the right of ownership when one owns the property, both corporeal and incorporeal objects. But when he owns the right of ownership, does he also own the right of ownership over the right of ownership endlessly, since ownership is again property?

The genuine titularity interpretation is more well-structured. Although there are significant similarities in that ownership is not limited to be with corporeal objects only, the difference is that under the titularity interpretation ownership is not a right but is the title.



The structure is similar in that ownership was presented on top, but this time not as a right. There is no paradox for the titularity interpretation now since ownership is not under the umbrella of *res incorporales*. Thus, when one owns the *res*, he has ownership as a title, the relationship between a person and his *res*. Then, there is no paradox that one must have ownership over ownership again.

Nonetheless, both approaches do not fit the previously mentioned Supreme Court decisions on intellectual property rights and shares. If adopting the mainstream opinion, then the interpretation is too narrow to the point in which the incorporeal objects shall not be acquired through adverse possession or be the object of sale. If applying the minority opinion, the problem will be that the ownership was interpreted too broadly so that one can have ownership over all incorporeal objects, including real rights and personal rights, such as the right to claim specific performance.

C. Redefined Interpretation

One owns things. They are also conveyable if he is the owner of the property. At the same time, a person who owns incorporeal objects, such as the owner of a copyright, is also considered to be an owner of the property as well. Therefore, both the owner of corporeal objects and incorporeal objects are given the title that he is the owner of the property.[93] This explanation is presented to distinguish between the title of the owner and ownership as a real right. For me, ownership is not a right, and the title of owner and ownership are not exactly the same. To elaborate, when I say that a person is an owner of a car, the term owner is a title that links between a person and his things. Similarly, when I say that a person is an owner of a copyright, the term owner is a title that links a person and his incorporeal property. However, the title in both cases is not the same; the term owner in the first case refers to ownership title, but the term owner in the second case does not.

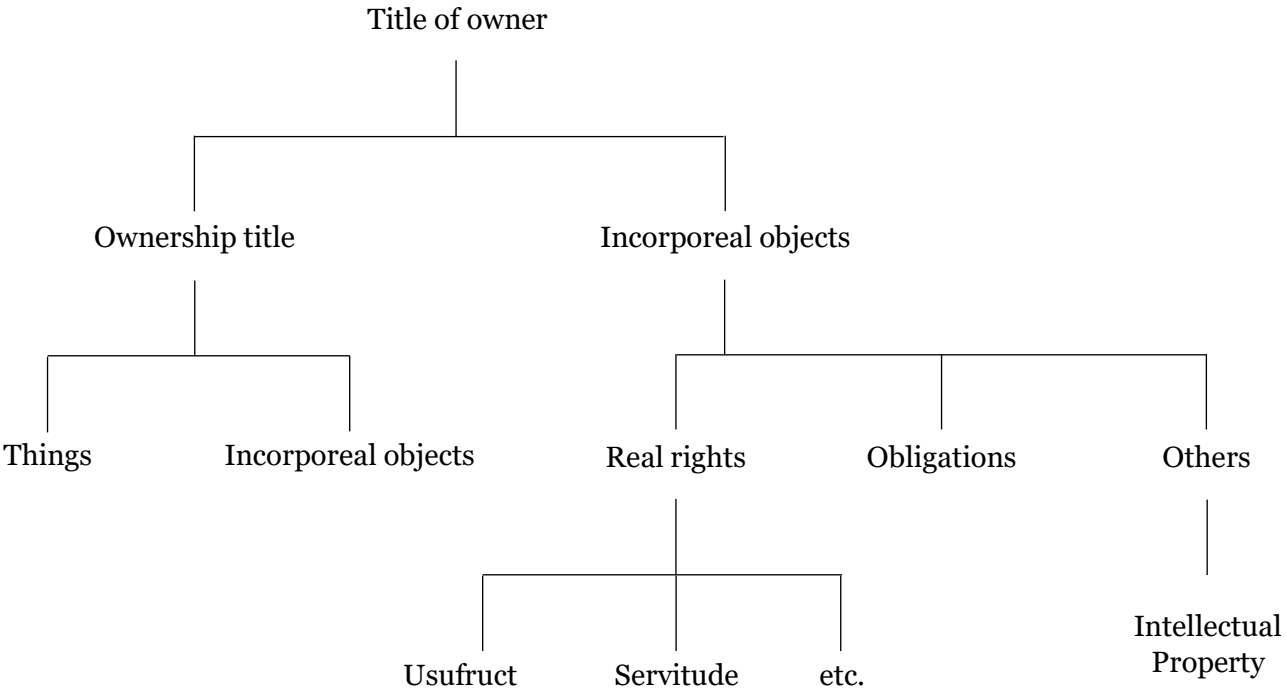
As I mentioned, I agreed that ownership is a title but not the sole title to be described. The word on top would be title of owner, then classified between those that

[93] Arnon, *Ownership* (n 22) 64–65.

can be with ownership title and those that are not. What I really think could be real rights are rights provided in section 1336. The title of owner is a collection of rights in which one can assert the title and exercise his rights to use, dispose of, acquire its fruits, follow and recover, and exclude another person. However, whether or not these rights are real rights depends on whether that person asserts that he owns things. If it is the right to use things such as land, then it certainly is a real right, but if it is right to use incorporeal property such as copyright, then it is not a real right.

Once the idea that ownership is a title is adopted, there is no issue on the object of right since the title of the owner can be over both corporeal and incorporeal objects. In other words, there is no problem in saying that there is ownership over incorporeal objects, such as shares. The first layer of the problem has been solved.

The chart that I that I think reflects Thai law is as follows:



Now it is time for the second layer of the distinction between the title of the owner and the title that can be considered ownership.

As aforementioned, the distinction between the title of owner and ownership title entails three criteria: absolute, exclusive, and perpetual. In this fashion, I will reiterate the explanation of each criterion as follows.

Absolute means that the rights arising from asserting the title of owner can be exercised arbitrarily without asking for permission. If one asserts that he owns a claim, it is a personal right. His assertion of the title of owner grants him the right to use, in which he can demand the claim. However, in doing so, he must ask the court to help him use it, and that lacks absoluteness.

Exclusive means that the owner can exclude the others from unlawful intervention, i.e., only the owner can assert his title and create a legal obligation for

the others to not interfere with his property. This exclusivity may be granted by law, such as exclusive rights of the owner of copyright,[94] trademark,[95] and patent.[96]

Perpetual means that the assertion of the title of owner is not precluded by prescription or any statute of limitations.

Once the title of the owner satisfies all these characteristics, it becomes ownership title.

D. Application of Redefined Ownership to Controversial Cases

As we observe the title, we will apply this redefined concept to the following incorporeal properties to determine which is subject to ownership title.

1. Shares

a) Absolute. The shareholders (owners of the share) can assert their title of owner and exercise their rights over it freely. For example, the shareholder has the right to use his shares by putting them as securities.[97] He also can use his right to take part in the management of the company by attending[98] and voting in shareholders' meetings on certain agenda, such as electing directors,[99] increasing or decreasing capital,[100] etc. He can also dispose of the share by transferring it to another person;[101] however, physical disposal by destroying it is not possible as the share is fictional. He or she also has the right to acquire any 'fruit,' which means to receive a dividend (if any).[102] For the right to recover, if the transfer of shares is void and the registration has already been made to the company, the shareholder can ask the company to cancel such registration by himself. Practically, it will be refused, and thus, there is a dispute to be raised in court,[103] but this never means that the shareholder can only exercise his right to recover his shares through legal action.

All the things mentioned are what the shareholders can assert as their title of owner and exercise them arbitrarily, subject to legal limitation. Thus, the rights arising from asserting the title of the owner on shares are absolute.

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[94] Thai Copyright Act, s 15.
[95] Thai Trademark Act, s 44.
[96] Thai Patent Act, s 36.
[97] Thai Civil and Commercial Code, s 753.
[98] ibid s 1176.
[99] ibid s 1151.
[100] ibid ss 1220, 1224.
[101] ibid s 1129.
[102] Thai Supreme Court Decision 988/2559.
[103] Thai Civil Procedure Code, s 55.

b) Exclusive. Only the shareholder can assert his title of owner to exercise rights over his shares. For example, only a shareholder or his proxy[104] can attend the meeting; if there is a person who is neither shareholder nor proxy, the resolution of the meeting is unlawful.[105] Thus, title of owner over shares is exclusive.

c) Perpetual. As long as the company exists, and not dissolved, the shareholders can always assert their title of owner. There is neither a statute of limitation that rules the cessation of shares according to time nor that shareholders are precluded from asserting their title according to time. Even though the company survives for a hundred years, shareholders' rights remain. Thus, title of owner over shares is perpetual.

Hence, as the title of owner, in this case, meets all the characteristics, the title of owner of the shareholder is not just a general title but becomes an ownership title, corresponding with the previous Supreme Court decisions that there is ownership over shares; thus, shares can be the object of a sale contract and be acquired through adverse possession.

2. Copyright, Trademark, and Patent

a) Perpetual. As there are statutes of limitations for copyright,[106] trademark,[107] and patent[108] on the term of protection, the title of the owner in all cases is not perpetual. Therefore, the title of owner is not ownership title; thus, they cannot be the object of sale or acquired through adverse possession, which followed the supreme court decisions.

Some of the other examples are the right to claim (obligation), which is a personal right, and that the assertion of the title of owner over a personal claim can be precluded by prescription; thus, the title of owner lacks absoluteness and perpetuity and is not ownership title. Therefore, a claim cannot be the object of the sale contract and cannot be acquired through adverse possession. Similar to trade secrets, unlike patents, although there is no protection term, the owner lacks exclusive rights.

VII. CONCLUSION

This article has argued that ownership should be interpreted as a title rather than a right. To do so, the author has examined possible interpretations of the meaning of ownership and discussed its status and characteristics in relation to the classification

[104] Thai Civil and Commercial Code, s 1187.
[105] Thai Supreme Court Decision 89/2512.
[106] Thai Copyright Act, s 19.
[107] Thai Trademark Act, s 53.
[108] Thai Patent Act, s 35.

of things and property. Then, the author compared it with German and French property laws and traced the examined concepts back to Roman law. From this analysis, a conclusion has been drawn.

The author redefined the interpretation of ownership, stating that it is not a right but a title, as a subset of the title of owner. This means that it is the link between a person and his elements of patrimony. Ownership, therefore, is not limited to only corporeal objects but can be extended to govern certain incorporeal objects as well. This explains a lot about why it is possible to acquire some incorporeal properties, such as shares through adverse possession, and not for others, such as intellectual property rights and claims.

The core distinctions are between the title of owner and ownership: the characteristics of absolute, exclusive, and perpetual of the title, in this paper, provide a solution to further prospective issues, such as whether or not it is possible to acquire digital assets, e.g., cryptocurrencies, through adverse possession.

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[*] **Indexing Thai names.** "Although family names are used in Thailand, Thais are normally known by their given names, which come first, as in English names. The name is often alphabetized under the first name, but practice varies." The Chicago Manual of Style (17th edn, University of Chicago Press 2017) §16.85.