

## MAKING A CASE FOR THE SECURITISATION OF INTELLECTUAL PROPERTY RIGHTS IN NIGERIA



**A** fundamental function of the government is to

promote the prosperity of its people by implementing policies and programs that facilitate economic growth and development. The economic model of every state is uniquely designed to ensure that individuals have access to finance either through the state (the socialist model) or private individuals (the capitalist model). Nigeria operates a dual economic model whereby the state and individuals work together to ensure that finance and credit infrastructure are made available to persons in need of same. With a population of over 160 million people and a strong entrepreneurial spirit, access to credit facilities is one of the factors that will trigger economic growth in Nigeria. A robust credit access system will be a motivating factor for the small and medium enterprise sectors of the economy, enable growth, create wealth and eradicate poverty.

One of the key factors that affects access to credit is the availability of adequate securities or collateral in exchange for financing. Collaterals are assets that individuals or entities use to secure or obtain credits or loans from another party. Traditionally, fixed properties such as real estate are common collateral

options. However, with innovations in technology, globalisation, and the continued protection of intellectual property rights through laws, policies, and regulations, the potential of using intellectual property as collateral is currently being explored.

This paper aims to examine the securitisation of intellectual property, which is the process of converting intellectual property assets into financial instruments that can be traded or used as collateral for financing. It will also analyse the benefits and risks of using intellectual property as a means of financing and provide recommendations on how to optimise the use of intellectual property for this purpose.

### Definition of Key Terms

Securitisation is the process in which certain types of assets are pooled so that they can be repackaged into interest-bearing securities<sup>1</sup>.

Intellectual property (“IP”) is the creation of the mind. The World Intellectual Property Organization defines IP as creations of the mind, such as inventions, literary and artistic works, designs and symbols, names and images used in commerce<sup>2</sup>. It is the category of property that includes intangible creations of the human intellect. IP rights are those legal rights associated with creativity and IP. Thus, though intangible, it permits people to own their innovations in the same way physical/tangible property can be owned. IP rights in Nigeria can be categorised into: Copyright, Trademark, Patent and Industrial Design.

Copyright is a branch of IP that grants the owner of a work economic and moral rights in his creations. The Copyright Act, 2022 fails to proffer a definition for the term ‘copyright’. It merely stated in its interpretation section that copyright means

<sup>1</sup> Andreas Jobst, ‘Back to basics, What Is Securitization – Finance & Development (September, 2008) [www.https://www.imf.org/external/pubs/ft/fandd/2008/09/pdf/basics.pdf](https://www.imf.org/external/pubs/ft/fandd/2008/09/pdf/basics.pdf) accessed 15 June 2023

<sup>2</sup> WIPO, What is Intellectual Property [https://www.wipo.int/about-ip/en/#:~:text=Intellectual%20property%20\(IP\)%20refers%20to,and%20images%20used%20in%20commerce](https://www.wipo.int/about-ip/en/#:~:text=Intellectual%20property%20(IP)%20refers%20to,and%20images%20used%20in%20commerce) accessed 15 June 2023

“Copyright under this Act”<sup>3</sup>, thereby proffering a descriptive approach to the term<sup>4</sup>. Copyright is a property right in an authorship (such as literary, musical, artistic, photographic, or film work) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work<sup>5</sup>.

It must be noted that copyright does not exist in perpetuity. Thus, under the Copyright Act 2022, the duration of Copyright varies depending on the category of the copyrighted work. Copyright in a literary, musical or artistic work is for a period of 70 years after the death of the author. For work made by government and government agency, it is for 50 years after the end of the year the work was made available to the public or if not made available to the public, 50 years after it was created. For audiovisual works and photographs, the duration of the copyright is for 50 years after the end of the year in which the work was first made available to the public with the consent of the author or 50 years after the work was created, if not made available to the public within that time. Copyright duration for sound recordings is for 50 years after the end of the year in which the recording was first made available to the public with the consent of the author or 50 years after the work was created, if not made available to the public within that time. For broadcasts, the copyright duration is for 50 years after the end of the year in which the broadcast first took place<sup>6</sup>.

Trademark is defined as the symbol which identifies the source of a product. The law of Trademark (TM) grants the owner of a registered trademark exclusive rights to use the trademark and protect it from any form of infringement<sup>7</sup>. According to Section 23 of the Trademark Act 2004, a Trademark shall subsist for a period of 7 years from the date of first registration and can be renewed from time to time in accordance with the provisions of the law.

Patent is the right granted to an innovator as a reward by providing him a legal monopoly to incentivise innovation. This right granted to the innovator prevents others from copying his idea.<sup>8</sup> An invention is patentable if it is; new, result from an inventive activity, capable of industrial application (or if it constitutes an improvement upon a patented invention and also is new, results from inventive activity and is capable of industrial application), and it does not fall within an excluded subject matter.<sup>9</sup> The duration of a patent is for 20 years subject to the payment of the stipulated annual renewal fees. Where the patent holder defaults in the payment of the annual renewal fee, the patent lapses, after which a 6-month period of grace for payment will be granted. If it is still not renewed upon the expiration of the 6-month period of grace, the patent cannot be revived again<sup>10</sup>.

Industrial Design is the way of creatively determining the features of a product before the manufacture or production of the product. The PDA in Section 12 describes Industrial Design as any combination of lines or colours or both, and any three-dimensional form, whether or not associated with colours, if it is intended by the creator to be used as a model or pattern to be multiplied by industrial process and is not intended solely to obtain a technical result.

### Securitisation of Intellectual Property

Traditionally, IP was not recognised as a viable means of securitisation, but with the advent of technology and the growth of information products such as computer software, pharmaceuticals, films, musical works etc., people are exploring new means of securitisation to finance their businesses. One of the new means of securitisation, being IP is the crux of this work. The securitisation of IP enables the capitalisation of IP rights that generates foreseeable streams of royalties to obtain interim financing for business operations. This practice is however alien to

<sup>3</sup> Copyright Act 2022, s 108.

<sup>4</sup> Copyright Act 2022, ss 2, 9, 10, 11, 12 & 13.

<sup>5</sup> Black's Law Dictionary (7<sup>th</sup> edition, 1999).

<sup>6</sup> Copyright Act 2022, s. 19.

<sup>7</sup> Trademark Act , s 5.

<sup>8</sup> PDA 1971, s 1(1)(a).

<sup>9</sup> Patents and Designs Act, LFN 2004, S. 1

<sup>10</sup> PDA 1971, s 7

the Nigerian jurisdiction because there is no legal framework that permits or encourages the usage of intellectual property as a means of generating funds.

Using IP as a source of financing through collateralisation is prevalent in the music and technology industries, especially in jurisdictions that have a legal framework for this practice. Thus, securitisation is possible for future royalty payments from licensing a patent, trademark or from the musical compositions. One of the most famous examples of securitisation in recent years involved the royalty payments of a rock musician in the USA, namely, Mr. David Bowie.<sup>11</sup>

As opposed to other categories of securities like realties and movable assets which creditors consider as preferable options when presented with a proposal for obtaining credit facilities, securitisation of IP rights is not a welcome means of financing in Nigeria though proven to be viable in some jurisdictions. There are myriads of instances where IP rights have been successfully used as a means of securitisation for loan facilities. Thomas Edison used his patent in incandescent bulb as collateral towards the repayment of a loan he procured to start his company 'General Electric'. The DRI Capital Inc in 2012 securitised cash flows on 18 royalty streams from 14 patent protected drugs, which amounted to a total of \$195 million.<sup>12</sup> Also in 1999, Bill Blass, a famous fashion designer having a large portfolio of products under his trademark, securitized revenue streams accruing from his trademark<sup>13</sup>.

As enticing as this mode of securitisation is, financial houses/creditors abhor securitising their loans on them largely because of their intangible nature and would rather proceed with tangible assets which they can see and easily access unlike IPRs which are intangible, cannot be easily assessed and create issues of valuation.

### **Intellectual Property and other forms of securities**

In a reiterative manner, real, or personal estate have been preferred options of financing which is because they are believed to be more secured as opposed to other assets. In securitisation of tangible properties which includes real and movable properties, the title deeds of the property are handed over to the creditor pending when the debtor can totally offset its loan. Through this form of security, the creditor is also assured that he can exercise certain rights like an owner in the event of default of payment by the debtor (e.g., the right to sell). With the advent of IP as a form of security, it creates uncertainties especially to the creditor as to whether it is a viable means of security. Whilst some entities are open to this means of security, some are uncertain as to its viability as a means of security particularly because it is not perceived as a valuable means of exchange for financing. This (Valuation) amongst others remain one of the biggest issues in securitisation of IP.

### **Valuation and pricing of Intellectual Property**

Acceptance of IP assets as collateral to obtain financing will be based on the ability to prove their liquidity, durability for the loan repayment period, and marketability in the event of foreclosure or bankruptcy. It is thus crucial to identify all the IP assets of a company to obtain an objective value of the assets from a competent valuation firm.

Determining the value of an asset is the first step in the securitisation of an intangible property, particularly IP. Knowing the worth of your IP assets will aid in various transactions such as sale, licensing, and securitisation as is the subject of discussion in this article. Valuation, as noted by Lord Kelvin, provides the potential to enhance our knowledge of IP and bridge the gap by providing a common set of methods to capture and describe the business, legal and

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<sup>11</sup> World Intellectual Property Organization (WIPO) Small and Medium-sized Enterprises Division, 'Intellectual Property for Business' Page 16

<sup>12</sup> Aishwary Kumar Gupta, 'Securitization of Intangible Assets' <http://www.slideshare.net/mobile/aishwarykgupta/securitization-of-intangible-assets> accessed 16 June 2023

<sup>13</sup> Ibid 11

financial aspects of the intangible asset in question<sup>14</sup>. There are two methods of valuation, being the traditional and modern methods, which will be considered below.

Traditional methods of valuation are cost method, market method and income method while the Modern methods are Monte Carlo method, royalty rate method, loss of profit calculation method, decision tree analysis method and contingent claim analysis<sup>15</sup>. It is worthy of note that the method of valuation to be adopted is dependent on the nature of assets and risks involved, together with the aim of the party in conducting the valuation. To be able to commercially deal with or enforce IP rights valuation is a necessity. The following are conditions precedent to the Valuation of intellectual property assets<sup>16</sup>;

- It must be separately identifiable
- There should be tangible evidence of the existence of the asset e.g., a license or contract.
- It should have been created at an identifiable point in time.
- It should be capable of being legally enforced and transferred.
- Its income stream should be separately identifiable and isolated from those of other business assets.
- It should be capable of being sold independently of other business assets.
- It should be subject to destruction or termination at an identifiable point in time<sup>17</sup>.

### Procedures in Securitisation of Intellectual Property

Securitisation of IP usually involves the following entities:

<sup>14</sup> Paul Flignor and David Orozco 'Intangible Asset & Intellectual Property Valuation: A Multi-disciplinary Perspective' (June 2006)

[http://www.labrate.ru/discus/messages/6730/IP\\_Valuation-8256.pdf](http://www.labrate.ru/discus/messages/6730/IP_Valuation-8256.pdf) accessed 16 June 2023.

<sup>15</sup> Dilip Sharma and Abhijeet Kumar 'Methods for Intellectual Property Valuation' (May 2021)

<https://academic.oup.com/book/41122/chapter/350443651>

accessed 16 June 2023.

<sup>16</sup> WIPO Valuing Intellectual Property Assets [https://www.wipo.int/sme/en/ip-](https://www.wipo.int/sme/en/ip-valuation.html#:~:text=The%20value%20of%20an%20IP%20asset%20represents%20the%20potential%20of%20future,to%20a%20third%20party%3B%20and)

- the originator, being the holder of the IP rights, the Special Purpose Vehicle (SPV)
- the independent entity in which the IP is transferred before onward transfer to the investor
- the investors or creditors, persons who are willing to invest their finance in the originator
- the servicer, who takes care of the IP
- the trustee, who acts as the middleman between the investor and the SPV
- the rating agency, which helps to analyze and value the future cash flows to be generated by the IP to be given by the investors
- credit enhancer, who reduces the probable risk of loss by investors
- insurance companies, who will insure the investors against risks of loss.

Securitisation procedure in IP is initiated by the originator being able to predict that its IP assets will generate cash flow in the future. Upon this discovery, the originator values its IP and transfers same to an SPV. The SPV creates securities with the IP assets which can be subsequently offered to investors. Where trustees are involved in the securitisation process, the IP assets could be transferred to the trustee who then takes on the responsibility of giving the assets to the investors.<sup>18</sup> Prior to this stage, the credit agency provides risk advisory services to investors on the viability of the IP asset. This enables the investors decide on whether the IP asset is a suitable investment. The credit agency makes investors feel secured about investing in the IP asset. The servicer and insurance company also play their respective roles at this point where they are involved in the transaction. The investor

[valuation.html#:~:text=The%20value%20of%20an%20IP%20asset%20represents%20the%20potential%20of%20future,to%20a%20third%20party%3B%20and">valuation.html#:~:text=The%20value%20of%20an%20IP%20asset%20represents%20the%20potential%20of%20future,to%20a%20third%20party%3B%20and](#) accessed 16 June 2023.

<sup>17</sup> Ibid.

<sup>18</sup> Stuti Jain, 'Securitization of Intellectual Property a right step towards a better framework'

<https://blog.ipleaders.in/securitization-of-intellectual-property-a-right-step-towards-a-better-framework/> Published on October 22 2020

contacts the trustee or the SPV to grant the IP asset in exchange of financing. The funds raised by the SPV, or trustee are then given to the originator being the holder of the IP.

### **Benefits associated with Intellectual Property securitisation**

IP securitisation though a relatively new means of financing has several benefits, some of which are:

- It helps a corporate organization monetize its IP assets especially when it needs funds, without having to solely rely on tangible assets as a mode of financing. It replaces the right to future receivables from the IP with presently available cash for organizations who urgently need financing. It also finances creativity and productivity particularly in relevant industries as they can tap into future capital and remain relevant within the industry.
- The interest rates accruable on IP assets as a means of securitisation are lower compared to that of tangible assets.
- It gives investors an opportunity to invest in unique and novel securities.
- There is some level of transparency and trust amongst parties involved in the securitisation process. This is usually because there are parties like the credit agency in the playing field who promote transparency and clarify the position of parties in the IP securitisation transaction.
- Investors' money is safe when they invest their finance into these IP backed securities, because if the originator goes insolvent, it doesn't affect the securities since the IP assets have been transferred.
- It serves as a collateral or security for debt finance.

### **Risks associated with Intellectual Property securitisation**

- Valuation of IP assets. There is no specific method or calculator through which one can derive the value of an IP asset. The value of an IP asset and its profitability by a person differs from the perception of another. Profitability of the IP asset is based on a person's perception/views of the IP asset.

- IP securitisation requires technical expertise and due diligence without which IP securitisation may be cumbersome. Professionals in law specifically IP, tax, accounting, insurance etc. are needed to aid a smooth and streamlined IP securitisation process. This may lead to a costly IP securitisation process.
- There must be a legal structure and framework that permits the workability of IP securitisation in the absence of which same may not be possible.
- IP assets may not be considered as a valuable means of exchange in place of funding by a lay man or one who is more inclined to tangible assets as a means of funding especially in a jurisdiction where IP securitisation is not prominent.
- If the cash flow from an IP is not visible at the point of assessment or valuation, investors may not be willing to proceed with the transaction.
- If the IP asset is not backed by the credit enhancement agency or insurance companies, investors will be at a high risk of facing a loss. Credit agencies and insurance companies ordinarily give investors assurance in funding the originator.
- Predictable cash flow from IP assets are unstable as opposed to tangible assets. A valuation of an IP asset carried out today to yield a particular amount in one year time does not mean that it will yield that amount in one year time.
- The term of maturity of the securities backed by the IP assets must be below the period for which the IP right is protected for if not, the investors' position may not be secured.
- In some sectors the risk of infringing third-party IP rights is high, and investors may be reluctant to invest unless they are confident that no such risk exists. Investors will need reassurance that you are not relying, without authorization, on the IP rights of others.

### **Conclusion**

Securitisation of IP assets is a promising and innovative way of leveraging the value of intangible assets to access financing. It can benefit both the IP rights holders and the investors by creating new sources of revenue, diversifying the risk, and

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enhancing the liquidity of the IP market. However, securitisation of IP assets poses some challenges and risks, such as the complexity of valuation and the uncertainty of legal protection. Therefore, it is important to have a clear and robust legal and regulatory framework that can facilitate the securitisation process, protect the rights and interests of parties involved, and ensure transparency and accountability of the transactions. Securitisation of IP assets is not a panacea for all the financing problems faced by IP owners, but it is a viable and attractive option that deserves more attention and exploration in Nigeria.



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