



THE 'SECURITY' THAT WAS PROMISED: HOLDING TO THE PROMISE OF IP UTILIZATION AS SECURITY & COLLATERAL

By Anna Anu Priya
From Law College Dehradun, Uttanchal University

Abstract

India's IPR Policy that released in 2016, despite being poorly drafted and overtly campaign-like, showed 'strategy' on certain grounds. One of those few grounds was the promise to "enable valuation of Intellectual Property (IP) rights as intangible assets", its securitization and use as collateral. This Essay talks about the necessity of the measure to effectively materialize as a possible financial tool. It also brings to light the lack of follow-through of the promise made by this policy, including the glaring defects in the policy itself. The Essay also includes a comparative analysis with countries like USA, etc. that have led the world in IP-based financing as well as Asian countries like China, that have started late but with promise. Jurisprudence and literature relating to IP securitization is explored—including the difference between securing

tangible and intangible assets, the challenges in implementing this newfound trend, prerequisites to implementation required in legislative as well as market framework, among other things. The prospective prominence of IP financing over traditional financing methods is also touched upon. This Essay can also be considered as a critique of the Indian IP policy in general and criticism of the lack of implementation of IP financing method in particular.

Keywords: Intellectual property, assets, intangible, collateral, securitization, financial.

Introduction: WHATs and WHYs

IP securitization, for the first time, was declared as a *trend* by the WIPO in 2002.¹ Ever since, the value of Intellectual Property as an 'intangible financial asset' has been on the rise—many technological firms across the world corroborate this fact.² In India, however, this obvious crossover between IPR and trade/finances has been least explored. Securitization, basically, is the "process in which certain types of assets are pooled so that they can be repackaged into interest-bearing securities"³. It enables the *originator*, i.e., the one who initiates

¹ Benedikt Maurenbrecher, "LEGAL ASPECTS OF IP SECURITIZATION IN SWITZERLAND", available at

<https://www.google.com/url?sa=t&source=web&rct=j&url=https://media.homburger.ch/karmarun/image/upload/homburger/IPSEC.pdf&ved=2ahUKEwi5guzn1ajqAhWhyDgGHdZnAMMQFjAAegQIBhAC&usg=AOvVaw1mq3mefXaqOsAjMNAOac5P>, last seen on 24.06.2020 at 1500 hours; Lynn M. Lopucki, THE DEATH OF LIABILITY, 106 YALE L. J. 1, 24 (1996);

²DASHPUNTSAG ERDENECHIMEG, "USING INTELLECTUAL PROPERTY AS COLLATERAL: AN INTERNATIONAL EXPERIENCE AND A MONGOLIAN PERSPECTIVE", available at

<https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.itcilo.org/sites/default/files/inline-files/Erdenechimeg.pdf&ved=2ahUKEwjihNKM16jqAhXz4zgGHcNSBJcQFjAAegQIAxAC&usg=AOvVaw2HxakOSWw6z444wumNkPQI>, last seen on 24.06.2020 at 1500 hours [hereinafter, "Using IP as Collateral"]; Jay H. Eisbruck, "CREDIT ANALYSIS OF INTELLECTUAL PROPERTY SECURITIZATION: A RATING AGENCY PERSPECTIVE", in FROM IDEAS TO ASSETS: INVESTING WISELY IN INTELLECTUAL PROPERTY 444 (Bruce Berman ed., 2002).

³J. ANDREAS, "BACK TO BASICS: WHAT IS SECURITIZATION?" *Finance & Development*, September 2008, 48, also available at



securitization to raise credits, to utilize assets that generate an estimated capital (typically, the rights of payment that a company⁴ expects by virtue of IP owned by it or its owner) in order to account for financing in the pendency (i.e., “interim financing”). It is advantageous when compared to other forms of raising funds. The 1970s witnessed the first prominent instance of the employment of this process as an advanced financial tool, wherein securities were issued backed by residential mortgages.⁵ With a basic understanding of universal jurisprudence of Bankruptcy Codes, it may be understood:

“By contrast, in securitization transactions the interest rate of asset-backed securities is not dependent on the risks involved in the

originator’s overall business activity. Rather, the interest rate is derived only from the risk inherent to the specific assets backing the securities.⁶ By isolating specified assets and securitizing them, the originator is able, in most cases, to fund operations at an effective interest rate lower than that of traditional financing methods⁷.”⁸

The Indian Cabinet approved the policy⁹ that provides for “enabling valuation of IP rights as intangible assets” and by means of proper technologies strives for “securitization of IP rights” and “use of IPR as collateral” on May, 2016. Although this objective was only lightly mentioned in the policy, it was streamlined as a major one.¹⁰ Even so, loopholes in implementing such a measure

https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.imf.org/external/pubs/ft/fandd/2008/09/pdf/basics.pdf&ved=2ahUKewjHxdrA3ajqAhVH6XMBHY_AAuQQFjAAegQIARAB&usg=AOvVaw0VEZ83ezDLhZwTfIeolZV, last seen on 24.06.2020 at 1200 hours

⁴ KENNETH C. KETTERING, “SECURITIZATION AND ITS DISCONTENTS: THE DYNAMICS OF FINANCIAL PRODUCT DEVELOPMENT”, 29 CARDOZO L. REV. 1553, 1564 (2008); STEVEN L. SCHWARCZ, “THE ALCHEMY OF ASSET SECURITIZATION”, 1 STAN. J.L. BUS. & FIN. 135 (1994)

⁵ JOSEPH C. SHENKER & ANTHONY J. COLLETTA, “ASSET SECURITIZATION: EVOLUTION, CURRENT ISSUES AND NEW FRONTIERS”, 69 TEX. L. REV. 1383–88 (1991).

⁶ See, Hugh Beale *et al.*, THE LAW OF PERSONAL PROPERTY SECURITY 242 OUP Oxford (29 March 2007); Tamar Frankel, SECURITIZATION—STRUCTURED FINANCING, FINANCIAL ASSETS POOLS, AND ASSET-BACKED SECURITIES 133–34, Fathom Pub. Co. (31 January 2005)

⁷ See JAMES A. ROSENTHAL & JUAN M. OCAMPO, “ANALYZING THE ECONOMIC BENEFITS OF SECURITIZED CREDIT”, 1 J. APPLIED CORP. FIN. 32, (Fall 1988), at 32; See also Lowell Bryan, The Risks, Potential, and Promise of

Securitization, in A PRIMER ON SECURITIZATION 171, 174 (Leon T. Kendall & Michael J. Fishman eds., 1996)

⁸ Dov Solomon & Miriam Bitton, “INTELLECTUAL PROPERTY SECURITIZATION”, 33 Cardozo Arts & Entertainment Law Journal 125 (2015), Also available at

https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2789531_code1389248.pdf?abstractid=2462216&mirid=1, last seen on 24.06.2020 at 1500 hours

[*hereinafter*, “Intellectual Property Securitization”]

⁹ DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, “NATIONAL INTELLECTUAL PROPERTY RIGHTS POLICY”, May 12, 2016, available at

http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/National_IPR_Policy_08.08.2016.pdf, last seen on 24.06.2020 at 1500 hours

¹⁰ THE ECONOMIC TIMES, “NATIONAL POLICY SUGGESTS USE OF INTELLECTUAL PROPERTY RIGHTS AS COLLATERAL TO RAISE FUNDS”, Ruchika Chitravanshi, December 16, 2015, available at

<https://m.economictimes.com/news/economy/policy/national-policy-suggests-use-of-intellectual-property-rights-as-collateral-to-raise-funds/articleshow/50194124.cms>, last seen on 21.06.2020 at 1600 hours



were completely ignored and an ostrich-like approach was adopted with the disbanding of the First Think Tank—which had apparently laid down the draft ‘as it should’ve been’. This is discussed in-depth in the later parts of the Essay. For a comprehensive study, it is also important to understand the ‘WHATs’ and ‘WHYs’ of the IP-financing paradigm. The primary reasons to employ intellectual property as collateral lie in the fact that IP is “untapped source of collateral”, the advantages of which include prompt returns on development and research products—and it also has potential for additional value.¹¹ It offers investment and opportunities for obtaining income-distribution, an alternative to bank credit. Including intangible IPR as securities would increase asset base in situations of asset-based financing. It induces *independence* in the market, in a manner to reduce dependence with respect to matters like bank credit, reduction in difficulty for raising capital, it is also considered "off-the-books" in matters of accounting and gives impetus to creativity and innovation.¹² The value of liquidity generated by securitizing IP becomes unusually useful if the seller's options to raise capital are limited or if the cost of capital is high.¹³ The activity of

securitization is even compared the chemical or even magically process of ‘alchemy’- an analogy suggesting a meritorious and profitable transaction, like that of converting other metals into gold.¹⁴

How Will This Work? : The Difference between IP and Conventional Securitization

This study wouldn't be complete without expressly listing the difference between IP security and other conventional assets. Given the risks as discussed, the “*due diligence on IP before securitization*” requires more capital than traditional/conventional assets.¹⁵

It is generally classified as ‘personal property’, a security may, nevertheless, in theory be taken over such property as well, with the consent of the owner.¹⁶ IP is considered *property* in the sense that it can be ‘bought, sold, licensed or traded in the same way as any other form of property’. IP, however, has some unique attributes. The difference lies in the *manner* of payment of Rights of payment, for instance payment from royalties, are a distinctive feature of IP, which sets it apart from other properties and assets.¹⁷ This means a clear distinction exists between licensing with

¹¹ W. J. Kramer, & C.B. Patel, “SECURITIZATION OF INTELLECTUAL PROPERTY ASSETS IN THE US MARKET”, available at https://www.google.com/url?sa=t&source=web&rct=j&url=https://ipo.org/wp-content/uploads/2013/04/Securitisation_of_IP_in_the_US.pdf&ved=2ahUKEwiQ8cHG46jqAhUh7XMBHWWPAoYQFjAAegQIARAB&usg=AOvVaw3bgsxopSwXg0To5Vf19B89, last seen on 21.06.2020 at 1600 hours [*hereinafter*, “U.S. Market”]

¹² Intellectual Property Securitization, *Supra note 8* at 127

¹³ ELLIOT A FISHERMAN, “SECURITIZATION OF IP ROYALTY STREAMS: ASSESSING THE LANDSCAPE”, Technology Access Report, September 2003, also referred at:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1314805, last seen on 21.06.2020 at 1600 hours

¹⁴ Schwarcz, *Supra note 4* at 134

¹⁵ NESBITT HARRIS, “ASSET-BACKED UPDATE” (Asset Securitization, USA), available at <https://www.google.com/url?sa=t&source=web&rct=j&url=http://www.bmoem.com/common/scripts/getFile.aspx%3FFileID%3D2467&ved=2ahUKEwi6vPjOl-anqAhXxzjGhXIPBtMQFjABegQIARAC&usg=AOvVaw0-9fJPLudAHTG0bWkOwIn9>, last seen on 05.06.2020 at 0500 hours

¹⁶A. TOSATO, “SECURITY INTERESTS OVER INTELLECTUAL PROPERTY”, *Journal of Intellectual Property Law & Practice*, 6(2), pp. 93–104 (2010)

¹⁷Using IP as Collateral, *Supra note 2* at 6



respect to IP rights and security rights originating from Intellectual Property.¹⁸ Securitization offers a means to capitalize one's IP to generate capital—this can provide for interim financing for operations that require investments.¹⁹ IPR are intangible rights in inventions (patents), authorships (copyright), service marks or trademarks, in which a set of *exclusive* rights is given due protection and is exclusively available to the right holder.²⁰ This forms the basis for securitizing/licensing/assignment.

The uniqueness of IP as aforementioned, gives rise to two (2) types of transportations, viz. transactions relating to IP rights and IPR based financial transactions.²¹ An analogy between contractual rights and IP rights may be created in this context. The knowledge of the former as financial assets (that serve as the object of different transactions)²² in modern law may help in one's understanding

of the latter's use of the same. The prospect of executing transactions by employing '*rights*' is recognized in modern law, which also allows its transfer through secured transactions²³, among other things.²⁴ Necessity of treatment of these rights as '*transferable property*' by the *lex loci* is crucial to a country's economic development.²⁵ The notion of an assignment of rights for the purpose of raising funds is extremely prevalent and significant in the modern economy.²⁶ The bonds created via the assignments are deemed to be 'loans' and hence are exempted from sales tax.²⁷ Additionally, the process of securitization doesn't imply loss of ownership of assets—unless of course, there's default.²⁸ Hence, IP could still be exploited for the maximization of funds.

Position Around the World and Ensuing Challenges

¹⁸ United Nations: 2011, "UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS SUPPLEMENT ON SECURITY RIGHTS IN INTELLECTUAL PROPERTY", available at https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.uncitral.org/pdf/english/texts/security-1g/e/10-57126_Ebook_Suppl_SR_IP.pdf&ved=2ahUKewj5u4Lr4qjqAhVDjOYKHTaIAA4QFjACegQICxAB&usg=AOvVaw246eV0PufsKCVVsWbLfvq7, last seen on 24.06.2020 at 1500 hours

¹⁹ See COMM. ON BANKR. & CORPORATE REORGANIZATION OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., "STRUCTURED FINANCING TECHNIQUES", 50 BUS. LAW. 527, 529-30 (1995) [*hereinafter*, "Structured Financing Techniques"]; Schwarcz, *Supra note 14* at 135-36; ROBERT STARK, "VIEWING THE LTV STEEL ABS OPINION IN ITS PROPER CONTEXT", 27 J. CORP. L. 211, 213 (2002).

²⁰ Intellectual Property Securitization, *Supra note 12* at 130

²¹ United Nations: 2011, *Supra note 18* at 23

²² Intellectual Property Securitization, *Supra note 20* at 129

²³ Intellectual Property Securitization, *Id.* at 129-30

²⁴ Intellectual Property Securitization, *Id.* at 30

²⁵ See E. Allan Farnsworth, CONTRACTS, (4th Revised ed.) Aspen Publishers (April 26, 2004)

²⁶ See United Nations: 2004, "U.N. CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INT'L TRADE", U.N. Sales No. E.04.V.14.

²⁷ GABALA J.J. JR., "INTELLECTUAL ALCHEMY: SECURITIZATION OF INTELLECTUAL PROPERTY AS AN INNOVATIVE FORM OF ALTERNATIVE FINANCING", J. MARSHALL. REV. INTELL. PROP. L., 3 (2004) 307, 316.

²⁸ NAINA KHANNA, "THE SECURITIZATION OF IP ASSETS: ISSUES AND OPPORTUNITIES (2018). JOURNAL OF INTELLECTUAL PROPERTY RIGHTS", Vol. 23 (2-3), March-May 2018, also available at <https://ssrn.com/abstract=3275999>, last seen on 25.06.2020 at 1600 hours [*hereinafter*, "Khanna"]

²⁹ Khanna, *Id.* at 95



It is widely noted that the a major hurdle in using IP as collateral is *risk*, which may occur at not an isolated, but plural stages of the securitization process.³⁰ The *risk factors* that may arise during the process may be listed as, *inclusively*, lack of certainty with respect to legal enforcement, complexity in technology transfer, term of the IP and its valuation.³¹ Other set of drawbacks for using IP as security are cost associated with securitization, non-registered factors of IP, nature of IPR as a *bundle* of rights (when some of those rights do not coincide with other rights), variation in predictability of cash flow, revenue generation risk and piracy risks. Securitization also requires the expenditure and capital that are considerable, including IP valuation costs, costs incurred in company constitution, issuance costs, etc.³² A major setback may ensue to the process of securitization may happen if there is a risk of being hit by suits of infringement, etc. Also, unnamed/unregistered factors associated with an IP like confidential information or manner of operating, etc. can affect the process of IP valuation. Term of IP as a hindrance in securitization is also a risk factor/challenge in the process.

Valuation, *per se*, is a difficult task in itself: without an established market, it is difficult to ascertain the value of goods. Immense variation in nature of different assets and

wide-ranging associating transactions do not make it any easier.³³ Patents, for instance, must be novel and unique by definition.³⁴ Accuracy in determining value of something novel can only be limited. IP as a bundle of rights can be best demonstrated specifically in copyright as it includes within itself the rights to reproduce, publish, to rent out/exploit the creative work as illustrated in the Copyright Act, 1957 (viz., cinematographic work, photography and computer software, to adapt the work and create derivative works, public performance rights, broadcast rights and to make the work available for public use.³⁵ Concentration of these rights in the hands of the originator for the securitization isn't easy. One of the notable features of David Bowie's glorious music career as well as a characteristic that was the most contributing in him becoming a successful pioneer in the IP securitization market—is the fact that he had the possession of almost all the copyrights to his musical works before the commencement of securitization transaction.³⁶ Coming to trademarks, they are traditionally exploited by their owners by means of *licensing*—but in current times, given their increasing economic value, both MNCs and SMEs fully utilize their commercial value, including using them as security.³⁷ Usually, IP valuation methods fall into one or more of three broad categories, viz. the market

³⁰ Using IP as Collateral, *Supra note 17* at 5

³¹ Using IP as Collateral, *Id.* at 5-6

³² See JONATHAN C. LIPSON, "RE: DEFINING SECURITIZATION" 85 S. CAL. L. REV. 1229, 1245-46 (2012)

³³ MAAYAN PEREL, "AN EX-ANTE METHOD OF PATENT VALUATION: TRANSFORMING PATENT QUALITY INTO PATENT VALUE", 16(2) J. HIGH TECH. L. 148, 163-64(2014)

³⁴ See MICHAEL S. KRAMER, "VALUATION AND ASSESSMENT OF PATENTS AND PATENT

PORTFOLIOS THROUGH ANALYTICAL TECHNIQUES", 6 J. MARSHALL. REV. INTELL. PROP. L. 463, 465 (2007)

³⁵ See The Copyright Act, 1957

³⁶ See ADAM GRANT, Note, "ZIGGY STARDUST REBORN: A PROPOSED MODIFICATION OF THE BOWIE BOND", 22 CARDOZO L. REV. 1291, 1299-1300 (2001)

³⁷ Intellectual Property Securitization, *Supra note 24* at 152



approach, cost approach and the income approach.³⁸ Simultaneous risk analysis is also needed in each of these methods/approaches. The world is a witness to famous securitization of IP rights by the David Bowie (singer-originator of IP rights in music), the Domino's Trademark and the Yale University's HIV drug patent.

The risk in determining interest rates is a hurdle in the frequent/widespread use of IP as an asset.

“One characteristic that differentiates IP transaction from tangible asset backed transaction is that they are highly dependent on popular tastes or technological change adding a layer of complexity and risk to the analysis.”³⁹

The major deterrent, however, is the absence of a legislative framework that would instill confidence and cure the lack of consciousness to use of IP as business assets. No IP law directly provides for a method to do the same. India's policy promised to create, or at least endeavor to/lay foundations

to create an appropriate legal and marketing climate.

United States is practically the world leader in securitized financing,⁴⁰ and the practice has gained momentum especially after the adoption of the Universal Commercial Code, from which few States depart⁴¹. An increase in the valuation of intangible assets from 20% to 73% in 20 years in the late 1970s indicates the steady increase in the value of intangible assets, which were higher than increase in the value of tangible assets.⁴² From 1997 to 2000, the money involved in IP royalty financing hiked from USD 380 to USD 840—this included music, cinema and licensing of patents. The immense success of US securitization of IP, mostly royalties shows that securitization of IP assets is both possible and profitable. It is equally popular in the United Kingdom as well—in forms of mortgage and fixed charge. However, it is important to note that there is a potential grey area concerning the defining lines between these forms of security since English law provides for the same obligations when it comes to the publication and perfection of these rights.⁴⁴ In many jurisdictions, like that

³⁸WORLD INTELLECTUAL PROPERTY ORGANIZATION, “IP VALUATION”, available at https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_11_learning_points.pdf&ved=2ahUKEwj_r8yp66jqAhUS7XMBHQMdBaUQFjAAegQIBBAB&usq=AOvVaw04U4PthL9ixvuTvaSWjd80, last seen on 20.06.2020 at 0700 hours

³⁹MOODY'S INVESTORS SERVICE, “CREDIT ANALYSIS OF PATENT AND TRADEMARK ROYALTY SECURITIZATION: A RATING AGENCY PERSPECTIVE”, Jay Eisbruck, available at

http://www.buildingipvalue.com/n_editorial/28_32.htm, last seen on 05.06.2020 at 0500 hours

⁴⁰Using IP as Collateral, *Supra note 30* at 6

⁴¹ROBIC LLP, François Painchaud and Jason Moscovici, “INTELLECTUAL PROPERTY AND SECURED TRANSACTIONS: GOING THE WRONG WAY IN THE RIGHT DIRECTION?”, available

at <https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.robic.ca/wp-content/uploads/2017/05/407-FP-2010.pdf&ved=2ahUKEwjOzsaP76jqAhXuzTgGHQpyDzsQFjAAegQIAhAB&usq=AOvVaw3DeU90abCmloKvq7MQkBLh>, last seen on 05.06.2020 at 0600 hours [*hereinafter*, “Robic”]

⁴² Baruch Lev, INTANGIBLES MANAGEMENT, MEASUREMENT AND REPORTING, Brookings Institution Press (June 1, 2001)

⁴³U.S. Market *Supra note 11* at 2

⁴⁴Robic, *Supra note 41* at 6



of Germany, registered and transferrable IP rights are preferred for the purpose, i.e., patents and trademarks (instead of copyrights)⁴⁵. Japan has allowed mortgaging of their IP assets for some time now.⁴⁶ Even in China, the IP Offices' promotion has led to an acceleration in the IP Rights system and IP financing has become an important means for financing.⁴⁷ In 2017, the country's State Council has issued the 'National Technology Transfer Plan'⁴⁸ and has proposed to "launch IPR securitization" and "encourage commercial banks to launch IPR pledge loan"⁴⁹. Although Asian countries have joined the trend comparatively late, India⁵⁰ and China—who released their new IP plan/policy almost at the same time (2016 and 2017 *respectively*), there is a sharp contrast in the two drafts. While both appear to be ideologically driven, the former—as described by Prof. Shamnad Basheer, is more "faith-based than fact-based"⁵¹, the latter at least appears strategic. Dr. Basheer's critique of the 2016's policy can be aptly used to describe the difference between the Indian and Chinese proposed plan of action and how one appears to work, the other doesn't.

Government of India's "Creative India, Innovative India"⁵² plan doesn't seem to follow-through. A 'campaign' probably wasn't the right solution. While the draft of the First Think Tank, or whatever is known of it, sounds more rational when compared to the present Cabinet-approved draft which is labelled to be "trite at best"⁵³. Ignoring the fundamentals of the IP-law foundation, the law is represented as an 'end' instead of 'a means to an end'. As was pointed out by even the powerful industry giant Elon Musk, the current IP law application is more used to stifle progress can facilitate it—a consideration any practical policy wouldn't ignore.

*If we lay intellectual property law landmines to inhibit others, we are acting a manner contrary to the goal.*⁵⁴

While our subject still remains the securitization of IP and its use as a financial asset, relevant considerations were yet again ignored by the impugned policy. The phenomenon of "Patent Trolls"—as pointed

⁴⁵Robic, *Id.* 41 at 6

⁴⁶Robic, *Id.* 41 at 7

⁴⁷ See THE 8DECIMAL BLOG, "CHINA'S SECURITIZATION OF INTELLECTUAL PROPERTY TAKES A NEW STEP FORWARD", available at <https://medium.com/8-decimal-blog/chinas-securitization-of-intellectual-property-takes-a-new-step-forward-180c549a2938>, last seen on 26.04.2020 at 1400 hours

⁴⁸ OFFICIAL WEB PORTAL OF THE CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, "STATE COUNCIL NOTICE ON THE PUBLICATION OF THE PROGRAM TO BUILD A NATIONAL TECHNOLOGY TRANSFER SYSTEM", available at

https://www.google.com/url?sa=t&source=web&rct=j&url=https://cset.georgetown.edu/wp-content/uploads/t0069_China_tech_transfer_system

EN.pdf&ved=2ahUKEwjv2PbzrqbqAhU47XMBHX4mBrEQFjALegQIBBAB&usq=AOvVaw0RriGjjHqHLMjqEr6_pJSy, last seen on 25.06.2020 at 1600 hours

⁴⁹ *Ibid*

⁵⁰ National IPR Policy, *Supra note 9*

⁵¹ SHAMNAD BASHEER & PANKHURI AGARWAL, "INDIA'S NEW IP POLICY: A BARE ACT?", 13 The Indian Journal of Law and Technology (IJLT) 1 (2018), also available at http://ijlt.in/wp-content/uploads/2018/07/01_shamnad_pankhuri.pdf, last seen on 26.04.2020 at 1400 hours [*hereinafter*, "Basheer"]

⁵² National IPR Policy, *Supra note 50* at 1

⁵³ Basheer, *Supra note 51* at 5

⁵⁴ TESLA, Elon Musk, "ALL OUR PATENT ARE BELONG TO YOU", (June 24, 2017), available at https://www.tesla.com/en_AU/blog/all-our-patent-are-belong-you, last seen on 24.06.2020 at 0500 hours



out by Dr. Basheer can become a menace, stifling progress and bullying innovators. This was explained with the Indian example of S. Ramkumar and his exploitation of major telecom companies by using his patent on dual SIM⁵⁵; although the patent was later revoked, a great deal of *trolling* was already done. A progressive policy (*ideally*) would encompass within itself, the scope for dereliction. This policy, however, highlights *only* two hurdles and suggests overarching ‘remedies’ for the same. The first, highly discussed menace is piracy and the second, lack of awareness/use of IP laws to garner protection. The policy suggests criminalization in case of offences under the Cinematography Act, 1952—an excessive measure. Criminalization of a necessarily *civil* wrong does not count as deterrence, it is ‘disproportionate’. The manner of raising awareness illustrated by the policy, i.e., public funding, is also dubious. As pointed out, it envisages a double-investment of the tax payers’ money.⁵⁶

Review of the Policy Provision and Exploring Possibility of new Laws

In India, none of the existing laws⁵⁷ have fully contemplated or incorporated IP-securitization. The Indian Securitization law,

apart from its definition of ‘*property*’⁵⁸ (which is specifically made to include IPR) lacks other essentials of securitization, viz. structures of securitization, in the nature of ‘pass through’ (which require charge over property)⁵⁹, absence of bond-investors and most importantly, the absence of an administrative machinery to value IP-assets makes it very difficult to envisage the securitization of IP rights as assets. None of the existing laws provide for a SPV-like body⁶⁰ (a company, a trust or a partnership; the primary purpose of creating or employing an SPV is to ensure that “the assets actually achieve the bankruptcy remoteness purpose”⁶¹), which is a characteristic feature in the securitization process, in order to acquire income streams (royalties, for instance) from IP rights and issue securities backed by the acquired rights.⁶² It enters into an agreement with the originator for collection purposes.⁶³

Even at the global-level, Securitization market for patents is still not booming in comparison to other fields, like Trade Marks and Copyrights, due to the complexity involved in the process of invention and also lack of awareness of prospective economic benefit.⁶⁴ There is also a requirement for

⁵⁵ SHAMNAD BASHEER, “RAMKUMAR VS CELL IMPORTERS: INDIA’S BIGGEST IP CASE YET?”, SpicyIP (August 9, 2009), available at <http://spicyip.com/2009/08/ramkumar-vs-cell-importers-in-dias.html>, last seen on 24.06.2020 at 0500 hours

⁵⁶ Basheer, *Supra note* 51 at 9

⁵⁷ See Indian Patent Act 1970; The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [*hereinafter*, the “SARFAESI Act”]

⁵⁸ *Id.* SARFAESI Act, See Section 2(1)(t)

⁵⁹ See *Id.* the SARFAESI Act

⁶⁰ See ROBERT DEAN ELLIS, “SECURITIZATION VEHICLES, FIDUCIARY DUTIES, AND

BONDHOLDERS’ RIGHTS”, 24 J. CORP. L. 299 (1999)

⁶¹ RESERVE BANK OF INDIA, “CHAPTER 7: SPECIAL PURPOSE VEHICLE” (on 29 December 1999), available at <https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?ID=164>, last seen on 24.06.2020 at 0500 hours

⁶² Intellectual Property Securitization, *Supra note* 37 at 127

⁶³ Structured Financing Techniques, *Supra note* 19 at 548-49

⁶⁴ ALEKSANDAR NIKOLIC, “SECURITIZATION OF PATENTS AND ITS CONTINUED VIABILITY IN LIGHT OF THE CURRENT ECONOMIC



registering these security rights. On an international standard, the International Trademark Association (INTA) has encouraged the process of security right registration by issuing a set of principles in that regard, especially focusing to Trademarks and Service Marks and has deemed them “best practice” to be followed whenever and wherever possible.⁶⁵ In *Canara Bank v. N.G. Subbaraya Setty*⁶⁶, the Indian Court held that IP assignment was held unacceptable by the Court because such security (i.e., the IP security) wasn't mentioned in the beginning; the Court didn't permit an unrelated IP to be attached as a collateral at a later stage.⁶⁷ A simplified global model/standard, like that of UNCITRAL in Arbitration laws, may help to reduce confusions and create a more secure financial environment—although varying jurisdictions may cause problems in creating such a standard. It is pertinent to mention here that there exists an *UNCITRAL Legislative Guide on Secured Transactions Supplement on Security Rights in Intellectual Property*⁶⁸ in addition to UNCITRAL's Model Law on Secured Transaction.⁶⁹ The ‘guide’, however, limits itself to secured transactions only—instead of interfering with the IP legal structure. However, it “takes into account the need to address the *interaction* between secured transactions law and law

relating to intellectual property at both the national and the international levels”⁷⁰.

“The law recommended in the Guide addresses only legal issues unique to secured transactions law as opposed to issues relating to the nature and legal attributes of the asset that is the object of the security right. The latter are the exclusive province of the body of property law that applies to the particular asset (...).”

The General Assembly Resolution⁷¹ makes it clear,

“recognizing that States would need guidance as to how the recommendations contained in the UNCITRAL Legislative Guide on Secured Transactions would apply in an intellectual property context and as to the adjustments that need to be made to their laws to avoid inconsistencies between secured transactions law and law relating to intellectual property.”

Before the Guide was published, Articles 14 and 86 of the Model Law⁷² paved the way for securitization of Intellectual Property (*‘intangible’*). The Guide however, as the name suggests, is no modality in itself but just a guiding force that would help the

CONDITIONS”, 19 ALB. L.J. SCI. & TECH. 412-13 (2009).

⁶⁵United Nations: 2011, *Supra note 18* at 73; *See also* International Trademark Association, available at www.inta.org/index.php?option=com_content&task=view&id=1517&Itemid, last seen on 24.06.2020 at 0500 hours

⁶⁶ AIR 2018 SC 3395; MANU/SC/0433/2018

⁶⁷MONDAQ, “INDIA: IP AS SECURITY (CANARA BANK V NG SUBBARAYA SETTY)”, available at <https://www.mondaq.com/india/trade-secrets/715820/ip-as-security-canara-bank-v-ng-subbaraya-sett>, last seen on 23.06.2020 at 0200 hours

⁶⁸ United Nations: 2011, *Supra note 18*

⁶⁹UNCITRAL: 2019, “UNCITRAL MODEL LAW ON SECURED TRANSACTIONS”, available at https://uncitral.un.org/en/texts/securityinterests/modelaw/secured_transactions, last seen on 24.06.2020 at 0900 hours

⁷⁰ United Nations: 2011, *Supra note 68* at 167

⁷¹General Assembly Resolution 65/23, adopted 6 December 2010, on the basis of the report of the Sixth Committee A/65/465, Draft Resolution III

⁷² United Nations: 2019, *Supra note 69* at 12, 70



countries to come up with their own laws, in light of the Model Law⁷³ standards. It is still open for the nations to induce the 'interaction of laws' as aforementioned.⁷⁴

Concluding Remarks: The Opportunity Has Presented Itself

In the economic slowdown caused by COVID-19, the reduction in value of the conventional, tangible, non-IP assets has afforded a greater importance to the IP based assets (in contrast: intangible, less conventional), this may be an opportune time for growth of intellectual property securitization industry. IPR occupies a central and important position in the economic policies of the world, which is clear by its rampant use as a '*finance-generating*' asset. The flowchart that transforms a 'creative idea' to a security or a collateral is a promising premise and USA's long-term, successful use of the same is a testimony of the same.

Mrs. Sitharaman, in her discourse with the press as well as in the policy, envisages India sans the piracy of Intellectual Property. She proposes to do so via the implementation of policy that (*barely*) provides for use of IP resources, while in reality, a decrease in piracy is needed to implement the policy in letter and spirit. A defect is unmistakably detected in the chronology of the plan of action. In India, even at present, IP securitization is legal—only a road rarely taken due to the glaring uncertainties. With a strategized law and market in place, the number of buyers and sellers of IP security will increase. While recognizing the value of goodwill, licensing of patents, etc., and the sale/assignment of IP rights are already

common practices in India, it is not structurally improbable that IPR securitization join the list.

The available jurisprudence of IP-securitization/financing is scanty, scattered and varied to say the least (given different legal systems in different parts of the world). It is, however, united by a common recognition and realization by countries of the world of the value of IP rights, given proper valuation.

⁷³ *Id.* at 1

⁷⁴United Nations: 2011, *Supra* note 70 at 167-68