



Securitisation of intellectual property rights in Nigeria: Prospects and challenges

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Abstract

Although intellectual property stem from ideas, considerable time and finances are invested in transforming them into products and services utilised and enjoyed in private and commercial settings. The economic rights, accruable to holders of intellectual property have, as is applicable for real properties, been utilised as collaterals in financial transactions. Securitisation, a debt financing mechanism, though more commonly utilised for real property, has been applied for intellectual property rights. This article explored the prospects and challenges in the securitisation of intellectual property rights in Nigeria.

Keywords: Securitisation, Intellectual Property Rights, Special Purpose Vehicles, Financial Market, Investors

Introduction

Article 2 (viii) of the Convention Establishing the World Intellectual Property Organization (WIPO) provides that:

Intellectual property shall include rights relating to literary, artistic and scientific works, performances of performing artists, phonograms and broadcasts, inventions in all fields of human endeavour, scientific discoveries, industrial designs, trademarks, service marks and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields ^[1].

Intellectual property is at the core of big businesses, especially in recent times where technological advancements have made it possible for transactions to be concluded within shorter period. Intellectual property rights can, arguably, be said to be the fastest growing agents of production as they improve or diversify as men's creativities are explored.

Intellectual property rights protection is said to have originated in Venice in the 15th century, when inventors were given the rights to exclude others from interfering with their invention so that the inventor could enjoy the benefits (financial and otherwise) of their invention, and recoup on the time and expenses they had invested in such invention ^[2]. International recognition and regulation came with the signing, firstly, of the Paris Convention for the Protection of Industrial Property, in 1883 ^[3], followed by the Berne Convention for the Protection of Literary and Artistic Works, in 1886 ^[7]. These treaties are administered by the World Intellectual Property Organization (WIPO). Another international regulator is the Trade-Related Aspects of Intellectual Property Rights (TRIPS), signed at Marrakesh, Morocco on 15th April, 1994 ^[5]. Its implementation started in January 1995 ^[6]. Nigeria signed the TRIPs Agreement on the 1st January, 1995 ^[7].

Intellectual Property Rights Protection in Nigeria

Statutes recognising and protecting some intellectual properties in Nigeria include; Trademarks Act ^[8], Patents and Designs Act ^[9], and Copyright Act ^[10].

Some of these intellectual properties are discussed thus:

a. Copyright: The Copyright Act ^[11], provides that a work is given copyright recognition and protection where:

1. Sufficient effort has been expended on making the work to give it an original character;
2. The work has been fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any medium or device ^[12].

Literary works, musical work, artistic work, cinematograph films, sound recordings and broadcast, are some of the works that enjoy copyright recognition and protection in Nigeria ^[13]. Ownership of a copyright comes with the right to gassing and grant license in relations thereto ^[14].

b. Patent: is granted to an invention,

1. if it is new, results from inventive activity and is capable of industrial application, or
2. if it constitutes an improvement upon a patented invention and is also new, results from inventive activity and is capable of industrial application ^[15].

An application for patent shall relate to only one transaction but may be for a number of product, application or manufacturing processes for those products ^[16]. Patent protection is granted for an initial period of 20 years ^[17].

c. Trademark is a legally protected name, word, symbol, design, colour, device or any combination thereof which identifies the manufacturer of a product or the provider of a service and which distinguishes it even from similar goods and services manufactured or supplied by persons or firms in the same industry ^[18].

Intellectual Property Rights in Nigerian Businesses

A great number of Nigerians make their living from running their personal businesses. A lot of these businesses are small or medium scale without real properties, that is, land., A majority of these businesses have unique concepts or ideas that they are either trading with or have translated into tangible objects, the subject of their business ventures. A greater exploitation of some of these concept could grow the business. Such exploitation is capital intensive and for small businesses getting finances is often difficult. This is because banks, the first option for the average business person, are

not willing to extend such facility because these businesses do not have landed properties, their most favoured collateral. Although the Banks and Other Financial Institutions Act ^[19] provides that can grant loans using property rights as security, a lot of the commercial banks do not accept intellectual property rights.

Securitisation of Property Rights

Securitisation, according to the Reserve Bank of India is '*...the process of pooling and repackaging of homogenous illiquid financial assets into marketable securities that can be sold to investors.* In a securitization, a rights holder (Originator) applies for a facility from a bank (or a financial institution that provide such services), using his property right as collateral. The financial institution would transfer the property rights to a Special Purpose Vehicle (SPV), specially established for the purpose of the securitisation. The SPV will, after getting a rating on the assets from a rating agency, classify them into transactional financial commodities such as shares, bonds or other negotiable instruments, with appropriate value attached to them, and then sell same to investors.

It is instructive to state here that the transfer of the pool of asset to the SPV could be done as a true sale, by using the 2 step method, or as a secured loan ^[20]. In the true sale (two step), the of property right (receivables) is first transferred by the Originator to an intermediate SPV (a wholly owned subsidiary of the Originator, established with the sole purpose of acquiring, owning and selling the assets) ^[21], who then sells them to an Issuer. This method is projected as a true sale, rather than a financing device, and thereby capturing the bankruptcy remote characteristics of the SPV as it prevents the consolidation of the securitized assets with other assets of the Originator in the event of bankruptcy ^[22]. Securitisation could also be done by the creation of a Trust. In this instance, the transaction would be done via the creation of a Trust Deed. The originator would, instead of transferring their rights or asset to a financial institution, create a Trust with the financial institution as the beneficiary. This arrangement is resorted to either because of the nature of the property or because laws regulating the creation of securities on such type of property specifically so provide. The trustee will then transfer the asset to a SPV who, after getting a rating from the rating agency, divides the interests into negotiable instrument, and sell to investors. Securitization is a means of bringing the financial and capital market together and this has significantly helped in facilitating economic growth and development ^[23].

Types of securitisation

Securitisation is divided into 2 broad categories:

1. **Asset-Backed Securitisation (ABS):** this is the conversion of existing assets into marketable securities ^[24]. These assets could be made up of securities whose collateral is composed either from mortgage loans (mortgage backed securities (MBS), or from collections of other types of financial assets (non-mortgage securities) ^[25].
2. **Future-Flows Securitization:** In a future flow securitization, the originator issues a debt instrument to investor with repayment made from future receivables from assets on which transaction was set up.

Securitisation of Intellectual Property Rights

Intellectual property rights securitisation, according to Lionel Leventhal, is an alternative way for companies and institutions with intellectual property to effectively monetise their intellectual property ^[26]. The securitisation of intellectual property rights, could either be done through the asset backed or future flow options. An Asset backed format can be done by selling the product from the exploration of protected rights whilst the future flow variant can be actualized by selling streams of income and royalties accruing from rights or claims from intellectual assets ^[27]. Although not as common as real property securitisation, intellectual property rights securitisation has been successfully executed in advanced climes. The most popular was between the late music icon David Bowie and Prudential Insurance Company. In the iconic transaction, popularly called the 'Bowie Bonds,' ^[28] bonds were created, using, as security, current (as at then) and future revenues of Mr. Bowie's first 25 albums (comprising 287 songs) recorded before 1990. The intellectual assets ten years worth of royalties from the securitized songs for a lump sum of \$55 Million (Fifty-Five Million Dollars), only. An SPV created and issued bonds that were given a triple 'A' rating, by Moody's Investors Services ^[29]. The bonds had a face value of \$1,000, an interest rate of 7.9% and a maturity period of 10 years ^[30]. Bowie Bonds matured and were redeemed, without default, in 2007 as originally planned. The rights to the songs reverted to Mr. David Bowie ^[31],

Structure of Intellectual Property Rights Securitisation: Participants to the IPR Securitization

1. **Originator:** The originator, in the case of non-IPR assets, is often a bank but for intellectual assets, it is the company that owns the asset subject of the securitization or an individual right holder or person entitled to royalties or licensing fees or any compensation therefrom.
2. **Special Purpose Vehicle (SPV):** Just as obtains in securitization of real property, the SPV in an IP securitisation does not have employees or engage in any business apart for the securitization for which it was established. The SPV's ultimate duty is to hold the assets, issue the requisite bonds, and ensure that appropriate return on investment is paid on the securities ^[32]. The SPV is bankruptcy remote. This, for an intellectual property right securitisation would mean that even if the owner right holder enters insolvency, investors will not lose their investment because royalties would still be paid by the SPV as the rights (and everything in relations thereto) have been transferred to it.
3. **Investors:** These could be pension funds, banks, mutual funds, hedge funds, insurance companies, central banks, international financial institutions and corporate entities, that invest money in the IPR asset. Their investment makes them eligible for a share in the securitised asset at the stipulated interest.
4. **Servicer (Administrator):** Since the activities of the SPV are limited, the servicer takes care of core administrative part of the process, especially as it relates to the payment and collection of royalties, taxes,

etc ^[33]. The SPV is somewhat the ‘employer’ of the Servicer; it could therefore replace the servicer in case of poor performance, errors, or fraud ^[34].

5. **Trustee:** Where the transaction is created using the instrumentality of a Trust, the Trustee acts as the connecting link between the investor and the SPV or the Trust. It is a stalwart of the investors as it protects them by ensuring that the transferred assets are free from any claims or liabilities.
6. **Rating Agency:** gives the asset the requisite rating. It evaluates the ratio of cash flow that would accrue after the securitization of the assets by analysing future events as well the level of risk the assets hold, before giving a rating on the asset.
7. **Credit Enhancer:** Credit enhancement reduces the losses an investor may incur in the face of unstable IP performance.
8. **Securities:** the SPV issues tradable securities to investors. Investors purchase the securities either through a public offering or by private placement. The securities performance is directly linked to the performance of the asset and not that of the originator.

Intellectual Property Right Securitisation Process

A step-by-step enunciation of IPR securitization process is as follows:

1. The Originator initiates the process by pooling IPR assets, capable of generating cash flow, as collateral in the foundational transaction.
2. Pooled assets are transferred to an SPV.
3. The SPV creates marketable securities from the IPRs assets, which are then sold to investors. An alternate route of creating a Trust can also be done by the SPV transferring the IPRs assets to a Trust.
4. A credit rating agency gives a rating, a pointer to the investors on the viability or otherwise of the assets.
5. Investors either approach the SPV or Trustee to purchase the securities
6. Funds raised by the SPV or the Trust are used to pay back the facility granted the rights holder
7. Investors get their return on investment.
8. IPR is return to the originator at the end of the transaction, after the investors and all liabilities in relations thereto have been settled.

Unique features of IPR securitisation include:

1. Since such a transaction is considered as a loan and not a sale under the premise of the law, it is excluded from being taxed.
2. The transaction is not a sale, there is therefore no transfer of ownership rights.
3. It can help make up for any losses or need for funds for research and development or expansion of any existing projects,

Securitisation of intellectual property rights in Nigeria: Prospects

Theoretically, securitising an intellectual property is no different to securitising other assets. The reality, however, is that the intangible nature of intellectual property may

present challenges different and peculiar from that encountered of tangible property. Whereas unlike in tangible property where accessing the asset may not pose much of a problem, same cannot be said for intellectual property. For instance, a product may, by its original nature, be a registered copyright, which has been transmitted into a computer code, (a patent), and trademarked. The assets, as it now stands, holds at least three severable (and at the same time interwoven) intellectual rights attached to it.

Despite the above some important things to note about IP securitisation are, firstly, although a facility is granted the originator, it is not of the nature that require him to personally make repayment. This is because repayment is tied to the performance of the assets. Secondly, there is no conflict between securitization and extant intellectual property laws, as the revenue from the IP is being taken as security and not the IP right itself. Another point of attraction of IPR securitisation is that the SPV and investors do not need to worry about whether their interest in a revenue stream has been properly perfected and whether they may have a lower priority against other conflicting rights. This is because as soon as the revenue stream is securitised, there will be no other competing interests on the assets.

Potential benefits of securitising IPRs in Nigeria

A major advantage of securitization over other types of debt financing, is that unlike lenders having to wait for a long period of time for repayment, they can pool different transaction, sell the rights by securitising the loan portfolio and start receiving some payment almost immediately ^[35]. Lenders are therefore able to transfer the risk associated with lending to a variety of investors. Another advantage is that it gives organisations the opportunity of converting their assets or debts into trade-able securities which are then sold to investors as bonds and stocks. This is a great way of sourcing for funds for growth and. or development. It is also an innovative way of raising funds in the capital market. Potentials of IPR securitisation for key participants will be highlighted as follows:

Originator

1. Access to Funds: Securitisation is a great way of accessing funding for the exploration of other assets, businesses or to exploit the potentials of properties that are not easily trade-able.
2. Transfer of obligation of repayment to investors eliminates the risk of the indebtedness not being serviced in a timely manner or as agreed by the originator and SPV. This is because re-payment is now managed through the SPV which usually has a system for the effective repayment of investors.
3. Risk Management: Securitization can help financial institutions reduce the chances of bad debts because instead of having just one debtor with the risk of late or no repayment, money will be coming from different sources per the scheduled plan. The chances of repayment of the facility granted are therefore very high.
4. Alternative of funding sources: Securitization helps in expanding the pool from where the originator could source from funds. Instead of just relying on the usual financial institutions like banks, the originator can explore this option.

5. The originator does not have to pay tax on the lump sum he had received because that is considered a loan.
6. Possible restoration of property: Securitisation, even when done using the mechanism of a 'true sale' is not a total alienation. There is therefore a high possibility of the asset being restored to the originator after all indebtedness settled.

Investor

1. Better investment option: Securitization offers an alternative, and often better, investment option. It makes for a predictable and reliable return on investment, especially where it's a future flow securitisation.
2. Less Credit Risk: The assets carry low credit risk. This is because Credit Rating Agencies professionally evaluate them, giving them their accurate rating. The IPRs thereby come with a certified creditworthiness.
3. The securitisation mechanism can be utilized to cater for the needs of both the consummate risk takers and risk-averse investors.
4. A securitization transaction can be tailored in a manner that responds to investors needs or Market exigencies^[36].
5. Investors benefit from the legal separation of the securitized assets from the originator. This ultimately protects the payment stream in the event of bankruptcy or insolvency of the originator.
6. Issuers can tailor the maturity and seniority of a security according to particular investor's needs. This flexibility not only boosts investor interest but also contributes to more efficient capital markets by ensuring investors and money managers have access to the most appropriate securities.

The Economy

1. Shifting the risk of the securitized assets to investors reduces that of the financial structure and system.
2. Securitisation, according to the European Parliament can reduce geographical and regional disparities in the availability and cost of credit by extending local credit activities to, not just national, but to the wider global capital markets systems^[37].
3. Securitisation helps banks to sell off their or Non-Performing Assets (NPAs) to Asset Reconstruction Companies (ARCs). The Asset Management Corporation of Nigeria (AMCON) is tasked with the reconstruction of bad debts in Nigeria and '...the securitization or refinancing of portfolios of eligible bank assets^[38]. The corporation also has the power to give security for any debt, obligation or liability of any company referred to it^[39].

Challenges of IPRs Securitisation in Nigeria

- a. Securitization of IPRs could be less profitable for small firms or personalities with low income because of the expenses to be incurred in the course of perfecting same. Professionals like rating agencies, law firms, accounting firms have to be paid for services rendered to make the securitisation viable. It is therefore advisable that before an individual or firm securitise its assets, it should consider the financial implication and not just be focused on the possible returns.

- b. Since the entire transaction is often predicated on a future cash flow, it may not be profitable for some IPRs because some of the products from intellectual exploits may be made for seasonal use and once the season is over, returns from them may cease or be minimal.
- c. Dearth of a legal framework for IPRs securitisation process in Nigeria.
- d. There are not enough data to show how royalties for the different IPR securitisation had perform and especially why they performed the way the did. Another issue is that because of the different types and peculiar characteristics of the different IPRs, it would be ludicrous to use one parameter to measure the performance of different IPRs.

Conclusion

This article aimed at discussing the potentials and challenges of securitisation of intellectual property rights in financial transaction in Nigeria.

In the Nigerian business world, the value placed on intellectual properties is not as much as that of other properties. This has affected their bargaining power or even lack of, leading to unfair outcomes between holders of intellectual property rights and holders of rights of other property rights in financial transactions. Creating more awareness of their versatility and profitability as subjects of financial transaction would help in building a stronger bridge for rights holder or investor in the financial market.

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