



Securitization of Intellectual Property: Legal Recourse in India

Ahmar Afaq¹ and Rupal Chhaya^{2†}

¹Symbiosis Law School, Nagpur, Symbiosis International (Deemed University) Pune, Maharashtra, India

²Symbiosis Law School, Hyderabad, Symbiosis International (Deemed University) Pune, Maharashtra, India

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Capital has been a major cause of concern amongst entrepreneurs across the globe. Not everyone enters the professional setting with a bag full of money, neither did the Ambani's nor did the TATA group. It was not just investments into fruit-bearing funds but also loans that have made them superpowers in the market, today. A loan requires one to offer collateral against the principal amount, this collateral is often referred to as security in common parlance. We most often offer tangible assets such as gold, land, car, etc. as security, however, can an intangible asset such as intellectual property also be offered as bank security? This question is dealt with at length by the authors while discussing the legal discourse in India and other developed countries. The authors have collected insights from the earlier cases where intellectual property was offered as security (more specifically as collateral) and analyzed its legal implications in the long run.

Keywords: Intellectual Property, Security, Loan, Collateral, Asset, Special Purpose Vehicle

Intellectual Property as defined by WIPO as a "Creation of mind such as inventions, literary and artistic works, designs, symbols, names and images used in commerce."¹ This creation of mind covers trademarks, copyrights, patents, designs, semiconductor integrated circuits apart from other unconventional intellectual properties making its way into the various legal regimes across the world. These are not just rights in the creation of one's mind but also a great asset for an individual/company. These bring immense goodwill to a professional set up and the consumer base recognizes and symbolizes them based on that creation. For instance, in the trademark of BMW cars, the circular symbol with the letters BMW imposed upon it, is something we associate with the brand BMW. This symbol is essentially the trademark of the company. A similar association goes with designs; the unique shape of the coca-cola bottles helps us recognize the beverage brand.

Is the worth of an intellectual property restricted just to market goodwill, consumer recognition, and brand loyalty? Well definitely not, an intellectual property is not just an asset but also a feasible mode of security for bank loans. This is how many startups and other MSMEs have funded their finances across the globe.² Walt Disney and Calvin Klein in the early

1990s were some of the foremost brands to have securitized their trademark and raise worth million Section³ Securitization of intellectual property may not necessarily be in the form of bank collateral, other modes of securitization include license, assignment, and mortgage.

In the present paper, the authors shall discuss the various legal provisions in the Indian setup making its way towards securitization of intellectual property, what the specific laws on the intellectual property provide for, and what does the history so far shows with regards to the securitization of intellectual property. We shall also, briefly discuss the international setting on the topic.

Collateral and Security

Before we proceed with the intricacies of the subject matter, one needs to understand that even though in common parlance we use the terms, security, and collateral interchangeably. The two are subtly different from one another.

Collateral are assets that are offered by the borrower against the loan amount to the lender while security refers to those financial assets (stocks, bonds, etc.) which are offered to the lender against the loan amount.⁴ While collateral is a larger sub-set meaning thereby, all securities are collateral but not vice-versa. Figure 1 can draw further clarity on the differentiation:

[†]Corresponding author: Email: rupal.chhaya1999@gmail.com

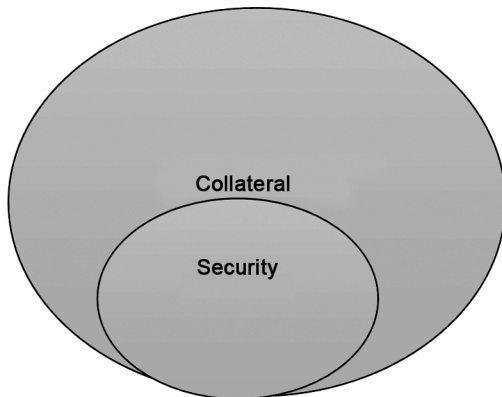


Fig. 1 — Differentiation between collateral and security

Assignment and License

Even though the two terms are not explicitly defined in the intellectual property laws in India, they have attained the same meaning as is affixed in the legal terminology.⁵ The two concepts are also the possible modes of securitization and monetization of intellectual property, however, excluding bank collateral from its purview.

Assignment means the transfer of title in the intellectual property meaning thereby that the assignor no longer has any proprietary rights over the intellectual property for the period of assignment. While in the case of a license, the licensee is given some rights of proprietorship which can be practiced at the same point of time by multiple licensees and the licensor is in no way devoid of practicing those rights. However, in both of the aforesaid cases, monetary benefits are affixed concerning both the parties (licensee and licensor, assignor and assignee).

Special Purpose Vehicle (SPV)

Even though the term sounds fancy and is a little misleading, it is one of the most important aspects of intellectual property securitization. These are entities having a separate existence from the owner of intellectual property or the parent company. They are formed especially for intellectual property securitization, whereby, the owner of the intellectual property transfers the intellectual property to the SPV in return for all the funds gathered by the SPV. In simple terms, the SPV is an intermediary, whereby, the investors who would like to invest in the intellectual property and reap profits would contribute to the SPV. The SPV in return would transfer the IP to the investors. These entities are also referred to as the bankruptcy-remote entities for the simple reason

that the investor and their rights would remain protected no matter what the financial condition of the owner of the intellectual property be.

In India, at the present, we don't have such a concept existing however, in countries like the USA where the law on the securitization of intellectual property has advanced, SPVs are given special importance.

Real-Life Cases on the Use of Intellectual Property as a Security

Bowie Bonds

David Bowie is a famous instrumentalist, musician, and actor known for some of his breathtaking performances in Space Oddity, The Man who fell Earth, and many more to add to the list. He was the creator of the Bowie Bonds. The idea originated during a casual conversation between his manager, William L. Zysblat, and investment banker David Pullman, a managing director at Fahnestock & Co.⁶

Being an artist back in time, he used to own his music recording which generated royalties. Also, there was a prediction made to the effect as to how much he would earn by the way of his live performances, live-streaming, and other sorts of programs. To purchase the copyright over his album from his former manager, David Bowie lent a loan against the securities of his albums (an intellectual property). The loan was issued when the investor, Prudential Insurance, purchased the collateral-backed securities/bonds (known as Bowie Bonds). Whatever income was generated by the way of royalties were paid to repay the debt. In this manner, the musician was able to raise \$55 million in bonds backed by future music royalty payments and copyright Section⁷ These bonds even surrounded with a lot of uncertainties made their way into the market where Moody's rated them better than any credit rating company.⁸ These bonds gave a kick start to intellectual property back securities (collateral to be specific), even though start-ups had explored the opportunity before, these bonds became a landmark in this regard.⁸

Arby's Securitization

Fast food has always been a center of attraction for the youth. The lack of time and urge for appealing tastes has brought these fast-food chains a long way. In India, we have fast-food joints such as Subway, McD, Burger King, KFC which are the most popular of all. In the USA, Arby's is one such fast-food joint that has been known for its beef sandwich and curled

fries.⁹ The brand has been the first to have successfully used franchise securitization.¹⁰

In a similar manner as Bowie Bonds, the bonds (also known as Asset-Backed Securities (ABS)) purchased by the investors were backed by the revenues earned by the franchise apart from other revenues such as rent, etc. The company had also recently come up with such bonds in the pandemic. As per the experts, the sales of the brand didn't drop in the pandemic because of the takeaway and drive-thru services offered which reduced the human-to-human interaction and hence the risks associated.⁸ Following the footsteps of Arby's other brands such as Domino's Pizza, Dunkin' Donuts, Sonic, Applebee's, Quizno, and IHOP explored the opportunity of trademark securitization.¹¹

Fashion Trademarks Securitization

Styling and fashion trends have been changing for decades. Movies and film stars play an imperative role in changing market trends. Bill Blass was one of the biggest American fashion designers of his time. He was known to have influenced the market trends and come up with the quirkiest designs. In the year 1999, he had successfully securitized his trademark by the way of future estimation of future revenues.¹² This was followed by Cadie, a famous women's footwear designer, and Guess Inc. the famous apparel shop.¹²

Daawat Securitization

Biryani has been triggering the taste buds of most Indians for centuries. The delicacy which is made of special biryani rice or basmati rice has now spread its wings across the nation. LT Foods the proprietor of the trademark "Daawat" popularly known by its tagline "*Pyaar ki Special Bhasha*" has been advertising its brand with the aromatic biryani in its tv commercials. The company had used its trademark "Daawat" as collateral to raise a loan worth \$50 million to acquire the USA-based company, Kusha Inc. (brand name; Royal).¹³ The company used this opportunity to increase its market share in the USA up to 52%.¹⁴

Kingfisher Airlines Securitization

Well, who doesn't know about the king of good times, Mr. Vijay Mallya. He was the founder of this airline, Kingfisher. The airlines were popularly known for their lavish treatment and extra foot space and made the middle class aspire to fly with them. Hence, the tagline, "Fly the Good Times".¹⁵ The

company wasn't doing well since 2010 when it made its decision to acquire Deccan airlines (Air Deccan)¹⁶, to overcome its debt Mr. Mallya decided to collateralize its trademark of Kingfisher (the airline brand) to raise \$50 million.

The banks after three years woke up to realize that the collateral no longer holds a similar valuation as it did at the time of securitization.³ This was because of the reason that the valuation of intellectual property is directly proportional to the business operations and standing of a company. Since the company had shut down its business in the year 2010 only there were bleak chances of recovering the debt from the trademarks. The banks failed to fetch a bid at the auction.¹⁷

Canara Bank v NG Subbaraya Reddy²²

This was a judgment of the Apex Court in India dealing with the aspect of securitization of the trademark "EENADU" (agarbatti/incense stick) with the bank. The Court referred to Section 6(2)¹⁸ and Section 8 of the Banking Regulation¹⁹ where there was an explicit prohibition on trading imposed on banking companies. Keeping in mind this provision alone, the court held the assignment of the trademark as invalid. The court, however, missed out on other provisions of the SARFAESI Act²⁰ which provides for securitization on intangible security which includes intellectual property.

Indian Intellectual Property Regime and Securitization of Intellectual Property

Brand recognition is an essential feature of intellectual property however; brand valuation accompanies it and is equally important. This valuation assesses essentially the financial worth of an intellectual property and securitization of intellectual property forms a part of this valuation.²¹

The Legal Provisions Providing for Securitization of Intellectual Property in India

World Intellectual Property Organization and Trade-Related Aspects of Intellectual Property Rights are the international body and the agreement on intellectual property, respectively. However, only the signatories or members are bound by the regulations. Thus, it becomes essential to read into the local laws of a country to fetch a better understanding of the subject matter. The following are the legislations and the corresponding provisions related to the securitization of intellectual property in India:

UNCITRAL Model Law on Secured Transaction²²

The model law is an exhaustive framework on the securitization of assets apart from the rights and liabilities affixed with the creditor and debtor. A few relevant provisions from the model laws concerning securitization of intellectual property are as follows:

*"Acquisition security right" means security right in a tangible asset, or in intellectual property or the rights of a licensee under a license of intellectual property, which secures an obligation to pay any unpaid portion of the purchase price of an asset, or other credit extended to enable the grantor to acquire rights in the asset to the extent that the credit is used for that purpose.*²³

*"Intangible asset" means any movable asset other than a tangible asset.*²⁴

*"Movable asset" means a tangible or intangible asset, other than immovable property.*²⁵

Article 17- *Tangible assets to which intellectual property is used,*²⁶ the provision simply provides that the tangible asset on which the intellectual property is owned is separate from the intellectual property. Thus, a security interest on the tangible asset doesn't extend to the intellectual property.

Article 99- *Security rights in intellectual property*²⁷, this provision enumerates that the law on the security interest and rights in the intellectual property would be the State law in which the intellectual property is protected.

From the above provisions, we can grasp that security interest in intellectual property is not a far-fetched reality. The model law makes it clear that collateralization of the intellectual property is possible in the present time apart from its mere securitization by the way of license. There is a separate chapter in this model law that talks about the collateralization of intellectual property and concomitant rights and liabilities and the necessary procedures in this regard. It is also interesting to note that the model law not just talks about the intellectual right but also the property that arises out of such rights as discussed under Article 17.

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002²⁸

The legislation came into force as a reform in the banking and financial sector, where the banks and other financial institutions were empowered to take custody of the security and auction them.²⁹ The Act has provided for wide-ranging provisions in this

regard almost exhaustively dealing with the subject matter. Since the intellectual property hadn't gained enough momentum when the Act came into force, there is no separate mention of it. However, one has to read intellectual property as a part of its provisions which are discussed below:

Financial asset

The term as defined under Section 2(l) of the Act, reads as follows:

*(vb) any right, title, or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain licence of the intangible asset.*³⁰

Property

The term as defined under Section 2(t) of the Act, reads as follows:

"(i) immovable property;
(ii) movable property;
(iii) any debt or any right to receive payment of money, whether secured or unsecured;
(iv) receivables, whether existing or future;
*(v) intangible assets, being know-how, patent, copyright, trademark, licence, franchise or any other business or commercial right of similar nature [as may be prescribed by the Central Government in consultation with Reserve Bank]."*³¹

Security Interest

The term as defined under Section 2(t) of the Act, reads as follows:

*"Such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset.*³²

Securitization

The term as defined under Section 2(z) of the Act, reads as follows:

"Means acquisition of financial assets by any [asset reconstruction company] from any originator, whether by raising of funds by such [asset reconstruction company] from [qualified buyers] by the issue of security receipts

representing undivided interest in such financial assets or otherwise."³³

From the definition of the term securitization, one can find it inclusive of collateralisation. The definition of asset reconstruction company as provided for in Section 2(c) of the Act³⁴ includes banks and asset reconstruction as defined under Section 2(b) of the Act³⁵ in layman language means the lending of loans against collateral.

The above-mentioned provisions of the SARFAESI Act are of vital consideration for the present research, as the law is one of its kind and the only law to date in India which governs the securitization and collateralization of intellectual property. The law provides not just for the securitization of the intellectual property (financial assets which include intangible asset) but also its collateralization.

The Banking Regulation Act, 1949³⁶

*Section 6 – Form and business in which banking companies may engage,*³⁷ this provision provides for an almost exhaustive list of activities that a bank can indulge in and there is an explicit prohibition on undertaking activities apart from those stated in the section.

*Section 8 - Prohibition of trading,*³⁸ the banks are exempted to undertake trade as their activity only to realise the value of good affixed with the realisation of a security or a bill of exchange.

The role of banks is by far restricted to deposit of money and lending loans, there is a restriction on the banks spilling themselves into the trading segment. This provision comes to light when the debtor or the proprietor of the intellectual property lapses in paying off its debt and the bank becomes the custodian or rather the owner of the said intellectual property or the intellectual property right. The banks can only sell off or auction the same and not use the same as the proprietor, as provided for under Section 6 of the Act.

The Trademark Act, 1999³⁹

The Act has enumerated the term licensee in its provisions but hasn't provided for explicit provisions governing the rights of the licensor and licensee and other relevant detail section. However, Chapter V (Section 37-45) of the Act⁴⁰ specifically deals with assignment and transmission with no proper definition affixed to the two terms in the Act. Though the Act provides for the rights and liabilities of the two parties and the requisite procedures.

The Patents Act, 1970⁴⁰

The Act provides for four possible means of securitization of a patent; license, assignment, mortgage, and transmission. Again, these terms are not defined in the Act, however, the various rights are enumerated. The concept of compulsory license also finds its place in the Act; however, it is upon the prerogative of the Central Government to issue one and not the patentee.

The Copyright Act, 1957⁴¹

Copyright Act provides for license and assignment under Chapter VI, Section 18, 19, and 19A, respectively. The Act exhaustively deals with the rights, liabilities, registration, and dispute settlement in these matters.

The Designs Act, 2000⁴²

The Act provides for any interest created in intellectual property by the way of a mortgage, assignment or license to be recorded with the Registrar under Section 30(2) of the Act.⁴³

From the above-mentioned provisions, we can clench that the UNICITRAL Model is the only law at the present that exhaustively deals with the concept of securitization of intellectual property. However, coming down specifically to the Indian laws, both the SARFAESI Act and the Banking Regulation Act have paved the way for the possibility of securitization and collateralization of intellectual property and no blanket ban as such is offered. Even though the law isn't explicit in its terms, a wider interpretation of the provisions when construed helps us bring in intellectual property within the domain of intangible property mentioned in the above laws. The special acts are silent on the collateralization of the intellectual properties yet securitization is an option that is made available to the proprietor.

Even though the SARFAESI Act has dealt with the securitization and collateralization of financial assets (inclusive of intellectual property), other legislations make a passing reference to the concept and define the term asset.

The Companies Act, 2013⁴⁴

The Act has exhaustively dealt with the rights and obligations of a company and the various procedures affixed with the same. It has also discussed the concept of charge, how and against which assets can be taken up. The following are the corresponding provisions in this regard:

Charge

The term as defined under Section 2(16) of the Act, reads as follows:

“Means an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.”⁴⁵

Application to Register Charges

Section 77 of the Act⁴⁶ discusses the duty of the registrar to take note of any charges created by the company against any tangible assets or otherwise. The term otherwise refers to intangible assets and of course, intellectual property. Schedule III of the Act prescribes a list of intangible assets which includes goodwill, trademarks, copyright, patent, brands, computer software, recipes, formulae, designs, license, franchise, and other intellectual properties.

The Income Tax, 1961⁴⁷

The Act at length provides for the taxability of various expenses, assets, liabilities, and deductions or exemptions in some events. The Act is framed in a manner to provide the benefits of one's invention with them and hence, makes them eligible for deductions under Sections 32, 35AB, 80-O, 80-QQB, and 80RRB of the Act.

Securitization of Intellectual Property in Foreign Jurisdictions

The intellectual property regime in India is in its toddler stages at the present, however, in other developed countries such as the USA, Singapore, Japan, Korea, etc. intellectual property is given special importance, especially for funding purposes. The select countries are chosen for the present study as they are developed countries and have imparted great emphasis on innovation. These countries are known for the best IPR laws. Hence, it was thought appropriate by the authors to compare with the best standing laws in this regard.

Concepts such as licensing and assignment of intellectual property have remained in the laws in almost all the countries, however, the concept of collateralization of intellectual property for a bank loan is a development that has taken place in the past decade.

Legislative Framework of Different countries on Securitization and Collateralization of Intellectual Property**United States of America**

Thomas Edison happened to be the very first person to collateralize his intellectual property in the

late 1880s⁴⁸. He used the patent in the incandescent electric bulb to start his company, General Electric Company.⁴⁹ That became the triggering point of using intellectual property, especially patents as security in the USA.

Uniform Commercial Code deals with securitization of intellectual properties in the USA. Article 9⁴⁹ specifically deals with the said provision in this regard. The process of securitization for both of the intellectual properties is akin, whereby the creditor would make a thorough research about the trademark and the patent, which includes any previous liens, salability of the product, any infringement of the trademark, or patent, market conditions, etc. After this, the contract concerning the securitization is entered into with suitable terms and condition. United States Patent and Trademarks Office plays an important role in the process of registration of the lien so created in the two intellectual properties. This becomes essential to protect the interest of the creditor and his right to know about any other securities which are raised against the same intellectual property.

Singapore

In the year 2014, Singapore Government had come up with the Intellectual Property Financing Scheme where the companies could use their intellectual property as bank collateral.⁵⁰ To finance their capital, the intellectual property was required to be locally registered. In the initial phases, three banks were participating in the lending; United Overseas Bank, DBS Bank, and Overseas Chinese Banking Corporation.⁵¹ The risk of failure of non-repayment of the loan was borne by the government and the banks. The process involved was akin to raising a loan from a bank against tangible security the only difference being that the valuation was to be done by the appointed valuers only (American Appraisal Singapore, Consor Intellectual Asset Management, and Deloitte & Touche Financial Advisory Services).⁵¹ With a strong regulatory mechanism in place, many companies were able to benefit from this policy one such was Masai Group International, a footwear company.⁵¹

China

In China, there was no formal policy or law which was promulgated, but notice was issued on behalf of the China Bank Insurance Regulatory Commission, the National Intellectual Property Administration, and

the National Trademark Administration in the year 2019.⁵² In the aforesaid notice, the regulations were to propagate the use of IP financing and provide a conducive atmosphere.

Korea

With no formal law in place, the practice of collateralization of intellectual property goes a long way in Korea. For instance, the Korean Development Bank (KDB) has advanced US\$ 100 million to 80 IP-rich companies in the form of collateralized loans while the IP SWF fund has reportedly made over 5,000 transactions in patents, with assets under management of US\$ 500 million.⁵³ Apart from these real-life transactions, the country is also said to run various schemes and insurances which bear almost 70% of the risk of the companies opting for IP financing.⁵⁴

Malaysia

In the year 2013, realizing the importance of funding for medium and small-scale businesses, the Prime Minister of Malaysia had launched the scheme MyIPO. In furtherance of the same, an Intellectual Property Financing Fund scheme was subsequently established and is offered through Malaysian Debt Ventures Berhad.⁵² To date only two laws on intellectual property, the Trademarks Act, 2019, and the Industrial Designs Act, 1996 have incorporated the concept of securitization of these registered intangible intellectual properties.⁵⁵ A company that opts for the collateralization of their intellectual property must get the same registered with the Registrar within 30 days of the creation of the charge.⁵⁵ Even though there were sincere efforts on part of the government to propagate the concept, it remains an alien amongst the citizens due to the lack of clarity on the process.⁵⁵

Philippines

The Philippines is another country that had advanced steps towards securitization of intellectual property and in specific its use as collateral in the year 2018. This was, however, in the form of law rather than a policy as we have seen in the case of other countries. With the enactment of the Personal Property Security Act,⁵⁶ the collateralization of the intellectual properties (irrespective of its form) was made eligible to fetch a loan from a bank.

Analysis

It was observed that the concept of securitization of intellectual property even though not new to the

intellectual property regime has been recognized by many countries including India. Securitization usually takes the form of a license, mortgage, or assignment. The concept of collateralization of intellectual property is new to the global as a whole while some countries have taken the initiative to tap the potential of collateral in an intellectual property some are yet to come to an understanding with the same.

Most countries providing for the collateralization have imparted recognition to only those intellectual properties which are locally registered. Most nations, including India, the USA, Singapore have so far advanced only to the extent of collateralizing trademarks and patents while Malaysia has spread its wings to industrial designs as well. We have seen from the previous section that only a handful of countries have the collateralization incorporated into a legal framework while most countries are opting for schemes and policies to motivate the businesses to opt for this mode of raising capital.

With the economies opening up, businesses are in dire need of funding, and what better than their creation and asset in case they fall short of tangible assets and cash. Mere policies or schemes cannot solve the purpose as the process does involve complexities and people lack clarity on the process. Hence, demotivating them from opting for an intellectual property-backed loan. In India, to be specific, there are mere passing references to the subject matter and no law clearly defines the intricacies of the matter. This requires that the National IPR Policy, which discusses the collateralization of intellectual property⁵⁷ takes the form of law and lends absolute clarity to the subject matter.

Even though the concept faces certain lapses and difficulties in its early stages. Yet, we have a lot to learn from the USA, it has in the past dealt with the Enron scam which dealt with the concept of Special Purpose Vehicles (SPVs) which are extensively made use of in the securitization of intellectual property.⁵² However, there were laws introduced to overcome the lapses and give the economy a push. Intellectual property infringement and litigation are common phenomena and can be done away with because the finances are raised in their early stages when it's clear if the intellectual property is genuine or not. Things such as taxability and volatility of intellectual property are the subject matter of the domestic laws and can be tackled accordingly. The following steps are suggested to become the part of the process and law:

Registration of Intellectual Property

It must be ensured that the intellectual property against which the loan is taken is registered with the respective office in India. This registration is a mandate because this can avoid the chances of any infringement or deception and the lender is well aware of its validity and can accordingly frame the terms and conditions of the loan agreement.

Valuation of the Intellectual Property

This is one of the important steps in the process. For valuation, we must have certain experts in place who can offer guidance not just to the banks but also to the proprietor of the intellectual property. For instance, Singapore had certain experts who alone would be taking up the task of valuation of the intellectual property.

Rights and Liabilities of the Lender/Bank and The Proprietor

These should be well defined either in the law or the agreement because disputes concerning what happens to the collateral if it gets devaluated over time, who shall be liable for the renewal of the IP, what if other securities are undertaken against the IP, the rights and liabilities of the licensee and assignee, how many loans can be taken against this single IP at one point of time and over a while, are a few questions which are likely to arise.

Conclusion

The concept of securitization and collateralization of intellectual property is a recent development in India and other south Asian countries. While in countries like the USA the concept dates back to the late 1900s, they haven't only introduced laws to the effect but have efficient machinery in place. In India, the concept hasn't reciprocated well and the conventional methods of financing are preferred. Moreover, with the Indian Courts, especially the Apex Court giving judgments like the NG Subbaraya is bound to demotivate the innovators from exploring intellectual property securitization. With greater vigor and motivation, the nation needs to come up with laws and policies to motivate intellectual property financing by the way of collateralisation. Certain lapses and difficulties are going to arise in the toddler stages; however, greater reassurance can be offered by the involvement of credit rating agencies which have been of great help in the American cases discussed in the paper before. This way the investors can fetch a better idea of investable rather profitable and non-profitable securities.

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