

Strengthening IP Securitisation in India: Legal reforms and financing innovations needed

Over the past two decades, intellectual property (IP) securitisation has gained prominence in securing debt financing. India's IP financing ecosystem, though nascent, could benefit significantly from robust securitisation practices and legislative improvements, similar to initiatives in other economies

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Over the past two decades, the importance of intellectual property (IP) as an asset class for securing credit through debt financing has steadily increased.

Securitisation of IP is not a new phenomenon. Notable transactions in this field include the securitisation of trademarks of the Domino's Pizza chain, future revenue streams associated with Arby's logo, and the patents of an HIV drug developed by Yale University, among many others. India's burgeoning technology, pharmaceutical, and semiconductor sectors stand to gain significantly from a robust IP-based financing ecosystem—a domain that remains in its infancy.

Basic structure of an IP securitisation process

Securitisation of IP is a practice which includes transforming an IP asset and / or future income streams from IP assets (such as royalty payments) into tradeable or marketable securities. Typically, an IP asset securitisation is structured with setting up of a Special Purpose Vehicle (SPV). The securitisation of an IP backed asset can be carried out by placing the IP asset or the rights to its future revenue streams (i.e., royalties) in such SPV.

The originator is the entity that creates the underlying asset that needs to be securitised. In an IP securitisation process, the originator either assigns the IP assets or the rights to the future cash flows accruing from these assets to the SPV. This isolation of IP assets, which are to be securitised, from the overall asset pool of the originator reduces financial costs. This is because the costs are determined by the quality of the securitised assets, not by the risks associated with the overall business activity of the originator. The SPV, thus formed, operates as a separate legal entity and acts solely to facilitate the securitisation transaction.

Protection of lenders' interests under Indian laws

To ensure the protection of lenders' interests in collateralised IP assets, it is essential to establish a transparent process where charges can be created and recorded on public registers, providing notice to prospective buyers or lenders. The Indian Companies Act, 2013, permits companies to create charges over their IP assets; such charges must be registered with the Registrar of Companies to be legally enforceable.

However, the current Indian IP laws do not provide a uniform mechanism for the recordal of charges. For instance, under the Indian Patents Act, 1970, and the Indian Designs Act, 2000, the recordal of charges is mandated only for granted Indian patents and registered designs, respectively. In the absence of recordal of such charges over granted Indian patents and registered designs, the document creating such a charge is inadmissible as evidence before any court. There is no requirement or formal process for recording charges for other forms of IP in India, including trademarks and copyrights. Securing the rights of lenders becomes even more challenging with unconventional IP assets such as trade secrets, for which there is currently no statutory protection in India. While the recently tabled bill on trade secrets introduces sui generis legislation for protecting trade secrets, it is silent on the use of such trade secrets as collateral.

As a practical solution, especially for trademarks, lenders usually obligate the owner of the trademark (registered or applied for) to file a letter with the Indian Trademarks Registry, formally declaring the grant of a security interest over the assets in favour of the lender. Similarly, for registered or pending copyright applications, as well as pending patent and design applications, lenders could obligate the proprietors to file similar letters.

To encourage IP financing mechanisms in India, the legislature may consider mandating the recordal of charges created over any IP assets, whether registered or pending registration. Such a step would provide comfort to financing institutions and investors, as well as due notice to any future purchaser of the IP asset or lender.

Certain economies like Singapore and Korea have introduced notable initiatives to boost their IP financing ecosystems. These include interest rate subsidies on IP-backed loans and credit guarantees for risk-sharing between lenders and the government. Additionally, certain jurisdictions, like Hong Kong, have established robust IP exchange platforms, attracting various financing options for IP assets and companies. The Indian government can also consider introducing such initiatives to foster the growth of IP financing in the country.

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