

# UNCITRAL Second International Colloquium on Secured Transactions – 18-19 Jan., 2007

## Panel Discussion: Third-Party Effectiveness and Priority for Copyright Financing

# Outline

- Conceptual Framework
- A Practical Example
- Efforts By IP Community
- Conclusion

# I. Conceptual Framework

# Reasons for Filing and Priority

- ❖ **FILING** is not an end in itself but a means to an end – effective disclosure to third parties who make later searches.
- ❖ **PRIORITY** is not an end in itself but a means to an end – obtaining a debtor's rights in collateral free of competing claims on default.
- ❖ Intellectual property law is necessarily *different* from tangible goods property law.
- ❖ Hence, IP rules for effective filing and for obtaining priority must necessarily differ from those for tangible property.

# Comparison of Filing Principles

## Copyright (IP)

## Tangibles

**Policy Goal**

New Creations

Free Alienability

**Policy Framework**

Title

Possession

**Ownership as to 3P**

Actual

Apparent

**Chain of Title**

Yes

No

**Fractionalized Interests**

Yes

No

**Statutory Model (if any)**

Recording Act

Registry Act

**Filing Principle**

Transaction filing

Notice filing

**Covered Transfers**

Ownership & security

Security only

**Indexing Method**

Property (work)

Party (debtor)

## II. A Practical Example

# Motion Picture Financing

- ❖ **Example:** Fund production of *Terminator 4*
- ❖ Production loan: \$175,000,000
- ❖ Due Diligence requires searching entire Chain of Title as termination / foreclosure of prior transfer or security right could defeat rights in T4
- ❖ 100 prior parties to search
- ❖ Assume in U.S. separate searches required for IP transfers (Copyright Office) and security rights (local state offices)

# U.S. Search Cost Comparison for Hypo

## Copyright

## Security

	Docs	Cost (est.)	Docs	Cost (est.)
Full Copyright Search	1	\$ 250 (Free)	1	\$ 250
Locate Debtor Searches			100	\$ 50,000
Individual Debtor Searches			100	\$ 5,000
Copies of Documents			@3,000	\$ 3,000
Review Documents				\$ 5,000
Judgment Searches			@600,000	\$30,000,000
Total	1	\$ 250	@603,201	\$30,063,250



# Alternative Filing Approaches

## 1. Separate Approach (IP Ownership; Local Security)

- Exponential searching problems
- Inadequate disclosure of Security Rights
- Which system prevails if the creditor forecloses?

## 2. Mixed Approach (File Security in both IP and Local)

- Same searching problems as separate approach
- Increases filing costs to no apparent benefit
- Impossible to reconcile different priority rules

## 3. Unitary Approach (File Ownership and Security in IP)

- Consistent priority rule
- Cost effective filing and searching
- What about after-acquired?
- What about floating liens?

# III. Efforts by IP Community

# International AV Register

- ❖ Specially Made for Financing
- ❖ Based on Relational Data Model
- ❖ Allowed Filing in Work Register and Person Register
- ❖ Allowed Filing against Person (“floating lien”)
- ❖ Allowed Future Assignments (“after-acquired”)

# International AV Register - Concerns

- ❖ Piracy – False Filings
- ❖ Limited Challenge Rule
- ❖ Arbitration concerns

# Other International Initiatives

- ❖ ICANN / WIPO – international arbitration for domain names
- ❖ ISAN / UNESCO – international identification for AV works and claimants
- ❖ Comparison to UNCITRAL approach

# Other National Influences

- ❖ US - Copyright Office & PTO
- ❖ EU – Community Trademark
- ❖ Patent Law Treaty (use national PTOs for security)
- ❖ US – Eximbank
- ❖ Other export credit enhancement

# Conclusion

- ❖ Ultimately, the goal of a security interest is to *transfer* the debtor's *rights* in collateral on default and proper foreclosure
- ❖ Thus, the acid test is determining rights on foreclosure; filing is a means to this end, not an end in itself
- ❖ A transfer on foreclosure must fit in with the priority rules for all transfers of the asset, including competing ownership transfers
- ❖ As the priority and transfer rules for IP necessarily differ from those for tangible property, the filing system must differ as well.