

UNCITRAL COLLOQUIUM ON SECURITY OVER IP: Vienna, 18-19 Jan 07

***Setting the stage: Economic background and intellectual property financing needs
and practices***

Introducing the Issues

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This event is called a “colloquium”. “Colloquium” means speaking together, not necessarily at the same time (in some universities, that’s called a seminar). Rather, the idea is to hold dialogues that conclude in our knowing and understanding more than we did when we started. Our panel is intended to start that process by “setting the stage” and by providing the economic background to intellectual property (“IP”) financing and to current needs and practices. As moderator, I shall be moderate. I want to make only seven short points before passing the subject over to our panellists:

(1) I think we all appreciate the difficulties in producing a single harmonized set of rules in the intersecting field of security over IP, where legal systems and preconceptions differ as much as they here do. We must find the right level of generality that enables states to absorb, into their own legal system without undue friction, whatever rules or guidelines are eventually suggested. The language of the guidelines should genuinely guide; it should not create ambiguities and confusion, as the current draft sometimes does.

(2) Some legal systems may deal with the relationship of security and IP in a well-thought out and coherent way. I suspect however that many, if not most, of us do not have that situation in our home jurisdictions. National legislators and courts have generally not dealt with this relationship at all. So for some of us, many of the issues to be discussed are not entirely familiar.

(3) I nevertheless hope and expect that these dialogues will find much common ground, for example:

- that secured lending on fair terms may promote economic growth and so deserves encouragement;
- that the production of IP is a good thing and also deserves encouragement;
- that where IP rights are freely transferable, they should in principle be available as security, and that the main questions here will be what procedures are appropriate for (a) taking them as security, and (b) realizing them on default;
- that a lender who takes over the security on default can get and give no greater rights than the borrower had in the thing secured.

(4) Some IP may not be freely transferable. We may here have to ask: is there a good reason of public policy or a good reason related to the intrinsic nature of an asset (these two reasons may merge) which makes it inappropriate to secure it, or at least requires carefully circumscribed security conditions?

(5) Whether the exceptions suggested in points (3) and (4) should be altered or eliminated, and how best to secure interests over unexceptional rights, may form the subject of debate. We should not however get bogged down in arguing about questions that don't matter much economically or practically. Theory should not be ignored; it sometimes matters, and where it does, we should take note.

(6) I doubt whether commercial lending is a monolithic category: I suspect policies and practices differ considerably among nations. I can certainly say that IP is not monolithic, nor is the way it is dealt with among different industries and countries. IP itself is really a handy catchphrase for many different categories of rights with contours that constantly change with new legislation. Voltaire said in his time that the Holy Roman Empire was neither Holy nor Roman nor an Empire; today much IP is not intellectual, and some may even not be property.

The "intellectual" bit of IP is probably something to discuss in another forum, although the trademark lawyers may mention it later. The "property" part does interest us because what is not property may be intrinsically difficult to lend against.

In any event, IP is a peculiar sort of property, even if today we are used to its being freely bought and sold. Even when a piece of IP is indeed property, its differences from tangible property must be kept in mind. A book is very different from the copyrights in it: I can hit you with a book but I can't hit you with a copyright. The book's value differs from the value of the copyrights in it. How a book is sold differs from how its copyrights can be sold –indeed, some states may say they can't be sold at all. The only common thing about IP rights is that they are exclusive: rights to exclude, rights to stop people doing things they could otherwise freely do.

(7) Here are some cases that may highlight some of the issues involved:

- The information that lawyers and doctors acquire about their clients and patients may be confidential. In some countries it may even count as “property” and may also be subject to copyright or database rights.
- A person's celebrity may be “property” in some countries. Advertisers will buy the right to use it to endorse their products or to attract public attention to them. The celebrity may even be translated into a registered trademark, e.g., that champion footballers and tennis stars have in their name in respect of sports equipment.
- A business may have copyright in its private correspondence or business plans; a publisher may have the right to future copyrights over an author's as yet incomplete (perhaps never to be completed) manuscript; a factory may hold a licence to make patented products.

In all these cases, may the rights or interests be secured, taken and sold without recourse to the IP owner? Is there any IP right that is or should be considered *hors de commerce* – something that intrinsically cannot be bought and sold, and thus secured?