

The Securitization of IP Assets: Issues and Opportunities

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Securitization of Intellectual Property (IP) Assets is very recent phenomenon that has been less captured by the academic literature on IP valuation. The understanding and application of the concept in India has been found even scantier. This article attempts to bring in some clarity about the general concept of securitization and its specific application to IP. It also captures the various risks and issues that limit the scope of securitization of IP assets from becoming an effective and successful tool of financing. A section is devoted to briefly analyse the status of IP asset securitization as done in the USA and its limited application in India; thereby leading to suggest some consideration that could enhance its scope in India.

Keywords: Intellectual property royalty financing, bowie bonds, IP assets, production costs, securitization, intellectual property, loan collateralization, special purpose vehicle, trustee, piracy risk

It is often said that Intellectual Property (IP) is all about money and in that context IP often finds its interrelation with fields like finance, trade etc. It is this financial potential and opportunities associated with IP that have led to emergence of fields like IP valuation, IP management, IP securitization and similar ones which require calculating the real value of intellectual property.¹ This implies that IP is now readily being accepted as a business asset. One such emerging area is IP securitization.

“Securitization is the process in which certain types of assets are pooled so that they can be repackaged into interest-bearing securities”²

So to simplify it, securitization is a financial model³ wherein whatever future cash flow one gets from an asset is used as a guarantee for repayment of debts. Securitization can be defined as *“a process in which a company pools the rights to receive certain future payments for certain assets and sells that right in the form of securities”⁴*

The Reserve Bank of India defines Securitization as:

“a process by which a single performing asset or a pool of performing assets are sold to a bankruptcy remote SPV and transferred from the

balance sheet of the originator to the SPV in return for an immediate cash payment.”⁵

The fact that securitization helps in generation of funds before one actually receives payment of their receivables is of a lot of benefit to a business as it keeps the flow of funds continuous.⁶ The changing conceptions about what constitutes an asset and the increase in number of intangible assets of companies has lead the corporate houses to search for methods to maximise the financial output from these intangible assets. Now, since IP is also regarded as an asset, owners of IP look forward to turn their IP asset into a profit venture and securitization of IP asset is an upcoming area or as WIPO describes it as “a new trend”⁷ which needs exploration. The fundamental requirement for the assets that can be securitized is that either they should have reasonably predictable cash flows or future receivables,⁸ for example, IP securitization could be for future royalty payments.

IP securitization comes along with certain benefits, first being the easy and immediate raising of cash as the owner would get a lump-sum amount for the future cash flow from an IP i.e it is a source of ready capital for development of the product and expansion of market-increased liquidity.⁹ This gives a huge support to investment in R&D, innovation, and creativity. Another advantage is that since these bonds are treated as a loan and not as sale, the income is excluded from being taxed.¹⁰ Later in the project we

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will see that the assets to be securitised are not counted on the balance sheets of the originator (off-balance sheet financing) thereby not affecting the debt-to-equity ratio for it.¹¹ Securitization does not transfer the ownership of the IP and the IP could still be exploited to maximise generation of funds. One gets a proper valuation of IP assets possessed in order to securitize them. In fact it actually provides value to something intangible, something which wasn't in existence before. It is an alternative to bank-credit system that has a limited scope due to its limited capital. It is generating money at much lower costs than doing it through traditional financial institutes, specifically for small and medium enterprises.¹²

“The transfer process of illiquid intangible assets into liquid Asset Backed Security (ABS) reduces the risk of small and medium size enterprises and removes their unstable assets from their balance sheet, which removes their risks at the same time.”¹²

All these advantages have led to the realization that securitization of IP assets holds a lot of scope for potential exploitation of enterprises of their IP and may open up new opportunities for them. However, this is just one side of the coin. The fact that IP is intangible property brings along with it some inherent difficulties in securitization of IP assets. This article attempts to study the scope of IP asset securitization and the inherent issues and opportunities associated with the same. Further it will examine some methods of IP asset securitization and the feasibility of such methods in today's time. A section is devoted to briefly analysing the status of IP asset securitization as done in the USA and its limited application in India; thereby leading to suggest some consideration that could enhance its scope in India

Structure and Methods of IP Assets' Securitization

Securitization methods may vary, for example, (1) Intellectual Property Royalty Financing: the licensor receives payment up front for the future income expected from the licence. This is done by estimating the present value of the future cash flow.¹³ Bowie Bonds are an example of royalty financing. (2) Loan Collateralization by a tilt to IP: A company having a number of IPs in its portfolios can borrow a percentage of the value of the portfolio using the IP as collateral.¹³ “Such loans allow the inventor to generate cash without giving equity.”¹³ (3) Sale–Licence backed Transaction: This is to monetise IPs

that show current high market value. However, almost all the methods follow a general structure that is discussed in this section.

Major Participants in the Process of IP Securitization

In general, the process of securitization of assets involves some major players, these are: “(i) the originator, SPV (special purpose vehicle), investor, trustee and underwriter and (ii) credit enhancer, rating company and insurance company.” It is pertinent to note that for each of such roles, certain expertise is required. All these participants have their specific roles to perform while securitization of IP Assets as discussed:

Originator

The company or the entity that creates the asset to be securitized is called the originator. Typically, in IP cases, the originator would isolate the IP assets with potential future cash flow and forward it to the SPV.¹⁴

Special Purpose Vehicle (SPV)

As the name suggests, an SPV is created by the parent/originator company for carry out some specific activities or transactions. This is done by transfer of assets to the SPV. The main purpose for creation of an SPV is to ensure that “the assets actually achieve the bankruptcy remoteness purpose.”¹⁵ To achieve this, assets are shifted from the balance sheet of the Originator to a separate entity i.e. SPV. So the Originator would create an SPV to buy its assets and securitize them further. By adopting this method, the investor readily invests as he knows that the asset in which they are investing will not deteriorate in credit quality as it is free from Originator's influence now.¹⁵

Servicers

The company playing the managerial role in securitization is called the servicer. Servicers would take care of the securitized property like collecting payments and like tasks.

Rating Agency

Basically these agencies would work as an assessor and rate the debtor's ability to pay back the loan thereby assessing the risk involved in securitization—basically “structuring the transaction”.¹⁶ The rating reflects the agency's assessment of the likelihood that the cash flow deriving from the securitized IP rights will fully repay the principal and interest payments of the asset-backed security within the designated time.¹⁷

Credit Enhancer

Credit Enhancement is done to reduce the risk arising from the debt or future payments. This is done by assuring the lender that borrower would repay the loan. Credit enhancer would be that third party who brings about this assurance.

Insurance Companies: an insurance company will perform its general role of providing an insurance cover in case of default.

Trustee

A trustee would act in fiduciary relationship with an SPV and would be created basically to administer the securitized asset. The main work of the trustee is “holding receivables, receiving payments on receivables and further making payments to the security holder”.

Underwriter

An underwriter advises the seller on structuring and pricing the asset.¹⁸

Investor

The person who purchases the asset that has been securitized is the investor.

Mechanism of Securitization

For a securitization to start, the first step is the creation/possession of the asset by the originator. He identifies an asset with reasonably predictable cash flow that he can use to raise funds.¹⁸ These assets are then required to be transferred to an SPV. This transfer has to be by the way of a true sale because this will eliminate the risk associated with the originator going bankrupt. The SPV will structure the security and attach an interest rate to it. If a trust has been created, the responsibility of the asset shifts to such a trust. At this stage, rating agency, insurance company, credit enhancer etc. would play their respective roles. Such a securitized asset would be shifted to the underwriter for his expertise on selling and pricing it. And lastly, the instrument would be distributed to the investors. This is a general process that is followed in IP securitization, be it copyright, patent, trademark etc., however, since the details of most securitization processes are not made public, it is very difficult to figure out what exact method is followed.

Issues involved in IP Asset Securitization

The central question is whether securitization of IP assets becomes an effective and successful tool of

financing as it has become for assets in general? This would lead us to analyse the risks and issues involved in IP assets securitization, these risks could be related to asset risk, commercial risk, legal risk, counterparty risk, country risk and credit risk.¹⁹ Following are some of the issues and problems concerning IP Securitization:

Costs Associated with Securitization

Considering from the perspective of ‘cost benefits of securitization’ it is pertinent to analyse if a give IP securitization scheme should be adopted or not. The process of securitization requires some costs to be incurred which would include the payments made to the accounting firms, the law firms etc. Therefore, the asset to be securitized must be of a reasonable size, so that the costs of securitization may be easily realised from it.

Non-registered factors of an IP

The non-registered factors of an IP like confidential information or know-how etc. can affect the IP value largely.

Nature of IPRs

IPRs is a bundle of rights and the division of different rights among different right holders could be detrimental to the process of securitization. For example, copyright included various rights such as right to adopt, right to reproduce; right to publish etc. and the author right holder of right to adopt might not coincide with the right holder of right to publish

Predictability of Cash flow

The most important characteristic required for an asset to be securitized is predictable cash flow from the asset. In copyrights, securitization has been largely done for music industry and films, which means the kind of IP which can generate future cash flows. For new authors or works having limited scope of generation of income, securitization is not recommended.

Revenue Generation Risk

Securitization can only be taken up for such IP that shows a brilliant revenue generating history. And such revenue generation should have the potential to continue for at least such number of years till the bond matures. For example, in case of patents with several years of proven licensing revenues, ABS could be resorted to.²⁰ In cases of copyrights, software, music industry, etc. might be expected to

generate stable cash flows for some years, therefore can be a subject-matter of securitization. In cases of trademarks, the rights are in perpetuity so time period would not create any problem. However, the fact that the trademark is well-known or popular enough among the public to generate sufficient cash flows may attract ABS investors. Another issue is that IP would generate fluctuating royalties due to varying sales.

Term of IP

The term of IP would be a major hindrance in securitizing. The legal right to exploit the IP should run longer than the term of maturity of the transaction.

Joint Owners

Another problem that may be witnessed is when the IP is owned jointly by two or more persons as this would lead to sharing of benefits from securitization among the owners thereby diminishing the adoption of securitization. Also different opinions of joint-owners may clash regarding credibility of such a process to be taken up.²¹

Litigation Risks

A major jeopardising to the process of securitization may happen if later on the IP is hit by suits of infringement etc.

Uncertainty in Valuation

A pre-requisite for securitization of an IP is a proper valuation of such an IP. So how accurate and appropriate the valuation method is would be a matter of concern. However, each of the IP Valuation methods has its own shortcomings; for example, none of these methods would take into account the potential harm an infringement suit can do to the IP. No IP valuation technique takes into account all possible risks associated with the IP. Even if valuation is done, the intangible nature of the IP asset would render it very difficult to be accurately and reliably valued.

Jurisdictional Difference

IPs are in general territorial in nature, therefore subject to different laws of the countries. So, in case of an SPV owning IPs in different countries, each such IP has to be subject to the law of the country in which it is registered. Legal experts may be appointed for such due diligence process which will lead to increased total costs of securitization process.

Technological Obsolescence and Latest Fashion

For example, a new technology may make a patent obsolescence in the market and it may not generate any further returns. Specifically, in cases of copyright and trademarks a particular artist/ brand/ product/ author etc. may lose the popularity or become out of fashion thereby affecting the associated cash flows.

Piracy Risk

The illegal downloads from internet, selling of pirated CDs/DVDs etc. further diminishes the value of the IP in hand which affects the securitization process as the securitization depends upon accuracy of valuation and valuation is largely effected in this kind of scenario of piracy. The risk of piracy therefore needs effective solution.

Requirement of Expertise

IP backed securitization would require more expertise than securitization of traditional assets.²² Due to the aforementioned reasons, the due diligence process pre-securitization for IPs would be cost more than that for convention asset securitization.

Post-Securitization

Once securitization has been done, it becomes imperative to keep a check as to how an IP is being handled. This would mean, for example, whether any improvement is taken up for a patent, whether TM is renewed etc.

Securitization of IP Assets in USA

The USA leads the world way ahead when it comes to application on securitized financing is concerned.²³ In fact the method was thoroughly developed in the U.S. only. With time the popularity of this financing technique has spread to other regions as well and also the subject matter that can be securitized expanded its scope.

Music industry is one of the first industries to use IP securitization to generate cash flows and witnesses the greatest number of IP securitizations. In 1997 the first case of securitization of IP Assets was witnessed in the U.S. music industry. The singer rock-star David Bowie converted the future royalties he was expecting to receive from sale of his records into securities and sold these. He was able to raise \$55 million.²⁴ These were famously called the 'Bowie – Bonds' and marked a turning point in financing of IP assets. Before this incident, securitization only applied to tangible assets. The structure for creating or securitizing Bowie's Bonds was devised by David

Pullman.²⁵ The Bowie Bond transaction is best defined as “a process whereby a copyright owner in need of instant financing legally separates itself from the right to receive present income from that asset for a fixed period of time in exchange for a lump sum of cash up-front.”²⁶ Moody’s Investors acted as a servicer who rated the bond and EMI were the credit enhancers. Prudential Insurance Company purchased the bonds for \$55 million ending the process. These were also called as ‘Pullman Bonds’ which after the success of being applied to Bowie’s case were created for many other singers and song writers like for Motown Hit Machine Holland Dozier Holland, Isley Brothers etc.²⁷ In fact the success of these bonds is evident from the fact that the Pullman Group went on to register Bowie Bonds and Pullman Bonds as their trademark!²⁷ It was considered a very successful case in those times. However, in present times taking into consideration the prominent increase in piracy and illegal internet downloads of songs, this method based on future royalty-based securitization may not seem to be that attractive.²⁸

Securitization in sports included the example of securitisation of future licensing revenues from a portfolio of Formula 1 Grand Prix contracts, which formed the basis of a US\$1.4 billion securitisation in 1999; and the €94 million securitisation of football sponsorship, advertising, trademark licence agreements and television rights licence agreements by Parma AC in 2002.

Such examples have seen limited scope as far as pharmaceuticals is concerned. One such example is, Royalty Pharma AG’s 2003 AAA-rated securitisation of the licence revenue it received from a portfolio of 13 different drugs, each with historically strong sales, which raised US\$225 million, and Drug Royalty Corporation’s issue of single A-rated notes backed by pharmaceutical patent royalties in March 2005, which raised US\$42 million. In case of copyrighted films, ticket sales in theatres, international release, DVD/CD versions of the movies, broadcasting on television etc would constitute future income from the film.²⁹ In the U.S., copyrights in motion pictures like Jurassic Park 2, Saving Private Ryan, The Matrix, Independence Day etc. had been securitised.³⁰ This has helped the producers to realise the high film making costs at a relatively lower-costs and pay associability. However, it is seen that in most of the cases, securitization is done of the entire range of motion pictures produced by the studio and selective picking is not allowed.³¹

Income from many mature brands meets the key securitisation criteria of being proven, steady and predictable. Examples of deals based on such trademark rights include: - Calvin Klein’s US\$58 million securitisation in 1993, which was linked to future sales of its perfume products: Guess’s US\$75 million deal based on securitising its domestic and international trademark licences; and - Athlete’s Foot’s rising of between US\$30 million and US\$40 million from securitising its franchise resources.

Over the course of more than forty years, Bill Blass gathered a reputation as a prominent fashion designer whose trademark decorated a wide variety of products. In 1999, Blass securitized the future revenue streams coming from his trademark. The securities backed by Bill Blass’s trademark received a rating of Baa3 by Moody’s, a significantly higher rating than the credit rating of Blass’s fashion house.

Securitization of IP Assets in India

Recently, Vijay Mallya, Chairman of UB group convinced State Bank of India (SBI) to accept Kingfisher Airline brand as collateral to raise Rs. 2000 crores in debt. However, securitization of IP Assets has not gained much of publicity in India and there are hardly any notable instances for the same. Some of the reasons that could be attributed to slow pace of success of securitization of IP in India are:

- a) Lack of consciousness to seriously treat IP as a business asset and apply business strategies to monetize it. Business house till lately have not been treating their IP assets as potential revenue generating assets.
- b) Lack of awareness about existence of modern techniques of monetizing IP such as securitization etc. besides traditional techniques of licensing, sale etc.
- c) Lack of legal backing for such process. Even if a right holder wants to securitize the IP asset, there is no legal recognition or guidelines governing such a securitization. This would mean lack of uniformity in adoption of valuation and securitization process ultimately leading to clashes between the parties to reach a common consensus for a workable process. No existing IP legislation provides for such a process.
- d) High pirated and fake product’s in the Indian markets and ineffective laws to regulate these thereby diminishing the desirability of right holder to go in for securitization process.

- e) The traditional asset securitization process is so much embedded in people's mind that there do not even show desire or enthusiasm to try and discover new ways of raising funds.
- f) Lack of experts to suggest and develop patterns of securitization for existing IPs.

All these above problems peculiar to Indian go along with the above raised general issues in relation to IP securitization thereby making it more difficult in India to effectively come up with IP securitization process. However, big enterprises are still looking forward for IP securitization after seeing its immense success in the U.S. and other countries, but for small and medium enterprises securitization of IP assets still seems to be a distant dream.

Conclusion

Securitization is a common financing phenomenon for tangible assets but is lately gaining popularity for intangible assets such as IP as well. The process applicable to securitization of IP assets would be the same as applied for tangible assets. However in practical, the risk factor associated with intangible assets is far more than that for tangible assets. For IPs, such patents which generally require huge R&D costs, development costs etc; films and music albums which require production costs etc., securitization could act as a ready source of cash flow. The creator of IP need not go into formal bank formalities for any loans etc. Also securitization doesn't mean loss of ownership over the assets. Coupled with all the other advantages of securitization process discussed in section 1 of this article, securitization of IP assets seems to be a profitable deal. One scholar even compared the activity of securitization to a type of alchemy that turns base metals into gold.³² Mostly the venture companies do not have a lot of tangible assets but own IP as assets. These have a very advanced technology or know-how but insufficient funds. In such a case securitization of IP assets can help them raise funds.

However, the inherent issues of any intangible property like IP bring along with it many difficulties which are not found in securitizing tangible assets. These problems largely arise due to the highly unpredictable and volatile nature of an IP. Also unlike tangible assets, the rights in an IP are term bound which becomes another hindrance in securitizing IPs for a longer time period. Uncertainty in valuation, the associated infringement and litigations risks further diminish the securitization scope for IPs. The article

already highlights the unique nature of IP and issues involved in IP securitization. However, if securitization of IP assets is workable, it may provide the right holder another avenue to exploit his work. The fact that in the US securitization of royalties received from an IP has already been successfully carried out shows that securitization of IP assets is not an impossible case. Once it is established that an IP is capable of generating future cash flow, the other problems are workable by specifically dealing with the problem and the solution or avenue that would be resorted if the problem arises in future. Also, the companies may have a separate IP department with IP experts continuously updating the status of IP held by the company. In India the mind set needs a revolution and the companies seriously need to consider monetizing their IPs. Though providing a legal backing for IP securitization is expected to boost the process in India, but before that is done, the peculiar problems in Indian context could be overcome by learning from examples set by the US.

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