

# INTELLECTUAL PROPERTY AS COLLATERAL - A REVIEW OF THE STMA ACT



## INTRODUCTION

It is, undisputable that intellectual property (IP) rights represent important assets for companies within the innovative ecosystem and often comprises the foundation for market dominance and continued profitability.<sup>1</sup> The value of these companies are mostly built on intangible assets, that can be used as collateral to obtain financing. For the last 25 years, the world economy has relentlessly migrated from asset-heavy industries to asset-light, and the value of most companies now resides primarily in their intellectual property.<sup>2</sup> This includes 'hard' intellectual property such as patents and copyrights, and powerful soft intellectual property like data, trade secrets and know-how.<sup>3</sup> It is also incontrovertible that IP has emerged as a commercially valuable and dominant asset to the global economy.<sup>4</sup> The integration of intellectual property rights system that recognizes the asset value of IPRs in the economy could accelerate business outcomes for young IP-rich startups, if lenders adopt a new mind-set to IP-backed debt finance.<sup>5</sup>

Compared to other countries with higher rates on innovation, Nigeria seems to be falling behind due to its slow approach in recognizing the asset value of intangibles in debt financing.

This article discusses the present state of the law with respect to the creation, perfection, and enforcement of security interests in intellectual property pursuant to the Secured Transaction in Movable Assets Act (STMA Act). It x-rays the context in which the creation of security interests in IP assets can be leveraged upon in Nigeria and sets out to establish how IP and intangibles might be able to facilitate the supply

of finance to businesses that are rich in this asset class.

## THE LEGAL REGIME OF SECURITY INTERESTS IN PERSONAL PROPERTY IN NIGERIA

Prior to the passage of the Secured Transaction in Movable Assets Act, 2017 (STMA Act), Nigeria did not have a cohesive statute on secured transactions in personal property. Much of the law related to secured transaction in personal property, mostly inherited from English law, was scattered into several statutes and with time, have become antiquated. Consequently, the lack of predictability in litigious outcomes made lenders wary of advancing credit with personal property as collateral, thereby dwindling the jurisprudence in the use of personal property as security for finance.

The chattel mortgage is one of the first English secured transactions law introduced in Nigeria.<sup>6</sup> It takes the form of a consensual security intended to secure a loan with personal property which remains in the possession of the borrower.<sup>7</sup> It can also be referred to as a bill of sale to secure a debt.<sup>8</sup> Before the enactment of the bills of sale legislation in Nigeria, encumbered personal properties which remained with the borrower throughout the duration of the loan period were unknown.<sup>9</sup>

Until the early 20th century, the pledge was the primary way of taking personal property as security in Nigeria.<sup>10</sup> The Pawnbrokers Act, 1917 governed the transaction including the rights and duties of the parties. The pledge of

1 Iwan Davies, Secured Financing of Intellectual Property Assets and the Reform of English Personal Property Security Law, 26 Oxford J. Legal Stud. 559 (2006).

2 Chris Donegan, Industry Report- IP Finance: the Asset Class that Fell to earth, IAM, (May 20, 2015) <https://www.iam-media.com/ip-finance-asset-class-fell-earth>.

3 Id.

4 Willa E. Gibson, The Intersection between UCC Article 9 and Intellectual Property: The Need for a National, Centralized Filing System for IP, 15 J. Marshall Rev. Intell. Prop. L. 83 (2015).

5 Janice Denoncourt, IP Debt Finance and SMEs: Revealing the Evolving Conceptual Framework Drawing on Initiatives from Around the World, in SECURITY INTEREST IN INTELLECTUAL PROPERTY 1 (Toshiyuki Kono ed., 2017).

6 Iyare Otabor-Olubor, A Critical Appraisal of Secured Transactions over Personal Property in Nigeria: Legal Problems and a Proposal for Reform, March, 2017, at 59, <http://irep.ntu.ac.uk/id/eprint/31955/1/IYARE%20OTABOR-OLUBOR%20Thesis%202017.pdf> (last visited Mar 23, 2021).

7 Id.

8 Id.

9 IYARE OTABOR-OLUBOR, INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 2015 STUCK IN A TIME WARP: SECURITY INTERESTS IN CHATTEL MORTGAGES AND THE BILLS OF SALE LEGISLATION IN NIGERIA, I.C.C.L.R 345 (2015), [http://irep.ntu.ac.uk/id/eprint/26210/1/3808\\_Otabor-Olubor.pdf](http://irep.ntu.ac.uk/id/eprint/26210/1/3808_Otabor-Olubor.pdf) (last visited Mar 9, 2021).

10 Id. at 1; See, Pawnbrokers Act, 1917, adopted by the various states in Nigeria.

personal properties was a suitable means of taking security as it provided petty merchants and peasant farmers with an opportunity to raise capital for their businesses.<sup>11</sup> However, owing to the economic advancements of modern times, the pledge of personal property became less significant due to its possessory nature.<sup>12</sup>

The Bill of Sale Act, 1882 was introduced in England to regulate the assignment, transfer and mortgage of movable properties.<sup>13</sup> The Bill of Sale Act was introduced as a non-possessory security device that took the form of a chattel mortgage.<sup>14</sup> Where a borrower intends to create a mortgage over personal chattels, a bill of sale is contemplated by statute and the document of transfer must comply with the provisions of the Statute with regards to form and registration.<sup>15</sup> The Bill of Sale Act 1882 forms part of the Statute of General Application under the Nigerian Law.<sup>16</sup> Given that Bill of Sale transactions are not included in the exclusive and concurrent list in the Constitution, it is, therefore within the legislative competence of State Governments to make laws that govern the transfer and registration of personal chattels as security for debt.<sup>17</sup>

Section 3 of the Bills of Sale law (Lagos) defines “personal chattels” to mean any goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops.<sup>18</sup> Concurrently, section 3 of the law excludes from its scope, interests in real estate, fixtures when assigned together with a leasehold or freehold interest in land or building to which they are fixed permanently, assignment of growing crops on land, shares or interest in stock or funds belonging to any government,

property or capital of incorporated or joint stock companies, choses in action, stock or produce forming part of farm or lands pursuant to the customs of the particular country which ought not be removed from a farm or land as at when the bill of sale is being executed.<sup>19</sup>

The exclusion of choses in action, a known legal expression used to describe all personal rights which can only be enforced by action, and not by taking physical possession,<sup>20</sup> from the scope of a bill of sale, inevitably excludes intellectual property rights. IPRs by their nature can only be enforced by legal action as opposed to possessory rights. A bill of sale can be either absolute or conditional and does not cover transfers of intangible property (such as intellectual property or contract rights).<sup>21</sup> It could be argued that the exclusion of intangible property from the scope of personal chattels under the Bill of Sale Act was because in the early 20th century, Nigeria was predominantly an agrarian society. With the increased integration of IPRs in the global economy, the bills of sale would be considered obsolete for secured transactions in the 21st century.

## **I. THE SECURED TRANSACTION IN MOVEABLE ASSETS ACT OF 2017**

The Federal Government in an effort to stimulate lending to micro, small and medium scale businesses in Nigeria enacted the Secured Transactions in Movable Assets Act, 2017 (otherwise known as the ‘STMA Act’ or ‘the Act’), to regulate the creation, perfection, and enforcement of security interests in movable assets. The Act provides uniform set of rules on the creation, perfection, registration, and enforcement of security interests over personal property in Nigeria. The law is said

11 Id.

12 Id.

13 Detail Solicitors, Collateral Registry Regulation: Impact on Micro, Small and Medium Enterprises' Access to Finance Detail (2014), [https://www.detailsolicitors.com/collateral-registry-regulation-impact-on-micro-small-and-medium-enterprises-access-to-finance/#\\_ftnref1](https://www.detailsolicitors.com/collateral-registry-regulation-impact-on-micro-small-and-medium-enterprises-access-to-finance/#_ftnref1) (last visited Mar 10, 2021).

14 IYARE OTABOR-OLUBOR, note 9 at 345

15 I. O SMITH, NIGERIAN LAW OF SECURED CREDIT, 152, (2001).

16 Id.: (Statutes of General Applications are those that are in force in England on 1st January 1900); See, Section 45 of the Interpretation Act 1964.

17 (To date only Lagos, Oyo, Ogun, Ondo, Osun, Ekiti, Edo and Delta States have adopted these laws and have established the Bill of Sale registries in their respective states).

18 § 3 Bill of Sale Law, Cap. B2, Vol. I Laws of Lagos State of Nigeria 2003.

19 Id.

20 Torkington v Magee, [1902] 2 KB 427 at 430.

21 WESTLAW, GLOSSARY: BILL OF SALE, (2021) [https://1.next.westlaw.com/6-382-3271?\\_lrTS=20201024030349032&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&OWSessionId=a86cd-83f07a84a97a7ac3713f0b2a654&isplc=true&fromAnonymous=true&bhcp=1](https://1.next.westlaw.com/6-382-3271?_lrTS=20201024030349032&transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=a86cd-83f07a84a97a7ac3713f0b2a654&isplc=true&fromAnonymous=true&bhcp=1) (last visited Mar. 16, 2021).



to be patterned after the US Article 9 and the UNCITRAL Legislative Guide. The overall objective of the law is to among others, ensure that micro, small and medium scale enterprises (MSMEs) could use movable assets to create security for debt finance.<sup>22</sup> The Act, establishes a National Collateral Registry (NCR) situated at the Central Bank of Nigeria which amongst others, receives, registers and stores information about security interests in moveable assets.<sup>23</sup>

The Act provides for a broad framework governing the creation of security interests in moveable assets, the enforcement of security agreements, mechanisms for perfecting security interests in moveable assets, the creation of a national collateral registry and the determination of priority of competing interests in secured assets.<sup>24</sup> The STMA Act is applicable to the creation, perfection and priority of a security interest in intangible asset as long as the grantor is located in Nigeria.<sup>25</sup>

## **SCOPE OF THE STMA ACT**

The scope of the Act extends to all security interests in moveable assets created by an agreement that secures payment or performance of an obligation. This suggests a shift from a formal to a functional approach in determining the applicability of the Act. The label given to a secured transaction by the parties would not matter as long as, the function of the agreement, seeks to secure payment or the performance of an obligation.<sup>26</sup>

The Act provides a broad definition of movable assets to serve as the object of a security interest, this includes tangible or intangible property other than real property.<sup>27</sup> The Act is, however, silent as to what constitutes “intangible property”, however, the elastic provision of the term, allows for broad interpretation and by implication, it embraces all categories of intellectual property.

<sup>22</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 1 (b) (Nigeria).

<sup>23</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 11 (a) (Nigeria).

<sup>24</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 1 (d - f) (Nigeria).

<sup>25</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 51 (3) (Nigeria).

<sup>26</sup> Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 2 (1) (Nigeria).

<sup>27</sup> Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 63 (Nigeria).

An interesting provision in the STMA Act relates to charges created by companies. The Act specifically excludes charges created under the provision of the Companies and Allied Matters Act (CAMA).<sup>28</sup> The treatment of charges created over IPRs pursuant to CAMA will not be discussed in this article.

## CREATION OF A SECURITY INTEREST

A security interest is defined as a property right in collateral that is created by agreement and secures the payment or other performance of an obligation regardless of whether the parties have denominated it as a security interest.

<sup>29</sup> Under the STMA Act, the creation of a security interest over movable assets requires the fulfillment of certain requirements. Once the requirements are fulfilled, the security interest attaches and becomes enforceable by the secured creditor against the debtor and third parties. The STMA Act, provides that a security interest is created by a security agreement between a creditor and a grantor.<sup>30</sup>

A security interest can be created over future assets if the asset falls under the collateral description in the security agreement and if the security agreement makes provision for the extension of the security interests to the grantor's future assets.<sup>31</sup> An after-acquired property clause is commonly used in commercial secured transactions to allow property coming into the debtor's hands after the execution of the security agreement to be included as collateral.<sup>32</sup> Similarly, intellectual property rights that come into existence after the execution of the security agreement can be included as collateral.<sup>33</sup> A simple clause providing that the collateral consists of the grantor's "present and future" patents, copyrights, trademarks, and

trade secrets should be sufficient.<sup>34</sup> By way of illustration, a moviemaker may be able to finance his or her movie by granting a security interest in the copyright of the unreleased film.<sup>35</sup> To the extent that recognizing security interests in after-acquired property increases wealth and drives creativity.<sup>36</sup>

A security interest is effective according to the extent of the rights the grantor has in the collateral.<sup>37</sup> For example, copyright in a work creates a bundle of exclusive rights, these rights are divisible and may be dealt with by the copyright owner separately and independently of one another. A grantor may have the rights to publish a literary work (e.g., novel) but may not have the right to adapt the same work as a film. Consequently, part of any lender's due diligence is to ensure that the grantor has rights in the collateral.

A security interest in an account-receivable is valid between the grantor and secured creditor, and against the account debtor of the account receivable and a third party with no perfected interest in the account receivable.<sup>38</sup> An account receivable is defined under the Act as a right to receive value arising from an obligation owed by an account debtor to the grantor including book debts but excluding a negotiable instrument.<sup>39</sup> By this definition, the assumption would be that transactions involving the right to receive payments under a license arrangement, including any royalty rights would be within the scope of section 4 (2) of the Act.

The Act makes a mandatory provision with regards to the content of a security agreement. Section 5 of the Act lists out contents. A

<sup>28</sup> Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 2 (3) (Nigeria).

<sup>29</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 63 (Nigeria).

<sup>30</sup> Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 3 (1) (Nigeria).

<sup>31</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 3 (2) (a) (b) (Nigeria).

<sup>32</sup> Thomas L. Bahrck, Security Interests in Intellectual Property, 15 AIPLA Q. J. 30 (1987).

<sup>33</sup> *Id.* at 36.

<sup>34</sup> *Id.*

<sup>35</sup> Paul Heald, Resolving Priority Disputes in Intellectual Property Collateral, 1 J. INTELL. PROP. L. 135 (1993).

<sup>36</sup> *Id.*

<sup>37</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 4 (1) (Nigeria).

<sup>38</sup> MIKE A A OZEKHOME, PERSONAL PROPERTY LAW IN NIGERIA 80 (2019); See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 4 (2) (a) (b) (Nigeria).

<sup>39</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 63 (Nigeria).



security agreement must reflect:

- (a) The intention of the grantor and the creditor to create a security interest;
- (b) The identity of the grantor and the creditor;
- (c) Description of the secured obligation as well as the maximum amount for which security interest is enforceable;
- (d) Adequate description of the collateral;
- (e) Tenor of the secured obligation; and
- (f) Agreement by the parties to submit to arbitration as a first recourse.

The provision of section 5(a) rests on the notion of freedom of contract rooted in common law contract.<sup>40</sup> There must be a consensus ad idem to demonstrate the willingness of the parties to enter into a security agreement.<sup>41</sup>

Section 5(b) states that parties to a security agreement must be identified, that is, the party who has right in the collateral and the party advancing the credit. In any secured transaction, the secured party must assess the status of the grantor's title to the property to be used as collateral.<sup>42</sup> Although assessing title is not unique to secured transactions involving intellectual property collateral, the procedure

in such cases may present unfamiliar issues for the secured party.<sup>43</sup> A secured party will ordinarily undertake an investigation of the relevant IP registry to check for problems concerning ownership and encumbrances.<sup>44</sup> Investigations at the relevant registries will uncover issues related to joint ownership or if the debtor has exclusive ownership and clear title to such property. With respect to copyrights, registration is not compulsory to enjoy protection under the law, the Nigerian Copyright Commission (NCC) has, however, created a platform for creators of copyright works or persons who have acquired rights in these works to register these works online with the NCC.<sup>45</sup> Thus, if a copyright is unregistered, a secured party may be compelled to rely in large part upon the grantor's representations and warranties concerning ownership of copyrights.

What constitutes adequate description of a collateral pursuant to section 5 (d) includes if it is described by the item, kind, type or category, year of manufacture or any other description that can identify the collateral.<sup>46</sup> If a collateral is not adequately described, the question of which collateral a secured party's security interest has attached upon may not

<sup>40</sup> Mike A A Ozekhome, *supra* note 40 at 84,

<sup>41</sup> *Id.*

<sup>42</sup> Thomas L. Bahrck, *supra* note 34 at 34.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> ABOUT NCERS - NIGERIAN COPYRIGHT REGISTRATION SYSTEM (NCERS), <http://www.eregistration.copyright.gov.ng/ncc/about> (last visited Apr 13, 2021).

<sup>46</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 6 (1) (a) (Nigeria).

be adequately answered.<sup>47</sup> In relation to IPRs, patents, copyrights, trademarks, and trade secrets are intangible legal rights distinct from the tangible property to which they pertain.<sup>48</sup> Intellectual property rights do not encompass rights to any tangible property embodying or derived from such rights and, conversely, rights to tangible property do not include intellectual property rights associate with that property.<sup>49</sup> Thus, the best way to minimize problems associated with collateral classification is to describe the collateral in as specific terms as possible, taking care to specifically include the intangible intellectual property rights associated with the tangible property, where appropriate.<sup>50</sup> The secured party who fails to do so could end up with title to a physical object and yet be unable to make proper use of the object for lack of the intellectual property rights still held by the debtor.<sup>51</sup> Ownership of a painting, for example, does not in itself carry with it the right to reproduce the painting.<sup>52</sup>

It is important to note that under the Act, a security interest granted to a secured party attaches in continuation in the identifiable or traceable proceeds of the collateral, whether or not the security agreement contains a description of the proceeds.<sup>53</sup>

## **PERFECTION OF SECURITY INTEREST**

Perfection of a security interest under the STMA Act is accomplished by the filing of a financing statement with the NCR.<sup>54</sup> The notion of perfection of a security interest is designed as a notice to the world of the potential or the actual existence of a security right in a particular collateral or category of a borrower's collateral.<sup>55</sup>

In Nigeria, like most countries, there are

specialized registries for filing transactions related to IPRs. For instance, there are separate registries for the registration of an assignment of trademarks or patents. The question is to what extent do these specialist registries interface with the NCR? Section 2 (1) (c) of the STMA Act mandates every public registry established by any Act of the National Assembly to coordinate or warehouse or oversee transactions in movable assets in Nigeria, to be operated in a manner that creates automated interface between the said registry and the NCR, with a purpose to ensuring and guaranteeing that the registry is made accessible through, by, and from the National Collateral Registry.

It is evident from this provision that the collateral registry is not to operate in isolation from other registries that record interests in moveable assets, including the registries for IP rights. The intention of this provision is to create a harmonization of all existing registries for movable assets in Nigeria with the intention that the NCR will be the central registry. In practice, however, the laws regulating IPRs are federal statutes that creates an autonomous registry for security interests over IPRs. To achieve the intent of section 2 (1) (1) of the STMA Act, the laws administering and regulating IPRs would have to be amended to recognize the NCR as the central registry of interests in IPRs. It can be argued that the provision of section 2 (1) (1) seeks to cure the issue of accessibility to data but does not cure the challenge with multiplicity of registry. Currently, there is no evidence that an interface has commenced between the existing IPR registries and the NCR, thus, it is advisable that a secured creditor taking security in IPRs should, in addition to filing in the NCR, file in the relevant IPR registry to be effective against competing lien holders.

<sup>47</sup> MIKE A A OZEKHOME, *supra* note 40 at 92.

<sup>48</sup> Thomas L. Bährick, *supra* note 57 at 34.

<sup>49</sup> *Id.* at 32.

<sup>50</sup> *Id.* at 33.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 7 (1) (Nigeria).

<sup>54</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 8 (1) (Nigeria).

<sup>55</sup> MIKE A A OZEKHOME, *supra* note 40 at 109.

A perfected security interest right survives into the proceeds realized from sale or exchange of the collateral.<sup>56</sup>

## PRIORITY OF A SECURITY INTEREST

Under the STMA Act, priority between competing security interests will be determined by order of registration.<sup>57</sup> Thus priority is rooted in perfection, only perfected security interests in respect of a collateral can be prioritized, given that priority is based on the time in which the secured creditors registered the security interests at the registry. Any interest arising subsequent to a competing unregistered security interest will be superior if it is recorded first. As illustration, if Bank A takes a security interest in a production company's copyrights in January, but does not record it, and in February, Bank B extends credit to the same production company and, takes a security interest in the copyrights without notice of Bank A's interest, and records at the NCR, Bank B succeeds.<sup>58</sup>

Section 24 (1) of the STMA Act makes no distinction between a perfected security interest in a collateral and the proceeds derived from the sale or exchange of that collateral vis-à-vis priority.<sup>59</sup> In other words, there is no obligation on a secured creditor who has a perfected security interest in a collateral to register a separate security interest in respect of the proceeds realized from that collateral, for which a security interest has already been perfected.<sup>60</sup>

A secured creditor may transfer a secured obligation without obtaining the debtor's consent even if such right or ability has been limited in the security agreement.<sup>61</sup> Likewise, if a secured creditor in the circumstances

transfers his secured obligation right, the transferred security interest would not need to be separately registered in the collateral registry as it would retain its original priority.<sup>62</sup>

Section 26 (1) of the Act allows a creditor to enter into an agreement to subordinate its priority in favor of another claimant.<sup>63</sup> Any agreement to subordinate priority is effective without having to register an amendment to the financing statement. Subordination is a way of changing the priority of claims against a debtor so that one creditor or group of creditors (the junior creditor(s)) agree that their debt will not be paid until debts owed to another creditor or group of creditors (the senior creditor(s)) have been paid.<sup>64</sup>

## ENFORCEMENT OF SECURITY

Once the requirements for the creation of a security interest is achieved pursuant to section 3 of the Act, then attachment is said to have occurred, thus enforceable. It is only once a security agreement is enforceable that one can be concerned about perfection and priority.<sup>65</sup> Enforcement is usually triggered by default of the borrower to repay its debt. The general rule is that following default, a secured party has rights under the Act and in the security agreement, including judicial remedy.<sup>66</sup> For companies, in addition to the remedies available under the STMA Act, are entitled to remedies under the Companies and Allied Matters Act (CAMA), including the right to appoint a receiver.<sup>67</sup>

The STMA Act, gives a secured party a right to take possession of collateral after default by giving the debtor a notice of default and intention to repossess the collateral.<sup>68</sup> The secured party has a right to take possession of the collateral,

<sup>56</sup> *Id.* at 146; See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 9 (1) (Nigeria).

<sup>57</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 23 (Nigeria).

<sup>58</sup> Paul Heald, *supra* note 36.

<sup>59</sup> MIKE A A OZEKHOME, *supra* note 40 at 171; See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 24 (Nigeria).

<sup>60</sup> *Id.*

<sup>61</sup> MIKE A A OZEKHOME, *supra* note 61 at 172; See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 25 (Nigeria).

<sup>62</sup> *Id.*

<sup>63</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 26 (1) (Nigeria).

<sup>64</sup> Subordination | Legal Guidance | LEXISNEXIS, WWW.LEXISNEXIS.CO.UK, <https://www.lexisnexis.co.uk/legal/guidance/subordination#:~:text=Subordination%20is%20a%20way%20of> (last visited Apr 14, 2021).

<sup>65</sup> MIKE A A OZEKHOME, *supra* note 40 at 191.

<sup>66</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 39 (1) (Nigeria).

<sup>67</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 39 (5) (Nigeria).

<sup>68</sup> See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 40 (1) (Nigeria).



10 days after sending the notice of default to the debtor, alternatively, the creditor could without taking possession, render the collateral inoperative.<sup>69</sup>

As with any intangible, enforcing a security interest in intellectual property may present some practical complexities.<sup>70</sup> It is not possible to take possession or assemble intangible intellectual property collateral.<sup>71</sup> Similarly, the Act provides for non-judicial disposition of collateral.<sup>72</sup> There are no regular markets for the sale of patents, trademarks, and copyrights, however, the STMA Act makes an innovative provision for the disposal of a collateral through licensing. In this circumstance, the secured creditor will look primarily to the proceeds of the license for satisfaction of the debt, rather than to the asset itself.<sup>73</sup>

## CONCLUSION

A recent report by the CBN, quoted by Vanguard Newspaper shows that the number of MSMEs that have used their movable assets to obtain loans from financial institutions through the NCR rose from 100,049 in the first year, 2017, to 154,827 as of December 19, 2018, indicating increase of 54 percent.<sup>74</sup> Further breakdown reveals that 146,777 of the borrowers were individuals, 3,416 were micro businesses, 2,169 were medium businesses, 1,777 were small businesses and 687 were large businesses.<sup>75</sup> The number of movable assets used by the MSMEs to obtain loans rose to 57,639 as at December

19, from 26,471 in 2017, representing increase of 28,302 or 118 percent.<sup>76</sup>

Top on the list of the movable assets used to secure loans are: Documents of title / Negotiable Instruments (17,105); Vehicles (11, 725); Consumer / Household goods (9,029); All assets (6,427); Electronics namely Television, Refrigerator, Projector (3,5740); Other intangibles (2,573); Inventory (2,531); Farm products (1,580); Deposit Accounts (1,141); and Equipment (537).<sup>77</sup>

From the data, it is indicative of a gradual shift in the recognition of the asset value of intangibles, however, the umbrella approach in the classification of 'intangibles' and the failure to consider properly the status of IPRs within the ambit of secured transaction may create uncertainty in litigious outcomes.

69 See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 40 (3) (a) (b) (Nigeria).

70 Kenneth B. Axe, Creation, Perfection and Enforcement of Security Interests in Intellectual Property under Revised Article 9 of the Uniform Commercial Code, 119 BANKING L.J. 62 (2002).

71 Id. at 79.

72 Id.; See, Secured Transactions in Movable Assets Act (2017) Cap. (A 41), § 40 (5) (Nigeria).

73 Andrea Tosato, Secured Transactions and IP Licenses: Comparative Observations and Reform Suggestions, 81 LAW & CONTEMP. PROBS. 155 (2018).

74 Babajide Komolafe, LENDING TO MSMEs UNDER NATIONAL COLLATERAL REGISTRY TO HIT N2TRN VANGUARD NEWS (2019), <https://www.vanguardngr.com/2019/02/lending-to-msmes-under-national-collateral-registry-to-hit-n2trn/> (last visited Apr 12, 2021).

75 Id.

76 Id.

77 Id.

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Mosun is Tope Adebayo LLP's Managing Partner, and she leads the firm's Corporate & Commercial Practice Group.

An innovative and accomplished transactions attorney with a knack for creating innovative legal products. She has, over the years, handled complex cases and transactions on behalf of major multinational companies in Nigeria and advised many corporate clients on intellectual property identification, valuation and commercialization.

Mosun is passionate about the intersection of intellectual property and innovation in policy making and is currently researching the efforts made in some jurisdictions to expand the scope of secured credit transactions to cover security interests over intellectual property and the barriers thereto, with the goal of determining the appropriate policy framework for Nigeria.

She is a registered Capital Markets consultant with the Securities and Exchange Commission (SEC) and a registered member of the Financial Reporting Council of Nigeria (FRCN). Mosun is member of the Nigerian Bar Association (NBA), International Bar Association (IBA) and Intellectual Property Law Association of Nigeria (IPLAN).

**If you want to know more about this topic, please contact us using any of the details provided below:**

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