

### Movable Property Security Rights Bill - towards IP financing Kenya - [Bowmans](#)

### Other issues Ownership changes

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The IP space in Kenya is continually changing as appreciation of the value of intellectual property rises. Increasingly, individuals and enterprises are becoming alive to the need to register, exploit and enforce their IP rights. Currently, it is not possible to acquire financing in Kenya on the basis of an intangible asset such as intellectual property. Intangible assets are not recognised as items capable of forming security. The Movable Property Security Rights Bill, which was published in November 2016, seeks to change this position. It provides for the creation of security rights in intangible assets, and includes intellectual property within the meaning of 'intangible assets'. 'Intellectual property' is defined in the bill as copyright, trademarks, industrial property rights and any other related right created under law.

If passed, this law would allow proprietors to use their IP assets - in the form of trademarks, copyright, patents, industrial designs, utility models or other related rights - as collateral for obtaining financing from a financial institution. The move is in line with the constitutional obligation of the state to support, promote and protect the IP rights of the people of Kenya. In an economy that is generally not knowledge-intensive, it is probably also recognition of the value of intellectual property, which has contributed significantly to the profitability of some of the world's largest companies, and an attempt to promote innovation in the country.

Commercial law has traditionally been concerned with transactions in tangible items, but as commerce changes, it is becoming essential to expand its scope to factor in intangible items. The [United Nations Commission on International Trade Law \(UNCITRAL\)](#) promulgated a "Legislative Guide on Secured Transactions" in 2007 to assist states in modernising their secured transactions law. Realising the interaction between secured transactions law and IP law, UNCITRAL adjusted the guide in 2010 to cater for intellectual property by promulgating a "Supplement on Security Rights in Intellectual Property". The supplement states that the intention was "to make credit more available and at a lower cost to IP owners and other IP rights holders, thus enhancing the value of IP rights as security for credit".

A major challenge in implementation, however, is the lack of capacity of IP asset valuation services in Kenya. Valuation is key because assigning a monetary value is necessary for any collateral to be useful. A financial institution ordinarily seeks comfort from the fact that the collateral put up is valuable in relation to the amount it advances to a borrower. The bill is silent on the issue of the valuation of intangible assets, but this may be addressed through regulations if the bill is enacted into law.

Another area of potential concern for financial institutions is the extent of effectiveness of the security right, both as between the parties and as against third parties. This may call for a deeper look into how the law will be implemented, especially for IP assets which have no formal registration process in Kenya such as copyright. For registered assets, successful implementation would also require harmonisation with the various registry systems to ensure, for instance, that encumbrances are noted on the register to restrict assignment or licensing by an owner without the financier's consent.

The National Assembly is currently debating the bill. If it is passed and comes into operation, there may be some implementation challenges at the onset but, overall, IP financing will be a welcome introduction to the IP space. As commercialisation of intellectual property becomes more extensive in Kenya, businesses will have to consider how best to exploit it as an asset, including in the area of secured financing. It is a move that financial institutions and IP rights holders should look forward to.

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