

4. COPYRIGHT AS COLLATERAL IN SECURITIES LENDING TRANSACTIONS: A COMPARATIVE ANALYSIS BETWEEN SOUTH AFRICA AND OHADA COUNTRIES

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ABSTRACT

Traditional input factors such as land, equipment, real estate, and other tangible resources are often used to create income. Thus, in secured financing, tangibles are readily accepted by financing institutions based on their materiality and hence practicability and certainty. Today, the world has noticed a shift to the knowledge economy where the creation of wealth is based on intangible assets such as information, creativity, and intellectual property (IP). Intangibles have developed to become an asset class. Meanwhile, IP is a creation of the mind with traditional financial tools such as assignment. The effective management of knowledge assets like IP rights, for instance, enables the delivery of financial and economic benefits.¹ With the cash flow associated with, for example licensing and assignment, the rights flowing from copyright as an IP category could be traded and commercialised. This paper critically examines the use of IP rights deriving from copyright as an asset-backed security in Africa. Taking South Africa and the OHADA States² as case studies, it discusses the feasibility, under law, of securitising copyright assets to enable right holders' access to credit, even before start-up. The paper concludes with recommendations for proper financing of the creative industries, which are determinant factors of the African knowledge economy.

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¹ HM Treasury, Getting smart about intellectual property and other intangibles in the public sector: Budget 2018, OCL, October 2018, © Crown copyright 2018, p. 29.

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1. INTRODUCTION

In today's knowledge economy, information products play an essential role in the economic growth of developing countries. Examples are numerous: films, musical works, computer programs, etc. Copyright regulates authorship and the rights associated with products qualifying as creative works. Copyright is a category of intellectual property (IP). Other categories refer to industrial property and include patents, trademarks, trade secrets, industrial designs, etc. IP falls within the concept of **property** as used in Section 25 of the South African Constitution.³ Often, tangible (corporeal) property (things) **is encountered as objects of security agreements. Things can be movable or immovable. Human senses easily apprehend this kind of property. Property is, therefore, a thing, easily perceptible. These attributes reinforce its appropriateness as security. The opposite stands true. The fact that a certain property is not tangible can restrict its suitability as an object for security purposes. Wille et al.⁴ describes such property as 'an abstract conception with an intrinsic pecuniary value'.**

The lack of financial means has been a major obstacle for owners of intangible property in creative industries in developing countries. Generally, funds scarcity for the creation of works of authorship prevents economic uplifting. Because adequate financing enables the successful commercialisation of creative ideas, copyright owners have been led to use their rights as security for bank lending. South African courts, *in the case of Louis Pasteur v. Bonitas Medical*,⁵ **have qualified 'good**

² The African Organisation for the Harmonisation of Business Law of its French acronym '*Organisation pour l'Harmonisation du Droit des Affaires en Afrique*', is a gathering of 17 African countries, mostly French speaking: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, the Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Cote d'Ivoire, Mali, Niger, Senegal, and Togo.

³ 1996 Constitution of the Republic of South Africa.

⁴ Du Bois F, Wille G, Bradfield G, *Wille's Principles of SA Law* (9th Ed JUTA Law 2007) 24.

⁵ [2018] ZASCA 82.

security' as easily realisable assets such as debtors' property or investments. Meanwhile, several authors describe the cession of share's personal rights/guarantees as less good security.

In OHADA, copyright backed collateral as a form of financing is not common as a majority of the corporations are not willing to invest in an industry that has just started growing.⁶ Also, as is the case in many other countries, using IP to gain access to credit is eagerly accepted when main patents or brands are involved.⁷ OHADA financing institutions are afraid of losing their money due to uncertainty, adverse selection, or moral hazard surrounding those rights in the region. Generally, financial institutions hesitate to lend money to copyright owners. The re-deploy ability of copyright and related challenges in the advent of default and the borrower's reputation may explain the fears of the financial institutions.⁸

The Supreme Court of South Africa has rectified this derogatory approach in, *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another*.⁹ The Court, in this case, reiterated that:

The fact that property is intangible does not make it of a lower order. Our law has always recognised incorporeal as a class of things in spite theoretical objections thereto.

The local market of OHADA nations grasps remarkable trade businesses, individuals and companies making a

living in the creative sector. This sector includes a range of activities from fashion design, cultural theatres, music, performing and visual arts, the movie industry, traditional architecture, the craft industry, etc.¹⁰ With the rise of technological advancement, modernisation, and global awareness, the OHADA creative sector has witnessed an explosive expansion to ICT related businesses, including electronic commerce, software and computer services, video games production, etc.¹¹

Most of these creative industries in OHADA's emerging creative sector are constantly exploring strategies to encourage their rise and economic readiness. Creations of the mind, such as inventions, literary and artistic works, designs, symbols, names, and images, used in commerce, are regulated by copyright.¹² Copyright is generated through creative activity. Through copyright, the owner can secure economic benefits in the marketplace.¹³ Copyright as an incentive tool rewards authors with exclusive remuneration rights as a counterpart for their creativity and investment.¹⁴ Like all property, the owner can lease it, license it, give it away or sell it.¹⁵

Local entrepreneurs in OHADA Central African countries, for example, are restricted in terms of access to funding. For small and medium creative industries operating in these various creative sectors, access to credit is necessary for start-up or survival. Financing becomes an accelerator for economic empowerment in these developing economies. It equips SMEs with funding, therefore boosting economic growth.

⁶ 'Intellectual Property Financing – An introduction' (*WIPO Magazine*, September 2008) <https://www.wipo.int/wipo_magazine/en/2008/05/article_0001.html> accessed 18 December 2018.

⁷ Ibid.

⁸ Loumrioti M, 'The Use of Intangible Assets as Loan Collateral' [2012] SSRN <<https://dx.doi.org/10.2139/ssrn.1748675>> accessed 18 December 2018.

⁹ CCT42/04 [2005] ZACC 7.

¹⁰ 'How to Make a Living in the Creative Industries' (WIPO Publication, 2017) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_cr_2017_1.pdf> accessed 18 December 2018.

¹¹ Ojoma O, 'Les industries créatives africaines ont le vent en poupe', December 2021 at <<https://www.un.org/africarenewal/fr/author/ojoma-ochai-0>> accessed [date unknown].

¹² 'How to Make a Living in the Creative Industries' (*WIPO Publication*, 2017) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_cr_2017_1.pdf> accessed 18 December 2018.

¹³ Ibid 6.

¹⁴ 'The Arts and Copyright' (*WIPO Publication*, September 2007) 25 <https://www.wipo.int/wipo_magazine/en/2007/05/article_0012.html> accessed 18 December 2018.

¹⁵ Daly V, 'True Econometrics wiki' cited by WIPO DL450 *Economic Perspectives on Intellectual Property Management* 8.

To achieve economic development in the creative sector, African film producers, for example, need access to financing. The only backed-up tool at hand is the copyright work which could include the cinematograph film embedded on a disc, fashion design, or film production. It becomes important to question to what extent copyright owners realise the market value of their works through their exploitation as a financing instrument. And especially the response of the OHADA banking legal system to the issuance of loans to copyright owners with creative work as collateral.

In the face of negative apprehensions of intangible property, it could seem that they are legally inappropriate for security purposes.

This article sheds light on the securitisation of copyright as assets for financing business operations. The paper firstly concentrates on the acceptability of security over intangible assets, specifically in the case of the rights flowing from copyright. The legal regulating theories relating to incorporeal, and property are highlighted in the South African Roman-Dutch perspective and the OHADA Napoleonic Civil Code approach. The paper further underlines to what extent the legal traditions of these countries have affected their legal capacity to grant securities over intangibles. The paper analyses issues arising in the course of adopting IP assets as security. Discussions follow on subsequent legal changes adopted in South Africa and OHADA and aiming recognition and accommodation of copyrights as collateral in the lending market. The paper concludes with an address to the need for appropriate security objects to overcome the small economic growth noticed in those sub-African regions.

2. COPYRIGHT AS PROPERTY

With the growing integration of IP as a valuable asset in the industry sector, IP has become a driver of global development. Today, intellectual capital is often the key objective in mergers and acquisitions.¹⁶ A proper understanding of the role of IP in a corporation and its subsequent valuation is the cornerstone of the rightful exploitation of intellectual assets.

Property is a wide concept, including rights and things. Generally, one can divide things into two categories: immovable and movable. Land and every right or interest in land or minerals qualify as corporeal immovable property, while rights constitute incorporeal movable property.¹⁷ In South Africa, the right to property is constitutionally protected and is not limited to land.¹⁸ The right to property extends to intangible assets: IP, state debts, licenses and permits, and commercial interests, for example.¹⁹ In the instance where such intangible assets have interests vested in, the creation of state monopolies will affect their management.²⁰ An IP asset is classified as movable property.²¹ South African law provides for the transfer of copyright as movable property by assignment, testamentary disposition or operation of law.²² Although qualified as movable property, IP rights are not tangible. Henceforth, an IP right is an incorporeal movable property. The courts have affirmed that an intangible asset, despite its immaterial nature and incorporeal aspect, falls within the meaning of property and movable property²³ and can constitute the subject matter of security.²⁴

¹⁶ 'Valuating Intellectual Property Assets' (*WIPO IP Valuation*) <https://www.wipo.int/sme/en/value_ip_assets/> accessed 21 March 2022.

¹⁷ s. 2 Insolvency Act 1936.

¹⁸ Constitution (n 3), s. 25.

¹⁹ Intellectual Property Financing – An introduction' (*WIPO Magazine*, September 2008) <https://www.wipo.int/wipo_magazine/en/2008/05/article_0001.html> accessed 18 December 2018.

²⁰ Van der Walt, 'The Constitutional Property Clause and Police Power Regulation of Intangible Commercial Property- A comparative analysis of case law' in *Property Law: Current Issues and Debates* (Routledge 1999) 208.

²¹ Insolvency Act 1936, s. 2.

²² Copyright Act of 1978.

²³ *Bank of Lisbon and South Africa Ltd. v Master of the Supreme Court* [1986] ZASCA 121.

²⁴ *Makate v Vodacom Ltd* [2016] ZACC 13.

A. INTANGIBLE MOVABLE PROPERTY AND SECURITY

Slomowitz A. J. in *Video Parktown North (Pty) Ltd v Century Associates and others*²⁵ purposely qualified copyright as species of ownership. Copyright comprehends a set of exclusive transferrable rights to the copyright owner. Copyright over a piece of work is tied with a plethora of economic and moral rights:

- Economic rights: the right to exploit the work in material form²⁶ and the right to publicly communicate the work in the non-material form.²⁷
- Moral rights: the right to claim authorship of the work, the right to object to any distortion, mutilation, or derogatory action in relation to the work.²⁸

In OHADA, the author of the work enjoys the exclusive right to exploit his work in any form whatsoever and obtain monetary advantage therefrom.²⁹

In *BSDA v Groupe Walf*³⁰ the local court affirmed the exclusive right of the copyright owner to exploit the work and perceive the fruits of its exploitation.³¹

Transfer of IP rights to a financial institution as security for a credit facility is a form of exploitation of personal rights in it. Even though an incorporeal property cannot be transferred physically, some personal rights flowing from the IP rights can be transferred. The rights flowing from copyright as an IP category operate as a monopoly

granted to creators over their intellectual creations. In practice, it is a combination of incorporeal rights entitling the copyright owner to exclusive entitlements. The bundle of rights in copyright could apply to literary works such as books or computer programs. They could equally apply to artistic works. Examples are music, paintings, films, and sculptures. The moral rights flowing from copyright relate to the personality of the author. Whereas the economic rights enable the lawful owner to extract financial benefits each time the work is used by third parties.

Copyright holders such as artists, filmmakers, writers, or musicians, like other individuals in the marketplace, have a need to provide security for credit facilities made available to them. The same also occurs for a loan or overdraft facility. However, a credit provider requires security from a debtor before it is prepared to grant a credit facility. The amount of capital that a creditor is willing to advance to a business depends on the reliability of the business and the value of the assets given as security.³² The question, therefore, arises to what extent IP rights in copyright can be utilised as valid security for a credit facility.

B. THEORETICAL BACKGROUND

According to Brits,³³ real security law can be defined as the use of institutions of property law, such as rights acquired in or burdens imposed on proprietary objects/things, to help ensure the fulfilment of personal obligations.

²⁵ [1986] 2 SA 623 (T).

²⁶ *National Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd* [2014] 2 All SA 461 (GJ).

²⁷ *Moneyweb (Pty) Ltd v Media 24 Ltd and another* [2016] 3 All SA 193 (GJ).

²⁸ 'Intellectual Property Handbook: Policy, Law and Use' (2nd, WIPO Publication, 2004) 46; See also *Nel and another v Ladismith Co-Operative Wine Makers and Distillers Limited* [2000] 3 All SA 367 (C) where the court emphasised that the ownership of any copyright conferred by s 3 or 4 of the Copyright Act on any work shall vest in the author or, in the case of a work of joint authorship, in the co-authors of the work. In this case related to the adaptation of an artistic work, the court mentioned that the substantial features of the original label remain recognisable in the disputed version. That version was accordingly found to be an adaptation of the original, and therefore enjoyed copyright protection.

²⁹ Bangui Agreement on the Creation of an African Intellectual Property Organisation 1999, Article 9(1), Annex VII.

³⁰ *Bureau Sénégalais du Droit d'auteur c Groupe Walf*, Tribunal régional hors classe de Dakar, Ordonnance de référé no 402, 28 janvier 2010; 2013 4 *Revue Africaine de Propriété Intellectuelle* 53 note Laurier Yvon Ngombé.

³¹ Article 33 of Loi relative a la Protection du Droit d'Auteur No. 73-52 du 25 Janvier 2008 Republic of Senegal: « l'auteur jouit du droit exclusif d'exploiter son oeuvre sous quelque forme que ce soit et d'en tirer un profit pécuniaire ».

³² Segal T, '5 C's of Credit' (*Investopedia*, 20 September 2021) <<https://www.investopedia.com/terms/f/five-c-credit.asp>> accessed 21 March 2022.

³³ Brits R, *Real Security Law* (Gerrit Pienaar ed, 1st edn, Juta 2016), 1.

The banking sector has come to recognise intangibles as a type of assets over which one can establish real security rights.³⁴ The copyright owner with the bundles of rights in his patrimony can also use it as an object of security in the same way as a movable asset or a piece of land.

a) Classification of Copyright as Property in South African and OHADA Contexts

In South Africa, there is no express statutory provision concerning the creation of a right of real security for copyright. Therefore, the need to determine the nature of IP prior to identification of the mean by which they could be offered as real security (mortgage, bond, hypothecation, etc.). It has been noted that, in the absence of legislation on the securitisation of IP, classification type determines the type of real security.³⁵

Property rights include all kinds of property, i.e., immovable, movable, immaterial, and incorporeal property. It is trite law in South Africa that securitisation of movable corporeal property can be attained through a pledge or by registering a notarial bond over the asset.³⁶ Incorporeal moveable property may be securitised by means of a security cession, otherwise called cession in *securitatum debiti*.³⁷ Real security provides the creditor with a limited real right in the property of the debtor as security for the repayment of the principal debt. Real securities are of two types: legal securities and securities by agreement. For the purpose of this paper, we will only consider security by agreement. They are of three types: Pledge, mortgage, and cession in *securitatum debiti*. Those are real securities born out of an agreement

between the debtor and the creditor. Their definition is of essence to this study.

Pledge is a right over the movable or incorporeal property of another which serves to secure an obligation.³⁸ The debtor provides his assets to the creditor in pledge until full payment of the debt. In the restrictive sense, a mortgage refers to the real security right over an immovable property for which a mortgage bond is registered in the Deeds Office.³⁹ Cession in *securitatum debiti* is real security related to incorporeal property whereby the debtor pledges his creditor's rights against third parties to the creditor of the principal/extant debt.⁴⁰

OHADA countries, in their capacities of former French colonies, have adopted the classification of property under the French Civil Code. In line with Article 516 of the Code, there are two kinds of property: movables and immovables. Immovables refer to property immovable either by their nature (example of lands)⁴¹ or by destination (example of animals attached to farming).⁴² The traditional definition of property under the French Civil Code did not accommodate intangibles as a category. It was the subsequent analysis of the Doctrine⁴³ that came to establish financial intangibles such as shares and industrial intangibles such as IP.⁴⁴ Prior to the reform in 2011, OHADA security law did not specifically accommodate the particularities of IP. IP securitisation was only acknowledged as an element comprising the fonds de commerce. Article 53 of the former law referred to the OHADA regional IP law – The Bangui Agreement of the African Organisation of Intellectual Property – for the

³⁵ Karijiker S, 'Intellectual Property as a real security' [2018] 6(1) SAIPLJ <<https://hdl.handle.net/10520/EJC-126f18c0ec>> accessed 18 December 2019.

³⁶ Ntsoan LS, 'A Legal Comparison of a Notarial Bond in South African Law and Selected Aspects of a Pledge without Possession in Belgian Law' (Master of Laws Thesis, University of South Africa 2016).

³⁷ Lubbe G, 'Scott on Cession: A Treatise on the Law in South Africa, Susan Scott' [2019] 3 JUTA 619, 409-420.

³⁸ *ibid.* 409-2420.

³⁹ Merges RP, Menell PS, Mark A, Lemley, *Intellectual Property in the New Technological Age* (4th ed, Aspen Publishers 2006).

⁴⁰ Boschhoff D, 'Understanding the basic principles of property law in South Africa' (2013) The South African Council for the Quantity Surveying Profession Module 3.

⁴¹ Article 517, Code Civil, 2013.

⁴² *Ibid.*

⁴³ Druffin-Bricca S, *L'essentiel du droit des biens* (14th Ed, Gualino Carres Rouges 2021-2022).

⁴⁴ Hania, « Les biens immatériels saisis par le droit des sûretés réelles mobilières conventionnelles » 3, cited by Nadine Josiane Bakam Titgoum, 'Le nantissement des marques de produits ou de services : le législateur OHADA à l'épreuve de l'immatérialité', (2016, 28 *CPI*) 589 <<https://www.lescp.ca/s/3319>> accessed 18 December 2018.

legal regime applicable to the pledge of IP rights. The latter was indisputably silent on the matter.⁴⁵

However, on 15 December 2010, to palliate the restrictions noticed at the regional level and related to the securitisation of intangibles, OHADA Member States revised the regional security law to beautify local jurisdictions into a more attractive business environment, especially in the context of secured transactions.⁴⁶ The OHADA Revised Act (The new law) offers more security options to borrowers and financing institutions, especially in the field of IP, including the assignment of receivables by way of security, cash collateral, and the pledge of IP rights. In OHADA, IP rights such as trademarks, trade names, and designs can be pledged. The term pledge, such as used in the OHADA Uniform Act organising securities, refers to the allocation by the settlor of any part of his IP rights as security for a debt.⁴⁷ OHADA lawmaker has nevertheless subjected the pledge of IP rights to new perfection formalities. The pledged IP right must be registered in one of the special registries in order to perfect the pledge.⁴⁸ It is worth noting that besides the pledge, IP rights can still be included in a pledge of fonds de commerce.

This reform certainly enables the use of copyright to bolster creative industries' financing efforts in OHADA. Lenders have been clothed with the capacity to protect themselves by requiring copyright as collateral that the financial institution can use in case the borrower defaults.

Analysing copyright securitisation implies a necessary understanding of the dual nature of copyright as property under real security law and right under commercial law.

⁴⁵ Bakam Titgoum NJ, 'Le nantissement des marques de produits ou de services: le législateur OHADA à l'épreuve de l'immatérialité', (2016, 28 *CPI*) 589 <<https://www.lescpi.ca/s/3319>> accessed 21 March 2022.

⁴⁶ Giustini A, 'The New OHADA Uniform Act on Security' (*Clifford Chance*, 19 May 2011) <https://www.cliffordchance.com/briefings/2011/05/the_new_ohada_uniformactonsecurity.html> accessed 21 March 2022.

⁴⁷ The OHADA Uniform Act organising securities, 2011 (Rev.), Article 156, defines Pledge of IP as: an agreement whereby the settlor allocates as

b) Theoretical Foundations of Copyright Recognition as Real Security

An understanding of copyright as a legal entity and right presupposes a review of the philosophical bases for the protection of private property. The mentioned theories are well rooted in intellectual property.

Firstly, the Natural Rights perspective:

Natural law grants property rights to everyone over the work of his hands.⁴⁹ The fact that labour is the unquestionable property of the labourer. Such works could be creations, books, music, paintings and sculptures, films, or technology-based works (such as computer programs and electronic databases). Those works are the fruit of the copyright owner's sweat of the brow.⁵⁰ Works are fruits, providing copyright over the work to the copyright owner, as to a labourer.⁵¹ Hettinger⁵² notes that:

The author's natural property right gives him the right to use his work. Transfer of copyright is one component of the right to use the property right in the thing produced by the author.

Secondly, the utilitarian/economic incentive perspective: Utilitarian theorists promote the rewards of copyright authors with enforceable rights. The South African Copyright Act of 1978 thereof provides that the owner has exclusive rights to do or to authorise the acts of:

- Reproducing the work in any manner or form;
- Performing the work in public;
- Broadcasting the work;

security for a debt all or any part of his existing or future IP rights such as letters, patent, trademark and trade name, design and registered pattern.

⁴⁸ The OHADA Uniform Act organising securities, 2011 (Rev.), Article 160.

⁴⁹ Locke J, *Two Treatises of Government* (Awnsham Churchill, 1689); Merges RP, (n 39).

⁵⁰ *Walter v Lane* [1900] AC 539.

⁵¹ Hettinger EC, 'Justifying Intellectual Property' [1989] 18 (1) *Phil & Pub. Aff.* 31.

⁵² *Ibid.*

- Making an adaptation of the work; etc.⁵³

No one has the right to perform those acts without his or her prior consent or license. Only the owner has the exclusive rights to do or to authorise. Otherwise, unauthorised acts shall amount to an infringement.⁵⁴ Copyright is, therefore, a right serving the purpose of stimulating artistic creativity for the general public good.⁵⁵ The economic perspective theory values copyright as a commercial right. Copyright, in this vein, protects commercially valuable products of the human intellect.⁵⁶

From these two theories flow the legal and commercial aspects of copyright as real security.

C. DUAL NATURE OF COPYRIGHT SECURITISATION IN SOUTH AFRICA AND OHADA: DOCTRINAL APPROACHES RELATED TO THE INCOMPATIBILITY OF PLEDGE WITH DISPOSSESSION AND IMMATERIAL PROPERTY

Generally, real security involves an overlap between the law of property and the law of obligations.⁵⁷ Copyright as real security comes into operation through a consensual transaction, i.e., the copyright owner using his/her rights over a work to secure a loan facility from a financial institution. The loan is served in line with the terms of the credit agreement. The use of copyright as security for a loan prompts the IP owner to repay the loan in terms of the loan agreement.

a) The South African Perspective and Traditional Roman-Dutch Law

Creating legal security over copyright involves legal and commercial aspects.

Firstly, it is trite law that IP is an intangible property that lacks a physical existence.⁵⁸ In line with the traditional Roman-Dutch school of thought, private property is an incorporeal thing. Roman-Dutch law regards actions real and personal as incorporeal things. As such, personal actions could be dealt with in the same way as corporeal things; they could be sold, mortgaged and pledged. However, because they are intangible, it is not possible to possess an incorporeal thing and, therefore, to transfer ownership by means of delivery.⁵⁹ This is supported by Boshoff J. in *Oertel NO v Brink*,⁶⁰ who specifically underlined that:

but in the case of an incorporeal right, such right is not capable of possession in any physical sense, and there cannot also be a real delivery of such right.

In the traditional Roman perspective, there can only be delivery by means of quasi-delivery, otherwise called cession. Delivery is by way of a cession of the right, and the cession which the cessionary has is a quasi-possession.⁶¹

The contemporary approach to the transfer of incorporeal has nevertheless witnessed a shift from the traditional position. Transfer of immaterial encompasses personal rights. A personal right is a property and can be transferred from the estate of the copyright owner to the estate of a financial institution. Consideration is given here to the legal relationship between a legal subject and the object of the right, for example, the copyright owner and his/her works of creativity. Copyright under the contemporary approach can be transferred from one estate to another. This transfer is regulated by the Copyright Act dealing with intellectual creations.

⁵³ *Rapid Phase Entertainment CC v S.A.B.C Wunsh* [1996] J 597 JOC.

⁵⁴ The Copyright Act of 1978, s. 23.

⁵⁵ The US Copyright Act of 1909, Article 1, s. 8, Clause 8.

⁵⁶ *Black's Law Dictionary*, 2004, 824.

⁵⁷ *Brits R* (n 33) 3.

⁵⁸ *Black's Law Dictionary*, 2004.

⁵⁹ *Lubbe G* (n 37) 409-420.

⁶⁰ *Oertel NO v Brink* [1972] (3) SA 669 (W) 674D.

⁶¹ *Gunman v Latib* [1965] (4) SA 715 (A).

The South African Copyright Act, 1978 (Copyright Act) organises the transfer of copyright in section 22 of the Copyright Act. In line with these dispositions, copyright is transferable by assignment. Karijiker⁶² notes that:

The equivalent South African concept to an assignment under English law is the cession [...] thus, the concept of the assignment of copyright appears to have been simply transposed into South African law.

This transposition is nevertheless with a different meaning. Cession under English law is limited to rights, while assignment under South African law involves both rights and obligations.⁶³ Copyright as a legal right relates exclusively to the law of property. In this context, it can be transferred in South Africa, as underlined above, via a cession, which regulates the transfer of assets in the context of property law.⁶⁴ The object of the copyright being intangible, a bundle of rights related to copyright is incorporeal by nature. Van der Merwe and De Waal underline the difficulty to recognise incorporeal as property from a doctrine perspective.⁶⁵ Nevertheless, South African Courts recognise a personal right (example of copyright) is incorporeal. In addition, copyright is classified as a movable property under the Copyright Act.⁶⁶ As moveable incorporeal property, in which way can real security rights be created over copyright? Once the copyright work is created and the exclusive right granted to the author subsists in work, those rights, statutory provided, constitute property. The author of the work has real rights over those legal objects in spite of the fact that those are incorporeal rights.⁶⁷

In the absence of a statutory provision on security over IP, except the hypothecation of registered IP rights (for

example a trademark, where the deed of security is duly endorsed in the trademarks register⁶⁸), Courts in South Africa have resorted to legal mechanisms to obtain rights of real security over copyright. South African Courts and scholars have admitted that incorporeal movable property may be pledged by means of a security cession⁶⁹. This seems to be an acceptable solution after years of debates and philosophical arguments.

In *Louis Pasteur Hospital Holdings (Pty) Ltd v Bonitas Medical Fund*⁷⁰, the Supreme Court of Appeal recalled the legal principles regulating the cession of rights in South Africa:

Since the object of a personal right is as yet unrealised performance due by another, delivery by the cedent or possession by the cessionary is not, in a physical sense, possible. A transfer is accordingly achieved not by reference to the object of the right (the performance) or the concurrence of the debtor who is to render it, but by the interactive meeting of minds of the transferor and the transferee. By their mere agreement, the transfer is affected, irrespective of the prior knowledge or consent or the subsequent notification of the debtor.

The South African solution offers the advantage to accommodate the dual nature of copyright: copyright is a movable property, and pledge is security over movables, and the commercial aspects of copyright are taken into account by the contractual legal aspects of cession.

A fortiori, this appears as a legal incompatibility of terms. Firstly, a pledge is a security over corporeal movable property, while copyright is movable incorporeal.

⁶² Karijiker S (n 35).

⁶³ id.

⁶⁴ *Consolidated Finance Co Ltd v Reuvid* [1912] TPD 1019 1024.

⁶⁵ Karijiker S (n 35).

⁶⁶ The Copyright Act of 1978, s. 22(5).

⁶⁷ Karijiker S (n 35).

⁶⁸ See section 41(3) of the Trade Marks Act 194 of 1993.

⁶⁹ There has been a remarkable transformative approach in the recognition of "cession of rights" in South Africa. In 1965, the older

approach to the nature of cession was admitted in *Gunman v Latib* 1965 (4) SA 715 (A) 722A. For the first time, the transfer of personal rights was considered by South African courts in the case *Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd* 1968 (3) SA 166 (A) 172H. The problems flowing from this approach were underlined by Van den Heever JA in the judgment of *First National Bank of SA Ltd v Lynn* 1996 (2) SA 339 (A) 350A.
⁷⁰ *Louis Pasteur Hospital Holdings (Pty) Ltd v Bonitas Medical Fund* [2018] ZASCA 82 (31 May 2018).

Secondly, a pledge presumes dispossession of corporeal movable property; meanwhile, the incorporeal nature of copyright precludes dispossession. Courts have nevertheless recognised the pledge of incorporeal characterising security cessions.

Considering copyright as a personal right refers to patrimonial rights regulated by the law of obligations. Courts in South Africa emphasise that the only way in which personal rights can be employed as security is by means of an outright cession coupled with a fiduciary agreement.⁷¹ This type of cession will be analysed in the section discussing the practicability of using copyright as collateral in the lending market in South Africa.

b) The Practicability of Using Copyright as Collateral in the Lending Market in South Africa

South Africa considers rights as an asset in a person's estate,⁷² which can be transferred at will. Securitisation has become a common form of credit security, ensuring access to credit in the country. Security cession is one of the tools of securitisation which allows one to monetise copyright assets.⁷³ The author of a work can agree with a bank for the cession of his/her copyright for the purpose of backing a loan request.

Any right entitlement in copyright vested in the copyright owner can be construed as such.⁷⁴ Copyright security cession occurs with the copyright owner transferring his bundle of rights (or part of it) to the cessionary to back up his loan. This position is voiced by South African academic authors such as Du Bois in Wille's Principles of South African Law. Pledges have been specifically tailored for movable corporeal property, while copyright is movable incorporeal property in the nature of a bundle of personal

rights. In other words, it is not the copyright itself that serves as security, but the personal rights as represented in the bundle of rights. The cedent/copyright owner is deprived of his rights, which subsequently vest solely in the assignee. A deed of cession is the sole document evidencing the transfer of the copyright owner's personal rights to the financial institution offering the credit facility.

c) Distinguishing between Assignment and Cession

In the case of cession, there is a transfer of a personal incorporeal emanating from an obligation by means of a real agreement made between the cedent and cessionary and arising out of a *justa causa*.⁷⁵ The cessionary can cede his right to someone else if they choose to do so. Under the regime of cession, for any right that the cedent has ceded to the cessionary, the latter will become the owner of the right. The cedent would no longer have any claim to that right.

On the contrary, under the law of insolvency, an assignment amounts to a transfer of right and not a proper form of real security. The bundles of rights (or a part of it) pass to the assignee, but not the ownership. If the assignee becomes insolvent, the copyright forms part of the assignee's estate.⁷⁶ In terms of s. 1(1) of the Security by Means of Movable Property Act 53, the registration of a non-possessory pledge over movable property requires the asset to be 'specially described and enumerated', and the possibility of obtaining actual possession of the property serving as the object of security. The strict peculiarity under the Act limits – the integration of open-end assets such as personal rights as security objects.⁷⁷

⁷¹ *Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd*. [1968] (3) SA 166 (A) 172H.

⁷² *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd*. [2000].

⁷³ The Copyright Act of 1978, s. 22.

⁷⁴ *Preformed Line Products v Hardware Assemblies* 203 Kumleben J 202 JOC (N).

⁷⁵ *Johnson v Incorporated General Insurance Ltd* [1983] (1) SA 318 (A).

⁷⁶ Contractually created security rights are only recognized as limited real rights under South African Insolvency law. The secured creditor does not

acquire the use and enjoyment of the property when the debtor is in default.

⁷⁷ See *Durmalingam v Bruce NO 1964 (1) SA 807 (D)* at 812G-813B. See also Koekemoer MM, Brits R "Lessons from UNCITRAL for Reforming the South African Legal Framework Concerning Security Rights in Movable Property" PER / PELJ 2022(25) – DOI <<http://dx.doi.org/10.17159/1727-3781/2022/v25i0a10992>>.

This is not the same under Copyright law where an assignment extent to the complete transfer of rights.⁷⁸

d) Distinguishing between out-and-out Cessions and Cessions in *Securitatem Debiti* in South Africa

A cession deals with the transfer of an incorporeal thing (personal right or claim) by agreement. In South Africa, the law regulating real security in lending transactions is remarkable for its pragmatism. The law of financing offers several ways of securitisation of the economic interests in the copyright. In terms of real security law, security over incorporeal moveable property, South Africa operates in practice two types of cession of right: an out-and-out cession and a cession of incorporeal rights commonly identified as in *securitatem debiti*.

The first type of security cession is an out-and-out cession, otherwise called outright cession. Lubbe defines outright cession as a cession effecting an alienation of rights, a complete transfer of the right to the cessionary.⁷⁹ An outright security cession vests in the cessionary the right in all its aspects. The cession entitles the cessionary to do whatever he wishes to do with the rights. An illustrative example is the case of *Louis Pasteur Hospital Holdings (Pty) Ltd v Bonitas Medical Fund*,⁸⁰ where the cedent testified that the policies which were subsequently ceded to replace the initial policies were an outright cession which resulted in ownership of the policies by the defendant and that this entitled the defendant to do whatever they wished to do with the policies.

The second type of security cession is a cession in *securitatem debiti*. In this case, the cedent is not wholly

divested of interest in the asset he provided as security to the cessionary.⁸¹ He retains a reversionary interest. The cessionary will re-cede the rights to the cedent upon satisfaction of the secured debt. The right related to the bundle of rights does not transfer and remains in the copyright owner's estate.

A cession in *securitatem debiti* is in effect an outright cession in which an undertaking or *pactum fiduciae* that the cessionary will re-cede the right to the cedent on the satisfaction of the secured debt. This was underlined by the court in the case of *Lief, NO v Dettmann*.⁸²

e) OHADA: Departing from the Napoleonic Possessory Ownership

In OHADA, security laws are derived from the Napoleonic Code or the French Civil Code, inherited from the French colonial master. The Napoleonic Civil Code regulating security and property matters is based on possessory ownership, which facilitates the pledge of physical assets only,⁸³ and therefore creates fundamental limitations regarding the securitisation of intangibles.⁸⁴ French rules governing the validation of collateral in credit transactions, such as adopted under OHADA laws, did not favour the Member States' knowledge economies. This prompted the following critique against economic elites' thought to exert pressure over the design of legal contracting frameworks, seeking arrangements that benefit their interests.⁸⁵

The non-recognition of intangibles as property and flagrant incompatibility between the immateriality of intangibles, and the dispossession requirement under pledge as recognised security, have fuelled abundant doctrinal literature like in the South African context. In

⁷⁸ See Sec. 3.1.2. in this paper.

⁷⁹ Van der Merwe JG, Van Huyssteen, *et al.*, *Contract: General Principles* (5th ed, Juta 2016).

⁸⁰ [2018] ZASCA 82.

⁸¹ *National Bank of South Africa Ltd v Cohen's Trustee* [1911] AD 235.

⁸² [1964] SA 252 (A) at 271H.

⁸³ Aretz K, Campello M, Marchica M, 'Access to Collateral and The Democratization of Credit: France's Reform of The Napoleonic Security

Code',

<https://www.tuck.dartmouth.edu/uploads/centers/files/Paper_10_Access_to_Collateral.pdf> accessed 19 December 2018.

⁸⁴ Code Civil Napoleon 1804, Article 2075.

⁸⁵ Aretz K, Campello M, Marchica M, 2020, 'Access to Collateral and The Democratization of Credit: France's Reform of The Napoleonic Security Code', (2019) 75(1) J. Finance 45-90 <<https://doi.org/10.1111/jofi.12846>> accessed 19 December 2018.

response to the Doctrinal debate, French lawmakers have alternated throughout the 20th century securities with or without dispossession in the case of intangibles. Pothier, for example, affirmed that an incorporeal could not be pledged in the absence of dispossession, which is the essence of a pledge.⁸⁶

Finally, on 23 March 2006, the French law governing security interests was reformed.⁸⁷ The country officially derogated from the notions of possessory asset ownership applicable since the birth of the Napoleonic Civil Code in 1804. The scope of assets capable of being collateralised has been extended as a fundamental benefit for the betterment of securities offered to credit lenders.

This reform echoed in the OHADA region a few years later. The 2011 OHADA Revised Uniform Act (Revised Act) organising securities has introduced the specific pledge of intellectual property assets in the region coupled with a double range of precautionary measures for financing institutions.

Firstly, the act of pledge must be in writing. The written agreement formalises the existence of the loan.⁸⁸ It serves as evidence in case of default and redeployment. OHADA security law sanctions the inobservance of the writing exigency by the nullification of the agreement.⁸⁹

Secondly, the exigency of a range of specific information. The act of pledge must specifically underline the names of the creditor, debtor, and settlor of the pledge.⁹⁰ Elements permitting the determination of rights allocated as security shall be provided.⁹¹ The Revised Act equally requires the designation of elements permitting

the identification of the secured debt with information related to valuation, duration, and settlement date.⁹²

The reform in OHADA was a two-ways benefit: Firstly, IP owners had to be protected as borrowers from negative conceptions related to intangibles. Pledge over IP rights was officially organised. Secondly, new requirements for creating and perfecting securities came to protect creditors from difficulties related to the surrender of collateral in case of borrower's default.

i) Creating and Perfecting IP Securities: Reform in OHADA: Conditions Related to the Nature of the Pledged IP in OHADA

The OHADA law reform made several exigencies in respect to the characteristics of the IP asset to be pledged. It could be assets currently in existence or assets to be acquired in the future.⁹³ Pledged assets should be allocated for certain or ascertainable debts. Mentioned debts could be existing or future.⁹⁴

ii) Pledge Registration and Realisation in OHADA

The resided security law offers more flexibility and a varied option to creditors in terms of security options. The said pledge may be conventional or judicial.⁹⁵ Consequently, the law has provided a dual institutional regime both conventionally and judicially. Under the conventional pledge, three specific rights have been granted to the creditor who realises the pledge in case of default:

- a. A right to pursue the pledged property⁹⁶,
- b. A right to liquidate the pledged property⁹⁷, and
- c. A right of preference over the pledged property.⁹⁸

⁸⁶ Bohoussou *Réflexion critique sur l'efficacité des sûretés réelles en droit OHADA: proposition en vue d'une réforme du droit OHADA des sûretés réelles*, Droit. Université de Bordeaux 2015. Français.

⁸⁷ Stoffel-Munck *Premier bilan de la réforme des sûretés en droit français 2012 Dr. et patr.* 56.

⁸⁸ (unreported) 1st Civ 14 January 2010, Appeal No. 08-18-581.

⁸⁹ The Revised OHADA Uniform Act organising Securities, Article 127.

⁹⁰ The Revised OHADA Uniform Act organising securities, Article 157(1).

⁹¹ The Revised OHADA Uniform Act organising securities, Article 157(2).

⁹² The Revised OHADA Uniform Act organising securities, Article 157(3).

⁹³ The Revised OHADA Uniform Act organising securities, Article 125.

⁹⁴ *Ibid.*

⁹⁵ The Revised OHADA Uniform Act organising securities, Article 156.

⁹⁶ The Revised OHADA Uniform Act organising securities, Article 92(2).

⁹⁷ The Revised OHADA Uniform Act organising securities, Articles 104 and 105.

⁹⁸ The Revised OHADA Uniform Act organising securities, Article 226.

On the judicial pledge option, the creditor may be authorised by a court of competent jurisdiction to register the pledge on IP rights.⁹⁹ OHADA provisions relating to sequestration of company stocks apply in this case.

iii) Securitisation of IP Rights

Under the South African Exchange Control Regulations as amended in 2012,¹⁰⁰ the concept of capital extends to any IP right, whether registered or unregistered. The Exchange Control Regulations Act moves on by extending the term 'export' to cession or assignment or transfer of any IP right to a person who is not resident in South Africa.¹⁰¹ Security can be obtained over immovable property by special mortgage of such property¹⁰² and over movable things by means of pledge or notarial bond. Under South African law, rights can also serve as security. The South African Copyright Act regulates the assignment of copyright in section 22. It provides that copyright is transmissible as movable property by assignment. The possibility to treat the bundle of rights existing in copyright as moveable property is of utmost importance for the growth of the credit market. This legal recognition enables the copyright owner to use the exclusive rights attached to his created work to secure a loan to finance his business. Enlarging loan securities beyond tangible assets is crucial for economic development in the 21st century knowledge economy. Admitting the transfer of tangible rights gives knowledge holders the ability to partake in business and trade on equal footing with real right owners. The creator of a work desirous of developing his business can seek a loan facility from a financial institution. The recognition of rights' transaction gives creators the possibility to transfer their rights over

the created work as a backup in case of default in payment.

The transfer of the literary and artistic works on the packaging of audio recording tapes is an illustrative example of the transfer of copyright. This was illustrated in the case of *Frank & Hirsch (Pty) Ltd v A Roopan and Brothers (Pty) Ltd*,¹⁰³ where the manufacturer of audio recording tapes successfully transferred the get-up of the audio recording tapes, the design of the packaging for the tapes and the wording found on the wrapper used as packaging.

The author of a copyright work can cede his rights in the copyright to a financial institution as security for a loan. The transfer operates through a copyright assignment agreement. It operates as a transfer of personal rights¹⁰⁴ with the substitution of contractual creditors.¹⁰⁵

In OHADA, the Revised OHADA Uniform Act organising securities does not, unfortunately, bring clarifications on the mechanisms regulating the pledge of copyright. In the OHADA region, rights relating to the field of copyright are independent national rights subject to the legislation of each of the Member States in which they have an effect.¹⁰⁶ Though the pledge has been recognised by the Act, the organisation and procedure taking into account the specificities of IP rights categories have not been legislated upon by national copyright laws. To fill this vacuum, an examination of the dispositions of the regional copyright law applicable to OHADA Member States¹⁰⁷, Annex VII of the Bangui Agreement¹⁰⁸ seems necessary.

If the Bangui Agreement grants exclusive rights to the authors over their creativities¹⁰⁹, the regional Intellectual Property Code of Francophone African nations will have

⁹⁹ The Revised OHADA Uniform Act organising securities, Article 158.

¹⁰⁰ Exchange Control Regulation Act of 2012, regulation 10(4).

¹⁰¹ Du Bois F, Wille G, Bradfield G (n 4).

¹⁰² *Deed Registries Act* of 1938, s. 50.

¹⁰³ Appellate Division, Per Corbett CJ, Botha JA, Goldstone JA, Nicholas AJA, Hamas AJA, 2 June 1993.

¹⁰⁴ Lubbe G (n 37) 409-420.

¹⁰⁵ Lubbe G (n 37).

¹⁰⁶ General Provisions of Bangui Agreement, Article 3 title 1.

¹⁰⁷ Except the country of Comoros, which is a Member of OHADA, but not OAPI.

¹⁰⁸ Bangui Agreement, 1999.

¹⁰⁹ Bangui Agreement, 1999, Article 9 of Annex VII.

failed to organise the management of copyright in the area of securitisation¹¹⁰. Copyright nevertheless grants authors exclusive rights over created works. They have the right to grant authorisation or proscribe the use of those works such as communication to the public, reproduction, broadcasting, adaptation, etc. Same as in South Africa, the OHADA regional IP Code acknowledges the assignment of rights in the management of copyright exclusive rights:

Economic rights shall be assignable by transfer *intra vivos*.¹¹¹

The World Intellectual Property Organisation (WIPO)¹¹² defines an assignment as:

A transfer of a property right. Under an assignment, the owner transfers the right to authorise or prohibit certain acts covered by one, several or all rights under copyright.

The Berne Convention (1971) grants the copyright owner the right to assign his work. The owner of a copyright may freely assign any or all his rights to a third party. The copyright assignment can apply only to the acts which the owner of the copyright has the exclusive right to control.¹¹³

As stated above, in South Africa, the transfer of copyright as security can only be done by cession.¹¹⁴ South African practice of assignment is a security cession which is a transfer of incorporeal rights deriving from a real agreement. In this case, the property passes to the cessionary, who loses the right to claim that right. This is not the same in the case of assignment where the

copyright forms part of the assignee's estate. Only the right passes to the lender in case of assignment.

Copyright assignment refers to the transfer of the owner's property rights in the created work.¹¹⁵ The person to whom the rights are assigned becomes the new copyright owner or right holder. By assignment, the author completely divests him-/herself of one or more of their rights under the copyright so that the assignor no longer has any claim to these rights, nor can he/she perform any of the acts covered by the particular rights without the authority of the assignee.¹¹⁶

The assignment, such as conveyed to a lender, grants the borrower all economic rights. All ownership interests existing in the work pass to the lender *mutatis mutandis*. Nevertheless, if the assignee becomes insolvent, the copyright forms part of the assignee's estate. A copyright assignment could be total or partial. Dean and Dyer¹¹⁷ emphasise that copyright as a bundle of rights is divisible. Thus, an assignment of copyright can be restricted through any of the following:¹¹⁸

- in terms of the acts which the owner of the copyright has the exclusive right to control;
- in relation to the term of the copyright;
- according to a specified country or other geographical areas.

The copyright owner who owns a created literary, artistic, or scientific work is clothed with an ownership interest in that property. He may borrow money from a financing institution and use his copyright as security, subject to the principle '*nemo dat quod non habet*' implying that at the time of the Agreement, the work must be owned by the copyright owner, as one cannot give what he does not

¹¹⁰ Timgou, op cit.

¹¹¹ Bangui Agreement of 1999, Article 34.

¹¹² 'Understanding Copyright and Related Rights' (WIPO Publications, 2016) <<https://www.wipo.int/publications/en/details.jsp?id=4081>> accessed 19 December 2018.

¹¹³ The Berne Convention of 1971.

¹¹⁴ *Lief NO v Dettmann* [1964] (2) SA 252 (A) 271 E-G. Where Wessels JA underlined that: '*The only manner in which a right of action (either secured or unsecured) can be furnished as security for a debt is by way of cession.*'

¹¹⁵ 'Copyright Assignment and Guidelines', (LegalZoom) <<https://www.legalzoom.com/download/pdf/copyright-assignment.pdf>> accessed 18 December 2018.

¹¹⁶ *David Feldman No and Emi Music Publishing SA (Pty) Limited* (unreported) Case No. 06/23129.

¹¹⁷ Dean OH, Dyer A, *An Introduction to Intellectual Property Law* (Oxford University Press 2016), 29.

¹¹⁸ The Copyright Act, 1978, s. 22(2).

have. The assignment of the copyright in the secured transaction can be prescribed for a particular period, after which the copyright owner's proprietary interests are restored – subsequent to the repayment of the loan. In the case of *David Feldman, No and Emi Music Publishing SA (Pty) Limited*,¹¹⁹ Jajbhay, J. sitting in the High Court of South Africa, Witwatersrand local division, emphasised in his judgment that the assignor loses all his entitlements in respect of the specific rights transferred by virtue of the assignment.

An example could be the assignment of software exploitation right for the financing of the exploitation of this software. When the copyright owner applies for a loan using his copyright as backup, it is the duty of the creditor to carefully check the borrower's right over the copyright. This should be done prior to granting the loan. The security interest in the software copyright precludes anyone else, including the previous or original copyright owner (borrower in the secured transaction), from using the creation.¹²⁰ The financier as assignee is entitled to sue for infringement of the copyright. This unveils another limitation of IP securitisation. The lender might not have the knowledge of IP management, which could alter the interests and entitlements of the copyright under his control.

South Africa permits the transferability of personal rights created by obligations through a cession of rights or *cession in securitatem debiti*. The cession in *securitatem debiti* resembles pledge and that the cedent is not wholly divested of interest in the asset he provided as security to the cessionary. Notwithstanding the cession, the cedent retains what has been described as a reversionary interest.¹²¹

Transmission operates by means of the pledge without dispossession. The bundle of rights in copyright are legal entities with monetary value. They are therefore transmissible by means of cession. It is trite law in South Africa that an agreement through which the cedent consents for the transfer of his personal rights to the cessionary amounts to a cession.¹²² It affects the passing of personal rights from the cedent to the cessionary;¹²³ however, the title of the right remains with the cedent. This solution enables pragmatic financing by allowing securitisation of copyright.

The cession here operates through the concurrence of the wills of the copyright owner and the financial institution.¹²⁴ The copyright owner, as cedent, offers his right as security, and the financial institution/creditor as cessionary accepts to provide a loan based on the personal right(s) offered as security to back up the loan. The mutual intention to transfer is sealed in an agreement.

The requirement of delivery related to all movable property is taken into account by the transmission by mere agreement.¹²⁵ This is what prompted Brits¹²⁶ when he observed that 'A security cession is legally characterised as being in the nature of a pledge, even though the object of cession is incorporeal'.

3. VALUATION

Copyright can be used for commercial lending. However, the copyright industries can only borrow up to the value of their creativities. Financing in this context requires relative probability.¹²⁷

¹¹⁹ (unreported) Case No. 06/23129.

¹²⁰ See Dean 1993 *ELR*, Case Comment South Africa – copyright: parallel importation of artistic works: '...Having acquired ownership of the South African copyright in the relevant works, F&H got their attorneys to write a sequence of letters to Roopan and informing them of F&H's ownership of the South African copyright in the works in question and advising them that if they continued to trade in grey TDK tapes embodying the reproductions of the relevant works, they would infringe F&H's copyright...'.¹²¹

¹²¹ *Louis Pasteur Hospital Holdings (Pty) Ltd v Bonitas Medical Fund*, [2018] ZASCA 82 (31 May 2018).

¹²² Lubbe G (n 37) 45.

¹²³ Lubbe G (n 37) 26-27.

¹²⁴ *Preformed Line Products V Hardware Assemblies* 210 Kumleben J 202 Joc (N).

¹²⁵ Karijiker S (n 35).

¹²⁶ Brits R (n 33) 142-182.

¹²⁷ DL 450 'IP as Collateral', WIPO/OMPI, 2018, 26.

It is crucial for the financing institution to know the exact value of the collateral which should be sold in case of default. Copyright valuation becomes, therefore, an important prior financing transaction to enable lenders to determine the value and, therefore, the credibility of the collateral in the market.

The successful appropriation and exploitation of IP rights is a source of huge economic impact.¹²⁸ Consequently, corporate valuation relies greatly on intellectual assets such as copyright based on IP potential in creating economic growth, enhancing productivity and profitability, and increasing enterprise value. Ellis and Jarboe¹²⁹ purposely wrote:

As intangibles emerge as an asset class, large investment banks and boutique private equity firms alike have begun raising and investing funds targeted at IP and other intangible assets... these firms are targeting the traditional venture capital space, looking for promising early-stage innovation and inventions.

If innovation can boost economic growth, it must nevertheless be accompanied by the securing of the associated knowledge as IP.¹³⁰ IP cannot engineer economic development in the absence of a successful valuation.

Valuation of the collateral is important not just for the borrower in quest of collateral but also for the financial institution lending the money. Anson¹³¹ notes that two types of questions must be answered when valuing and envisaging the sales of IP assets: firstly, the value and ownership of IP, and secondly, the practicality of the valuation process. Knowledge of the accurate value of the

copyright asset offered as collateral is crucial. The practicability of the valuation method is essential.

Nevertheless, copyright as incorporeal property poses specific problems in utilising them as security objects due to their intangibility. Copyright lacks physical substance and, as such, is difficult to value, especially in the absence of a clear situs.¹³² Examples are customer lists, databases, novels, etc. Copyright is an IP right and intangible by nature. Contrary to other tangibles (such as assets), IP assets are created by statute, protected by statute, and enforceable in terms of the statute. Unlike tangible assets, copyright does not exist in physical locations. Copyright constitutes resources controlled by individuals or companies or as a result of assignment or self-creation. From copyright, only future economic benefits are generally expected in terms of inflows of cash or assets.

This is not the case in practice with traditional forms of security such as mortgages, pledges, or notarial bonds over corporeals. Those securities over tangible property are frequently encountered and are unproblematic. Taking security over copyright gives rise to various concerns. Except in the case of copyright of a thing over the material creation of the copyright author, it could be difficult to determine the value copyright considered in this case as personal of the right. A creditor relies entirely on its security for the satisfaction of his claim¹³³ and needs to be assured of its financial reliability.

Despite the above challenges, several jurisdictions have witnessed creative businesses overcoming challenges associated with access to finance buying their IP assets as collateral. The asset-backed music securitisation of Davie Bowie¹³⁴ is an illustrative example. The artist made USD 55 million by issuing 10-year bonds out of future revenues from the 25 albums in his back catalogue.¹³⁵

¹²⁸ Gabison G, Pesole A, *An Overview of Models of Distributed Innovation* (JRC and Policy Reports EUR 2014), 4.

¹²⁹ Ellis J, 2010 in WIPO DL450 *Economic Perspectives on Intellectual Property Management* 7.

¹³⁰ WIPO *Intellectual Property Handbook* (WIPO 2004).

¹³¹ Anson 2008 *The Licensing Journal*, 8.

¹³² See *Danning v. Pacific Propeller* [1980] 620 F.2d at 735-736.

¹³³ *Bank of Lisbon and South Africa Ltd. v Master of the Supreme Court* [1986] ZASCA 121; [1987] 1 All SA 286 (A) (30 September 1986).

¹³⁴ (n 6) 9.

¹³⁵ Wong A, 'Banking on Intellectual Property' (*The Edge Malaysia*, 9 February 2015) <<https://www.pwc.com/my/en/assets/press/150209-theedge-banking-on-intellectual-property.pdf>> accessed 21 March 2022.

WIPO mentions that the practice of IP as collateral in lending transactions is a recent phenomenon in developed countries.¹³⁶ It becomes important to analyse how to determine the value of copyright in secured transactions?

According to Financial analyst CONSOR in the United States, the first step in the valuation of the IP asset consists in determining the portfolio of copyright assets. In this vein, groups of intangible assets under copyright should be gathered and bundled.¹³⁷ Art-related intangible assets falling under copyright in a company could include, for example, (i) literary works, (ii) musical compositions, (iii) photography, (iv) maps, and (v) engravings.¹³⁸ While, IT and database intangibles would include, for example, operating systems, mailing lists, proprietary software, databases, logo drawings, manuals source code. After the determination of the portfolio of the copyright assets, the financing institution and borrower can start placing value on those assets. That is the valuation process. A financial institution providing a loan on the basis of copyright assets must necessarily access its value. Several methods can be used to determine the fair market value of the IP collateral. Valuation methodologies generally depend on the information available and the specific circumstances.¹³⁹

The cost approach values the IP according to its current or historical costs. This value could sometimes encompass the difference between the cost for the creation of the work and replacement cost or assessment of the expenses necessary to replace the IP given as collateral.¹⁴⁰

In view of the specificities of the African creative industries, and in a context where OHADA has been regarded by some economists as a neoliberal institution with market-oriented reform policies, this paper argues that the valuation of such assets shall be determined by

the value of labour, or the costs of labour put in the production of the copyright collateral. Copyright collateral could equally be determined on the basis of the usefulness of the copyright collateral to African society.

A. DIFFICULTIES PERTAINING TO THE SECURITIZATION OF IP RIGHTS

This section critically examines the challenges of the use of copyright as bank lending backup in secured transactions in both South Africa and OHADA countries. What are the risks related to the securitization of bundles of rights in copyright as means to raise funds?

Creditors face numerous impediments when taking security in copyright. Existing hindrances relate, among others, to conflicts between IP law and security law, valuation, risks related to the personal nature of the assets backing the security, and absence of registration which prevents securities from being perfected.

a) Difficulties Related to the Absence of Registration

In the OHADA region, the fact that copyright as property is not subjected to registration requirements and issuance of a certificate of registration by public authorities as part of registration mechanisms, advertising, and other formalities aiming its opposability to third parties is an important restricting factor.¹⁴¹ This makes it difficult for copyright to be used as collateral in loan transactions.¹⁴²

Both regional security and IP law of OHADA Member States did not figure out securitisation mechanisms applicable to copyright assets. To fill this gap, practice usually refers to the conventional system using the exclusive rights granted to the copyright owner as a loan backup.

¹³⁶ *Id.*

¹³⁷ Anson and Samala 2014 *TLJ* 1.

¹³⁸ Anson and Samala 2014 *TLJ* 1.

¹³⁹ Anson and Samala 2014 *TLJ* 2.

¹⁴⁰ Anson and Samala 2014 *TLJ* 2.

¹⁴¹ Code de Propriété Intellectuelle Français, Article 5(1).

¹⁴² See, for example, De Visscher et Michaux *Précis du droit d'auteur et des droits voisins*, Bruxelles, Bruylant 55.

Since courts in Francophone African countries often refer to the position of French lawmakers to fill the gaps in national legal systems, it is important at this stage to highlight significant development in France concerning the securitisation of copyright assets.

French lawmakers have established the pledge of software exploitation rights¹⁴³ and also the pledge of cinematographic works.

The pledge of software is a collateral agreement seeking to use software exploitation rights as a backup for a loan. The main purpose is to promote the financing of the creation of software. The rules of IP specify that in this case, the software is not transferred but the rights associated with it.

The law made the exigency of a written Act and registration at the special register of France National Institute of Intellectual Property (INPI)¹⁴⁴. In case of default, the financing institution could exploit the rights.¹⁴⁵ This was confirmed by France Cour de Cassation for the pledge of cinematographic works¹⁴⁶. The financing institution in this case is clothed with the legal capacity to recover the royalties of a defaulted debtor whose works have been duly registered. Recovery is up to the due amount, and according to the registration order.

¹⁴³ Code de Propriété Intellectuelle Français. 24 janvier 2014, Article L.122-126: 'le droit d'exploitation de l'auteur d'un logiciel peut faire l'objet d'un nantissement dans les conditions suivantes : Le contrat de nantissement est, à peine de nullité, constaté par un écrit. Le nantissement est inscrit, à peine d'inopposabilité, sur un registre spécial tenu par l'Institut national de la propriété industrielle. L'inscription indique précisément l'assiette de la sûreté et notamment les codes source et les documents de fonctionnement.'

¹⁴⁴ Institut National de la Propriété Industrielle.

¹⁴⁵ Articles L. 123-1 et L. 124-2 France Code du Cinéma et de l'Image animée.

¹⁴⁶ Cour de cassation chambre commerciale Audience publique du mardi 23 octobre 2012 No. de pourvoi: 11-23599. '...le bénéficiaire d'une cession de tout ou partie des produits présents ou à venir d'une oeuvre cinématographique ou audiovisuelle dûment inscrite au RPCA encaisse seul et directement, nonobstant toute opposition autre que celle fondée sur un privilège légal, à concurrence de ses droits et suivant l'ordre de son inscription.'

In OHADA, where the registration to the special registry has expired, the sale of pledged assets become null and void.¹⁴⁷

Another difficulty relates to the fact that the bundle of rights subsisting in copyright is not evidenced by a document. They exist by the mere fact of the creation of the work.¹⁴⁸ In the South African Copyright Act, the term *author* refers to the person who first makes or creates the work. The copyright is automatically granted at the creation of the work without any registration or other formalities,¹⁴⁹ except for cinematograph films¹⁵⁰ and traditional works.¹⁵¹ In the absence of formalities registration, concrete evidence of the existence of copyright proposed as debt backup is absent.¹⁵² In addition, in the case of transfer, a mere consensus translated through an agreement is enough to realise the cession. This state of regulation weakens the reliability of copyright as a backup in secured transactions. Unscrupulous copyright owners could transfer the same right to several authors without the knowledge of the lender. This is aggravated by the fact that there is no notification of the assignment of rights to third parties.

b) Difficulties Related to the Personal Nature of Copyright

The associated perception risks of intangible assets have greatly hampered their utilisation in capital markets.¹⁵³

¹⁴⁷ *Tribunal de Première Instance de Bamako • Jugement du 24/06/2004, Jugement No. 48, BALLY S.A C/ BICIM. Ohadata J-06-04.*

¹⁴⁸ Copyright Act of 1978, sec. 1.

¹⁴⁹ Van der Merwe, *et al.*, *Law of Intellectual Property in South Africa* 225-226.

¹⁵⁰ 'Register Copyright' (South African Government) <<https://www.gov.za/services/intellectual-property/register-copyright>> accessed 19 December 2018.

¹⁵¹ Traditional works should be registered in a national database. See section 28C of the *Copyright Act* as amended by s.4 of IPLAA.

¹⁵² *Barber-Greene Company and Others V Crush quip (Pty) Ltd Coetzee J*

¹⁵³ Joc (W).

¹⁵³ Patrick J, Furrow R, 'Intangible asset monetization, the promise and the reality' (2008) Athena Alliance 21-44, <<https://www.yumpu.com/en/document/read/16480102/intangible-asset-monetization-athena-alliance>> accessed 19 December 2018.

Copyright, in particular, does present odd risks as a form of real security.

Firstly, due to the abstract nature of intangible assets as non-physical property, it is often difficult to determine the nature and effect of security over these assets. The possibility to apply the general principles found in property law to intangible property and to use these to determine its suitability in secured transactions have been subject to doubts.¹⁵⁴ The reason is that while adopting the principle of securitisation of incorporeal rights, there has not been an adoption of legislation that fits this special regime. To fill the gap, judges revert to the principles of the pledge, which is not always suitable.¹⁵⁵

Secondly, in South Africa, for example, legislators have not amended the corresponding dispositions of securitisation in the law of insolvency. Consequently, uncertainty arises in the case of the debtor's insolvency. If the right passes to the financial institution during the assignment of rights, the property remains in the debtor's estate in case of insolvency.¹⁵⁶ This is far from favouring the lender's interests. In the absence of a lien over the assigned rights, the debtor can cede those rights at will to a third party.

Thirdly, the status of moral rights during the assignment of copyright is another element acting against the use of copyright as collateral in secured transactions. Beyond the economic rights related to the commercial exploitation of the work, copyright does have a clearly recognised proprietary basis tied to the author's personality. It is well established at the international level under international copyright conventions that independently of the author's economic rights, and even

after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to his honour or reputation.¹⁵⁷ Under the South African Copyright Act, an author may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work. The above applies exclusively when the author has authorised the use of his work in a cinematograph film or a television broadcast or an author of a computer program or a work associated with a computer program.¹⁵⁸ The right to claim authorship of the work¹⁵⁹ and the right to object to any distortion of the work are distinctive features of the moral rights in copyright.¹⁶⁰ They are purely personal, non-economic rights and belong to the creator of the copyright work. As such, moral rights do not create any rights of property and are incapable of cession.¹⁶¹ How does the personal nature of moral rights hinder/promote the assignment of copyright as security in a loan transaction? Moral rights influence in a substantial manner the determination of copyright security during three important stages of the life of security:

- 1) prior to the grant when the debtor applies for the loan;
- 2) during the grant, when copyright management is needed; and
- 3) at the end of the loan period, in case of default payment and exploitation of the copyright work by a subsequent owner of the copyright.

¹⁵⁴ Patrick J, Furrow R, 'Intangible asset monetization, the promise and the reality' (2008) Athena Alliance 21-44, <<https://www.yumpu.com/en/document/read/16480102/intangible-asset-monetization-athena-alliance>> accessed 19 December 2018.

¹⁵⁵ Van den Heever JA in the case *First National Bank of SA v The Master* [1987] (1) SA 276 (A) assimilated for example the cession of rights to 'the legal institution of corporeal things'. This mistake was later explained by the judge as ...*scholars and lawyers trying to prise one legal concept into the gard not ideally suited*. Cited by Lubbe G, (n 34) 419.

¹⁵⁶ Ntsoan LS, 'A Legal Comparison of a Notarial Bond in South African Law and Selected Aspects of a Pledge without Possession in Belgian Law' (Master of Laws Thesis, University of South Africa 2016) (n 36), pp. 23-50.

¹⁵⁷ Berne Convention for the Protection of 1971, Article 6Bis.

¹⁵⁸ The *Copyrights Act*, 1978, S. 20(1).

¹⁵⁹ Example, the removal of the publisher's name infringed its moral right as author of the Programme in the case *Technical Information Systems v Marconi Gildenhyus* JJ 1047 JOC (W) Witwatersrand Local Division, 16 March 2007.

¹⁶⁰ *WIPO Intellectual Property Handbook* 46.

¹⁶¹ Visser and Pistorius *Essential Copyright Law* 1, 5 & 26.

Non-recognition of the copyright owner's moral rights during a copyright cession will amount to infringement. The breach of rights of the copyright owner could impair the exploitation of the work in case of work related to the reputation of the author, or his physical performance, in such a way that the mention of his name will deter cash flow in the exploitation of the work, and therefore cause a default payment. To prevent such disagreements harmful to his financial interests, the creditor can require a waiver of moral rights at the time of the cession. It is important for authors to protect their reputation and integrity in the course of any transfer of copyright as security. In South Africa, the Copyright Act has decided in favour of the author's interests. The proposed amendment to the South African Copyright Act has settled for the non-transferability of moral rights.¹⁶²

In the OHADA regional IP code, the author's moral rights subsist even after the assignment of the work.¹⁶³ Independently of his economic rights, which have passed to the assignor, the author of a piece of work maintains his moral rights including (i) to claim authorship of his work, (ii) to have his name affixed to copies of his work and, (iii) to oppose any distortion, mutilation or other modification of his work.

Moral rights could stand as obstacles to the redeployment of works of art in case of transfer. This was confirmed by the French courts, usually referred to by OAPI States' tribunaux. France Cour de Cassation has condemned in this sense a public officer who published the work of art transferred to him for violation of the artist's moral right to publish his work.¹⁶⁴

The author of an artistic work has the exclusive right to publish the work and determine the conditions under which the publication should be exercised.¹⁶⁵ Pledge of the material embodiment of an artistic work by the owner to a third party does not necessarily imply the artist's will to publish the work.

The law emphasises the automatic acknowledgement of moral rights upon creation of the work.¹⁶⁶ Not doing so would amount to infringement of the copyright owner's right.¹⁶⁷ In Gabon, an OHADA State, in the case of *Madame Christine ROSSANO v Société SOVINGAB*¹⁶⁸, the court ruled that he who contributed to the creation of a work, and whose name has been omitted on the work, can file a lawsuit to have his name affixed on the work, and seek reparation for violation of his moral right to paternity. In the case of collective management of copyright, the transfer only operates for economic rights, but not moral rights, which remain with the author.¹⁶⁹ In the case of copyright assignment, the assignee is responsible towards the assignor for the ways and manners the pledged copyright is exploited. He shall be held responsible when such exploitation infringes the assignor's moral rights.¹⁷⁰

Fourthly, based on the divisibility of copyright, it is possible to have different rights in the same work, with numerous right owners for the same work. Professor Cornish¹⁷¹ explains the numerous ways of exploitation of copyright works; taking a novel as an example, it includes volume rights, serial rights, translation rights, film rights, dramatization rights, electronic rights, etc. To levy fraud and malpractice related risks during the assignment, the creditor needs to ensure that the debtor is effectively the

¹⁶² See the proposed addition of section 20(4) to the *Copyright Act* as introduced by cl 15(c) of the Copyright Bill. Van der Merwe, *et al.*, *Law of Intellectual Property in South Africa* 254.

¹⁶³ Bangui Agreement of 1999, Article 8(1) Annex VII.

¹⁶⁴ Chambre civile 1, du 29 November 2005, 01-17.034.

¹⁶⁵ Chambre civile 1, du 29 November 2005, 01-17.034.

¹⁶⁶ TGI Paris, 11 January 1971, JCP 1971, II 16697

¹⁶⁷ Cass. Civ. 1ère, 13 November 1973, D. 1974, p. 533.

¹⁶⁸ Tribunal de Libreville, Jugement (non daté), *Affaire Madame Christine ROSSANO C/Société SOVINGAB*, In *Le contentieux de la propriété intellectuelle dans l'espace OAPI*, préc. P.116.

¹⁶⁹ Fometeu <<https://barreaucamerun.org/site/le-contentieux-du-droit-d-auteur-et-des-droits-voisins-presente-par-le-professeur-joseph-fometeu/>>.

¹⁷⁰ Cour de cassation, civile, Chambre civile 1, 4 November 2011, 10-13.410.ess.

¹⁷¹ Cornish *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 1-23. Cited by Pistorius and Visser *Essential Copyright Law* 1, 4, 20.

owner of the right offered as security. The Copyright Act carefully emphasises this point:

An assignment or testamentary disposition of copyright may be limited so as to apply to some only of the acts which the owner of the copyright has the exclusive right to control, or to a part only of the term of the copyright [...]¹⁷²

Another aspect is the unsatisfactory character of the physical nature of copyright for the purpose of hypothecation through a deed of security. IP rights are traditionally classified into two broad categories: Industrial property comprised of trade secrets, patents, trademarks, industrial designs, etc., and rights related to intellectual creation comprised of copyright and related rights. In terms of intellectual assets, the Trade Mark Act regulates the hypothecation of registered trademarks.¹⁷³ The text allows the hypothecation of a registered trademark.¹⁷⁴ The exigency of attachment should be met in order to confirm jurisdiction for the purposes of legal proceedings.¹⁷⁵

The abovementioned application could be served on the registered proprietor and any other person recorded in the register as having an interest in the trademark. However, no similar provisions have been made in the case of copyright, which is by nature a similar IP right of an intangible nature. Copyright as a right is not accompanied by a physical manifestation that can serve as authentication of its existence, such as in the case of a trademark, except for certain forms of copyright such as cinematographic films, which usually are subject to registration.¹⁷⁶ Karjiker¹⁷⁷ emphasises that by the mere fact of the similarity between the two:

[...] giving effect to a hypothecation or attachment of copyright can thus present practical problems, but this does not detract from the principle espoused.

This particular formalism pertaining to industrial property rights categories has been established in OHADA States. There are conventional rules of publicity recognised in OHADA and common to the pledge of business property on patent, trademark, service mark or trade name, designs and model,¹⁷⁸ including:

- registration in the Trade and Personal Property Rights Register,
- be in conformity with the rules of publicity prescribed for deeds transferring ownership of IP rights and the rules of this Uniform Act relating to the pledge of any equipment forming part of the business property.¹⁷⁹

A special register of trademarks¹⁸⁰ has been, for example, established in this vein in OHADA, as well as a recording of acts in the special register of patents. The regional Code of IP requires that:

the Administrative Council shall draw up regulations concerning the acts to be recorded in the Special Register of Patents, on pain of their not being enforceable against third parties.¹⁸¹

Unlike other types of IP rights, which are registered and therefore used as the object of hypothecation by means of a deed of security, copyright given as collateral can easily be disposed of in the absence of registration backup. It could therefore be a rightful concern for financial institutions in terms of copyright reliability and certainty in security law.

¹⁷² The Copyright Act, 1978, s. 22(2).

¹⁷³ Trade Mark Act No. 194 of 1993, s. 41.

¹⁷⁴ Ibid. s.41(1)

¹⁷⁵ Ibid. s.42(2)

¹⁷⁶ *Warner Brothers Inc. and Others v Melotronics (Pty) Ltd*, Cape of Good Hope Provincial Division, where the court mentioned that South African copyright, in several films are usually registered under the Registration of Copyright in Cinematograph Films Act (No. 62 of 1977). In addition, s.26(9)

of the Copyright Act creates certain presumptions in regard to the infringement of copyright in films registered in terms of the Registration Act.

¹⁷⁷ Karjiker *Handbook of South African Copyright Law* 1-156.

¹⁷⁸ OHADA Uniform Act organizing securities, Article 169.

¹⁷⁹ OHADA Uniform Act organizing securities, Article 170.

¹⁸⁰ Bangui Agreement 1999, Article 29(4) Annex III.

¹⁸¹ Bangui Agreement 1999, Article 25(1) Annex I

B. LIMITATIONS RELATED TO THE USE OF COPYRIGHT AS A GUARANTEE IN SECURED TRANSACTIONS IN OHADA

The 2011 security reform in OHADA has brought substantial positive changes in the securitisation of IP assets. This has inevitably led to security efficiency in terms of creation, realisation, and enforcement. Nevertheless, some limitations subsist, and which prevent copyright owners from accessing financing institutions for funding purposes:

a) Lack of Registration of Security and Registration of Copyright

Registration of property stands as evidence in case of default. Its absence could negate the creditor's right.

The second limitation relates to the very recognition of the copyright itself. According to the Berne Convention for the Protection of Literary and Artistic Works¹⁸² regulating copyright, the enjoyment and the exercise of these rights shall not be subject to any formality. Copyright recognition is not subjected to any formalism, and protection is enjoyed *ipso facto* (by the mere fact of its creation).

Certain countries operate a register for copyrighted works, and the certificate issued in this context evidences the ownership of the right by the bearer of the certificate, as well as the existence of the copyrighted work.¹⁸³

However, the absence of proof of the existence of security over the IP and the existence of the right itself creates uncertainty and insecurity in the secured transactions.

b) Difficulties Related to the Perfection of the Security

The *intuitu personae* nature of certain IP rights as copyright operates as an obstacle to the perfection of security. The fact that the creditor is subrogated in the rights of the copyright owner can give rise to abuses and dysfunction in the management of rights.

c) Limits Relating to the Registration of Privileges

In credit practice, the registration of a creditor in the register indicated by the regulations in force allows the creditor to retain his priority as the guarantor. The question of registration of privileges in the perspective of collateral on copyright in the OHADA region raises three issues:

- (i) the trade or IP register assigned to copyright;
- (ii) the feasibility of pledge of future works as a backup of current loan applications;
- (iii) Harmonisation of the pledge of IP rights and collective management.

i) Registration of the pledge of copyright

In terms of the OHADA Revised Security Act, the pledge of intangible movable property is part of movable security. As such, it is subject to publicity and is therefore subject to registration in the register of commerce and securities. Article 170 of the same Act provides that IP rights must, outside the Trade and Personal Property Rights Register, be satisfied with the publication affecting the ownership of IP rights.

The Bangui Agreement, which has not yet ruled on the organisation of security interests in the field of copyright, does not organise the formalities related to the registration of these securities either. Thus, it is the copyright law of the Member States which is

¹⁸² Paris Act, 1971.

¹⁸³ Bouchoux *La Propriété Intellectuelle. Le droit des Marques, Le Droit d'Auteur, Le Droit des Brevets d'Invention et des Secrets Commerciaux* 201.

applicable.¹⁸⁴ Our analysis shows the silence of copyright law in OAPI States with regard to the latter's contribution as a credit guarantee.¹⁸⁵

ii) Pledge of future works

In line with the regional IP Code applicable to OHADA Member States, the total assignment of future works is invalid.¹⁸⁶ The same prohibition stands in member states such as Cameroon. Article 26 Law No. 2000/011 19 December 2000 of the Cameroonian law regulating copyright, the pledge of future works is null and void. Meanwhile, the pledge of copyright as security for future works is authorised by the regional security law. This antagonism between the security law and IP law in OHADA does not favour predictability and certainty in the local market. Pledge of future works as a loan backup is fundamental for the start-up of creative industries

C. HARMONISATION OF THE PLEDGE OF IP RIGHTS AND COLLECTIVE MANAGEMENT

One of the major developments in the field of administration of copyright in OHADA is the organisation of collective management of authors' rights. In Cameroon, for example, organisations derive from their members the most extensive powers to exercise their economic rights, such as the rights of reproduction, representation, distribution, and resale.¹⁸⁷ The situation is similar in other States such as Mali, Benin, and Burkina Faso.

Should we conclude from this that any contribution in the guarantee of a national copyright body should be registered in these management bodies?

It is the responsibility of national legislators in OHADA to fill this legal vacuum in the absence of an organised register for the registration of securities in the field of copyright, unlike branches of industrial property.¹⁸⁸

In order to protect both the financier and the debtor, an extensive legal system of secured financing must be developed. The following section analyses copyright as collateral in securities lending transactions in Africa, taking as an example the practical financing developed by South Africa.

D. CESSION AS SECURITY: FORMALITIES REQUIREMENTS

In the context of the pledge without dispossession, delivery of the instrument validating the right by analogy to the pledge of corporeal movable property symbolises the cession.¹⁸⁹ In the case of shares, another type of movable incorporeal property, the share certificate can be delivered as evidence of the cession.¹⁹⁰ However, in the case of copyright, the law does not make the exigency of registration for the right to come into being.¹⁹¹ Such state of affairs negates the predictability of incorporeal as reliable security. This was supported by academic authors voicing against the feasibility of the pledge of incorporeal.¹⁹² Its theoretical unsoundness has been criticised, as well as the likelihood of the existence of real rights in intangible assets, dominium in a personal right,¹⁹³ or the existence of a pledge in an asset incapable of being captured by the five senses.¹⁹⁴ Nevertheless, and as above demonstrated, South African courts have opted for the legal recognition of security cession, despite its doctrinal problems.

¹⁸⁴ Bangui Agreement of 1999, Article 3(1), Title 1.

'Rights relating to the fields of IP, as provided for in the Annexes to this Agreement, shall be independent national rights subject to the legislation of each of the Member States in which they have effect.'

¹⁸⁵ Revised Uniform OHADA Act organising Securities, Article 50.

¹⁸⁶ Bangui Agreement of 1999, Article 37 Annex VII.

¹⁸⁷ Seuna 2004, e. *Bulletin du droit d'auteur* 6.

¹⁸⁸ Bangui Agreement of 1999, Article 34(1), Annex 1:

"The acts referred to in the foregoing Article shall not be enforceable against third parties unless they are recorded in the Special Register of

Patents kept by the Organisation. A record of such acts shall be kept by the Organisation."

¹⁸⁹ Du Bois F (n 94).

¹⁹⁰ *Botha v Fick* [1995](2) SA 750 (A).

¹⁹¹ Dean OH (n 117) at 145.

¹⁹² De Wet & van wyk *kontrakte reg* 417-422, cited by Contracts, 497.

¹⁹³ *Grobler v Oosthuizen* (299/2008) [2009] ZASCA 51.

¹⁹⁴ Van der Merwe *Contract: General Principles* 497.

The practice of imposing a duty to re-cede the copyright upon payment of the debt is a welcome initiative favouring the interests of copyright owners in financing transactions. It was purposely said by Wessels JA that:

The only manner in which a right of action (either secured or unsecured) can be furnished as security for a debt is by way of cession, i.e., by a transaction which in our law results in the cedent being divested of his rights and those rights vesting in the cessionary. Where the cession is said to be made as security for a debt, it does not, in my opinion, signify that the cedent in fact retains any right in the subject matter of the cession; his continued interest therein flows from the agreement, either express or implied, with the cessionary that the right of action will be ceded back to him upon the discharge of his debt.¹⁹⁵

4. CONCLUSIONS

Copyright: Fugitive or Secured Asset? The purpose of this discussion has been to illustrate the related concerns in taking copyright as security in secured transactions in Africa as a foyer of creative industries. The analysis has taken into account two specific jurisdictions in Africa: OHADA Member States and South Africa. Many financing transactions, such as loans or securitisations, involve businesses focused on or have some substantial IP rights.¹⁹⁶ Collateral security is an important feature of credit contracts and is used to provide security for a lender's loan.¹⁹⁷ Nevertheless, when the collateral is a copyright work, several questions arise about the IP security interest process. The weakness of the copyright asset in secured transactions is evident in Africa based on its immateriality and the incertitude and unpredictability

surrounding its securitisation, but also based on the history of legal traditions – Roman-Dutch and Napoleonic Civil Code – influencing the security law applicable in these regions. Using copyright as collateral in secured transactions might mean a bank loan in return for a share of any IP profits or with the lender holding the copyright as security for repayment.¹⁹⁸

South Africa has made use of security cessions for pragmatic reasons to solve problems related to the use of incorporeal properties as securities. OHADA lawmakers on another side have departed from the Napoleonic possessory ownership to embrace a full recognition of intangible assets as property. In both cases, legislators have to step in and remedy legal inadequacies to enable economic growth through funding. It is this paper's position that this is standardly capable of enabling development and an illustrative example for other African nations without a supportive economic system of security over intangibles. The common law dynamic is to encourage, with its pragmatic and dimensional way of seeing things, instead of committing itself to supposed universals, seeks to develop piecemeal solutions in response to distinct types of disputes and problems.¹⁹⁹

Many owners of intangible assets in Africa, such as artists, musicians, painters, book writers, do not own movable property capable of delivery as security. They rely on rights granted over works, including paintings, musical compositions, crafts, movies, and qualified as copyright under law. Monetising them is of the essence. Unleashing their economic value requires an adequate legal framework to embrace knowledge-based economies.

¹⁹⁵ *Lief N O v Dettmann* op cit, 271.

¹⁹⁶ Orzechowski, Bagdasarian, <<https://www.whitecase.com/publications/article/perfecting-security-interests-united-states-patents-trademarks-and-copyrights>> accessed December 2019.

¹⁹⁷ *Sena V, Credit and Collateral* (1st edn, Routledge 2007).

¹⁹⁸ Phillips J, 'IP Financing: the Ten Commandments' (WIPO, September 2008)

<https://www.wipo.int/wipo_magazine/en/2008/05/article_0002.html> accessed 18 December 2018.

¹⁹⁹ Kotz, 'National Report of Germany' in Hayton, Kortmann & Verhagen (eds) *Principles of European Trust Law* 96, cited by Scot Scott on Cession at p. 509

5. RECOMMENDATIONS

In today's knowledge-based economy, intangibles have become more and more important in business.²⁰⁰ The relevance of intangibles in the financing sector as securitable assets should be supported by appropriate legislative framework. The conditions set under security laws of developing countries should enable the rise of knowledge-based economies countries. This will involve risk management through a more practical financing system. South Africa's system of lending transactions in the case of copyright is an example susceptible to inspire other African nations, as well as OHADA law reform to set an adequate legal framework. The dominance of creative industries makes copyright an important tool for credit bargain. Just as physical assets were used to finance the creation of more physical assets during the industrial age, intangible assets should be used to finance the creation of more intangible assets in the information age.

The following recommendations can be made for the betterment of securitisation of Copyright in Africa:

1. Granting security *over future-owned* copyright assets to uplift the economy in African nations. This would imply broadening the scope of copyrightable works in the regional IP code in OHADA.
2. The legal obligations arising out of copyright securitisation are *erga omnes*, i.e., enforceable against all; henceforth, the need of ample transparency ascertaining the existence of the right Registration for example ensures third parties of the successful constitution of the limited real right, and therefore its enforceability.²⁰¹ Registration of works has been restricted till now²⁰² to cinematographic works. Holders of copyright in cinematographic films in South Africa must apply for registration to the

Registrar of Copyright, while any contract transferring copyright over cinematographic films shall be recorded. Recordation serves as advertising and protection of the interests of the IP rights, together with any other parties recorded as having an interest in the IP right. Additionally, it enables enforceability *vis-à-vis* third parties, which is important for financial institutions in need of predictability and security in credit-related transactions. It is important for the financier risking his money in a loan transaction to notify the rest of the world of his interest in the copyright object of security.

3. Harmonise the scope of IP rights in African legislations with the scope of security laws. Contradictions between both documents should be levelled by lawmakers.

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²⁰⁰ Giglio S, Severo T, 'Intangible Capital, Relative Asset Shortages and Bubbles' (2011) 271 *IMF Working Papers*, <<http://dx.doi.org/10.5089/9781463925260.001>> accessed 18 December 2018.

²⁰¹ Koekemoer MM, "A framework for regulating South African law of security rights in movable property", Doctorate Thesis, February 2020, Faculty of Law, University of Pretoria, pp. 37-38

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