SECURITISATION OF INTELLECTUAL PROPERTY RIGHTS IN ZIMBABWE THROUGH THE MOVABLE PROPERTY SECURITY INTERESTS ACT

*Christopher Munguma

Abstract

This article discusses intellectual property movable security in the African context. It notes that securitisation of movable property in the African context is a recent development spurred by the establishment of a soft law on the subject by the United Nations. This international soft law has seen a number of African countries setting legal frameworks that accepts the use of movable property including intellectual property rights as security for credit in the formal market. This development has a serious impact on the ease of doing business for individuals and small businesses who otherwise lack immovable property to use as security. Despite the setting up of the statutory regimes that accepts the use of movable property as security some challenges are noted in the way some of the laws have been crafted in countries such as Kenya, Uganda, Nigeria and Zimbabwe. As a result recommendations to tighten and close the gaps in in the Zimbabwean law context are made.

Keywords

credit, movable property, security, intellectual property and Zimbabwe

*Christopher is a lecturer in Law and Intellectual Property at Africa University where he has been teaching for the past 12 years. Christopher has a Bachelor of Laws Honours Degree from the University of Zimbabwe and a Masters in Intellectual Property from Africa University. His areas of interest include patents, trademarks, geographical indications and enforcement of intellectual property.

Introduction

Many forms of property are used as security or collateral for credit in many business transactions. The most popular form of property used to secure indebtedness is land through the registration of various types of mortgage bonds over land. For a long time creditors and to an extent governments were unwilling to extend the same level of respect for movable property as a medium to use in securing indebtedness (Wanyama, 2019). This can be seen by a lack of statutory regulation on the use of movable property as security in many countries especially in Africa until the last five or so years. One of the major weakness cited for the use of movable property as security was the perceived risk associated with extending credit for this this medium. Unlike with land, movable property can easily be disposed off or moved from one point to the other to the disadvantage of creditors. One major challenge with movable property securitisation was the lack of a public central registries or data bases of movable properties used as security in many countries (Igbinosun, 2020; Kawooya and Nawaali, 2019; Wanyama, 2019). The last five years have however seen a flurry of activity on the part of African parliaments in coming up with laws that allow security to be taken on movable property including intellectual property. Examples include the Movable Property Security Rights Act No. 13 of 2017 of Kenya, the Movable Property Security Interests [Chapter I4:I5] Act No.9 of 20I7 for Zimbabwe and the Security Interest in Movable Property Act of 2019 of Uganda.

Countries such as Kenya, South Africa, Uganda and Zimbabwe have recently took the initiative to come up with movable security laws. One major innovation of these recently enacted laws has been the creation of a Movable Security Registries which are public offices where notices of security registrations are kept. See for example section 4 of the Zimbabwean Act and s10 of the Nigerian Act. These offices come with an electronic database which is searchable by members of the public and interested stakeholders. This approach was a good innovation that makes the system usable and open to members of the public.

The sections below discusses some of these developments starting off from an international perspective followed by a discussion of what has happened in three African countries. The paper concludes by analysing the Zimbabwean law and noting its weaknesses and strengths.

Methodology

The paper carries a literature review of primary and secondary legal sources namely legislation, case law and scholarly writings. The work is to a large extent doctrinal research (Makulilo, 2012). The article does not proceed to look at the practical implementation of the law in practice.

Securitisation of IP from an International Perspective

Up until 2016 when the United Nations Commission on International Trade Law (UNCITRAL) completed a truly international inquiry into movable property security, attempts to regulate the subject of movable security were primarily regional in nature. (Castellano and Tosato, 2019). The first attempts can be traced to 1994, when the European Bank for Reconstruction and Development (EBRD) adopted its Model Law on Secured Transactions (EBRD Model Law). The scope of the EBRD Model Law covered the taking of security in both personal and real property provided that neither party was a consumer. This model law advocated replacing all pre-existing security devices with a single "consensual security right" called a "charge". Under the EBRD Model Law, a charge could encumber both tangible and intangible assets, present and future.
In 2002, the Organization of American States (OAS hereafter) adopted its Model Inter-American Law on Secured Transactions (OAS Model Law), followed by the Model Registry Regulations under the Model Inter-American Law on Secured Transactions (OAS Model Registry Regulations) in 2009. According to Castellano and Tosato (2019) the OAS Model Law espoused a functional and unitary approach to regulate all transactions that award a proprietary "interest" in personal property for the purpose of securing an obligation. Under this model law, a security right is created between a "secured debtor" and "secured creditor" by way of contract. The security created was contractual in nature.

In 2007 the UNCITRAL Commission adopted the UNCITRAL Guide on Secured Transactions Law (the UNCITRAL Guide), which was followed by the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property in 2010 (the UNCITRAL IP Supplement), and the UNCITRAL Guide on the Implementation of a Security Rights Registry in 2013 (the UNCITRAL Registry Guide). These soft law at the international level had a bearing on later developments at national level (Castellano and Tosato, 2019). Finally, the year 2016

saw the birth of the UNCITRAL Model Law on Secured Transactions (the UNCITRAL Model Law), followed by the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Secured Transactions (the UNCITRAL Guide to Enactment), in 2017. Koekemoer (2020) has said that the UNCITRAL Legislative Guide was a very successful soft law instrument. Koekemoer (2020) further asserts that in view of the fluidity of transactional laws, a soft law approach was the best as it provides both flexibility and wider application in this branch of property law.

The purpose of the UNCITRAL Guide and UNCITRAL Model law is to serve as a foundation for law reform at national level. It also sets out key policy objectives that should be adopted in crafting secured transactions law at the national level. The scope of the UNCITRAL Model Law covers the taking of security in all types of "movable assets", subject to limited exceptions. The UNCITRAL Model Law states that a "grantor" and "secured creditor" can create a mutually binding security right by way of agreement (article 6). To be enforceable, such a contract must include the identity of the parties, and a description of both the encumbered asset and the secured obligation (article 6 and 7). Perfection is done by way registration or possession of the movable asset (article 18). Priority is awarded to the secured creditor who is first to register or otherwise perfected his or her rights (article 29). On issues of enforcement the Model Law provides both judicial and self-help remedies to the creditor in the event of default. Enforcement issues are dealt by articles 54, 56 and 58 of the Model law. This makes the scheme flexible and easy to manage. In concurrence with this sentiment Castellano and Tosato state, "these enforcement regimes aim to find equilibrium between the conflicting interests of secured creditors, grantors and unsecured creditors, while concurrently ensuring a flexible, expeditious and efficient realization of the security" (Castellano and Tosato, 2019, p. 305).

National Situations outside Africa

In Europe and America the use of movable property as security including intangible assets such as intellectual Property (IP) has been practiced for many years. One country that adopted the use of intellectual property as security from early times is the United States of America. See for example, the case of Republic Pictures Corp. v Security-First National Bank of Los Angeles (1952) where coyright was accepted as security. In the United States of America (USA) article 201(d) of the Copyright Act permits the taking of

Copyright mortgages. According to Nguyen (2015) the existence of Copyright mortgage in the USA dates back to the nineteenth century. The mortgages were associated with books and music publishing (Nguyen, 2015). The use of Bowie Bonds in 1997 over the expected current and future revenue from David Bowie's albums being a later example. This expected revenue was used as collateral for liabilities.

The law that permits the securitization of IP in United States of America is the Uniform Commercial Code. The Uniform Commercial Code regulates all secured transactions of commerce (Jacobs, 2011). Article 9 of the Uniform Commercial Code, governs the grant of a security interest in personal property to secure payment or performance of an obligation. This cuts across all contractual transactions that create an interest in personal property (Ward, 2009). While the Code does not specifically mention Intellectual Property in its provisions IP can be read into Article 9 since IP (such as copyright) is a form of personal property. To that extent the subject matter of IP securitization is covered in the Commercial Code.

In Europe, Belgium is one country with an excellent movable security regime (Boger, 2017). The Belgian Act on Security Rights in Movable Property (2013) changed the Belgian Civil Code with regard to the right of security rights on movables (Dirix and Sagaert, 2014). The Civil Code following Napoleonic traditions allowed pledges to be taken on movables. According to Dirix and Sagaert (2014) the new Act contains a full and far-reaching modernization of the statutory framework regarding security rights on movables including the retention of title and a legal lien. The Belgian law acknowledges the pledge on movable goods without dispossession of the pledgee. In order to have effect against third parties, the pledge must be registered in a–fully electronic–national Pledge Register. This approach introduces a general system of publicity by registration (Boger, 2017).

Gona-Fondo (2019) notes that in many developed countries, Intellectual Property is treated as an asset and in most cases; it is part of the company's IP portfolio, which attracts goodwill. This means that various IPRs including Copyright, trademarks and patents can be assigned, mortgaged or sold. This paradigm was however different in many African countries before 2012 (Gona-Fondo, 2019; Igbinosun, 2020). The situation is slowly changing with

recent changes in the law in countries such as Kenya, Uganda and Zimbabwe (Pasi and Moyo, 2019). Laws that allow the securitization of movables including IPRs have been enacted in these countries.

The African Regional Situation

In the view of Castellano and Tosato (2019) African sub-regional efforts to come up with a movable security regime can be traced to 1997. In that year the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), adopted its OHADA Uniform Act. The OHADA Uniform Act is directly applicable in all OHADA member states, it regulates both "personal securities" and "real securities", and applies to consumers and businesses alike. With regard to the taking of security in personal property (article 5-54 and 67 of the Act), it supplies a fixed list of typified security devices, each with distinct formal and substantive rules such as possessory lien and transfer of ownership for security purposes (articles 92 and 98). In its scheme of operations security is offered through transfer of possession and registration. Security over intellectual property is provided for in article 156 of the Act, which has some detailed rules on the formalities to be taken.

At a country level, Nigeria was one of the pacesetter countries in using IP as security (Oke, 2019; Igbinosun, 2020). This movement is in line with Nigeria's Secured Transactions in Movable Assets Act (2017). This law regulates the creation, perfection and realization of security interests in movable assets (Igbinosun, 2020). This legal regime has seen an increase in the use of IP as security. Oke (2019) states that; "intangible assets like intellectual property rights (IPRs) are increasingly being given global prominence in asset-based lending activities. Businesses are turning towards their intangible assets, specifically their intellectual property (IP) to finance their growth and further innovation." (Oke, 2019, p.3). As a result financial institutions such as the Nigerian Export-Import Bank offers loans on various sectors of the Creative Industry such as music, film, television, radio, fashion, distribution, production, and equipment. The funding carries with it conditions such as a maximum of seven years tenure, inclusive of a moratorium period depending on the type of transaction. Among the forms of collateral accepted by the financial institution is Intellectual Property (NEXIM, 2019).

In Uganda, the Security Interest in Movable Property Act, (2019) came into force on 30th May 2019. The statute has more or less similar provisions to the Movable Property Security Interests

Act (Chap I4:I5) of Zimbabwe. Like its Zimbabwean counterpart, the purpose of the Act broadly is to facilitate the use of movable property as collateral for credit. The importance of the Act has been explained by Kawooya and Nawaali (2019, p.2) in the following words, "this Act is one of the most significant statutes to impact the taking of security in Uganda". Key provisions in the statute include Part I dealing with creation of security interests, Part III dealing with perfection of security interests and Part IV on registration of security interests. Part IV deals with priority of security interests while Part V is on enforcement of security rights. Section 4 deals with the creation of security interests while section 6 regulates the rights and duties of the parties to a security transaction.

One easily observable weakness in the set up in this law is that while prior security rights are valid, those have to be re-registered if the beneficiary is to obtain permanent protection. Kawoola and Nawaali (2019) notes that banks and other financial institutions holding securities such as debentures or chattel mortgages that had already been registered need to register their rights in terms of the new law. This is unnecessarily cumbersome and a double cost for those who had registered their rights in terms of the then existing law. The better approach should have been one where registrations done in terms of previous laws were to be regarded as valid until their full term.

Intellectual property is dealt in section 10 of the Act. Intellectual property in the Act is well defined (by section 2) to mean rights protected by copyright, industrial property rights, trademarks and any other related rights. As shall be discussed below, this definition is much broader than the definition in the Zimbabwean law. The Zimbabwean definition excludes certain IPRs from its ambit. The key point to note is that in Uganda commencing 2019 there is only one piece of legislation that regulates the registration of movable security. The scheme allows IP to be used as security for debts, thereby bringing the law in this aspect in line with laws from other countries particularly in Europe and the United States of America.
Kenya is another African country that recently adopted a similar law through the Movable Property Security Rights Act No. 13 of 2017. The key parts of the law are as follows. Rights to movable security rights are created through Part II, while security notices are registered in terms of Part IV. In addition, Part V regulates priority of rights. The rights and obligations of the parties are dealt with in Part VI. The other key part of the Act is Part VII which addresses

enforcement matters. The arrangement and order of the statute closely resembles the Ugandan Act discussed above. However, the Kenyan Act has slightly more detail than the former Act. In line with the desire to make the processes simple and easy Munga and Wabwoba (2017) notes that the Act does not prescribe a form for creation of a security right.

One of the major motivation for the creation of this law was that the need for a single legal regime for this sector. Prior to the new law there were a plethora of laws that regulated collateral in the market in Kenya. Wanyama (2019) notes that a total of 20 statutes regulated this field of law. The fragmented laws made doing business related to collateral security expensive, risky, time consuming and difficult. There was therefore a great need for a comprehensive and consolidated movable collateral security regime in the country. Njoroge Rugeru and Company (2017) has noted that the Act has introduced numerous advantages by enhancing access to credit facilities using moveable property as collateral which will benefit small and medium-sized enterprises.

In relation to IPRs, the Act defines intellectual property in the same way as in the Ugandan Act. Section 10 of the Ugandan Act is similarly worded to section 14 of the Kenyan Act in so far as the application of tangible assets with underlying IP rights are concerned. The sections say that rights in the tangible assets do not extend to the IP and vice versa. Section 81(4) of the Act provides that the choice of law rules applicable to creation and priority of rights registered over IP is the law of the land where the IP right is registered. Precisely the section says "The law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the country in which the intellectual property is protected."

Despite the detailed explanation of processes related to movable properties one key weakness is that the use of intellectual property as security is scantily dealt with in the Act (Business Registration Service, 2020). The Business Registration Service tasked with the registration of movable security has bemoaned the lack of detail with regard to IP. The Business Service says that taking up Intellectual Property assets as collateral remains a challenge due to legislative gaps. The IP Laws do not envisage creation of charges over IP thereby creating an enforcement problem (Business Registration Service, 2020). Another weakness in the Act is that

it does not provide any mechanism to verify that a person who registers a notice on movable property in their name is the owner of the property (Njoroge Rugeru and Company, 2017). The problem it poses is the risk of disputes around ownership. Disputes can lead to unnecessary and costly litigation which small businesses and individuals may not afford in the long run.

The Zimbabwean Movable Security System

On the 4th August 2017 thorough General Notice 442/2017, the government of Zimbabwe published the Movable Property Security Interests Act (Chap I4:I5) into law. This law introduced for the first time in Zimbabwe a law that regulates movable security in the country. Prior to that, the country relied on a number of legal instruments such as the Agriculture Finance Act, the Stamp Duty Act, the Hire Purchase Act and the Bills of Exchange Act among others, to regulate movable security. In addition, the common law regulated movable security to a greater extent. The introduction of the new law codifies and reduces the applicable statutes to the subject matter. The Act is not yet operational though.

The preamble of the Act simply states that the purpose of the Act is to "provide for the registration of movable property security interests; to amend various Acts; and to provide for matters incidental thereto". The Act seeks to enable entities and individuals to use their movable property as collateral in accessing credit. According to Pasi and Moyo (2019) while movable property could be registered as security in the past as notarial bonds, the scattered legal framework and the absence of a statute regulating the subject made the possibility uninviting to many. In addition, Notarial General Covering Bonds did not offer sufficient security to creditors. As a result, movable property was not a popular collateral security in the formal market. In line with this view, Pasi and Moyo (2019) say that for long, businesses and individuals who sought security for commercial transactions were largely limited to real security through various types of mortgage bonds over immovable security, while Notarial General Covering Bonds were generally not preferred as they gave insufficient security over movables.

An analysis of Movable Property Security Interests Act

The Movable Property Security Interests Act (hereinafter, Movable Security Act) creates a one stop shop in terms of providing a legal

framework for movable security in Zimbabwe. The Act assists individuals, small to medium enterprises and small business who do not have immovable property to access funding using movable property. The Act also safeguards creditors in that where a movable asset is given as collateral, it may be registered as such in a central electronic registry. Because, the central electronic registry is a public medium, anyone including creditors can search the platform to see what property has been offered as security. The Act assists small to medium enterprises access funding in the formal sector where they do not own immovable property (Njoroge Rugeru and Company, 2017; Business Registration Bureau, 2020; Pasi & Moyo, 2019). Unlike with an ordinary pledge and pawn broking there is a public official record of the transaction which can be available on demand.

Section 2 of the Act defines collateral as "a movable asset that is subject to a security interest; or b) a receivable that is the subject of an outright transfer". This definition clearly show that any movable asset such as car, livestock, furniture or other chattel may be used as security. Another interesting definition is movable asset which refers to "any tangible or intangible property including assets that may be or are affixed to immovable property". The reference to intangible property is key to the field of intellectual property which protects creations of the mind. To clarify matters intangible property is also defined in the same section. Further to that, the schedule does directly define intellectual property. This is defined as follows:

> "Intellectual property" means –
> (a) a copyright as defined in section 2(l) of the Copyright and Neighbouring Rights Act [Chapter 26 :05]
> (b) industrial property rights as defined in section 2(l) of the Industrial Designs Act [Chapter 26 :02]
> (c) a trade mark as defined in section 2(1) of the Trade Marks Act [Chapter 26:04] ; and
> (d) any other rights related to the rights set out in paragraph (a), (b) or (c); (First Schedule paragraph 1 of the Act)

The definition above does cover most fields of intellectual property that is industrial property and copyright. However, other forms of intellectual property are not addressed in the First Schedule cited above. Fields of intellectual property such as Patents and Utility Models are not mentioned in the above definition. This is a weakness as shall be discussed below.

Section 4 of the Act creates a Collateral Registry whose responsibility is to enable "individuals and business to utilise their movable property as collateral for credit'' (section 6 of the Act). In this regard, it registers security interests over movable property, amend or cancel the registered notices of security interest and makes accessible to the public information in registered notices with respect to security interests; and to maintain a database of relevant information of debtors and secured creditors. The Collateral Registry is a publicly available database of interests in, or ownership of movable assets allowing borrowers to prove their credit worthiness and potential lenders to assess their ranking priority in potential claims against a particular collateral (Pasi and Moyo).

To be effective, the costs for searching and filing applications before the registry should be reasonable otherwise the potential beneficiaries may be closed out. In the Kenyan context (Business Registration Service, Kenya, 2020) high search fees have forced some members of the public and small businesses to file applications without first checking on the priority of their applications. This becomes a problem for enforcement purposes where it may become apparent that an applicant has no priority at all. It is suggested that when the regulations are enacted they should peg reasonable levels of fees that will enable the system to be used by the public. Fees that are user friendly for all operations of the Registry are a necessity if the system is to benefit those it was intended to help in the first place.

The Act in Section 6 as read together with the First Schedule regulates the registration of notices in the Collateral Registry. Once registered a Lender who filed the notice immediately becomes a secured creditor. Therefore the timing of a registration of a notice is a critical factor as it provides the lender with a right of priority. Searches may also be utilized by potential lenders to establish whether a movable asset is encumbered or to verify whether a security interest has been discharged following payment of a debt or performance of the secured obligation. Additionally, potential lenders may utilize the Collateral Registry to benefit them, by registering as users, and gaining access to information on whether the movable asset has been pledged as a security interest in whole or part for another debt.

Enforcement of registered interests is handled by section 8 of the Act. Section 8(1) provides that every registered notice of a security

interest is deemed to be a liquid document enforceable by way of provisional sentence proceedings. This provision is good in so far as it simplifies the execution and enforcement of an interest in the event of a default. However, the enforcement regime provided in the Act requires the prosecution of claims in the High Court only. Reference to provisional sentence in section 8 suggests that only the High Court has jurisdiction since Magistrate Courts do not entertain such claims. In the same vein, section 9 provides that registered notices and other entries in the Collateral Register are regarded as conclusive proof of rights and obligations stated therein. This reduces the burden of proof on the Lender in the event of taking the legal route.

The Positives in the Movable Security Act

The starting point in discussing the positives stemming from the Act lie in the introduction of the very act. It does appear from a reading of the Act that this law was crafted with the desire to make doing business in Zimbabwe easy. For example section 5(1) states that the purpose of the Collateral Registry is "to facilitate commerce, industry and other socio-economic activities by enabling individuals and business to utilise their movable property as collateral for credit". It is a positive factor that parliament introduced this law to cater for individuals and small businesses that could not access credit from the formal financial market due to lack of immovable collateral security. The law thus empowers those with less means to participate in the formal lending market. This protects them from dealing in the informal market where they could fall prey to loan sharks and usurious interest rates as exemplified in the case of Kufahandiori v Chipuriro 2004 (1) ZLR 74 (H). In the case usurious rates were charged coupled with a very unfair *pactum commissorium* that allowed the lender to take the pledged car.

It would be interesting to see whether financial institutions will adopt and welcome this development through providing credit in return for movable security. Banks will use their discretion taking into account relevant factors to make their decisions (Njoroge Rugeru and Company, 2017). It is interesting that in a related matter A2 Long Leases for agricultural land given to resettled farmers by the state were shunned by banks. The government had asserted that the A2 leases were bankable but banks in Zimbabwe refused to accept them as security for credit. These matters are discussed by Matondi and Masengwe (2012), Makuvaza and Dube (2022). Masengwe et al, notes that because the leases were offered without

land surveys and proper demarcations they could not offer the beneficiaries bankable security. As a result, theory and practice were at loggerheads. It is hoped that in this case, banks will welcome the move and accept movable security.

It positive that the Act includes intellectual property as one intangible property that can be used as security in terms of this law. Earlier versions of the bill did not directly include intellectual property as an asset that could secure one's indebtedness to a third party. It is gratifying that parliament took into account concerns that members of the public and academic writers raised in order to improve the law. The inclusion and securitisation of intellectual property rights is a step in the right direction for Zimbabwe. Other regional countries have also adopted this approach (Oke, 2019; Kawoola and Nawaali, 2019; Munga and Wabwoba, 2017). This means that inventors, artists and designers can use their IP rights as security and be able to access credit in the formal lending system. The Act indirectly supports small to medium scale enterprises (SMEs) and individuals to obtain credit from financial institutions. This is so because the challenge of failing to raise security from the formal market affected individuals and small businesses most (Chikwereti, Foya and Muyeche, 2022). In addition, the preamble of the Act makes reference to these two groups of persons. Thus, the window of opportunity provided by this law is a milestone for individuals and small businesses such as SMEs, small scale farmers, small scale manufacturers and the informal sector generally (Sachikonye and Sibanda, 2016).

The creation of a Collateral Registry is a huge advantage for lenders and debtors alike. The Registry is a public platform where members of the public can access information at a small cost. Just like the Deeds Registry, Intellectual Property Office Registry and the Company Registry, searches for information and inquiries can be made at the forum. Therefore, a lender can lend their money with full knowledge of the status of the secured property they are receiving as security. Cases of fraud in relation to the secured property are thus minimised. It is important to note that minus the collateral registry secured movable collateral can be sold to unsuspecting third parties creating loss to either the lender or the purchaser or both. The registry thus makes public what could otherwise have been a private affair. It is also a good attribute that the act provides that the security right automatically extends to proceeds of a secured asset.

The Negatives in the Movable Security Act

A number of negatives can be pointed out in the way the Act is framed. The first negative factor is that despite the law being enacted in 2017, the law is still to be promulgated to date. The year 2023 is the sixth year since the enactment of the law. One wonders why the notice to operationalize and the regulations have not been published in terms of s1 (2) of the Act. While parliamentary processes to introduce a new law take time and may face a lot of bottlenecks, the same cannot be said for publishing the commencement date of a law. Delays in promulgating the law suggests a lack of commitment to continue to improve the ease of doing business on the part of the state.

Another problem in the law is that taking up Intellectual Property assets as collateral remains a challenge due to legislative gaps. The substantive IP Laws do not envisage creation of charges over IP thereby creating an enforcement problem (Business Registration Service, 2020). One glaring omission is that the Act does not amend any section of the pre-exiting IP Laws to make them compliant with this new dispensation. On paper it is possible to register IP as security but the process of doing so is not directly provided or explained. What kind of charges will be created over the IP rights and will the IP registers be endorsed with a notice once a security notice is registered over the IP right? The laws of Nigeria are however, clearer in this regard. Section 2(1) (c) of the STMA Act mandates every public registry to be coordinated and have an interface with the movable security registry (Oke, 2019).

In the Zimbabwean context there is therefore lack of clarity on the operational framework. Regulations when crafted will close some of these gaps. Copyright law in the United States for example, allows a lender to file an assignment, mortgage, or exclusive license with the Copyright Office. Similar arrangements are not made in the law under discussion in Zimbabwe. One important issue to note is that in the United States the filing must specifically identify the work, which the instrument pertains to (Copyright Law of the United States, 2016). In the Zimbabwean law such clarity is lacking. The lack of linkages and connectedness to existing IP laws exemplifies a challenge. It is as if the inclusion of IP as a security under the scheme of the Act was an afterthought. This means that IP laws need to be updated to be at par with the new security law that is available through the recent Act.

In addition, enforcement matters of the same IPRs is not as clear cut as it should be. How will an IPR such as a patent be deemed a liquid document for purposes of enforcement? How will be the value of the patent or a trademark be determined by a foreclosing court? It is difficult to fathom. It is hoped that the regulations when they are finally made will address some of these legislative gaps. Perhaps some of the issues will be plugged by the regulations.

Allied to the above challenge, is the definition of intellectual property in section 2 of the Act. As alluded to in paragraph 2.1 above the definition of IP in the Act is less than adequate for a number of reasons. Firstly one key form of IP, patents are left out in the definition. It appears that the omission of patents is an error which must be corrected. This is because the reference to "industrial property rights" in part 'b' suggests that the lawmaker wanted to provide a definition for all industrial property rights which include patents, trademarks and industrial designs but somehow ended up defining industrial designs only. This is because the latter part of the sentence addresses industrial designs only. This clearly reads like an error. It requires correction. Further, there are other forms of IP rights that are not mentioned at all in the Act. These include Utility Models and Seed and Plant Variety rights among other rights. Whether this absence was by design meaning that these IPRs cannot provide movable security or a case of an omission is not very clear. For utility models the explanation could be that this substantive right is not provided for in the national law. For plant variety rights though this may require a resolution.

Experience gained from applications filed in Kenya has shown that a lack of a standard way of description for most movable assets pose an implementation hurdle. Different lenders may describe the same asset differently thereby creating confusion in the Registry (Business Registration Service, Kenya, 2020). This problem suggests a need for regulations that help practitioners and the public in describing key movable assets. As it is now the Act does not help in this regard. This is however, understandable since this is an issue that can easily be provided for by the regulations to the act. One hopes that the regulations will pick that up.

Conclusion

From the above discussion it is submitted that there are a number of areas and practices that may require improvement in the law. Some of these improvements may only require clarity being added into the Act while in some cases amendments to the Act may be necessary. The following proposals and recommendations are made to improve the statutory framework surrounding movable property security law in Zimbabwe. Firstly other fields of IP are left out in the definition of IP in the Act. These other subject matter of IP such as patents and plant variety rights may need be added to the list of IP in the Act. Secondly, for Zimbabwe to benefit from the new legal regime, the Movable Security Act must be urgently be made operational. This means that the date of operation of the Act must be urgently gazetted. The gazetting of the law must also come with regulations to operationalize the movable security system. Without relevant regulations providing for the procedures, forms to use and other relevant criteria the Act can become a white elephant. It is also suggested that the regulations must also attempt to standardise descriptions of some key movable properties so that there can be a degree uniformity and standardization in the movable security system. As has been seen above, the Kenyan Act attempts to do this very well. This is worth emulating. In order for the law to benefit the people it sought to help namely small businesses and individuals to access credit, the costs for carrying out searches and filing notices must be as reasonable as possible so that the unbanked community of informal sector players can access this legal system and its attendant benefits. One weaknesses noted above, was that Intellectual Property statutes were not affected by the introduction of this law. It is strongly recommended that these statutes should be amended and updated to ensure that they are compliant to the Movable Security Act. This compliance will help in implementing and enforcing intellectual property as a security in Zimbabwe. As it is, there are some critical gaps that may dissuade those that may be ready to accept IP as collateral. If the IP statutes and the new security law are congruent the use of IP as security and its recognition in the Zimbabwean market may rise. Despite the gaps and issues raised, the new law has great promise to the field of security law in general and IP in particular. The government did right in easing access to finance for the unbanked population of Zimbabwe though the introduction of the Movable Security Act.

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