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2016 – Study Question (General)

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Security interests over intellectual property

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I. Current law and practice

You are reminded that **IPRs** refers to patents, trademarks and registered designs only.
If more than one type of security interest is available under your Group's current law, please answer the questions for each type of security interest, as applicable.

Availability of security rights

1) Does your Group's current law provide for the possibility of creating security interests over IPRs?

yes

Please explain:

For the purposes of our response, the phrases:

- “Security Provider” refers to the owner of IPRs and may be a person or body corporate.
- “Security Taker” refers to a person or body corporate which has or wishes to advance monies to the Security Provider where such advance has been or will be secured on one or more of the Security Provider’s IPRs.

If yes, please answer Questions 2) to 14) inclusive before proceeding to question 15) and following.
If no, please proceed directly to question 15).

2) Are the available types of security interests defined by specific provisions relating to security interests over IPRs or by general commercial law principles (e.g. specific provisions in your Group's patent legislation rather than general commercial provisions that are applicable to tangible personal property as well as to patents)?

yes

Please explain:

The availability of security interests over IPRs in Singapore is defined by a combination of statutory provisions and general commercial law. To comprehend this legal framework, it is crucial to draw the following distinction:

1. Statutory provisions set out the available types of security interests (i.e. assignments, charges, etc.) and the basic procedural requirements for obtaining and protecting these interests.
2. However, general commercial law governs the substance of the agreements creating security interests. In other words, parties are free to agree on what to securitise, and the rights and obligations that accompany such securitisation.

The 3 IP statutes relevant to this study (i.e. the Trade Marks Act (Chapter 332), Patents Act (Chapter 221) and the Registered Designs Act (Chapter 266)) do mention that IPRs may be securitised through assignments, mortgages, and charges. These statutes also set out some basic procedural requirements for the creation and protection of security interests in IPRs.

- Under the Trade Marks Act and Registered Designs Act, the assignment of a registered trade mark or registered design by way of security “is not effective unless it is in writing signed by or on behalf of the assignor or, as the case may be, a personal representative”. However, not registering the security transaction does not mean that the security transaction itself would become void. Rather, until the registration occurs, “the transaction is ineffective as against a person acquiring a conflicting interest in or under the registered trade mark in ignorance of the transaction”.
- Under the Patents Act, it is stipulated that “any assignment or mortgage of a patent or any such application, or any right in a patent or any such application ... shall be void unless it is in writing and is signed by or on behalf of the assignor or mortgagor”. Like the Trade Marks Act and Registered Designs Act, the Patents Act does not state that not registering the security transaction would void the transaction in and of itself. However, a person “... shall be entitled as against any other person who claims to have acquired that property by virtue of an earlier transaction, instrument or event to which this section applies if, at the time of the later transaction, instrument or event ... the earlier transaction, instrument or event was not registered.”

In addition to the IP statutes, the availability of security interests over IPRs may also be affected by other statutes such as the Companies Act (i.e. requirement to register charges), and any applicable regulations set out by the Accounting and Corporate Regulatory Authority of Singapore.

Apart from the above-mentioned statutory and regulatory requirements, IP securitisation in Singapore is generally governed by commercial and contractual principles. For example, the Trade Marks Act does not dictate substantive terms (e.g. interest rate payable, events of default, preservation of value, etc.) governing the relationship between the Security Provider and the Security Taker. Indeed, the Registrar of Trade Marks may not enquire as to the substance of the security transaction if the procedural requirements as set out in the Trade Marks Act are fulfilled.

- 3) Under your Group's current law, what types of security interests are available for IPRs? In addressing the questions in sub-paragraphs a) to c) below, please specify briefly the main characteristics and differences of the available types of security interests.

- a) Does your law provide for security interests which are characterized by the full assignment of the underlying IPR to the security taker? For example, an assignment of the IPR for the purpose of security or authorization to dispose/use fully in the event of default.

yes

Please explain:

Under section 38(5) of the Trade Marks Act and section 32(8) of the Registered Designs Act, registered trade marks and registered designs are assignable by way of security.

Under section 41(1) of the Trade Marks Act and section 35(1) of the Registered Designs Act, applications to register trade marks and applications to register designs are also assignable by way of security.

The Patents Act, unlike the Trade Marks Act and Registered Designs Act, does not make any specific mention of “assignment by way of security”. However, section 43(3)(b) of the Patents Act does mention the “the mortgage of, or grant of any other security interest in, a patent or application”. To our understanding, a mortgage of personal property, like an assignment, involves the full transfer of legal ownership to the mortgagee, subject to an equity of redemption. Therefore, we are of the view that the Patents Act does indeed provide for the full assignment of IPRs to the Security Taker.

b) Does your law provide for security interests that authorize the security taker to realize the security interest only in the event of default? For example, a pledge over an IPR that authorizes the pledgee to liquidate the pledged IPR in the event of default (but not to otherwise dispose of the IPR).

yes

Please explain:

However, note that this is governed by general commercial and contractual principles in addition to the 3 relevant IP statutes.

As a starting point, Singapore’s statutory law provides for the creation of charges over personal property (e.g. plant and machinery). Under the 3 IP statutes, patents, trademarks and designs are stated to be personal property. As such, charges may be created over patents, trademarks and registered designs.

- Under section 38(6) of the Trade Marks Act and section 32(8A) of the Registered Designs Act, registered trade marks and registered designs may be the subjects of charges in the same way as other personal or movable property.
- Under section 41(1) of the Trade Marks Act and section 35(1) of the Registered Designs Act, applications to register trade marks and applications to register designs may be the subjects of charges in the same way as other personal or movable property.
- Under section 41(2) of the Patents Act, any patent or any such application, or any right in it, may be mortgaged; and under section 2(1) of the Patents Act, the term “mortgage” is defined to include a charge for securing money or money’s worth. It is important to note that under section 131(1) (read with section 131(3)) of the Companies Act, where a charge is created by a company, the company must register with the Registrar of Companies any floating charge over a company’s property, and any fixed charge over IPRs. If not so registered, “...the charge shall, so far as any security on the company’s property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company”. This would be notwithstanding registration of the charge before the Registrar of Patents, Registrar of Trademarks or Registrar of Designs. Where a charge has been created, the chargee has the right to realise the charged property in the event of default or where some other condition as may be agreed between the parties are fulfilled. Charges differ from assignments and mortgages because there is no transfer of ownership from the chargor to the chargee upon the creation of a charge.

However, we reiterate that the 3 IP statutes do not concern themselves with the contents of or substance of the charge that is being registered.

- c) Does your law provide for security interests that authorize the security taker to use the underlying IPR? For example, usus fructus rights that authorize the creditor to use and/or realize proceeds from the exercise of the IPR only during the term of encumbrance. Is any right to use the encumbered IPR conditional upon default of the security provider?

no

Please explain:

In Singapore, legislation does not expressly provide that a Security Taker may use or profit from the underlying IPR during the term of the security transaction.

However, as mentioned above, legislation does provide for security to be provided through the assignment of IPRs (assignment by way of security – see preceding paragraphs), and assignees by their very nature as owners, may use the IPRs. In any case, rights to use encumbered IPRs are often determined in the contract/agreement creating the security interest.

Consequently, depending on, (1) the type of security interest, and (2) what the parties agree on during in connection with the creation of the security interest, the right to use the encumbered IPR may or may not be conditional upon the default of the Security Provider.

- 4) If more than one type of security interest is available under your Group's current law, what types are commonly used for IPRs? Please also specify if certain types of security interests are exclusively used for certain types of IPRs in your country. For example, patents may commonly be encumbered with pledges, while trademarks may commonly be assigned to the security taker.

Securitization of IP in Singapore may be said to be in its infancy. Therefore, we are unable to comment on which type of security transaction is more common for any particular type of IPR. However, we are aware that charges have been created over IPRs in Singapore. Furthermore, under the Intellectual Property Office of Singapore's IP Financing Scheme, patents must be charged to the financial institution.

Effects of security interests

- 5) Is the security provider restricted in their right to use their IPR after providing a security interest over that IPR? For example, in respect of their right to grant licenses, or the right to use the protected subject matter. Please answer for each available type of security interest.

yes

Please explain:

Where a security interest is provided by way of an assignment or mortgage by way of security, the Security Provider will be restricted in its right to use its IPR unless the assignee grants a licence back to the assignor to permit the latter's continued use of the IPR.

Where a security interest is provided by way of a charge (either fixed or floating), the Security Provider is unlikely to be restricted in its right to use its IPR. However, this is subject to the terms & conditions of the agreement reached between the parties.

6) May encumbered IPRs be assigned to third parties by the security provider?

yes

Please explain:

Subject to the terms agreed between the Security Provider and Security Taker, it may be possible for an encumbered IPR to be assigned if the nature of the security interest is a charge. However, it is likely that the assignee will have to take the IPR subject to the encumbrance.

However, if the IPR is encumbered by an assignment or mortgage, there would have been a transfer of ownership to the assignee or mortgagee and the Security Provider will therefore be unable to once again assign the IPR to another party.

7) If yes:

a) under what conditions may an IPR be assigned (e.g. obligation to obtain consent from the security taker, public notification or registration)?

If the security interest is a floating charge, the Security Provider may assign the IPR to third parties as long as the floating charge has not crystallised. However, the Security Provider should, in good faith, notify the Security Taker about the assignment and notify the assignee about the existing encumbrance.

If the security interest is a fixed charge, the Security Provider may only assign the IPR to third parties with the consent of the chargee.

b) does the IPR remain encumbered with the original security interest for the benefit of the security taker?

no

Please explain:

Yes and No

If the security interest is a floating charge, the IPR will not remain encumbered with the original security interest after it has been assigned to a third party.

If the security interest is a fixed charge, the IPR may remain encumbered with the original security interest after it has been assigned to a third party with the consent of the chargee.

Note that in both cases 7(a) and 7(b), if the charge (whether fixed or floating) has been registered or recorded on the Register, that recordal would likely have to be removed before the assignment may be recorded. The Trade Marks Act is silent on this point but section 39(7) does provide that "(7) Provision may also be made by rules as to the amendment of or removal from the register of particulars relating to a security interest on the application of, or with the consent of, the person entitled to the benefit of that interest."

8) What are the rights of the security taker before default (e.g. entitlement to damages, injunctions against infringers, or license fees)?

If the security interest is created by assignment, the Security Taker gains ownership of the IPR and therefore has the rights of the IPR owner. However, the Security Taker would only be entitled to damages etc. if the assignment was recorded and the Security Taker is the proprietor on record.

If the security interest is a fixed or floating charge or by way of a mortgage, the Security Taker *prima facie* has no right to damages etc. because the Security Taker is not the proprietor on record. He merely has a security interest in the IPR. However, we would expect that the agreement between the Security Provider and Security Taker would have provisions dealing with such matters. For example, the Security Taker might wish to have a say as to whether or not infringement action should be taken since an infringement action might lead to an attack (e.g for revocation) on the IPR. The rights of the Security Taker before the Security Provider's default are likely to depend on what has been agreed by the parties in the contract/agreement to create the security interest.

9) Who of the security provider or the security taker is responsible for maintenance and defence of the IPR provided as collateral?

If the security interest is created by assignment, the Security Taker gains ownership of the IPR and becomes responsible for the maintenance and defence of the IPR provided as collateral.

If the security interest is a fixed or floating charge, responsibility for the maintenance and defence of the IPR will depend on what has been agreed by the parties in the contract/agreement to create the security interest. The responsibility ought to rest with the Security Provider but since the Security Taker would have a vested interest in the continued validity and enforceability of the IPR, the agreement between the Security Provider and Security Taker would likely have provisions dealing with the maintenance of the IPR and the consequences of not maintaining the validity or currency of the IPR.

10) What are the legal consequences if the underlying IPR expires or is revoked? For example, the security right lapses simultaneously; the creditor has a compensation claim against the security provider.

If the underlying IPR expires or is revoked, the legal consequences are likely to depend on what has been agreed by the parties in the contract/agreement to create the security interest.

11) Can any of these effects of security interests over IPRs before default be modified by contractual provisions between the parties? If so, which effects?

yes

Please explain:

Some of the effects of security interests on the use, maintenance, defence, and enforcement of encumbered IPRs may be modified to varying extents by contractual provisions.

For example, the Security Taker who gains ownership of the IPR by assignment may license the rights to use the IPR back to the Security Provider. In another example, the Security Taker who gains ownership of the IPR by assignment has the primary responsibility to maintain, defend, and enforce the IPR, but may contract with the Security Provider to pay for the costs of discharging these responsibilities. Finally, the holder of a charge over an IPR may contract to allow the chargor to deal with the IPR, or to compel the chargor not to act in a manner which may prejudice the IPR.

Applicable law

12) Does your Group's current law provide for conflicts of laws as to the availability and effect of security interests over IPR portfolios containing foreign as well as national IPRs?

no

Please explain:

Uncertain.

We are unaware of any such provisions under our Group's current law. Such conflict of laws issues are likely to be dealt with as a matter of private international law.

13) Which national law applies as to creation, perfection and effect of security interests over foreign IPRs? For example, where a US patent is provided as collateral in respect of a financial transaction in Europe.

This is a complex question that we believe should be examined in parts and it our view that there is no clear answer to the question.

The substantive law governing the underlying security transaction should be the national law chosen by the parties to govern the security transaction. In that sense, the creation of the security interest and the rights & liabilities of the parties would be dealt with under the law of the contract governing the security transaction.

However, the law governing the recordal and/or rendering the security interest enforceable should be the law of the country in which the IPR is registered. This stems from the view that IP is largely territorial in nature and the court of one country cannot direct the IP Registrar or courts of another country to perfect the security interest in the IPR or the enforcement of that security interest.

For example, if a security interest over a Singapore patent is sought in relation to a financial transaction outside of Singapore, the creation of the security interest would be under that foreign agreement. However, if Singapore procedural law was not followed, e.g. because the foreign agreement was not in written form, Singapore law would consider that transaction to be void and therefore would not give effect to the foreign agreement (effectively determining that no security transaction exists).

As a further example, if a Singapore trademark was used as a security interest and such security interest was not recorded in accordance with Singapore law, then even if the foreign agreement giving rise to the security interest was valid and enforceable, that "foreign" security interest may still lose out to a bona fide purchaser for value without notice who took a later security interest in the Singapore trademark (or even an assignment of that Singapore trademark).

If the requirements of Singapore law are not satisfied, there is no guarantee that a security interest over a Singapore IPR will be recognised, especially if there are conflicting interests.

14) Can a choice of law provision in a security interest agreement over IPRs overrule the applicable law as to availability and effect?

no

Please explain:

The statutory provisions in Singapore governing the availability and effect of security interests in

Singapore IPRs are unlikely to be overruled by a choice of law provision.

It is noteworthy that under section 13 of the Choice of Court Agreements Bill (a Bill which has been passed by Singapore’s Parliament but has yet to commence), the Singapore courts must recognise and enforce a foreign judgment if that foreign judgment results from an “exclusive choice of court agreement”. However, the Choice of Court Agreements Bill also provides grounds under which the Singapore courts can refuse to recognise or enforce foreign judgments. Such refusal is likely to occur if a foreign judgment conflicts with Singapore’s statutory provisions governing security interests over IPRs.

Additional question

15) Regardless of your Group's current law relating to security interests over IPRs, is it possible to create a solely contractual regime for security interests over IPRs (i.e. beside the types of security interests defined by law) that is enforceable between the contracting parties?

yes
Please explain:

In fact, this is the current situation except that registration of the security interest at the IP registry confers priority to the registrant.

II. Policy considerations and proposals for improvements of the current law

16) Is your Group's current law regarding security interests over IPRs sufficient to provide certainty and predictability to the parties?

yes
Please explain:

Singapore’s current law does provide a sufficient measure of certainty and predictability because (1) it expressly states that security interests which have been granted over IPRs in Singapore may be registered with the appropriate registries, and (2) sets out the procedural requirements for obtaining and protecting such security interests. For example, the Trade Marks Act, Registered Designs Act, and Patents Act all provide for a registration mechanism to deal with competing security interests in IPRs in Singapore.

Additionally, Singapore general commercial law is fairly advance in relation to banking and finance matters. Lending monies, secured on IPRs, would not pose undue or unusual demands on the law.

However, more could be done at the national and international level to clarify the rights and obligations of parties in relation to cross-border transactions and further address specific rights and obligations as between Security Takers and Security Providers.

17) Under your Group's current law, is there an appropriate balance between the rights between security takers and security providers? For example:

- a) are there situations in which the rights of security takers should be limited or extended (e.g. if assignment of an encumbered IPR is possible by the security provider without involvement of the security taker)?

yes

Please explain:

Where an IPR has been assigned by way of security, the rights of the Security Taker to deal with the IPR should be limited such that the Security Taker cannot act in a manner that may prejudice the IPR during the period of encumbrance. This is in recognition of the fact that the Security Provider still has a residual interest in the IPR in the form of an “equity of redemption”. Borrowing from land law principles, there ought not to be any clog on the equity of redemption and given the nature of intellectual property (as opposed to real property), steps should be put in place to protect the validity/viability of the IPR during the period of encumbrance.

Where an IPR is the subject of a fixed charge, the rights of the Security Taker should be extended to allow it to seek remedies if the Security Provider acts in a manner that prejudices the IPR during the period of encumbrance.

- b) are there situations in which the rights of security providers should be limited or extended (e.g. if the security taker is authorized to dispose of existing licenses without involvement of the security provider)?

yes

Please explain:

Where an IPR is the subject of a fixed charge, the rights of the Security Provider to deal with the IPR should be limited such that the Security Provider cannot act in a manner that may prejudice the IPR during the period of encumbrance.

Where an IPR has been assigned by way of security, the rights of the Security Provider should be extended to allow it to seek remedies if the Security Taker acts in a manner that prejudices the IPR during the period of encumbrance.

- 18) Are there any aspects of these laws that could be improved? Are there any other changes to your Group's current law that would promote transactions involving IPRs as collateral? If yes, please briefly explain.

yes

Please explain:

As mentioned above, there are potential improvements to the existing law that would create more certainty in the field of IP securitisation and promote more transactions in this regard. Improvements would include (1) clarification as to whether the statutorily provided security interests are exhaustive, (2) greater clarity on the rights and obligations of Security Takers and Security Providers, as well as (3) more guidance on how cross-border security interests should be governed.

III. Proposals for harmonisation

- 19) Does your Group consider that harmonization of laws concerning security interests over IPRs is

desirable?

yes

If yes, please respond to the following questions without regard to your Group's current law. Even if no, please address the following questions to the extent your Group considers your Group's laws could be improved.

Security system regarding IPRs

20) Should there be specific provisions regulating security interests over IPRs (i.e. separate from security interests over tangible property) generally?

yes

Please explain:

There could be benefits to regulating security interests over IPRs.

There are several reasons for this:

- (1) On a theoretical level, the IPRs relevant to this study are statutory creations and security interests over such IPRs should continue to be governed by statute.
- (2) On a practical level, IPRs are affected by particular issues such as infringement, invalidation, and opposition, which do not affect tangible personal property. Specific provisions are therefore necessary to regulate security interests over IPRs.

Alternatively, general commercial law could evolve over time to address some of these issues. However, any such evolution can only take place through the courts interpreting financial contracts and applying existing statutory laws to rule on the issue. This will take time and there will be no certainty in the meantime, until the subject has been examined by the Court of Appeal (which is Singapore's apex court). For various reasons, not every case will be adjudicated upon by the Court of Appeal.

21) If no, should there be general commercial law principles that also apply to IPRs? If not, why?

yes

Please explain:

See comments above.

22) What types of security interests should be available as minimum standard in all countries?

As a minimum standard, security interests of a proprietary nature over IPRs should be available. This would include assignments, mortgages, and both fixed and floating charges.

It is suggested that possessory interests such as pledges and liens need not be part of a minimum standard because there are doubts as to whether IPRs can be physically possessed in all circumstances.

23) Should the law be applied differently depending on the type of IPR? For example, should patents be encumbered exclusively with pledges, should trademarks be assigned to the security taker for the purpose of security?

no

Please explain:

Effect of security interests

24) Should the security provider be restricted in their right to use their IPR after providing a security interest over that IPR (e.g. in respect of their right to grant licenses, or to use the protected subject matter)? If so, how?

yes

Please explain:

There should be some restrictions to ensure that the interests of the Security Taker are not unfairly jeopardised. For example, as mentioned above at Question 17(b), a Security Provider who grants a charge over its IPRs should have its rights to use the IPRs limited such that it cannot act in a manner that may prejudice the IPRs during the period of encumbrance.

25) Should the security provider be able to assign encumbered IPRs to third parties?

no

Please explain:

No, unless (1) the Security Taker consents to such an assignment; and (2) the third party is notified of the encumbrance and agrees to take the assignment subject to that encumbrance.

26) What should the rights of the security taker be before default (e.g. entitlement to damages, injunctions against infringers, or license fees)?

See our comments / responses in the paragraphs above.

27) Should the security provider or the security taker be responsible for maintenance and defence of the IPR provided as collateral?

yes

Please explain:

It depends.

Where the security interest is an assignment, the Security Taker becomes the owner of the IPRs and should therefore be responsible for the maintenance and defence of the IPRs provided as collateral. However, parties should be allowed to agree on arrangements such as where the Security Provider pays for the costs of maintenance and defence of the IPRs during the period of encumbrance.

Where the security interest is a charge, the Security Provider retains ownership until the charge is enforced, and the Security Provider should therefore remain responsible for the maintenance and defence of the IPRs provided as collateral before enforcement of the charge. However, as mentioned above, these responsibilities can be varied by contract between the parties.

28) What should the legal consequences be if the underlying IPR expires or is revoked (e.g. the security right lapses simultaneously; creditor gains a compensation claim against security provider)?

If the underlying IPR expires or is revoked due to the fault of the party responsible for its maintenance and defence, the other party should be entitled to remedies for any detriment suffered. For example, if the Security Provider negligently allows the charged IPR to expire during the period of encumbrance, the Security Taker should have remedies against the Security Provider. This can be in the form of a mandatory injunction to replace the expired IPR with another asset or for liquidated damages to be imposed.

If the underlying IPR expires or is revoked due to no fault of either party, the legal consequences should be determined by the security agreement between the parties. The lost may have to lie where it falls.

29) Should it be possible to modify these effects of security interests over IPRs before default by contractual provisions?

yes

Please explain:

Yes, provided that the contractual modifications do not conflict with other laws.

Applicable law

30) Which law should apply as to the availability and the effects of security interests where a foreign IPR is provided as collateral? Why?

The law of the country in which the foreign IPR is registered should apply.

This is because interests in IPRs are usually registered in national registries and under national laws and procedural requirements. It would be problematic for an IPR to be governed by foreign law since the judgment of a foreign court may not be enforceable in the country where the IPR is actually based.

For example, a judgment by a Malaysian court on the enforcement of a security interest over a Singapore patent may not be enforceable in Singapore if the security interest was not even created in line with section 41 of Singapore's Patents Act, which provides that "any assignment or mortgage of a patent ... shall be void unless it is in writing and is signed by or on behalf of the assignor or mortgagor".

31) Should a choice of law provision in a security interest agreement over IPRs overrule the applicable law? If yes, why?

no

Please explain:

Additional considerations and proposals

32) To the extent not already stated above, please propose any other standards your Group considers

would be appropriate to harmonize laws relating to security interests over IPRs.

It is suggested that there should also be harmonisation of the legal requirements for creating and perfecting security interests over IPRs.

At present, the requirements for creating and perfecting such security interests (i.e. registration, written instruments, etc.) differ from jurisdiction to jurisdiction. The resulting difficulty is that when IPRs are offered as security for cross-border transactions, the Security Taker receiving the foreign IPR as collateral may not be aware of the requirements for creating and perfecting the security interest. Consequently, such Security Takers may run into significant obstacles in enforcing their interests. Or it would be costly / pose an administrative difficulty to have to contend with multiple and potentially different regulatory requirements (essentially over the same IPR).

33) Please comment on any additional issues concerning any aspect of security interests over IPRs you consider relevant to this Study Question.

Bearing in mind the goal of promoting the use of IPRs as security, the setting of basic standards, methods, and processes for valuing IPRs should also be explored.

Please indicate which industry sector views are included in part “**III. Proposals for harmonization**” of this form:

General consideration of all industrial sectors since any industrial sector would generate IP that could be securitized.

Summary

Overall, Singapore’s existing IP securitisation regime is satisfactory in that it does provide a sufficient level of certainty and workability in relation to the availability of IP securitisation, the creation of security interests, and the resolution of competing security claims over IPRs.

Nevertheless, improvements can be made in areas relating to (1) what the respective rights and obligations of Security Takers and Security Providers should be, (2) how security interests in cross-border transaction are to be governed, (3) the harmonisation of laws governing the creation and substance of security interests over IPRs, and (4) how IPRs are to be valued for the purposes of securitisation.