

## Personal Property Securities

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In the same way real estate is frequently mortgaged as security to raise loans, it is also common practice for lenders or creditors in commercial transactions to require securities be given over business assets other than land, in order for businesses to acquire funds or goods more quickly at a favourable rate. This is where businesses need to be aware of the common pitfalls and legal issues involved in security over business assets, especially where intellectual property is involved.

All kinds of moveable chattels, goods, assets or negotiable instruments that are not land or fixtures on land (e.g. buildings) are considered “personal property” capable of being used as collateral in commercial transactions under the New Zealand Personal Property Securities Act 1999, and the similar Australian Personal Property Securities Act 2009 (“the PPSA”). Unbeknown to some, this also includes intangible goods such as intellectual property rights in patents and trade marks, or valuable commercial licences that exploit intellectual property rights.

As a result, many businesses have value and leverage intellectual property as security in commercial transactions, not only to raise funds from banks or other lenders, but also

to ensure compliance in distribution or supply agreements, as a hedge against failure in licensing/franchising arrangements, and as assets to increase value in sale and purchase of businesses. Such security interests entitle the security holder to claim possession of the secured intellectual property rights, and sell them to realise financial value in order to offset money owed.

However, as intellectual property rights cannot be physically “possessed” or “held” as security by the party requiring payment, the only way to ensure your security interest takes priority over other possible competing claims is to register them on the Personal Property Securities Register (“the PPSR”), which came into being in New Zealand in 2002. The Australian equivalent comes into effect in May 2011.

A first-come-first-served system, the PPSR establishes a single nationwide online system for the registration of security interests in all personal property assets, which provides adequate security to registered creditors by giving them priority over subsequent or unregistered security interests granted by the same debtor over the same asset. While it has no bearing on the actual validity of a security interest, having your security interest registered on the PPSR is vital in protecting your interests by obtaining priority over other interested parties.

The PPSR not only provides a nationwide system to register your rights, but also provides a public platform for ascertaining whether a business you are dealing with in fact has rights to trade/secure the intellectual property rights it claims to own.

Searching the PPSR is essential if you wish to extend credit to a supplier or distributor, assign certain rights and license to third parties, or invest in any entity that claims to own significant intellectual property.

The risk of failing to perfect your security interest on the PPSR is evident in the case of *Viacom Global (Netherlands) B.V. v Scene One Entertainment Limited (In Receivership)* CA 600/09 [2009] NZCA 457. Viacom Global, a subsidiary of Paramount Pictures, licensed Scene One to distribute Paramount Pictures DVDs in New Zealand. While the licence gave Viacom full title and intellectual property rights in the DVDs, Viacom did not register its interests under the PPSR. Meanwhile, Scene One also independently granted ASB Bank a blanket General Security Agreement over all of its assets (including the DVD stock) as is often required by banks. The bank promptly registered its interests on the PPSR and when Scene One went into receivership, the receiver was allowed to sell the DVDs to a retailer chain in order to pay back the bank, despite Viacom's rights under the contract to the DVDs and its copyright. The registration of ASB Bank's security interest was crucial in the court's eventual decision, where ASB Bank's first-in-line registration and validly executed security to the DVDs gave it unassailable rights and priority to the DVDs over Viacom, despite Viacom's rights under its contract with Scene One.

This case serves as a reminder to businesses which trade and exploit intellectual property rights, to ensure that not only a comprehensive contract is executed in commercial dealings, but also that key intellectual property rights, such as patents,

designs, or trade marks, as well as licences and products that rely on these rights, are protected under the PPSA either by registering your interests or excluding them from other registered creditors' interests.

With the imminent introduction of the Australian PPSA regime, it is important for businesses to understand how to protect assets and interests under the PPSA in both New Zealand and Australia. Given the potential risks involved in non-compliance you should take legal advice before proceeding.