

## Using Intellectual Property to Secure Financing after the Worst Financial Crisis Since the Great Depression

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# COMMENTS

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## INTRODUCTION

Ever since Thomas Edison first used his patent on the incandescent electric light bulb as collateral to secure financing to start his company, the General Electric Company, intellectual property has been able to be used as collateral.<sup>1</sup> Although not immediately thought of when securing financing, using intellectual property as collateral has occurred ever since the late 1800's with Thomas Edison.<sup>2</sup> In recent years, using intellectual property as collateral to secure financing has become quite popular.<sup>3</sup> However, as with most financing in general, the use of intellectual property as collateral has slowed due to the first recession in the twenty-first century. Even though there have been signs of the recession coming to an end and recovery starting in the beginning of 2010,<sup>4</sup> will the use of intellectual property to secure loans ever bounce back?

There are two types of intellectual property that can be used to secure financing: legal intellectual property and competitive intellectual property.<sup>5</sup> Legal intellectual property refers to patents, trademarks, copyrights, and trade secrets, while competitive intellectual property usually refers to proprietary know-how, collaboration activities, leverage activities, and structural activities.<sup>6</sup> This Comment will focus on using only legal intellectual property to secure financing so competitive intellectual property need not be discussed any further.

This Comment will explain the use of intellectual property to secure financing and then the possible future use of intellectual property as collateral. Part I will explain the history of using intellectual property as collateral in securing financing. Part II will explain the advantages and disadvantages of using intellectual property as collateral. Lastly, Part III will explain the use of intellectual property as collateral during the recession and then the possible future use of intellectual property after the recession. As the United States grows farther away from a

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1. See ANDRE MILLARD, EDISON AND THE BUSINESS OF INNOVATION 43-46 (1990).

2. Shawn K. Baldwin, "To Promote the Progress of Science and Useful Arts": A Role for Federal Regulation of Intellectual Property as Collateral, 143 U. PA. L. REV. 1701 (1994-95) (discussing the first use of intellectual property as collateral).

3. Darin Neumyer, *Future of Using Intellectual Property and Intangible Assets as Collateral*, THE SECURED LENDER (Jan./Feb. 2008), [http://findarticles.com/p/articles/mi\\_qa5352/is\\_200801/ai\\_n24392870/?tag=content;coll](http://findarticles.com/p/articles/mi_qa5352/is_200801/ai_n24392870/?tag=content;coll).

4. Roger Runningen, *Obama Says GDP Growth 'Affirmation' Recession Ending*, BLOOMBERG (Oct. 29, 2009), [http://www.bloomberg.com/apps/news?pid=20601103&sid=azBlz2DG\\_Q](http://www.bloomberg.com/apps/news?pid=20601103&sid=azBlz2DG_Q).

5. Neumyer, *supra* note 3.

6. *Id.*

manufacturing-based economy and closer to a technology-based economy, the use of intellectual property as collateral will continue to be more prevalent. Even though the use of intellectual property as collateral declined during the recession, it will increase again and continue to rise in use in the future.

#### I. BACKGROUND AND HISTORY OF USING INTELLECTUAL PROPERTY TO SECURE FINANCING

Collateral is used to secure financing in lending agreements. Collateral is a borrower's promise of specific property if a loan is not repaid.<sup>7</sup> When using intellectual property as collateral, the borrower is promising the rights of his intellectual property (be it patent, trade secret, trademark, or copyright rights) if he does not repay his loan.<sup>8</sup>

Intellectual property was first used as collateral to secure financing by Thomas Edison in the late 1880s.<sup>9</sup> Edison used his patent for the incandescent electric light bulb as collateral to secure financing for his own business.<sup>10</sup> That business would eventually become the General Electric Company.<sup>11</sup>

Using intellectual property as collateral did not really gain popularity until the end of the twentieth century.<sup>12</sup> The act of using intellectual property as collateral became more popular once the United State's economy started shifting from manufacturing-based to more intellectual-based.<sup>13</sup> This shift accelerated and became common once the increased cash flow from the licensing of intellectual property caught the eyes of those on Wall Street.<sup>14</sup> This economic shift occurred because of the merger and acquisition activity of the 1980's.<sup>15</sup> Soon the use of intellectual property as collateral became well known once intellectual-based transactions became the hot topic of the news. Such

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7. JOAN F. GARRETT, *BANKS AND THEIR CUSTOMERS* 99 (1995).

8. *Id.*

9. See MILLARD, *supra* note 1.

10. *Id.*

11. *Id.*

12. Daryl Martin & David C. Drews, *Intellectual Property: Collateral for Securitization or Lending*, THE SECURED LENDER (Jul./Aug. 2005), <http://www.allbusiness.com/legal/intellectual-property/1051949-1.html>.

13. Neumyer, *supra* note 3.

14. Martin & Drews, *supra* note 12.

15. Melvin Simensky, *The New Role of Intellectual Property in Commercial Transactions*, 10 ENT. & SPORTS LAW 5 (1992-93) (explanation of how mergers and acquisitions of the 1980s raised awareness of the importance of intellectual property in evaluating the value of companies and financing deals).

transactions included the sale of the song rights for both Jimi Hendrix<sup>16</sup> and the widely-known purchase of the Beatles catalog by pop musician Michael Jackson for \$47.5 million in the 1980s<sup>17</sup>, along with the widely popular speculation of the future of the catalog after the death of Michael Jackson.

Edison's use of his patent for the incandescent electric light bulb is a great example of the use of intellectual property to secure financing.<sup>18</sup> But patents are not the only form of intellectual property that can be used. As discussed above, other forms include trade secrets, trademarks, and copyrights.<sup>19</sup> This section will explain the types of intellectual property mainly used as collateral as well as the steps to take when using different kinds of intellectual property to secure financing.

### A. Background On Patents

What is a patent? 35 U.S.C. § 271(a) states that “[e]xcept as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefore, infringes the patent.”<sup>20</sup> Essentially, a patent gives an owner the right to prevent others from making, using, offering to sell or selling their patented invention for the length of the patent (right now 20 years for most patents).<sup>21</sup> For example, if an inventor patents an invention, that inventor is the only one who has the right to make, use, and offer to sell or sell that particular patented invention.

There are different categories of inventions that an inventor may patent. These categories include process, machine, composition of matter, manufacture, and an improvement on any of the previous categories,<sup>22</sup> which all fall under “utility patents.” These “utility patents” cover the useful aspects of inventions,<sup>23</sup> including two special categories of patents called design patents, which cover the aesthetic

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16. *Jimi Hendrix Song Catalogue Sells for \$15 Million*, JET (Nov. 20, 2006), [http://findarticles.com/p/articles/mi\\_m1355/is\\_20\\_110/ai\\_n26710286/](http://findarticles.com/p/articles/mi_m1355/is_20_110/ai_n26710286/).

17. *With Michael Jackson Dead . . . What About the Rights to the Beatles Catalog?*, TRENTLAPINSKI.COM (Jun. 25, 2009), <http://trentlapinski.com/?p=778>.

18. MILLARD, *supra* note 9.

19. Robert S. Bramson, *Intellectual Property as Collateral—Patents, Trade Secrets, Trademarks and Copyrights*, 36 BUS. LAW. 1567, 1570-73 (1981) (explaining the use of patents, trade secrets, trademarks, and copyrights as collateral).

20. 35 U.S.C. § 271(a) (2006).

21. 35 U.S.C. § 154 (2006).

22. 35 U.S.C. § 101 (2006).

23. Bramson, *supra* note 19, at 1570.

appearance of useful objects,<sup>24</sup> and plant patents, which cover certain types of asexually reproduced plants.<sup>25</sup> For an invention to be patentable, the patent must be useful,<sup>26</sup> novel,<sup>27</sup> and non-obvious.<sup>28</sup>

One main thing to think about when using patents as collateral is the fact that they are only enforceable within the United States.<sup>29</sup> Therefore, the protection given by 35 U.S.C. § 271(a) is only afforded to a patent owner within the United States.

### B. Background on Trade Secrets

“Trade secrets make up the majority of intellectual property.”<sup>30</sup> One of the most well-known trade secrets, and a great example of one, is KFC’s “secret blend of herbs and spices” in their Original Recipe Chicken.<sup>31</sup> According to the Uniform Trade Secrets Act, “trade secret” means:

[I]nformation, including a formula, pattern, compilation, program device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from no[t] being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>32</sup>

A trade secret may also protect blueprints, product formulae, manufacturing processes, customer lists, pricing and cost information, computer programs, and computer data bases.<sup>33</sup>

Essentially, trade secrets may be any form of information as long as (1) there are reasonable steps taken to ensure the information is kept

24. 35 U.S.C. § 171 (2006).

25. 35 U.S.C. § 161 (2006).

26. *See* Brenner v. Mason, 383 U.S. 519 (1966).

27. 35 U.S.C. § 102 (2006).

28. 35 U.S.C. § 103 (2006).

29. 35 U.S.C. § 271(a) (2006).

30. SHUBHA GHOSH ET AL., INTELLECTUAL PROPERTY: PRIVATE RIGHTS, THE PUBLIC INTEREST, AND THE REGULATION OF CREATIVE ACTIVITY 7 (2007).

31. Newsroom, KFC.COM, Feb. 10, 2009), <http://www.kfc.com/about/newsroom/021009.asp>.

32. UNIF. TRADE SECRETS ACT § 1(4) (amended 1985).

33. Bramson, *supra* note 19 at 1571.

secret and (2) the information must have some kind of economic value.<sup>34</sup>

In order for trade secrets to be properly utilized, they must be kept secret.<sup>35</sup> Therefore, certain precautions by a trade secret owner must be taken, such as: (1) signing confidentiality agreements with employees; (2) placing restrictions on access to secret information; and (3) carefully marking and limiting access to secret documents.<sup>36</sup>

### C. Background on Trademarks

Trademarks are used in connection with the interstate sale of goods. Protection of federal trademarks comes directly from the Constitution under the Commerce Clause.<sup>37</sup> 15 U.S.C. § 1125(c)(1) defines a mark as something that is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner.<sup>38</sup> The term "mark" includes "any trademark, service mark, collective mark, or certification mark."<sup>39</sup> The Lanham Act of 1946<sup>40</sup> statutorily protects trademarks and is the main statute for trademark law in the United States.<sup>41</sup> The Lanham Act also protects trade dress and product configuration.<sup>42</sup>

Trademarks are used for several different reasons, including: as a source identifier, to identify a good or service, to identify the quality associated with the mark, and to identify a certain culture or lifestyle. Three requirements exist for federal trademark registration. The first is that the mark must be used in interstate commerce;<sup>43</sup> this is because the power of the federal government to regulate federal trademarks comes from the Commerce Clause.<sup>44</sup> The second requirement is that the mark must be distinctive.<sup>45</sup> The third is that the mark cannot be banned from registration by 15 U.S.C. § 1052. The USPTO will allow registration of

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34. SHOSH, *supra* note 30 at 8.

35. *Id.*

36. *Id.*

37. U.S. CONST. art. I, § 8, cl. 3.

38. (2006).

39. 15 U.S.C. § 1127 (2006).

40. 15 U.S.C. ch. 22 (2006).

41. Other forms of protection include common law trademark protection. In this comment only federal trademark law covered under the 1946 Lanham Act will be covered in this comment.

42. 15 U.S.C. § 1127 (2006).

43. *See* Mountain Top Beverage Group, Inc. v. Wildlife Brewing N.B., Inc., 432 F.3d 651 (6th Cir. 2005).

44. U.S. CONST. art. I, § 8, cl. 3.

45. 15 U.S.C. § 1052 (2006).

a trademark under 15 U.S.C. § 1052 unless it is: a generic mark, likely to cause confusion with a pre-existing mark, functional, deceptive, primarily geographical, deceptively misdescriptive, suggesting a false connection, immoral or scandalous, disparaging, or a name and likeness without written consent.<sup>46</sup>

#### *D. Background on Copyrights*

A copyright gives a person exclusive control over the use of an original work of authorship.<sup>47</sup> A simple example of original work that one can obtain a copyright over is a fictional novel, but that is not the only type of copyrightable work. Copyrights can protect: literary works, musical works, dramatic works, pantomimes, choreographic works, pictorial works, sculptural works, graphic works, motion pictures and other audiovisual works, sound recordings, and architectural works.<sup>48</sup> Copyrights do not protect: ideas, procedures, processes, systems, methods of operations, concepts, principles, or discoveries.<sup>49</sup>

Owners of copyrighted works have exclusive rights to those works.<sup>50</sup> These exclusive rights are designated by 17 U.S.C. § 106:

The owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic,

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46. 15 U.S.C. § 1052 (2006).

47. 17 U.S.C. § 102 (1994).

48. 17 U.S.C. § 102(a) (1994).

49. 17 U.S.C. § 102(b) (1994).

50. 17 U.S.C. § 106 (1994).

or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>51</sup>

As you can see, different exclusive rights are conferred upon the owner of the copyright depending on the type of work.

*E. Statutory Analysis on the Use of Intellectual Property as Collateral*

In all fifty states, Article Nine of the Uniform Commercial Code regulates secured transactions within commerce.<sup>52</sup> For the most part, Article Nine applies to all consensual transactions that create a security interest in personal property.<sup>53</sup> Even though the phrase “intellectual property” does not actually appear in the text of Uniform Commercial Code Article Nine, intellectual property is a form of personal property and is therefore applicable to Article Nine.<sup>54</sup>

Even though Uniform Commercial Code Article Nine regulates the use of intellectual property as collateral, other federal laws, such as the Patent Act, the Lanham Trademark Act, and the Copyright Act discussed above, regulate the actual obtaining of intellectual property rights and infringement upon those rights.<sup>55</sup> Of the federal statutes regulating intellectual property, the Copyright Act contains the clearest information on security interests.<sup>56</sup> Provisions of the Copyright Act allow the lender to file any “assignment, mortgage, exclusive license, or any other conveyance”<sup>57</sup> with the Copyright Office.<sup>58</sup> One important issue is that the filing must “specifically identify the work which [the document] pertains [to].”<sup>59</sup> This means that a lender wishing to protect his security interest in a borrower’s copyright must register the possible conveyance with the Copyright Office.<sup>60</sup>

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51. *Id.*

52. *See* U.C.C. art. 9 (2005).

53. THOMAS M. WARD, INTELLECTUAL PROPERTY IN COMMERCE § 2:6 (2009).

54. *Id.* at § 2:7.

55. *Id.* at § 2:68.

56. Baldwin, *supra* note 2 at 1712.

57. 17 U.S.C. § 101 (1994).

58. 17 U.S.C. § 205(a) (1994).

59. 17 U.S.C. § 205(c)(1) (1994).

60. Baldwin, *supra* note 2 at 1712.

The Patent Act is not as clear as the Copyright Act, but it does contain recordation provisions for security interests.<sup>61</sup> The Patent Act mandates the recordation of an “assignment, grant or conveyance” of patents.<sup>62</sup> The Patent Act does not specifically state that mortgages be recorded however. Different courts have held this to mean that a lender must register the security interest in a borrower’s patent with the Patent Office, while others state that normal Uniform Commercial Code Article Nine procedures of securing interests are sufficient.<sup>63</sup>

The Lanham Trademark Act does not preempt any statute in securing interests in collateral. The Lanham Act only provides for an assignment of trademarks.<sup>64</sup> Courts have therefore found that filing under Uniform Commercial Code Article Nine provisions is sufficient.<sup>65</sup>

Naturally, because trade secrets are not filed with any governmental agency, Uniform Commercial Code Article Nine provisions are only used to secure interests in the trade secret.<sup>66</sup>

## II. ADVANTAGES AND DISADVANTAGES OF USING INTELLECTUAL PROPERTY AS COLLATERAL

As with using any property as collateral to secure financing, the use of intellectual property has its advantages as well as its disadvantages. This section analyzes the advantages and disadvantages and compares the results.

### A. *Advantages of Using Intellectual Property as Collateral*

Using intellectual property as collateral has many advantages. The advantages range from greater protection over the intellectual property to simply greater return the owner of the intellectual property earns.<sup>67</sup>

61. *Id.* at 1713.

62. 35 U.S.C. § 261 (2006).

63. *City Bank & Trust Co. v. Otto Fabric, Inc.*, 83 B.R. 780, 784 (D. Kan. 1988); *In re Transp. Design & Tech., Inc.*, 48 B.R. 635, 641 (Bankr. S.D. Cal. 1985) (holding that federal filing under U.C.C. Article Nine was sufficient); *City Bank & Trust Co. v. Otto Fabric, Inc. (In re Otto Fabric Co.)*, 55 B.R. 654 (Bankr. D. Kan. 1985) (holding that the federal Patent Act preempted the U.C.C., therefore filing under the U.C.C. was not sufficient, filing with the U.S. patent office needed to be done).

64. 15 U.S.C. § 1060 (2006).

65. *TR-3 Industr., Inc. v. Capital Bank (In re TR-3 Industries)*, 41 B.R. 128, 131 (Bankr. C.D. Cal. 1984) (holding that, when a lender did not file with the Patent and Trademark Office but did record a UCC statement indicating a security interest in general intangibles, such security interest was appropriately perfected).

66. *See* UNIF. TRADE SECRETS ACT (amended 1985).

67. *Martin & Drews*, *supra* note 12.

These advantages help businesses in need of collateral to make the decision to use their intellectual property to receive financing.

First, using intellectual property as collateral takes advantage of the property in more ways than normal. Most businesses take advantage of their intellectual property, which are patents, copyrights, or trademarks, through licensing.<sup>68</sup> However, using intellectual property as collateral, secures loans when money is needed without depending on the income from licensing. If the financing is nonrecourse, then the risk of licensing and not receiving royalties is transferred to the investors.<sup>69</sup> The risk of possible infringement and obsolescence is also transferred.<sup>70</sup>

Second, using intellectual property as collateral increases the owner's return through increased leveraging.<sup>71</sup> This can happen because, currently, many royalty streams are collected in one lump sum rather than over time. This lump sum can then be invested in future projects or current projects that have a higher return than the cost of financing.<sup>72</sup>

Third, intellectual property can be more secure than other forms of collateral.<sup>73</sup> Many investors only invest in intellectual property that is receiving licensing royalties. This investment option is chosen because the royalty payments are the ultimate source of cash that repay the loan. Using intellectual property as collateral is therefore more secure because through licensing, there is a consistent source of cash flow to repay the loan and therefore lower the risk of defaulting.<sup>74</sup>

#### *B. Disadvantages of Using Intellectual Property as Collateral*

The main source of disadvantages in using intellectual property as collateral is risk.<sup>75</sup> The general risks associated with the use of intellectual property as collateral are: market acceptance, obsolescence, maintenance, and legal risks.<sup>76</sup>

Market acceptance is always a risk when introducing a new product into a market, but when there is the weight of collateral on top of that, the risk is heightened. Market acceptance affects intellectual property

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Neumyer, *supra* note 3.

76. *Id.*

much more than other more established forms of collateral.<sup>77</sup> More established forms of collateral, such as tangible property, are generally more stable and provide appraisers and potential buyers with market information when assessing the value of the property.<sup>78</sup> Because intellectual property does not have this exactness in assessment and valuation, potential investors and creditors are less willing to invest because they know less of how the market will react to the property in the future.

The opposite of market acceptance is obsolescence.<sup>79</sup> As new offerings enter the market, the value of intellectual property associated with products in the market declines.<sup>80</sup> This can easily be seen in the world of computer technology with Moore's Law.<sup>81</sup> Moore's Law describes the long-term trend of computer hardware specifications, such as processing speed and memory capacity, that is expected to inexpensively double every two years.<sup>82</sup> This long-term trend can show why the value of a patent associated with computer technology can significantly decrease in only a matter of two years. Obsolescence can be reduced through proper loan structure, and therefore minimize the risk.<sup>83</sup>

Intellectual property needs to be maintained to retain its value.<sup>84</sup> This maintenance varies for the different types of intellectual property. For example, trade names and patents need to be protected from infringement.<sup>85</sup> Maintenance of intellectual property, much like any other property, is often neglected when a company is performing poorly.<sup>86</sup> This risk can also be minimized by continuing maintenance on the intellectual property assets.

There are multiple legal risks that affect intellectual property.<sup>87</sup>

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. David E. Liddle, *The Wider Impact of Moore's Law*, IEEE SOLID-STATE CIRCUITS SOC'Y (Sept. 2006), [http://www.ieee.org/portal/site/sscs/menuitem.f07ee9e3b2a01d06bb9305765bac26c8/index.jsp?&pName=sscs\\_level1\\_article&TheCat=2165&path=sscs/06Sept&file=Liddle.xml](http://www.ieee.org/portal/site/sscs/menuitem.f07ee9e3b2a01d06bb9305765bac26c8/index.jsp?&pName=sscs_level1_article&TheCat=2165&path=sscs/06Sept&file=Liddle.xml).

82. Nathan Myhrvold, *Moore's Law Corollary: Pixel Power*, N.Y. TIMES, Jun. 7, 2006, available at <http://www.nytimes.com/2006/06/07/technology/circuits/07essay.html>.

83. Neumyer, *supra* note 3.

84. *Id.*

85. 35 U.S.C. § 271 (2006).

86. Neumyer, *supra* note 3.

87. *Id.*

These legal risks can be split into two major categories: (1) ownership challenge and infringement and (2) expiration of contracts or rights.<sup>88</sup> Older and more established intellectual property will most likely not have the legal risk of ownership challenges associated with it.<sup>89</sup> Active monitoring performed by compliance specialists can also minimize the risk of infringement; this, however, costs more money than is already put into maintenance of the intellectual property.<sup>90</sup>

It is also important to check if the intellectual property has been registered with the necessary government agencies, such as the United States Patent and Trademark Office and the United States Copyright Office.<sup>91</sup> As previously discussed, it is important to determine whether there needs to be registration with the United States Patent and Trademark Office or the United States Copyright Office for using the intellectual property as collateral, as well as following normal Uniform Commercial Code Article Nine procedures.<sup>92</sup>

Though risks exist with using intellectual property as collateral to secure financing, these risks can be minimized. Once the risks are minimized, intellectual property can be just as safe as using real property as collateral.

### III. INTELLECTUAL PROPERTY USED AS COLLATERAL DURING THE FINANCIAL CRISIS AND THE FUTURE OF USING INTELLECTUAL PROPERTY AS COLLATERAL

Even though the use of intellectual property as collateral to secure financing decreased during the financial crisis at the end of the 2000-2010 decade, the use will once again steadily increase as America's economy becomes more and more intellectual-based rather than industrial.

#### *A. Intellectual Property use as Collateral During the Financial Crisis*

The recession changed many ways banks do business, including the risks they take when giving loans.<sup>93</sup> Giving loans can always be risky, but during recessions and times of economic crisis banks become much

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88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Ward, *supra* note 53, at § 2:7.

93. Joe Nocera, *So When Will Banks Give Loans?*, N.Y. TIMES, Oct. 25, 2008, available at <http://www.nytimes.com/2008/10/25/business/25nocera.html>.

more wary of giving out risky loans.<sup>94</sup> As previously discussed, along with using intellectual property as collateral comes some risks not seen when using real property, therefore, it could easily be understood why some banks are more reluctant to give out loans backed by intellectual property during times of economic crisis.

Even though the recession hurt many businesses, including those using intellectual property, the businesses using intellectual property as collateral and the banks loaning against intellectual property are not doing as poorly as one might think.<sup>95</sup> Intellectual property that is potentially perpetual, like trademarks, generally have a constant value even during an economic crisis.<sup>96</sup> However, that does not mean that trademarks and other stable intellectual properties can be neglected during times of market crisis.

There are even more risks associated with intellectual property during tough economic times.<sup>97</sup> During recessions, competitors may resort to extreme measures to ensure their own profitability.<sup>98</sup> This means that the legal risks previously discussed are heightened and cases of infringement must be watched more carefully during tough economic times.

The risks with using intellectual property as collateral demonstrate why banks have been more reluctant during recessions to use intellectual property as collateral rather than real property. During the recession, banks were reluctant to give loans at all, even when real property was used as collateral.<sup>99</sup> Therefore, loans based on intellectual property as collateral, which have risks and do not show as physical a value as real property, will be easily overlooked and considered too risky. This results in banks being hesitant to use intellectual property as collateral for loans.

### *B. The Future of Intellectual Property as Collateral to Secure Financing*

The advantages of using intellectual property as collateral to secure financing along with the increased use of intellectual property in American businesses will result in intellectual property being used more

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94. *Id.*

95. Jeremy Phillips, *The Impossible Nightmare? IP in recession*, 3 J. INTELL. PROP. L., No. 9, 535 (2008).

96. *Id.*

97. *Global recession increasing risks to Intellectual Property*, HELP NET SECURITY (Jan. 30, 2009), <http://www.net-security.org/secworld.php?id=6992>.

98. Phillips, *supra* note 95.

99. Nocera, *supra* note 93.

and more as collateral. As America moves even more away from an industrialized society and into an intellectual society, the use of intellectual property as collateral to secure financing will increase as well.

There are many other reasons why intellectual property is good to use as collateral and the use will increase more in the coming years even during future economic downturns.<sup>100</sup> First, intellectual property may still be used to generate revenues, even during economic downturns.<sup>101</sup> Second, in many instances the intellectual property's lifetime of revenue significantly extends beyond the recession.<sup>102</sup> Third, intellectual property alone may not be sufficient to receive financing during economic times but intellectual property along with real property may be used to secure financing more easily than using real property alone.<sup>103</sup> These examples, as well as many others, show that intellectual property is stable even during tough economic times. Therefore, if intellectual property is still useful and somewhat stable during even tough times, then intellectual property is even stronger and more stable during good economic times and therefore used more as collateral.

The use of intellectual property as collateral will also increase because of the increase of businesses that use intellectual property.<sup>104</sup> The types of businesses that use intellectual property on a regular basis are much more willing to use their intellectual property as collateral when attempting to secure financing. These types of businesses include software and computer companies, with patents and copyrights, and pharmaceutical companies with their pharmaceutical patents. These types of businesses are becoming more and more a part of the United States economy.<sup>105</sup> As businesses that rely on intellectual property become more popular, their assets in intellectual property will be used more and more as collateral when seeking financing.

Intellectual property being used as collateral will increase in the

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100. *Intellectual Property and Recession*, INTELLECTUAL PROP. INTELLIGENCE BLOG (Oct. 11, 2008, 18:29 CST), <http://www.ipintelligenceblog.com/2008/10/intellectual-property-and-recession.html>

101. *Id.*

102. *Id.*

103. *Id.*

104. Chelan David, *Banking and Finance: Intellectual Collateral*, SMART BUSINESS, Jan. 2006, available at [http://www.sbnonline.com/Local/Article/8046/75/62/Intellectual\\_collateral.aspx](http://www.sbnonline.com/Local/Article/8046/75/62/Intellectual_collateral.aspx).

105. Toni Bowers, *Colleges Report Increase in Computer Science Enrollment: What Does It Mean?*, TECHREPUBLIC, Mar. 3, 2010, available at <http://blogs.techrepublic.com.com/career/?p=1827>.

future. The use of intellectual property as collateral is indicative of a strong technology market, something the United States is trying to head towards.<sup>106</sup> Intellectual property used as collateral took a steep decline after the dot-com bust of 2000, but steadily increased again until the recession of 2008, in which loans in general were hard to obtain.<sup>107</sup> Once again, the use of intellectual property will continue to steadily increase as the market recovers. Sectors such as information technology and life sciences are growing industries in the United States.<sup>108</sup> Both of these growing sectors rely heavily on intellectual property in their everyday businesses. Along with their growth will come the increased use of intellectual property as collateral to secure financing in the United States.<sup>109</sup>

#### IV. CONCLUSION

As the United States grows further away from a manufacturing-based economy and closer to a technology-based economy, the use of intellectual property as collateral will continue to be more prevalent. Even though the use of intellectual property as collateral declined during the recession, much like it did after the dot-com bust; it will increase again and continue to rise in use in the future.

Even though intellectual property has been used to secure financing for over a hundred years, many intellectual property owners do not take advantage of their property in this way. There are disadvantages with using intellectual property to secure financing but there are many more advantages. During the last recession, these disadvantages pushed many banks away from giving loans secured by intellectual property. Even though the use of intellectual property as collateral declined over the past couple of years, it will rise again because of its many advantages and as the United States head more towards a technology-based market.

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106. David, *supra* note 104.

107. *Id.*

108. *Id.*

109. *Id.*

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